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New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows

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Abstract

Governments cannot ignore international human rights standards for unauthorized migrant workers forever. This chapter presents a call for comparative work on the issue of the legal regimes affecting unauthorized immigrant workers in order to bring governments into greater awareness and compliance with their obligations to unauthorized immigrant workers.

Global illegal migration by laborers seeking economic opportunities is expanding, resulting in an increasing number of migrants in every country who are working in violation of immigration laws. Unauthorized immigrant workers are numerous enough to form a recognizable group in every major world economy, because most receiving countries have immigration laws that make the existence of such a group inevitable. On the one hand, these countries welcome and avail themselves of the physical labor of foreigners. But on the other hand, their laws restrict the number of legally issued visas and other immigration possibilities available for blue-collar workers to migrate legally. Therefore, only an insignificant percentage of the actual number of workers demanded by receiving-country employers are afforded a legal means to enter the country and take on the jobs they seek.

In recent years, a spate of new international and regional legal developments has established and extended the human rights of these unauthorized migrant workers. The international community, however, has not embraced the standards on unauthorized migrant workers with enthusiasm. For example, ratification of the

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families remains very low.

This chapter first posits that comparative research could play an important role in developing and improving ratification of norms for the protection of unauthorized immigrant workers. The weak status of international migrant human rights treaties such as the Convention demonstrates two intertwined phenomena: the international human rights community's awareness of the particularly vulnerable condition of unauthorized migrant workers, and most national governments' preference to avoid granting rights to this population. In this situation, the development, publication, and analysis of information on national treatment of unauthorized immigrant workers is urgently needed to support the new standards. Awareness about national policies will further the international norms by: (1) identifying the best practices for replicating and building customary international law; (2) identifying violative practices and situations where new standards would most profitably be disseminated; and (3) placing national laws about unauthorized workers into a human rights framework to create new paradigms and approaches to these laws.

Secondly, the chapter argues that comparative research relating to this population is lacking. The extensive literature on comparative labor and employment rights rarely touches on this population. Immigration laws are also subjects of legal surveys and comparative work that, again, generally do not include information specifically relevant to unauthorized migrant workers and their rights qua workers. These efforts should be expanded or supplemented by work that includes issues of particular importance to unauthorized workers and to the receiving and sending governments whose policies affect them.

Finally, the chapter proposes principles that should underlie national studies and research. To facilitate comparative projects, the chapter proposes considerations for constructing effective comparisons of this complex policy area, arguing for three underlying principles: (1) as unauthorized immigrants are affected by a range of legal regimes, neither immigration nor labor law alone can address their human rights situation, but all relevant regimes must be addressed, including the special problem of enforcement and providing remedies to a shadow labor force; (2) national studies should not ignore instrumental arguments, for example the positive correlation between enforcement and security issues that preoccupy the polity, but should instead make clear the enforcement effect of providing rights to the workers through dampening of employer demand; and (3) comparative re-

search must be structured to support and further new international standards relating to unauthorized immigrant workers.

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I Introduction

Governments cannot ignore international human rights standards for unauthorized migrant workers forever. Global illegal migration by laborers seeking greater economic opportunity is expanding,[1] resulting in an increasing number of migrants in every country who are working in violation of immigration laws. In recent years, a spate of new international and regional legal developments has expanded the human rights of these unauthorized migrant workers. The international community, however, has not embraced the standards on unauthorized migrant workers with the same enthusiasm. For example, ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter Migrant Workers Convention)[2] remains very low. This chapter posits that comparative research could play a role in developing and improving ratification of norms for the protection of unauthorized immigrant workers. Moreover,

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1 See International Organization for Migration, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003) at 18 (describing the expansion of illegal migration); with *ibid.*, at 66 (noting that "economic hardship as well as the attraction of the western consumption society remain the most common motive for both regular and irregular movements") [hereinafter *2003 World Migration Report*].

2 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, adopted on 18 December 1990 (in force 1 July 2003).

Anne F. Bayefsky (ed.), Human Rights and Refugees, Internally Displaced Persons and Migrant Workers, *pp. 551-582.*
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the chapter argues that comparative research relating to this population is lacking and proposes principles that should underlie national studies and research.

A Background and description of the issues

Unauthorized immigrant workers are numerous enough to form a recognizable group in nearly every economy in the world – and subject to international human rights protection – because most receiving countries have immigration laws that make the existence of such a group inevitable. On the one hand, these countries welcome and avail themselves of the physical labor of foreigners. But on the other hand, their laws restrict the number of legally issued visas and other immigration possibilities available for blue-collar workers to migrate legally. Therefore, only an insignificant percentage of the actual number of workers demanded by receiving-country employers are afforded legal means to enter the country and take on the jobs they seek.

Many receiving countries have specialized laws and policies that restrict entry and other rights afforded to this category of workers, reflecting national decisions about how to tap into foreign low-wage labor pools while controlling immigration. Arriving at these decisions is a dynamic process in most migrant-receiving countries, leading to shifting regimes in the many fields of law that join to govern national treatment of unauthorized workers. For their part, sending countries must determine how to balance facilitating remittances from expatriate laborers with advocating that wealthier countries protect their nationals from dangerous transit and working conditions abroad. Meanwhile, the combination of their economic importance, vulnerability, and cross-border nature has led to the development of regional and international standards to protect unauthorized migrant workers. A series of new standards, pronouncements, and institutions has recently been dedicated to the rights of migrant workers, and many of these efforts are focusing specifically on the rights of unauthorized and trafficked workers. However, the international movement for unauthorized migrant worker rights is hampered by governmental indifference, as the standards providing rights to these workers are proving slow to gain ratification and meaningfully binding status. The underlying resistance to these standards must be examined and addressed in order to sustain and implement these important international standards.

One important indicator of host-country indifference to migrant workers is the lack of information about their legal rights. As regimes shift at the regional and international level, comparative studies about national policies can inform and heighten the impact of the process. However, the extensive literature on comparative labor and employment rights rarely touches on this population. Immigration laws are also subjects of legal surveys and comparative work that, again, generally do not include information specifically relevant to unauthorized migrant workers. These efforts should be expanded or supplemented by work that includes issues of particular importance to unauthorized workers and to the receiving and sending governments whose policies affect them.

B Goals and objectives

This chapter presents a call for comparative work on the issue of the legal regimes affecting unauthorized immigrant workers. To facilitate comparative projects, the chapter proposes considerations for constructing effective comparisons of this complex policy area, arguing for three underlying principles: (1) that comparative legal studies relating to this population must transcend the traditional enforcement focus on deportation, sanctions and trafficking and encompass all of the intertwined domestic legal regimes that strongly impact the human rights of migrants; (2) that, conforming to a growing trend in comparative methodology, this work must examine the vindication of labor and employment rights and acknowledge the special problem of delivering justice and fashioning remedies for a shadow labor force; and (3) that the research must be structured to acknowledge and further the new international standards relating to unauthorized immigrant workers.

C Definitions

Overlapping, confused, and politicized terminology is rife in the realm of migration law,[3] a problem that is compounded when carried into a trans-national and comparative context. The author seeks to enhance clarity in the following discussion by defining a few terms. For the purposes of this chapter, "unauthorized immigrant workers" or "unauthorized migrant workers" are people whose remunerated, otherwise lawful[4] employment violates national immigration laws, and "undocumented immigrants" or "undocumented migrants" are people whose presence in a country violates immigration law.[5] "Receiving country" refers to a country within which an unauthorized immigrant worker is working, and "sending country" indicates a country whose expatriates are laboring as unauthorized immigrant workers in another country. Finally, the chapter uses the contrasting categories of "blue-collar/white-collar" and "laborer/professional" as alternatives to the "skilled/unskilled" distinction.

3 See Kevin R. Johnson, "'Aliens' and the U.S. Immigration Laws: the Social and Legal Construction of Nonpersons", 28 *University of Miami Inter-American Law Review* (1997) 263, *passim*.

4 "Otherwise lawful" means that the immigrant's work is proscribed only by immigration laws. Thus, for the purposes of this chapter, the term does not encompass work that is illegal because of the nature of the industry, such as prostitution, or because of other worker characteristics, such as child labor.

5 For a detailed discussion of these terms, see Beth Lyon, "When More 'Security' Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers", 6 *University of Pennsylvania Journal of Labor and Employment Law* (2004) 571 at 573-582.

II Key role of comparative research

Research that compares the legal rights granted by national governments to unauthorized immigrant workers living within their borders is limited, and it is increasingly necessary that such information be compiled and publicized. Comparative treatment of the issue is timely because of the growth of the phenomenon worldwide and because of the current state of the regional and international standards relating to this population. Globalization has led to an increased change and displacement in local economies around the world and to greater movement of workers across borders.[6] National information would describe best practices at a time when international standards about unauthorized workers are in development, and such information would also reveal violative practices as transnational bodies begin to enforce these standards. Comparative analyses could further propose conceptual frameworks for the transnational and regional bodies that are now setting out to grapple with the human rights problems of unauthorized migrant workers. Additionally, comparative information could directly influence national policy at a critical juncture as many receiving countries re-examine their legal treatment of unauthorized immigrant workforces.

A Emerging international standards

In recent decades, the international human rights standard-setting community has singled out the rights of migrant workers for expansion, clarification, and enhanced monitoring. However, the key United Nations (hereinafter UN) international instrument promulgated for this purpose is languishing for lack of ratification. The same is true for other specialized migrant worker rights treaties issued by the International Labour Organization (hereinafter ILO). It is only more recently that international institutions have identified unauthorized migrant workers as a particularly vulnerable subclass of migrant workers in general, thus requiring enhanced protections for this group. However, recent pronouncements have taken the form of soft law advisory opinions and recommendations, and only with attention from advocates, scholars, and governments will these recommendations find binding expression in treaty provisions and law.

