

THE UNSIGNED UNITED NATIONS MIGRANT  
WORKER RIGHTS CONVENTION:  
AN OVERLOOKED OPPORTUNITY TO  
CHANGE THE “BROWN COLLAR”†  
MIGRATION PARADIGM

BETH LYON\*

I.	INTRODUCTION . . . . .	392
II.	BRUSHING THE DUST OFF THE U.N. MIGRANT WORKER CONVENTION . . . . .	401
	A. <i>The Migrant Worker Convention Has Passed through Few Stages of the U.S. Multilateral Treaty-Making Process</i> . . . . .	403
	1. <i>Steps One and Two: Active Executive Engagement in Negotiation</i> . . . . .	404
	2. <i>Steps Three and Four: Delayed Executive Signature and Submission to Senate, and the</i>	

---

† The term “brown collar” is often used in place of the term blue collar to call attention to the growing percentage of low-income workers in America who are people of color. See, e.g., Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 962 n.1 (2006) (A “brown collar workplace” is “one in which newly arrived Latino immigrants are overrepresented in jobs or occupations. Because the newly arrived Latino can be documented or undocumented, it is less immigration status than the employer’s perception of the worker as a newly arrived immigrant that marks the identity of the brown collar worker.”).

\* Associate Professor of Law & Director, Farmworker Legal Aid Clinic, Villanova University School of Law. I am very grateful to my Villanova colleagues, to the participants in the Marquette Law School faculty exchange workshop, and to the participants in the Migration Reading Group session at Brooklyn Law School. Particular thanks to Gil Carrasco, Nancy Ehrenreich, Sarah Paoletti, Michele Pistone, and Carlos Vázquez for their helpful comments on this article, as well as to Villanova School of Law for its writing support. I thank the Villanova Law and University of Pennsylvania Law librarians for their excellent assistance. While any errors are my own, I also thank Research Assistants Kristin Waller, Amarachi Utah, Kim Gasparon, Sarah Lichter, Ellen Cantillon, Eric Eilerman, Raimundo Guerra, Ron Hochbaum, and Caroline Kim for their excellent work, as well as Elisabeth Bradley, David Frankel, Robert O’Leary and the other editors of the NYU Journal of International Law and Politics for their excellent editorial support. I also thank my family members for their unswerving love and support.

*Slow Move from the “Flying Buttress” to the “Pillar from Within”* . . . . . 409

3. *Delayed Senate Approval* . . . . . 413

4. *Potential Restrictions on Ratification* . . . . . 414

III. DOMESTIC LAW ASSESSMENT OF THE MIGRANT WORKER CONVENTION . . . . . 419

A. *Proposed Typology for Assessing Treaty Provisions vis-à-vis U.S. Law* . . . . . 420

B. *Comparison of the Migrant Worker Convention with Key U.S. Laws* . . . . . 424

1. *A Significant Portion of the Convention Overlaps with the United States’ Existing International Commitments* . . . . . 425

2. *The Convention’s Effect on Five Politically Sensitive Policies*. . . . . 428

a. *The Convention Does Not Mandate Legalization*. . . . . 428

b. *The Convention Likely Conflicts with the U.S. Policy of Expedited Removal from the Interior*. . . . . 429

c. *The Convention Does Not Challenge Border Policies* . . . . . 433

d. *Family Unification for Temporary Workers: Weakly Mandated Protections Present Some De Jure Conflicts* . . . . . 435

e. *The Convention Does Not Challenge Worksite Enforcement* . . . . . 437

f. *Restrictions on Ratification Will Prevent Judicial Reconciliation of De Jure Conflicts*. . . . . 441

IV. RATIFICATION ASSESSMENT OF THE MIGRANT WORKER CONVENTION . . . . . 443

A. *Engaging with the Convention Would Shift the Political Climate Toward Policy Reform* . . . . . 444

B. *Signature and Ratification of the Convention Would Advance Foreign Policy Goals* . . . . . 453

1. *Ratification Would Improve the U.S.-Mexico Relationship* . . . . . 453

2. *Ratification Would Increase World Leadership vis-à-vis the Global South* . . . . . 456

3. *U.S. Ratification Would Encourage Additional Ratifications*. . . . . 458

- 4. *Ratification Would Enable the United States to Shape Interpretation of the Convention . . .* 460
- C. *Engaging with the Convention Would Educate U.S. Officials on Best Practices in Labor Migration . . . . .* 465
- D. *Ratification of the Convention Would Benefit Civil Society . . . . .* 470
- E. *Criticisms of the Convention . . . . .* 473
  - 1. *Substantive Criticisms . . . . .* 474
    - a. *Over-Inclusiveness Concerns . . . . .* 474
  - 1. *Trafficking . . . . .* 474
  - 2. *Quantum and Timing of Work . . . . .* 477
  - 3. *Overlap with other Treaties . . . . .* 479
    - b. *Protection for Unauthorized Workers and Undocumented Family Members . . . . .* 483
    - c. *Gender and Migrant Workers . . . . .* 488
  - 4. *Technical Criticisms: Lack of a Reciprocity Clause, Prohibition on Excluding Categories of Immigrants, and Complexity . . . . .* 489
    - a. *Reciprocity . . . . .* 490
    - b. *Non-Exclusion of Worker Categories . . . . .* 491
    - c. *Complexity . . . . .* 494
- V. CONCLUSION . . . . . 495

“There are world organisations for trade, health, the environment, telecoms, food. There are two black holes in world governance: finance . . . and migration.”<sup>1</sup>

– Pascal Lamy, World Trade Organization

---

1. Alain Faujas & Frédéric Lemaître, Pascal Lamy: “Il faut une régulation contraignante:” Le patron de l’OMC plaide pour l’instauration d’un mécanisme de surveillance et de sanctions de la finance mondiale, LE MONDE (Paris), Nov. 9, 2008 (“Je remarque qu’il y a des organisations mondiales pour le commerce, la santé, l’environnement, les télécommunications, l’alimentation. Il existe deux « trous noirs » dans la gouvernance mondiale : la finance, avec ses bulles qui éclatent, et les migrations, un secteur où il n’y a pas de bulle, mais des drames quotidiens.”) (author’s translation).

“The problem is . . . not the lack of international standards, but the lack of political will to implement them.”<sup>2</sup>

– Antoine Pécoud and Paul de Guchteneire,  
United Nations Educational, Scientific  
and Cultural Organization

## I. INTRODUCTION

The United States is reordering its foreign policy priorities. President Obama’s signing of the U.N. Convention on the Rights of Persons with Disabilities,<sup>3</sup> his pledge to ratify several international treaties such as the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>4</sup> and his statements on the urgency of poverty alleviation in the global south<sup>5</sup> all demonstrate that the United States is beginning an era of heightened international cooperation and leadership with regard to humanitarian issues. On the domestic policy side, the administration has also taken steps that indicate a focus on improving conditions in the American workplace, including for low-income immigrants. With these goals foregrounded for the first time in recent political history, the United States should take steps to ratify the International Convention on the Protection of the Rights of All Migrant Workers

---

2. Antoine Pécoud & Paul de Guchteneire, *Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers’ Rights*, 24 WINDSOR Y.B. ACCESS TO JUST. 241, 244 (2006).

3. See The White House Office of the Press Secretary, Remarks by the President on Signing of U.N. Convention on the Rights of Persons with Disabilities Proclamation (July 24, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing/).

4. See Bob Egelko, *Obama Pledge on Treaties a Complex Undertaking*, S.F. CHRON., Dec. 1, 2008, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/01/MNK414CTFB.DTL>; Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14 [hereinafter CEDAW]. President Obama also indicated during the campaign his interest in re-engaging the United Nations Framework Convention on Climate Change, and also indicated support for U.S. ratification of the Comprehensive Test Ban Treaty.

5. See Bob Unruh, *Obama’s \$845 Billion U.N. Plan Forwarded to U.S. Senate Floor: ‘Global Poverty Act’ to Cost Each Citizen \$2,500 or More*, WORLDNETDAILY, July 25, 2008, <http://www.wnd.com/index.php?pageId=70308>.

and Members of their Families.<sup>6</sup> Signing the Migrant Worker Convention would advance the U.S. government's policy goals, but the United States has never seriously considered taking this step. This article aims to begin the discussion.

The Article argues that the United States should look to international standards with regard to the controversial political issue of labor migration.<sup>7</sup> Specifically, the Article posits that the U.N. Migrant Worker Convention, dismissed by this and other migrant-receiving countries for nearly two decades as a political non-starter, provides a rational approach to labor migration that deserves meaningful examination by the United States. The Article further asserts that even the most preliminary discussion about the Convention would benefit this country, because it would inject into domestic debates the notion that immigrant workers, including unauthorized workers, are subjects of human rights protection.

The United States needs to examine international models because Americans and their leadership are fundamentally at odds about labor migration. While all sides agree that illegal immigration is undesirable, the country is deeply divided on the solution. The groups that disfavor even the current levels of *legal* immigration, let alone regularization of undocumented immigrants, typically advocate for tighter visa quotas, stricter border controls, and more aggressive deportation measures. On the other hand, most immigrants' rights advocates seek legalization and better workplace protections for all low-wage workers, including those who are unauthorized immigrants. Moderates of both wings favor temporary worker programs as a way to control migration, though they differ over

---

6. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *opened for signature* Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003), *available at* <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [hereinafter U.N. Migrant Worker Convention].

7. *See generally* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417 (2005) (describing the controversial and failed attempt to enact "AgJobs," a targeted, compromise immigration legalization measure that had been negotiated by the agricultural industry, unions, and immigrants' and workers' rights organizations); Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (describing public demonstrations regarding proposed U.S. immigration legislation).

the optimal size and entry and work conditions of the temporary workforce. Compromise has proved near impossible through more than six years of serious, high-level policy debate and bipartisan effort. Approval of legalization as a solution to the exponentially increasing undocumented population is expanding among policymakers, even as the American public expresses an increased preference for enforcement-focused solutions. The result is a series of superficial policy shifts that fail to address the underlying issues, producing an immigration regime that seems to be rudderless, offering only unenforceable laws to address vocal public concern, widespread human suffering, and damage to America's credibility within the international community.

Similar dynamics are playing out around the world. There are large numbers of brown collar immigrant workers, many of them unauthorized, in other wealthy regions and countries, such as Europe,<sup>8</sup> Canada,<sup>9</sup> and Australia,<sup>10</sup> and alle-

---

8. See MELANIE KIEHL & HEINZ WERNER, THE LABOUR MARKET SITUATION OF EU AND OF THIRD COUNTRY NATIONALS IN THE EUROPEAN UNION (Educational Resources Information Center No. ED429228, 1998), available at [http://eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detail\\_mini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED429228&ERICExtSearch\\_SearchType\\_0=no&accno=ED429228](http://eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detail_mini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED429228&ERICExtSearch_SearchType_0=no&accno=ED429228) (putting the number of non-nationals in the EU workforce at 7.8 million as of 1995, 3 million of them Europeans working outside of their home countries); European Parliament, MEP's Adopt Legislative Resolution to Crackdown on Employers of Illegal Immigrants, <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20090202FCS47946&language=EN> (stating that "[b]etween 4.5 and 8 million illegal immigrants work in the construction, farming, hotel and other sectors in the EU"); Marinette Mormont, *Agreement on Combating Illegal Working in the Construction Industry*, EUR. INDUSTR. REL. OBSERVATORY ON-LINE, <http://www.eurofound.europa.eu/eiro/2002/12/inbrief/be0212301n.htm> (discussing undeclared workers and work in Belgium and across Europe); EUROPEAN PLATFORM FOR MIGRANT WORKERS' RIGHTS, THE RIGHTS OF MIGRANT WORKERS IN THE EUROPEAN UNION: 2006 SHADOW REPORTS FOR ESTONIA, FRANCE, IRELAND AND THE UNITED KINGDOM 16 (2006), available at <http://www.december18.net/article/european-platform-migrant-workers-rights-epmwr> (noting the difficulty of collecting data on migrant workers in Europe).

9. See U.N. Educational, Scientific and Cultural Organization [UNESCO], *Identification of the Obstacles to the Ratification of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: The Canadian Case*, U.N. Doc. SHS/2006/MC/9 (Aug. 2006) (prepared by Victor Piché et al.), available at <http://unesdoc.unesco.org/images/0014/001473/147310e.pdf> [hereinaf-

gations of insupportable working conditions arise from each of these areas.<sup>11</sup> In 1949 and again in 1975, the International Labour Organization (ILO) issued Conventions for the protection of migrant workers.<sup>12</sup> As compared with other ILO treaties, the two migrant worker Conventions were ignored. The eight “fundamental” ILO treaties, dealing with freedom of association, non-discrimination in the workplace, forced labor, and child labor, have on average 163 ratifications.<sup>13</sup>

---

ter *Canadian Assessment of the Treaty*] (explaining obstacles to Canada’s ratification and subsequent implementation of the Convention); see also Press Release, International Labour Organization [ILO], As Migrant Ranks Swell, Temporary Guest Workers Increasingly Replacing Immigrants Private Employment Agencies Send Millions Overseas to Work (Apr. 18, 1997), available at [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang—en/WCMS\\_008048/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_008048/index.htm) (explaining the danger of exploitation of temporary migrant workers, and the influx of such workers).

10. See AUSTRALIAN GOV’T, DEP’T OF IMMIGRATION AND CITIZENSHIP, IMMIGRATION UPDATE 2007-2008 (2008), available at [http://www.immi.gov.au/media/publications/statistics/immigration-update/update\\_june08.pdf](http://www.immi.gov.au/media/publications/statistics/immigration-update/update_june08.pdf) (studying recent movements of immigrants into Australia).

11. See Anabelle Garay, Immigrants in USA Blog, Immigrants Tell Panel of Poor Working Conditions, Apr. 3, 2006, <http://immigrantsinusa.blogspot.com/2006/04/immigrants-tell-panel-of-poor-working.html>; Barb MacLaren and Luc LaPointe, Editorial, *Temporary Foreign Workers Need to be Treated Fairly*, GEULPH MERCURY, Dec. 31, 2008, at A10, available at <http://news.guelphmercury.com/Opinions/article/421617>; Sabaa A. Khan, *From Labour of Love to Decent Work: Protecting the Human Rights of Migrant Caregivers in Canada*, 24.1 CAN. J. L. & SOC. 23 (2009); *Toil and Trouble in the 457 Visa System*, CANBERRA TIMES, June 13, 2009; R.E.S.P.E.C.T. NETWORK, MIGRANT DOMESTIC WORKERS PERSPECTIVES (2009), <http://www2.ohchr.org/english/bodies/cmw/docs/DGD/RESPECT.doc>.

12. Convention Concerning Migration for Employment, July 1, 1949, I.L.O. No. 97, 1616 U.N.T.S. 120, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097> [hereinafter ILO 97]; 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, 17426 U.N.T.S. 1120, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143> [hereinafter ILO 143].

13. See Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, I.L.O. No. 87, 68 U.N.T.S. 17, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> (149 ratifications); Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, I.L.O. No. 98, 96 U.N.T.S. 257, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> (159 ratifications); Convention Concerning Forced or Compulsory Labour, June 28, 1930, I.L.O. No. 29, 39 U.N.T.S. 55, available at <http://www.ilo.org/ilolex/>

Meanwhile, the ILO's 1949 migrant worker convention, ILO 97, has attracted only 48 ratifications, and the 1975 convention, ILO 143, has garnered only 23.<sup>14</sup>

In 1979, the Mexican and Moroccan governments proposed that the United Nations promulgate a migrant worker rights treaty, feeling that a U.N. Convention would attract more countries of employment.<sup>15</sup> After ten years of negotiation that involved all regions of the world,<sup>16</sup> the U.N. promulgated the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the Migrant Worker Convention). What resulted is the world's only comprehensive document for the protection of migrant workers.<sup>17</sup> Among the treaty's major accomplishments are the following: 1) it provides groundbreaking protection for documented labor migrants; 2) it establishes equality

---

cgi-lex/convde.pl?C029 (173 ratifications); Convention Concerning the Abolition of Forced Labour, June 25, 1957, I.L.O. No. 105, 320 U.N.T.S. 291, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> (169 ratifications); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, I.L.O. No. 100, 165 U.N.T.S. 303, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100> (166 ratifications); Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, I.L.O. No. 111, 362 U.N.T.S. 31, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111> (168 ratifications); Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, I.L.O. No. 138, 1015 U.N.T.S. 297, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> (151 ratifications); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, I.L.O. No. 182, 2133 U.N.T.S. 163, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (169 ratifications).

14. ILO 97, *supra* note 12; ILO 143, *supra* note 12.

15. Two major reasons for a U.N. Convention were: 1) U.N. Conventions allow the flexibility of restrictions on ratification, while ILO Conventions do not; and 2) the ILO, with its tripartite Government-Employer-Union structure, was viewed with more suspicion by the West than the U.N. monitoring process. See Pécoud & Guchteneire, *supra* note 2, at 245-46 (explaining foundation and underlying reasons for creating U.N. Convention).

16. See Linda S. Bosniak, *Human Rights, State Sovereignty And The Protection Of Undocumented Migrants Under the International Migrant Workers' Convention*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 311, 312 & n.6 (Barbara Bogusz et al. eds., 2004) (noting the time period and different nations involved).

17. Pécoud & Guchteneire, *supra* note 2, at 241-42 (explaining how U.N. Convention protects migrants' rights but that immigration countries have yet to adopt it).



of protection in the workplace for immigrant workers;<sup>18</sup> and 3) it repeats and underscores existing human rights protection for unauthorized workers by guaranteeing fundamental rights for *all* migrant workers (including unauthorized immigrants),<sup>19</sup> including for example, the right to overtime pay<sup>20</sup> and the right not to be tortured<sup>21</sup> or enslaved.<sup>22</sup> Importantly for its ratification prospects, the treaty establishes these human rights principles without dictating any particular immigration policy framework.<sup>23</sup>

The Convention was opened for signature in 1990. To the surprise of the negotiators, the Convention was not widely ratified.<sup>24</sup> The major migrant-receiving countries which initially participated in negotiating the Convention<sup>25</sup> set it

---

18. Migrant Worker Convention, *supra* note 6, art. 25 (providing equal rights for immigrant workers as those of nationals).

19. *Id.* art. 1 (providing that the convention applies to all migrant workers without exception).

20. *Id.* art. 25.1(b).

21. *Id.* art. 10 (“No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

22. *Id.* art. 11 (“No migrant worker . . . shall be held in slavery or servitude.”).

23. *See* Pécoud & Guchteneire, *supra* note 2, at 246 (emphasizing Convention’s protection of human rights rather than establishing new rights).

24. *See generally* Pécoud & Guchteneire, *supra* note 2 (seeking to understand why only a few states have ratified the Convention and no major immigration country has adopted it).

25. The following is a non-exclusive list of industrialized countries that were active participants in the negotiations, drawn from the record of proceedings at different stages of the process: Australia, Belgium, the Federal Republic of Germany, Denmark, Finland, Great Britain, Greece, Italy, Japan, Malaysia, the Netherlands, Norway, Portugal, Spain, Sweden, the Union of Soviet Socialist Republics, and the United States. *See* U.N. Econ. & Soc. Council [ECOSOC], *Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group*, annex VI, U.N. Doc. A/C.3/35/13 (Nov. 25, 1980) [hereinafter *November 1980 Working Group Report*] (written proposal of United States); *id.* Annex IV (working paper submitted by Italy); ECOSOC, *Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group*, ¶ 31, U.N. Doc. A/C.3/36/10 (Nov. 23, 1981) [hereinafter *November 1981 Working Group Report*] (statement of Greece, Italy, and Spain); *id.* ¶ 44 (statement of the Netherlands); *id.* ¶ 53 (statement of Finland, Italy, Norway, Spain, and Sweden); ECOSOC, *Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group on the Elaboration of an*

aside,<sup>26</sup> and it languished for thirteen years before accruing the twenty ratifications it needed to go into force.<sup>27</sup> The ratification then picked up speed. Mary Robinson, former U.N.

---

*International Convention on the Protection of the Rights of All Migrant Workers and Their Families on its Intersessional Meetings from 10 to 21 May 1982*, ¶ 23, U.N. Doc. A/C.3/37/1 (June 11, 1982) [hereinafter *June 1982 Working Group Report*] (statement of Finland, France, Greece, Italy, Norway, Portugal, and Sweden); *id.* ¶ 24 (statement of the Netherlands); *id.* ¶ 93 (statement of Belgium); ECOSOC, *Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶ 22, U.N. Doc. A/C.3/37/7 (Nov. 19, 1982) [hereinafter *November 1982 Working Group Report*] (statement of Great Britain); *id.* ¶ 43 (statement of Malaysia); ECOSOC, *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶¶ 19-22, U.N. Doc. A/C.3/40/1 (June 20, 1985) [hereinafter *June 1985 Working Group Report*] (statement of the Federal Republic of Germany); *id.* ¶¶ 25-27 (statement of Australia); *id.* ¶¶ 28-29 (statement of Norway); *id.* ¶¶ 30-31 (statement of Denmark); *id.* ¶ 28 (statement of Greece); *id.* ¶¶ 50-51 (statement of the Union of Soviet Socialist Republics); *id.* ¶¶ 57-58 (statement of Italy); *id.* ¶¶ 59-60 (statement of France); *id.* ¶¶ 61-62 (statement of the United States); *id.* ¶ 68 (statement of the Netherlands); *id.* ¶ 89 (statement of Finland and Sweden); ECOSOC, *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶ 14, U.N. Doc. A/C.3/45/1 (June 21, 1990) [hereinafter *June 1990 Working Group Report*] (statement of Portugal); *id.* ¶ 15 (statement of the Federal Republic of Germany); *id.* ¶ 16 (statements of France and the Netherlands); *id.* ¶ 17 (statements of Finland and Japan); *id.* ¶ 18 (statements of Italy and the Union of Soviet Socialist Republics); *id.* ¶ 19 (statements of France, the Netherlands, and the United States); *see also* LUCA BIOCCHI, RIGHTS OF ALL MIGRANT WORKERS (PART III OF THE CONVENTION) TRAVAUX PRÉPARATOIRES 1 & n.6, available at <http://www2.ohchr.org/english/issues/migration/taskforce/docs/draftinghistoryrev1.doc> (listing a number of countries and groupings that “made substantial contributions to the final outcome”).

26. *See* Pécoud & Guchteneire, *supra* note 2, at 242 (recognizing states’ lack of interest in ratification or adoption of the UN Convention).

27. *See* UNITED NATIONS TREATY COLLECTION, STATUS OF INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (as of Dec. 20, 2009), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-13.en.pdf> [hereinafter ICMW RATIFICATION RECORD] (listing Member state parties to the UN Convention); *see also* U.N. Migrant Worker Convention, *supra* note 6, art. 87(1) (“The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.”).

High Commissioner for Human Rights, concentrated resources on a ratification campaign during her time with the U.N. and in her own capacity since,<sup>28</sup> and as a result the treaty now has 30 signatories and 42 parties.<sup>29</sup>

None of the current parties to the treaty is considered to be a major country of employment, although parties Mexico, Morocco, and Turkey do host significant migrant worker populations. There is some movement toward ratification in the industrialized world. The European Parliament,<sup>30</sup> the European Economic and Social Committee,<sup>31</sup> and the Organization of American States<sup>32</sup> have all favorably reported on the Migrant Worker Convention and called on the countries in those regions to ratify it. However, there are obstacles to immediate ratification by countries of employment, including

---

28. See, e.g., Speech: UNHCHR: Farewell Speech in Geneva by Mary Robinson, High Commissioner for Human Rights (Sept. 13, 2002), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/608B646C44611148C1256C31002FF3E8?opendocument> (hoping to ratify the U.N. Convention in the following weeks); *Top UN Rights Official Calls on European Countries to Portray Migrants Fairly*, U.N. News Service, (June 21, 2002), available at <http://www.un.org/apps/news/story.asp?NewsID=4012&Cr=migrants&Cr1=encouraging+European+countries+to+sign+the+U.N.+Convention,+which+required+one+more+signature+to+enter+into+force>); Press Release, United Nations, (Dec. 18, 2000) <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A13CEE6FE329524C12569B9002CD9B9?opendocument> (urging countries to help ratify the U.N. Convention on the first International Migrants Day). In 2002, Mary Robinson founded Realizing Rights: the Ethical Globalization Initiative, and she remains active as the organization's president. See [http://www.realizingrights.org/index.php?option=com\\_content&task=view&id=46&Itemid=88](http://www.realizingrights.org/index.php?option=com_content&task=view&id=46&Itemid=88).

29. ICMW RATIFICATION RECORD, *supra* note 27.

30. See Resolution on the EU's Rights, Priorities and Recommendations for the 58th Session of the U.N. Commission on Human Rights in Geneva, ¶ 5, EUR. PARL. DOC. P5-TA(2003)0034, available at [http://portal.unesco.org/shs/en/files/3832/10757166251EU\\_on\\_the\\_UN\\_convention.pdf/EU%2B on%2Bthe%2BUN%2Bconvention.pdf](http://portal.unesco.org/shs/en/files/3832/10757166251EU_on_the_UN_convention.pdf/EU%2B on%2Bthe%2BUN%2Bconvention.pdf) (calling for the EU to work for the ratification of, *inter alia*, the Migrant Worker Convention).

31. Eur. Econ. and Soc. Comm., *Opinion on the International Convention of Migrants*, Doc. No. SOC/173 (June 30, 2004), available at [http://eescopinions.esc.eu.int/EESCopinionDocument.aspx?identifier=ces\soc\soc173\ces9602004\\_ac.doc&language=EN](http://eescopinions.esc.eu.int/EESCopinionDocument.aspx?identifier=ces\soc\soc173\ces9602004_ac.doc&language=EN).

32. See Org. of American States, *The Human Rights of All Migrant Workers and Their Families*, G.A. Res. 1898 (XXXII-O/02) (June 4, 2002), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://scm.oas.org/Reference/english/english.htm>.

prominently the “fear to be among the first”<sup>33</sup> and domestic anti-immigrant sentiment.<sup>34</sup> Ironically, both of these obstacles can also be seen as reasons why migrant workers need supplementary protection in the form of an international treaty. Even as the Convention slowly accrues country of origin ratifications, advocates and officials in many regions and countries of employment are undertaking pre-ratification studies of the treaty vis-à-vis domestic law and the difficult politics of immigration, including Canada,<sup>35</sup> Europe,<sup>36</sup> Japan,<sup>37</sup> and New Zealand.<sup>38</sup>

The goal of this Article is to broaden the discussion by analyzing the possibility of ratification of the Migrant Worker Convention by the United States. Part II of the Article argues that the United States has not yet assessed the Migrant Worker Convention in a serious way. This part also points out that the United States’ delay in engaging the Convention is typical in light of this country’s past human rights treaty ratification processes. The section provides an overview of the analytical and political work that is likely to be involved in such an assessment, based on this country’s past human rights treaty ratification processes. The section flags the difficult question of restrictions on ratification, noting that the United States is likely to heavily restrict ratification of the Migrant Worker Conven-

---

33. Pécoud & Guchteneire, *supra* note 2, at 258.

34. *See id.* at 259-61 (discussing the generally negative public opinion of immigrants).

35. *See Canadian Assessment of the Treaty, supra* note 9.

36. *See UNESCO, The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, U.N. Doc. SHS-2007/WS/7 – CLD 1195.7 (2007) (*prepared by Euan MacDonald and Ryszard Cholewinski*), available at <http://unesdoc.unesco.org/images/0015/001525/152537E.pdf> [hereinafter European Assessment of the Treaty] (discussing the European position and the positions of the member states).

37. *See UNESCO, Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective* 25-30, U.N. Doc. SHS/2003/MC/1 REV (Oct. 2003) (*prepared by Nicola Piper and Robyn Iredale*), available at <http://unesdoc.unesco.org/images/0013/001395/139528E.pdf> (compiling migration research and opinions about the treaty from seven countries from Asia-Pacific region).

38. *See id.* at 39-42 (detailing New Zealand’s position and actions to protect migrant human rights).

tion, just as it has in ratifying previous human rights treaties. Part III of the Article proposes a typology of treaty comparisons drawn from the United States' past human rights treaty ratification experience, providing an analytical framework for American policymakers to assess the Convention vis-à-vis U.S. law. Arguing that a significant portion of the Convention contains standards that the United States has already ratified, Part III also lays out the substantive concerns raised by the United States during the treaty negotiations, and points out that most of the passages that were objectionable at the time were or have since become part of U.S. law. Part III then analyzes the Convention's likely interplay with five sensitive U.S. migration and migrant worker policies. Part IV of the Article addresses arguments for and against ratification, concluding that signature and ratification of the Convention are advisable as they would shift the political climate toward policy reform, advance foreign policy goals, educate U.S. officials on best practices, and benefit civil society.

