ESSAYS

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

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I. INTRODUCTION

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

Though it was not free from controversies, the legal protection of migrants has a long lineage in the history of international law. One can even argue that, from its inception, international law has had a symbiotic relationship with migration. The very term “jus gentium” designated the set of customary rules governing the legal status of aliens under the law of ancient Rome.1 As far back as the 16th century, this Latin expression was specifically used to refer to the law of nations, before Jeremy Bentham coined the term “international law” in 1789.2 In the meantime, the movement of persons across borders was a typical subject of discussions among the founding fathers of international

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2. JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ¶ XXV, at 236 (Batoche Books 1999) (1789).
law, such as Franciscus de Victoria,\(^3\) Hugo Grotius,\(^4\) and Emer de Vattel.\(^5\)
Since then, migration has remained a topical issue of international concern, which mirrors the broader development of international law. A particularly telling case can be found in the human rights of migrants. The present article traces back their historical origins and analyses the primary features under contemporary international law. Though this issue has raised a considerable literature among contemporary scholars, human rights of migrants have been rarely approached from a general international law perspective.\(^6\)
Such an approach proves to be particularly valuable for many reasons. Most notably, it provides the global frame of migrants' rights and contributes to a better understanding of their legal environment and core content.

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

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


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

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

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

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

This overlapping between the territorial and personal jurisdictions is

10. Vattel, supra note 5, at 298, § 71.
inherent to alienage. It further explains the longstanding interest of international law towards aliens. By contrast, classical international law has long been indifferent to the treatment of nationals within their own country who were left at the discretion of their sovereign state. As Hersh Lauterpacht observed, “the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.”12

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

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

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

Thus, one should not be surprised that diplomatic protection has been a persistent source of tension among states—especially between western states and newly independent ones (notably in Latin America). Aliens in question were generally entrepreneurs from industrialized countries in search of new markets; furthermore, diplomatic protection was used as a common pretext for intervention in disregard of the principles of sovereignty and non-interference in the domestic affairs of states, in this case developing states. As a result, “[t]he history of the development of the international law on the responsibility of states for injuries to aliens is thus an aspect of the history of ‘imperialism,’ or ‘dollar diplomacy.’”16

The conflicting interests at stake have been reflected by two opposite conceptions of the standard of treatment granted to aliens. First, developing states have advanced the doctrine of national treatment: Aliens must be treated on an equal footing with nationals (with the obvious exception of political rights).17 As a result, aliens cannot claim more rights than those granted to nationals and only a difference of treatment can trigger the responsibility of the host state. The doctrine of national treatment was endorsed at the First International Conference of American States held in Washington in 1889-1890.18 It has been reinforced at the regional level in several treaties, including the 1902 Convention relative to the Rights of Aliens,19 the 1928 Convention on the Status of Aliens,20 as well as the famous Montevideo Convention on the Rights and Duties of States adopted in 1933.21

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

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

16. JEANZI, supra note 9, at 96. See also Barcelona Traction, 1970 I.C.J. at 246 (separate opinion of Judge Padilla-Nervo). Among other well-known instances, the Boer War from 1899 to 1902 was officially justified by the UK in order to protect the British mine owners of Witwatersrand, South African War, ENCyclopédia BRITANNICA, http://www.britannica.com/EBchecked/topic/555806/South African-War (last updated Dec. 14, 2013).
19. Id. at 415-16.
20. Id.
21. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. As to the previous convention, the US made a reservation to Art. 9, Id.
notion of minimum international standards, traditionally defined in the following terms:

Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same Redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the law of the world... If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.23

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


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

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

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

According to Amador, traditional conceptions have shown their own limits for establishing clear-cut rules in this field.33 They must be reassessed in accordance with the dramatic transformations of contemporary international law deriving from the UN Charter and the international recognition of human rights:

International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State. Hence it is no longer true, as it was for centuries in the past, that international law exists only for, or finds its sole raison d'être in, the protection of the interests and rights of the State; rather, its function is now also to protect the rights and interests of its other subjects who may properly claim its protection ... International law today recognizes that individuals and other subjects are directly entitled to international rights, just as it places upon them certain international obligations.

The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international law.34

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

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33. Id. at 175.

34. Id. at 184, 192, 203.


37. Id. at 46-47.

The 'human rights and fundamental freedoms' referred to in the foregoing paragraph are those enumerated below: (a) The right to life, liberty and security of person; (b) The right to own property; (c) The right to apply to the courts of justice or to the competent organs of the State.
more, communist states still viewed human rights as a product of capitalism and thus resisted their international recognition. As a result of the cold war and the decolonisation process, it was not the moment to codify the legal status of aliens, and even less to relate it to human rights.