1 International Labour Organization

Long known for its attention to *authorized* migrant worker rights, the International Labour Organization first issued binding standards on unauthorized workers in the 1970s. As discussed in further detail below, the ILO recently issued a legal opinion in favor of an unauthorized worker in both the United States and Spain whose worker rights had been limited because they were not legal immigrants. With expansive interpretations continuing at the international level, despite the difficult

6 See The World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, International Labour Office (2004) at para. 430.

political context that clearly surrounds unauthorized migrant worker rights, the stage is set for supportive national action.

The ILO has, from its pre-United Nations inception, been the international body most concerned with migrant worker rights,[7] putting forth its earliest binding standards for them in the 1939 Migration for Employment Convention (hereinafter ILO Convention No. 66).[8] However, ILO Convention No. 66 and other conventions that followed designated only legally present migrants for protection.[9] Unauthorized migrant workers remained ineligible for protection under the ILO Convention until 1975, when ILO Convention No. 143[10] explicitly accorded them rights in an international treaty,[11] granting them equal status with authorized migrant workers with regard to a limited array of benefits.[12] However, ILO Convention No. 143 has, as of 2004, garnered only 18 ratifications,[13] which is notable given that a similar treaty, promulgated in 1949 and also governing migrant worker rights, was ratified by 42 countries, but does not include rights for the unauthorized.[14] In 1980, the

7 See Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Clarendon Press (1997) at 92 [hereinafter Cholewinski].

8 Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment (1939) (ILO No. 66) (revised by ILO No. 97 and no longer open to ratification). See also, *ibid.*, Cholewinski at 93.

9 For example, ILO Convention No. 66 Article 3.1(b) discusses the recruitment abroad and immigration of migrants and the other provisions of the Convention deal with related matters; thus the Convention appears to contemplate only legal migration pursuant to employment contracts. See *ibid.*, ILO No. 66; see also, Migration for Employment Convention (Revised) (1949) (ILO No. 97), 120 UNTS 70 (in force 22 January 1952) at art. 11.1 (defining a migrant for employment broadly as "includ[ing] any person regularly admitted as a migrant for employment").

10 See Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975) (ILO No. 143), 1120 UNTS 323 (in force 9 December 1978).

11 See *supra*, note 7, Cholewinski at 135; see also, Linda S. Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention", 25 *International Migration Review* (1997) 737 at 738 [hereinafter Bosniak].

12 See *supra*, note 10 at art. 9. Note also that the ILO addresses the rights of unauthorized immigrant workers in a recent report, labelling the unauthorized as among the "most vulnerable groups of workers" and calling for "inter-country cooperation" on labor migration. See International Labour Conference, *Report VI: Towards a fair deal for migrant workers in the global economy*, ILO (2004) at 60-61, 119-127, available at <www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>.

13 See ILO Convention No. 143 was ratified by 18 countries. Ratification information is available at <www.ilo.org/ilolex/english/convdisp2.htm> (last visited 30 November 2004).

14 See ILO Convention No. 97 was ratified by 42 countries. Ratification information is available at <www.ilo.org/ilolex/english/convdisp2.htm> (last visited 30 November 2004).

ILO expressed the opinion that the provision relating to unauthorized workers was hindering the ratification effort.[15] Meanwhile, the ILO 1949 Migration for Employment Convention (hereinafter ILO Convention No. 97),[16] which explicitly excludes unauthorized migrant workers from protection,[17] has received 42 ratifications.[18]

Despite this indication of the international community's reluctance to commit to protections for unauthorized migrant workers, two recent interpretations of broader ILO treaties indicate that the ILO continues to consider this category of workers. Those interpretations appear in cases initiated by the General Union Workers of Spain[19] and the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Conference of Mexican Workers,[20] which involved complaints against Spain and the United States, respectively. In each case, the ILO Committee on Freedom of Association (hereinafter the ILO Committee) expanded rights for unauthorized immigrant workers.

The General Union of Workers of Spain initiated *Case No. 2121*, a complaint under two ILO conventions already ratified by Spain: (1) the Freedom of Association and Protection of the Right to Organise Convention (hereinafter ILO Convention No. 87); and (2) the Right to Organise and Collective Bargaining Convention (hereinafter ILO Convention No. 98).[21] The complaint involved a new Spanish law explicitly restricting "the exercise of [the] right[s] to organize and strike, freedom of assembly, demonstration and association and, by extension, collective bargain-

15 See International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, General Survey of the Reports relating to Conventions Nos. 97 and 143 and Recommendations Nos. 86 and 1511 concerning Migrant Workers, 66th Session (1980).

16 See *supra*, note 9, ILO No. 97.

17 See *ibid.*, at art. 11.1.

18 See *supra*, note 14.

19 See *Case No. 2121 (Spain): Definitive Report*, Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT), in *327th Report of the Committee on Freedom of Association*, International Labour Office Governing Body, GB.283/8, 283rd Session (March 2002) 164 [hereinafter *Case No. 2121*].

20 See *Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments*, Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), in *332nd Report of the Committee on Freedom of Association*, GB.288/7 (Part II), 288th Session (November 2003) 142, available at <www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf> [hereinafter *Case No. 2227*]. In November 2004, the Committee expressed its "regret[] that the Government has not provided any information on measures taken to explore possible solutions, in full consultation with the social partners concerned, aimed at redressing [inadequate remedial measures]." See Case No. 227 (United States), in *335th Report of the Committee on Freedom of Association*, GB.291/7, 291st Session (November 2004) at 18, available at <www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf>.

21 See *supra*, note 19, *Case No. 2121*.

ing rights" to legally present workers, and did not grant such rights to unauthorized workers.[22] The ILO Committee rejected the provision and decided that Article 2 of ILO Convention No. 87, which states that "workers … without distinction whatsoever, shall have the right to establish and … join organisations of their own choosing," applies equally to all workers regardless of their immigration status.[23] Based on this finding, the ILO Committee requested that Spain "take into account" its interpretation.[24] While the ILO Committee does not have coercive powers, its interpretive expansion of a general standard is an important step for unauthorized workers, particularly given the fact that ILO Convention No. 87 has been ratified by 142 countries.[25]

More recently, in November 2003, the ILO Committee decided a complaint filed against the United States by the AFL-CIO and the Conference of Mexican Workers.[26] The complaint arose from a 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds v. National Labor Relations Board*,[27] which reviewed the case of an unauthorized immigrant worker who had been fired when he participated in a union organizing movement.[28] Earlier, the U.S. National Labor Relations Board (hereinafter NLRB) had ruled that the employer's decision to fire the worker had violated the applicable domestic labor protection laws.[29] A dispute then arose between the employer and the NLRB over the remedies.[30] The issue before the Supreme Court was whether an unauthorized worker who is fired in violation of his rights should be compensated for the time he missed from work, when, because of his illegal immigration status, he would not have legally been entitled to work those hours under immigration law.[31] Weighing labor rights against immigration enforcement, the Supreme Court had ruled that, even though the worker's labor rights had clearly been violated, he was not entitled to what amounts to the key monetary remedy in U.S. labor cases: the right to recover the wages he had lost as a result of the firing.[32]

In reviewing *Hoffman*, the ILO Committee decided that the remaining non-monetary remedies available against the employer who had unlawfully dismissed

22 See *ibid.*, at para. 550.

23 See *ibid.*, at para. 550.

24 See *ibid.*, at para. 562.

25 International Labour Organization, Convention No. 87 was ratified by 142 countries. Ratification information is available at <www.ilo.org/ilolex/english/convdisp2.htm> (last visited 30 November 2004).

26 See *supra*, note 20, *Case No. 2227*.

27 *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) [hereinafter *Hoffman*].

28 See *supra*, note 20, at para. 555.

29 See *supra*, note 27 at 152.

30 See *ibid.*

31 See *ibid.*

32 See *ibid.*

the worker "in no way sanction[ed] the act of anti-union discrimination already committed,"[33] and found that "the remedial measures left to the NLRB … [were] inadequate to ensure effective protection against acts of anti-union discrimination."[34] The ILO Committee then invited the United States to reverse the Supreme Court through legislation restoring full remedies to unauthorized migrant victims of labor rights violations.[35]

The ILO Committee's decision is significant because it requires "effective protection against acts of anti-union discrimination"[36] for unauthorized immigrant workers. The ILO did not interpret ILO Convention No. 143 protections for unauthorized migrants because the United States has not ratified ILO Convention No. 143. Instead, it interpreted the United States' general obligation, as a member state of the ILO, to respect freedom of association.[37] Thus, the ILO Committee defined unauthorized workers as rights-holders under the ILO's general protection. Cases 2121 and 2227 also demonstrate the ILO's continued willingness to grapple with the politically difficult issue of unauthorized migrant worker rights.

2 United Nations Migrant Workers Convention

The 2003 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[38] is another example of both the political difficulty of the unauthorized migrant worker issue and the potential for supporting new standards that are included therein. Although the treaty has been criticized for omitting significant rights from the section protecting unauthorized workers, it does represent the United Nations' first effort to ascribe binding rights specifically to the unauthorized. Perhaps unsurprisingly in light of the above discussion regarding ILO Convention No. 143, which gives rights to the unauthorized, the migrant worker community is also hampered by a very low number of ratifications. At the same time, however, the treaty brings the resources of the UN human rights monitoring system to bear on the issue in a new way, and marks an important juncture for new national efforts on behalf of these protections.

33 See *supra*, note 20 at para. 609.

34 *Ibid.*, at para. 610.

35 See *ibid.*, at para. 613.

36 See *ibid.*

37 See *ibid.*, at para. 600. The complainants had originally invoked three general freedom of association sources: 1) ILO Convention No. 87, the Freedom of Association and Protection of the Right to Organise Convention, 1948; 2) ILO Convention No. 98, the Right to Organise and Collective Bargaining Convention, 1949; and 3) the 1998 Declaration on Fundamental Principles and Rights at Work (see *ibid.*, at para. 555). In response to the United States' argument that it has ratified neither ILO convention, and that the 1998 Declaration is non-binding (see *ibid.*, at paras. 578-579), the ILO Committee noted that its jurisdiction over "complaints alleging violations of freedom of association" arises from the ILO Constitution. See *ibid.*, at para. 600.

