PROTECTING MIGRANTS' RIGHTS: UNDOCUMENTED MIGRANTS AS LOCAL CITIZENS

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ABSTRACT

Migration is a complex phenomenon, which cannot be easily summarized. Many migrants are stripped from their social capital and rendered vulnerable to whoever has power over their life. Irregular migration comes in a multiplicity of patterns. This vulnerability is deepened by deterrence measures and preventive policies, that have been a part, of the reinforced international security paradigm since 9/11. Even if migrants have rights in theory, the practice of States is often to deny access to recourses in case of abuse, and migrants cannot really mobilize the local populations in favour of their cause. Whatever the migration policies adopted at federal or national level, it might be socially advantageous to consider all migrants, whether in a regular situation or not, as local citizens in order to make sure that they have access to the services they need (schooling of the children, health care for the family, etc.) and models exist which prove that, beyond political slogans, it is possible and beneficial.

提要

移民是一个复杂的现象，并不能很容易地加以归类。许多移民由于丧失了其社会资本，对于任何一个掌控着他们命运的人来说都是脆弱的。非正规移民有着多重模式。自9·11以来，作为加强国际安全的一种手段，各种威慑和防御政策加深了这种脆弱性。即使在理论上移民享有权利，但美国的做法通常是拒绝追索权以防滥用，移民并不能真正获得当地人对他们权利的支持。无论联邦或国家政府采取何种移民政策，将所有移民，无论是正规的还是非正规的，视为当地公民从社会意义上来说是有利的，可以确保他们获得所需的各种服务（子女的教育、家庭的医疗保健，等等）。而这样的范例是存在的，它们表明，除了政治口号，这是有可能的，也是有益处的。

INTRODUCTION

Politicians adopt contradictory discourses about irregular migrants depending on the audience they are addressing. To conservative voters and security agencies, they toe the "law and order" line and vow to expel these "criminals". To employers associations, they promise to recruit the labour force needed in our economy. To social workers and NGOs, they insist on the dignity and rights of individuals.

Stephen Legomsky[2] has shown how these varying discourses give rise to two opposing views of irregular migrants. The first image is of hordes of faceless "illegal" migrants, intent on taking jobs from worthy citizens and engaging in dangerous criminal activities. The insecurity thus created must be firmly repressed through detention and deportation. The second typically takes the form of individual stories, giving migrants an identity and a voice. It insists that irregular migration is a crime neither against persons, nor against property, noting that irregular migrants perform tasks that citizens don't want to do. Hence they should be given a chance to gain access to residence and citizenship.

It is in this second category that this article fits, namely that of a humane approach to irregular migration. Although States retain the power to decide who can enter and reside in their territory, there are democratic bodies within the State that may not want to include immigration status as a relevant criteria to define their constituency.

Why should this be? The answer is based on four points: The first is that, as migration is a constant of civilization, we are all migrants. Secondly, we have witnessed, over the past thirty years, the passage from irregular migration as a social phenomenon that responded to the economic needs of post-war growth to its construction as a threat to national security. Nevertheless, third, migrants do have rights and the respect, protection and promotion of the rights of migrants and how they compare to the rights of citizens is the next frontier in the development of human rights policies. As a result, finally, at least locally, we may need to reconceptualise citizenship and residence in order to recognise everyone's human dignity over and above their administrative statuses.

WE ARE ALL MIGRANTS

A. MIGRATION AS A COMPLEX PHENOMENON

Migration is a complex phenomenon that defies caricature. It is a constant of civilization: the history of humanity is that of an endless journey on the various continents of our planet. Over time, it is also a generational phenomenon, triggered by a huge array of political, economic and social factors that cannot meaningfully be altered by short term politics. It is multifaceted: it may be at once an economic transfer, a vector of social transformation, a challenge to territorial sovereignty, a security concern, a clandestine phenomenon, a key to cultural pluralism, etc. It is also a personal trajectory through different social spaces: despite migration being described in terms of "flows" or "waves", we should never lose sight of the individual voicing her hopes and fears.