## II. BRUSHING THE DUST OFF THE U.N. MIGRANT WORKER CONVENTION

Many industrialized countries of employment, or migrant-receiving countries, including the United States, participated actively in the Migrant Worker Convention's ten-year drafting process.<sup>39</sup> Eighteen years later, not one of these countries has signed or ratified the Convention.<sup>40</sup> During those 18 years, the United States has ratified six other human rights treaties,<sup>41</sup>

---

39. For a non-exclusive list of industrialized countries that were active participants in the negotiations, see *supra* note 25.

40. See ICMW RATIFICATION RECORD, *supra* note 27 (listing current Member states of the U.N. Convention). Note that the USSR, listed in note 25 as a migrant-receiving participant in the negotiations, has since dissolved, but its major successor nation, Russia, has not ratified the ICMW. See *id.* (same).

41. The United States has ratified the following six international human rights treaties since 1990: (1) in 1992 the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); (2) in 1994 the International Convention on the Elimination of all forms of Racial Discrimination (CERD), Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969); (3) in 1994 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987); (4) in 1999 the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,

but has not seriously examined the Migrant Worker Convention. The following section lays out the ten steps typically involved when the United States engages in multilateral treaty-making and argues that the Migrant Worker Convention has passed through only a few stages of the process. The section further argues that many features of the Migrant Worker Convention's progress toward U.S. ratification fit the pattern of this country's previous human rights treaty ratification processes.

---

June 17, 1999, I.L.O. No. 182, 2133 U.N.T.S. 161; (5) in 2002 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, 54th Sess., U.N. Doc. A/54/RES/263; and (6) in 2002 the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263. For their current status, a list of states that have signed and ratified the conventions, and information about ratification by the United States, see UNITED NATIONS TREATY COLLECTION, STATUS OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> [hereinafter ICCPR RATIFICATION RECORD]; UNITED NATIONS TREATY COLLECTION, STATUS OF INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf> [hereinafter CERD RATIFICATION RECORD]; UNITED NATIONS TREATY COLLECTION, STATUS OF CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> [hereinafter CAT RATIFICATION RECORD]; ILO.org Ratifying Countries of the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C182> (last visited Dec. 20, 2009); UNITED NATIONS TREATY COLLECTION, STATUS OF OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-b.en.pdf> [hereinafter CRC CHILD SOLDIER PROTOCOL RATIFICATION RECORD]; UNITED NATIONS TREATY COLLECTION, STATUS OF OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-c.en.pdf> [hereinafter CRC CHILD ABUSE PROTOCOL RATIFICATION RECORD].

A. *The Migrant Worker Convention Has Passed through Few Stages of the U.S. Multilateral Treaty-Making Process*

Article II of the U.S. Constitution sets forth the basic requirements of the U.S. ratification process: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”<sup>42</sup> The framers’ intent was for the Senate to be closely involved in all stages of the treaty-making process.<sup>43</sup> However, the Senate’s role in the treaty-making process changed as the body expanded and the number of international agreements became too great to make close involvement in negotiation practicable.<sup>44</sup> According to a Congressional Research Service Handbook on the treaty-making process, “the Senate role [in treaty formation] now is primarily to pass judgment on whether completed treaties should be ratified by the United States. The Senate’s advice and consent is asked on the question of Presidential ratification.”<sup>45</sup>

The Handbook describes modern multilateral treaty-making<sup>46</sup> as a ten-step process:<sup>47</sup> 1) the Secretary of State authorizes negotiation; 2) the U.S. representative negotiates with representatives of other country or countries; 3) negotiators agree on terms and, upon authorization of the Secretary of State, the U.S. representative signs the treaty; 4) the President may submit the treaty to Senate; 5) the Senate Foreign Relations Committee considers the treaty and decides whether to report it favorably to the Senate; 6) the whole Senate may consider the treaty, and a 2/3 majority may vote to approve a reso-

---

42. U.S. CONST. art. II, § 2, cl. 2.

43. See CONGRESSIONAL RESEARCH SERVICE, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 2-3 (Comm. Print 2001) [hereinafter SENATE TREATY HANDBOOK] (detailing evolution of Senate’s role in treaty-making process).

44. *Id.*

45. *Id.* at 3.

46. Different processes apply to Executive Agreements and bilateral treaties. See *id.* at 21-26 (describing executive agreements, which are international agreements that the executive branch enters but does not submit as treaties to the Senate); see also *id.* at 10 (flow chart showing formation process of Executive Agreements); *id.* at 8-9 (flow chart showing formation of bilateral treaties).

47. *Id.* at 8-9 (referring to flow chart showing formation of multi-lateral treaty).

lution of ratification, and the Senate may “approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval;”<sup>48</sup> 7) after renegotiating any terms put into question by the ratification resolution, the President may sign the instrument of ratification; 8) the President may deposit the instrument of ratification with the designated depository, whereupon 9) the treaty enters into force according to its terms, and thereby becomes binding under international law; and 10) the President proclaims entry into force, providing domestic notification of the new law.

At the present juncture, the Migrant Worker Convention has passed through only steps one and two of the Senate Handbook. The fact that the Migrant Worker Convention is stalled at step three is unsurprising. The particular political history of U.S. human rights treaty-making has created some relatively predictable wrinkles in the treaty-making paradigm that are already manifesting themselves in the case of the Migrant Worker Convention.

### 1. *Steps One and Two: Active Executive Engagement in Negotiation*

Professor Louis Henkin invoked the flying buttress as a metaphor of the United States’ relationship to the international human rights treaty regime—in the words of Professor Margaret McGuinness, “the U.S. supports the cathedral of international human rights from the outside, rather than as a pillar from within the system.”<sup>49</sup> One reason for this image is that the United States historically participates actively in human rights treaty development but does not readily join human rights treaties as a party subject to international monitoring. Thus, the United States’ active negotiation of the Migrant Worker Convention does not make this particular treaty unique. Indeed, from the earliest days of the international human rights regime, the United States has been an active participant in creating human rights standards. Through its representative Eleanor Roosevelt, the United States was instru-

---

48. *Id.* at 3.

49. Margaret E. McGuinness, Sanchez-Llamas, *American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 52 (2007) (citing Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979)).



mental in steering the Universal Declaration of Human Rights (UDHR)<sup>50</sup> to successful completion.<sup>51</sup> Mrs. Roosevelt also worked to ensure that the UDHR was enshrined in a treaty that could become binding international law through individual country ratifications.<sup>52</sup> Subsequently the United States continued to play an active role in negotiating major human rights treaties.<sup>53</sup>

In fact, past U.S. executives carried out negotiations on human rights treaties over the active objections of the Senate and established domestic actors. For example, the United States was heavily involved in negotiating the International Covenant on Economic, Social and Cultural Rights despite domestic outrage over the socialist nature of the rights it contained.<sup>54</sup> U.S. participation in negotiations leading to the International Criminal Court similarly suffered from the active opposition of a key domestic actor, the Department of Defense.<sup>55</sup> Negotiation of the Migrant Worker Convention appears to have taken place against a somewhat less controversial domestic backdrop, and the United States actively engaged in the treaty negotiations. A detailed analysis of the U.S. role in negotiation of the Convention lies beyond the scope of the present Article, but a brief description is provided here to support this Article's assertion that the United States was deeply and genuinely involved in the creation of the treaty.

---

50. Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

51. See NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 66-67 (1990).

52. See *id.* at 66-67.

53. See, e.g., LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN *passim* (1993) (noting many instances of United States involvement in negotiation of the title Convention); SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "Travaux Préparatoires" *passim* (1992) (documenting the United States' active participation in negotiating the title Convention).

54. See KAUFMAN, *supra* note 51, at 69-93 (noting objections by Frank Holman and American Bar Association of the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]).

55. Joe Stork, *International Criminal Court*, FOREIGN POL'Y IN FOCUS, Apr. 1998, 1-3 (1998).

In 1979, at the urging of Mexico and Morocco, and following lurid reports of abuses against North African immigrants in Europe,<sup>56</sup> the U.N. General Assembly created a Working Group to draft a convention to protect migrant workers and their families.<sup>57</sup> Although the United States abstained from this vote,<sup>58</sup> the formal reports of the Working Group, which provide summaries of the various delegations' positions and conclusions, reflect literally hundreds of substantive and detailed interventions by the United States over the ten years of negotiations.<sup>59</sup> On more than one occasion, the United States was instrumental in breaking impasses by proposing compromise language, participating in informal consultations,<sup>60</sup> and registering its underlying understanding of particular provisions.<sup>61</sup>

---

56. See Roger Böhning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future*, 25 INT'L MIGRATION REV. 698, 699-70 (1991) (explaining the Moroccan and Mexican governments' efforts to address the concerns of migrant worker abuses).

57. G.A. Res. 34/172, ¶ 3, U.N. Doc. A/RES/34/172 (Dec. 17, 1979).

58. United Nations Bibliographic Information System, Voting Record for G.A. Res. 34/172, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1237PB86C4849.643618&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=34%2F172&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&culoper=%3D&ullimit=&uloper=%3D&ullimit=&sort=&x=19&y=11#focus> (last visited Dec. 20, 2009) (recording the UN delegation votes).

59. See, e.g., *November 1980 Working Group Report*, *supra* note 25 (presenting eleven considerations for drafting the Convention); *November 1981 Working Group Report*, *supra* note 25, *passim*; ECOSOC, Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, *passim*, U.N. Doc. A/C.3/41/3 (Oct. 10, 1986) [hereinafter *October 1986 Working Group Report*].

60. See, e.g., *November 1981 Working Group Report*, *supra* note 25, ¶ 17 (reporting that the U.S. Representative agreed to hold an "informal consultation" with representatives of Jamaica and Morocco "to find a compromise text" on preambular language).

61. See, e.g., *June 1990 Working Group Report*, *supra* note 25, ¶ 34 (explaining in the statement of the United States that the U.S. delegation "had not wished to block consensus on [the provisions relating to social security], but clarified for the record that, in her delegation's view, the only 'appropriate measures' a State could take to try to avoid denial of social security rights or

During the negotiations, the United States occasionally expressed ambivalence about the Convention. In 1986, the U.S. Working Group representative stated that a reservation to Convention article 16.9 would likely be registered “*if and when* the present Convention is submitted to the Senate.”<sup>62</sup> In 1987, the U.S. Representative “stated that his Government was not yet convinced of the need for a convention on the human rights of migrant workers, and that if such a need were demonstrated, such a convention should be negotiated in [the] ILO.”<sup>63</sup>

At the same time, the negotiation history reveals a United States that was committed to the goals of the Convention. For example, the United States introduced and successfully advocated for Convention coverage of foreign investors, thereby creating a new category of protection under the treaty.<sup>64</sup> The United States also sought successfully to broaden the Convention’s protection of migrants’ associational rights.<sup>65</sup> Finally, in the June 1989 Working Group session, the first in which the George H. W. Bush administration participated, the U.S. Representative made a statement that at least one other participant took to be a significant change of position by the United States. In that statement, the U.S. Representative urged that the Working Group take the time to iron out the final details of the Convention before submitting it to the General Assem-

---

duplication of payments would be to endeavor to conclude bilateral or multilateral agreements aimed at achieving that goal”).

62. *October 1986 Working Group Report*, *supra* note 59, ¶ 222 (emphasis added).

63. ECOSOC, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶ 326, U.N. Doc. A/C.3/42/1 (June 22, 1987) [hereinafter *June 1987 Working Group Report*].

64. *See* ECOSOC, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶¶ 104-11, U.N. Doc. A/C.3/40/6 (Oct. 15, 1985) [hereinafter *October 1985 Working Group Report*] (describing discussions of the U.S. Representative’s proposed text, which created a small category of persons defined as “treaty traders and investors,” that the Chairman supported and other nations followed).

65. *See June 1987 Working Group Report*, *supra* note 63, ¶ 236 (agreeing that the words, “to take part in . . . associations . . . for the protection of economic, social, cultural and similar interests” were too restrictive).

bly.<sup>66</sup> In his remarks, the U.S. Representative stated that “[m]y delegation is pleased that the Working Group has made substantial progress this session towards completing the Convention.”<sup>67</sup> The representatives of several other countries immediately associated themselves with this intervention.<sup>68</sup> According to the reported reaction of the Moroccan Representative, “the statement by the United States was very useful, especially since in the Third Committee the United States delegation had always voted against the resolution of the draft Convention that the Working Group was in the process of drafting.”<sup>69</sup>

Working Group participant and Vice-Chairman Juhani Lönnroth has observed that, during the negotiations, “[t]here was a rather widespread belief that the United States would not sign and ratify the Convention in the immediate future. But it was equally evident that the United States wished to make the draft meet high legal standards and to make its content as close to its interests as possible in order to create prerequisites for an eventual ratification at some later stage.”<sup>70</sup> Whether the United States’ positive statements about the Convention indeed reflected a change of heart by a new administration, or merely reflected due diligence on the part of the U.S. delegation, this and many other actions by the United States over the ten-year drafting period meaningfully advanced finalization of the Convention. The United States’ dedication of resources to the drafting process reflected the United States’ tradition, begun with the UDHR, of molding human rights treaties.

---

66. See ECOSOC, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, ¶ 307, U.N. Doc. A/C.3/44/1 (June 19, 1989) [hereinafter *June 1989 Working Group Report*] (the U.S. statement). The statements contained in the U.N. record reveal that the U.S. Representative was a man, but do not provide his name.

67. *Id.* ¶ 307.

68. *Id.* ¶¶ 308-09 (association with the U.S. statement by the representatives from Norway, the Netherlands, Finland, France, Italy, Japan, and Sweden).

69. *Id.* ¶ 311.

70. Juhani Lönnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT’L MIGRATION REV. 710, 734 (1991).

2. *Steps Three and Four: Delayed Executive Signature and Submission to Senate, and the Slow Move from the “Flying Buttress” to the “Pillar from Within”*

The history of U.S. human rights treaty ratification indicates that the delay between promulgation and signature of the Migrant Worker Convention is not unusual. Step three in the generic treaty process laid out above, “negotiators agree on terms and, upon authorization of the Secretary of State, the U.S. representative signs the treaty,” appears to anticipate that an executive, fresh from negotiating the terms of a treaty and voting for its promulgation, will sign the document.<sup>71</sup> However, because of the controversial nature of human rights treaties, the more common occurrence has been a significant delay between promulgation and U.S. signature. The Congressional Research Service recently estimated that the U.N., the ILO, and the OAS had produced 50 multilateral human rights treaties, of which the United States had signed 30.<sup>72</sup> For those major U.N. human rights treaties that have been signed, the average wait between promulgation and signature has been roughly four years.<sup>73</sup> Moreover, three other human rights treaties, signed by the President in 1962, 1977, and 1995, have never been submitted to the Senate.<sup>74</sup> Thus the vast majority of ratified human rights treaties were, or will be, shepherded through the ratification process by a president who did not negotiate them, heightening the importance of contemporary analysis balanced with the preservation of institutional memories by outside actors.

---

71. See *supra* notes 46-48 and accompanying text (describing the multilateral treaty-making process).

72. See SENATE TREATY HANDBOOK, *supra* note 43, at 285-86 (2001) (tracking the U.S.’s participation and ratification in multilateral human rights conventions).

73. See *infra* Chart I. Compare this timeline with treaties of greater complexity and comparable controversiality, such as the United Nations Charter, the North American Free Trade Agreement, and the SALT II Strategic Arms Limitation Treaty, all signed the day they were promulgated. U.N. Charter; North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Treaty on the Limitation of Strategic Offensive Arms (SALT II), U.S.-U.S.S.R., June 18, 1979, S. EXEC. DOC. Y, 96-1.

74. See SENATE TREATY HANDBOOK, *supra* note 43, at 286 (referring to the chart of human rights treaties pending on Senate Foreign Relations Committee Calendar).

As the following chart indicates,<sup>75</sup> the Migrant Worker Convention is among the human rights treaties that the United States has not signed. Moreover, according to a Department of State Treaty Analyst, the executive branch has given “no serious consideration” to signing either the Migrant Worker Convention, or the ILO Conventions that deal with migrant workers.<sup>76</sup>

In the case of the Women’s Convention, twenty members of the House of Representatives introduced a resolution urging the President to sign the treaty.<sup>77</sup> Meanwhile, the Migrant Worker Convention has received virtually no public attention from the Senate,<sup>78</sup> nor from civil society. The American Bar Association’s (ABA) recent ratification advocacy focus is on

---

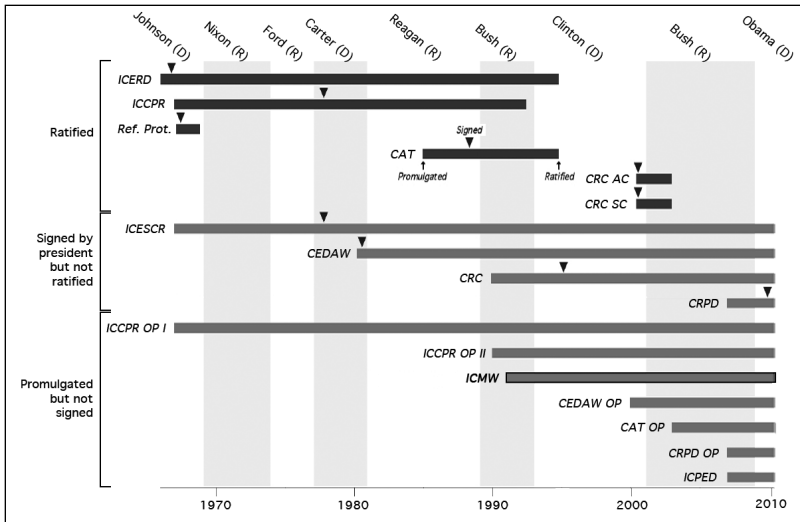
75. Chart 1 lists the UN human rights treaties classified by the UN as “core human rights treaties,” the substantive protocols to the core treaties, and also the UN Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, which incorporates the substantive provisions of the earlier Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. OHCHR, *The Core International Human Rights Instruments and Their Monitoring Bodies*, <http://www2.ohchr.org/english/law/> (last visited Dec. 20, 2009). The chart does not track ILO Conventions because, by the terms of the ILO Constitution, ILO treaties are subject to a unique ratification process that does not lend itself to this analysis. See Constitution of the International Labor Organization (ILO) art. 19(5), Oct. 9, 1946, 62 Stat. 3490, 15 U.N.T.S. 40, available at <http://www.ilo.org/ilolex/english/constq.htm>. Examination of the United States record on regional (OAS) human rights treaty ratification is also supportive of this proposition, but the regional treaty specifics are omitted from the chart because the treaty under examination in the instant article is an international rather than a regional document. Note that Chart 1 is based on the dates provided below in Appendix I: U.S. Human Rights Treaty Signature and Ratification History.

76. E-mail from Joan M. Sherer, Senior Reference Librarian (Legal), Ralph J. Bunche Library of the U.S. Department of State, to author (Jan. 24, 2008) (forward of an e-mail to Joan Sherer from Robert Dalton, U.S. Department of State Senior Advisor for Treaty Practice, and including comments from Karen Ghaffarkhan, U.S. Department of State Treaty Analyst) (on file with author) [hereinafter Sherer E-mail].

77. See H.Res. 738: A resolution relating to the United Nations Mid-Decade Conference for Women (referred to the House Committee on Foreign Affairs July 1, 1980).

78. In a search of the Congressional Record, I found only one mention of the U.N. Migrant Worker Convention, a reference in a written statement by the International Council of Voluntary Agencies entered by Senator Ted Kennedy in 1992. 138 CONG. REC. S106, 111 (1992) (urging the Senate to ratify and to implement the U.N. Convention).

CHART 1: HUMAN RIGHTS TREATY PROMULGATION WITH U.S. SIGNATURE AND RATIFICATION TIMING



Last updated: November 1, 2009

the Convention on the Law of the Sea and the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>79</sup> Other treaties of high priority for the ABA are the Rome Statute for an International Criminal Court, and the Convention on the Rights of the Child.<sup>80</sup> Furthermore, the American Bar Association has not yet assessed the Migrant Worker Convention in order to form an initial opinion as to whether or not the document should be ratified.<sup>81</sup> One depart-

79. See, e.g., Press Release, American Bar Association, Treaties: ABA Urges U.S. Ratification of Women’s Rights Treaty and Law of the Sea Treaty (Apr. 2007), [http://www.abanet.org/poladv/priorities/it/2007apr\\_treaties\\_factsheet.pdf](http://www.abanet.org/poladv/priorities/it/2007apr_treaties_factsheet.pdf) (urging U.S. ratification of the Convention on the Law of the Sea and the Convention on the Elimination of Discrimination Against Women).

80. See American Bar Association Governmental Affairs Office, Legislative and Governmental Priorities, <http://www.abanet.org/poladv/priorities/> (last visited July 2, 2009) (urging ratification of the CEDAW and the Law of the Sea Treaty).

81. See Telephone Interview with Kristi Gaines, Legislative Counsel, Gov’t Affairs Office, A.B.A. (Jan. 15, 2008) (confirming that the ABA has not analyzed the Migrant Worker Convention); see also A.B.A., LEGISLATIVE ISSUES, CURRENT THROUGH MAY 2008 (on file with author) (recommending numer-

ture from this trend is a report published by the American Constitution Society in 2008, which lists the Migrant Worker Convention among the “important human rights treaties” that the incoming administration should support for ratification.<sup>82</sup>

The lack of attention to the Migrant Worker Convention extends to the U.S. academy. There is literature on U.S. ratification of the CEDAW (Women’s Convention),<sup>83</sup> the Rights of the Child Convention,<sup>84</sup> and other human rights treaties,<sup>85</sup> but little work exists on U.S. ratification of the Migrant Worker Convention.<sup>86</sup> Meanwhile, as noted above, there is a signifi-

---

ous human rights treaties for ratification, such as the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Rome Statute, but without a mention of the U.N. Migrant Worker Convention).

82. CATHERINE POWELL, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION 23-24 (Oct. 2008), available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf> (emphasis omitted).

83. E.g., Ravi Mahalingam, *Women’s Rights and the “War on Terror”*: Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism, 34 CAL. W. INT’L L.J. 171 (2004); Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1461 (2003). For the treaty itself, see CEDAW, *supra* note 4.

84. E.g., JONATHAN TODRES ET AL., THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (2006); Paula Donnolo & Kim K. Azzarelli, *Ignoring the Human Rights of Children: A Perspective on America’s Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL’Y 203 (1996); Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161 (2006). For the treaty itself, see Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

85. E.g., Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365 (1990) (regarding ratification of the title treaty); Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121 (2005) (regarding ratification of the title treaty).

86. The International Migration Review devoted an issue to the Migrant Worker Convention in 1991, the year after its promulgation. That issue included a piece by the late Arthur Helton. Arthur C. Helton, *The New Convention from the Perspective of a Country of Employment: The U.S. Case*, 25 INT’L MIGRATION REV. 848 (1991). Other U.S. scholars have contributed to the literature about the Migrant Worker Convention. E.g., Bosniak, *supra* note 16; Virginia Leary, *Labor Migration*, in MIGRATION AND INTERNATIONAL LEGAL



cantly more robust commentary regarding the Convention vis-à-vis European standards.<sup>87</sup> Even the United Nations Economic and Social Council, which has commissioned a series of studies on the Convention's prospects for ratification in a variety of countries, has not engaged in such a study with regard to the United States.<sup>88</sup>

### 3. *Delayed Senate Approval*

From the earliest days of the human rights treaty regime, the Senate has struggled with whether and how to incorporate international human rights norms into domestic law.<sup>89</sup> Even when the content of a treaty appeared to be unobjectionable, for example in the case of the Genocide Convention, concerns about loss of sovereignty appear to hold particular sway in the realm of human rights treaty ratification.<sup>90</sup> According to Pro-

---

NORMS 227, 234-36 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); James A. R. Nafziger & Barry C. Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, 25 INT'L MIGRATION REV. 771 (1991) (summarizing the relationship between the U.N. Convention and instruments of human rights law); Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1 (2005); Anna Zalewski, Note, *Migrants for Sale: The International Failure to Address Contemporary Human Trafficking*, 29 SUFFOLK TRANSNAT'L L. REV. 113, 126-29, 131-34 (2005). These studies, however, did not focus on the Migrant Worker Convention vis-à-vis U.S. law or its ratification by the United States.

87. E.g., European Assessment of the Treaty, *supra* note 36; Tugrul Ansay, *The New UN Convention in Light of the German and Turkish Experience*, 25 INT'L MIGRATION REV. 831 (1991); Giovanni Kojanec, *The UN Convention and the European Instruments for the Protection of the Migrants*, 25 INT'L MIGRATION REV. 818 (1991).

88. See E-mail from Antoine Pécoud, Programme Specialist, Int'l Migration and Multicultural Policies Section, UNESCO, to author (Oct. 1, 2008) (on file with author) [hereinafter Pécoud E-mail] (stating that ECOSOC has not examined the Convention's ratification prospects in the U.S. context).

89. See KAUFMAN, *supra* note 51, at 2 & *passim* (arguing that the Senate has a history of opposition to and struggle with human rights treaty ratification and implementation). The U.S. Senate Subcommittee on Human Rights and the Law recently held a hearing on this issue, which was long overdue. For the archived webcast, see U.S. Senate Committee on the Judiciary, "The Law of the Land: U.S. Implementation of Human Rights Treaties," (Dec. 16, 2009), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4224>.

90. See *id.* at 287-88 (observing that Senate approval of treaties such as the Genocide Convention depended on negotiations with the Administration on conditions, and that the Genocide Convention was pending in the

fessor Natalie Kaufman, “the actual content of the treaties is not viewed as the primary determinant of the current situation. Perception is important, not content.”<sup>91</sup> Seven human rights treaties are pending on the Foreign Relations Committee calendar and six of them have been pending for more than 10 years.<sup>92</sup> The longest pending treaty on the calendar relates to labor rights: the ILO Freedom of Association Convention.<sup>93</sup> Given the sensitive nature of immigration policy, it is likely that a Convention on Migrant Worker Rights would also encounter opposition and lengthy debates, making treaty ratification steps four through seven slow and painstaking. However, as argued below, it is precisely the controversiality of the subject matter that makes debate about migrant-focused international human rights standards valuable at this juncture.

#### 4. *Potential Restrictions on Ratification*

A common state practice is to restrict treaty ratification, to limit the document’s impact on the domestic legal system. In its ratification of human rights treaties, the United States has taken this practice further than with respect to any other type of treaty.<sup>94</sup> The following section discusses common restrictions and concludes that, although such restrictions are inadvisable and undermine the benefits of ratification, recent U.S. human rights treaty practice makes it virtually certain that at least some restrictions will be included in the U.S. ratification of the Migrant Worker Convention.

When the earliest human rights treaties were promulgated, the question of the appropriate way to handle reserva-

---

Senate for thirty-seven years); *see also* KAUFMAN, *supra* note 51, at 184-193 (describing the concerns continually raised against the Genocide Convention for decades, many of them related to loss of sovereignty).

91. KAUFMAN, *supra* note 51, at 181.

92. *See* SENATE TREATY HANDBOOK, *supra* note 43, at 286 (listing ILO Convention on Freedom of Association; ILO Employment Policy Convention; International Covenant on Economic, Social and Cultural Rights; American Convention on Human Rights; Convention on the Elimination of All Forms of Discrimination Against Women; and Geneva Convention Protocol II; as well as Protocols to the Convention on the Rights of the Child, which are no longer pending).

93. *See id.* (pending since 1949).

94. *See id.* (list of pending human rights treaties along with the dates from which they have been pending).

tions was unsettled.<sup>95</sup> The international community had to strike a balance between universality, in the form of widespread ratification, and the integrity of the treaty.<sup>96</sup> Ultimately, a balance was struck to permit States Parties to make unilateral reservations to human rights treaties, but only reservations that do not contravene the “object and purpose” of the treaty are permissible.<sup>97</sup> This balance has been criticized, because the “object and purpose” norm has proven to be virtually ineffective as a barrier to unilateral restrictions on ratification.<sup>98</sup>

Likely as a result of the relatively permissive regime that has evolved, the United States has regularly applied a set of restrictions that was based on what the late Senator Jesse Helms termed the “sovereignty package.”<sup>99</sup> Over the years, the “sovereignty package,” as applied in the context of human rights treaties, has evolved to include the following restrictions: 1) an “understanding” that assures federal and state government cooperation to ensure compliance with the treaty;<sup>100</sup> 2) a declaration that the terms of the treaty are not “self-executing,” or not enforceable in domestic court, until they have been implemented in domestic legislation;<sup>101</sup> and 3) an understanding that “nothing in [the treaty] establishes a basis for jurisdiction by any international tribunal, including the Inter-

---

95. See LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 15 (1995) (describing the “decisive importance” of the 1951 International Court of Justice advisory opinion on how to handle reservations regarding the 1951 Genocide Convention).

96. See *id.* at 23 (noting that approval of such treaties relied heavily on negotiating conditions to treaty provisions).

