
Undocumented or Irregular Migrant Workers under the Model International Mobility Convention: Rights and Regularization

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This paper argues in favor of a rethinking of how the status of migrants in an irregular situation is tackled. The New York Declaration for Refugees and Migrants mentions numerous times the need to facilitate and ensure safe, orderly and regular migration.¹ It is laws, however, which create irregularity. In particular, when such laws are applied at the border, migration often becomes unsafe and disorderly as proven by the hundreds of individuals dying when trying to cross borders each year.

Undocumented migration is indeed one of the most politicized and debated aspects of mobility on a global scale. Despite the fact that, in places like Europe, most unauthorized migrants at some point possessed regular status and only lose such status through visa-overstay, non-renewal or unauthorized work,² discussions regarding undocumented migration are usually interrelated with issues of border control. Clarifications in legal instruments as to who is in an irregular situation are often far from conclusive, because these instruments tend to simply define “irregular migrants” in the negative: as individuals who are not legally residing in the country. However, as Hiroshi Motomura has highlighted, “immigration status is hard to ascertain or is changeable. And even when a violation is clear, its consequences are not.”³ This tendency can also be found in existing international legal instruments. For instance, Article 5 of the

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1. G.A. Res. 71/1, ¶¶ 4, 40, 41, 57 (Sept. 19, 2016).

2. INTERNATIONAL CENTRE FOR MIGRATION POLICY DEVELOPMENT, REGULARISATIONS IN EUROPE: STUDY ON PRACTICES IN THE AREA OF REGULARISATION OF ILLEGALLY STAYING THIRD-COUNTRY NATIONALS IN THE MEMBER STATES OF THE EU (2009), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/pdf/general/regine_appendix_b_january_2009_en.pdf [https://perma.cc/M88S-SH23].

3. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 21 (2014).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) defines non-documented persons as those who do not comply with the conditions “to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.”⁴ This level of generality demands domestic analysis on a case-by-case basis.

The Model International Mobility Convention (MIMC) takes a similar approach to that of the ICMW in Article 2 but limits undocumented status to those who are not authorized to enter or stay for a period of time in the host State. In principle, this means that under the MIMC, working without permission under a residence permit should not lead to losing residency status and falling into irregularity. Additionally, Chapter IV, Part II of the MIMC also contains provisions for several important rights granted to migrant workers, irrespective of whether they have residence permits. These include access to emergency medical care (Art. 57), equal treatment in respect of remuneration and other conditions of work (Arts. 58–61), and certain provisions applicable to women and children, including access to education for children (Arts. 63–64).⁵

Equally crucial are the provisions of the MIMC which create protections against expulsions and provide for possible regularization. Regularization, or the process by which an irregular migrant may obtain a resident permit, in particular is undoubtedly a current pressing global challenge. Many countries, ranging from Morocco to Brazil, USA to Russia, or Japan to numerous Member States in the European Union, have opted for regularization mechanisms, either permanent or extraordinary, based on a variety of reasons including length of residence, family links, employment, ethnic ties or humanitarian motivations.⁶ Numerous international organizations, ranging

4. G.A. Res. 45/158. (Dec. 18, 1990).

5. The full list of rights can be found Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, arts. 56–67 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [https://perma.cc/F3Q3-6G88].

6. See, e.g., on Brazil: D. Acosta & L. F. Freier, *Turning the immigration policy paradox up-side down?*, 49 INT’L MIGRANT REV. 659, 696 (2015); on Japan see: Atsushi Kondo, *Migration and Law in Japan, Asia & the Pacific*, 2 ASIA & THE PACIFIC POL’Y STUD. 155, 168 (2015); on Russia see: Caress Schenk, *Open Borders, Closed Minds: Russia’s Changing Migration Policies: Liberalization or Xenophobia?*, 18 DEMOKRATIZATSIYA 101, 121 (2010); on Morocco see: Kirsten Schuettler, *A second regularization campaign for irregular immigrants in Morocco: When emigration countries become immigration countries*, THE WORLD BANK (Jan. 13, 2017), <http://blogs.worldbank.org/peoplemove/second-regularization-campaign-irregular->

from the Inter-American Commission on Human Rights,⁷ to the Parliamentary Assembly of the Council of Europe,⁸ to the U.N. Special Rapporteur on the Human Rights of Migrants,⁹ have considered regularization as a vital policy tool to deal with migration regulation.