Humanity is on an ongoing endless journey. We have always been migrants, since our species appeared around 200,000 years ago in Africa and then colonised all continents. Migration is at the heart of many civilisations, as exemplified by the book of Exodus in the Bible, the Kadesh treaty (1275 BCE) between the Pharaoh Ramses II and the Hittites, Homer's Odyssey, the parable of the Good Samaritan in the New Testament, the Hegira in Islam, just to name a few.

Our settling on the land is recent and unstable. Nomadic populations still exist, such as the Roma. Pilgrimages remain important traditions. Rural exodus, urbanisation and seasonal agricultural work, for example, all include elements of migration. "Expats" and "snowbirds" are all migrants. And we dream of outer space.

Migrants have represented about 3 percent of the world population throughout the last century, although numbers have hugely increased, to over 210 million migrants worldwide today. Migration has always existed, from areas of poverty and violence towards regions of prosperity and stability: the first create push factors, the second pull factors. We can slow migration in the short term, but cannot stop it in the long term, as it responds to a basic human need, i.e. the ability to imagine a future for oneself and one's children. Most of us would try to migrate if faced with the choices of the 210 million.

Global North States design policies intended to control migrations in various ways. In countries like Canada, Australia and the United States, immigration policies are mainly used to realize demographic objectives. In contrast, continental European States' policies have been designed to manage unskilled foreign populations, often considered as cheap labour. But both share common policies, such as the repression of irregular migration and resurgent temporary migrant workers' schemes. These policies create spheres of vulnerability. Temporary migrant workers and irregular migrants are often left at the mercy of employers who can trigger their deportation. This is the case, for example, in Canada, for migrants who come under the seasonal agricultural workers programme or the live-in care-givers programme. This power over the migrant's life generally silences them and creates a huge potential for exploitation including sexual exploitation – a modern form of slavery.[3]

Irregular migration results from the interplay of three factors: our hidden low-skilled labour migration needs, the needs of those seeking to emigrate from countries in the south, and our repressive border policies which interfere with the effective interplay of push and pull factors.

Thus, the plight of the migrant illustrates the conflict between the two basic paradigms in international law and policy. Under the traditional territorial sovereignty paradigm, the host State decides who enters and stays in the country, who is a member of the political community. But according to the more recent human rights paradigm, every person has fundamental rights that should be respected by any authority. The conflict sets States asserting their power of exclusion against migrants who try to resist through their rights.

B. IRREGULAR MIGRANTS ARE EXTREMELY DIVERSIFIED

Irregular migrants do not constitute a homogeneous community. Although they used to be generally young, able-bodied, male and unskilled, this picture is changing, becoming more diversified.

The irregularity of their administrative status comes from very different sources. They may have arrived on a temporary tourist, student or migrant worker visa, and decided to stay on. They may have entered the country clandestinely either through "smuggling" rings, or using improper identity and travel documentation. The latter may be forged altogether, or "altered" (the documents are authentic but the identity is that of another person), or entirely valid but the real reason for the travel (i.e. work) has not been disclosed. They may also have been stranded while transiting through the country and trying to access another country.

Indeed, they may have been brought to the country as young infants by their parents who have remained in an irregular situation: although schooled and socialized as any other resident, they then discover as young adults that they have no status in what they consider their country. They may have been apprehended by the authorities on the day they try to enter the country or after twenty years' residence in the country. They may have founded a family, married a resident or citizen, and they may have children who are born citizens of the country. Some have achieved very successful professional lives, integrating themselves easily into the wider community, even publicly recognized for their achievements. Others will remain in the shadows, bonding mainly with fellow irregular migrants or with persons from their country of origin.

All this to say that there is not one pattern of irregular migration. If one takes the time to inquire and research, one will find very different life stories, as compelling and deserving of respect as any other.