38 See *supra*, note 2.

By the late 1970s, ILO Convention No. 143 and other initiatives brought the issue of migrant workers to the international forefront,[39] resulting in the 1990 promulgation of the Migrant Workers Convention,[40] which provides for a series of migrant worker rights. While it exempts unauthorized workers from many of the listed rights,[41] a portion of the treaty does explicitly provide rights for the unauthorized,[42] including the right to a refund of their social security contributions,[43] the right to return home with their savings and belongings,[44] and the right to send their children to public school.[45]

However, as was the case with ILO Convention No. 143, ratification of the Migrant Workers Convention has lagged.[46] Although the treaty needed only 20 ratifications to go into force, it was not until the summer of 2003 – 13 years after its promulgation – that the Convention actually took effect.[47] Moreover, as of November 2004, the treaty has received only 27 ratifications, most of them registered by sending rather than receiving countries.[48]

3 UN World Conference Against Racism Final Documents

The human rights of unauthorized immigrant workers received attention at the 2001 UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban. Both the Durban Declaration and Durban Programme of Action noted the vulnerability of migrants "in an irregular situa-

39 See *supra*, note 11, Bosniak at 738; see also, James A.R. Nafziger and Barry C. Bartel, "The Migrant Workers Convention: Its Place in Human Rights Law", 25 *International Migration Review* (1991) 771 at 773-774.

40 See *supra*, note 2.

41 See *ibid.*, at arts. 36-56 (grouped under "Part IV: Other Rights of Migrant Workers and Members of Their Families Who Are Documented or in a Regular Situation").

42 See *ibid.*, at arts. 8-35 (grouped under "Part III: Human Rights of All Migrant Workers and Members of Their Families").

43 See *ibid.*, at art. 27.2.

44 See *ibid.*, at art. 32.

45 See *ibid.*, at art. 30.

46 See *supra*, note 8, Cholewinski at 202-203 (noting that the UN had anticipated that the Migrant Workers Convention would receive the 20 ratifications needed to go into force by 1992).

47 See for example, Office of the United Nations High Commissioner for Human Rights (OHCHR), Status of Ratification of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at <www.ohchr.org/english/law/cmw-ratify.htm> (last visited 30 November 2004) [hereinafter Migrant Workers Convention Ratification List].

48 See *ibid*. As of 24 November 2004, the countries that have ratified the Migrant Workers Convention are: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Libya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay.

tion"[49] and the positive social contributions of migrants.[50] The Declaration further stated "that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices."[51] The Durban Programme urged governments to "ensure the full equality of all before the law, including labour law …"[52] and called for "the full enjoyment by *all* migrants of all human rights."[53]

The Durban documents are not binding treaties, nor do the statements noted above represent the first hortatory words by the United Nations in support of unauthorized migrant workers. For example, in 1985 the General Assembly adopted the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live,[54] a document with provisions that apply to all migrants, including the undocumented.[55] However, with only a few exceptions,[56] these provisions are essentially restatements of general human rights standards.[57] The Durban documents are a significant recent international law development because, unlike most previous statements, they specifically link the situation of undocumented immigrants with racism and xenophobia. Furthermore, a recent advisory opinion from the Inter-American human rights system, discussed in the next

49 See *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration*, in *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban, 31 August – 8 September 2001*, A/CONF.189/12 (2002) 5 at para. 50 [hereinafter *Durban Declaration*]; *Programme of Action*, in *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban, 31 August – 8 September 2001*, A/CONF.189/12 (2002) 28 at para. 27 [hereinafter *Durban Programme of Action*].

50 See *ibid.*: *Durban Declaration* at para. 46 (referring to "migrants"); *Durban Programme of Action* at para. 27 (referring to "migrants").

51 *Supra*, note 49, *Durban Declaration* at para. 16.

52 *Supra*, note 49, *Durban Programme of Action* at para. 29.

53 *Ibid.*, at para. 30(g) (emphasis added).

54 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted by G.A. Res. 40/144 on 13 December 1985 [hereinafter Declaration on Non-Nationals].

55 See *ibid.*, at art. 1 (defining "alien" as "any individual who is not a national of the State in which he or she is present") with arts. 5-6, 9-10 (granting rights to "aliens"), and arts. 7-8 (granting rights to "aliens lawfully residing in the territory of a State").

56 See for example, *ibid.*, at art. 3 (requiring states to "make public" their migration laws); art. 4 (requiring aliens to "observe the laws of the state in which they reside … and regard with respect the customs and traditions of…that State"); art. 1(g) (granting aliens the right to send home remittances); art. 10 (granting the right of consular access).

57 See for example, *ibid.*, at art. 5.1(a) (granting, *inter alia*, "the right to life and security of the person" and protection from "arbitrary arrest or detention"), art. 2(b) (granting "the right to freedom of expression").

section, demonstrates the increasing importance of relying on non-discrimination analysis for the protection of the unauthorized. Thus, to support such an analysis, the explicit linkage of a group like undocumented immigrants with a classic protected category like race is an important connection.

4 The Americas

The Western Hemisphere is a region that demonstrates relatively little cooperation in the field of labor migration. The region is host to what many view as the world's largest unauthorized worker flow, from Mexico to the United States,[58] which is generally cited as the primary example of unauthorized worker host countries.[59] Recent estimates place its undocumented immigrant population at around 9 million,[60] and its unauthorized worker population at around 5.3 million.[61]

To date, the governments of the Americas have not engaged in significant labor migration harmonization. For example, although the North American Free Trade Agreement (hereinafter NAFTA) regime opened a process for the migration of some technical and managerial personnel,[62] the NAFTA negotiators specifically rejected Mexico's attempt to include labor migration.[63] Thus what is probably the largest worldwide flow of illegal migration is unregulated at the supranational level. However, various bi-lateral and sub-regional trade area arrangements in South America – like the trade agreement between the Andean Community and Mercosur, for example – do address labor migration to varying degrees.[64] Further, consultative processes in the region are linking labor migration to the issue of migrants'

58 See Migration Policy Institute, *Immigration Facts: Unauthorized Immigration to the United States* (2003), available at <www.migrationpolicy.org/pubs/USImmigration-Facts2003.pdf>.

59 See *ibid.*

60 See *ibid.*, (noting "high end estimates" place the number at 12 million people). See also, *supra*, note 1, *2003 World Migration Report* at 58.

61 The Pew Hispanic Center estimates the numbers of undocumented immigrants in the workforce, placing the urban labor force at 5.3 million and the agricultural one at 1.2 million, with some uncertain percentage of overlap. See B. Lindsay Lowell and Roberto Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*, Pew Hispanic Center (21 March 2002) at 7-8. The Center notes that this overlap between the unauthorized urban and agricultural work forces is "significant", and, because of uncertainty about how to calculate the overlap, the authors decline to provide an estimate of the total unauthorized workforce. *Ibid.* This chapter thus uses the urban labor force figure of 5.3 million as a conservative estimate of the total number of unauthorized workers in the United States.

62 See North American Free Trade Agreement, (17 December 1992), "Temporary Entry of Business Persons" (part 5, chapter 16) (effective 1 January 1994), reprinted in 32 ILM 289 (1993) at 296 [hereinafter NAFTA].

63 See Sidney Weintraub, "North American Free Trade and the European Situation Compared", 26 *International Migration Review* (1992) 506 at 507.

64 See *Andean Community-Mercosur Trade, 1992-2001*, (December 2002), available at <www.comunidadandina.org/ingles/stadis/CanMer9201.htm>.

human rights.[65] To date, though, there is no regional treaty addressing these rights, and only eight countries in the region have ratified the UN Migrant Workers Convention, all of them sending countries.[66]

An important new development in the Americas is the 2003 decision by the Inter-American Court of Human Rights (hereinafter Inter-American Court), the region's human rights court of last instance, which has contentious and advisory jurisdiction over all the regional human rights treaties and declarations.[67] As noted above, the U.S. Supreme Court decision in *Hoffman* stripped unauthorized workers of an important remedy for labor rights violations.[68] The plaintiff in *Hoffman* was a Mexican national,[69] and when the case decision was handed down, the Mexican government expressed public displeasure.[70] However, Mexico could not take the United States directly to task in the human rights system because the Inter-American Court of Human Rights does not have contentious jurisdiction over the United States.[71] Therefore, a few months after the Supreme Court rendered its decision, the government of Mexico requested an advisory opinion from the Inter-American Court that would determine whether undocumented immigrants are entitled to protection under the regional non-discrimination and equality-before-the-law standards.[72] It further requested that the Court determine whether such protections would mandate equal worker rights *and remedies* (the issue in the *Hoffman* case) for unauthorized immigrant workers.[73]

65 See *supra*, note 1, *2003 World Migration Report* at 182-86.

66 The eight countries are Belize, Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Mexico, and Uruguay. See *supra*, note 47. Note that Mexico is also considered to be a significant receiving country.

67 See American Convention on Human Rights, 1144 UNTS 123 (in force 18 July 1978) at arts. 61-65 [hereinafter American Convention].

68 See Section II(A)(1) of this chapter, *supra* notes 7-37.

69 See *supra*, note 27, *Hoffman* at 137.

70 See Press Release, Embassy of Mexico, "The Embassy of Mexico Is Concerned About the Consequences of a U.S. Supreme Court Ruling", Washington, D.C. (1 April 2002) (on file with author).

71 See *supra*, note 67, American Convention at art. 62.3 (stating that the Court has jurisdiction over cases against "States Parties [that] recognize such jurisdiction") with *ibid.*, at art. 63.1 (stating that a state party may declare its consent to the Court's jurisdiction "upon depositing its instrument of ratification or adherence to this Convention."). The United States has not ratified the Convention, and therefore cannot fall into the Court's jurisdiction: see Signatures and Current Status of Ratifications: American Convention on Human Rights: "Pact of San Jose, Costa Rica," available at <www.cidh.org/Basicos/basic4.htm> (last visited 30 November 2004).