97. *Id.* at 28-29 (quoting the Vienna Convention on the Law of Treaties, May 23, 1960, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980)).

98. LIJNZAAD, *supra* note 95, at 95 (“The ‘object and purpose’ rule has been of limited relevance in treaty practice, if measured by the number of objections made to reservations to human rights treaties.”).

99. KAUFMAN, *supra* note 51, at 187.

100. ICCPR RATIFICATION RECORD, *supra* note 41, at 14; CERD RATIFICATION RECORD, *supra* note 41, at 10; CRC CHILD ABUSE PROTOCOL RATIFICATION RECORD, *supra* note 41, at 5; CAT RATIFICATION RECORD, *supra* note 41, at 7.

101. ICCPR RATIFICATION RECORD, *supra* note 41, at 14; CERD RATIFICATION RECORD, *supra* note 41, at 10; CAT RATIFICATION RECORD, *supra* note 41, at 6.

national Criminal Court.”<sup>102</sup> The “sovereignty package” is controversial internationally. The U.S. ratification restrictions have garnered formal protests from other human rights treaty members,<sup>103</sup> sparked inter-governmental policy statements designed to limit restrictions,<sup>104</sup> and elicited widespread censure domestically from constituencies that believe that U.S. domestic law should be changed to conform to those international human rights standards that are more stringent.<sup>105</sup> The question of whether non-self-execution can be read into a treaty that was *not* ratified contingent on a non-self-execution understanding has been the subject of recent debate and litiga-

---

102. CRC CHILD SOLDIER PROTOCOL RATIFICATION RECORD, *supra* note 41, at 19. Note also that two ratifications involved what Senator Helms termed the “sovereignty proviso,” conditions included in the Senate resolution ratifying the Genocide Convention but not included in the Convention Against Torture instrument of ratification deposited by the President. SENATE TREATY HANDBOOK, *supra* note 43, at 134-35. The “sovereignty proviso” stated that the President would not deposit the instrument of ratification until he had notified “all present and prospective ratifying parties . . . that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” *Id.* at 134, 287.

103. *See, e.g.*, ICCPR RATIFICATION RECORD, *supra* note 41, at 16-17 (including Denmark’s objection to the United States’ reservations); CAT RATIFICATION RECORD, *supra* note 41, at 9 (providing the Netherlands’ objections to reservations, understandings, and declarations made by the United States).

104. Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392, 397-98 (Michael Byers & Georg Nolte eds., 2003).

105. *E.g.*, Press Release, ACLU, ACLU And Human Rights Watch Report on U.S. Violations of International Human Rights Covenant: Groups Call on Clinton Administration to Correct Abuses, Ensure That International Standards Can Be Invoked in U.S. Courts (Dec. 14, 1993), available at [http://www.skepticfiles.org/aclu/12\\_14\\_93.htm](http://www.skepticfiles.org/aclu/12_14_93.htm).

tion,<sup>106</sup> but U.S. courts do enforce explicit non-self-execution ratification restrictions.<sup>107</sup>

The United States also conditions specific substantive provisions of human rights treaties that conflict—or potentially conflict—with domestic law. For example, in its ratification of the International Covenant on Civil and Political Rights (ICCPR), the United States reserved the right to execute convicted criminals for crimes committed below the age of 18<sup>108</sup> to shield the U.S. death penalty regime from the ICCPR's prohibition on the juvenile death penalty.<sup>109</sup> Similarly, the United States' ratification of the Child Pornography Protocol was conditioned on the United States' particular understanding of the definition of child pornography.<sup>110</sup>

Professor Louis Henkin argued against restrictions on ratification in the context of an earlier human rights treaty:

The first [principle governing executive branch human rights treaty ratification] is that, while the

106. The Supreme Court recently read such a treaty to be non-self-executing and thus unenforceable in U.S. court. See *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (holding that while a “treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be self-executing and is ratified on these terms” (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))). For recent scholarship on this issue, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”*, 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing At Treaties*, 99 COLUM. L. REV. 2154 (1999); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 600 (2008); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

107. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539-40 (1999).

108. See ICCPR RATIFICATION RECORD, *supra* note 41, at 14 (reserving “the right, in exceptional circumstances, to treat juveniles as adults,” for purposes of criminal punishment).

109. ICCPR, *supra* note 41, art. 6(5) (mandating that minors not be sentenced to the death penalty). See generally SENATE TREATY HANDBOOK, *supra* note 43, at 291 (recognizing that international law requires nations not to act in a manner that would defeat a treaty's purpose).

110. See CRC CHILD ABUSE PROTOCOL RATIFICATION RECORD, *supra* note 41, at 5 (understanding the term child pornography “to mean the visual representation of a child engaged in real or simulated sexual activities or of the genitalia of a child where the dominant characteristic is depiction for a sexual purpose”).

U.S. will adhere to this covenant, it will not agree to any change in U.S. law as it is today. Mr. Rodley referred to this as unseemly; I have called it ignoble and have sometimes thought of it as outrageous. The purpose of adhering to a treaty is to undertake obligations, in this case to adhere to a common international standard. What sort of convention would you have if every country adhered subject to the reservation that it would not make any changes in its laws? If the Soviet Union made such a reservation, we would, rightly, reject its adherence as fraudulent.

Some apparently support such a reservation with the argument that it is necessary because it is unconstitutional or undesirable to make changes in domestic law by treaty. That is plain nonsense. We have always made changes in domestic law by treaty . . . If one did not make domestic law by treaty, there would be no sense in, no need for, a clause that declares treaties to be the supreme law of the land.<sup>111</sup>

Since Professor Henkin issued his scathing critique of human rights treaty ratification restrictions, the United States has ratified seven human rights treaties, including three major United Nations human rights conventions, and as discussed above, has included significant restrictions. It is unlikely that the Migrant Worker Convention would be an exception to this pattern, particularly given the charged political climate with respect to immigration. Indeed, the International Labour Organization raised concerns about moving the migrant worker issue into a UN treaty because of concern that the UN process includes the potential dilution effect of restrictions on ratification, while the ILO Convention process does not.<sup>112</sup> Such restrictions lessen the positive impact of ratification, not only on protection for vulnerable groups like migrant workers, but also respecting the enhancement to the United States' international reputation that ratification brings. In the case of the Migrant Worker Convention, restrictions would have an addi-

---

111. Louis Henkin, *The Covenant on Civil and Political Rights, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?* 20, 22 (Richard B. Lillich ed., 2d ed. 1985).

112. See Böhning, *supra* note 56, at 702-03 (1991) (comparing the ILO and U.N. processes).

tional negative effect in that they would affect United States leadership vis-à-vis other countries that are still deciding whether and how to ratify. Therefore, while it is likely that ratification of the Migrant Worker Convention would be conditioned, it will be very important to limit restrictions to the greatest possible extent.

In sum, although I share the opinion that restrictions on ratification constitute a subversion of the protective function of human rights treaties, U.S. ratification of the Migrant Worker Convention would likely be conditioned on a set of reservations, understandings, and declarations, by way of an initial package proposed by the Executive upon signature, followed by Senate stipulation upon authorization to ratify, and formalized by the final act of ratification by the President. These limitations would likely include the longstanding generic reservations, such as the federal/state understanding and the non-self-execution declaration, as well as a series of substantive reservations and declarations addressing both clear and potential substantive conflicts between the Convention and domestic law. The exact nature of any potential substantive restrictions on ratification of the Migrant Worker Convention is a large question that lies beyond the scope of the present article, but again, in the context of the Migrant Worker Convention, limiting such restrictions will be politically difficult but important for the future of the treaty.

### III. DOMESTIC LAW ASSESSMENT OF THE MIGRANT WORKER CONVENTION

Interviews with domestic and international government officials and advocates reveal that the Migrant Worker Convention receives virtually no attention in the United States from either civil society or government because of the assumption that any attempt to define immigrants as rights holders is a political non-starter.<sup>113</sup> Therefore, none of the relevant actors has completed the work needed to analyze the Convention. Thus, the controversial nature of immigrants' rights leads to a

---

113. Sherer E-mail, *supra* note 76 (confirming that the U.S. has not seriously considered ratification of the U.N. Convention); Telephone Interview with Kristi Gaines, *supra* note 81; Pécoud E-mail, *supra* note 88 (stating that migration is too sensitive a subject for the Convention to get serious consideration).

chicken-and-egg problem: until the Convention is assessed and ratification can be debated based on specific concerns, these political assumptions will remain a self-fulfilling prophecy. Some steps are essential to the process of assessing the treaty: 1) a technical legal project to assess the Convention in light of U.S. law, so that interested domestic actors can develop their own positions on the Convention and formulate potential conditions on ratification; and 2) a domestic debate on the relative merit of the Convention in light of U.S. interests and policy aspirations.

The present article takes first steps in the larger project. The following Section proposes a typology for assessing the Migrant Worker Convention through the lens of U.S. law, and analyzes provisions of the Convention that potentially affect selected, particularly sensitive domestic policies. Each actor in the U.S. migration system—whether a border patrol official, a Legal Advisor to the Department of State, or an unauthorized immigrant worker—would create a different map of how exactly the Convention relates to U.S. law, and unanimity is not a realistic goal. However, arriving at a common domestic understanding of the major areas of concordance and tension is important for any treaty's prospects. Such an understanding will demonstrate the areas of dispute so that the Administration can develop a tentative negotiation package and engage with the Senate.

A. *Proposed Typology for Assessing Treaty Provisions  
vis-à-vis U.S. Law*

Assessing any treaty for potential ratification involves a wide range of legal, political, and economic considerations. The following proposed typology highlights the information needed to examine the Migrant Worker Convention for its domestic legal implications, using comparison of norms as well as past U.S. restrictions on human rights treaty ratification as a guide to the legal issues that are likely to be pertinent to the debate.

The following section analyzes five different types of relationships between the Migrant Worker Convention protections and domestic law. The first is a **clear *de jure* conflict between a domestic norm and the treaty provision, where the treaty provision is the more stringent of the two.** An example



of such a norm is Migrant Worker Convention Article 22(9), which states that “[e]xpulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.”<sup>114</sup> This provision conflicts with the U.S. rule stripping lost-wage remedies from deported workers whose National Labor Relations Act rights were violated.<sup>115</sup> Thus, at the present moment in U.S. treaty practice, such a conflict may result in a reservation limiting this country’s international obligation to the level of protection already afforded by the parallel, conflicting U.S. standard.

Other Migrant Worker Convention provisions **clearly present a less rights-protective standard than domestic law**. The Migrant Worker Convention, for example, provides for freedom of speech<sup>116</sup> to a lesser extent than the U.S. Constitution,<sup>117</sup> indicating the need for a ratification restriction such as the second U.S. Declaration to its ratification of the ICCPR. ICCPR Ratification Declaration 2 stated that

For the United States, [the ICCPR provision] which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.<sup>118</sup>

Treaty provisions about which domestic actors will likely not agree—about which **de jure conflicts with domestic laws are arguable**—are also useful to identify. An example of such a Migrant Worker Convention provision is Article 18(1), which

114. U.N. Migrant Worker Convention, *supra* note 6, art. 22(9).

115. *See* Sure-Tan, Inc., v. NLRB, 467 U.S. 883, 902-03 (1984) (stripping NLRA remedies from deported workers).

116. *See* U.N. Migrant Worker Convention, *supra* note 6, art. 13 (recognizing migrant workers’ right to freedom of expression and right to hold opinions, but noting the “special duties and responsibilities” of the former right may be subject to restriction).

117. Helton, *supra* note 86, at 857.

118. ICCPR RATIFICATION RECORD, *supra* note 41, at 14.

requires that all migrant workers and family members, including those in undocumented status, “have the right to equality with nationals of the [State of employment] before the courts and tribunals.”<sup>119</sup> Non-governmental advocates are likely to argue that the United States’ restriction on Legal Service Corporation (LSC)-funded service to undocumented immigrants<sup>120</sup> violates the Article 18(1) guarantee of non-discriminatory access to the courts.<sup>121</sup> However, the U.S. Government is unlikely to see the LSC restrictions as conflicting with Article 18(1), given the current state of international law, which has rarely considered and does not clearly mandate provision of civil legal services as a matter of human right.<sup>122</sup>

Additionally, provisions that likely involve **no *de jure* conflict with domestic law, but do suggest an arguable *de facto* conflict**, are indicators of issues that may have political traction but little legal relevance to ratification. An example of such a provision is Migrant Worker Convention article 17(1), which requires that “[m]igrant workers and members of their families who are deprived of their liberty shall be treated with human-

---

119. U.N. Migrant Worker Convention, *supra* note 6, art. 18(1).

120. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(2)(B), 110 Stat. 1321, 1321-56 (prohibiting non-federal funds to assist undocumented immigrants); Act of Sept. 24, 1979, Pub. L. No. 96-68, 93 Stat. 433, 433 (prohibiting use of federal funds to assist undocumented immigrants).

121. See Helton, *supra* note 86, at 854 (raising the possibility of such a claim).

122. See Sarah Paoletti, *Deriving Support from International Law for the Right to Counsel in Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 651, 652 (noting that “International law is silent. . . on the express question as to whether counsel must be provided to ensure a fair trial in civil cases,” while arguing that international law is moving toward establishing this norm). See also ROGER SMITH, CRIMINAL LEGAL AID, INTERNATIONAL LAW AND PRACTICE ¶ 1 (2003), available at <http://www.justice.org.uk/images/pdfs/crimlegalaid.pdf> (arguing that, although there is “growing international acceptance of a right to legal representation,” only the European Court of Human Rights has found a right to free civil legal services for European countries); *Airey v. Ireland*, 2 Eur. Ct. H.R. 305 (1979) (interpreting European treaty law so as to find a right to free civil legal services in some instances). However, a question might arise in that, even though article 18 begins with a general statement about equality of protection—“before the courts and tribunals”—its subsequent language focuses on rights in criminal proceedings as opposed to civil trials. U.N. Migrant Worker Convention, *supra* note 6, art. 18 (mentioning specifically the rights of migrant workers and their families in the determination of “any criminal charge against them”).

ity and with respect for the inherent dignity of the human person. . . .”<sup>123</sup> Although there is room for more protective measures to be implemented in the law,<sup>124</sup> the United States has an elaborate legal framework for the detention of immigrants<sup>125</sup> that, if enforced, is unlikely to run afoul of article 17(1). However, the implementation of these domestic standards, and the actual treatment of immigrants in U.S. detention facilities, has been the subject of significant controversy and debate.<sup>126</sup> For example, at least one U.S. court has made findings of fact that torture and other forms of abuse have been meted out in immigration detention facilities located in U.S. territory.<sup>127</sup> Nevertheless, human rights violations such as these are unlikely to be of grave concern to the U.S. government in making the signature or ratification decision because the Convention does not allow for individual complaints.<sup>128</sup>

---

123. U.N. Migrant Worker Convention, *supra* note 6, art. 17(1).

124. *See, e.g.*, Press Release, Human Rights Watch, US: Immigration Detention Neglects Health (Mar. 17, 2009) available at <http://www.hrw.org/en/news/2009/03/17/us-immigration-detention-neglects-health> (calling on the U.S. government to “[i]ssue federal regulations so that the immigration agency’s detention standards have the force of law, and detained individuals and their advocates have recourse to courts to redress shortfalls in health care,” and to “[r]evamp policies limiting access to non-emergency services”).

125. *See generally* OFFICE OF DETENTION AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (2008) (setting forth national detention standards for the safety, security, order, care, and activities of illegal immigrants while in custody).

126. *See e.g.*, Nina Bernstein, *Officials Hid Truth About Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, available at <http://www.nytimes.com/2010/01/10/us/10detain.html>; Nina Bernstein, *Officials Say Detainee Fatalities were Missed*, N.Y. TIMES, Aug. 17, 2009 (stating that more than one in ten deaths in immigration facilities were overlooked); *see also* Carmen Gentile, *Group Calls for Inquiry into Death of Detainee*, N.Y. TIMES, July 15, 2008, available at <http://www.nytimes.com/2008/07/15/us/15immig.html> (discussing circumstances surrounding the death of Immigration and Customs Enforcement detainee Valery Joseph); Jane Guskin, *Immigration Detention: The Case for Abolition*, HUFFINGTON POST, Aug. 27, 2008, available at [http://www.huffingtonpost.com/jane-guskin/immigration-detentionthe\\_b\\_121374.html](http://www.huffingtonpost.com/jane-guskin/immigration-detentionthe_b_121374.html) (discussing the death of immigration detainee Hiu Lui Ng and suggesting that the United States government end detention of immigrants in removal proceedings).

127. *See, e.g.*, *Jama*, 22 F. Supp. 2d at 358-59.

128. *See* U.N. Migrant Worker Convention, *supra* note 6, art. 77 (discussing when a “communication” is permitted and providing no means to lodge formal complaints).

Once the treaty was ratified, organizations and individuals could comment to the monitoring committee about the United States' compliance with the treaty but they could not lodge formal complaints.

Finally, it is important to identify treaty provisions that **arguably involve neither *de jure* nor *de facto* conflict**. An example of this type of provision in the Migrant Worker Convention is Article 20(1), which states that “[n]o migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfill a contractual obligation.”<sup>129</sup> This provision does not appear to conflict with any legal or actual U.S. practice.<sup>130</sup>

These five comparison categories are laid out visually in the following grid, along with the five examples from the Migrant Worker Convention discussed above. Each substantive provision of the treaty will fall into one of these five comparison categories.

#### B. *Comparison of the Migrant Worker Convention with Key U.S. Laws*

The Migrant Worker Convention contains seventy-seven substantive articles, which, according to my count, break down into 187 separate points of comparison with U.S. law. Analyzing and sorting every one of these comparison points into the five categories is a substantial project that lies beyond the scope of this Article. However, through selected examples, it is possible to draw some initial conclusions about the potential interplay of the Convention and U.S. law. First, as Professor James Nafziger and Mr. Barry Bartel observed at the time of promulgation, because half of the Convention delineates the fundamental human rights guaranteed to *all* migrant workers and family members, a significant portion of the treaty is a recitation of international standards to which the United States has already bound itself by virtue of previous treaty ratifica-

---

129. *Id.* art. 20(1).

130. In addition, the United States is already held to a similar norm through its ratification of the Covenant on Civil and Political Rights. See ICCPR, *supra* note 41, art. 11 (an independent U.S. obligation that prohibits imprisonment merely due to inability to fulfill a private contractual obligation).

	<b><i>De Jure</i> Conflict Unlikely</b>	<b><i>De Jure</i> Conflict Arguable/Likely</b>
<b><i>De Facto</i> Conflict Unlikely</b>	Article 20(1) - No imprisonment for contractual violation.	<i>ICMW is less protective than U.S. law:</i> Article 13 - Allows restrictions on freedom of speech that are not found in U.S. law.
<b><i>De Facto</i> Conflict Arguable/Likely</b>	Article 17(1) - Respect for the inherent dignity of detained migrants. (The government has been sanctioned for abuses in immigration detention.)	<i>ICMW is clearly more protective than U.S. law:</i> Article 25 - National treatment with respect to termination of the employment relationship. (U.S. law excludes undocumented workers from monetary remedies for wrongful termination.)  <i>ICMW is arguably more protective than U.S. Law:</i> Article 18(1) - Right to equality “before the courts and tribunals” (U.S. law excludes undocumented immigrants from access to LSC-funded civil legal aid.)

tions.<sup>131</sup> Second, of five immigrant worker-related policies identified as having particular importance for the U.S. enforcement branches, two partially conflict with the Convention and three are unlikely to be challenged through the Convention.

1. *A Significant Portion of the Convention Overlaps with the United States’ Existing International Commitments*

The bulk of the Migrant Worker Convention’s seventy-seven substantive provisions are divided between 1) protec-

---

131. See Nafziger & Bartel, *supra* note 86 at 781-82 (noting the general overlap with existing human rights embodied in other human rights conventions).

tions for *all* migrant workers and members of their families, including those who are in an irregular or undocumented status<sup>132</sup> and 2) protections for legally present and employed workers and family members.<sup>133</sup> The provisions that apply to undocumented migrants are, to a great extent, a recitation of international norms to which the United States has already acceded by virtue of previous treaty ratifications.<sup>134</sup> In fact, twenty-three<sup>135</sup> provisions of the Migrant Worker Convention merely echo the language of treaties the United States has ratified.<sup>136</sup> An additional two provisions, which do not corre-

---

132. U.N. Migrant Worker Convention, *supra* note 6, arts. 8-35 (recognizing human rights of all migrant workers and their families, guaranteeing due process of law, and enumerating rights, including freedom of expression, religion, liberty, property, and more).

133. *Id.* arts. 36-63 (recognizing the right of legally documented and employed workers and family members to choose the remunerated activity in which they engage, the right to equal treatment in employment, and the rights to access to education, interstate travel, and residency).

134. *See id.* art. 8 (corresponding to ICCPR art. 12 and CERD art. 5(d)); *id.* art. 9 (corresponding to ICCPR art. 6); *id.* art. 10 (corresponding to CAT art. 16); *id.* art. 11 (corresponding to ICCPR art. 8); *id.* art. 12 (corresponding to ICCPR art. 18 and CERD art. 5(d)); *id.* art. 13 (corresponding to ICCPR art. 19 and CERD art. 5(d)); *id.* art. 14 (corresponding to ICCPR art. 17); *id.* art. 16 (corresponding to ICCPR art. 9, CERD art. 5(b), and CAT art. 14); *id.* art. 17(4) (containing a more enumerated version of the protections found at ICCPR arts. 8-9); *id.* art. 18 (corresponding to ICCPR arts. 14, 26 and CERD arts. 5(a), 6); *id.* art. 19 (corresponding to ICCPR art. 15); *id.* art. 20 (corresponding to ICCPR art. 11); *id.* art. 22 (corresponding to ICCPR art. 13); *id.* art. 23 (corresponding to Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261); *id.* art. 24 (corresponding to ICCPR art. 16); *id.* art. 26 (corresponding to ICCPR art. 22 and CERD arts. 5(d), 5(e)); *id.* art. 27 (corresponding to CERD art. 5(e)); *id.* art. 28 (corresponding to CERD art. 5(e)); *id.* art. 29 (corresponding to ICCPR art. 24); *id.* art. 31 (corresponding to ICCPR art. 27). ICCPR, *supra* note 41; CERD, *supra* note 41; CAT, *supra* note 41.

135. *See* Nafziger & Bartel, *supra* note 86, at 789-99 (compiling provisions that overlap or correspond with other multilateral treaties); *see also* U.N. Migrant Worker Convention, *supra* note 6, art. 10 (corresponding to CAT art. 16); *id.* art. 16 (corresponding to CAT art. 14).

136. *See* Nafziger & Bartel, *supra* note 86, at 789-99 (compiling provisions that overlap or correspond with other multilateral treaties). The provisions are in *supra* note 134, as well as the U.N. Migrant Worker Convention, *supra* note 6, art. 39 (corresponding to ICCPR art. 12); *id.* art. 40 (corresponding to ICCPR art. 22 and CERD art. 5(e)); *id.* art. 42 (corresponding to ICCPR art. 25 and CERD art. 5(c)); *id.* art. 43 (corresponding to CERD art. 5(e)); *id.* art. 44 (corresponding to ICCPR art. 23). ICCPR, *supra* note 41; CERD, *supra* note 41.

spond to protections already ratified by the United States, echo the language of the Universal Declaration of Human Rights,<sup>137</sup> a document that the United States helped to draft<sup>138</sup> and in favor of which this country voted in 1948.<sup>139</sup> Moreover, each of these two provisions—protection from arbitrary deprivation of property and the right to secondary education for undocumented immigrant children, are both firmly established in U.S. domestic law.<sup>140</sup> Thus, a significant portion of the Migrant Worker Convention overlaps with the United States' existing obligations.

---

137. See U.N. Migrant Worker Convention, *supra* note 6, art. 15 (corresponding to UDHR art. 17); *id.* art. 30 (corresponding to UDHR art. 26). Universal Declaration of Human Rights (UDHR), *supra* note 50.

138. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE CREATION OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS* (2000) (discussing Eleanor Roosevelt's various and significant contributions towards the creation of the Universal Declaration).

139. For information and background on the voting of states regarding the Declaration, see generally *id.* at 143-72. Note that the Universal Declaration of Human Rights, *supra* note 50, is a declaration, not a treaty, and therefore is not as a whole formally binding on the United States. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995-96) (explaining that although not written in binding terms, "[t]he Universal Declaration remains the primary source of *global* human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations"). Some provisions of the Declaration, such as the prohibition on torture contained in Article 5, are now accepted by the United States as binding on this country through the international law devices of customary international law. See *id.* at 306 (noting that "one may . . . conclude that the Universal Declaration . . . is now widely accepted in the United States as one of the sources of evidence of customary international law"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980) (indicating that the Declaration is part of customary international law). However, articles 17 and 26 of the Universal Declaration of Human Rights are not among these provisions. Nevertheless, the United States' endorsement of the Declaration lends weight to the argument that the above-mentioned parallel articles in the U.N. Migrant Worker Convention (arts. 15 and 30) are not foreign to the United States. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

140. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that undocumented immigrant children have constitutional right to education, as long as it is being offered to others and Congress has not asserted responsibility in this area).

## 2. *The Convention's Effect on Five Politically Sensitive Policies*

To illustrate the types of concerns and analyses that might be involved in an assessment of the Convention, the following section examines the application of the Convention to five currently politically sensitive American policies: legalization, expedited removal, border enforcement, family unification for legal, temporary workers, and worksite enforcement. The following analysis argues that most of these policies would go unchallenged by the Convention, many of them would be subject only to challenge at the *de facto* level through ratification of the Convention, and only two (expedited removal from the interior and failure to provide some forms of family unification for temporary workers) present either arguable or clear *de jure* conflicts.

Although they arise from current American policy debates, these five issues also correspond to policy concerns in other countries. Although there has not been any significant discussion about the Convention in the United States, most of the likely arguments against ratification are relatively predictable. For example, a recent study published by the United Nations Educational, Scientific and Cultural Organization noted that in Europe the two major legal concerns raised against ratification of the Migrant Worker Convention are the “common claim that it would limit the sovereign rights of states to decide upon who can enter their territory and for how long they can remain; and, secondly, the equally ubiquitous fear that the Convention would provide for a robust right of family reunification to all migrant workers present in a regular situation in the territory of a state.”<sup>141</sup> These concerns should be anticipated and addressed in the U.S. context as well, and the following section aims to begin this process by comparing five particularly sensitive U.S. policies with the Convention.

### a. *The Convention Does Not Mandate Legalization*

The Convention explicitly places no obligation on States Parties to expand visa numbers or engage in legalization of undocumented immigrants. Article 35 of the Convention states, “Nothing in the present part of the Convention [Part III, relating to unauthorized workers and undocumented fam-

---

141. *European Assessment of the Treaty*, *supra* note 36, at 51.



ily members] shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are [undocumented] . . . or any right to such regularization [immigration amnesty] of their situation. . . .”<sup>142</sup> The Convention underscores this point in Article 34, noting, “Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from . . . the obligation to comply with the laws and regulations of . . . the State of employment.”<sup>143</sup> Thus the Convention does not purport to take any position on the bedeviled legalization question that has increasingly preoccupied Congress since America’s last wide-scale regularization in 1986. Article 69(1) does direct States Parties to “take appropriate measures” to ensure that the presence within their territory of migrant workers and families in an “irregular situation” (undocumented status) does not persist.<sup>144</sup> However, Article 69(1) does not suggest what measures States Parties should take, leaving the means to individual states’ immigration regimes.

b. *The Convention Likely Conflicts with the U.S. Policy of Expedited Removal from the Interior*

Expedited removal is a process by which foreign nationals can be summarily removed from the United States after an interview with border enforcement officials.<sup>145</sup> Some safeguards for identifying and protecting asylum seekers, U.S. citizens, and permanent residents were included in the process at the time that expedited removal became part of U.S. law, but over the twelve-year history of expedited removal the efficacy of these protections has been questioned.<sup>146</sup> Moreover, in 2004,

---

142. U.N. Migrant Worker Convention, *supra* note 6, art. 35.

143. *Id.* art. 34.

144. *Id.* art. 69(1).

145. *See, e.g.*, 8 U.S.C. §§ 1225, 1228 (2006) (stating immigration officers need only conduct a preliminary screening to determine admissibility before removal, and also allowing for expedited procedures for aliens convicted of committing aggravated felonies).

