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The Unsigned United Nations Migrant
Worker Rights Convention: An
Overlooked Opportunity to Change the
Brown Collar Migration Paradigm

Beth Lyon
1567, lyon@law.villanova.edu

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Abstract

The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Worker Convention or Convention) is one of the United Nations' nine core human rights treaties. The United States has neither signed nor ratified the treaty. Despite various reports and articles assessing potential ratification of the Convention by European and other countries, and an even more robust literature examining potential U.S. ratification of other UN core human rights treaties, there has been no examination of the potential for U.S. ratification of this Convention.

The Convention is the most comprehensive global attempt to grapple with labor migration, a problem of dramatic international and domestic scope. The more than 24 million immigrants in the American workplace represent nearly 16% of the U.S. labor force. U.S. business continues to press for lower immigrant worker wage and housing standards, making the foreign-born an especially likely replacement for American workers in recessionary times.

Ratification of the Migrant Worker Convention is desirable because, by promoting a vision of migrant workers as rights holders, the Convention would shift the American political climate toward policy reform. This would help to break through the current domestic political stalemate and build-up of undocumented immigrants. Ratifying the Migrant Worker Convention would also advance agendas important to both the right and the left, including increased national security through enhanced standing with the global south and a improved humanitarian situation for one of America's most vulnerable groups.

An analysis of the United States' relationship to human rights treaties reveals that active negotiation, followed by delayed Executive signature and Senate consideration, are the norm. Seen within this historical context, the current lack of attention to the Convention appears typical of U.S. human rights treaty ratification practice, though the delay has been somewhat exacerbated by the controversial nature of immigration policy. The article proposes a typology for assessing treaty provisions, and uses this framework to analyze the Migrant Worker Convention's potential impact on five politically sensitive U.S. questions: legalization, border policies, expedited removal, family unification for legal workers, and worksite raids.

World Trade Organization President Pascal Lamy recently noted that "There are world organisations for trade, health, the environment, telecoms, food. There are two black holes in world governance: finance... and migration." U.S. engagement with the Migrant Worker Convention would help to address this situation and contribute to a rational global approach to low-paid labor migration.

The Unsigned United Nations Migrant Worker Rights Convention: an Overlooked Opportunity to Change the “Brown-Collar”¹ Migration Paradigm

"There are world organisations for trade, health, the environment, telecoms, food. There are two black holes in world governance: finance ... and migration."²
– Pascal Lamy, World Trade Organization

“The problem is ... not the lack of international standards, but the lack of political will to implement them.”³
- Antoine Pécoud and Paul de Guchteneire, United Nations Educational, Scientific and Cultural Organization

Beth Lyon⁴

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

² Reuters, *WTO Chief Urges Tough Global Financial Regulation*, JAVNO, Nov. 8, 2008, http://www.javno.com/economy/wto-chief-urges-tough-global-financial-regulation_201584. *See also* Alain Faujas and Frédéric Lemaître, *Pascal Lamy: “Il faut une régulation contraignante:” Le patron de l’OMC plaide pour l’instauration d’un mécanisme de surveillance et de sanctions de la finance mondiale*, LE MONDE, November 9, 2008.

³ Antoine Pécoud & Paul de Guchteneire, *Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers’ Right*, 24 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 241, 244 (2006).

⁴ Associate Professor of Law and Director, Farmworker Legal Aid Clinic, Villanova University School of Law. I am very grateful to my Villanova colleagues, to the participants in the Marquette Law School faculty exchange workshop, and to Tucker Culbertson, Nancy Ehrenreich, Sarah Paoletti, Michele Pistone, and Carlos Vazquez for their helpful comments on this article, as well as to Villanova School of Law for its writing support. I thank the Villanova Law and University of Pennsylvania Law librarians for their excellent assistance. While any errors are my own, I also thank Research Assistants Kristin Waller, Amarachi Utah, Kim Gasparon, Sarah Lichter, Ellen Cantillon, Eric Eilerman, Raimundo Guerra and Ron Hochbaum for their excellent research assistance. I also thank my family members for their unswerving love and support.

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I. Introduction

The United States is re-ordering its foreign policy priorities. The closing of Guantanamo,⁵ planned withdrawal from Iraq,⁶ President Obama's pledge to ratify several international treaties such as the Convention on the Elimination of Discrimination against Women (CEDAW),⁷ and

⁵ See Frank Jordans, *UN Expert Wants Gitmo Probe Before Camp Closes*, ASSOCIATED PRESS, Mar. 10, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5hl-l62Szmf-WOjAMmO8fZMi4A7AAD96RB4H01>.

⁶ See Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES, Feb. 27, 2009, <http://www.nytimes.com/2009/02/28/washington/28troops.html>.

⁷ See Bob Egelko, *Obama Pledge on Treaties a Complex Undertaking*, S.F. CHRON., Dec. 1, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/01/MNK414CTFB.DTL&type=printable>. President

his statements on the urgency of poverty alleviation in the global south⁸ all demonstrate that the United States is beginning an era of heightened international cooperation and leadership with regard to humanitarian issues. On the domestic policy side, the administration has also taken steps that indicate a focus on improving conditions in the American workplace and improving the situation of low-income immigrants. With these goals fore-grounded for the first time in recent political history, the United States should take steps to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Signing the Migrant Worker Convention would advance the U.S. government's humanitarian goals, but the United States has never seriously considered the Migrant Worker Convention. This article aims to begin the discussion.

The Article argues that the United States should look to international standards with regard to the controversial political issue of labor migration.⁹ Specifically, the Article posits that the U.N. Migrant Worker Convention, dismissed by this and other migrant-receiving countries for nearly two decades as a political non-starter, provides a rational approach to labor migration that deserves meaningful examination by the United States. The Article further asserts that even the most preliminary discussion about the Convention would benefit this country, because it would inject into domestic debates the notion that immigrant workers, including unauthorized workers, are subjects of human rights protection.

The United States needs to examine international models because Americans and their leadership are fundamentally at odds about labor migration. While all sides agree that illegal immigration is undesirable, the country is deeply divided on the solution. The groups that disfavor even the current levels of *legal* immigration, let alone regularization of undocumented immigrants, typically advocate for tighter visa quotas, stricter border controls, and more aggressive deportation measures. On the other hand, most immigrants' rights advocates seek legalization and better workplace protections for all low-wage workers, including those who are unauthorized immigrants. Moderates of both wings favor temporary worker programs as a way to control migration, though they differ over the optimal size and conditions of entry and work of the temporary workforce. However, compromise has proved impossible for more than six years of serious, high-level policy debate and bipartisan effort. Approval of legalization as a solution to the exponentially increasing undocumented population is expanding among policymakers, even

Obama indicated during the campaign his interest in re-engaging the United Nations Framework Convention on Climate Change, and also indicated support for U.S. ratification of the Comprehensive Test Ban Treaty. *See id.* The CEDAW can be found at Convention on the Elimination of All Forms of Discrimination Against Women, adopted by General Assembly on 18 December, 1979, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193; in force 3 September, 1981 [hereinafter CEDAW].