72 See Request for Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights, in *Advisory Opinion OC-18* (17 September 2003) Inter-Am. Ct. H.R., (Ser. A) No. 18 (2003) at 10 [hereinafter Request for Advisory Opinion].

73 See *ibid.*, at 10-11.

In fall 2003, the Court answered these questions in the affirmative, holding that unauthorized workers are entitled to enjoy the same employment and labor rights as the citizens of the country of residence. In *Advisory Opinion OC-18*,[74] the Court enumerated a non-exclusive list of rights to which unauthorized workers should be equally entitled: "the prohibition on forced labor, the prohibition and abolition of child labor, special treatment for women workers, and rights relating to association and union freedom, collective bargaining, fair wages for work performed, social security, judicial and administrative guarantees, reasonable working hours and adequate working conditions (safety and hygiene), rest and indemnification."[75]

As a controlling interpretation of the regional human rights treaties, the standards set forth in *Advisory Opinion OC-18* can be invoked in individual petitions against all 35 governments in the region by the Inter-American Commission on Human Rights, the system's court of first instance. The Commission can elect to carry such cases forward against the subset of countries that have accepted the Court's jurisdiction. Among the interesting holdings in *Advisory Opinion OC-18* is the designation, in a concurring opinion, of unauthorized immigrant workers as a "suspect category."[76] In effect, this pronouncement acknowledges that the vulnerability of unauthorized immigrant workers outweighs their definitional status as lawbreakers for the purposes of determining whether they merit heightened protection under general regional non-discrimination human rights standards. For this reason, and because it explicitly accords new rights to unauthorized workers, *Advisory Opinion OC-18* represents an important jurisprudential development with regard to the international legal status of such workers.[77]

5 Europe: enforcement outstripping rights

A 2001 estimate placed the number of unauthorized workers in Western Europe at 3 million.[78] Despite these numbers, the European Union (hereinafter EU) has never issued protective human rights standards for unauthorized immigrant workers. Moreover, although it has in place a highly developed regime creating open

74 See *Advisory Opinion OC-18* (Juridical Condition and Rights of the Undocumented Migrants), (17 September 2003) Inter-Am. Ct. H.R., (Ser. A) No. 18 (2003) [hereinafter *Advisory Opinion OC-18*], available at <www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc>.

75 *Ibid.*, at para. 157.

76 See Concurring Opinion of García, J., in *Advisory Opinion OC-18* (Juridical Condition and Rights of the Undocumented Migrants), (17 September 2003) Inter-Am. Ct. H.R., (Ser. A) No. 18 (2003) [hereinafter *Advisory Opinion OC-18* García Concurrence].

77 See Beth Lyon, "The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18", 29 *New York University Review of Law and Social Change* (forthcoming in 2004).

78 See Peter Stalker, *The No-Nonsense Guide to International Migration*, New Internationalist Publications (2001).

intra-EU migration,[79] only in recent years has the EU begun to address the issue of third-country (originating outside the EU) labor migration[80] and the problem of unauthorized migrant workers specifically.[81] The EU is currently undertaking its first harmonization of national illegal immigration policies,[82] but early indications are that the policy will almost exclusively take an enforcement approach, with no attention to the human rights of the workers or the appropriateness of current labor visa levels.

Furthermore, Europe has promulgated no specialized protective standards for unauthorized immigrant workers analogous to those contained in the UN Migrant Workers Convention.[83] The European Social Charter protections for migrants and the European Convention on the Legal Status of Migrant Workers apply only to EC workers in other EC countries, who are by definition legally working as a matter of regional immigration law.[84] Moreover, the only European countries to ratify the UN Migrant Workers Convention are Bosnia and Herzegovina and Turkey.[85]

Against this backdrop of inaction on specialized human rights standards for unauthorized migrant workers, the European harmonization process could have a greater impact on their rights. Nonetheless, key documents in this process demonstrate the lack of attention to in-country unauthorized migrant worker rights: a 2001 Communication of the Commission of the European Communities (hereinafter Commission Communication)[86] and a 2002 proposal by the Council of the Eu-

79 See for example, Jan Niessen, "Migrant Workers", in *Economic, Social and Cultural Rights: A Textbook*, 2nd ed., Asbjrrn Eide, Catarina Krause, and Allan Rosas (eds.), M. Nijhoff Publishers (2001) 389 at 391 (describing the European Union has having "the most developed precedent with regard to migrant workers).

80 See *ibid.*, at 401-402 (describing 1997 amendments to the European Community Treaty giving the regional government authority "a limited mandate" to regulate third-country immigration).

81 See Commission of the European Communities, Communication from the Commission to the European Parliament and the Council in View of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents, Brussels, COM(2003) 323 Final, *passim* (6 March 2003).

82 See *ibid.*

83 See *supra*, note 8, Cholewinski at 200 (stating that the Migrant Workers Convention "...offers a minimum standard of treatment for illegal migrants in Europe, who are presently [1996] ignored by analogous European standards.")

84 See *supra*, note 79, Niessen at 394 (describing the European Social Charter, 529 UNTS 89 (in force 26 February 1965), and the European Convention on the Legal Status of Migrant Workers, ETS No. 093 (in force 1 May 1983)).

85 See *supra*, note 47, Migrant Workers Convention Ratification List.

86 See Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, Brussels, COM(2001) 672 Final (15 November 2001) [hereinafter EC Illegal Immigration Communication].

ropean Union Presidency,[87] both of which call for "a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union."[88]

The Commission Communication suggests a series of guidelines and an action plan for developing a harmonized approach to illegal immigration.[89] The section of the Communication entitled "Compliance with International Obligations and Human Rights" refers only to refugee protection provisions, and states that "whatever measures are designed to fight illegal immigration, the specific needs of potentially vulnerable groups like minors and women need to be respected."[90] While these are important principles, the report made no mention of the employment and labor protections, nor the deportation due-process protections, that are central to the interests of the vast majority of illegal migrants. Likewise, the 2002 Council proposal contains two paragraphs on human rights that essentially restate the Commission's Communication. The proposal again focuses on asylum procedures, with a reference to women and children, but makes no reference to employment or labor protections.[91]

Upon the release of these documents, European advocacy groups expressed disappointment.[92] For example, the Platform for International Cooperation on Undocumented Migrants (hereinafter PICUM) expressed its regret that the Commission had not made a statement as to the centrality of "respect for a dignified existence of undocumented migrants," and urged the importance of respecting "the human and basic social rights of undocumented migrants."[93] Similarly, a coalition of churches[94] further noted that the proposal "neglected" the issue of employer

87 See Council of the European Union Presidency, *Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union*, Brussels, 6621/1/02, Rev. 1 (27 February 2002) at 1 [hereinafter 2002 EU Presidency Proposal].

88 See *ibid.*

89 See *supra*, note 86, EC Illegal Immigration Communication, *passim.*

90 See *ibid.*, at 7-8.

91 See *supra*, note 87, 2002 EU Presidency Proposal at 7.

92 See Platform for International Cooperation on Undocumented Migrants (PICUM), *Comments on the Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, (April 2002), available at <http://www.picum.org/POLICY/Comments%20Clandestine%20Mig.htm> [hereinafter PICUM Comment]; Caritas Europe et al., *Comments* (on the Communication from the Commission to the Council and the European Parliament On a Common Policy on Illegal Immigration, COM (2001) 671 Final of 22 November 2001 and on the Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union as adopted on 28th February Presented by the Presidency to the Council of the European Union (Document ST 6621/1/02 REV 1)), [hereinafter European Churches' Comment].

93 *Ibid.*, PICUM Comment at 1.

94 The church groups were Caritas Europe, Churches' Commission for Migrants in Europe, Commission of the Bishops' Conferences of the European Community Working Group on Migration, the International Catholic Migration Commission, the Jesuit Ref-

responsibility to their unauthorized workers.[95] Indeed, the proposal specifically noted that illegal employment would *not* be considered, pending a study of Member States' laws.[96] Further, the proposal acknowledged that "a significant number" of illegal immigrants entered the receiving countries legally and overstayed their visas[97] – a revealing admission in a document that heavily emphasizes the detection and prosecution of smugglers. Finally, the proposal noted that the Commission and Council had already issued initial proposals about illegal work in the mid-1990s, but that, since 1996, "the sensitive issue of illegal employment of third-country nationals has not been tackled again in the Council."[98] In a report that discusses many seemingly delicate political issues, it is revealing that only illegal employment is described as "sensitive."

The third significant omission from these foundational documents in the European process is any discussion of labor immigration policy itself. Such a discussion would, for example, evaluate the appropriateness of maintaining a policy of strictly limited third-country labor visas, and also air the issue of legalization of existing undocumented populations.[99] Instead, the Commission Communication focuses on such issues as the maintenance of harmonized visa-required country lists and the creation of an integrated border administration.[100] In fact, it explicitly excludes any possibility that the harmonization process will include addressing status regularization for existing undocumented populations and notes, in bold type, that "[i]llegal entry or residence should not lead to the desired stable form of residence."[101]

Thus, the EU is at an important crossroads, and the issue of unauthorized immigrant worker rights appears to have been lost during this period of information-gathering and regime formation. The next section of this chapter argues that attempts to influence both the harmonization process and the absence of specialized human rights standards could be strengthened by identifying and highlighting protective measures at the national level.

B Importance of national policies to international and regional norm development

The status of the emerging norms described above demonstrates two intertwined phenomena: the international human rights community's awareness of the par-

ugee Service Europe, and the Quaker Council for European Affairs. See *ibid.*, European Churches' Comment at 1.