The MIMC provides important protection for migrants in an irregular situation when it comes to expulsion and regularization. To appreciate this innovation of the Model Convention, Articles 69(2) and 70(4) must be read together. Under Article 70(4), States have to take into account family ties, humanitarian considerations, and the length of residence before taking any expulsion decision.¹⁰ In other words, the Convention opts in favor of a personalized proportionality assessment of the individual circumstances of the person concerned in order to see if expulsion constitutes an excessive measure in the particular case. In turn, Article 69(2) encourages States Parties to consider regularization in cases of family connections, compassionate, humanitarian or other reasons when a migrant is undocumented.¹¹ This approach deserves several comments.

To begin with, Article 69(2), while not imposing an obligation on States Parties to regularize an individual under certain given circumstances, provides a non-exhaustive enumeration of possible grounds to consider offering an undocumented migrant authorization

immigrants-morocco-when-emigration-countries-become [https://perma.cc/2T4L-2R75]; on the European Union, see ICMPD, *supra* note 2; on the United States, see Motomura, *supra* note 3.

7. Press Release, Inter-American Commission on Human Rights (IACHR), IACHR Welcomes Measures to Provide Protection to Venezuelan Migrants in Peru and Calls on States in the Region to Implement Measures for their Protection (Apr. 4, 2017), http://www.oas.org/en/iachr/media_center/preleases/2017/043.asp [https://perma.cc/T2PR-JA54].

8. Eur. Consult. Ass., *Regularisation Programmes for Irregular Migrants*, Doc. No. 11350 (2007) <http://www.unhcr.org/4b9fac519.pdf> [https://perma.cc/N9GM-UNC3].

9. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants*, U.N. Doc. A/HRC/26/35 (Apr. 3, 2014), <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf> [https://perma.cc/Y4AG-8TPK].

10. “In considering whether to expel a migrant worker or a member of his or her family, account should be taken of family ties, humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.” MIMC, *supra* note 5, art. 70(4).

11. “States Parties should consider, as they deem appropriate, granting an autonomous residence permit or other authorization offering a right to stay for family connections, compassionate, humanitarian or other reasons to a non-national staying irregularly on their territory.” *Id.*, art. 69(2).

to remain. In other words, States Parties can come up with their own list of criteria or requirements to regularize individuals falling into particular categories or fulfilling certain conditions.

Second, when it comes to family connections or family life, the best interests of the child are prioritized. This emphasis tracks important legal innovations that have taken shape in existing regional frameworks. For example, the Inter-American Court on Human Rights has already clearly established that:

the rupture of the family unit by the expulsion of one or both parents due to a breach of immigration laws related to entry or permanence is disproportionate in these situations, because the sacrifice inherent in the restriction of the right to family life, which may have repercussions on the life and development of the child, appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offence.¹²

According to this interpretation, in countries falling under the jurisdiction of the Inter-American Court, an individual right to regularization exists for the family member concerned when children have the nationality of the host State or when they have permanent residence.¹³ Expulsion is illegal since it would breach the best interests of the child. Indeed, several countries in the Americas provide for this individual right in their legislations when family life and the best interest of the child are at stake.¹⁴ In the European case, the European Court of Human Rights has also interpreted family life in certain circumstances as impeding the expulsion of undocumented migrants.¹⁵ For example, children who are EU nationals have a right as EU citizens to not have their parents deported, but only when deportation would entail the need to leave the entire territory of the EU and

12. Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21. ¶ 280 (Aug. 19, 2014).

13. *Id.*, ¶ 277.

14. See Law No. 25871, 2004, E.D.L.A. 616, arts. 22, 61 (Arg.); Law No. 370, May 8, 2013, art. 380 (Bol.); Decreto No. 13.445, de 25 de maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], art. 55 (Braz.); Law No. 978/96, 2010, art. 35 (Para.); Law No. 18.250, 2008, art. 48 (Uru.). In Peru, this has been framed as a temporarily limited right to regularize during a certain period in 2017. Supreme Decree, No. 001-2017-IN, Jan. 2, 2017 (Peru).