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

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

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

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

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


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

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


58. Id.


tive density of the matter for two main reasons. First, a wide range of regional and bilateral treaties have been adopted for regulating various aspects of migration (including for labor purposes). To give only a few instances, more than 120 states are involved in regional economic integration schemes aimed at facilitating the movement of persons between states parties.64 Furthermore, countries from the Organization for Economic Cooperation and Development (OECD) have alone entered into more than 176 bilateral labor recruitment agreements in 2004, a fivefold increase since 1990.65

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

64. Patrick Taras, Redshifting Development and Migration: Some Elements for Discussion & unpublished working paper) (on file with the author).


67. See CRPD, supra note 66, art. 18(1)(d); CECR, supra note 66, art. 10(2); CEDAW, supra ibid., art. 15(4); CCPR, supra note 66, arts. 12(2), 4; CERD, supra note 66, arts. 5(d)(ii).


69. See CCPR, supra note 66, art. 18(1)(a)-b); (2); CECR, supra note 62, art. 7; CEDAW, supra ibid., art. 16(6); ICCPR, supra note 66, arts. 24(2), 3; CERD, supra note 66, art. 5(d)(ii).

the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on the Rights of the Child (CRC) regularly insist on the need for protecting migrant workers under their respective instruments.
Finally, migrants can also bring individual complaints to the seven existing UN supervisory bodies currently competent (namely the HRC, the CERD, the CAT, the CEDAW, the CESC, the Committee on Enforced Disappearances, and the Committee on the Rights of Persons with Disabilities). The CAT is by far the most solicited UN treaty body. It has even become an anti-deportation committee, as between 80% and 90% of all individual complaints submitted to the CAT concern alleged violations of its Article 3 devoted to the principle of non-refoulment.\textsuperscript{78} At the regional level, the European Court of Human Rights is another particularly active treaty-body, which has regularly sanctioned violations of human rights committed against migrants.\textsuperscript{79} The European Court is not the only active regional body, as virtually all are concerned, such as the Inter-American and African Courts of human rights.\textsuperscript{80}

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

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


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

\textsuperscript{82} ICCPR, supra note 66, para 1; UDHR, supra note 44, para 1.


\textsuperscript{84} ICCPR, supra note 66, art. 2(1). Though nationality is not mentioned expressly in this non-exhaustive list of prohibited grounds of discrimination, it is clearly covered by the one referring to "national origin." For further developments about the scope and content of the principle of non-discrimination see DENTON MYRIEL AMBEYRIDGE, EQUALITY AND DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003); CURTIS F. J. DEREK, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL LAW (2007); WARWICK MCKEAN, EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW (1983); DANIEL MORELLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE "WAR ON TERROR" (2008); WEAER VANDESMULD, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES (2005); E. W. VERHAEG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW (1993); LI WENNIANG, EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS LAW (2004); Anne F. Bayefsky, The Principle of Equality or Non-Discrimination in International Law, 11 H.R.L.J. 1, 1-2 (1990); M. BOSSERT, L'INTERDIT DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME (1976); Mel Cousins, The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?, 16 J. SOC. SEC. L. 3, 120-38 (2009); Aaron X. Fellmeth, Non-discrimination at a Universal Human Right, 34 VALE J. INT'L L. 558, 558-95 (2009).
The principle of non-discrimination is a well-recognized norm of general international law and its impact on the legal position of non-citizens is quite straightforward. Interpreting Article 2(1) of the ICCPR, the HRC underlined:

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

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

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and [practice] their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

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

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

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

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


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

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

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

The rationale behind limiting rights based on an alien’s legal status is closely related to the traditional power of states to regulate entries and stays within their own territory. As acknowledged by the HRC, “the question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations.”

While states retain a substantial margin of appreciation, this does not mean that they have a purely discretionary power for deciding upon admission of non-citizens. Here again the legal position of migrants mirrors a broader transformation of the international legal order, which has evolved from a law of coexistence towards a law of interdependence. As a result of this structural evolution of public international law, territorial sovereignty is both a competence and a responsibility. Against such normative background, the competence to regulate admission in domestic legislation must be exercised in due accordance with the legal norms of international law.