95 See *ibid.*, at 4.

96 See *supra*, note 87, 2002 EU Presidency Proposal at 28.

97 See *ibid.*, at 33.

98 *Ibid.*

99 See *supra*, note 92, PICUM Comment at 2-3; *supra*, note 92, European Churches' Comment at 3-4.

100 See *supra*, note 86 at 11-15.

101 See *ibid.*, at 6 (emphasis removed).

ticularly vulnerable condition of unauthorized migrant workers, and most national governments' preference to avoid granting rights to this population. In this situation, the development, publication, and analysis of information on national treatment of unauthorized immigrant workers is urgently needed to support the new standards. Awareness about national policies will further the international norms by: (1) identifying the best practices for replicating and building customary international law; (2) identifying violative practices and situations where new standards would most profitably be disseminated; and (3) placing national laws about unauthorized workers into a human rights framework to create new paradigms and approaches to these laws.

Underlying the new standards is the realization that an unauthorized immigrant worker's status as an immigration lawbreaker is imposed on a vibrant transnational labor market by what Guiraudon and Joppke call "receiving states' labeling practices."[102] The new standards proclaim that, while governments retain the right to determine who may live and work within their borders, their migration policies must conform to international human rights obligations. They expand the areas of law – employment, labor, and even some areas of immigration law itself – within which the workers' status as lawbreakers is of less significance than their situation of deprivation, vulnerability, and likelihood of experiencing classic forms of racial, national, and gender discrimination.

However innovative and compelling these new standards may be, most of them are institutionally vulnerable. In the case of the ILO and the UN, standards have been put into place, but widespread enforcement is unlikely in the short term because the new standards lack ratification. In Europe, the regional migrant worker rights treaty excludes the unauthorized, and a key harmonization dialogue touching directly on the issue of such workers virtually ignores both human rights and the appropriateness of the underlying labor migration regimes. In the Americas, the key trade regime similarly ignores labor migration, and only the actions of an influential sending government have brought a new standard to the region, through *Advisory Opinion OC-18.*

The underlying reasons for government hesitation are easily imagined. First, governments are under unceasing pressure from their electorates to demonstrate that they are limiting immigration, in the name of national security, cultural and racial purity, social spending, the environment, and domestic worker protection.[103] An interesting expression of this pressure is found in U.S. border policies, which have tightened controls at the U.S.-Mexico border with arguably little result, causing one commentater to argue that the enhanced controls "ha[ve] less to do with actual deterrence and more to do with managing the image of the border."[104] Meanwhile,

102 See Virginie Guiraudon and Christian Joppke, "Controlling a New Migration World", in *Controlling a New Migration World*, Virginie Guiraudon and Christian Joppke (eds.), Routledge (2001) 1.

103 See *ibid.*, at 8-11.

104 See *ibid.*, at 12 (quoting Peter Andreas, "The Escalation of US Immigration Control in the Post-NAFTA Era", 113 *Political Science Quarterly* (1998) 591 at 593).

governments are also under pressure from influential industries, such as agriculture and construction, which typically profit most from the use of low wage unauthorized immigrant labor,[105] requiring and using a steady flow of such laborers.

The result is that most governments chart a domestic course that emphasizes enforcement against unauthorized immigrant workers *qua* lawbreakers, while simultaneously refusing to enforce employer-focused laws, such as employer sanctions regimes and wage protections.[106] For example, in 1997 *no* employers were successfully prosecuted under the United Kingdom's employer sanctions law,[107] this number that grew to just 23 in the year 2000.[108] Similarly, in fiscal year 1999, the U.S. Immigration and Naturalization Service issued 383 warnings and 417 Notices of Intent to Fine to employers nationwide, in stark contrast with the millions of workers known to be unauthorized.[109] In the international arena, governments manage these twin pressures through supporting greater international and border law enforcement, as demonstrated by the European harmonization process noted above, but avoid endorsing unauthorized immigrant worker rights standards, the enforcement of which could negatively impact important domestic commercial interests.

Despite the unpromising political climate, the sizable gap between new international human rights standards and national support for them can be bridged. Over time, receiving countries can be pulled into human rights regimes that may initially seem economically disadvantageous to powerful industrial interests, as the international anti-slavery movement proved.[110] The publication and analysis of national standards on the human rights of unauthorized immigrant workers have a key role to play in the bridging process.

Information about national policies will facilitate international standard-setting and enforcement, first by identifying national legal norms that can influence interpretation of new standards and build toward the formation of customary international law. This interpretation will be happening at several levels, principally at the UN Committee on Migrant Workers and the Inter-American Commission on Human Rights. Evidence of national practices is generally of interest to inter-

105 See James F. Hollifield, "The Politics of International Migration: How Can We 'Bring the State Back In'?", in *Migration Theory: Talking Across Disciplines*, Caroline B. Brettell and James F. Hollifield (eds.), Routledge (2000) 137 (describing theories of "clientelist politics" that result in more open immigration policies).

106 See *supra*, note 1, *2003 World Migration Report* at 66 (stating that "enhancing the responsibility and culpability of employers who hire irregular migrants … is … [the] point on the migration policy and practice chain that the problems are more resistant to change").

107 See *ibid.*, at 67.

108 See *ibid.*

109 See *ibid.*, at 5.

110 See for example, John Oldfield, *British Anti-Slavery*, available at <www.bbc.co.uk/history/society_culture/protest_reform/antislavery_print.html> (stating that "in the space of just 26 years, the British government outlawed the slave trade that Britain had created and went on to abolish the practice of slavery throughout the colonies").

national agencies seeking to implement new standards, and can be presented in the form of *amicus* briefs, testimony, and statements in the context of cases and country reporting. The Committee on Migrant Workers will soon begin to issue General Comments, which are periodic interpretations and elaborations on the provisions of the Migrant Workers Convention.[111]

In addition, information about national standards can contribute to the formation of customary international law, one of the traditional sources of international law.[112] The Statute of the International Court of Justice defines international custom as "evidence of a general practice accepted as law."[113] One widely accepted[114] formulation of the customary law test is "a general and consistent practice of states followed by them from a sense of legal obligation."[115] Customary international law is normally invoked to fill a gap in the law controlling a case – for example, in the domestic courts of countries that have not ratified a treaty containing the relevant standard. Without information about country-by-country practices, engaging in a customary law analysis is impossible. Thus, information on the domestic rights of unauthorized migrant workers can assist tribunals at all levels as they examine the possibility that a customary norm may have emerged.

An example of an issue for which a customary law analysis might be fruitful is the question of wages for unauthorized workers. The ILO does not enumerate the right to pay for work performed[116] in its list of four fundamental worker rights declared binding on all countries.[117] In countries outside the Americas that have not ratified the Migrant Workers Convention or ILO Convention No. 143, unauthorized workers seeking pay for work may have no direct binding law to invoke to support a wage and hour claim. They might argue that they are entitled to pay for work performed as an adjunct of the prohibition on slavery, which is one of the ILO fundamental rights, or as a matter of general non-discrimination. In addition, an unauthorized immigrant worker seeking to recover pay for work performed might

111 See OHCHR, Committee on Migrant Workers: Monitoring the protection of the rights of all migrant workers and members of their families, available at <www.ohchr.org/english/bodies/cmw/index.htm> [hereinafter CMW Overview].

112 See Statute of the International Court of Justice, (San Francisco, 26 June 1945) at art. 38 (listing "international custom" as one of the four sources of law that the International Court of Justice must apply).

113 *Ibid.*

114 See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 1st ed., Clarendon Press (1996) at 28.

115 See American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987) at § 102(2).

116 Note that pay for work *performed* is distinct from the remedy of back pay for *lost* time, which was the issue in the *Hoffman* case.

117 The four fundamental rights are the prohibition on slavery, the prohibition on child labor, the right to non-discrimination in the workplace, and the right to freedom of association. See ILO Declaration on Fundamental Principles and Rights at Work, adopted at 86th Session (June 1998) at art. 2.

also present a customary law argument, which would avoid the problems of a non-discrimination balancing test that pits rights against sovereignty over migration.[118]

In addition to identifying rights-*protective* practices, national information can also support international standards by identifying *violative* practices, identifying situations in which information about new international standards would most profitably be disseminated among the migrant labor community. In the absence of international jurisdiction and monitoring resources, specific information about negative practices can help the international community to identify countries where the dissemination of information about relevant new human rights standards might be most urgently needed. For example, the low number of UN Migrant Worker Convention ratifications severely limits the number of countries that have an obligation to the new monitoring body to submit – and defend – reports about their compliance with the treaty. Thus the production of comparable information about national migrant worker rights by any source will facilitate the work of international human rights monitors simply by expanding the resources and information available to them.

A third way that national information can support international standards is through direct education about the existence and content of the standards. Research and reporting that places national laws about unauthorized workers into emerging human rights frameworks can begin to create new paradigms and approaches to domestic laws by the scholars, advocates, and judges who will be exposed to them. This type of familiarization process is particularly important in private legal fields such as employment and labor law, where international law arguments and frameworks might be less likely to arise.

C *Importance of comparative information when national policies are in transition*

Around the world, policies governing undocumented immigrants are in a marked state of flux. Faced with growing populations of undocumented people and unauthorized workers, many European countries have engaged in or are considering legalization measures.[119] The United States, where the last general legalization took place in 1986, has for years debated the possibility of a new legalization.[120]

118 See for example, Human Rights Watch, "Treating 'Illegals' Legally: Commentary regarding the European Commission Green Paper on a Community Return Policy on Illegal Residents", Briefing Paper (August 2002) at 5 (describing EU and European national non-discrimination laws that have been interpreted to "provid[e] immigration authorities with special powers to discriminate against certain groups").

119 See Claudia Cortés Diaz, "Regularization of Undocumented Migrant Workers: What Are the Advantages? What are the Inconveniences? What are the Criteria?", in *Undocumented Migrant Workers in Europe*, Michele LeVoy, Nele Verbruggen and Johan Wets (eds.), PICUM and HIVA (2004) 81 at 84.