146. *See* KAREN MUSALO ET AL., THE EXPEDITED REMOVAL STUDY: EVALUATION OF THE GENERAL ACCOUNTING OFFICE’S SECOND REPORT ON EXPEDITED REMOVAL 18-19 (2000) available at [http://w3.uchastings.edu/ers/reports/10-00\\_rep1.pdf](http://w3.uchastings.edu/ers/reports/10-00_rep1.pdf) (explaining that asylum seekers may often incorrectly and unjustifiably be denied referral to a credible fear hearing, though the lack of

the Bush administration began utilizing expedited removal against undocumented individuals discovered up to 100 air miles in from the borders.<sup>147</sup>

Articles 22 and 23 of the Migrant Worker Convention do provide various due process protections in expulsion, but appear not to set limits on decisions of non-admittance.<sup>148</sup> In fact, the U.S. representative to the Working Group, along with other delegations, made several statements to the effect that such was their understanding.<sup>149</sup> In 1981, early in the negotiations, several delegations stated that the Convention needed a provision on “the question of non-admittance of undocumented migrant workers at ports of entry in countries of destination.”<sup>150</sup> However, the official record of the discussions reveals that such a provision was never drafted. In the discussions about the Article 23 guarantee of the right to consular access in expulsion proceedings, the Argentine and U.S. representatives stated that consular access rights “should not be applicable to persons who have not yet entered the country concerned or who have been turned back at ports of entry.”<sup>151</sup> The United States further argued that the right to consular

---

transparency of the process means that there is not enough evidence to be sure).

147. A Congressional Research Service report lays out the history of the expanding use of expedited removal by the United States:

From April 1997, to November 2002, expedited removal only applied to arriving aliens at ports of entry. In November 2002, it was expanded to aliens arriving by sea who are not admitted or paroled. Subsequently, in August 2004, expedited removal was expanded to aliens who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. southwest land border, and can not establish to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter. In January 2006, expedited removal was reportedly expanded along all U.S. borders.

ALISON SISKIN & RUTH ELLEN WASEM, CRS REPORT FOR CONGRESS: IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 2 (2007), available at <http://www.rcusa.org/uploads/pdfs/2007,0402-crs.pdf>.

148. U.N. Migrant Worker Convention, *supra* note 6, arts. 22, 23.

149. See, e.g., *November 1981 Working Group Report*, *supra* note 25, ¶¶ 67, 76 (statements by the U.S. Representative).

150. *Id.* at ¶ 64.

151. *Id.* at ¶ 76.

access “should not necessarily apply to all those who are apprehended as illegal migrants shortly after crossing the border of the country concerned.”<sup>152</sup> In 1987, during the second reading of article 22, the German representative stated his opinion that “the notion of expulsion included the specific case of a migrant worker who has to be expelled immediately after arriving in a country where he was not accepted.”<sup>153</sup> The Italian representative responded immediately, stating “that the article [22] addressed the case of a migrant worker who might be expelled from the territory of a State and [not to] the case of a migrant worker who had not yet entered the territory of that State.”<sup>154</sup>

Later still, in 1989, the United States touched on the issue again during the discussion of Convention Article 79. Article 79 states, “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.”<sup>155</sup> In the reported discussion of this language, the U.S. representative stated that “his delegation understood the word ‘admission,’ in this article, in its broadest concept, to encompass all terms and conditions pursuant to which migrant workers and members of their families may enter and remain in the United States.”<sup>156</sup> Despite the ambiguity introduced by the German representative’s statement regarding the definition of expulsion, the better conclusion is that the Convention does not regulate refusal of entry at ports of entry and at the border.

There is, however, another feature of current U.S. expedited removal policy that may arguably come under the purview of Article 22. To the extent that the curtailed processes of expedited removal are enforced from within the *interior* of the United States, the action is likely to be defined as expulsion and thus regulated by the Convention. After the expansion of expedited removal and its concomitant checkpoints into the interior, the American Civil Liberties Union used census data to conclude that “fully TWO-THIRDS [sic] of the United States’ population lives within this Constitution-free or

---

152. *Id.*

153. *June 1987 Working Group Report, supra* note 63, ¶ 102.

154. *Id.*

155. U.N. Migrant Worker Convention, *supra* note 6, art. 79.

156. *June 1989 Working Group Report, supra* note 66, ¶ 13.

Constitution-late Zone . . . [and that n]ine of the top 10 largest metropolitan areas as determined by the 2000 census, fall within the Constitution-free Zone. . . . Some states are considered to lie completely within the zone: Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island and Vermont.”<sup>157</sup> Should future administrations choose to continue to exercise this expansive authority, it is unlikely that the application of expedited removal within such a broad swath of the United States will be viewed as “non-admittance” as opposed to expulsion. Once defined as expulsion, the expedited removal from the interior would be liable to due process analysis by the Committee.

Currently, immigration advocates are urging the Obama administration to limit the scope of expedited removal to the border itself and ports of entry<sup>158</sup> and/or to seek repeal of the policy altogether.<sup>159</sup> The United Nations High Commissioner for Refugees has been critical of expedited removal policies in the United States as well as in Europe,<sup>160</sup> where the practice originated. The Migrant Worker Committee, the U.N. body that monitors the ICMW, has commented negatively on Mexico’s law that permits the executive branch to immediately deport any immigrant for any reason.<sup>161</sup> Mexico’s law is less pro-

---

157. American Civil Liberties Union, Fact Sheet on U.S. “Constitution Free Zone,” <http://www.aclu.org/privacy/37293res20081022.html> (last visited Dec. 20, 2009).

158. See, e.g., ASIAN AMERICAN JUSTICE CTR. ET AL., IMMIGRATION POLICY: TRANSITION BLUEPRINT 9-10 (2008), available at [http://65.36.162.162/files/ImmigrationTransitionBlueprint\\_2008.pdf](http://65.36.162.162/files/ImmigrationTransitionBlueprint_2008.pdf) (explaining and supporting repeal policy for those apprehended within 100 miles of border).

159. See *id.* at 11 (recommending that undocumented immigrants receive “meaningful administrative review”).

160. See U.N. High Comm’r for Refugees [UNHCR], *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, ¶¶ 1-3 (Feb. 1999), available at [www.unhcr.org.au/pdfs/detentionguidelines.pdf](http://www.unhcr.org.au/pdfs/detentionguidelines.pdf) (stating that detention of asylum-seekers is “undesirable” and that it should only be “resorted to in cases of NECESSITY”); UNHCR, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* (June 16, 2008), available at [www.unhcr.org/refworld/pdfid/4856322c.pdf](http://www.unhcr.org/refworld/pdfid/4856322c.pdf) (urging the European Parliament to adopt effective safeguards for foreign nationals in removal situations, which a pending proposal did not include).

161. See U.N. Comm. on the Prot. of the Rights of all Migrant Workers and Members of their Families, *Consideration of Reports Submitted by States Parties*

tective of due process than U.S. expedited removal, but the attention paid to Mexico's law does underscore the fact that due process in removal from the interior is liable to scrutiny.

Viewed through the lens of the Article 22 due process limitations on expulsion, American expedited removal from the interior would likely violate the Convention on several grounds. At a minimum, it would conflict with the Article 22(4) requirement of review of the expulsion decision.<sup>162</sup> Moreover, the policy also likely fails Article 22(6)'s requirement that expelled migrant workers be afforded a "reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities."<sup>163</sup> Thus, to the extent that expedited removal from the interior is expulsion, both of these provisions would likely conflict with U.S. domestic law. In the ratification process, some U.S. government officials are likely, therefore, to press for a restriction on ratification that leaves the United States free to pursue interior expedited removal. However, it is important to remember that the port-of-entry expedited removal proceedings that are actually statutorily mandated are unlikely to present an issue under the Migrant Worker Convention. It is only expedited removal from the interior, repealed at the will of the Executive, which likely runs afoul of the Convention.

### c. *The Convention Does Not Challenge Border Policies*

The majority of illegal immigration into the United States takes place along this country's 1,969-mile border with Mexico.<sup>164</sup> The United States spends heavily on border-crossing

---

*under Article 9 of the Convention, Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico*, ¶ 13, U.N. Doc. CMW/C/MEX/CO/1 (Dec. 20, 2006) [hereinafter *Mexico's Concluding Observations*] (recommending that Mexico withdraw its reservation to article 22(4) of the Convention).

162. U.N. Migrant Worker Convention, *supra* note 6, art. 22(4).

163. *Id.* art. 22(6).

164. See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 4 (2008), available at <http://pewhispanic.org/files/reports/94.pdf> (reporting that 59% of the United States's illegal immigrant population comes from Mexico); INT'L BOUNDARY AND WATER COMM'N, UNITED STATES-MEXICO BOUNDARY MAP, [http://www.ibwc.state.gov/Files/US-Mx\\_Boundary\\_Map](http://www.ibwc.state.gov/Files/US-Mx_Boundary_Map).

prevention—approximately \$1.7 billion in fiscal year 2002.<sup>165</sup> Border control funding increased 519% between 1986 and 2002, and border staffing increased 221% in the same period.<sup>166</sup> Border control is such a clear priority of the United States government that one of the few significant pieces of immigration-related legislation to pass during the George Bush administration was the “Secure Fence Act of 2006.”<sup>167</sup> The Migrant Worker Convention does not specifically mention border control, but clearly anticipates that it will be used as an enforcement tool. Article 68 directs States Parties to collaborate on measures to sanction “illegal or clandestine movements,”<sup>168</sup> stating that “measures to be taken to this end . . . shall include . . . measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families.”<sup>169</sup> To the extent that U.S. domestic actors—government and civil society alike—raise concerns about the humaneness<sup>170</sup> of the United States’ border control strategies, these concerns might be addressed in the context of the Convention Article 9 right to life,<sup>171</sup> just as it has already come up in the context of the right to life protection contained in the ICCPR.<sup>172</sup> A recent decision of the Inter-American Commis-

---

pdf (displaying the border between United States and Mexico and the mileage of various segments).

165. DEBORAH WALLER MEYERS, MIGRATION POLICY INST., U.S. BORDER ENFORCEMENT: FROM HORSEBACK TO HIGH-TECH 10 (2005), available at <http://www.migrationpolicy.org/ITFIAF/Insight-7-Meyers.pdf> (providing a chart tracking border control spending).

166. *Id.* at 21 (providing a chart tracking border control funding and staffing).

167. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

168. U.N. Migrant Worker Convention, *supra* note 6, art. 68(1).

169. *Id.* art. 68(1)(b).

170. *See, e.g.*, MEYERS, *supra* note 165, at 22 (discussing the dangers of border crossing); U.S. GEN. ACCOUNTING OFFICE, INS’ SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 24-26 (2001), available at <http://www.gao.gov/new.items/d01842.pdf> (documenting an increase in deaths at the border and discussing attempts to reduce the death rate).

171. *See* U.N. Migrant Worker Convention, *supra* note 6, art. 9 (“The right to life of migrant workers and members of their families shall be protected by law.”).

172. *See* UNHCR, Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America*, ¶ 27, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter Human Rights Comm., 2006

sion on Human Rights of the Organization of American States, disallowing a complaint against the United States alleging that U.S. border policies violate the right to life, lends weight to the assumption that U.N. monitors are likely to take a cautious approach to the border enforcement issue.<sup>173</sup> This assumption is likely to be an important element of any American debate on ratifying the Convention, to the extent that advocates and officials pressing for signature and ratification would need to dispel concerns as to whether the Convention would hamper U.S. sovereignty over its borders.

d. *Family Unification for Temporary Workers: Weakly Mandated Protections Present Some De Jure Conflicts*

Several Convention articles offer substantive immigration protections to legally present workers aimed at protecting family reunification. Article 38 requires States of employment to “make every effort to authorize [legally present] migrant workers and [family members] to be temporarily absent without effect upon their authorization to stay or to work.”<sup>174</sup> With regard to workers who are lawful permanent residents, the United States makes precisely that provision, permitting LPR-status immigrants to undertake temporary visits abroad without running any risk of jeopardizing their status.<sup>175</sup> With regard to temporary entrants, however, no such provision for

---

*Concluding Observations on the United States*], available at <http://www.universalhumanrightsindex.org/documents/825/1095/document/en/pdf/text.pdf> (expressing concern about militarization of the U.S./Mexico border).

173. Victor Nicolas Sanchez et al. v. United States, Case 65/99, Inter-Am. C.H.R., Report No. 104/105, OEA/Ser.L./V/II.124 doc. 5 (2005), available at <https://www.cidh.oas.org/annualrep/2005eng/USA.65.99eng.htm> (dismissing petition alleging that border policies led to deaths of petitioners in violation of American Declaration of the Rights and Duties of Man, for failure to exhaust domestic remedies); see also David C. Baluarte, *Challenging Mandatory Deportation Before the Inter-American Commission on Human Rights: The Hope of Smith and Armendariz vs. United States*, 12 BENDER'S IMMIGR. BULL. 1718 (2007) (describing a pending petition challenging mandatory U.S. deportation for past convictions of minor crimes).

174. U.N. Migrant Worker Convention, *supra* note 6, art. 38(1).

175. See 8 U.S.C. §1101(a)(27(A)) (2009); *Chavez-Ramirez v. INS*, 792 F.2d 932 (9th Cir. 1986) (holding that, to be “temporary,” a sojourn abroad must be a relatively short period fixed by an event, or the permanent resident must have had a continuous, uninterrupted intention to return to the United States during the entirety of the time abroad).

temporary travel is made, creating a *de jure* conflict between Article 38 and U.S. law.

Article 44 directs that States Parties “take measures that they deem appropriate and that fall within their competence to facilitate the reunification of [authorized] migrant workers with their spouses [or equivalent] . . . as well as with their minor dependent unmarried children,” and directs that “on humanitarian grounds, [States Parties] shall favourably consider granting equal treatment to other family members of migrant workers.”<sup>176</sup> As to the first requirement, the language “take measures that they deem appropriate” prevents this clause from conflicting with domestic law. However, the second phrase requires examining whether those family reunification protections that are in place are being extended to “other family members.” This, too, is a weak requirement, using the mandating language of “shall favourably consider,” but if that language were interpreted to be binding, the U.S. domestic immigration system would present a *de jure* conflict with Article 44 as well. There are numerous instances in U.S. law of more favorable treatment for nuclear as opposed to extended, or “other” family members.<sup>177</sup> Similarly, if “favourably consider” is interpreted to be binding, Article 50(1) raises a *de jure* conflict. Article 50(1) requires States to “favourably consider” granting family members of deceased or divorced migrant workers authorization to stay and to take into account the length of time already resided in that State.<sup>178</sup> These provisions, though arguably weakly worded, raise potential conflicts that would likely require either a change in U.S. law to guarantee conformance or spark a restriction on ratification.<sup>179</sup> Mov-

---

176. *Id.* art. 44.

177. *E.g.*, THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 277-80 (5th ed. 2003) (describing top U.S. family immigration preference categories as spouses and unmarried children, while married children, parents, and siblings accorded lower preference).

178. U.N. Migrant Worker Convention, *supra* note 6, art. 50(1).

179. For example, the death of an immigration family petitioner, before the petition has been approved, as well as in most other situations, automatically revokes the petition and strips the family member of the petitioner of the right to status in the United States. *See Abboud v. INS*, 140 F.3d 843, 849 (9th Cir. 1998); *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993); 9 Foreign Affairs Manual 42.53 N.7.2; IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK 828-29 (11th ed. 2009) (describing effect of petitioner’s death on immigration petition).



ing toward modifying U.S. law on this point would better comport with the United States' obligation under International Covenant on Civil and Political Rights Article 23(1) to treat the family as "the natural and fundamental group unit of society[,] entitled to protection by society and the State."<sup>180</sup>

e. *The Convention Does Not Challenge Worksite Enforcement*

Because the U.S. immigration regime provides few opportunities for legal migration by poor and middle-class foreigners,<sup>181</sup> the United States economy currently makes jobs available to at least 7.2 million unauthorized immigrants.<sup>182</sup> Bringing down this number is frequently cited as a goal by all branches and levels of government.<sup>183</sup> Over the past five years, the Executive branch has expanded its use of worksite raids in order to address the phenomenon of unauthorized work.<sup>184</sup> In 2002, Immigration and Customs Enforcement (ICE) made

---

180. ICCPR, *supra* note 41, art. 23(1).

181. See Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 587-89 (2004) (describing the immigration law "bottleneck" that prevents laborers from gaining visas to enter the United States legally for work).

182. PEW HISPANIC CTR., FACT SHEET: THE LABOR FORCE STATUS OF SHORT-TERM UNAUTHORIZED WORKERS 1 (2006), available at <http://pewhispanic.org/files/factsheets/16.pdf> [hereinafter PEW UNDOCUMENTED WORKER COUNT] (noting that there are 7.2 million unauthorized immigrant workers in the United States). See generally MAUDE TOUSSAINT-COMEAU ET AL., PEW HISPANIC CTR., OCCUPATIONAL ATTAINMENT AND MOBILITY OF HISPANICS IN A CHANGING ECONOMY (2005), available at <http://www.pewhispanic.org/files/reports/59.1.pdf> (discussing Hispanic job opportunities and immigration, and explaining the link between low brown-collar visa numbers and illegal work).

183. See, e.g., WhiteHouse.gov, Immigration, <http://www.whitehouse.gov/agenda/immigration/> (last visited Dec. 20, 2009) (listing as one of the new Administration's goals: to "remove incentives to enter the country illegally by preventing employers from hiring undocumented workers and enforcing the law"); Hazleton, Pa., Ordinance 2006-18 (Sep. 8, 2006), available at <http://www.hazletoncity.org/090806/2006-18%20Illegal%20Alien%20Immigration%20Relief%20Act.pdf> (providing for punishment of local businesses that hire unauthorized immigrants in Hazleton, Pennsylvania).

184. See Lorraine Schmall, *Worksite Enforcement of U.S. Immigration Laws*, PROFESSOR'S COLUMN, Aug. 20, 2008, at 1, available at [http://law.niu.edu/law/faculty/columns/SchmallLorraine\\_8\\_20\\_08.pdf](http://law.niu.edu/law/faculty/columns/SchmallLorraine_8_20_08.pdf) (noting ICE's claim that raids are conducted to protect national security and to protect undocumented workers from employers who take advantage of them).

“25 criminal and 485 administrative arrests” in worksite raids (numbers that have increased every year since) and in 2007 ICE made 863 and 4077 arrests.<sup>185</sup> Compared with the number of companies and individuals employing unauthorized workers in the United States, these are low numbers,<sup>186</sup> but the increase has nevertheless been dramatic and well-publicized.<sup>187</sup> Any administration assessing the Migrant Worker Convention will be concerned that it would foreclose the use of this enforcement tool. The Convention does not specifically address worksite enforcement measures, and no provision appears to challenge the use of worksite raids. Indeed, Convention Article 68.2 directs that States Parties “shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation.”<sup>188</sup>

One common critique of worksite enforcement raids by the U.S. government is that they target workers rather than employers.<sup>189</sup> If the United States were to ratify the Convention, likely the Committee would not scrutinize the use of worksite raids as a matter of policy, but rather it would examine how rights-protective those raids are. In its definition of “adequate and effective measures to eliminate [unauthorized] employment,” the Convention mandates that States Parties shall sanction employers “whenever appropriate.”<sup>190</sup> Apart from this statement, the Convention does not inquire into the ratio of employer-to-employee sanctions. Therefore,

---

185. *Id.* at 6.

186. *See id.* at 2 (noting the industries with large proportions of undocumented workers and the high absolute numbers—in the millions—of undocumented workers in certain industries).

187. *See, e.g.,* Anna Gorman & Andrew Blankstein, *Massive Sweep Departs Hundreds—More than 1,300 Are Arrested as U.S. Officials Target Immigrant Criminals in Southland*, L.A. TIMES, Oct. 3, 2007, available at <http://articles.latimes.com/2007/oct/03/local/me-immig3> (publicizing raids in Southern California); *Hundreds Nabbed in Immigration Raid: Executives, Workers Arrested in Nationwide Move Against Pallet Maker*, MSNBC.COM, Apr. 19, 2006, <http://www.msnbc.msn.com/id/12393925/> (reporting on the raid of IFCO Systems).

188. U.N. Migrant Worker Convention, *supra* note 6, art. 68(2).

189. *See* Schmall, *supra* note 184, at 7 (presenting worksite enforcement as “possibly discriminatory” and directed toward employees rather than host company officers).

190. U.N. Migrant Worker Convention, *supra* note 6, art. 68(2).

this domestic critique is likely to be contained in a debate over whether the United States is sanctioning employers “whenever appropriate.” A second common critique is that some raids are carried out in an abusive manner.<sup>191</sup> This concern is not specifically addressed in the Convention, but could be incorporated in the Article 10 protection against torture and cruel, inhuman, or degrading treatment or punishment,<sup>192</sup> or the due process, consular, and detention protections in criminal prosecution.<sup>193</sup> However, given that these ICMW articles mirror provisions of the ICCPR (for example, ICMW article 10 mirrors ICCPR article 7<sup>194</sup>) this protection is already in place for migrant workers in the United States and would not create new obligations for the United States.

Article 68 states that unauthorized workers’ rights “vis-à-vis their employer arising from employment shall not be impaired by [enforcement] measures.”<sup>195</sup> The U.S. Executive generally maintains that worksite enforcement is supportive of labor rights. For example, the ICE webpage on worksite enforcement currently carries the following language:

Illegal workers frequently lack the employment protections afforded those with legal status and are less likely to report workplace safety violations and other concerns. In addition, unscrupulous employers are likely to pay illegal workers substandard wages or force them to endure intolerable working conditions. In addition to alleviating the potential threat posed to national security, ICE’s efforts also prohibit em-

---

191. See NAT’L NETWORK FOR IMMIGRANT & REFUGEE RIGHTS, OVER-RAIDED, UNDER SIEGE: U.S. IMMIGRATION LAWS AND ENFORCEMENT DESTROY THE RIGHTS OF IMMIGRANTS 5-10 (2008), available at [http://www.nnirt.org/resources/docs/UnderSiege\\_web2.pdf](http://www.nnirt.org/resources/docs/UnderSiege_web2.pdf) (chronicling abuses committed by ICE officials).

192. See U.N. Migrant Worker Convention, *supra* note 6, art. 10 (“No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

193. See *id.* arts. 16-18 (providing protections for criminally prosecuted migrant workers).

194. Compare U.N. Migrant Worker Convention, *supra* note 6, art. 10 (“No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”), with ICCPR, *supra* note 41, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

195. U.N. Migrant Worker Convention, *supra* note 6, art. 68.

ployers from taking advantage of illegal workers. ICE's Worksite Enforcement Unit also helps employers improve worksite enforcement of employment regulations.<sup>196</sup>

In contrast, the argument made by most civil society actors is that worksite enforcement increases fear, causing workers in the many work settings that are never raided to refrain from asserting their workplace rights.<sup>197</sup> This debate, carried into the treaty monitoring process, would likely be framed in terms of whether raids are taking place in a way that impairs worker rights; in other words, worksite enforcement would likely be found to be *de jure* compliant with the Migrant Worker Convention but arguably *de facto* non-compliant. As the Migrant Worker Committee typically functions,<sup>198</sup> the Committee would likely publish in its periodic commentary on U.S. treaty compliance recommendations urging the government to take steps to better protect worker rights in its enforcement actions. As argued at greater length below, any negative reputational effect of this type of reporting would be far outweighed by enhancement of the United States' international stature as a result of participating more fully in the Migrant Worker treaty regime.

---

196. U.S. Immigration and Customs Enforcement, Office of Investigations: Worksite Enforcement, <http://www.ice.gov/pi/worksite/> (last visited Dec. 16, 2009).

197. See, e.g., Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 404 (2001) ("[B]ecause courts are unwilling to recognize the punitive nature of deportation and the criminalization of immigration law, undocumented workers who assert workplace rights remain vulnerable to deportation.").

198. Typically, the committee examines the reports by the State Parties and publishes its recommendations to urge that the State Parties improve protection of worker rights. See e.g., *Mexico's Concluding Observations*, *supra* note 161; U.N. Comm. on the Prot. of the Rights of all Migrant Workers and Members of their Families, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Philippines*, U.N. Doc. CMW/C/PHL/CO/1 (May 22, 2009), available at <http://www.unhcr.org/refworld/pdfid/4a8d4b000.pdf>.

f. *Restrictions on Ratification Will Prevent Judicial Reconciliation of De Jure Conflicts*

In the fuller assessment of the Convention that this Article intends to encourage, differences between U.S. law and the Convention will be identified. However, as was emphasized earlier in this Article, U.S. human rights treaty ratifications typically include a restriction on ratification stating that treaty provisions are “non-self-executing;” in other words, that no provision may be invoked in U.S. domestic courts unless the legislature has “executed” that provision in domestic legislation.<sup>199</sup> This provision, along with the various substantive restrictions that are likely to limit ratification, appears to block domestic law from any real change in the absence of legislative implementation.<sup>200</sup> At the same time, even a ratification fettered by numerous restrictions can have an impact on domestic law by bringing domestic actors into indirect contact with new standards.

The history of the juvenile death penalty might seem to challenge this gradualist image. In 1992, the United States ratified the International Covenant on Civil and Political Rights,<sup>201</sup> reserving to itself the right “to impose capital punishment . . . for crimes committed by persons below eighteen years of age.”<sup>202</sup> This reservation constituted a direct exclusion of article 6(5) of the ICCPR, which banned the juvenile death penalty.<sup>203</sup> Although the United States never removed the reservation, in 2005 the U.S. Supreme Court banned the juvenile death penalty, tangentially referring to international

199. See *supra* Part II.D.

200. See Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 695 (2008) (discussing the effect of the *Percheman* rule on domestic implementation of multilateral treaties); Carlos M. Vázquez, *Judicial Enforcement of Treaties: Self-Execution and Related Doctrines*, 100 AM. SOC'Y INT'L L. PROC. 439, 439 (2006) (assessing the impact of cases that considered applicability of international rights in domestic courts). See generally U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? (Richard B. Lillich ed., 1981) (discussing United States reservations, declarations, understandings, and statements to human rights treaties).

201. ICCPR RATIFICATION RECORD, *supra* note 41.

202. *Id.*

203. See ICCPR, *supra* note 41, art. 6(5) (“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”).

and comparative law in its analysis.<sup>204</sup> However, it is unlikely that the ratification of the Covenant lay behind this domestic about-face. To the extent that the Supreme Court's ban on the juvenile death penalty came about through the influence of international forces, it was almost certainly the overwhelming weight of comparative (foreign) law, not international standards, that was persuasive to the Court.<sup>205</sup> Even if the ICCPR ratification had weighed heavily with the Court, which was unlikely given the explicit reservation to Article 6(5), 13 years was hardly a speedy transformation. Moreover, many other examples of *de jure* conflicts between U.S. law and human rights treaties (shielded by restrictions on ratification and therefore arguably not constituting treaty violations) remain standing more than a decade after ratification.<sup>206</sup>

---

204. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (noting that execution of offenders under 18 is out of line with the weight of international opinion as expressed in several international agreements including ICCPR).

205. See Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June-July 2005, at 33, 36-37, (explaining the *Roper* Court's use of foreign law as evidence of "foreign elite opinion" about values rather than as law); Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 233 (2007) [hereinafter Lyon, *Tipping the Balance*] (noting that the court was willing to consider a ratified treaty as persuasive authority demonstrating the "global rejection of the death penalty for juvenile offenders" even though unwilling to consider it binding law).

206. A few examples include trying juveniles as adults, refusing to imposing heavier penalties on criminals where lighter penalties have been legislated in the intervening time since commission of the crime, and the United States' use of a more stringent definition of torture than that included in the Convention Against Torture. See ICCPR RATIFICATION RECORD, *supra* note 41 (including United States Reservation 5, restricting application of ICCPR articles 10 and 14 to allow the United States to try juveniles as adults in exceptional circumstances); Human Rights Comm., 2006 *Concluding Observations on the United States*, *supra* note 172, ¶ 34 (expressing concern that the United States treats juveniles as adults and that this treatment "is not only applied in exceptional circumstances"); ICCPR RATIFICATION RECORD, *supra* note 41 (including United States Reservation 4, refusing to adhere to ICCPR article 15(1) mandate that lighter penalties be applied to crimes committed when heavier penalties applied but lighter penalties have been legislated in the intervening time period since commission of the crime); CAT RATIFICATION RECORD, *supra* note 41 (including United States Reservation 1(a), instituting a more stringent definition of torture than found in article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommenda-*

Thus, in the future debate on ratifying the Migrant Worker Convention, the U.S. reversal on the juvenile death penalty should be neither cause for hope in the migrant worker rights community nor cause for alarm in the anti-immigration community. Given the dearth of comparative information available regarding guest worker program protections and unauthorized immigrant worker rights,<sup>207</sup> it is unlikely that U.S. courts would, in the near term, rely on the Migrant Worker Convention in any challenge to sensitive U.S. migrant worker policies. Thus, ratification of the Convention would enrich U.S. law and involve the country in a much-needed self-examination process but would not threaten longstanding policies. As noted above, this limited domestic role for ratified human rights treaties was not the original vision for the UN human rights treaty regime,<sup>208</sup> but it is the likely short-term domestic legal effect of ratification of the Migrant Worker Convention in this country. As discussed in the next section, however, there are many reasons for this country to ratify the Convention beyond the Convention's immediate domestic legal impact.