⁸ *See* Bob Unruh, *Obama's \$845 Billion U.N. Plan Forwarded to U.S. Senate Floor: 'Global Poverty Act' to Cost Each Citizen \$2,500 or More*, WORLDNETDAILY.COM, July 25, 2008, <http://www.worldnetdaily.com/index.php?pageid=70308>.

⁹ *See, e.g.,* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, *passim* (2005) (describing the controversial and failed attempt to enact "AgJobs," a targeted, compromise immigration legalization measure that had been negotiated by the agricultural industry, unions, and immigrants' and worker rights organizations); *see also* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, *passim* (2007) (describing public demonstrations regarding proposed U.S. immigration legislation). [Why are you citing these sources in your roadmap?]

as the American public expresses an increased preference for enforcement-focused solutions. The result is a series of superficial policy shifts that fail to address the underlying issues, producing an immigration regime that seems to be rudderless, offering only unenforceable laws to address vocal public concern, widespread human suffering, and damage to America's credibility with the international community.

Similar dynamics are playing out around the world. There are large numbers of brown collar immigrant workers, many of them unauthorized, in other wealthy regions and countries, such as Europe,¹⁰ Canada¹¹ and Australia,¹² and allegations of insupportable working conditions arise from each of these different country contexts.¹³ In 1949 and again in 1975, the International Labour Organization issued Conventions for the protection of migrant workers.¹⁴ As compared with other ILO treaties, the two migrant worker Conventions were ignored. The eight "fundamental" ILO treaties, dealing with freedom of association, non-discrimination in the workplace, forced labor, and child labor, have on average 163 ratifications.¹⁵ Meanwhile, the

¹⁰ See Melanie Kiehl and Heinz Werner, The Labour Market Situation of EU and of Third Country Nationals in the European Union, ERIC # ED429228, http://eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED429228&ERICExtSearch_SearchType_0=no&accno=ED429228 (giving a figure of 7.8 million non-nationals in the EU work force as of 1995, 3 million of them Europeans working outside their home countries); European Parliament, MEPs adopt legislative resolution to crackdown on employers of illegal immigrants, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20090202FCS47946&language=EN> (stating that "between 4.5 and 8 million illegal immigrants work in the construction, farming, hotel and other sectors in the EU."); <http://www.eurofound.europa.eu/eiro/2002/12/inbrief/be0212301n.htm>; European Platform for Migrant Workers' Rights, The Rights of Migrant Workers in the European Union: 2006 Shadow Reports for Estonia, France, Ireland and the United Kingdom 16 (2006) (noting the difficulty of collecting data on migrant workers in Europe), available at <http://www.december18.net/web/docpapers/doc5097.pdf>.

¹¹ See UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION [UNESCO], *Identification of the Obstacles to the Ratification of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: The Canadian Case*, at 4, UNESCO Doc. SHS/2006/MC/9 (Aug. 2006) (prepared by Victor Piché et al.), available at <http://unesdoc.unesco.org/images/0014/001473/147310E.pdf> [hereinafter *Canadian Assessment of the Treaty*]; see also Press Release, International Labour Organization [ILO], As Migrant Ranks Swell, Temporary Guest Workers Increasingly Replacing Immigrants Private Employment Agencies Send Millions Overseas to Work, ILO/97/9 (Apr. 18, 1997), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008048/index.htm.

¹² See AUSTRALIAN GOVERNMENT, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, IMMIGRATION UPDATE 2007-2008 (2008), available at http://www.immi.gov.au/media/publications/statistics/immigration-update/update_june08.pdf.

¹³ See Immigrants Tell Panel of Poor Working Conditions, <http://immigrantsinusa.blogspot.com/2006/04/immigrants-tell-panel-of-poor-working.html> (Apr. 3, 2006, 13:18 EST).

¹⁴ See Convention Concerning Migration for Employment, adopted July 1, 1949, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted June 24, 1975, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143> [hereinafter ILO 143].

¹⁵ See Convention Concerning Freedom of Association and Protection of the Right to Organise, adopted July 9, 1948, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> (having 149 ratifications); Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, adopted July 1, 1949, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> (having 159 ratifications); Convention

ILO's 1949 migrant worker convention, ILO 97, has attracted only 48 ratifications, and the 1975 convention, ILO 143, has garnered only 23.¹⁶

In 1979, the Mexican and Moroccan governments proposed that the United Nations promulgate a migrant worker rights treaty, feeling that a UN Convention would attract more countries of employment.¹⁷ After ten years of negotiation that involved all regions of the world,¹⁸ the UN promulgated the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the Migrant Worker Convention). What resulted is the world's only comprehensive document for the protection of migrant workers.¹⁹ Among the treaty's major accomplishments are: 1) it provides groundbreaking protection for documented labor migrants; 2) it establishes equality of protection in the workplace for immigrant workers;²⁰ and 3) it repeats and underscores existing human rights protection for unauthorized workers, by guaranteeing fundamental rights for *all* migrant workers (including unauthorized immigrants),²¹ for example the right not to be tortured²² or enslaved.²³ Importantly for its ratification prospects, the treaty establishes these human rights principles without dictating any particular immigration policy framework.²⁴

Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029> (having 173 ratifications); Convention Concerning the Abolition of Forced Labour, *adopted* June 25, 1957, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> (having 169 ratifications); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *adopted* June 29, 1951, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100> (having 166 ratifications); Convention Concerning Discrimination in Respect of Employment and Occupation, *adopted* June 25, 1958, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111> (having 168 ratifications); Convention Concerning Minimum Age for Admission to Employment, *adopted* June 26, 1973, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> (having 151 ratifications); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (having 169 ratifications).

¹⁶ See Convention Concerning Migration for Employment, *adopted* July 1, 1949, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, *adopted* June 24, 1975, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>. [Again you need International Treaty Sources for all these conventions. Additionally, I gave the adoption date. Bluebook, however, prefers the signing date if available. The ILO website only gives the adoption and coming into force dates.]

¹⁷ Two major reasons for a UN Convention were: 1) UN Conventions allow the flexibility of restrictions on ratification, while ILO Conventions do not; and 2) the ILO, with its tri-partite Government-Employer-Union structure was viewed with more suspicion by the West than the UN monitoring process. See Pécoud & Guchteneire, *supra* note 3, at 246.

¹⁸ See Lisa S. Bosniak, *Human Rights, State Sovereignty And The Protection Of Undocumented Migrants Under the International Migrant Workers' Convention*, in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, 311, 312 (Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyzszak eds., 2004).

¹⁹ See Pécoud & Guchteneire, *supra* note 3, at 241.