120 See Anna Marie Gallagher, "The Situation of Undocumented Persons in the U.S.: A Practical Overview", in *Undocumented Migrant Workers in Europe*, Michele LeVoy, Nele Verbruggen and Johan Wets (eds.), PICUM and HIVA (2004) 67 at 78-79.

As governments undertake to scrutinize their policies in this regard, awareness of practices of other countries can directly influence – with or without the mediating influence of international standards and actors – the decisions of those searching for solutions. Of course, it is always possible that information about rights-*undermining* practices will lead to a deterioration of support for international standards, rather than an increase – a "race to the bottom." However, as argued above, enforcement already plays an exaggeratedly dominant role in the political discourse in most receiving countries.[121] In light of that political reality, it is exposure to information about comparative human rights *protective* measures that seems most likely to be the novel element in any political debate.

III Current lack of comparative information

The previous section argued that important new international standards are emerging, that governments are ignoring them, and that publication and analysis of national standards could both influence and improve the legal status of the new standards. The following section attempts to demonstrate that the entities that might be expected to produce this reporting and analysis are currently not doing so. Indeed, among the standard sources of comparative information on national immigration and labor law, the domestic legal treatment of unauthorized immigrant workers is conspicuously absent.

The current literature 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. The following discussion divides the relevant literature into: (1) international monitoring mechanisms' information-gathering practices; (2) ongoing surveys of multiple national legal schemes; (3) comparative scholarly monographs; and (4) *ad hoc* comparative agency studies. In each of these bodies of literature, there is no information relevant to unauthorized immigrant workers, while information relating to other specialized groups of laborers and immigrants does receive detailed attention.

A International monitoring mechanisms

Inter-governmental monitoring mechanisms have the potential to draw out comparative national information about unauthorized immigrant worker policies. At both the international and regional levels, numerous mechanisms elicit, evaluate, and publicize information about human rights. Among these, a number of specialized entities now have mandates encompassing the rights of unauthorized immigrant workers. Section II(A) above discussed the emergence of new supranational norms and the low levels of political support these norms are receiving. The following subsection returns the focus to the international level, to show that the low levels of political support discussed above, in addition to limitations in the substantive protections, restrict the ability of international institutions to gather

121 See *supra,* notes 103-109 and accompanying text.

the type of national information that this chapter argues is critical to drive the new standards.

1 United Nations mechanisms

Two UN mechanisms currently focus on the rights of migrant workers. As described above, the coming-into-force of the UN Migrant Workers Convention triggered the formation of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter CMW), which now monitors the performance of the treaty's ratifying nations. The United Nations also houses a Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants. Because of their resources and the status of their mandates, for the immediate future these institutions are unlikely to produce detailed comparative information on the rights of unauthorized immigrant workers.

As it begins operations, the CMW has great potential for developing the Convention's standards and promoting awareness of the Convention.[122] In the course of its activities, it will also develop the capacity to solicit and publicize a good deal of nuanced information about state practices with regard to unauthorized immigrant workers. Each of the States parties to the Convention will move onto a reporting schedule by which it will submit a written statement about its performance under the terms of the treaty and respond in writing to any supplementary questions the Committee may generate.[123] If the Committee operates similarly to the other UN human rights treaty bodies, it will hold sessions at which States Parties appear and report to it orally.[124] The Committee will then issue an evaluative report containing any findings of treaty violations, commendation of positive practices, and recommendations for future action.[125] In addition, most UN treaty monitoring bodies perform missions and issue reports containing their findings, uncovering further detailed information about specific locales of concern, although these missions are generally quite limited in number.[126]

The Committee is, then, a significant new development in the international capacity to uncover information about migrant workers in general. However, in the near term, its ability to gather information about unauthorized immigrant workers will be limited in two ways. First, the UN Committee has the power to com-

122 For example, as discussed in Section II(B) of this chapter, the Committee will soon begin issuing General Comments offering detailed interpretations of the provisions of the Migrant Workers Convention (see note 111).

123 See *supra*, note 2, Migrant Workers Convention at art. 73.1 (States Party reporting requirement), art. 74 (Committee examination of reports and requests for supplementary information).

124 See Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, Transnational Publishers (2001) at 3 (noting that treaty bodies "normally [review reports] in the presence of state representatives").

125 See *supra*, note 111, CMW Overview.

126 See *supra*, note 124, Bayefsky at 92-93.

mand information only from those countries that have ratified the treaty,[127] and as noted above, as of 24 November 2004, only twenty-seven countries have done so: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Libya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay.[128] The Committee will only have jurisdiction over these countries, rendering it virtually powerless to gather information in many large-scale migrant worker-receiving states like the EU countries, South Africa, the United States, Canada, Australia, Malaysia, and Japan. Moreover, as the provisions of the Migrant Workers Convention primarily deal with the treatment of migrant workers by the *receiving countries* in which they are employed, the lack of receiving-country ratifications will significantly restrict the scope of the Committee's inquiry powers.

In addition, the Convention itself limits the Committee's power to gather information about unauthorized immigrant workers by virtue of its substantive provisions. First, it excludes unauthorized workers from several significant protections, including trade union rights[129] and access to social and health services.[130] Moreover, the Convention created few rights that address the unique fundamental deprivations of migrant workers.[131] Most of the rights that the Convention acknowledges – like the right to transfer earnings to the home country – apply only to authorized workers.[132] By contrast, most of the rights accorded to unauthorized workers merely restate provisions in other human rights treaties of general application.[133] One commentator classifies the Convention's provisions as a "deeply ambivalent" protection.[134]

During the years when the creation of the Committee awaited the entry-into-force of the Migrant Workers Convention, the United Nations nonetheless devoted resources to the issue. In 1999, the UN Commission on Human Rights created the

127 See *supra*, note 2, Migrant Workers Convention at arts. 73-74 (requiring participation in the Committee processes by "States Parties"). Additionally, the Committee will have the power to hear individual complaints and complaints by states parties only against those states parties that have explicitly given that jurisdiction to the Committee. See *ibid.*, at arts. 76-77. As of June 2004, none of the states parties had given the Committee jurisdiction under these two provisions. See OHCHR, *Declarations and reservations to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, available at <www.ohchr.org/english/law/cmw-reserve.htm> (last visited 30 November 2004).

128 See *supra*, note 47, Migrant Workers Convention Ratification List.

129 See *supra*, note 2, Migrant Workers Convention at art. 40.1.

130 See *ibid.*, at art. 43.1(e).

131 See *supra*, note 39, Nafziger and Bartel at 787.

132 See *ibid.*, at 790-796 (comparing the Convention provisions with existing treaty provisions).

133 See *ibid.*

134 See *supra*, note 11, Bosniak at 741.

post of Special Rapporteur on the Rights of Migrants.[135] Since that time, the Special Rapporteur has taken and prepared reports on missions to nine countries.[136] These reports discuss the general situation of migrants in each country and list some of the rights of undocumented immigrants, but do not enumerate or analyze the visited countries' laws in this regard.[137]

2 Regional human rights mechanisms

Regional human rights mechanisms also have an important role to play in exposing information about unauthorized immigrant workers, but to date none has devoted the needed resources to gather detailed information. As noted above, the European human rights institutions have no mandate protective of unauthorized immigrant workers. The Americas have made the most progress in this regard, and the following subsection focuses on the Inter-American mechanisms; however, these remain unlikely to produce detailed national information on unauthorized migrant worker rights in the immediate future.

The Inter-American Court's deliberations in the *Advisory Opinion OC-18* case elicited some interesting comparative material. Numerous parties submitted briefs and made presentations as *amici curiae,* describing differential treatment of unauthorized immigrant workers in various countries. The Court received particularly detailed information regarding the United States.[138] Of specific interest were the joint brief and presentation by the Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and Harvard Law School, the Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, and the Centro de Justiça Global (Global Justice Center). These discussed information

135 See Commission on Human Rights Res. 1999/44, adopted on 27 April 1999, at para. 3; see also, Commission on Human Rights Res. 2002/62, Human Rights of Migrants, adopted on 25 April 2002, at para. 13 (extending Special Rapporteur's mandate for three years). Resolutions are available at <http://ap.ohchr.org/documents/mainec.aspx>.

136 See OHCHR, Special Rapporteur of the Commission on Human Rights on the human rights of migrants – Country Visits, available at <www.ohchr.org/english/issues/migration/rapporteur/visits.htm>.

137 See for example, Specific Groups and Individuals: Migrant Workers, Report submitted by Ms. Gabriela Rodriguez Pizarro, Special Rapporteur, E/CN.4/2004/76/Add.2 (14 January 2004) *passim*.

138 See Brief Amici Curiae of Delgado Law Firm (12 December 2002) at 2-11 (on file with author); Brief Amicus Curiae of Law Office of Sayre and Chavez (6 February 2003) *passim*; Brief Amicus Curiae of Group of Labor, Civil Rights and Immigrants Rights Organizations in the United States (10 February 2003) at 6-21; Brief Amici Curiae of the Harvard Immigration and Refugee Clinic, Student Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools and Global Justice Center (13 January 2003) at 41-57 (on file with author) [hereinafter Harvard University, Boston College, and Center for Global Justice Brief]; Memorial Amicus Curiae of the Center for International Human Rights of Northwestern University School of Law (21 February 2003) at 4-11 (on file with author).

on disparate legal protections in six countries in the Americas, giving an overview of legal treatment and the factual conditions of migrant laborers.[139] All of these efforts were helpful to the Court, but were limited in scope by the deadlines involved in the deliberation process and by the specific advocacy purpose for which they were presented.

The publication of *Advisory Opinion OC-18* lends weight to future attempts by petitioners in all 35 states of the hemisphere to challenge their governments' practices through petitions to the Inter-American Commission on Human Rights. The result of this potential litigation will likely be a close examination of specific, problematic national practices in the employment and labor law areas listed in the Court's opinion. However, this litigation is unlikely to result in the detailed information that this chapter urges. In addition to its contentious jurisdiction, the Commission can initiate general hearings examining broader themes or country situations,[140] a process that could potentially result in the collection of more meaningful data.