#### IV. RATIFICATION ASSESSMENT OF THE MIGRANT WORKER CONVENTION

The following section argues that, notwithstanding the minimal *de jure* conflicts between the Migrant Worker Convention and current U.S. law and the likelihood of reservations being made by the U.S. upon any ratification of the IMWC, ratifying the Convention would still help the United States in its search for both a more stable migration system and a more

---

*tions of the Committee Against Torture: United States of America*, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf) (calling on the United States to expand the definition of torture to which it limited itself in the original RUDs).

207. See Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN HONOUR OF JOAN FITZPATRICK AND ARTHUR HELTON 551, 571-80 (Anne F. Bayefsky ed., 2005) [hereinafter Lyon, *Pull Governments Out of the Shadows*] (discussing the absence of comparative information on domestic legal treatment of undocumented workers).

208. See *supra* Part II.D.

rational and efficient process for achieving policy reform. The Migrant Worker Convention ratification would likely be beneficial to the United States in five general areas. First, ratification would enable policy reform by shifting the political climate; second, it would improve the lot of migrant workers; third, it would encourage identification and examination of best practices; fourth, it would advance foreign policy goals; and fifth, it would benefit U.S. civil society.

A. *Engaging with the Convention Would Shift the Political Climate Toward Policy Reform*

Currently, a large portion of the U.S. electorate sees enforcement against immigrants as the only route out of the country's current predicament of falling employment opportunities and rising numbers of undocumented immigrants. Domestic engagement with the Convention offers the potential to increase the electorate's tolerance for protection-focused solutions to brown-collar labor migration. The above-cited UNESCO report on potential ratification of the Convention in the European Union states that:

[T]here is a prevailing sense of vaguely negative indifference [to the Convention in Europe], in which genuine concerns are combined with simple misunderstanding; and this, when confronted with a skeptical public and media, has led to the governments of the region generally adopting the path of least resistance. Broadly speaking, until the public perception of migrants in general, and irregular migrants in particular, changes from an undesirable necessity to an understanding of them as rights-bearing individuals, the political incentive to inaction in this regard will remain; ratification of the ICRMW, however, should be viewed as not merely the end result of such a transformation, but also as one of the key means of its achievement.<sup>209</sup>

If ratification of the Migrant Worker Convention is seen in Europe as a way of moving public opinion away from the notion that undocumented immigrants are "an undesirable necessity" and toward the notion that they are "rights-bearing

---

209. *European Assessment of the Treaty*, *supra* note 36, at 87.



individuals,” in the United States it might be said that ratification of the Migrant Worker Convention could move people from the notion that there is a way to screen out immigrant flows toward accepting immigrants as an inevitable part of the U.S. economy. This section argues that debate and ratification of the Migrant Worker Convention might further this process by exposing the public to the concept of immigrants as rights-holders.<sup>210</sup>

Illegal immigration is the central political preoccupation of a significant portion of the American public, and one of the top issues of Presidential elections.<sup>211</sup> In a September 2007 poll of three politically key states, 34-37% of Republicans stated that they could not vote for someone who did not share their view on illegal immigration, and 12-24% of Democrats polled indicated the same.<sup>212</sup> All sides of this policy debate seem able to agree that they dislike illegal immigration. Every interest group has a different reason to feel negatively about illegal immigration: from the far-right, which sees sneaking across the border and working illegally as a serious infraction, to ethical employers who do not like the uncertainty and risk of hiring clearly unauthorized workers, to undocumented immigrants themselves, who feel it is in their best interest to emigrate and send money home, but who would prefer to do so legally and with dignity.

What the country cannot agree on is how to solve the problem. Proponents of punishment advocate enforcement:

---

210. See Lyon, *Tipping the Balance*, *supra* note 205, at 193 (discussing arguments in favor of viewing unauthorized immigrant workers as the proper subjects of human rights protections).

211. See Editorial, *The Great Immigration Panic*, N.Y. TIMES, June 3, 2008, available at [http://www.nytimes.com/2008/06/03/opinion/03tue1.html?\\_xr=1&scp=10&sq=2008+election%2C+illegal+immigration&st=nyt](http://www.nytimes.com/2008/06/03/opinion/03tue1.html?_xr=1&scp=10&sq=2008+election%2C+illegal+immigration&st=nyt) (noting that the “American public’s moderation on immigration reform, confirmed in poll after poll, begs the candidates to confront the issue with courage and a plan. But they have been vague and discreet when they should be forceful and unflinching”).

212. L.A. TIMES/BLOOMBERG, IOWA, NEW HAMPSHIRE AND SOUTH CAROLINA PRE-PRIMARY/CAUCUS POLL FIELD DATES: SEPTEMBER 6-10, 2007, at 9 (2007), available at <http://www.scribd.com/doc/282208/LAT-Bloomberg-Presidential-Poll-09112007>. The three states included in the poll were Iowa (34% of Republicans polled and 13% of Democrats polled), South Carolina (35% and 12%, respectively), and New Hampshire (37% and 24%, respectively). *Id.*

using border deployment and deportations to rid America of the problem. Feelings on this side run strong. For example, a recent poll indicated that strong majorities of Americans support a human rights approach to many social justice issues, including racial profiling and quality education for poor children.<sup>213</sup> The only human rights issue in the survey that failed to carry a majority of the respondents was health care for undocumented immigrants.<sup>214</sup> Employers recommend expanded visa programs that allow for a reliable supply of brown-collar workers that come with lower overhead costs (in the form of cheaper housing, less regulation, and fewer rights) than locals. Advocates for the working poor of all nationalities urge that enforcement focus on workplace issues such as equal pay, improving working conditions, and limiting employer incentives to hire unauthorized immigrants. Undocumented immigrants point to their record of contributions to America and advocate for a path to earned legalization. Various interest groups who are more politically powerful or sympathetic, such as agricultural employers and undocumented children who have achieved academic success in America, urge targeted legalization programs that would relieve the situation of their particular constituencies. However, the more the undocumented population grows and demands lawmakers' attention, the more politically difficult a solution becomes. Until public opinion can coalesce around a solution, even minor adjustments to the status quo will remain beyond America's grasp.

Meanwhile, U.S. immigration laws place the Executive branch in a chronic, untenable position. The Executive cannot meaningfully enforce the existing tight visa restrictions on brown-collar labor migration, because to do so would threaten the status quo for hundreds of thousands of American businesses. At the same time, sealing the border is logistically and ethically untenable. Thus, in the short term, there is no enforcement solution to the problem. Despite the fact that the United States is one of the wealthiest countries, the Executive branch cannot enforce laws that many citizens of the United States are urging it not to carry out. Laws controlling immigra-

---

213. Alan Jenkins & Kevin Shawn Hsu, *American Ideals & Human Rights: Findings from New Public Opinion Research by the Opportunity Agenda*, 77 *FORDHAM L. REV.* 439, 447-48 (2008).

214. *Id.* at 448.

tion, in a country hosting nearly 12 million undocumented residents,<sup>215</sup> arguably rival underage drinking, highway speeding, and tax evasion laws in the annals of American rule of law failures.

The Executive is keenly aware of the problem. For the Bush administration, the President's longstanding relationship with Mexico and the post-9-11 impulse to track foreign entrants only heightened the government's desire to address the situation. The Bush administration tried to legislate a way out of the conundrum by suggesting that Congress use the tools migrant-receiving countries around the world typically use when undocumented populations build to a crescendo: legalization and expanded legal opportunities for brown-collar labor migrants to enter the country.<sup>216</sup> To win over the "anti-immigrant" (pro-enforcement) wing of his party, President Bush attempted to get across two messages: that he favored strong enforcement, in the form of heightened border security and increased workplace enforcement, but that legalization was also necessary in order to ensure sufficient workers for American businesses.<sup>217</sup>

Despite years of close Congressional attention, public demonstrations, and Executive support for immigration reform, the pro-enforcement lobby blocked all attempts at significant legislation. This failure extends even to politically well-grounded proposals like the agricultural jobs bill.<sup>218</sup> This bill would have legalized the status of some undocumented farm workers over time and was the product of a hard-won agreement between industry and worker rights groups. Its failure illustrates that the American public is extremely difficult to educate about two politically unpopular truths regarding brown-collar labor migration: that labor migration is inevitable and that border control and deportation are insufficient enforcement tools. Therefore, the U.S. government will have to carry

---

215. PASSEL & COHN, *supra* note 164, at i.

216. See Transcript of President Bush's Speech on Immigration (May 15, 2006), available at [http://www.nytimes.com/2006/05/15/washington/15text-bush.html?\\_r=1](http://www.nytimes.com/2006/05/15/washington/15text-bush.html?_r=1) (supporting temporary guest worker programs).

217. See *id.* (emphasizing enforcement at the border and in the workplace).

218. See Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJOBS Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 442-450 (2005) (discussing in detail the AgJOBS bill proposal and failure).

on providing symbolic enforcement of an increasingly absurd mandate. The only relevant legislation that *did* achieve passage in recent years was the Secure Fence Act of 2006, which devoted significant additional monies to construction and enhancement of the U.S.-Mexican border fence.<sup>219</sup>

Meanwhile, the human consequences of this failed legal regime make the United States the object of increasingly morbid fascination internationally. In the eyes of the rest of the industrialized world, the suffering along the southern border and the sheer size of the illegal migrant population in this country rank with the death penalty, gun violence, and homelessness as peculiarly American failings.<sup>220</sup>

Non-enforcement methods to ensure that immigration laws are respected decrease employer *demand* for unauthorized immigrant workers and decrease the *push*-factors motivating people to leave behind their communities in search of employment in the United States. To decrease employer incentives to hire foreign nationals without working papers would be a long-term process requiring the enforcement of underutilized labor laws and the use of technology to monitor every employment relationship. Furthermore, to decrease the number of workers willing to run risks to enter or work illegally in this country would require targeted development assistance aid to reduce the push factors.

Despite the post-9/11 political atmosphere, the Bush administration made attempts to educate the American public on this issue by putting some increased pressure on employers who flout immigration laws. For example, the administration took on Wal-Mart in a high-profile immigration prosecution,<sup>221</sup> expanded workplace raids and prosecutions against employers of unauthorized workers,<sup>222</sup> and enlisted state and

---

219. See generally Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

220. See e.g., *All Together Now: Could This be the Year for Immigration Reform?*, ECONOMIST, Apr. 18, 2009, at 27 (describing the United States system for dealing with immigration as "a model of dysfunctionality").

221. See Steven Greenhouse, *Wal-Mart Raids by U.S. Aimed at Illegal Aliens*, N.Y. TIMES, Oct. 24, 2003, at A1, available at <http://www.nytimes.com/2003/10/24/us/wal-mart-raids-by-us-aimed-at-illegal-aliens.html?pagewanted=1>.

222. See Carl Hampe, *New ICE Memo and Rescinded No-Match Rule Confirm Worksite Enforcement Strategy*, 14 BENDER'S IMMIGR. BULL. 1351 (Nov. 1, 2009), available at LEXIS 14-21 Bender's Immigr. Bull. 1 (2009) (noting that ICE's

municipal localities for workplace raids.<sup>223</sup> Most important are two employer-focused initiatives that the Bush Administration quietly advanced. First, early in the Bush Administration, the Social Security Administration began to blanket the country with social security “no-match” letters, alerting employers when the numbers under which earnings were reported did not match the employees’ names. Currently, employers are under no obligation to fire employees about whom a no-match letter has been issued. However, in August 2007, the Bush Administration issued regulations requiring employers to fire employees who do not furnish proof of a legal right to work within ninety days of the no-match letter.<sup>224</sup> The Bush Administration’s second key initiative that proactively involved employers in immigration enforcement was the government’s

---

priority was to prosecute employers who knowingly hire illegal workers); Spencer S. Hsu, *Napolitano Pledges Shift in Immigration Focus*, WASH. POST, Jan. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011501542.html> (noting the Bush administration’s “focus on raids, criminal prosecutions, and expedited deportation of immigrants”); Ginger Thompson, *Immigration Agents to Turn Focus to Employers*, N.Y. TIMES, Apr. 30, 2009, at A19, available at <http://www.nytimes.com/2009/04/30/us/politics/30immig.html>; Adam Nossiter, *Hundreds of Workers Held in Immigration Raid*, N.Y. TIMES, Aug. 25, 2008, at A12, available at <http://www.nytimes.com/2008/08/26/us/26raid.html>; *Immigration Raid Spotlights Rift of Have-Nots*, MSNBC.COM, Jan. 24, 2008, <http://www.msnbc.msn.com/id/28816336/>. The Obama administration has continued this enforcement strategy leading to a rise in immigration prosecution cases. See John Schwartz, *Immigration Enforcement Fuels Rise in U.S. Cases*, N.Y. TIMES, Dec. 21, 2009, available at [http://www.nytimes.com/2009/12/22/us/22crime.html?\\_r=2](http://www.nytimes.com/2009/12/22/us/22crime.html?_r=2) (noting a rise of almost nine percent in cases from 2008 to 2009). The Obama administration, however, has shifted from focusing on raids to pressuring employers to fire undocumented workers. Julia Preston, *Immigration Crackdown with Firings, Not Raids*, N.Y. TIMES, Sept. 29, 2009, available at <http://www.nytimes.com/2009/09/30/us/30factory.html>.

223. See Press Release, DHS, *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements* (July 10, 2009), available at [http://www.dhs.gov/ynews/releases/pr\\_1247246453625.shtm](http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm).

224. On October 28, 2008, the Department of Homeland Security (DHS) published a “Supplemental Final Rule” which DHS hoped would address a concern with its prior final rule, which had led to the rule being subject to an injunction order. On October 7, 2009, DHS rescinded the “no-match” rule effective November 6, 2009. NAFSA: Association of International Educators, No-Match Letter Rule Updates, [http://www.nafsa.org/regulatory\\_information.sec/no\\_match\\_letter\\_rule](http://www.nafsa.org/regulatory_information.sec/no_match_letter_rule) (last visited Jan. 21, 2010) (posting DHS’s rescission of the “no-match” letter rule).

continued promotion of “E-Verify,” which provides a way for employers to confirm an employee or prospective employee’s work authorization status.<sup>225</sup> However, as these policies played out, the regulatory impact fell generally on workers and scrupulous employers rather than on unscrupulous employers.<sup>226</sup>

The Bush administration also endorsed the importance of the “demand” element of illegal migration in litigation before the Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*.<sup>227</sup> In that case, an employer appealed the decision of the District of Columbia Circuit Court of Appeals. Hoffman Plastic Compounds, Inc. had fired a group of workers who supported a movement to organize a union.<sup>228</sup> The National Labor Relations Board ordered repayment of damages that included back pay, or the pay lost as a result of the unlawful firing.<sup>229</sup> The employer appealed, arguing that unauthorized workers should not receive pay for work for which they were not legally “available.”<sup>230</sup> The Solicitor General’s brief for the National Labor Relations Board cited an earlier D.C. Circuit Court opinion, stating that “the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA’s goal), reinforces collective bargaining rights for all workers (the NLRA’s goal), and protects wages and working conditions for authorized workers (the

---

225. U.S. Citizenship and Immigration Services, E-Verify, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (last visited Dec. 16, 2009).

226. I co-authored a Society of American Law Teachers (SALT) transition paper with immigration policy recommendations, which included issues such as E-Verify Misuse, to the Obama Administration. See SALT Recommendations to the Administration for Immigration Agency Reforms (June 16, 2009), 40-42, available at <http://www.saltlaw.org/userfiles/6-09immigrationstatement.pdf> (noting a negative impact on workers, especially due to widespread misuse of E-Verify).

227. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

228. *Id.* at 140.

229. *Id.* at 140-41.

230. Brief of Petitioner-Appellant at 19, *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (No. 00-1595).

goal of both Acts).”<sup>231</sup> The *Hoffman Plastic Compounds* dissent endorsed the administration’s view, stating that “the National Labor Relations Board’s limited back pay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.”<sup>232</sup> The five-Justice majority, however, found that “recognizing employer misconduct but discounting the misconduct of illegal alien employees subverts [the Immigration Reform and Control Act].”<sup>233</sup>

These failed efforts of a Republican administration to bring about immigration reform and influence the Supreme Court in favor of unauthorized immigrant worker rights demonstrate a significant alignment of interests between the left and right political establishments in favor of softening public opinion on migrant workers. As argued above, a movement of public opinion in this direction is in the best interest of all but the most committed anti-immigration policymakers because the vast majority of politicians in both parties would like to bring about comprehensive immigration reform, and anti-immigrant public sentiment has thwarted numerous serious efforts to do so. It stands to reason, then, that for most federal government actors, a potential downside of pursuing ratification of the Migrant Worker Convention would be its potential to spark a controversy that would inflame public opinion *against* migrant worker rights.

This potential is not of great concern, however. It is certainly possible that a first step toward ratification, such as a Senate hearing or Presidential signature on the treaty, could spark a huge outcry against ratification. Controversy would likely arise on several counts. As discussed above, the traditional American concern about human rights treaties, namely the protection of sovereignty and the flaws of the United Nations, would arise. This particular Convention would generate concerns about the fact that it explicitly protects an unpopular group—unauthorized workers—and, depending on the situa-

---

231. Brief for the NLRB in Opposition at 10, *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (No. 00-1595) (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 650 (D.C. Cir. 2001)).

232. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 153 (Breyer, J., dissenting).

233. *Id.* at 150.

tion at the time of the controversy, that there may be few other ratifications by countries of employment. It may even be possible that the Executive would decide to reverse itself, as did President George W. Bush in the wake of President Clinton's signature of the Rome Convention establishing the International Criminal Court,<sup>234</sup> although this was generally considered to be an extreme act<sup>235</sup> and the nature of the concerns about the ICC were quite different.<sup>236</sup>

Even if such a controversy were to arise, however, the controversy itself would serve a positive purpose. The airing of concerns would inescapably communicate to the public that in at least one major international treaty, *immigrants, including undocumented immigrants, are the subjects of rights*. Given the current nature of the debate, this would, for many members of the electorate, be a novel message. The public educational benefits of the United States signing onto this treaty, even if followed in the short-term by a failed ratification campaign, would be well worth the controversy involved.

An interesting historical parallel is the forging of the currently entwined humanitarian and international law regimes for assisting refugees. The problem of political and religious refugees had been met with various national level responses throughout history, but the creation of an international legal regime arose in response to two waves of European refugees: eight hundred thousand Russian refugees in the first decades of the 20th century,<sup>237</sup> and millions of "displaced persons"

---

234. See Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Court Treaty*, ASIL INSIGHTS, May 2002, [http://www.asil.org/insigh87.cfm#\\_edn1](http://www.asil.org/insigh87.cfm#_edn1) (assessing the legality of the Bush Administration's decision not to ratify the Rome Statute despite having signed it in December 2000).

235. See Press Release, Human Rights Watch, United States "Unsigning" Treaty on War Crimes Court (May 6, 2002), <http://www.hrw.org/en/news/2002/05/05/united-states-unsigned-treaty-war-crimes-court> (referring to the Bush Administration's decision as "an unprecedented diplomatic maneuver").

236. See Bradley, *supra* note 234 (noting U.S. concern that the court would prosecute American service members and officials).

237. ATLE GRAHL-MADSEN, *THE EMERGENT INTERNATIONAL LAW RELATING TO REFUGEES: PAST-PRESENT-FUTURE 1-5* (1985) [hereinafter, GRAHL-MADSEN, *THE EMERGENT INTERNATIONAL LAW RELATING TO REFUGEES*].



forced out of their countries in the Second World War.<sup>238</sup> The Refugee Convention and Protocol came about despite the fact that these refugees had often been treated as a despised burden in their countries of reception. In fact, many countries were “punish[ing] refugees for illegal entry and residence, and [pushing] them across the frontiers into neighbouring countries, where the history repeated itself.”<sup>239</sup> The fact that a legal regime succeeded in providing rights of immigration to a category of people that was being prosecuted and rejected demonstrates that the political project of the Migrant Worker Convention is not entirely unique.<sup>240</sup>

As Professor Jules Lobel notes in his study of social change litigation and political movements, the success or failure of a legal strategy cannot be judged merely by the outcome of the particular strategy;<sup>241</sup> nor can it be measured in the short term.<sup>242</sup> Professor Lobel quotes Paul Douglass: “even if every battle was unsuccessful, constant but peaceful struggle would hasten the ultimate coming of needed reforms.”<sup>243</sup> These words should ring true for policymakers of all stripes who wish to break through America’s migration policy dead-lock.

## B. *Signature and Ratification of the Convention Would Advance Foreign Policy Goals*

### 1. *Ratification Would Improve the U.S.-Mexico Relationship*

Ratification of the Migrant Worker Convention would favorably impact the United States’ relationship with Mexico, the principal country of origin for immigration into America, both

---

238. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 18 (1966).

239. GRAHL-MADSEN, *THE EMERGENT INTERNATIONAL LAW RELATING TO REFUGEES*, *supra* note 237, at 7.

240. I am indebted to the participants of the Migration Reading Group for this point.

241. JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 264-66 (2003).

242. *Id.* at 266-67.

243. *Id.* at 267 (citing ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 793 (2002)).

legal and illegal.<sup>244</sup> The Mexican government's political and material support for immigrants in the United States is widely documented.<sup>245</sup> With roughly ten percent of its electorate living in the United States<sup>246</sup> and boosting the Mexican economy through remittances,<sup>247</sup> the Mexican government is strongly motivated to advocate for its expatriates.<sup>248</sup> Mexico has been publicly critical of the United States' failure to regularize the status of undocumented Mexicans, and has backed formal complaints in numerous international fora concerning U.S. labor and death penalty policies.<sup>249</sup> Despite the fact that Mexico

---

244. See Jeanne Batalova, Migration Pol'y Inst., Mexican Immigrants in the United States (Apr. 23, 2008), <http://www.migrationinformation.org/US-focus/display.cfm?id=679#1> (analyzing Mexican immigration trends).

245. See, e.g., Ginger Thompson, *Fox Urges Congress to Grant Rights to Mexican Immigrants in U.S.*, N.Y. TIMES, Sept. 7, 2001, at A6 [hereinafter Thompson, *Fox Urges Congress*], available at <http://www.nytimes.com/2001/09/07/world/fox-urges-congress-to-grant-rights-to-mexican-immigrants-in-us.html?scp=6&sq=Mexico's%20support%20for%20immigrants&st=cse> (summarizing President Vicente Fox's address to U.S. Congress); Ginger Thompson, *Mexico's Leader Says He'll Persevere on Migration*, N.Y. TIMES, Nov. 30, 2005, at A8, available at <http://query.nytimes.com/gst/fullpage.html?res=9C07EED71431F933A05752C1A9639C8B63> (reporting President Fox's advocacy for increasing the ability of Mexicans to legally migrate to U.S.).

246. See Batalova, *supra* note 244 (noting that 10% of the Mexican-born population constitutes approximately one-third of United States immigrants).

247. A Pew Hispanic Center Poll dated January 2006 found that 58% of adult Mexicans living in the United States had sent money to someone in Mexico over the past year. See Pew Hispanic Center, Mexican Voter Survey, Jan., 2006, <http://pewhispanic.org/questions/?qid=1714184&pid=54&ccid=54#top> (last visited Sept. 27, 2009) (polling 987 adult Mexicans living in United States). Mexico received approximately \$25 billion in remittances in 2007. The World Bank, Migration and Remittances, Country Groups, Top 10 (Mar. 2008), <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Top10.pdf> [hereinafter The World Bank, Top 10] (displaying the top thirty remittance-receiving countries in 2007 as measured by U.S. dollars); see also Press Release, The World Bank, Remittances May Buoy Developing Countries Caught in Financial Crisis (Nov. 24, 2008), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21996712~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> ("The average value of remittances sent by Mexican migrants has remained in the \$340-\$350 range per transaction since 2005 . . .").

248. See Thompson, *Fox Urges Congress*, *supra* note 245 (reporting President Fox's statement to Mexican immigrants in the United States: "'We will support you. And we will not fail.'").

249. See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (containing Mexico's allegation that the

itself receives substantial numbers of immigrants,<sup>250</sup> the Mexican government has helped establish immigrant-protective international law standards. For example, Mexico took a significant leadership role in the formation of the Convention. A Mexican representative chaired the treaty formation working group throughout the ten years of negotiations.<sup>251</sup> Mexico's commitment to the Convention continued in the form of its early ratification of the Convention—Mexico was only the eleventh country to ratify<sup>252</sup>—and now is manifested in its active engagement with the Migrant Worker Committee.<sup>253</sup> Given Mexico's concern for its nationals in the United States, belief in international law mechanisms, and history as one of the primary sponsors of the Convention, the Mexican government

---

United States failed to notify Mexican citizens accused of crimes in the United States that they had the right to notify their consulate through the Vienna Convention); Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1) (suggesting that foreign nationals be informed that they can seek assistance from their consulate prior to giving statements and that the death penalty should not be executed where there was not consular notification); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17) [hereinafter *OC-18*] (recognizing that individual rights guarantees apply to migrants, regardless of their immigration status).

250. Mexico received 644,361 immigrants in 2005, making up 0.6% of the population. MPI Data Hub: Mexico, <http://www.migrationinformation.org/databhub/countrydata.cfm?ID=479> (last visited Oct. 21, 2009).

251. See *November 1980 Working Group Report*, *supra* note 25 (listing Antonio Gonzalez de Leon of Mexico as Chairman of the Working Group); *November 1981 Working Group Report*, *supra* note 25 (same); *June 1982 Working Group Report*, *supra* note 25 (same); *November 1982 Working Group Report*, *supra* note 25 (same); *June 1985 Working Group Report*, *supra* note 25 (same); *October 1985 Working Group Report*, *supra* note 64 (same); *October 1986 Working Group Report*, *supra* note 59 (same); *June 1987 Working Group Report*, *supra* note 63 (same); *June 1989 Working Group Report*, *supra* note 66 (same). In the last year of negotiations, Mexico's Claude Heller took over as Chairman. See ECOSOC, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, U.N. Doc. A/C.3/45/2 (Oct. 21, 1989) (listing Claude Heller as Chairman of the Working Group).

252. See ICMW RATIFICATION RECORD, *supra* note 27 (noting Mexico's ratification on March 8, 1999).

253. See, e.g., U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families, *Consideration of Reports Submitted by States Parties Under Article 73 of the Convention*, U.N. Doc. CMW/C/MEX/1 (Nov. 18, 2005) (describing implementation of the Convention in Mexico).

would likely view positively a serious examination of the Convention by the United States.

## 2. *Ratification Would Increase World Leadership vis-à-vis the Global South*

Ratification of the Migrant Worker Convention would likely increase U.S. influence with other countries of migration origin, in addition to Mexico. One of the most commonly advanced arguments in favor of past human rights treaty ratifications by the United States has been that, by subjecting itself to international scrutiny, this country becomes a more credible and effective advocate with countries that it attempts to influence on rights questions.<sup>254</sup> In a recent meeting with the Department of State officials responsible for reporting to the Committee on the Elimination of Racial Discrimination, the official representing the National Security Administration repeated this assertion.<sup>255</sup> This argument has been raised to support ratification of treaties that primarily implicate domestic concerns. It seems that the foreign policy effect of participating in the Migrant Worker Convention regime would be even more pronounced than with respect to other human rights treaties, because this country has ratified only one other treaty with an exclusive focus on foreign nationals. That treaty is the Refugee Protocol<sup>256</sup>—but refugee protection and migrant worker protection are very different from one another. It stands to reason that countries of origin would not pursue protection for refugees, who are claiming persecution in their countries, while they might for their citizens who are eco-

---

254. See, e.g., KAUFMAN, *supra* note 51, at 197-98 (explaining that because the United States has failed to ratify certain human rights treaties, its criticism of other countries' human rights violations lacks force).

255. See Memorandum from Beth Lyon to 9-11 Committee (Jan. 17, 2008) [hereinafter 2008 CERD State Department/NGO Meeting Notes] (on file with author) (describing meeting on January 16, 2008).

256. Note that one provision of the Convention Against Torture relates to foreign nationals. Article III of the Convention forbids States Parties from deporting immigrants to countries where they would experience torture. See Convention Against Torture, *supra* note 41, art. III ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."). The other human rights treaties that the United States has ratified provide only limited explicit treatment of foreign nationals.

conomic migrants. Therefore, if migrant-producing countries indeed credit U.S. human rights treaty participation to the extent that the U.S. foreign policy branches report, the effect is likely to be even more pronounced in the case of the Migrant Worker Convention. Moreover, if the United States were to move forward in the ratification process in advance of other countries of employment, the positive influential impact with countries of origin would undoubtedly be enhanced.