²⁰ See Convention Concerning the Protection of the Rights of All Migrant Workers and Members of their Families, ICMW, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* 1 July 2003, art. 25 *available at* http://www.unhcr.ch/html/menu3/b/m_mwctoc.htm [hereinafter UN Migrant Worker Convention].

²¹ See *id.*

²² See *id.* at

²³ See *id.*

²⁴ See Pécoud & Guchteneire, *supra* note 3, at 246.

The Convention was opened for signature in 1990.²⁵ To the surprise of the negotiators,²⁶ the Convention was not widely ratified. After initially participating in negotiating the Convention,²⁷ the major migrant-receiving countries set it aside, and it languished for a record thirteen years²⁸ before accruing the twenty ratifications it needed to go into force.²⁹ The ratification then picked up speed. Mary Robinson, former U.N. High Commissioner for Human Rights, concentrated

²⁵ See Convention Concerning the Protection of the Rights of All Migrant Workers and Members of their Families, *supra* note 20.

²⁶ See Pécoud & Guchteneire, *supra* note 3, at 242.

²⁷ The following is a non-exclusive list of industrialized countries that were active participants in the negotiations, drawn from the record of proceedings at different stages of the process: Australia, Belgium, the Federal Republic of Germany, Denmark, Finland, Great Britain, Greece, Italy, Japan, Malaysia, the Netherlands, Norway, Portugal, Spain, Sweden, the Union of Soviet Socialist Republics, and the United States. See [Insert Issuing Body], *Report of the Economic and Social Council, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open Working Group*, A/C.3/35/13 (Nov. 25, 1980) [hereinafter *November 1980 Working Group Report*] (Annex VI (written proposal of United States); para. 9 (statement of Italy); Report of the Economic and Social Council, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group, A/C.3/36/10 (Nov. 23, 1981) [hereinafter *November 1981 Working Group Report*] (para. 31 (statement of Greece, Italy and Spain), para. 44 (statement of the Netherlands), para. 53 (statement of Finland, Italy, Norway, Spain, and Sweden); Report of the Economic and Social Council, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families on its intersessional meetings from 10 to 21 May 1982, A/C.3/37/1 (June 11, 1982) [hereinafter *June 1982 Working Group Report*] (para. 23 (statement of Finland, France, Greece, Italy, Norway, Portugal, and Sweden, para. 24 (statement of the Netherlands), and para. 93 (statement of Belgium)); Report of the Economic and Social Council, Measures to Improve the Situation and Ensure the Human Rights and Dignity of all Migrant Workers: Report of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/37/7 (Nov. 19, 1982) [hereinafter *November 1982 Working Group Report*] (para. 22 (statement of Great Britain), and para. 43 (statement of Malaysia)). Report of the Economic and Social Council, Report of the open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/40/1 (June 20, 1985) [hereinafter *June 1985 Working Group Report*] (paras. 19-22 (statement of the Federal Republic of Germany), paras. 25-27 (Australia), paras. 28-29 (statement of Norway), paras. 30-31 (statement of Denmark), para. 28 (statement of Greece), paras. 50-51 (statement of the Union of Soviet Socialist Republics), paras. 57-58 (statement of Italy), paras. 59-60 (statement of France), paras. 61-62 (statement of the United States), para. 68 (statement of the Netherlands), and para. 89 (statement of Finland and Sweden); Report of the Economic and Social Council, Report of the open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/45/1 (June 21, 1990) [hereinafter *June 1990 Working Group Report*] (para. 14 (statement of Portugal), para. 15 (statement of the Federal Republic of Germany), para. 16 (statements of France and the Netherlands), para. 17 (statements of Finland and Japan), para. 18 (statements of Italy and the Union of Soviet Socialist Republics), and para. 19 (statements of France, the Netherlands and the United States)). See also Luca Bicocchi, *Rights of All Migrant Workers (Part III of the Convention) Travaux Préparatoires*, 1 & n. 6 (available at <www2.ohchr.org/english/issues/migration/taskforce/docs/draftinghistoryrev1.doc> [hereinafter Bicocchi, *Travaux*].

²⁸ See Pécoud & Guchteneire, *supra* note 3, at 242.

²⁹ See United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT, Chapter IV, Human Rights: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: New York, 18 December 1990, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=138&chapter=4&lang=en> (last visited March 18, 2009) [hereinafter ICMW Ratification Record]; see also UN Migrant Worker Convention, *supra* note 20, at Art. 87, Clause 1.

resources on a ratification campaign during and in the years since her time with the U.N.,³⁰ and as a result the treaty now has 30 signatories and 41 parties.³¹

None of the current parties to the treaty is considered to be a major country of employment, although parties Mexico, Morocco and Turkey do host significant migrant worker populations. There is some movement toward ratification in the industrialized world. The European Parliament,³² the European Economic and Social Committee,³³ and the Organization of American States³⁴ have all favorably reported on the Migrant Worker Convention and called on the countries in those regions to ratify it. However, there are obstacles to immediate ratification by countries of employment, including prominently the “fear to be among the first”³⁵ and domestic anti-immigrant sentiment.³⁶ Ironically, both of these obstacles can also be seen as reasons why migrant workers need supplementary protection. Even as the Convention slowly accrues country of origin ratifications, many regions and countries of employment are undertaking pre-ratification studies and assessments of the treaty vis-à-vis domestic law, including Canada,³⁷ Europe,³⁸ Japan,³⁹ and New Zealand.⁴⁰

³⁰ See Press Release, December 18: International Advocacy and Resource Centre on the Human Rights of Migrant Workers, On International Migrants Day, NGOs Call for Ratification of UN Migrant Workers’ Convention (Dec. 18, 2004), <http://www.december18.net/web/docpapers/doc2162.doc> (urging Ireland to ratify the Migrant Worker Convention); Press Release, December 18: International Advocacy and Resource Centre on the Human Rights of Migrant Workers, Mary Robinson Joins Global Radio Marathon to Celebrate International Migrant’s Day on 18th December (Dec. 11, 2006) <http://www.december18.net/web/docpapers/doc4741.doc>; See Sean O’Driscoll, Mary Robinson, Former UN High Commissioner for Human Rights, Addressed the Rethinking Global Immigration Conference in New York, IRISH EXAMINER, May 27, 2006, http://portal.unesco.org/shs/en/ev.php-URL_ID=9634&URL_DO=DO_TOPIC&URL_SECTION=201.html (explaining Robinson criticized U.S. for not ratifying U.N. Convention on the Rights of the Child and Migrant Worker Convention); Press Release, Migrant Rights International, Former UN Human Rights Head Mary Robinson to Governments on Migration and Development: Do Not Forget Human Rights (Sept. 15, 2006), http://migrantsrightsinternational.blogspot.com/2006_09_01_archive.html (describing Robinson’s position that “there is a need to link migration to development without sacrificing human rights”).

³¹ See ICMW Ratification Record, *supra* note 29.