An additional important development in the Americas is the Special Rapporteur on Migrant Workers and Their Families in the Hemisphere, created in 1997.[141] The Rapporteur produces detailed annual reports.[142] Since its inception, it has been gathering country-by-country information on the situation of migrant workers by disseminating a detailed questionnaire;[143] though it does not track unauthorized immigration status through an enumerated list of rights,[144] and government responses have been uneven,[145] the responses and the reports on the Rapporteur-

139 See *ibid.*, Harvard University, Boston College, and Center for Global Justice Brief, *passim* (describing situation of migrant workers in Argentina, Brazil, Chile, Dominican Republic, Mexico, and United States).

140 Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109th special session held from 4-8 December 2000, amended at its 116th regular period of sessions, held from 7-25 October 2002 and at its 118th regular period of sessions, held from 7-24 October 2003, at arts. 59-60.

141 See *Fifth Progress Report of the Rapporteurship on Migrant Workers and Their Families*, in *Annual Report of the Inter-American Commission on Human Rights 2003*, OEA/Ser.L/II.118, Doc. 5 rev. 2 (29 December 2003) at para. 1 [hereinafter *2003 Progress Report*].

142 See for example, *ibid.*, *2003 Progress Report*; *Third Progress Report of the Rapporteurship on Migrant Workers and Their Families*, in *Annual Report of the Inter-American Commission on Human Rights 2001*, OEA/Ser.L/V/II.114, doc. 5 rev. (16 April 2001) [hereinafter *2001 Progress Report*].

143 See *ibid.*, *2001 Progress Report* at Annex: Questionnaire on Migrant Workers and Their Families for OAS Member States (containing questionnaire response of El Salvador).

144 See for example, *ibid.*

145 See *Progress Report of the Office of the Rapporteur on Migrant Workers and their Families in the Hemisphere*, in *Annual Report of the Inter-American Commission on Human Rights 1999*, OEA/Ser.L/V/II.106 Doc. 6 rev. (13 April 1999) at para. 39.

ship's missions[146] do represent an important source of national information in the region. Unfortunately, the medium-term prospects for collecting more detailed and comprehensive information are uncertain, as the Special Rapporteurship is currently hampered by lack of funding.[147] In the Americas, the information the Special Rapporteurship is collecting should be expanded and analyzed, by civil society if the OAS does not have the resources, in view of the new ruling in *Advisory Opinion OC-18.*

Thus it seems that international human rights institutions are not currently collecting much of the national data that could drive the international standards they have worked so hard to bring about. In addition, even the better-supported international human rights institutions are limited by the norms of the day. Reporting and analysis of national standards should also reflect the global community's vision for enhanced human rights. For example, in the realm of unauthorized migrant worker rights, one goal to be explored by commentators is the possibility of requiring a more equitable distribution of legal entry opportunities between laborers and professional immigrants. Additionally, scholars can examine the practices of sending countries for patterns that suggest potential obligations to protect expatriate unauthorized workers. Currently, international law lays no obligations on sending nations, an omission that overlooks the important role they can play in improving the welfare of their nationals abroad.

B Ongoing surveys of multiple national legal schemes

Several periodic surveys of multiple national legal schemes deal with topics relevant to unauthorized immigrant workers and could be expanded to include more such information. These surveys are not technically comparative, in that they do not discuss the differences and similarities among national systems, but they do facilitate comparison by providing up-to-date, roughly contemporaneous information in uniform categories. The richest surveys relate to national labor and employment standards, while a smaller set deals with immigration law regimes. However, neither of these specialized bodies of research appears to devote much space to unauthorized immigrant workers.

1 Labor surveys

A number of excellent detailed surveys provide information on national labor and employment law standards.[148] However, they do not provide information on the ap-

146 See for example, *supra* note 141, *2003 Progress Report* at paras. 143-193.

147 See *ibid.*, at para. 8.

148 See for example, William L. Keller et al. (eds.), *International Labor and Employment Laws*, 2nd ed., BNA Books (2003) (describing labor and employment laws in 31 countries, the European Union and NAFTA/NAALC) [hereinafter Keller et al., *International Labor and Employment Laws*]; Roger Blanpain (ed.), *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer (loose-leaf, 1977-) [hereinafter Blanpain, *International Labour Law Encyclopaedia*]; European Industrial Relations Observatory

plicability of these laws to unauthorized immigrant workers. Most of these country studies state that foreigners must have permission to work,[149] and they provide occasional details about the rights of such immigrants,[150] but with few exceptions[151]

On-Line, *Comparative Overview of Industrial Relations in Europe in 2003*, available at <www.eiro.eurofound.eu.int/2004/03/feature/tn0403106f.html>; Roger Blanpain (ed.), *Labour Law, Human Rights, and Social Justice: Liber Amicorum in Honour of Prof. Ruth Ben-Israel*, Kluwer Law International (2001); Rinus Penninx and Judith Roosblad (eds.), *Trade Unions, Immigration and Immigrants in Europe: 1960-1993: A Comparative Study of the Actions of Trade Unions in Seven West European Countries*, Berghahn Books (2000) [hereinafter Penninx and Roosblad, *Trade Unions and Immigration*]; Bob Hepple (ed.), *Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945*, Mansell (1986) [hereinafter Hepple, *European Comparative Study*]; Joris Van Ruysseveldt et al. (eds.), *Comparative Industrial and Employment Relations*, Sage Publications Ltd. (1995) [hereinafter Van Ruysseveldt et al., *Comparative Industrial and Employment Relations*]; Titia Loenen and Peter R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspective*, Kluwer Law International (1999).

149 See for example, Carl Bevernage, "Belgium", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 2-1, 2-100 - 2-101 (2003) [hereinafter Bevernage, *Belgium*]; Stephen E. Tallent et al., "France" in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 3-1, 3-78 - 3-79 (2003); Richard E. Lutringer and Mark S. Dichter, "Germany", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 4-1, 4-106 - 4-107; Piergiovanni Mandruzzato, "Italy", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 5-1, 5-95 - 5-97 [hereinafter Mandruzzato, *Italy*]; Lourdes Martín Flórez and Marina Mengotti González, "Spain", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at at 6-1, 6-84 - 6-86; Katy Jack, "United Kingdom", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 7-1, 7-156 - 7-159; Roy L. Heenan and Thomas E.F. Brady, "Canada", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 21-1, 21-69 - 21-73; Néstor de Buen Lozano et al., "Mexico", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 22-1, 22-70 - 22-72; Pedro Romano Fragoso Pires and Luciana Cabral Marques Gomes, "Brazil", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 30-1, 30-59 - 30-60; Andreas Lauffs, "China", in Keller et al., *International Labor and Employment Laws*, *ibid.*, at 31-1, 31-49 - 31-51. See also, John M. Howells, "New Zealand", in Blanpain, *International Labour Law Encyclopaedia*, *ibid.*, at paras. 109-110; Axel Adlercreutz, "Sweden", in Blanpain, *International Labour Law Encyclopaedia*, *ibid.*, at paras. 101, 371 [hereinafter Adlercreutz, *Sweden*]; Alexandre Berenstein and Pascal Mahon, "Switzerland", in Blanpain, *International Labour Law Encyclopaedia*, *ibid.*, at paras. 94, 98, 98(a)-98(c) [hereinafter Berenstein and Mahon, *Switzerland*]; F. Mecri, rewritten by Monica Smith, "Tunisia", in Blanpain, *International Labour Law Encyclopaedia*, *ibid.*, at paras. 225-226; T. Dereli, "Turkey", in Blanpain, *International Labour Law Encyclopaedia*, *ibid.*, at para. 151; see also, August Gächter, "Austria: Protecting Indigenous Workers from Immigrants", in Penninx and Roosblad, *Trade Unions and Immigration*, *ibid.*, at 70-71.

150 See for example, *ibid.*, Adlercreutz, *Sweden* at paras. 257, 371; *ibid.*, Berenstein and Mahon, *Switzerland* at para. 98.

151 See *ibid.*, Berenstein and Mahon, *Switzerland* at para. 340 (noting that foreign workers who do not have work permits have a right of action under minimum-wage laws).

they do not discuss workplace norms for those who do not have permission. The only significant exception is the entry on U.S. law in each of the major labor and employment surveys – Keller's *International Labor and Employment Laws* and Blanpain's *Encyclopaedia for Labour Law and Industrial Relations* – which explain some aspects of differential treatment of the unauthorized as reflected in federal labor law.[152] But even these discussions lack the detail that the U.S. chapter dedicates to the laws relating to legal workers. For example, neither chapter discusses differential state workers' compensation benefits for unauthorized workers in the United States, although the nuances of state laws are discussed in other contexts in both chapters.[153] Interestingly, many of these sources also reflect greater detail in their treatment of other specialized worker populations, such as children and youth,[154] people with family responsibilities,[155] and disabled workers.[156]

PICUM, the European NGO described above, publishes a web-based survey of the labor rights of unauthorized workers in 13 European countries and the United States.[157] The survey, not yet complete,[158] aims at providing country-by-country information on various social rights subjects, fair labor conditions, the right to organize, the right to education and training, the right to moral and physical integrity, and the right to legal aid.[159] PICUM also recently published a general overview of laws governing unauthorized migrant workers in sixteen European

152 See Patrick Hardin and Timothy J. Darby, "United States", in Keller et al., *International Labor and Employment Laws*, *supra* note 148, at 23a-1, 23j-27 - 23j-40 [hereinafter Hardin and Darby, *United States*] (describing not only the employer sanctions regime, but also describing some of the laws relating to the workplace rights of unauthorized workers); and Alvin L. Goodman and Rebecca H. White, "United States of America", in Blanpain, *International Labour Law Encyclopaedia*, *supra* note 148, at para. 134 [hereinafter Goodman and White, *United States of America*] (describing not only the employer sanctions regime, but also describing some of the laws relating to the workplace rights of unauthorized workers).