Similarly, the Convention's current lack of ratifications by wealthier countries of employment<sup>257</sup> presents an unusual opportunity for the United States vis-à-vis its allies in the industrialized world. The industrialized world has been relatively more prompt than the United States to ratify the United Nations' other human rights treaties. As described in the chart contained below at Appendix II, for the three major U.N. human rights treaties it has joined, the United States averaged 270 months between promulgation and ratification.<sup>258</sup> By contrast, the other nine nations in the list of the top countries of migrant employment (Russia, Germany, Ukraine, France, Saudi Arabia, Canada, India, the U.K., and Spain)<sup>259</sup> took an average of 98 months after promulgation to ratify the same three treaties.<sup>260</sup> In fact, of these nine countries, only Saudi Arabia, which has not yet ratified the Civil and Political Rights Covenant, has a higher average promulgation time than the United States.<sup>261</sup> Taking the lead in ratifying—or simply signing—the Migrant Worker Convention would be noted by wealthy countries that are beginning to consider ratification and would give the United States, to a far greater extent than have past ratifications, a human rights leadership moment that

---

257. See ICMW RATIFICATION RECORD, *supra* note 27 (listing 42 parties to the Convention, none of which are wealthy states).

258. See *infra* Appendix II: Treaty Ratification Timing by Top Ten Countries of Migrant Employment.

259. See The World Bank, Top 10, *supra* note 247 (displaying top immigration countries in 2005).

260. See *infra* Appendix II: Treaty Ratification Timing by Top Ten Countries of Migrant Employment. Note that two of these countries have not yet ratified one of the three treaties. Saudi Arabia has not yet ratified the Covenant on Civil and Political Rights (ICCPR) and India has not yet ratified the Convention Against Torture (CAT). See *id.* (charting ratification of ICERD, ICCPR, and CAT by top ten countries of migrant employment).

261. See *id.* (indicating average number of days between promulgation and ratification).

this country badly needs as it attempts to convince its industrialized world allies to support its foreign policy priorities. Even if individual countries of employment were to view U.S. steps toward ratification as a negative development because they do not want to be pressured into making a similar commitment, signature and ratification would be a modest but indisputable sign of leadership at a time when the U.S. human rights record has been tarnished by multiple incidents of torture of foreign nationals in U.S. military prisons<sup>262</sup> and post-9-11 restrictions on domestic civil liberties.<sup>263</sup>

### 3. *U.S. Ratification Would Encourage Additional Ratifications*

U.S. signature or ratification of the Migrant Worker Convention could convince other countries of employment to give more serious consideration to the treaty. The participation of other countries is frequently cited in human rights treaty ratification debates in the United States,<sup>264</sup> and human rights treaties' track records are relevant to the ratification processes of

---

262. See Editorial, *The Torture Report*, N.Y. TIMES, Dec. 17, 2008, available at <http://www.nytimes.com/2008/12/18/opinion/18thu1.html?scp=6&sq=Guantanamo+torture&st=nyt> (describing the findings of a bipartisan report by the Senate Armed Services Committee).

263. See Editorial, *Spies, Lies and Wiretaps*, N.Y. TIMES, Jan. 29, 2006, available at <http://www.nytimes.com/2006/01/29/opinion/29sun1.html?scp=10&sq=domestic+civil+liberties&st=nyt> (challenging the Bush Administration's justification for warrantless spying).

264. See, for example, the following statements made during debates in the House of Representatives and the Senate over ratification of human rights treaties:

[T]he United States, along with Somalia, are the only two nations on the face of the Earth which have not ratified [the Convention on the Rights of the Child], not formalized our commitment to our own children and the world's children.

155 CONG. REC. E98 (Jan. 15, 2009) (statement of Rep. McCollum).

[CEDAW] has been in force since 1981 and has been ratified by 185 countries; 185 countries cannot be wrong, and they include such countries as Saudi Arabia, Rwanda, Nigeria, and Pakistan. The U.S. stands out as the only Western country that has not ratified the treaty and, in doing so, keeps company with Iran, Sudan, and Somalia.

153 CONG. REC. H1177 (Feb. 5, 2007) (statement of Rep. Maloney).

[M]any of our European allies and our other friends, such as Belgium, Canada, Finland, France, Germany, Hungary, Italy, the Netherlands, New Zealand, Sweden, Switzerland, and the United Kingdom, have all ratified this landmark international instrument.

other countries as well.<sup>265</sup> It is likely that a decision by the United States to endorse the treaty, even with multiple limitations on ratification, could influence other potential signatories. Given the limited participation by countries of employment in the Convention, the United States could meaningfully advance the state of international law on this issue by influencing other wealthy countries' ratification processes. Moreover, ratification by other industrialized countries would offer greater protection to American citizens who are themselves migrant workers living and working abroad, the majority of whom, by last reported figures, are in industrialized countries.<sup>266</sup>

---

148 CONG. REC. E502 (Apr. 11, 2002) (statement of Rep. Lantos) (referring to the Rome Statute of the International Criminal Court).

168 countries have ratified CEDAW. However, the United States is not one of those countries. In fact, the United States is the only industrialized nation that has not ratified CEDAW, a distinction that places us in the company of North Korea, Iran, and Afghanistan.

147 CONG. REC. H10950 (Dec. 20, 2001) (statement of Rep. Woolsey).

41 countries have ratified ILO Convention #182—countries from every region of the world. 12 African nations, 12 European nations, 10 American Caribbean nations, 5 from the Middle East, and 2 from Asia. Since the ILO was established in 1919, never has one of its treaties been ratified so quickly by so many national governments.

146 CONG. REC. S11903 (daily ed. Dec. 15, 2000) (statement of Sen. Harkin).

[T]he United States is the only Western industrialized nation that has neither signed nor ratified the Convention, and the United States stands with Iraq, and Libya as one of fewer than 30 countries that neither is a party to the Convention nor has signed the Convention[.]

139 CONG. REC. 2758 (Feb. 16, 1993), S. Res. 70, 139th Cong. (1993) (introduced by Sen. Bradley).

All the permanent members of the UN Security Council have ratified these [Human Rights] treaties—except the US. Among the 35 Helsinki-process countries eligible to become a party to these treaties—including the 16 members of NATO—only Ireland, Turkey, and the U.S. have not.

136 CONG. REC. 11561 (May 22, 1990) (statement of Rep. Faleomavaega quoting Dennis DeConcini & Steny Hoyer, *Time to Ratify U.N. Human Rights Covenant*, CHRISTIAN SCI. MONITOR, Apr. 18, 1990).

265. See Pécoud & Guchteneire, *supra* note 2, at 258-59 (describing states' reluctance to be the first to ratify a treaty).

266. See AMERICAN CITIZENS LIVING ABROAD BY COUNTRY 1 (1999), <http://www.aca.ch/amabroad.pdf> (noting that, in 1999, 17% of Americans abroad

#### 4. *Ratification Would Enable the United States to Shape Interpretation of the Convention*

By not participating in the Convention's monitoring regime, the United States and the other countries of employment are losing the opportunity to influence the Committee's interpretations of the document. The treaty went into force in 2003<sup>267</sup> and the Committee convened for the first time in 2004.<sup>268</sup> Throughout its first years in operation, the Committee is not only forming its working methods and priorities, but is also giving sustained consideration to the provisions of the Convention, the first time the international community has done so since the negotiations in the 1980s. The other U.N. human rights monitoring bodies have made it a practice not only to comment on individual member states' compliance, but also to issue periodic statements, called "General Comments," containing general interpretations of particular provisions of the treaty they monitor<sup>269</sup> and over time the Committee on Migrant Workers will be doing the same.<sup>270</sup> The closer access and contact that comes with treaty ratification and monitoring participation would give the United States a greater opportunity to anticipate and influence these interpretations.

Of course, if the United States decides to eschew ratifying the Convention altogether, then the interpretation given to the treaty's provisions might seem to be irrelevant. However, international law standards can be imported into domestic law in several ways other than through treaty ratification. Most notably in the United States, courts are bound to apply international law if it has risen to the level of

---

lived in Canada, 28% lived in Europe, 4% lived in Israel, 2% lived in Australia, and 2% lived in Japan). Notably, 25% of Americans living abroad are in Mexico, a country that has already ratified the Convention. *See id.* (referring to over one million Americans living in Mexico).

267. ICMW RATIFICATION RECORD, *supra* note 27 (listing July 1, 2003 as the date the treaty entered into force).

268. OHCHR, Committee on Migrant Workers, <http://www2.ohchr.org/english/bodies/cmw/> (last visited Dec. 17, 2009) [hereinafter Committee on Migrant Workers].

269. ANNE BAYESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 3 (2001).

270. *See* Committee on Migrant Workers, *supra* note 268 ("The Committee will also publish its interpretation of the content of human rights provisions, known as general comments on thematic issues.").



*jus cogens* or customary international law,<sup>271</sup> and they are permitted to use international law as persuasive authority.<sup>272</sup>

---

271. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (stating that “[i]nternational law and international agreements of the United States are law of United States and supreme over the law of the several States”); *id.* § 111 cmt. d (“[C]ustomary international law is considered to be like common law in the United States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State courts.”); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 244 (2d Cir. 2003) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)) (describing the *Filartiga* court’s *jus cogens* analysis); *Sampson v. Germany*, 250 F.3d 1145, 1151 (7th Cir. 2001) (concluding that a German court’s reference to *jus cogens* norms in a decision to waive sovereign immunity and hold people responsible for the past did not constitute a waiver of Germany’s immunity from suit in a United States court). The most likely development of *jus cogens* in the field of migrant worker rights is the norm of non-discrimination. In 2003, the Inter-American Court of Human Rights held that non-discrimination has now risen to the level of *jus cogens* and is thus a binding global norm. *OC-18*, *supra* note 249, ¶ 173(4). The Inter-American Court applied non-discrimination to unauthorized immigrant workers, declaring that non-discrimination gives them the right to equality of treatment with other workers. See *id.* ¶ 173(7) (reasoning that international equality guarantees apply to all people). Note that a country can avoid the imposition of customary international law by objecting to the norm. See *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (“A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm” (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d)). However, given that the United States has not engaged the treaty even to the extent of accepting or rejecting particular provisions, it has not placed any such rejections on record.

272. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (stating that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries”); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (recognizing that “the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the *Eighth Amendment’s* prohibition of ‘cruel and unusual punishments’” (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion))); Daniel J. Frank, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 IOWA L. REV. 1037, 1037 (2007) (positing that use of foreign law in domestic constitutional matters comports with the intent of the founding fathers). But see *id.* at 1039 (stating that “[t]he current composition of the Supreme Court may compromise the continued use of foreign law as persuasive authority on certain American constitutional issues”). For a discussion of possible approaches a U.S. court might take in looking to international

In addition, an opportunity to influence the law at the international level is particularly important for countries in the Americas, given the current lack of a similar instrument at the regional level and also given the Inter-American human rights system's demonstrated interest in the issue of migrant workers.<sup>273</sup> International human rights standards that are already clarified can provide a persuasive context for shaping new standards at the regional level. Influencing the interpretation of the Migrant Worker Convention offers the United States a meaningful opportunity to shape the ultimate development of regional law.

By participating in this regime, the United States would have a significantly greater opportunity to urge its preferred interpretations. For example, a U.S. national would likely gain a place on the Committee. Committee members<sup>274</sup> are nominated by the States Parties and elected by secret ballot.<sup>275</sup>

---

standards on unauthorized workers as persuasive authority, see Lyon, *Tipping the Balance*, *supra* note 205, at 208-12.

273. The Inter-American Commission on Human Rights has convened two *ad hoc* situation hearings on migrant workers in the United States. See Rebecca Smith, *Human Rights at Home: Human Rights As an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285, 308-09 (2007) [hereinafter Smith, *Human Rights at Home*] (discussing a hearing assessing the U.S. government's response to Hurricanes Katrina and Rita); ANNUAL REPORT OF THE IACHR, Ch. 2 ¶ 19 (2006), available at <http://www.cidh.org/annualrep/2006eng/Chap.2.htm#124th> (noting that the Commission held hearings concerning migrant workers during the 2006 session). The Commission also has in place a Special Rapporteurship on Migrant Workers and their Families. See Inter-American Commission on Human Rights, Special Rapporteurship on Migrant Workers and Their Families: Case Law, <http://www.cidh.org/Migrantes/migrants.caselaw.htm> (last visited Dec. 17, 2009) (listing cases addressing rights of migrant workers). In 2003, the Inter-American Court of Human Rights issued a landmark advisory opinion on the rights of unauthorized workers, and it has issued various other decisions touching on the rights of migrants. See *OC-18*, *supra* note 249 and accompanying text. Moreover, a regional convention on migrant workers is currently in force in Europe. European Convention on the Legal Status of Migrant Workers, Nov. 24, 1977, Europ. T.S. No. 93, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/093.htm>.

274. Currently there are fourteen committee members. Committee on Migrant Workers, Fourth Meeting of States Parties to the Convention on Migrant Worker: result of the elections, available at [http://www2.ohchr.org/english/bodies/cmw/4thmeeting\\_election\\_result.htm](http://www2.ohchr.org/english/bodies/cmw/4thmeeting_election_result.htm) [hereinafter Committee Composition].

275. *Id.* art. 72(2)(a).

States Parties are permitted to nominate one of their own nationals,<sup>276</sup> and the Convention instructs States Parties to cast their votes with “due consideration” to “equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal system.”<sup>277</sup> This explicit assurance of participation for the nationals of States of employment recognized the polarity inherent in the migrant worker rights field and is borne out by the current operations of the Committee selection process. Presently, both Mexico and Turkey, the two most significant countries of employment that are State parties under the Convention, have nationals serving on the Committee.<sup>278</sup>

Mexico’s participation on the Committee has implications which, from the U.S. government’s perspective, likely cut both ways with regard to ratification. First, as a participant in shaping international law, it seems all the more urgent for the United States to engage with the Committee as a State Party, as this country’s own principal source country for migration<sup>279</sup> is actively engaged in shaping the interpretation of the Convention. However, the fact that Mexico, at least currently, has a national on the Committee also raises the concern that allowing a Mexican national to participate in the Concluding Observations regarding U.S. compliance with the treaty would result in outcomes less favorable to the U.S. government position. The former argument, however, should outweigh the latter for several reasons.

---

276. *Id.*

277. *Id.*

278. Francisco Alba of Mexico and Myriam Poussi Konsimbo of Turkey currently serve on the Committee. See Committee Composition, *supra* note 274.

279. Aaron Terrazas & Jeanne Batalova, Migration Pol’y Inst., Frequently Requested Statistics on Immigrants and Immigration in the United States (Oct. 2009), <http://www.migrationinformation.org/USFocus/display.cfm?ID=714#7> (“Mexican-born immigrants accounted for 30.1 percent of all foreign born residing in the United States in 2008, by far the largest immigrant group in the United States.”); MICHAEL HOEFER ET AL., U.S. DEPT. OF HOMELAND SEC., POPULATION ESTIMATES: SEPTEMBER 2008: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, 1 (2008), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf) (reporting that approximately seven million people originating from Mexico were in the United States without authorization in 2007, 59% of the total number of unauthorized United States residents).

First, the Committee selection process is such that partisan influence is more likely to play a role in the general interpretive function than in individual country determinations. Member states are expected to appoint “experts of high moral standing, impartiality and recognized competence in the field”<sup>280</sup> who serve in their individual capacities.<sup>281</sup> The opportunity to shape the General Comments is an important one, and therefore gaining a role in the interpretation process is worth the slightly heightened risk of unenforceable, negative language directed at this country regarding particular policy issues. Moreover, engagement yields understanding on both sides and can therefore lead to mutually satisfactory approaches.

As a party to the treaty, the United States would also be able to help immigrants in other national settings, by educating the Committee—and, by extension, other participating countries—about its own best practices vis-à-vis migrant workers. For example, a common concern of migrant worker advocates in the Global South is the condition of immigrants in detention.<sup>282</sup> As noted above,<sup>283</sup> the United States has an elaborate set of standards in place for the protection of immigrant detainees that could be of persuasive value for other countries. Another example of a creative practice in the United States is its system of training and licensing non-lawyers, including law students, to represent immigrants on a *pro bono* basis before the Department of Homeland Security and the Immigration Courts.<sup>284</sup> In other countries that may lack robust legal aid services for immigrants, this model could be of utility. By demonstrating the implementation of unique policies that successfully implement treaty standards, the United States can support the development of international law.

---

280. See U.N. Migrant Worker Convention, *supra* note 6, art. 72(1)(b) (explaining qualifications for membership on Committee).

281. *Id.* art. 72(2)(b).

282. See *e.g.*, Amnesty International Press Release, *Haitian Workers Face Deportations, Rights Violations in Dominican Republic, Amnesty International Investigation Finds* (Mar. 21, 2007), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070321002> (concerning mistreatment of Haitian workers in the Dominican Republic).

283. See *supra* note 125 and accompanying text.

284. See 8 C.F.R. §§ 292.1-2 (2008) (creating a category of representatives who may provide legal services at no charge to indigent immigrants).

C. *Engaging with the Convention Would Educate U.S. Officials on Best Practices in Labor Migration*

Participating in the Convention monitoring process would be a valuable opportunity for the United States to identify foreign best practices in the treatment of migrant workers. I argue elsewhere that next to no comparative research is being carried out at either the advocacy, academic, or government, levels regarding the treatment of unauthorized immigrant workers,<sup>285</sup> which form the focus of 28 substantive provisions of the Migrant Worker Convention.<sup>286</sup> Legal migration for work has received somewhat more attention<sup>287</sup> and there are inter-governmental entities that offer the United States the opportunity to discuss labor migration.<sup>288</sup> However, these fora do not provide the same opportunities for identifying best practices and comparing them with specific U.S. policies as would the Migrant Worker Convention process.

According to the Organization of American States, at least 20 initiatives, sponsored by more than 14 inter-governmental organizations, currently focus on migration in the Americas.<sup>289</sup>

---

285. See Lyon, *Pull Governments Out of the Shadows*, *supra* note 207, at 571 (arguing that comparative research “lacks information about most phases of relevant domestic law: the reception, domestic legal treatment, and deportation of unauthorized immigrant workers, as well as relevant sending country laws”).

286. See U.N. Migrant Worker Convention, *supra* note 6, arts. 8-35 (addressing the “[h]uman rights of all migrant workers and members of their families”).

287. See generally LUCA BIOCCHI & MICHELE LEVOY, PICUM’S MAIN CONCERNS ABOUT THE FUNDAMENTAL RIGHTS OF UNDOCUMENTED MIGRANTS IN EUROPE IN 2006 (2007), <http://www.picum.org/data/PICUM%27s%20Concerns%20About%20the%20Fundamental%20Rights%20of%20UDM.pdf>; SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2007), [http://www.splcenter.org/pdf/static/Close\\_to\\_Slavery.pdf](http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf).

288. These include the 2006 U.N. High-level Dialogue on Migration and Development, see International Migration, <http://www.un.org/esa/population/migration/index.html> (providing links to reports and resolutions related to international migration), and a working group of the Organization of American States, see Opening Remarks—Special Committee on Migration Issues Special Forum on Migration Issues (April 17, 2008), available at [http://www.oas.org/en/about/speech\\_assistant\\_secretary\\_general.asp?sCodigo=08-0031](http://www.oas.org/en/about/speech_assistant_secretary_general.asp?sCodigo=08-0031).

289. See Permanent Council of the Organization of American States Special Committee on Migration Issues, *Summary of Current Programs Dealing with*

These programs are sponsored by sub-regional arrangements such as MERCOSUR,<sup>290</sup> regional bodies such as the Organization of American States and the Regional Conference on Migration (known as the Puebla Process),<sup>291</sup> and by international organizations such as the International Organization for Migration,<sup>292</sup> the International Labour Organization,<sup>293</sup> and the International Federation of the Red Cross.<sup>294</sup> Most of these initiatives, which range from standard-setting to community trainings, provide the opportunity to identify and replicate best practices in migration policy. At least half of these programs are concentrated in the Global South and do not focus on the treatment of migrant workers within the countries of employment.<sup>295</sup> Only a sub-program of one of them, the Pan-American Health Organization's Hispanic Forum project on Latino occupational health in the United States, maintains a concentrated focus on U.S. policies.<sup>296</sup> Only two, the OAS Inter-American Commission on Human Rights and the International Labor Organization, have examined migrant workers in the United States from a rights perspective and these instances have been relatively *ad hoc*.<sup>297</sup>

---

*Migration in the Americas*, OAS Doc. OEA/Ser.G, CE/AM-36/08 rev. 1 (June 18, 2008) [hereinafter *Summary of Current Programs*] (listing names of various Secretariats and Departments that pledged commitment, and summarizing a current description of activities promulgated by each organization), available at [http://scm.oas.org/doc\\_public/ENGLISH/HIST\\_08/CP20713E11.doc](http://scm.oas.org/doc_public/ENGLISH/HIST_08/CP20713E11.doc).

290. *Id.* at 23.

291. *Id.* at 23-24.

292. *Id.* at 15.

293. *Id.* at 16.

294. *Id.* at 21.

295. See *Summary of Current Programs*, *supra* note 289, *passim* (indicating that ten of twenty initiatives named focus on sending country policies). One lists no activities to date. *Id.* at 8.

296. See *id.* at 18-19 (listing "preventing, reducing, and eliminating environmental and occupational risks that jeopardize the Hispanic community in the USA" as one of the program's aims).

297. The ILO Committee on Freedom of Association has heard one complaint regarding the union rights of U.S. unauthorized workers. See *Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments*, in 332nd Report of the Committee on Freedom of Association, 154, GB.288/7 (Part II), 288th Session (November 2003) [hereinafter *ILO Case 2227 on Complaints Against the United States*], available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf> (concluding that the right to freedom of association requires that the United States reverse its policies that limit labor rights remedies for unauthorized

Compared with the other existing programs, the monitoring process of the Migrant Worker Convention offers the United States a unique opportunity to review its own policies on a regular basis and interact intensively with a group of experts that is tracking policies over time against a stable metric. As a party to the treaty, the United States would submit a report to the U.N. Committee on the Rights of Migrant Workers within one year of ratification and every five years thereafter, respond to written questions, and participate in a question and answer session before the Committee.<sup>298</sup> At the end of this process, the Committee would issue a report offering its conclusions and observations about U.S. compliance with the

---

immigrant workers). The United States has not responded to the Committee's request that the United States provide follow-up progress reports. See *Case No. 2227 (United States)*, in 335th Report of the Committee on Freedom of Association, 18, GB.291/7, 291st Session (November 2004), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf> (expressing regret at the failure of the United States to report on its implementation of the 2003 ruling). The Inter-American Commission on Human Rights has convened two *ad hoc* situation hearings on migrant workers in the United States. See Smith, *Human Rights at Home*, *supra* note 273, at 308-09 (revealing that Latin American migrant workers, brought to the Gulf Coast by large corporate employers to clean up after Hurricane Katrina, were put to work doing "the dirtiest cleanup work [. . .] and often for less money than local workers might insist on"); ANNUAL REPORT OF THE IACHR, *supra* note 273 (noting that the Commission held three hearings concerning migrant workers during the 2006 session). Another case against the United States is pending with the Inter-American Commission. See Inter-American Commission on Human Rights, *Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America* (Nov. 1, 2006), available at [http://www.aclu.org/images/asset\\_upload\\_file946\\_27232.pdf](http://www.aclu.org/images/asset_upload_file946_27232.pdf) (urging that the United States be encouraged to amend its laws and policies to comport with the international obligation to apply workplace protections in a nondiscriminatory manner, and to unify its laws and policies to ensure that undocumented workers are given the same rights and remedies for violations as other workers). See also Press Release, ACLU, Undocumented Workers Bring Plea for Non-Discrimination to Human Rights Body (Nov. 1, 2006), available at <http://www.aclu.org/immigrants/discrim/27235prs20061101.html> ("The [ACLU] . . . today filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace.").

298. See U.N. Migrant Worker Convention, *supra* note 6, art. 73(1) (explaining the monitoring process of the Convention).

treaty.<sup>299</sup> This exchange would allow Committee members to transmit the practices they have identified through interaction with other countries. The value added by this process will increase as more countries of employment ratify the convention and educate the Committee on their own best practices.

The Committee reporting process<sup>300</sup> mirrors to a large extent the monitoring mechanisms of the CAT, CERD, and ICCPR, and over the past 15 years the U.S. government has developed a corps of officials who have experience at serving as liaisons between the relevant agencies and the various U.N. committees in these reporting processes.<sup>301</sup> The Migrant Worker process would, then, be familiar to the United States and, with a mere five-year periodicity, would not be burdensome.

Although the Migrant Worker Committee could be a useful policy educator, it should be noted that the Executive has not always been aggressive in implementing the recommendations arising from the proceedings of other U.N. human rights committees. During the Bush Administration, the Department of State circulated the Concluding Observations issued by the committees, but made few additional efforts to examine or alter policies in light of committee concerns.<sup>302</sup> The view of that Administration was that committee pronouncements are non-binding.<sup>303</sup> In contrast, President Clinton issued an executive order in 1998 creating an inter-agency body charged with implementing international human rights obligations,<sup>304</sup> establishing an indirect mechanism for follow-up on committee pronouncements.

---

299. *See id.* at art. 74(7) (providing that upon examination of the State Party's report, the committee would present an annual report of its observations and recommendations).

300. *See* U.N. Migrant Worker Convention, *supra* note 6, arts. 72-77, for a full description of the Committee process.

301. 2008 CERD State Department/NGO Meeting Notes, *supra* note 255.

302. *See id.* (officials stated that they would circulate the recommendations to other branches of government, but that they were not legally obligated to do more).

303. *Id.*

304. *See* Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) ("There is hereby established an Interagency Working Group on Human Rights Treaties for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters.").



The reporting process itself would likely be the biggest benefit of ratification for policy advocates in the near-term. The three committee-monitored Conventions to which the United States is a party are arguably more general in nature than the Migrant Worker Convention, dealing as they do with such issues as civil and political rights, freedom from torture, and race discrimination. As a result, these treaties involve more settled, constitutional law than the ICMW.<sup>305</sup> Debating the details of the temporary worker program with a Committee of experts may be more productive for the United States than, for example, discussing its widely criticized Guantánamo Bay policies with the Committee Against Torture. America's guestworker program is a relatively more obscure program<sup>306</sup> that would derive a concomitantly greater benefit from international monitoring. Each reporting cycle of the other U.S.-ratified human rights treaties sees increasingly robust participation by U.S. civil society.<sup>307</sup> This pattern would likely play out with the Migrant Worker Convention. The next section examines why domestic non-governmental advocates might

---

305. Collectively, these treaties are generally known as the "International Bill of Rights." M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1170 (1993).

306. A New York Times website search of articles using the term "guest worker program" turned up 248 results in the time period Jan. 1, 2006 to Mar. 24, 2009. A second New York Times website search for the term "Guantanamo Bay" turned up 1,150 results over an identical time period. Results can be seen at <http://query.nytimes.com/search/query?frow=0&n=10&srcht=a&query=guest+worker+program&srchst=nyt&submit.x=29&submit.y=4&submit=sub&hdlquery=&bylquery=&daterange=period&mon1=01&day1=01&year1=2006&mon2=03&day2=24&year2=2009> and <http://query.nytimes.com/search/query?frow=0&n=10&srcht=a&query=Guantanamo+Bay&srchst=nyt&hdlquery=&bylquery=&daterange=period&mon1=01&day1=01&year1=2006&mon2=03&day2=24&year2=2009&submit.x=42&submit.y=14> respectively.

307. See, e.g., Press Release, U.S. Human Rights Network, U.N. to Probe U.S. Human Rights Abuses: U.S. Non-Profits Submit 465-Page "Shadow Report" Detailing Abuses at Home: Treatment of Immigrants, Katrina Survivors among Issues to be Reviewed (July 5, 2006), available at [http://www.ushrnet.org/files/ushrn/images/linkfiles/Press\\_Release\\_UN\\_probe\\_US\\_human\\_rights\\_abuses.pdf](http://www.ushrnet.org/files/ushrn/images/linkfiles/Press_Release_UN_probe_US_human_rights_abuses.pdf); NGO Information relating to United States of America, U.S. Human Rights Network, Table of Contents for U.S. NGO Submissions to the Committee for the Elimination of Racial Discrimination, <http://www2.ohchr.org/english/bodies/cerd/cerds72-ngos-usa.htm>.

value the Migrant Worker Convention and its monitoring process sufficiently to prioritize working toward ratification.