³² See EC, *Resolution on the EU’s rights, priorities and recommendations for the 58th Session of the UN Commission on Human Rights in Geneva (17 March to 25 April 2003)*, [2003] document no. P5-TA 0034, sitting of Thursday, 30 January 2003, O.J. C 39/E 70 (13 February 2004) at point 5, available at <http://europe.edint/eurlx/pri/en/oj/dat/2004/ce03920040213en00700073.pdf>.

³³ European Economic and Social Committee, SOC/173, *Opinion No. 960* of 30 June 2004, available at http://eescopinions.esc.eu.int/EESCopinionDocument.aspx?identifier=ces\soc\soc173\ces9602004_ac.doc&language=EN.

³⁴ Organization of American States, General Assembly, 32nd Sess., *The Human Rights of All Migrant Workers and Their Families*, OR OEA/Sen./AG/Res. 1898 (XXXII-O/02) (2002), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://scm.oas.org/Reference/english/english.htm>.

³⁵ Pécoud & Guchteneire, *supra* note 3, at 258-59.

³⁶ See *id.* at 259-61.

³⁷ See *Canadian Assessment of the Treaty*, *supra* note 11.

³⁸ See UNESCO, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, SHS-2007/WS/7 – CLD 1195.7 (2007) (prepared by Euan MacDonald and Ryszard Cholewinski) [hereinafter *European Assessment of the Treaty*].

³⁹ See UNESCO, *Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective*, SHS/2003/MC/1 REV (Oct. 2003) (prepared by Nicola Piper and Robyn Iredale) available at

The goal of this Article is to initiate another of these long-deferred discussions by analyzing the possibility of ratification of the Migrant Worker Convention by the United States. Part II of the Article argues that the United States has not yet assessed the Migrant Worker Convention in a serious way. This part also points out that the United States' delay in engaging the Convention is typical in light of this country's past human rights treaty ratification processes. The section provides an overview of the analytical and political work that is likely to be involved in such an assessment, based on this country's past human rights treaty ratification processes. The section flags the difficult question of restrictions on ratification, noting that the United States is likely to heavily restrict ratification of the Migrant Worker Convention, just as it has in ratifying previous human rights treaty. Part III of the Article proposes a typology of treaty comparisons drawn from the United States' past human rights treaty ratification experience, providing an analytical framework for American policymakers to assess the Convention vis-à-vis U.S. law. Arguing that a significant portion of the Convention contains standards that the United States has already ratified, Part III also lays out the substantive concerns raised by the United States during the treaty negotiations, and points out that most of the passages that were objectionable at the time were or have since become part of U.S. law. Part III then analyzes the Convention's likely interplay with five sensitive U.S. migration and migrant worker policies. Part IV of the Article addresses arguments for and against ratification, concluding that signature and ratification of the Convention are advisable, as it would shift the political climate toward policy reform, advance foreign policy goals, educate U.S. officials on best practices, and benefit civil society.

II. Brushing the Dust off the U.N. Migrant Worker Convention

Many industrialized countries of employment, or migrant-receiving countries, including the United States, participated actively in the Migrant Worker Convention's ten-year drafting process.⁴¹ Eighteen years later, not one of these countries has signed or ratified the Convention.⁴² During those 18 years, the United States has ratified six other human rights treaties,⁴³ but has not

<http://unesdoc.unesco.org/images/0013/001395/139528E.pdf> [hereinafter *Asia Assessment of the Treaty*].

⁴⁰ See *id.* at 39-42.

⁴¹ For a non-exclusive list of industrialized countries that were active participants in the negotiations, drawn from the record of proceedings at different stages of the process, see *supra* note 27.

⁴² See ICMW Ratification Record, *supra* note 29. Note that the USSR, listed in the prior footnote as a migrant-receiving participant in the negotiations, has since dissolved, but its major successor nation, Russia, has not ratified the ICMW. See *id.*

⁴³ The United States has ratified the following six international human rights treaties since 1990: 1) the International Covenant on Civil and Political Rights (ICCPR) in 1992, see United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT: CHAPTER IV: HUMAN RIGHTS: 4. International Covenant on Civil and Political Rights, New York, 16 December 1966, at 3, available at

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en> [hereinafter ICCPR Ratification Record]; 2) the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1994, see United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT: CHAPTER IV: HUMAN RIGHTS: 2. International Convention on the Elimination of all forms of Racial Discrimination, New York, 7 March 1966, at 3, available at

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en> [hereinafter CERD Ratification Record]; 3) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

seriously examined the Migrant Worker Convention. The following section lays out the ten steps typically involved when the United States engages in multilateral treaty-making United States, and argues that the Migrant Worker Convention has passed through few states of the process. The section further argues that many features of the Migrant Worker Convention's progress toward U.S. ratification fit the pattern of this country's previous human rights treaty ratification processes.

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

Article II of the U.S. Constitution sets forth the basic requirements of the U.S. ratification process: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...”⁴⁴ The framers' intent was for the Senate to be closely involved in all stages of the treaty-making process.⁴⁵ However, the role of the Senate in the treaty-making process changed as the Senate grew and the number of international agreements became too great to make close involvement in negotiation practicable.⁴⁶ According to the Congressional Research Service's Handbook on the treaty-making process, “the Senate role [in treaty formation] now is primarily to pass judgment on whether completed treaties should be ratified by the United States. The Senate's advice and consent is asked on the question of Presidential ratification.”⁴⁷

The Handbook describes modern multilateral treaty-making⁴⁸ as a ten-step process: 1) Secretary

Punishment in 1994, *see* United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT: CHAPTER IV: HUMAN RIGHTS: 9. Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, at 3, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=129&chapter=4&lang=en> [hereinafter CAT Ratification Record]; 4) the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in 1999, *see* *Convention No. C182*, at 9, available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C182>; 5) the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2002, *see* United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT: CHAPTER IV: HUMAN RIGHTS: 11.b. the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000, at 3, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=135&chapter=4&lang=en> [hereinafter CRC Child Soldier Protocol Ratification Record]; and 6) the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2002, *see* United Nations Treaty Collection, STATUS AS AT: 18-03-2009 06:04:59 EDT: CHAPTER IV: HUMAN RIGHTS: 11.c. the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000, at 3, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=136&chapter=4&lang=en> [hereinafter CRC Child Abuse Protocol Ratification Record].

⁴⁴ U.S. CONST. art. II, § 2, cl. 2.

⁴⁵ *See* S. REP. 106-71, at 2-3 (2001).

⁴⁶ *See id.*

⁴⁷ *Id.* at 3.