153 See Goodman and White, *United States of America*, *ibid.*, at para. 135; Hardin and Darby, *United States*, *ibid.*, at 23b-7 - 23b-9.

154 See for example, David Marsden, "Wages from a European Perspective", in Van Ruysseveldt et al., *Comparative Industrial and Employment Relations*, *supra,* note 148 at 202, 220-221; *supra*, note 149, Adlercreutz, *Sweden* at paras. 148-149; Jordan W. Cowman and Siobhán McKeating, "Hong Kong", in Keller et al., *International Labor and Employment Laws*, *supra* note 148 at 31-134.

155 See for example, *supra*, note 149, Berenstein and Mahon, *Switzerland* at paras. 447-448; *supra*, note 149, Bevernage, *Belgium* at 2-81.

156 See *supra*, note 149, Mandruzzato, *Italy* at 5-80 - 5-82, 5-93 - 5-94; Ramon T. Jimenez, "Philippines", in Blanpain, *International Labour Law Encyclopaedia*, *supra* note 148, at para. 242.

157 See *Basic Social Rights: Countries*, available at <www.picum.org> (last visited 30 November 2004).

158 See *Updating of Information*, available at <www.picum.org> (last visited 30 November 2004).

159 See *supra*, note 157.

countries, including information on "work contract" and "entitlements from illegal employment" that provide important information relating to the rights of unauthorized immigrant workers.[160] The ILO maintains a database of national labor law statutes[161] that lists many labor immigration statutes and regulations that require work permits[162] and also reveals a few important examples of national statutes relating to the employment and labor rights of unauthorized immigrant workers. For example, it summarizes an Austrian law establishing that "a foreigner employed without a permit shall have the same rights in relation to the employer as a worker with a valid contract of employment."[163] One limitation is that this database does not include judicial case law, and another is that it does not index unauthorized immigrant workers.[164]

2 Immigration surveys

Comparative surveys on immigration law are far fewer in quantity and coverage than the cross-national labor and employment law surveys described above. The Organization on International Migration publishes an annual report that includes a sophisticated immigration-law-oriented-analysis of labor migration.[165] However, the report does not provide detailed country-by-country information, nor does it cover the national labor and employment rights of the unauthorized. Other annual human rights and refugee country-by-country case studies are similarly lacking in coverage of migrant laborers.[166]

3 *Ad hoc* agency studies

In addition to ongoing country surveys and academic monographs, a potential source of comparative work is the agencies that utilize comparative legal research to illuminate particular policy issues. The studies the author has identified are enforcement-

160 See "Protective and Repressive Measures in EU Member States", in *Undocumented Migrant Workers in Europe*, Michele LeVoy, Nele Verbruggen and Johan Wets (eds.), PICUM and HIVA (2004) 31 at 32-37.

161 See International Labour Organization, Labour Law Database, NATLEX, available at <www.ilo.org/natlex> (last visited 30 November 2004).

162 See for example, International Labour Organization, NATLEX, Browse By Country, *Bahrain*, available at <www.ilo.org/dyn/natlex> (listing "Order No. 14 of 1994 of the Minister of Labour and Social Affairs: to provide for the non-renewal or withdrawal of foreign workers' work permits and for exemptions therefrom in certain cases").

163 See International Labour Organization, NATLEX, Browse By Country, *Austria*, available at <www.ilo.org/dyn/natlex> (summarizing Federal Act of 21 April 1988 amending the Act governing the employment of foreigners [BGBI. No. 218/1975]. Text No. 231).

164 See *supra*, note 161. The database does index migrant, which produces the results described above.

165 See *supra*, note 1, *2003 World Migration Report*; International Organization for Migration, *World Migration Report 2000*, IOM (2000).

166 See for example, U.S. Department of State, *Annual Report on Human Rights Practices* (2004); U.S. Committee for Refugees, *World Refugee Report* (2004).

rather than rights-oriented. For example, in 2000 the Organisation for Economic Co-Operation and Development (hereinafter OECD) published "Combating the Illegal Employment of Foreign Workers," which focused its discussion on measurement of undocumented immigrants and enforcement in the OECD countries.[167]

IV Three principles that should underlie comparative research

This chapter is a call for national studies and comparative work on the legal regimes affecting unauthorized immigrant workers. In order to facilitate comparative projects, the following section proposes three principles that should underlie this proposed information-gathering and analysis: (1) as unauthorized immigrants are affected by a range of legal regimes, neither immigration nor labor law alone can address their human rights situation, but all relevant regimes must be addressed, including the special problem of enforcement and providing remedies to a shadow labor force; (2) national studies should not ignore instrumental arguments, for example the positive correlation between enforcement and security issues that preoccupy the polity, but should instead make clear the enforcement effect of providing rights to the workers through dampening of employer demand; and (3) comparative research must be structured to support and further new international standards relating to these workers.

Underlying the first principle is the need for comparative legal studies to transcend the traditional enforcement focus on deportation, sanctions, and trafficking. They should strive to encompass or at least facilitate examination of the intertwined immigration, labor, employment, tax, criminal, family law, education, and benefits laws that most heavily impact the human rights of migrants. Moreover, studies should examine the key issue of rights enforcement and remedies for unauthorized workers. A critical examination of enforcement of existing laws, for example the adequacy of government spending on workplace safety, will require new scholarly attention to the development of specific human rights indicators. Remedies for unauthorized immigrant workers is an equally important and relevant question that should be comparatively examined. The above mentioned U.S. Supreme Court decision *Hoffman Plastic Compounds*, in which lost wage remedies were denied to the unauthorized, demonstrates the importance of this issue. Remedies represent a key area in which employers can successfully invoke unauthorized workers' status as lawbreakers to avoid their obligations to workers as rights holders under protective domestic laws.

The second suggested principle stresses the importance of emphasizing instrumental arguments for rights-protective laws. Instrumental arguments on this issue emphasize that pulling unauthorized immigrant workers into the ambit of the regulatory state strengthens the regulatory scheme as applied to all workers, and

167 See Organisation for Economic Co-Operation and Development, *Combating the Illegal Employment of Foreign Workers: International Migration*, OECD (July 2000) *passim*, available at <www.oecd.org/LongAbstract/0,2546,en_2649_201185_2388488_1_1_1_1,00.html>.

does not only benefit unauthorized immigrants. One specific example of an important and contested argument that national studies should engage is the link between unauthorized immigrant worker rights enforcement and reduction in illegal immigration flows. National security concerns should not be ignored; instead, they should be marshaled on behalf of the unauthorized by demonstrating that protection of rights in countries can ultimately stem the flow of potential security risks. Stalker cites a survey of Dutch employers demonstrating that employers' strongest motivation for hiring unauthorized immigrant workers is the ability to pay them less in wages.[168] If unauthorized workers have and enforce the right to minimum wages and payment for work performed, this would erode to at least some extent the "pull factor" of this key employer motivation.

A third principle that should inform national and comparative studies is that they should, when possible, use the language and concepts employed in the newly in force international standards. This process will frame new paradigms for domestic legal experts. Tracking international standards when examining domestic laws can also facilitate comparison across legal traditions and cultures. At the same time, national studies should not be captured by existing transnational norms. Contemporary international human rights law does not address many areas of concern to unauthorized workers that commentators have established are key to a rights-centered policy on labor migration. One such neglected issue, for example, is the right to immigration confidentiality for unauthorized workers who attempt to enforce their rights and obligations as workers – for example, by lodging wage and hour claims or by paying taxes. This issue is of prime importance to workers who fear deportation if they attempt to enforce their rights.[169] Another issue that might lead to future human rights standards is the question of obligations owed to expatriate unauthorized workers by sending states. Many practices of sending states – such as regulation of foreign employer recruitment tactics and rules about absentee voting, dual nationality, willingness to permit re-entry and reintegration of deported nationals – can greatly affect the rights of their expatriates abroad.

V Conclusion

The extreme disadvantages faced by unauthorized immigrant workers have moved the international community to promulgate and expand various human rights pro-

168 See *supra*, note 78 at 34. The second most favored reason, ranking at about half as important to the employers as low wages, was flexibility: the opportunity to hire the workers during peak production times and dismiss them when demand dropped. *Ibid.*

169 See for example, Norbert Cyrus, "Representing Undocumented Migrant Workers in Industrial Tribunals: Stimulating NGO Experiences from Germany", in *Undocumented Migrant Workers in Europe*, Michele LeVoy, Nele Verbruggen and Johan Wets (eds.), PICUM and HIVA (2004) 107 at 108-109 (describing the German Foreigners Law (Section 76), which requires "all public offices" to notify immigration officials and the fact that unauthorized immigrant workers are too afraid to make wage claims to industrial tribunals because of this lack of confidentiality).

tections for this population. However, most governments refuse to engage the new standards or the institutions that focus on unauthorized workers. Ratification of the relevant treaties is markedly low, depriving the standards of their jurisdictional scope. The careful examination of national laws relating to the rights of the unauthorized can facilitate greater awareness, support, and, in the case of widely accepted norms, enforcement of the new international standards through customary international law. Unfortunately, information about national regimes has not been produced in a systematic or rights-centered way. National data should be disseminated and analyzed, based on three underlying principles: (1) the need to examine the multiple legal regimes affecting the unauthorized, including enforcement and remedies; (2) the need to employ instrumental arguments, and in particular to clarify the positive links between national security and unauthorized worker rights enforcement; and (3) the importance of utilizing international human rights concepts and terminology in national and comparative studies, while additionally transcending existing norms in order to continue the dynamic process of identifying and defining violations of the essential human dignity of the unauthorized.

The argument contained in this chapter is a modest proposal. The author is aware that there is a long road between publicizing a particular controversial domestic rights issue and ratification of a controversial rights treaty. However, awareness must begin somewhere so that the international community can eventually complete the crucial step between awareness and ratification, between isolated practices and a binding customary norm.