15. Rodrigues de Silva and Hoogkamer v. The Netherlands, App. No. 50435/99, Eur. Ct. H. R. (Jan. 31, 2006), <http://www.refworld.org/cases,ECHR,464dcaca2.html> [perma.cc/ZC9F-NCTD].

provided that the children are dependent on their parents.¹⁶ When family life is not considered as a sufficiently strong link to obtain residence, this can lead to dramatic consequences. In the United States for example, around half a million parents of U.S. nationals were deported between 2009 and 2013.¹⁷

Finally, and in line with the U.N. Convention against Torture, the MIMC affirms the requirement that no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that the individual would be in danger of being subjected to torture, inhuman or degrading treatment.¹⁸ These constraints on expulsion are further supplemented by the MIMC’s broader framing of the grounds for a claim to international protection. Not only does this approach offer a more capacious standard for accessing refuge under a formal status, but the MIMC also explicitly includes the requirement that States provide recognition for protection needs that may arise *sur place*.¹⁹ In doing so, the MIMC opens additional space for States to provide avenues to regularize the status of certain groups of undocumented persons.

These three elements combined offer States Parties the possibility to opt for a less restrictive legal choice when dealing with undocumented migration. This is paramount in the case of the so-called un-removable migrants, meaning those migrants who cannot be expelled for a variety of reasons including the lack of cooperation of the countries of origin, the lack of a functioning government in the nationality State with the capacity to issue an identity document, or simply the non-recognition of an individual as a national by that second State. At times States may tolerate a segment of the population as being undocumented with potential risks of increasing labor exploitation and vulnerability.²⁰ Indeed, the puzzle of un-removable

16. This would be the case when both parents are to be deported but not necessarily when it is only one who is expelled. See Cases C-34/09, Gerardo Ruiz Zambrano v. Office National de l’emploi (ONEm), 2011 E.C.R. I-01177, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0034&from=EN> [https://perma.cc/5M5A-RUVL]; C-256/11, Murat Dereci et al. v. Bundesministerium für Inneres, 2011 E.C.R. 734, ¶ 68, http://eur-lex.europa.eu/resource.html?uri=cellar:f0ce2b9b-9d5e-4c91-8455-eb248eb288b2.0002.05/DOC_1&format=PDF [https://perma.cc/MAD4-JDWV].

17. R. CAPPS ET AL, MIGRANT POL’Y INST. & URBAN INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES: A REVIEW OF THE LITERATURE (2015).

18. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51, art. 3 (1984).

19. See MIMC, *supra* note 5, arts. 125(d), 128.

20. Motomoro, *supra* note 3, at 22. For examples of unreturnable migrants, see

migrants is particularly important regarding vulnerable categories of individuals such as pregnant women, unaccompanied minors or those who have been the victims of trafficking.²¹ The Model International Mobility Convention provides States with a legislative choice more in line with respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination.²² If the intention is to have safe and orderly migration, we need to re-assess how we legally tackle the distinction between irregular and regular migration and the legal transitions between both concepts. By encouraging States to strengthen regularization mechanisms, providing transparent, non-discretionary criteria to access regular status, and by prioritizing residence status as the first option for undocumented migrants under certain conditions, the MIMC is a step in the right direction.

VANDERBRUGGEN ET AL, POINT OF NO RETURN: THE FUTILE DETENTION OF UNRETURNABLE MIGRANTS (2014), http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf [<https://perma.cc/RQ4H-Z2GL>].

21. See MIMC, *supra* note 5, art. 76 on protection during pregnancy providing safeguards against loss of status on such grounds; Chapter VI, Part II requiring that States provide assistance to victims of trafficking in persons without regard to the immigration status of such victims (art. 181) as well as special protections for children (art. 182, Child Victims of Trafficking in Persons); and art. 184 providing that in cases of victims of trafficking in persons States shall consider adopting legislative or other appropriate measures that them to remain in its territory, temporarily or permanently, giving appropriate consideration to humanitarian and compassionate factors.

22. See *Id.*, Preamble.