⁴⁸ Different processes apply to Executive Agreements and bi-lateral treaties. *See id.* at 21-26 (describing executive agreements, which are international agreements that executive branch enters into without submitting them to Senate as treaties); *see also id.* at 10 (including flow chart showing formation process of executive agreement); *Id.* at 8-9 (containing flow chart showing formation of bi-lateral treaty).

of State authorizes negotiation; 2) U.S. representative negotiates with representatives of other country or countries; 3) negotiators agree on terms and, upon authorization of the Secretary of State, the U.S. representative signs the treaty; 4) the President may submit treaty to Senate; 5) the Senate Foreign Relations Committee considers the treaty and decides whether to report it favorably to the Senate; 6) the whole Senate may consider the treaty, and a 2/3 majority may vote to approve a resolution of ratification.⁴⁹ The Senate may “approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval;”⁵⁰ 7) after renegotiating any terms put into question by the ratification resolution, the President may sign the instrument of ratification; 8) the President may deposit the instrument of ratification with the designated depository, whereupon 9) the treaty enters into force according to its terms, and thereby becomes binding under international law; and 10) the President proclaims entry into force, providing domestic notification of the new law.⁵¹

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

A. Steps One and Two: Active Executive Engagement in Negotiation

Professor Louis Henkin invoked the flying buttress as a metaphor of the United States’ relationship to the international human rights treaty regime – in the words of Professor Margaret McGuinness, “the U.S. supports the cathedral of international human rights from the outside, rather than as a pillar from within the system.”⁵² One reason for this image is that the United States historically participates actively in human rights treaty development, but does not readily join human rights treaties as states parties subject to international monitoring. Thus, the fact that the United States was active in negotiating the Migrant Worker Convention does not make this particular treaty unique. Indeed, from the earliest days of the international human rights regime, the United States has been an active participant in creating human rights standards. Through its representative Eleanor Roosevelt, the United States was instrumental in steering the Universal Declaration of Human Rights (UDHR) to successful completion.⁵³ Mrs. Roosevelt also worked to ensure that the UDHR was enshrined in a treaty that could become binding international law through individual country ratifications.⁵⁴ Subsequently the United States continued to play an active role in negotiating major human rights treaties.⁵⁵

⁴⁹ See *id.* at 8-9 (referring to flow chart showing the formation of a multi-lateral treaty).

⁵⁰ *Id.* at 3.

⁵¹ See *id.* at 8-9.

⁵² Margaret E. McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 52 (2007).

⁵³ NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 66-68 (1990) [hereinafter KAUFMAN].

⁵⁴ *Id.* at 68

⁵⁵ See, e.g., LARS ADAM REHOF, GUIDE TO THE TRAVAUX PREPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN X (1993); SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 116, 117, 151 &

In fact, past U.S. executives carried out negotiations on human rights treaties over the active objections of the Senate and of established domestic actors. For example, the United States was heavily involved in negotiating the International Covenant on Economic, Social and Cultural Rights despite domestic outrage over the socialist nature of the rights it contained.⁵⁶ U.S. participation in negotiations leading to the International Criminal Court similarly suffered from the active opposition of a key domestic actor, the Department of Defense.⁵⁷ Negotiation of the Migrant Worker Convention appears to have taken place against a somewhat less controversial domestic backdrop, and the United States engaged extensively in the negotiating the treaty. A detailed analysis of the U.S. role in negotiation of the Convention lies beyond the Scope of the present article, but a brief description is provided here to support this paper's assertion that the United States was deeply and genuinely involved in creation of the treaty.

In 1979, the UN General Assembly created a Working Group to draft a convention to protect migrant workers and their families.⁵⁸ Although the United States abstained from this vote,⁵⁹ the formal reports of the Working Group, which provide summaries of the various delegations' positions and conclusions, reflect literally hundreds of substantive and detailed interventions by the United States over the ten years of negotiations.⁶⁰ On many occasions, the United States was instrumental in breaking impasses by proposing compromise language, participating in informal consultations,⁶¹ and registering its underlying understanding of particular provisions.⁶²

Notwithstanding this active involvement in the negotiations, at several junctures the United

passim (1992) (documenting the United States' active participation in negotiating the Convention on the Rights of the Child).

⁵⁶ See KAUFMAN, *supra* note 53, at 69-93. The International Covenant on Economic, Social and Cultural Rights can be found at Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵⁷ See Joe Stork, *International Criminal Court*, 3 FOREIGN POL'Y IN FOCUS 1, 1-3 (1998).

⁵⁸ See G.A. Res. 34/172, ¶ 3, U.N. Doc. A/RES/34/172 (Dec. 17, 1979).

⁵⁹ See UNBISNET, Voting Record Search for G.A. Res. 34/172, available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1237PB86C4849.643618&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=34%2F172&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&uloper=%3D&ullimit=&uloper=%3D&ullimit=&sort=&x=19&y=11#focus> (searched January 5, 2009).

⁶⁰ See, e.g., *November 1980 Working Group Report*, *supra* note 27, Working Paper Presented by the United States of America (presenting eleven considerations for drafting the convention); *November 1981 Working Group Report*, *supra* note 27, paras. 6, 17, 26, 29-30, 33, 50, 55, 62, 64, 67, 70, 73-74, 76; Report of the Economic and Social Council, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/41/3 paras. 38, 55-56, 59, 62, 66, 71, 80, 142, 14, 162, 179, 194, 199, 209, 222, 230 (Oct. 10, 1986) [hereinafter *October 1986 Working Group Report*].

⁶¹ See, e.g., *November 1981 Working Group Report*, *supra* note 27, para. 17 (U.S. Representative agreed to hold an "informal consultation" with the representatives of Jamaica and Morocco "to find a compromise text" on preambular language).

⁶² See, e.g., *June 1990 Working Group Report*, *supra* note 27, para. 34 (statement of the United States, stating that the U.S. delegation "had not wished to block consensus on [the provisions relating to social security], but clarified for the record that, in her delegation's view, the only 'appropriate measures' a State could take to try to avoid denial of social security rights or duplication of payments would be to endeavor to conclude bilateral or multilateral agreements aimed at achieving that goal.").

States expressed ambivalence about the Convention. In 1986, the U.S. working group representative stated that a reservation to Convention article 16.9 would likely be registered “*if and when* the present Convention is submitted to the Senate.”⁶³ In 1987, the U.S. representative “stated that his Government was not yet convinced of the need for a convention on the human rights of migrant workers, and that if such a need were demonstrated, such a convention should be negotiated in [the] ILO.”⁶⁴

At the same time, the negotiation history also reveals a United States that was committed to the goals of the Convention. For example, the United States introduced and successfully advocated for Convention coverage of foreign investors, thereby creating a new category of protection under the treaty.⁶⁵ The United States also sought successfully to broaden the Convention’s protection of migrants’ associational rights.⁶⁶ Finally, in the June 1989 working group session, the first in which the George Bush administration participated, the U.S. representative made a statement that at least one other participant took to be a significant change of position by the United States. In that statement, the U.S. representative urged that the working group take the time to iron out the final details of the convention before submitting it to the General Assembly.⁶⁷ In his remarks, the U.S. representative stated that “[m]y delegation is pleased that the Working Group has made substantial progress this session towards completing the Convention.”⁶⁸ Several other representatives immediately associated themselves with this intervention.⁶⁹ According to the reported reaction of the Moroccan representative, “the statement by the United States was very useful, especially since in the Third Committee the United States delegation had always voted against the resolution of the draft Convention that the Working Group was in the process of drafting.”⁷⁰

Working Group participant and Vice-Chairman Juhani Lönnroth has observed that, during the negotiations, “[t]here was a rather widespread belief that the United States would not sign and ratify the Convention in the immediate future. But it was equally evident that the United States wished to make the draft meet high legal standards and to make its content as close to its interests as possible in order to create prerequisites for an eventual ratification at some later stage.”⁷¹ Whether the United States’ positive statements about the Convention indeed reflected a

⁶³ *October 1986 Working Group Report*, *supra* note 60, para. 222 (emphasis added).