THE SECURITIZED CONTROL OF MIGRATIONS

In the period of post-war prosperity, irregular migration was seen as a minor cost to be paid to meet the soaring demand for unskilled labour. It was the oil crisis of 1973 that led to and justified the relative closure of Global North borders to foreign workers. Combined with an increased accessibility to international travel and communications, the number of asylum claims and later of irregular migrants soared. States reacted with a strong anti-asylum discourse and with repressive and deterrence measures against irregular migration.

Deterrence measures attempt to discourage irregular migrants from entering the country by raising the cost and diminishing the benefits of migration. They focus on reducing the entitlements offered to migrants, such as the elimination of appeals in the immigration process and restriction of access to legal aid, labour market and social protection. Migrant smuggling is increasingly criminalised. States resort more to international agreements to facilitate the return of undesirable migrants. In addition, migrants face increased detention.[4] *Preventive measures* are designed to impede the arrival of irregular migrants on "our" territory altogether in order to avoid the possible intervention of NGOs, lawyers, politicians or journalists to fight deportations, since none of these actors will intervene in favour of someone who is maintained abroad. Measures include visa regimes, among which the visa obligation for Mexican and Czech nationals is the most recent Canadian example, an obligation directly triggered by the rise in the number of asylum claims from these two countries. There are also carrier sanctions (fines imposed on transportation companies for bringing foreign individuals without appropriate documentation), the effect of which is a partial privatisation of migration controls. States also resort to interception mechanisms abroad in order to prevent irregular migration: Canada has deployed "migration integrity officers" abroad.

Immigration intelligence is widely shared without effective control on access to the personal information found on such databases. International economic cooperation arrangements – such as the Barcelona Process in the Mediterranean, the Puebla process for Central America or the EU-ACP development agreements – nowadays all contain chapters obliging countries in the Global South to implement migration control mechanisms that "protect" the Global North. Borders and seas are militarized: Guantanamo during the '90s was used to "warehouse" Haitians picked up on the high seas before returning them home; the enduring Pacific Solution in Australia has applied the same mechanism towards migrants coming through Indonesia; the European Frontex agency is patrolling the Mediterranean to the same end. European countries have discussed the idea of an "externalisation" of asylum procedures, which would only take place abroad, in such countries as Libya, Morocco, Albania and Mauritania[5].

All in all, States are increasingly coordinating efforts to set within a coherently articulated strategy their arsenal of measures for preventing irregular movements of persons, including asylum seekers and refugees, and reducing the "burden" of such migration.

These measures proceed from a transformation of the political paradigm, reflected by a new public discourse on migrants. Especially since 9/11, as well as the 2004 Madrid and 2005 London bombings, migrants are considered suspect, dangerous. More than before, they are associated with economic ills (unemployment, welfare state crisis, etc.), insecurity (inner cities, petty violence, organized crime, terrorism, etc.) and identity anxiety (demographic changes, identity markers). The *"us and them"* mentality is at work, creating discrimination and easily manipulated into hatred. Migration is now part of a new international security paradigm structured around the "securitisation of the public space" (water security, food security, energy security, communication security, environmental security, etc.)[6].

But is it justified? Irregular entry is not a crime against persons or against property: it is essentially the crossing of a virtual line in the sand, which hurts no one in itself. Moreover, the use of smuggling rings is often the last resort, when all other avenues of protection are closed. In history, countless people were saved by smugglers (remember the movie *Casablanca*). The large majority of irregular migrants pose no security risk (the 9/11 terrorists were not irregular migrants). Although framed as a fight against international criminality, the migration control mechanisms serve more to reassure citizens that governments are taking appropriate action, than to meaningfully increase their security.

Furthermore, measures against irregular migration are inefficient, as they never address a root cause for migration, i.e. the need for exploited labour in the Global North. The exploitation of vulnerable migrants in specific sectors of the economy (construction, agriculture, domestic workers, cleaning or catering services, for example) enhances the competitiveness of Global North economies. These "illegal employers" are an essential pull factor that is systematically forgotten in government discourse regarding irregular migration: the fact that "we" are co-responsible for the phenomenon is never mentioned[7].