D. *Ratification of the Convention Would Benefit Civil Society*

Assessing a new human rights treaty is not merely a process of gauging the legal implications and political sensitivity of its provisions. These considerations are certainly critical to the inquiry, but they are not all-encompassing. In order for review of a potential ratification to advance domestically, civil society must value it sufficiently to pursue ratification. Over the past fifteen years, various domestic migrant workers' rights groups have made forays into international advocacy, airing concerns about domestic conditions with international bodies such as the Inter-American Commission and Court and the International Labour Organization. However, as I have argued elsewhere, there has been little sustained effort to import international standards into domestic advocacy<sup>308</sup> and virtually no attention given to the Migrant Worker Convention.<sup>309</sup> Working to ratify the Migrant Worker Convention would represent a meaningful shift in modality for U.S. migrant workers and their advocates, requiring that they articulate and justify a broad range of international standards for domestic audiences. It has already been noted above that the battery of reservations, understandings, and declarations with which the United States is likely to limit ratification would rob the treaty of virtually any immediate enforceability.<sup>310</sup> Given this reality, why should pro-migrant rights civil society expend limited resources advocating for ratification?<sup>311</sup>

---

308. Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT'L. L. & FOREIGN AFF. 161, 177 (2008) [hereinafter Lyon, *Changing Tactics*]. There have been a few domestic efforts to import international norms in the United States, but compared with the work of other advocacy communities, these have been quite sparse. These exceptions that prove the rule include a group of claims lodged under the Alien Tort Claims Act on behalf of immigrant workers, a visit by the U.N. Rapporteur on Migrant Worker Rights, and some efforts to implement North American Agreement on Labor Cooperation (NAALC) recommendations. *See id.*

309. *See supra* Part II.B.

310. *See supra* Part II.D.

311. Professor Meg Satterthwaite raised the resource concern in a 2005 article, arguing that "a dominant focus on the Migrant Workers' Convention could be detrimental, not only because such a focus would siphon off

Depending on the restrictions on ratification, the Convention offers some substantive attractions to the migrant worker rights advocacy community: it is somewhat more protective of family reunification for documented workers than U.S. law, it calls for due process in expulsion decisions, and it calls for equal workplace rights remedies for all migrant workers.<sup>312</sup> These are important concerns for the migrant worker rights community. Furthermore, although many of the Convention's protections have been read into other treaties via monitoring body interpretation,<sup>313</sup> the Convention details rights that have not yet been extended in other settings.<sup>314</sup> Additionally, by its very structure, the Convention offers a comprehensive examination of the temporary worker experience that is lacking in any other treaty. Finally, as a general statement of the principle that migrant workers are rights-bearers, the Convention would fill a symbolic void in protection for this vulnerable population. The United States has not ratified the ILO conventions on migrant workers, and the NAFTA side agreement on labor has no substantive provisions; it requires only that governments enforce laws already on the domestic books.<sup>315</sup>

Moreover, based on the experiences of advocates working with other UN treaty monitoring processes, the Migrant

---

needed energy more wisely placed elsewhere, but also because it would allow states to minimize the obligations they owe to women migrants under existing human rights law regardless of their decision to sign, ratify, or ignore this new treaty." Satterthwaite, *supra* note 86, at 2.

312. See U.N. Migrant Worker Convention, *supra* note 6, arts. 22-23, 44, 50 (providing for due process rights with regard to expulsion, consideration of measures to protect family unity, and consideration of time family members of a deceased migrant worker have already been in the state).

313. See Satterthwaite, *supra* note 86, at 63 (noting that "[a]dvocates should look to the Committee for explications of rights protections that can be used as interpretive guides for similar obligations under other human rights treaties").

314. See *id.* at 2 ("Certainly, the existence of a binding human rights convention that provides explicit and extensive protections for migrant workers is a singular achievement.").

315. See Secretariat of the Commission for Labor Cooperation, The NAALC, <http://www.naalc.org/naalc.htm> (last visited Oct. 19, 2009). The NAALC "provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems . . . ." *Id.*

Worker Committee's monitoring work would likely provide various advocacy opportunities for migrant workers. The first is that the process provides useful access to policymakers. The Department of State is the agency that is primarily responsible for reporting to the Committee, but, as noted above, other government agencies whose work implicates the treaty protections participate in meetings leading up to the process, and most send representatives to Geneva for the hearings.<sup>316</sup> Non-governmental organizations have direct input into Committee proceedings, via written reports and meetings with Committee members.<sup>317</sup> Although Concluding Observations are not directly enforceable in court, advocates can use them for policy advocacy, for community organizing,<sup>318</sup> and for empowering a group that is extraordinarily fearful and afraid of retaliation for asserting its rights.<sup>319</sup> Secondly, interaction with and detailed pronouncements from the Migrant Worker Committee can invigorate a base that feels beset by post-9-11 enforcement measures, increased loss of life at the border, legal setbacks such as *Hoffman Plastic Compounds*, failed immigration reform, and the loss of federal legal aid funding for undocumented

---

316. See U.N. CERDOR, 72d Sess., 1853d mtg., U.N. Doc. CERD/C/SR.1853 (Feb. 28, 2008), available at <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/G08/406/75/PDF/G0840675.pdf?OpenElement> (in French; English translation not yet available) (summarizing the United States' most recent presentation to the CERD Committee, at which multiple government officials made presentations); 2008 CERD State Department/NGO Meeting Notes, *supra* note 255 (noting that multiple government agencies mentioned they would be attending hearings).

317. See U.N. Migrant Worker Convention, *supra* note 6, art. 74(4) (providing for submission of reports by U.N. agencies, intergovernmental organizations, and other concerned bodies).

318. See Lyon, *Tipping the Balance*, *supra* note 205, at 217-41 (discussing ways in which findings about international rights can be useful to U.S. courts). Cf. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1895-98 (2007) (providing examples of organizing and policy-advocacy work engaged in by lawyers).

319. See *Adequacy of Labor Law Enforcement in New Orleans: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 10 (2007), available at <http://domesticpolicy.oversight.house.gov/documents/20070703121612.pdf>. (testimony of Catherine K. Ruckelshaus, National Employment Law Project, describing how workers are afraid to come forward to complain about workplace conditions and fear retaliation, including termination by their employers, which may cause them to quietly accept substandard conditions).

immigrants.<sup>320</sup> The U.S. migrant worker community has already shown itself to be interested in transmitting concerns to international monitors;<sup>321</sup> in the Migrant Worker Committee, it would find an expert body that is fully focused on many of its issues. For these reasons, ratification of the Convention is worth exploring by U.S. civil society.

### E. *Criticisms of the Convention*

Each of the core U.N. human rights treaties that the United States has considered ratifying, including the three that the United States has actually ratified, has been the subject of criticism. Some of the criticisms are generic, having been raised in the context of virtually every ratification debate. Examples of these generic criticisms include potential threats to U.S. sovereignty,<sup>322</sup> or the possibility that the treaty will hamper the United States by requiring bureaucratic monitoring procedures.<sup>323</sup> Each ratification process has also generated treaty-specific criticisms, including the concern that the United States is actually more protective of human rights than some passages of the treaty in question, or, conversely, that ratifying a treaty will require changes in a particularly sensitive area of domestic law.<sup>324</sup> The following section considers criticisms specific to the Migrant Worker Convention, including its place within the broader human rights regime, its scope of coverage, and technical issues such as the treaty's complexity and its provisions regarding permissible limitations on ratifica-

---

320. See Smith, *Human Rights at Home*, *supra* note 273, at 294-98 (discussing the value of considering labor rights as human rights in order to avoid the "divisions between immigrants and non-immigrants currently fostered by the government's war on terror"); Lyon, *Changing Tactics*, *supra* note 308, at 191 (noting that "in recent years federal and state laws on unauthorized workers have seen setback after setback").

321. Lyon, *Changing Tactics*, *supra* note 308, at 181-82.

322. See KAUFMAN, *supra* note 51, at 185-86 (discussing fears that the Genocide Convention would lead to the United States being subject to a world government).

323. See John R. Bolton & John Yoo, Op-Ed., *Restore the Senate's Treaty Power*, N.Y. TIMES, Jan. 5, 2009, at A21, available at [http://www.nytimes.com/2009/01/05/opinion/05bolton.html?\\_r=1](http://www.nytimes.com/2009/01/05/opinion/05bolton.html?_r=1) (positing that "America needs to maintain its sovereignty and autonomy, not to subordinate its policies, foreign or domestic, to international control").

324. See KAUFMAN, *supra* note 51, at 129 (noting concern that treaties may disturb state's rights in the federal system).

tion. In keeping with the present article's focus on the Convention's prospects in the United States, the following section highlights U.S.-based articles: those written with a view to the U.S. context or simply produced by U.S. commentators. In this section I agree with some of the concerns advanced but conclude that they are not significant enough to warrant disengagement with the Convention.

### 1. *Substantive Criticisms*

The Migrant Worker Convention is the subject of various substantive criticisms regarding the scope and coverage of its provisions. Many of these criticisms argue that the Convention is *over-inclusive*. Commentary faults the Convention for making mention of trafficking, for leaving vague the quantum and timing of work that might qualify a worker for protection, and for overlapping with other treaties, in particular the Refugee Convention. Perhaps the most significant of the over-inclusion concerns relates to the controversial decision to provide explicit coverage for unauthorized workers and their undocumented family members in the Convention. The following discussion points out that most, though not all, of these concerns were raised in a 1991 article by Professor James Nafziger and Mr. Barry Bartel, and that intervening events have altered the analytical landscape with regard to at least some of these issues.

The Convention is also the subject of *under-inclusion* criticisms. The critiqued omissions include the following: 1) the Convention's notable failure to provide a right to regularization of status for long-term undocumented residents and workers; 2) the Convention's failure to ensure that workers who assert their rights under the Convention will not face deportation as a result; and 3) the Convention's failure to address the unique and pressing concerns of women migrant workers.

#### a. *Over-Inclusiveness Concerns*

Over-inclusiveness concerns center on four areas of protection: the Convention's terms on trafficking, its vagueness regarding the quantum and timing of work needed to trigger treaty protection, its protections that overlap with existing instruments, and, most controversially, the Convention's explicit inclusion of protections for unauthorized workers and un-

documented family members. The following discussion addresses the first three of these concerns in turn, concluding that the Convention appropriately covers these areas. The question of the Convention's treatment of unauthorized workers is then addressed in the following section.

### 1. *Trafficking*

In their 1991 article, Professor Nafziger and Mr. Bartel objected to the Convention's preambular statement that "appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights."<sup>325</sup> The authors argued:

A separate instrument to address the problem of trafficking in undocumented aliens, that is, workers in an irregular situation, is preferable to the incorporation of anti-trafficking provisions in a more general human rights instrument, so as to stigmatize those aliens. The lot of undocumented workers is bad enough without enlisting a new corpus of human rights law, in effect, against them.<sup>326</sup>

I agree that a separate anti-trafficking enforcement treaty was needed in 1991, and indeed in 2000 the Economic and Social Council promulgated The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.<sup>327</sup> The United States ratified the Protocol in 2005.<sup>328</sup> This instrument involves sig-

---

325. U.N. Migrant Worker Convention, *supra* note 6, pmb1; Nafziger & Bartel, *supra* note 86, at 777.

326. Nafziger & Bartel, *supra* note 86, at 788.

327. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 31-39, U.N. Doc. A/Res/55/25 [Hereinafter Protocol to Prevent Trafficking], *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf).

328. UNITED NATIONS TREATY COLLECTION, STATUS OF PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED STATES CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII->

nificantly different goals than the Migrant Worker Convention, although the populations it is intended to assist, and in some cases intended to punish, certainly overlap.

However, I do not agree that including the issue of trafficking in the Migrant Worker Convention was inappropriate. Protecting migrant worker rights and reducing human trafficking are mutually supportive efforts, and, properly pursued, anti-trafficking enforcement should not be an act of stigmatization. Anti-trafficking enforcement can and should be protective of victims of trafficking. For example, Article 7 of the anti-trafficking Protocol requires States Parties to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently . . . giv[ing] appropriate consideration to humanitarian and compassionate factors.”<sup>329</sup> This type of policy, which is reflected in U.S. law,<sup>330</sup> keeps with the Migrant Worker Convention’s protection focus.

In addition, it is important to note that not all “workers in an irregular situation” are trafficked—in the United States, for example, estimates are that fewer than 20,000 people are trafficked into the country each year,<sup>331</sup> as compared with 7.2 million unauthorized workers.<sup>332</sup> The vast majority of undocumented immigrants were smuggled at their own request,<sup>333</sup>

---

12-a.en.pdf. In 2005, the United States also ratified a parallel protocol on human smuggling, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the U.N. Convention against Transnational Organized Crime. UNITED NATIONS TREATY COLLECTION, STATUS OF PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME STATUS (as of Dec. 20, 2009), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-b.en.pdf>.

329. Protocol to Prevent Trafficking, *supra* note 327, art. 7.

330. See 8 U.S.C. § 1101(a)(15)(T) (2006) (establishing a visa category for “victim[s] of a severe form[s] of trafficking”).

331. U.S. DEPARTMENT OF JUSTICE ET AL., ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 9 (2004), available at [http://www.usdoj.gov/crt/crim/wetf/us\\_assessment\\_2004.pdf](http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf) (estimating that between 14,500 and 17,500 people are trafficked annually into the United States).

332. PEW UNDOCUMENTED WORKER COUNT, *supra* note 182, at 1 (estimating that there are a total of 7.2 million unauthorized workers in the United States and explaining that more than 35% arrived between 2000 and 2005).

333. See IMMIGRATION IN AMERICA TODAY: AN ENCYCLOPEDIA 335 (James Loucky et al. eds., 2006) (noting that 75% of undocumented immigrants



and roughly thirty percent entered legally and overstayed their visas or otherwise violated their status.<sup>334</sup> The two groups—unauthorized workers and trafficking victims—should not be conflated, but their shared need for protection is appropriately addressed through the Migrant Worker Convention’s preambular call for anti-trafficking enforcement.<sup>335</sup>

## 2. *Quantum and Timing of Work*

Professor Nafziger and Mr. Bartel also objected to the Convention’s Article 2 definition of a migrant worker because it suggests that *past* labor alone can qualify one for Convention protection.<sup>336</sup> Professor Nafziger and Mr. Bartel further pointed out that Article 2 leaves open how much remunerated activity is necessary for an individual to qualify as a migrant worker.<sup>337</sup> Neither of these issues was controversial at the drafting stage, and neither conflicts with principles of U.S. employment law.

Article 2.1 of the Migrant Worker Convention states that “[t]he term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” The concern is that, under this definition, which took nearly the

---

entering from Latin America are smuggled in by a paid professional human trafficker); KO-LIN CHIN, SMUGGLED CHINESE: CLANDESTINE IMMIGRATION TO THE UNITED STATES 6 (1999) (noting that 50,000 Chinese nationals smuggled into the United States per year).

334. UNITED STATES GENERAL ACCOUNTING OFFICE, OVERSTAY TRACKING: A KEY COMPONENT OF HOMELAND SECURITY AND A LAYERED DEFENSE 10 (2004), available at <http://www.gao.gov/new.items/d0482.pdf>.

335. Similarly, I disagree with the argument that the Migrant Worker Convention should not have included a call for enforcement measures. See Nafziger & Bartel, *supra* note 86, at 784 (noting that the UN Convention limits the rights of undocumented migrant workers due to strong measures that Member States are required to take, such as collaboration to detect and eliminate clandestine movements of migrant workers). It is true that a climate of enforcement chills rights and brings inevitable abuses. At the same time, employer sanctions may move political will toward legalization, and a treaty including rights for undocumented migrant workers without endorsing enforcement would be even more politically unpalatable than the Migrant Worker Convention has heretofore proven to be.

336. See *id.* at 786 (noting various ambiguity issues in interpreting the definition of “migrant worker”).

337. See *id.* (same).

entire decade of negotiation to iron out,<sup>338</sup> individuals who no longer work, or who worked for very brief periods of time, might be accorded protection under the Convention. This concern was apparently not aired during the treaty negotiations<sup>339</sup> and likely does not impinge on U.S. law. For example, many of the provisions of the Convention relate to rights that logically survive termination of the employment relationship under U.S. law, such as the right to remuneration and overtime for work performed,<sup>340</sup> due process in deportation<sup>341</sup> (which typically follows termination of the employment relationship), or protection for temporary workers who have lost their jobs.<sup>342</sup> Therefore, inclusion of former workers in the Convention is appropriate. Moreover, the original decision to include family members of migrant workers in the Convention likely means that many former workers would fall within the treaty's mandate even if they were no longer considered migrant workers.

The second concern about Article 2.1, regarding its failure to establish a minimum period of employment, *does* resonate slightly with U.S. law. Some labor and employment regimes require minimum periods of work to trigger eligibility; for example, some workers' compensation schemes<sup>343</sup> and so-

---

338. See Juhani Lönnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT'L MIGRATION REV. 710 *passim* (1991) (discussing protracted negotiations about which migrant workers would be included for protection under the Convention).

339. See *id. passim* (discussing various debates about which migrant workers would be covered, but not mentioning the questions of previously employed migrant workers or briefly employed migrants).

340. See U.N. Migrant Worker Convention, *supra* note 6, art. 25 (setting the standard of treatment for migrant workers in the work place).

341. See *id.* art. 22 (setting rules for expulsion of migrant workers).

342. See *id.* art. 49 (setting a standard of treatment for migrant workers seeking to engage in a remunerated activity).

343. See JOSEPH W. LITTLE, ET AL., *WORKERS' COMPENSATION: CASES AND MATERIALS* 110-11 (5th ed. 2004) (noting that some state workers' compensation excludes from coverage "casual employees" whose employment is "sufficiently transitory or temporary"). Excluding a worker from coverage solely on the basis of the temporariness of the work performed is, however, likely a minority rule among the states. See JACK B. HOOD ET AL., *WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS IN A NUTSHELL* 43 (3rd ed. 1999) (noting that "casual" workers' compensation schemes sometimes require minimum periods of work to attain eligibility but that "the majority view may

cial security.<sup>344</sup> These exclusions were created to lessen the financial burden on employers and ensure sufficient pay-ins to fund the system.<sup>345</sup> However, these domestic law considerations are misplaced in the context of the Convention. Protection under the Convention should be triggered by any period of work because, by definition, even a short period of work was preceded by a migration experience and will likely be followed by a second migration experience. It seems unlikely that a foreign national would immigrate into the United States and then work for one day in order to claim the benefits of the Convention's protection. The Convention would provide such an individual no right to legalize and likely no other immigration benefit.<sup>346</sup> An immigrant who worked even very briefly in the United States should have the baseline protections that the Convention offers. Moreover, unlike the Social Security system, the Convention does not look to its beneficiaries to finance its operations.

### 3. *Overlap with other Treaties*

Professor Nafziger and Mr. Bartel argue that the section of the Migrant Worker Convention protecting all workers and family members mirrors existing rights and “may obfuscate or obscure the enforcement of both the Convention and corresponding human rights instruments that are designed to protect everyone, including migrant workers.”<sup>347</sup> The United States raised this concern in its preliminary statement to the Working Group in 1980.<sup>348</sup> However, the United States did

---

well be to exclude an employment from compensation coverage only if the employment is both casual and outside of the course of the employer's business”).

344. See 42 U.S.C. § 414(a) (2006) (stating that in order to qualify for old-age social security benefits a recipient must have accrued six quarters of work); 20 C.F.R. § 404.120(a) (2009) (same).

345. See Social Security Administration, Legislative History: 1939 Amendments, <http://www.socialsecurity.gov/history/reports/1939no3.html> (last visited Dec. 18, 2009) (stating that “under an insurance program, to be eligible for benefits, a worker should have made some minimum contribution”).

346. See *supra* Parts III.B.2.a & III.B.2.d (discussing the U.N. Migrant Worker Convention and its implementation in United States domestic law).

347. Nafziger & Bartel, *supra* note 86, at 787.

348. See *November 1980 Working Group Report*, *supra* note 25, Annex VI, ¶ 3 (preliminary written proposal of the United States emphasizing “[t]he importance of avoiding overlap or conflict with existing multilateral, regional

not raise this concern again. Indeed, in the next year's 1981 round of Working Group sessions, the United States supported a proposal that the Convention include a separate listing of rights owed to undocumented migrants.<sup>349</sup>

The contention that the Convention provision mirrors provisions of pre-existing treaties is certainly correct. In fact, in their article raising the overlap concern, Professor Nafziger and Mr. Bartel demonstrate the parallel nature of 23 protections between the ICMW and the ICCPR.<sup>350</sup> However, the existence of overlap between the Migrant Worker Convention's protections for all workers and family members and other human rights treaties would not hinder the United States' treaty compliance. To the extent that the specific language of analogous treaty provisions differs, presumably countries that have ratified both would need to ensure that their domestic laws conform to whichever of the two standards is most rights-protective. Should treaty monitoring committee *interpretations* of analogous provisions differ, the U.S. government would simply be presented with the opportunity to urge the interpretation that is in this country's best interests, just as advocates do in lower courts when confronted with a split between the U.S. Circuit Courts of Appeal.

The human rights treaties currently binding on the United States already contain overlapping language. For example, as Professor Nafziger and Mr. Bartel's research demonstrates, Article 5 of the International Convention on the Elimination of All Forms of Race Discrimination (CERD) also contains an extensive set of fundamental rights that overlap with

---

and bilateral instruments or arrangements"). Note that, after making this point in the first year of negotiations, the United States did not raise this concern again in the next year's (1981) round of Working Group sessions. Instead, the United States supported a proposal that the Convention include a separate listing of rights owed to undocumented migrants. *November 1981 Working Group Report*, *supra* note 25, ¶ 30.

349. See *November 1981 Working Group Report*, *supra* note 25, ¶ 30 (describing U.S. Representative's preference to distinguish rights applicable to documented migrant workers in a regular situation from rights applicable to undocumented migrant workers or migrant workers in an irregular situation).

350. See Nafziger & Bartel, *supra* note 86, at 789-99 app. (demonstrating overlapping and corresponding provisions with other multilateral treaties).

the International Covenant on Civil and Political Rights (ICCPR).<sup>351</sup>

The United States has ratified both of these treaties. A survey of the United States' country reports to those bodies as well as the relevant Concluding Observations does not reveal any problems raised by overlapping protections, wording differences, or conflicting interpretations.<sup>352</sup> Nor has the concern about overlapping language been raised against ratification of the Migrant Worker Convention in the non-ratifying countries that recently published reports on their assessments of the treaty.<sup>353</sup>

---

351. See *id.* (noting that CERD Article 5 protections, such as the right to leave and enter one's state of origin and the right to freedom of thought, conscience, and religion overlap with ICCPR articles 9, 12, 14, 18, 19, 22, 25, and 26); CERD, *supra* note 41; ICCPR, *supra* note 41.

352. See, e.g., U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America: Addendum: Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008) (responding to selected recommendations of the U.N. Human Rights Committee).

353. See generally *European Assessment of the Treaty*, *supra* note 36 (presenting the findings of a series of detailed, UNESCO-commissioned reports into the situation of several countries in the region, including France, Germany, Italy, Poland, Spain, the United Kingdom, and Norway); BABACAR SALL, 2 ÉTUDES UNESCO SUR LES MIGRATIONS: MIGRATION DE TRAVAIL ET PROTECTION DES DROITS HUMAINS EN AFRIQUE: LES OBSTACLES À LA CONVENTION INTERNATIONALE SUR LA PROTECTION DES DROITS DE TOUS LES TRAVAILLEURS MIGRANTS ET DES MEMBRES DE LEUR FAMILLE EN AFRIQUE SUBSAHARIENNE (2007), available at <http://unesdoc.unesco.org/images/0015/001525/152536F.pdf>; *Canadian Assessment of the Treaty*, *supra* note 9 (explaining Canada's obstacles in ratification and subsequent implementation of the Convention); LES MIGRANTS ET LEURS DROITS AU MAGHREB: AVEC UNE RÉFÉRENCE SPÉCIALE À LA CONVENTION SUR LA PROTECTION DES DROITS DE TOUS LES TRAVAILLEURS MIGRANTS (Khadija Elmudmad ed., 2004) (assessing the Convention for non-ratifying country Tunisia and ratifying countries Algeria and Morocco), available at <http://portal.unesco.org/shs/en/files/6407/11400026311LIVRE.pdf/LIVRE.pdf>; Z.H. A. ZAYONCHKOVSKAYA, UNESCO SERIES OF COUNTRY REPORTS ON THE RATIFICATION OF THE UN CONVENTION ON MIGRANTS: THE PROTECTION OF THE RIGHTS OF MIGRANTS IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE AND THE CIS AND PERSPECTIVES OF JOINING THE 1990 UN CONVENTION (2004) (assessing the treaty for non-ratifying countries—Armenia, Czech Republic, Estonia, Hungary, Kazakhstan, Moldova, Russia, Ukraine, and Uzbekistan—and for ratifying countries: Azerbaijan and Kyrgyzstan), available at <http://unesdoc.unesco.org/images/0013/001395/139533E.pdf>; *Asian Assessment of the Treaty*, *supra* note 37 (investigating why a sample of major sending and receiving countries in the Asia Pacific region

It may be that the Convention will ultimately be abandoned because it simply cannot garner the country of employment ratifications to make it worth the expense to monitor. The Convention should not, however, be replaced with protocols or even amendments to existing treaties of broader application, as Professor Nafziger and Mr. Bartel suggest.<sup>354</sup> The utility of a single Convention focusing on this population is that it allows a group of specialists to focus on all the issues relating to an important and challenging policy concern such as immigrant workers. In addition, the United Nations has already determined that population-specific human rights treaties are appropriate, as evidenced by the Women's Convention, the Convention on the Rights of the Child, and the Convention on Persons with Disabilities. Subsets of broader population-focused treaties have been addressed through protocols, for example the Protocol to the Convention on the Rights of the Child dealing with the human rights of child soldiers,<sup>355</sup> but that approach is quite distinct from what Professor Nafziger and Mr. Bartel suggest, which would amount to adding a protocol to one or more treaties of broad application for a large population such as migrant workers. Nor can many of the unique challenges faced by migrant workers be addressed merely through interpretation of broader documents.

Professor Nafziger and Mr. Bartel also raise a specific concern about the Migrant Worker Convention's interrelationship with the international treaties that protect refugees. They argue that "distinguishing workers, as defined, from other aliens makes sense only if the distinction addresses the special problems of workers. Unfortunately, too many provisions in the Convention extend protections unrelated to the distinct

---

have not ratified the convention and proposing recommendations to encourage ratification); OLAIDE A. ADEDOKUN, UNESCO SERIES OF COUNTRY REPORTS ON THE RATIFICATION OF THE UN CONVENTION ON MIGRANTS: THE RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES: NIGERIA (2003) (discussing why Nigeria has not ratified the Convention and providing recommendations for renewed efforts to encourage ratification), *available at* <http://unesdoc.unesco.org/images/0013/001395/139534E.pdf>.

354. See Nafziger & Bartel, *supra* note 86, at 788 (suggesting modification of general instruments of human rights with protocols or an amended definition of protected persons).

355. Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 41.

status and plight of migrant workers beyond those enjoyed by refugees.”<sup>356</sup> The authors offer as an example the fact that the Refugee Convention provides national treatment in the right to work.<sup>357</sup> However, this provision and the Migrant Worker Convention provisions on employment are not analogous. Refugee Convention Article 17 is a direct intervention into *migration law*, because it requires that States Parties allow refugees to work legally. The refugee convention goes far beyond the migrant worker convention, which explicitly does not purport to effect basic immigration quotas and allocations, including the decision about which immigrants may legally work. The most the Migrant Worker Convention does in this regard is inject humanitarian factors for consideration into expulsion and visa extension decisions<sup>358</sup> and require States Parties to offer portability of temporary visas from one employer to another.<sup>359</sup> Thus, the Migrant Worker Convention, in the example cited, does not go beyond the Refugee Convention.

b. *Protection for Unauthorized Workers and Undocumented Family Members*

As noted above, most of the treaty’s substantive provisions are divided between general protections for all migrant workers, including unauthorized workers, and a more limited subset of rights accorded only to authorized workers. Various concerns have been raised about the Convention’s treatment of unauthorized workers and undocumented family members. Most fundamentally, the drafters’ decision to extend protections to unauthorized workers is likely to be viewed as controversial in the American context as a political matter, although the academic discussion appears to focus its concern not on the fact that these workers are given protection but on how the Convention is structured to provide that protection.

---

356. Nafziger & Bartel, *supra* note 86, at 787. The 1991 article also argues that the ICMW extends rights beyond those extended to other aliens and to citizens but does not provide examples. *Id.*

357. *Id.* at 787 n.72.

358. See *supra* Part III.B.2.d (discussing how weakly mandated protections present some de jure conflicts with U.S. domestic law).

359. See U.N. Migrant Worker Convention, *supra* note 6, arts. 51-52 (establishing standards governing states’ treatment of migrant workers’ remunerated activity).