⁶⁴ Report of the Economic and Social Council, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/42/1 para. 326 (June 22, 1987) [hereinafter *June 1987 Working Group Report*].

⁶⁵ See Report of the Economic and Social Council, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/40/6 paras. 104-111 (Oct. 15, 1985) [hereinafter *October 1985 Working Group Report*].

⁶⁶ See *June 1987 Working Group Report*, *supra* note 64, para. 236.

⁶⁷ Report of the Economic and Social Council, Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/44/1 para. 307 (June 19, 1989) [hereinafter *June 1989 Working Group Report*].

⁶⁸ See *id.*

⁶⁹ See *id.* at paras. 308 (Norway); see also *id.* at 309 (Netherlands, Finland, France, Italy, Japan and Sweden).

⁷⁰ See *id.* at para. 311.

⁷¹ Juhani Lönnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, XXV INT’L MIGRATION REV. 711, 734 (1991).

change of heart by a new administration, or merely reflected due diligence on the part of the U.S. delegation, this and many other actions by the United States over the ten year drafting period, meaningfully advanced finalization of the Convention. The United States' dedication of resources to the drafting process reflected the United States' legacy, begun with the UDHR, of molding human rights treaties.

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

The history of U.S. human rights treaty ratification indicates that the delay between promulgation and signature of the Migrant Worker Convention is not unusual. Step three in the generic treaty process laid out above appears to anticipate that an Executive, fresh from negotiating the terms of a treaty and voting for its promulgation, will sign the document.⁷² However, because of the controversial nature of human rights treaties, the more common occurrence has been a significant delay between promulgation and U.S. signature. In 2006, the Congressional Research Service estimated that the UN, the ILO, and the OAS had produced 50 multilateral human rights treaties, of which the United States had signed 30.⁷³ For those major UN human rights treaties that have been signed, the average wait between promulgation and signature has been roughly four years.⁷⁴ Moreover, three other human rights treaties, signed by the President in 1962, 1977, and 1995, have never been submitted to the Senate.⁷⁵ Thus the vast majority of ratified human rights treaties were, or will be, shepherded through the ratification process by a President who did not negotiate them, heightening the importance of contemporary analysis balanced with the preservation of institutional memories by outside actors.

As the following chart indicates,⁷⁶ the Migrant Worker Convention is among the human rights treaties that the United States has not signed. Moreover, according to a Department of State Treaty Analyst, the Executive branch has given “no serious consideration” to signing either the Migrant Worker Convention, or the ILO Conventions that deal with migrant workers.⁷⁷

⁷² See *supra* text at notes 48-51.

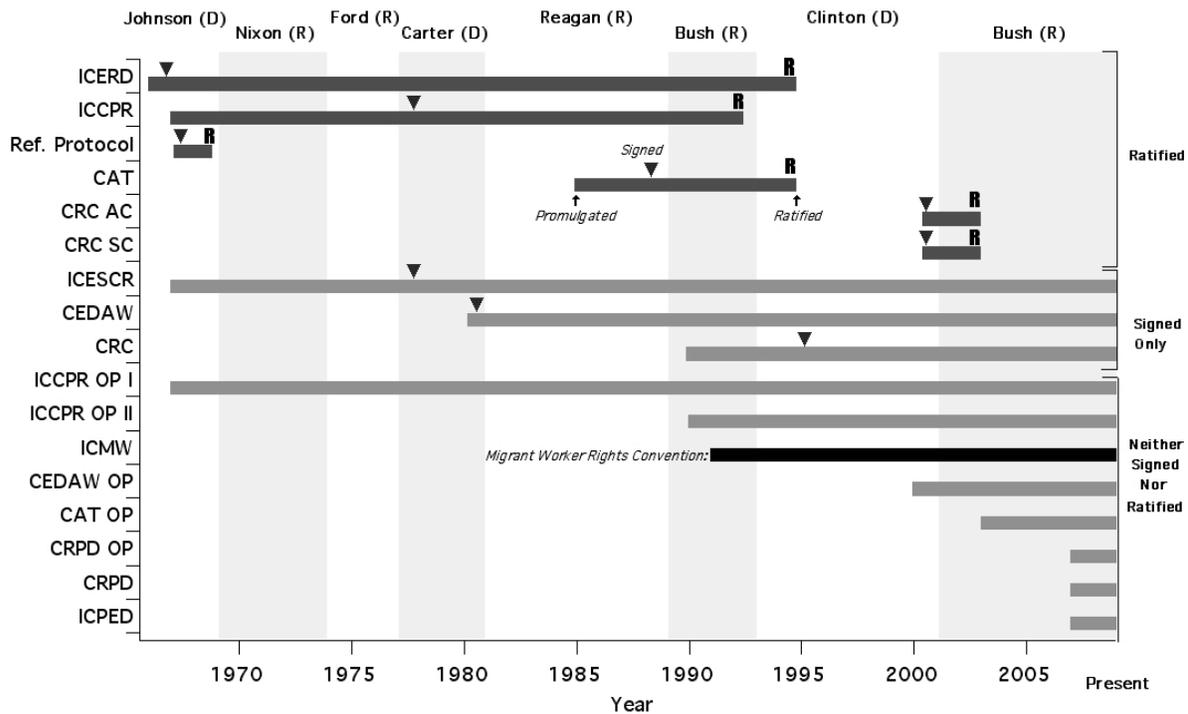
⁷³ CRS HANDBOOK ON U.S. TREATY MAKING PROCESS, *supra* note 45, at 285-86.

⁷⁴ See *infra*. Chart 1. Compare this time line with treaties of greater complexity and comparable controversiality, such as the United Nations Charter, the North American Free Trade Agreement, and the SALT II Strategic Arms Limitation Treaty, all signed the day they were promulgated. See Charter of the United Nations (1945); See also North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); see also Treaty on the Limitation of Offensive Arms and Protocol Thereto (SALT II Treaty) art. XIV, June 18, 1979, U.S.-U.S.S.R., S. Exec. Doc. Y, 96th Cong., 1st Sess., 37 (1979).