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

allowed to submit the reasons against his expulsion and to have his case reviewed by, and as represented for the purpose before, the competent authority or a person or persons especially designated for that purpose by the competent authority.” Similar conditions governing the deportation process can be found in other treaties. See, e.g., Arab Charter on Human Rights art. 26(b), adopted May 23, 2004 (reprinted in 12 INT’L HUM. RTS. REP. 883 (2005)) (entered into force Mar. 15, 2008); Protocol No. 7 to the Convention for the Protection of Migrants Rights and Fundamental Freedoms, Nov. 11, 1964, 1525 U.N.T.S. 195; African Charter on Human and Peoples’ Rights art. 25(d), June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); American Convention on Human Rights, supra note 79, art. 22(b); Convention Relating to the Status of Refugees art. 32, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

For further discussions see AM. SOC’Y OF INT’L L., THE MOVEMENT OF PERSONS ACROSS BORDERS 1-22 (Louis S. Bohn & Thomas Buergenthal eds., Studies in Transnational Legal Policy No. 23, 1992); Vincent Chetati, Migration, Droits de l’Homme et Souveraineté: Le Droit Interna-

193. For an overview, see, Vincent Chetati & Gilles Giaccia, Who Cares?: The Right to Health of Migrants, in REALIZING THE RIGHT TO HEALTH 224-34 (Andrew Clapham & Mary Robinson eds., 2009); Ryszard Cholewinski, Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights (2005); Ryszard Cholewinski, Economic and Social Rights of Refugees and Asylum Seekers in Europe, 14 GEO. IMMIGR. L.J. 709, 709-55 (2000); Odder Depper, Migrant Workers and the Right to Social Security: An International Perspective, 18 STELLENSBOSCH L. REV. 219-54 (2007); Sylvie Dufourna, Immigration Status and Basic Social Rights: A Comparative Study of Irregular Migrants’ Right to Health Care in France, the UK and Canada, 28 MELS. Q. HUM. RTS. 1, 6 (2010); Aliya Haider, Out of the Shadows: Migrant Women’s Reproductive Rights under Interna-


As amended in Article 2(1) of the U.N. International Covenant on Economic, Social and Cultural Rights (ICECSR), “[t]he States Parties to the present Covenant undertake to take steps, individually and through international assistance and cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” ICECSR, supra note 95, art. 2(1).


ICECSR, supra note 96, art. 2(2).

Nonetheless, contrary to its counterpart in the ICCPR, the principle of non-discrimination under the ICESCR is limited by a noteworthy—albeit circumstantiated—exception. According to Article 2(3), "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."\footnote{ICESCR, supra note 96, art. 2, ¶ 3.} As any exception to a principle, this one should be restrictively interpreted (especially when the principle at stake is so fundamental and represents one of the funding backbones of the Covenant). Furthermore, the wording of this provision is circumscribed by three substantial cumulative conditions regarding the states concerned, the nature of the rights subjected to this exception, and the degree of permissible restrictions to them.

Regarding the first condition (the states concerned), Article 2(3) is a permissive, not a mandatory, provision which can be invoked only by "developing countries."\footnote{Id.} The notion of developing countries being a factual rather than a legal one, it is commonly understood as including "countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries."\footnote{Limburg Principles, supra note 98, ¶ 44.} Although this kind of qualification referring to a particular type of State may be found in international trade law and other related areas, it remains quite unique in the field of human rights law. This specificity must be understood in the historical context which prevailed during the drafting of the ICESCR.

Article 2(3) is a remnant of the traditional law of aliens and the longstanding debates between newly independent states and western states. The delegate of Indonesia who proposed this provision explained that its only purpose was to protect the rights of nationals of former colonies against the abuses deriving from "the dominant economic position enjoyed by [mostly western] foreigners as a result of the colonial system."\footnote{Limburg Principles, supra note 98, ¶ 43.} In summing up the debates between the delegations, the Third Committee of the General Assembly further insisted that:


The sole aim of the proposals in question was to rectify situations which frequently existed in the developing countries particularly those which recently won their independence. In such countries, the influence of non-nationals on the national economy—a heritage of the colonial era—was often such that nationals were prevented from enjoying the economic rights set forth in the draft Covenant.\footnote{U.N. GAOR, 17th Sess., 1206th mtg. ¶¶ 42-45, U.N. Doc. A/C.3/SR.1206 (Dec. 10, 1962).}