The political concern relating to the Convention's explicit protections for unauthorized workers is the controversy of protecting people who have, by definition, violated immigration law. Public opinion around the world is negative about undocumented immigrants,<sup>360</sup> and during the early discussions regarding the Migrant Worker Convention, the negotiators debated whether to place unauthorized workers within the ambit of the Convention and which rights to accord them.<sup>361</sup> The decision was made, however, to follow the precedent set by the more recent of two ILO Conventions on Migrant Workers, ILO Convention 143, which preceded and informed the Migrant Worker Convention and includes protections for unauthorized workers.<sup>362</sup> Additionally, the 1985 U.N. General Assembly Declaration on the Human Rights of Individuals who are not Citizens of the Countries in Which They Live, after "factious debates,"<sup>363</sup> does include protections for

---

360. See, e.g., 50 SOUTHERN AFRICAN MIGRATION PROJECT MIGRATION POLICY SERIES: THE PERFECT STORM: THE REALITIES OF XENOPHOBIA IN CONTEMPORARY SOUTH AFRICA 1 (Jonathan Storm ed., 2008) (portraying destructive and reactionary consequences of xenophobia in South Africa), available at <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat50.pdf>; John Judis, *Phantom Menace: The Psychology Behind America's Immigration Hysteria*, NEW REPUBLIC, Feb. 13, 2008, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=19878> (describing varied anti-immigration sentiment in different states); Jeffrey Stinson, *More Immigrants Feeling Unwelcome in Europe*, USA TODAY, June 10, 2008, available at [http://www.usatoday.com/news/world/2008-06-09-Rome\\_N.htm](http://www.usatoday.com/news/world/2008-06-09-Rome_N.htm) (discussing increasing number of immigrants who feel ostracized in Europe).

361. See Bosniak, *supra* note 16, at 325-26 (providing a detailed account of negotiations behind Migrant Worker Convention).

362. See ILO 143, *supra* note 12, art. 9 ("[T]he migrant worker shall, in cases . . . in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security, and other benefits."). Note that the ILO also issued a supplementary recommendation on migrant workers in 1975, which again called for rights protections for unauthorized workers, including equal workplace rights. Migrant Workers Recommendation 1975, ¶ 8(3), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R151> ("Migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.").

363. Bosniak, *supra* note 16, at 314.



undocumented immigrants.<sup>364</sup> The decision to include unauthorized workers in the Migrant Worker Convention was, however, a departure from the European precedent, which concluded a regional treaty in 1977 that explicitly excludes unauthorized workers.<sup>365</sup> In 2007, the Association of Southeast Asian Nations (ASEAN) issued the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, which, though much shorter and more general than a treaty, nonetheless explicitly offers some limited protection to unauthorized workers.<sup>366</sup>

Moreover, in the years since the Migrant Worker Convention negotiators grappled with the tension between human rights and political reality, the legal rights of unauthorized workers have gained some footholds in international law. The U.N. Committee on the Elimination of Racial Discrimination has interpreted the Convention on the Elimination of Racial Discrimination to provide equal workplace rights for unauthorized workers.<sup>367</sup> The Inter-American Court has issued an advisory opinion establishing the same principle through the right to equality of treatment enshrined by the American Dec-

---

364. Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, U.N. Doc. A/RES/40/144 (Dec. 13, 1985), *available at* <http://www.unhcr.org/refworld/docid/3b00f00864.html>5-10; *see also* Bosniak, *supra* note 16, at 314 (noting that “undocumented migrants were ultimately *not* excluded from the class protected” under the declaration).

365. *See* European Convention on the Legal Status of Migrant Workers, art. 1(1), Nov. 11, 1977, Europ. T.S. No. 093, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/093.htm> (defining a migrant worker as “a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment”).

366. *See* ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, ¶ 1 (July 30, 2007), *available at* <http://www.12thaseansummit.org.ph/innertemplate3.asp?category=docs&docid=23> (aiming to promote decent, humane, productive, dignified, and remunerative employment for migrant workers).

367. *See* U.N. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 30: Discrimination Against Non Citizens, ¶ 4 (Jan. 10, 2004), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument) (“Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”).

laration on the Rights and Duties of Man.<sup>368</sup> The Committee on Freedom of Association of the International Labour Organization has also held that the right to freedom of association applies equally in all respects, including the available legal remedies, to unauthorized workers.<sup>369</sup>

There seems to be little doubt that by offering protection to unauthorized workers, the framers of the treaty risked what has been to date the result: most countries of migrant employment have shunned the treaty. However, the inclusion has been supported by subsequent legal developments and continues to be justified by the humanitarian situation of these workers. Undocumented status tracks numerous other indicia of vulnerability, such as race, poverty, poor-country origin, trauma survivorship, and lower education level,<sup>370</sup> underscoring the need for careful attention to baseline rights. So long as international law is unwilling to disturb national sovereignty with respect to regulating the availability of brown-collar visas, international law should acknowledge the resulting hierarchies. Because undocumented immigrants are so vulnerable, the Convention's explicit application of basic rights to them provides the Migrant Worker Committee with a more effective

---

368. See *OC-18*, *supra* note 249, ¶ 160 (“[U]ndocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice.”); Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers’ Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 548, 552 (2004) (discussing *OC-18*).

369. See *ILO Case 2227 on Complaints Against the United States*, *supra* note 297 (holding that the right to freedom of association requires that the United States reverse its policy that limits labor rights remedies for unauthorized immigrant workers).

370. See Jorge A. Bustamante, *A Dialectical Understanding of the Vulnerability of International Migrants*, in HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 161 (Hernan Vera & Joe R. Feagin eds., 2007) (providing examples of the socioeconomic difficulties that illegal immigrants confront before, during, and after migrating to the United States); Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 36-45 (2005) (discussing socioeconomic realities and working conditions for migrant workers).

mandate for exploring and shoring up their situation within each State Party.

A related concern involves the structure of the Convention's protections for unauthorized workers. According to Professor Nafziger and Mr. Bartel, "providing one set of rights for *all* migrant workers and another for *documented* workers alone poses enormous problems of interpretation and implementation. The distinction may also threaten principles of humanity and justice."<sup>371</sup> Moreover, the Convention's structure has a historical antecedent: ILO 143 is also structured to include one set of rights for all migrant workers and additional rights for authorized workers.<sup>372</sup> Although the resulting protection scheme may seem complicated, and also may seem to endorse the underlying hierarchies in a way that may be philosophically disturbing, the dualist nature of the Convention is a compromise that achieves the treaty's goals as efficiently as possible given the existence of the strong documented-undocumented distinction in most workplaces. As argued above, a treaty that purports to protect migrant workers without providing protections to the unauthorized would fail both classes of workers. Moreover, the Migrant Worker Convention does not only distinguish between authorized and unauthorized workers. The Convention also breaks out brief particularized protections for other sub-classes of migrant workers, for example frontier workers<sup>373</sup> and seasonal workers,<sup>374</sup> much as the Convention on the Elimination of Discrimination Against Women addresses particular protections for rural women.<sup>375</sup>

A third concern regarding the Convention's treatment of unauthorized workers involves those protections that are omitted. Although the Convention broke new ground in establishing rights for the unauthorized, including many protections

---

371. Nafziger & Bartel, *supra* note 86, at 787. However, Professors Nafziger and Bartel did not elaborate on the problems the distinction would cause.

372. See ILO 143, *supra* note 12 *passim* (limiting some rights as available only to authorized migrant workers while providing some rights for migrant workers regardless of authorization).

373. U.N. Migrant Worker Convention, *supra* note 6, art. 58.

374. *Id.* art. 59.

375. See CEDAW, *supra* note 4, art. 14 (highlighting States Parties' obligations regarding the appropriate treatment of rural women).

that remain unique to the Convention,<sup>376</sup> some omissions have been the subject of criticism. The first and most glaring is the lack of any right to legalization of status for long-term residents. As Professor Bosniak states, despite its groundbreaking protections, the Convention is “a staunch manifesto in support of state territorial sovereignty.”<sup>377</sup> The lack of opportunities for legal brown-collar migration is, arguably, the underlying cause of many of the human rights violations that undocumented immigrants experience. However, as Professor Bosniak concedes, including such a right to legalize would have been enormously difficult politically.<sup>378</sup> Most significantly, Professor Bosniak objects to the Convention’s failure to guarantee that undocumented individuals who assert their rights under the Convention will not then be placed into deportation proceedings as a result of the assertion.<sup>379</sup> I agree that such a provision would have been an important and appropriate resolution of the rights-sovereignty tension that the Migrant Worker Convention so starkly embodies.

c. *Gender and Migrant Workers*

Professor Meg Satterthwaite criticizes the Convention for its silence on the issue of gender and migrant worker rights. She rightly points out that the Convention fails to provide any explicit protection from the *gendered* forms of exploitation and violence that migrant workers face.<sup>380</sup> Professor Satterthwaite also notes the Migrant Worker Convention’s slow pace of ratification.<sup>381</sup> Based on these observations, Professor Satterthwaite correctly argues that ratification of the Convention

---

376. See Bosniak, *supra* note 16, at 313-15 (highlighting unique protections offered by the U.N. Migrant Worker Convention).

377. *Id.* at 316.

378. See *id.* at 338 (noting that it would have been difficult to include a right to legalization of status for long-term residents in the U.N. Migrant Worker Convention because of the perceived interference with territorial sovereignty).

379. See *id.* at 335-39 (arguing that the U.N. Migrant Worker Convention’s failure to provide undocumented migrants with adequate protection from deportation process undermines the rights it does provide).

380. See Satterthwaite, *supra* note 86 (noting that “[a]t this stage in the development of the human rights framework, the experiences of women migrant workers have not been thoroughly and holistically articulated by international human rights analysis”).

381. *Id.* at 2.

should not be the sole focus of governments and advocates concerned about developing the law on this issue.<sup>382</sup> She argues that, rather than focusing exclusively on ratification efforts for the Convention, migrant worker advocates should direct their energies toward ensuring that more widely ratified human rights treaties are interpreted so as to extend protection both to migrant workers in general, and to women migrant workers in particular.<sup>383</sup> The monitoring process of the Migrant Worker Convention promises a concentrated examination of this community that Professor Satterthwaite's approach cannot provide, but if the Convention is not ratified more widely, this benefit will be limited. Moreover, her intervention clearly points to the age of the Convention—if drafted today, it would likely include explicit provisions on women migrant workers. This is not an uncommon problem; most of the other major human rights treaties are older than the Migrant Worker Convention, and contemporary concerns can be incorporated through the use of protocols and interpretations. Professor Satterthwaite's argument also underscores the lack of civil society advocacy resources discussed above.

4. *Technical Criticisms: Lack of a Reciprocity Clause, Prohibition on Excluding Categories of Immigrants, and Complexity*

Professor Nafziger and Mr. Bartel raise several technical issues about the Migrant Worker Convention. Two of these concerns relate to the Convention's enforcement scheme. First, the authors point out that the Convention lacks a reciprocity clause, an omission that "may inhibit ratification and accession to the Convention."<sup>384</sup> Second, the authors argue that the treaty's injunction forbidding governments to exclude application of entire treaty sections, or to exclude entire migrant categories from protection, creates a danger of "complicated sub-regimes" of exclusions and obligations. The concern is that if only small subsets of exclusions are permitted it will needlessly complicate Convention member states' map of obligations. The following section argues that these features of the Convention are entirely appropriate to human rights treaties in general and to the Convention in particular. Fi-

---

382. *Id.* at 62-63.

383. *Id.*

384. Nafziger & Bartel, *supra* note 86, at 786.

nally, the 1991 article lodges a concern about the complexity of the treaty. As argued in this section, although I agree that these observations are factually correct, I do not feel that they should preclude ratification of the Convention.

a. *Reciprocity*

The 1991 article argues that the lack of a reciprocity clause weakens the Convention. A reciprocity clause is a mechanism that allows States Parties to avoid their own treaty obligations when other States Parties breach the treaty.<sup>385</sup> This omission may well be a weakness, but it should not, as the authors of the 1991 article suggest,<sup>386</sup> prevent governments from ratifying the Convention. Dr. Liesbeth Lijnzaad argues that the general failure of human rights treaty States Parties to protest treaty reservations made by other States Parties is a failure of reciprocity.<sup>387</sup> However, the omission of a reciprocity clause is an omission that the Convention shares with other human rights treaties.<sup>388</sup> None of the other eight “core” UN human rights treaty includes such a clause. Dr. Lijnzaad maintains that human rights treaties “have a validity well beyond the bounds of reciprocity.”<sup>389</sup>

The fact that the actual beneficiaries of the conventions are civilians rather than states, together with the objective nature of the rights might suggest that no exchange of benefits between the ratifying states took place. This is incorrect. The most essential benefit is the fact that human rights will be regulated at the international level. . . . There are often other benefits involved in negotiating and acceding to a human rights treaty. These will not be retributions in the

---

385. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 801 (1987) (defining “reciprocity” as “an obligation to treat another state, its nationals or goods, as the other state treats the promisor state, its nationals or goods”).

386. Nafziger & Bartel, *supra* note 86, at 786 (noting that the absence of a reciprocity clause may inhibit ratification of the Convention).

387. See LIJNZAAD, *supra* note 95, at 112 (arguing that reciprocity is essential to internal dynamics of treaties).

388. See *id.* at 110-11 (listing other human rights treaties that do not include reciprocity clauses and providing commentary on why international human rights treaties are not considered reciprocal agreements).

389. *Id.* at 111.

shape of favourable provisions in an international legal instrument, but may take the form of extra-legal remunerations, such as an improvement of the States' international standing, the proof of being a respected member of the international community.<sup>390</sup>

Furthermore, the Vienna Convention on the Law of Treaties specifically exempts "provisions relating to the protection of the human person contained in treaties of a humanitarian character" from its general rule permitting parties to a treaty from terminating or suspending the operation of a treaty as a result of a material breach by another party.<sup>391</sup> The Vienna Convention's *travaux préparatoires* suggest that "treaties of a humanitarian character" includes human rights treaties.<sup>392</sup> Finally, the U.S. Restatement of the Law of Foreign Relations takes the position that a government ("State A") may not take countermeasures against another government ("State B") by suspending either human rights norms or minimum protections provided to the aliens of State B.<sup>393</sup> Given these multiple protections against unilateral suspension of human rights treaty provisions, in particular in the treatment of aliens, the Migrant Worker Convention's lack of a reciprocity clause is appropriate to the treaty's status as a human rights treaty.

### b. *Non-Exclusion of Worker Categories*

Article 88 of the Migrant Worker Convention forbids states that are joining the Convention from "exclud[ing] the application of any Part of it, or . . . [from] exclud[ing] any

---

390. *Id.*

391. Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331.

392. See U.N. Conference on the Law of Treaties, Second Session, Apr. 9-May 22, 1969, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 112, A/CONF.39/11/Add.1, available at [http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/vol/english/2nd\\_sess.pdf](http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/vol/english/2nd_sess.pdf) (remark by Switzerland) (suggesting that "conventions relating to protection of the human person should be sacrosanct" and in "no event should their violation by one party result in injury to innocent people").

393. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 905 cmt. b (1987).

particular category of migrant workers from its application.”<sup>394</sup> This provision is significant because it prevents ratifying states from excluding undocumented immigrants from protection. The authors of the 1991 article criticize this provision, arguing that Article 88 raises a concern about “complicated sub-regimes of international obligations among States Parties” because states parties can exclude application of individual provisions but can’t exclude the application of an entire “Part.”<sup>395</sup> This criticism is misplaced because it does not account for the fact that none of the other major U.N. human rights treaties forbids states parties from excluding application of individual provisions or small clusters of rights.<sup>396</sup> The concern that complicated sub-regimes will arise does not seem to be bearing itself out, at least based on the limited record of the 42 ratifications to date. Only 27 limitations on ratification have been registered to date,<sup>397</sup> creating a ratio of ratification-to-exclusions that is not significantly different from the three “core” U.N. human rights treaties that the United States has ratified.<sup>398</sup> While this rate of exclusions likely arises in part from the fact that countries of origin have ratified the Convention, each of the ratifying countries does host some migrants, and even the two states parties that host significant numbers of migrants—Turkey and Mexico—registered relatively fewer restrictions on ratification<sup>399</sup> than the United States has in its

---

394. U.N. Migrant Worker Convention, *supra* note 6, art. 88. Note, however, that by its own terms the Convention does not protect various categories of migrants: (1) individuals working for international agencies or performing various diplomatic functions; (2) foreign investors; (3) refugees; (4) stateless persons; (5) students and trainees; and (6) seafarers and offshore workers who have not been admitted for employment. *See id.* art. 3 (listing categories of persons to whom the Convention does not apply).

395. Nafziger & Bartel, *supra* note 86, at 785.

396. *See generally* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/Res/61/106 (Dec. 13, 2006) [hereinafter CRPD]; CRC, *supra* note 84; CAT, *supra* note 41; CEDAW, *supra* note 4; ICCPR, *supra* note 41; ICESCR, *supra* note 54; CERD, *supra* note 41.

397. *See* ICMW RATIFICATION RECORD, *supra* note 27 (listing ratifying states and registered limitations on ratifications).

398. *E.g., compare* CAT RATIFICATION RECORD, *supra* note 41 (reflecting 146 states parties and 71 reservations, understandings, and declarations), *with* ICMW RATIFICATION RECORD, *supra* note 27 (reflecting 42 states parties and 27 reservations).

399. *See* ICMW RATIFICATION RECORD, *supra* note 27 (showing that Turkey registered one reservation and three declarations, and that Mexico regis-



ratification of other treaties.<sup>400</sup> Moreover, the greater length of the Convention would seem to lead to more exclusions, a prediction that has not been borne out. However, until more countries of employment analyze the Convention, it will not be clear which provisions, if any, wealthy countries are likely to eschew. In any event, it is not clear that the inability to avoid responsibility for entire parts of the Convention, or to exclude entire categories of migrants, would lead governments to exclude a patchwork of provisions.

---

tered one interpretive declaration, one reservation, and one declaration under article 77). With the declaration under article 77, Mexico took the unusual step of consenting to the Migrant Worker Committee's jurisdiction over individual complaints. *See id.* Turkey ratified ICMW with limited restrictions: Articles 15 (Right to Property), 40 (Right to Trade Unions), 45 (Equal Treatment at Work), 46 (Exemption from export and import taxes), 76 & 77 (Competence of the U.N. Committee). *Id.*

400. The United States has introduced numerous limitations to each one of the treaties it has ratified. *See e.g.*, CAT RATIFICATION RECORD, *supra* note 41 (showing that the United States registered two reservations, five understandings (one with multiple sub-parts), and one declaration relating to: Articles 1 (Definition and Scope of Torture), 3 (Non-Refoulement), 14 (Availability of Redress), 16 (Definition of Cruel and Inhuman Treatment), and 30 (Dispute Settlement Procedure)). Repeatedly recalling the doctrine of non-self-execution and its right to practice capital punishment, the United States has also entered critical limitations to specific treaty provisions. For instance, the most sweeping restriction to CAT was made to the definition and scope of torture under Article 1. *See* CAT RATIFICATION RECORD, *supra* note 41 (considering "itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States"). Similarly, the United States entered extensive limitations to ICCPR. *See* ICCPR RATIFICATION RECORD, *supra* note 41 (showing that the United States registered five reservations, five understandings, and three declarations relating to: Articles 2 & 26 (Protected Grounds of Discrimination), 7 (Definition of Cruel and Inhuman Treatment), 9 & 14 (Right to Compensation for Unlawful Arrest or Detention), 10 (Treatment of Detainees), 14 (Right to Counsel, Double Jeopardy, and Treatment of Juveniles in the Criminal Justice System), 15 (Penalties Imposed for Criminal Offense), and 20 (Restrictions on Freedom of Speech)). United States limitations to CERD relate to Articles 2, 3 & 5 (Protection against Discrimination in the Private Sphere), 4 & 7 (Restrictions on Freedom of Speech), and 22 (Dispute Settlement Procedure). *See* CERD RATIFICATION RECORD, *supra* note 41 (showing that United States registered three reservations, one understanding, and one declaration).

Indeed, the more likely risk of Article 88 is the possibility that it will deter governments from ratifying the Convention at all, because they cannot exclude the category of undocumented workers from protection. However, as Professor Linda Bosniak argues, Article 88 “goes a long way to protecting the purpose and integrity of the instrument.”<sup>401</sup> In sum, having decided that protecting all migrant workers is a core value of the Convention, requiring that ratifying countries sign onto at least some protections for the unauthorized ensures that the document stands true to the consensus reached by its negotiators.

c. *Complexity*

Professor Nafziger and Mr. Bartel argue that the Convention is a complex document<sup>402</sup> that should be replaced by efforts at clarifying that existing rights apply to migrants and a “separate, concise instrument” containing “special protections that take account of the unique status and problems of migrant workers.”<sup>403</sup> The Migrant Worker Convention is certainly more specialized than human rights treaties of more general application, and it is lengthy. Its 71 substantive provisions significantly exceed the other major U.N. human rights conventions.<sup>404</sup> However, a longer and more specialized document does not mean a more burdensome compliance process. Indeed, as the first 34 provisions aimed at *all* migrant workers substantially mirror existing treaty obligations (a major reason the document is so lengthy),<sup>405</sup> in order to clarify protection for unauthorized workers, a great deal of the reporting would be synergistic with the U.S. government’s ongoing compliance work. Moreover, because much of the Convention involves

---

401. Bosniak, *supra* note 16, at 339.

402. See Nafziger & Bartel, *supra* note 86, at 784 (“Although the Convention brings together a welter of protections for migrant workers in a single document, its vocabulary and complexity do not augur well for quick ratification or accession by states.”).

403. *Id.* at 788.

404. See ICCPR, *supra* note 41 (27 substantive provisions); Convention Against Torture, *supra* note 41 (16 substantive provisions); CERD, *supra* note 41 (7 substantive provisions); ICESCR, *supra* note 54 (15 substantive provisions); CRC, *supra* note 84 (45 substantive provisions); CEDAW, *supra* note 4 (16 substantive provisions); CRPD, *supra* note 396 (30 substantive provisions).

405. See *supra* Part IV.E.1.a.3.

one government regime—the temporary worker program<sup>406</sup>—a relatively discrete number of agencies and officials would be responsible for reporting on the most detailed provisions.

## V. CONCLUSION

The time has come for the United States to take stock of the U.N. Convention on Migrant Worker Rights. The Convention is one of the United Nations' nine major in-force human rights treaties, of which, to date, the United States has ratified four and signed three. By failing to sign or even assess the Migrant Worker Convention, the United States misses an important opportunity to protect one of this country's most notoriously subordinated populations.

Numerous immediate benefits would accrue from the ratification debate and the monitoring process. By exposing more U.S. citizens to the notion that immigrant workers are the subject of a human rights treaty, engaging with the Convention would help to shift the political climate toward policy reform. Ratification would also advance U.S. foreign policy goals by improving the United States' reputation abroad, increasing its world leadership vis-à-vis the global south, improving the U.S.-Mexico relationship, and enabling the United States to shape the development of the emerging international law standards on immigrant workers. Working with the Convention would also assist the United States in identifying best practices and assist in badly needed cross-agency examination of this country's fragmented temporary worker program.

The history of previous U.S. human rights ratifications also supports moving forward with the Migrant Worker Convention. Because of the United States' extremely cautious human rights treaty ratification practice, and also because the Convention does not challenge U.S. immigration priorities, ratifying the Convention would pose no threat to U.S. sovereignty. The substantive legal effects of such a move would likely be muted in the short—and medium—term. Moreover, the Convention takes no position on controversial immigration policies such as legalization, border enforcement, and worksite raids. Instead, the Convention focuses on protecting

---

406. See U.N. Migrant Worker Convention, *supra* note 6, arts. 36-56 (elaborating other rights of migrant workers and members of their families who are documented or in a regular situation).

migrant workers' fundamental human rights and ensuring fundamental employment rights on an equal basis with other workers, mandates that fall in line with most U.S. worker laws. Moreover, most of the rights provided to unauthorized workers in the Convention are already theirs by virtue of past U.S. treaty ratifications.

Most of the concerns raised about the treaty when it was first promulgated have not borne out in the intervening years and are not persuasive, but some concerns unique to this Convention do remain. The most important concern is that the treaty has a relatively low ratification rate to date, and has not attracted ratification from any of the other industrialized countries of migrant employment. However, other countries of employment are examining the Convention more actively than the United States, and an early ratification would be appropriate for a country that is perceived as having one of the world's largest undocumented worker populations. Moreover, Europe already has a regional instrument on migrant worker rights, and the Americas do not; therefore, ratification of the international document is appropriate to fill a protection gap.

The second valid concern about the Convention is that it is a good deal more detailed than the other U.N. human rights treaties, and that the initial work of assessing the treaty is therefore more daunting. However, the treaty focuses on a particular population and, to a large extent, one particular program, the U.S. temporary worker program. Therefore, monitoring the treaty will involve a relatively more discrete group of government actors and will not be burdensome once the initial work of assessment and the first round of reporting are complete.

In the words of Professor Oona Hathaway, "treaties shape behavior not simply by influencing tangible benefits and not simply because they create legitimate legal obligations, but also by providing nations with a powerful expressive tool."<sup>407</sup> The United States desperately needs expressive tools for addressing migration. This country has developed the world's largest per capita undocumented immigrant population, one of the world's most deadly peacetime borders, and the most poverty-stricken low-income workforce in the industrialized

---

407. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L. J.* 1935, 2020 (2002).

world. Most agree, on humanitarian, labor, fiscal, international relations, and security grounds, that this is a problem that needs to be addressed. Yet, except for policies of increased enforcement, domestic policy reform proposals have failed politically. Signature and ratification of the Migrant Worker Convention would re-frame the debate on migrant labor and refocus attention on non-enforcement solutions to illegal immigration, allowing the United States to start on the path toward a rational global approach to low-paid labor migration.

**APPENDIX I: U.S. HUMAN RIGHTS TREATY SIGNATURE  
AND RATIFICATION HISTORY**

Last updated: August 1, 2009

<b>Topic of Treaty</b>	<b>Name of Treaty</b>	<b>Date promulgated (opened for signature)</b>	<b>Date of U.S. Signature</b>	<b>Date of U.S. Ratification</b>
<b>Race</b>	ICERD	12/21/1965	9/28/1966	10/21/1994
<b>General Civil and Political Rights</b>	ICCPR	12/16/1966	10/5/1977	6/8/1992
<b>General Economic, Social and Cultural Rights</b>	ICESCR	12/16/1966	10/5/1977	Not ratified by U.S.
<b>Refugees</b>	Refugee Protocol	1/31/1967	FIND	11/1/1968
<b>Gender</b>	CEDAW	3/1/1980	7/17/1980	Not ratified by U.S.
<b>Torture</b>	CAT	12/10/1984	4/18/1988	10/21/1994
<b>Children</b>	CRC	11/20/1989	2/16/1995	Not ratified by U.S.
<b>Death Penalty</b>	ICCPR Optional Protocol 2	12/15/1989	Not signed by U.S.	Not ratified by U.S.
<b>Migrant Workers</b>	ICMW	12/18/1990	Not signed by U.S.	Not ratified by U.S.
<b>Children &amp; Armed Combat</b>	CRC Optional Protocol I	5/25/2000	7/5/2000	12/23/2002
<b>Children – Sale and Prostitution</b>	CRC Optional Protocol II	5/25/2000	7/5/2000	12/23/2002
<b>Persons with Disabilities</b>	Convention on Persons with Disabilities	12/13/2006	7/24/2009	Not ratified by U.S.
<b>Enforced Disappearance</b>	Convention Against Enforced Disappearance	12/20/2006	Not signed by U.S.	Not signed by U.S.

## APPENDIX II: TREATY RATIFICATION TIMING BY TOP TEN COUNTRIES OF MIGRANT EMPLOYMENT

Last updated: March 20, 2009

Treaty	ICERD	ICCPD	CAT	Average Days Between Promulgation and Ratification, by Country
Country by rank in migrant employment				
Date of Promulgation	12/21/1965	12/16/1966	12/10/1984	
United States Ratification	10/21/1994	10/21/1994	10/21/1994	3603
Russia Ratification	2/4/1969	10/16/1973	3/3/1987	814
Germany Ratification	5/16/1969	12/17/1973	10/1/1990	2122
Ukraine Ratification	3/7/1969	11/12/1973	2/24/1987	807
France Ratification	7/28/1971	11/4/1980	2/18/1986	436
Saudi Arabia Ratification	9/23/1977	Not signed; Not Ratified (calculated using 3/ 20/2009)	9/23/1997	4671
Canada Ratification	10/14/1970	6/19/1976	6/24/1987	927
				2053

8102 days/  
270  
months\*\*

## (APPENDIX II, CONTINUED)

India Ratification	12/3/1968	1079	4/10/1979	4499	Signed; Not Ratified (calculated using 3/20/2009)	8867	4815
UK Ratification	3/7/1969	1173	5/20/1976	3444	10/8/1988	1399	2005
Spain Ratification	9/13/1968	998	4/27/1977	3786	10/21/1987	1046	1943
Average Days Between Promulgation and Ratification, by Treaty		2544		5346		2469	3453
				Total Average	3453 days/115 months**	Average leaving out U.S.	2936 days/98 months**

\* Time elapsed calculations made using <http://www.timeanddate.com/date/duration.html>.

\*\* average "months" calculated by dividing days by 30