⁷⁵ See CRS HANDBOOK ON U.S. TREATY MAKING PROCESS, *supra* note 45, at 286.

⁷⁶ Graph 1 lists the UN human rights treaties classified by the UN as “core human rights treaties,” see *International Law*, available at <http://www2.ohchr.org/english/law/>, the substantive protocols to the core treaties, and also the UN Refugee Protocol, which incorporates the substantive provisions of the earlier Refugee Convention. The chart does not track ILO Conventions because, by the terms of the ILO Constitution, ILO treaties are subject to a unique ratification process that does not lend itself to this analysis. See ILO Constitution Art. 19(5), available at <http://www.ilo.org/ilolex/english/constq.htm>. Examination of the United States record on regional (OAS) human rights treaty ratification is also supportive of this proposition, but the regional treaty specifics are omitted from the chart because the treaty under examination in the instant article is a international rather than a regional document.

⁷⁷ See Email from Joan M. Sherer, Senior Reference Librarian (Legal), U.S. Department of State to Beth Lyon (Jan. 24, 2008), forwarding email to Joan Sherer from Robert Dalton, U.S. Department of State Senior Advisor for Treaty Practice and including comments from Karen Ghaffarkhan, U.S. Department of State Treaty Analyst (on file with



In the case of the Women’s Convention, the Senate signaled to the Executive that it would welcome signature and thus the opportunity to consider the treaty. Other civil society actors carry out signature - and ratification - campaigns as well. The American Bar Association⁷⁸ and Amnesty International⁷⁹ have been particularly active in these campaigns. Meanwhile, the Migrant Worker Convention has received virtually no public attention from the Senate,⁸⁰ nor from civil society. Currently the American Bar Association’s ratification advocacy focus is on the Convention on the Law of the Sea and the Convention on the Elimination of Discrimination Against Women.⁸¹ Other treaties of high priority for the ABA are the UN Convention Against Corruption, the Rome Statute for an International Criminal Court, and the Convention on the Rights of the Child.⁸² Furthermore, the American Bar Association has not yet assessed the

author) [hereinafter Sherer Email].

⁷⁸ See, e.g., American Bar Association, *Treaties: ABA Urges U.S. Ratification of Women’s Rights Treaty and Law of the Sea Treaty*, available at http://www.abanet.org/poladv/priorities/it/2007apr_treaties_factsheet.pdf.

⁷⁹ See, e.g., 138 Cong. Rec. S4781 (April 2, 1992) (publishing letter of Amnesty International to the Senate Foreign Relations Committee, supporting ratification of the ICCPR); Amnesty International, *Support Basic Rights for All Women: Urge the U.S. to Ratify CEDAW*, available at <http://www.amnestyusa.org/violence-against-women/ratify-the-treaty-for-the-rights-of-women-cedaw/take-action-online/page.do?id=1108265>.

⁸⁰ A search of the Congressional Record yields only one mention of the Migrant Worker Convention, a passing reference in a written statement by the International Council of Voluntary agencies entered into the Record by Senator Theodore Kennedy in 1992. 138 Cong. Rec. S. 106, 111 (Jan. 22, 1992).

⁸¹ See AMERICAN BAR ASSOCIATION, *ABA URGES U.S. RATIFICATION OF WOMEN’S RIGHTS TREATY AND LAW OF THE SEA TREATY* (2007) (on file with author).

⁸² See Legislative and Governmental Advocacy, Governmental Affairs Office, *Rule of Law - Global: Funding for Domestic and International Agencies that Promote Rule of Law*, at http://www.abanet.org/poladv/priorities/international_org/#STATUS.

Migrant Worker Convention in order to form an initial opinion as to whether or not the document should be ratified.⁸³

The lack of attention to the Migrant Worker Convention extends to the U.S. academy. There is a literature on U.S. ratification of the CEDAW (Women's Convention)⁸⁴ the Rights of the Child Convention,⁸⁵ and other human rights treaties,⁸⁶ but scarcely any work has been done on the Migrant Worker Convention.⁸⁷ Meanwhile, as noted above, there is a significantly more robust commentary regarding the Convention vis-à-vis European standards.⁸⁸ Even the United Nations Economic and Social Council, which has commissioned a series of studies on the Convention's prospects for ratification in a variety of countries, has not engaged in such a study with regard to the United States.⁸⁹

C. Delayed Senate Approval

⁸³ Telephonic Interview with Kristi Gaines, Legislative Counsel, Government Affairs Office, American Bar Association (January 15, 2008); *see also* AMERICAN BAR ASSOCIATION, LEGISLATIVE ISSUES, CURRENT THROUGH MAY 2008 65-70 & *passim* (on file with author) (recommending numerous human rights treaties, such as the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Rome Statute, for ratification).

⁸⁴ *See, e.g.,* Ravi Mahalingam, *Women's Rights and the "War on Terror": Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism*, 34 Cal. W. Int'l L.J. 171 (2004); Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399, 1460-62 (2003). Ann E. Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996).

⁸⁵ *See, e.g.,* Lainie Rutkow and Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161 (2006); Paula Donnolo and Kim K. Azzarelli, *Youth, Family and the Law: Defining Rights and Establishing Recognition: Essay: Ignoring the human rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J. LAW & POL'Y 203 (1996); JONATHAN TODRES, ET AL., THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (2006). The Convention on the Rights of the Child can be found at Nov. 20, 1989, [28 I.L.M. 1448](#) (1989), *corrected at* [29 I.L.M. 1340](#) (1990) (entered into force Sept. 2, 1990) [hereinafter CRC].

⁸⁶ *See, e.g.,* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural rights: the Need for an Entirely New Strategy*, 84 A.J.I.L. 365 (1990); Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121 (2005).

⁸⁷ The International Migration Review devoted an issue to the Migrant Worker Convention in 1991, the year after its promulgation. That issue included a piece by the late Arthur Helton entitled *The New Convention from the Perspective of a Country of Employment: The U.S. Case*, XXV INT'L MIGRATION REV. 848 (1991). Other U.S. scholars have contributed to the literature about the Migrant Worker Convention, *see* Bosniak, *supra* note 18, at 311; James Nafziger & Barry Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, XXV INT'L MIGRATION REV. 771 (1991) [hereinafter Nafziger & Bartel]; Virginia Leary, *Labor Migration*, in THOMAS ALEXANDER ALENIKOFF AND VINCENT CHETAIL, EDS., MIGRATION AND INTERNATIONAL LEGAL NORMS 227, 234-236 (2003), Anna Zalewski, Note, *Migrants for Sale: The International Failure to Address Contemporary Human Trafficking*, 29 SUFFOLK TRANSNAT'L L. REV. 113, 125-29, 131-34 (2005); Meg Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUMAN RIGHTS & DEVELOPMENT L. J. 1, 2 & *passim* (2005), but these studies did not focus on the Migrant Worker Convention vis-à-vis U.S. law or its ratification by the United States.