MIGRANTS HAVE RIGHTS

Irregular migration is now treated as a form of "international criminality", the implication of which is that irregular migrants shouldn't be recognized any rights. Indeed, not one State of the Global North signed or ratified the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[8], which details the rights of all migrants. Its "flaw" is to extend many of these rights to irregular migrants.

In international law, as well as in most domestic legal systems, two rights are exclusive to the citizen: the right to political participation, which means the right to vote and be elected to office, and the right to enter and remain on the territory. All other rights in principle apply equally to the foreigner and the citizen, by virtue of their common humanity. Foreigners benefit from the right to equality and to not being discriminated against on the ground of nationality. They are protected against returning to face torture and arbitrary detention. Foreign children enjoy specific protections. Foreigners must have access to remedies and due process. They benefit from guarantees even in cases of national security. In Canada, according to article 1 of the *Canadian Charter of Rights and Freedoms,* a differentiation between citizens and non-citizens must be "reasonable and justifiable in a free and democratic society"[9].

This is what several tribunals have recently affirmed. The Supreme Court of Canada has curtailed the discretionary elements and the secrecy of the long-term detention without charges of persons subject to a security certificate[10]. The United States Supreme Court has progressively imposed a due process framework to the detention in Guantanamo Bay of suspects caught in the "war against terror"[11]. The European Court of Human Rights has affirmed that so-called "international" zones in airports are actually national territory where human rights guarantees apply[12]. The British House of Lords has decided that indefinite detention and discriminatory practices in a foreign airport are against basic human rights guarantees[13].

In the end, once past the moral panic that followed 9/11, normal legal frameworks slowly reasserted themselves. Our common universal human rights framework has been established by the World War II generation. Its legacy is that law must always prevail over executive power. This was threatened by the modus operandi established for the "war on terror". It is heartening to see courts restricting the application of laws and policies that expanded executive powers against individual freedoms.

Political mobilisation must complement legal guarantees to defend human rights. The history of the 20th century showed that majorities can be wrong and that individuals and minorities must be able to defend their rights against the majority. Marginalized or vulnerable categories of people have always had to fight for their rights: industrial workers, women, aboriginals, national minorities, detainees, gays and lesbians, among others. In modern times, they had to fight through the courts, against the Executive, against Parliament, and often against a majority of public opinion. Migrants are the latest such a vulnerable group.

Who will defend them? One cannot generally expect the Executive or the Legislator to protect the rights of migrants. They are convenient scapegoats for the woes of our societies. They rarely complain and do not vote, so they are legally and politically insignificant. As nationalist populist discourse goes unopposed, public opinion is easily deflected from supporting or even taking an interest in migrants. NGOs, churches, pro bono lawyers and other concerned citizens are thus often left to carry the burden of defending their rights.

RECOGNISING MIGRANTS' ROLE IN OUR SOCIETIES: MIGRANTS AS LOCAL CITIZENS

Migrants are an integral part of the city; they should be recognized as such. They would be citizens with a small «c», as they are not nationals; but, locally, they would be considered as citizens, on an equal footing with everyone who also lives and works in the city.

Irregular migrants all work (they can't afford not to); their work contributes to the competitiveness of the economy in several sectors like agriculture, cleaning, construction or catering. They pay taxes on everything they buy or rent, and sparingly use public services. The absence of an administrative status that recognizes the whole range of their rights makes them vulnerable. Restoring a meaningful status to such persons, albeit only locally, would go a long way towards empowering them to fight exploitation and discrimination.

Examples exist of how some local communities already adopt a different attitude on vulnerable migrants. In many American cities (such as San Francisco), the police have decided to ignore immigration status in carrying out their work with fellow citizens to maintain the confidence of all segments of the population: fighting violence becomes impossible when victims or witnesses do not call the police for fear of deportation. In Toronto, all children have the right to go to school whatever the status of their parents, in conformity with a "don't ask, don't tell" policy. In Massachusetts, the State hands out driver's licences without checking immigration status, thus allowing irregular migrants to gain access to many services. In many European countries, resident European citizens can now vote at local elections; but several other jurisdictions also allow resident aliens to vote in local elections: six townships in Maryland; two towns in Massachusetts (Amherst and Cambridge); New York, Chicago and Arlington (VA) for school board elections; and New Zealand for all elections[14]. In Quebec, the AH1N1 flu vaccination campaign of the fall of 2009 was available to all, irrespective of immigration status. In Paris, "Médecins du Monde" administers 21 medical dispensaries for irregular migrants with the cooperation of the local authorities.