Article 2(3) was finally adopted by a small majority of states: forty-one votes to thirty-eight, with twelve abstentions.\footnote{ICESCR, supra note 96, art. 2, ¶ 3.}

The second range of conditions governing Article 2(3)'s scope relates to the rights concerned by this exception to the principle of non-discrimination. Article 2(3) is exclusively limited to the "economic rights recognized in the present Covenant."\footnote{ICESCR, supra note 96, art. 2, ¶ 3.} Although this notion is not explicitly defined in the Covenant, the ordinary meaning of the terms presupposes that the rights in question primarily consist of the right to work and other related rights,\footnote{See also Alice Edwards, Human Rights, Refugees, and the Right to 'Enjoy' Asylum, Int'l J. Refugee L. 283, 325-26 (2005).} such as the enjoyment of just and favourable conditions of work.\footnote{ICESCR, supra note 96, art. 2, ¶ 3.} This excludes both social and cultural rights for which non-discrimination remains plainly operational.

Third, according to the cautious and restrictive wording of Article 2(3), developing countries are not allowed to suspend the rights of non-nationals, they can only "determine to what extent they would guarantee the[ir] economic rights."\footnote{Id.} They can thus merely envisage restrictions to the exercise of economic rights, which must be determined "with due regard to human rights and their national economy" as explicitly required by Article 2(3).\footnote{Limburg Principles, supra note 98, art. 2, ¶ 3.} Possible restrictions on the economic rights of non-nationals are therefore deemed acceptable as long as they do not impair the enjoyment of other human rights. Following this stance, a general prohibition of the right to work imposed to non-citizens would not be justified if no welfare assistance is instead provided to them.\footnote{Limburg Principles, supra note 98, art. 2, ¶ 3.}

In any event, Article 2(3) cannot justify any breach of economic rights and other related guarantees provided by other treaties. For example, it cannot be
used to avoid articles 17, 18, and 19 of the Refugee Convention governing access to employment.\textsuperscript{113} Article 5(2) of the ICESCR ensures indeed that more favourable treatments granted by any other domestic legislation and treaties remain plainly applicable.\textsuperscript{114} This safeguard clause has further far-reaching effects with regard to more favourable treatment enshrined in regional human rights treaties, for both the 1981 African Charter on Human and Peoples Rights\textsuperscript{115} and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights\textsuperscript{116} guarantee the right to work without any discrimination. In such a case, Article 2(3) is literally neutralised.

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

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


\textsuperscript{114} ICESCR, supra note 96, art. 5, § 2.


\textsuperscript{117} Dunkwe, supra note 109, at 242.

\textsuperscript{118} Supra note 109, at 415. See also Matthew Craven, The International Covenant on Economic, Social and Cultural Rights, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 101, 111 (Rajja Hankí & Marika Saité eds., 2d rev. ed. 1999).


\textsuperscript{121} Human Rights of Migrants in General International Law 251 (2013).

\textsuperscript{122} This general trend finds additional support in the general prohibition against degrading and inhuman treatment, a well-established norm of customary international law.\textsuperscript{123} Indeed, violating a minimum of subsistence rights can cross the threshold of degrading treatment.\textsuperscript{124}
highlighting the interdependent and interrelated nature of human rights can be observed with regard to some of the core labour rights reaffirmed in several widely ratified ILO treaties.  

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

All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.  

needs . . . have attained the level of severity required to fall within the scope of Article 3 of the Convention." Id. § 1, 83.


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

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

At the regional level, the Inter-American Court of Human Rights has come to a similar conclusion in its Advisory Opinion on Jurisdictional Condition and Rights of the Undocumented Migrants.  

The Court has deduced from the principle of non-discrimination and equality before the law some far-reaching assertions regarding labour rights of migrant workers:

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

V. CONCLUSION

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

Interdisciplinary Research Grp. on Int’l Agreements & Dev., Working Paper No. 1, 2003). One should add that discrimination in employment is defined by Art. 1(1) of ILO Convention No. 111 as comprising "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." International Labour Organization, Convention Concerning Discrimination in Respect of Employment and Occupation art. 1, ¶ 1, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960). However, the prohibited ground of "national origin" that is traditionally retained in this kind of non-discrimination clause was substituted by the more ambiguous term "national extraction." Id. 128. International Labour Conference, June 1-17, 2004, Towards a Fair Deal for Migrant Workers in the Global Economy, ¶ 229.


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

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

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

131. Cholewinski, supra note 6, at 180.
135. U.N. Charter, art. 55, para. c.