These are all examples that show that a different conception of the place of vulnerable migrants in many host societies is possible. Immigration status is still an important factor at the national level and the power of States to deport migrants in irregular situations is not at issue: it is part of the present international legal regime. However, local governments (regional or municipal) can take a different stand. They don't have to act as enforcers of an immigration policy which is not theirs (for example, by interconnecting their databases to that of the immigration department). In order to appropriately focus on their own priorities (such as fostering social cohesion), they can leave it to be enforced by the immigration authorities.

The key idea is that there should not be any special status (or non-status) for migrants at local level: there would be only one status for all inhabitants of the city or local community. Any person who resides there and participates in the economic and social workings of any society should enjoy a status that allows her to benefit from services commensurate to her contribution and participate in the local political decision-making.

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FOOTNOTES

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[2] Stephen H. Legomsky, "Portraits of the Undocumented Immigrant: Epiphany through Dialectic", (2009): 44 *Georgia Law Review,* online: *http://sssrn.com/abstract=1372171* (last accessed 5 March 2010).

[3] See, for example, on the new forms of slavery: *Siliadin* v. *France,* no 73316/01, ECHR, 2005-VII.

[4] Migreurop, "'The encampment' in Europe and around the Mediterranean Sea" (2009), online: www.migreurop.org/IMG/pdf/L_Europe_des_camps_2009.pdf (last accessed 23 November 2009).

[5] Derek Lutterbeck, "Policing Migration in the Mediterranean", (2006): 11 *Mediterranean Politics* 59, at 69; Sophie Huguenet, *Droit de l'asile: le projet britannique d'externalisation,* Paris, L'Harmattan, 2004.

[6] See: Thomas Faist, "The Migration-Security Nexus. International Migration and Security before and after 9/11", Malmö University School of International Migration and Ethnic Relations, Willy Brandt Working Papers, 2004, online: www.dspace.mah.se/bitstream/2043/686/1/Willy%20Brandt%202003-4.pdf (last accessed 26 November 2009).

[7] See: International Labour Office, *Towards a Fair Deal for Migrant Workers in the Global Economy,* Report VI (International Labour Conference, 92nd Session), Geneva, 2004, at 48, online: www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/meetingdocument/kd00096.pdf (last accessed 20 December 2009); Global Commission on International Migration, *Migration in an interconnected world: New directions for action,* Global Commission on International Migration, 2005, at 32-40, online: www.gcim.org/attachements/gcim-complete-report-2005.pdf (last accessed 20 December 2009).

[8] On 5 March 2010, 42 states had ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (18 December 1990): United Nations Treaty Collection, "CHAPTER IV: HUMAN RIGHTS 13. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", online: www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (last accessed 5 March, 2010).

[9] *Canadian Charter of Rights and Freedoms,* part I of the *Constitution Act,* 1982 [Schedule B to *Canada Act 1982* (1982, U.K., c. 11)], art. 1-15.

[10] *Charkaoui* v. *Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350.

[11] *Boudemiene* v. *Bush,* 553 U.S. (2008); *Sale v. Haitian Centers Council,* 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).

[12] *Amuur* v. *France,* 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

[13] *A and others* v. *Secretary of State of the Home Department,* [2004] UKHL 56; *Regina* v. *Immigration Officer at Prague Airport,* [2004] UKHL 55.

[14] See: David C. Earnest, "Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm", American Political Science Association, 2003, online: www.odu.edu/~dearnest/pdfs/Earnest_APSA_2003.pdf; Jamin B. Raskin, «Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage» (1993) 141 *University of Pennsylvania Law Review* 1391