⁸⁸ *See, e.g.,* EUROPEAN ASSESSMENT OF THE TREATY, *supra* note 38; Giovanni Kojanec, *The UN Convention and the European Instruments for the Protection of the Migrants*, XXV INT'L MIGRATION REV. 818 (1991); Tugrul Ansay, *The New UN Convention in Light of the German and Turkish Experience*, XXV INT'L MIGRATION REV. 831 (1991).

⁸⁹ *See* Email from Antoine Pécoud, International Migration Section, Social and Human Sciences, United Nations Economic and Social Council (Oct. 1, 2008) (on file with author) [hereinafter Pécoud Email].

From the earliest days of the human rights treaty regime, the Senate has struggled with identifying whether and how to incorporate international human rights norms into domestic law. Even when the content of a treaty appeared to be unobjectionable, for example in the case of the Genocide Convention, concerns about loss of sovereignty appear to hold particular sway in the realm of human rights treaty ratification.⁹⁰ According to Professor Natalie Kaufman, “the actual content of the treaties is not viewed as the primary determinant of the current situation. Perception is important, not content.”⁹¹ Seven human rights treaties are pending on the foreign Relations Committee calendar, and six of them have been pending for more than 10 years.⁹² One of them, the ILO Freedom of Association Convention, is the longest pending treaty on the Committee calendar.⁹³ Given the sensitive nature of immigration policy, it is likely that a Convention on Migrant Worker Rights would also encounter opposition and lengthy debates. However, as argued below, it is precisely the controversiality of the subject matter that makes debate about international human rights standards valuable at this juncture.

D. Multiple Restrictions on Ratification

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

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

⁹⁰ See CRS HANDBOOK ON U.S. TREATYMAKING PROCESS, *supra* note 45, at 287-88; see also KAUFMAN, *supra* note 53, at 183 (describing the concerns raised against the Genocide Convention over decades).

⁹¹ KAUFMAN, *supra* note 53, at 181.

⁹² See CRS HANDBOOK ON U.S. TREATYMAKING PROCESS, *supra* note 45, at 286 (listing the ILO Convention on Freedom of Association, the ILO Employment Policy Convention, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Geneva Convention Protocol II. The Handbook also lists the Protocols to the Convention on the Rights of the Child, which are no longer pending).

⁹³ See *id.*

⁹⁴ See *id.* at 286.

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

⁹⁶ See *id.* at 23.

⁹⁷ See *id.* at 29 (quoting the Vienna Convention on the Law of Treaties).

ratification.⁹⁸

Likely as a result of the relatively permissive regime that has evolved, the United States has regularly applied a set of restrictions that was based on what the late Senator Jesse Helms termed the “sovereignty package.”⁹⁹ Over the years, the “sovereignty package,” as applied in the context of human rights treaties, has evolved to include the following restrictions: 1) an “understanding” that assures federal- and state- government cooperation to ensure compliance with the treaty;¹⁰⁰ 2) a declaration that the terms of the treaty are “non-self-executing,” or not enforceable in domestic court, until they have been implemented in domestic legislation;¹⁰¹ 3) an understanding that “nothing in [the treaty] establishes a basis for jurisdiction by any international tribunal, including the International Criminal Court.”¹⁰² The “sovereignty package” is controversial internationally. The U.S. ratification restrictions have garnered formal protests from other human rights treaty members¹⁰³ and sparked inter-governmental policy statements designed to limit restrictions,¹⁰⁴ and eliciting widespread censure domestically from constituencies that believe that U.S. domestic law should be changed to conform to those international human rights standards that are more stringent than U.S. law protections.¹⁰⁵ The question of whether non-self-execution can be read into a treaty that was *not* ratified contingent on a non-self-execution understanding has been the subject of recent debate and litigation,¹⁰⁶ but U.S. courts do enforce

⁹⁸ See *id.* at 95 (stating that “[t]he ‘object and purpose’ rule has been of limited relevance in treaty practice, if measured by the number of objections made to reservations to human rights treaties.”)

⁹⁹ See KAUFMAN, *supra* note 53, at 187.

¹⁰⁰ See U.S. Understanding 5, in ICCPR Ratification Record, *supra* note 43, at 14; U.S. Understanding, in CERD Ratification Record, *supra* note 43, at 10; U.S. Understanding 6, CRC Child Abuse Protocol Ratification Record, *supra* note 43, at 5; U.S. Understanding 5, CAT Ratification Record, *supra* note 43, at 7.

¹⁰¹ See U.S. Declaration 1, in ICCPR Ratification Record, *supra* note 43, at 14; U.S. CERD Declaration, in CERD Ratification Record, *supra* note 43, at 10; U.S. Declaration, in CAT Ratification Record, *supra* note 43, at 6.

¹⁰² See U.S. Understanding 5, in CRC Child Soldier Protocol Ratification Record, *supra* note 43, at 19. Note also that two ratifications involved what Senator Helms termed the “sovereignty proviso,” a reservation included in the ratification of the Genocide Convention, and also that was placed in the Senate’s resolution of ratification of the Convention against Torture, but not included in the Convention against Torture instrument of ratification deposited by the President. See CRS HANDBOOK ON U.S. TREATYMAKING PROCESS, *supra* note 45, at 134-35. The “sovereignty proviso” stated that the President would not deposit the instrument of ratification until he had notified “all present and prospective ratifying parties” that “nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” See *id.* at 134, 287.

¹⁰³ See, e.g., Objection of Denmark to Reservations made by the United States, in ICCPR Ratification Record, *supra* note 43, at 16; Objection of the Netherlands to Reservations, Understandings and Declarations made by the United States, in CAT Ratification Record, *supra* note 43, at 9.

¹⁰⁴ See Catherine Redgwell, *US reservations to human rights treaties: all for one and none for all?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392, 397-98 (Michael Byers and Georg Nolte, Eds., 2003) (describing response of U.N. Human Rights Committee to U.S. restrictions on ICCPR ratification).

¹⁰⁵ See, e.g., American Civil Liberties Union and Human Rights Watch, *ACLU And Human Rights Watch Report on U.S. Violations of International Human Rights Covenant: Groups Call on Clinton Administration to Correct Abuses, Ensure That International Standards Can Be Invoked in U.S. Courts* (Dec. 14, 1993), available at http://www.skepticfiles.org/aclu/12_14_93.htm (urging that the United States repeal ICCPR RUDs).

¹⁰⁶ The Supreme Court recently read a treaty to be non-self-executing and thus unenforceable in U.S. court. See *Medellin v. Texas*, 552 U.S. ____ (2008). For recent discussion of this issue, compare Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599 (2008) and Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties As*

explicit non-self-execution ratification restrictions.¹⁰⁷

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

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

The first [principle governing executive branch human rights treaty ratification] is that, while the U.S. will adhere to this covenant, it will not agree to any change in U.S. law as it is today. Mr. Rodley referred to this as unseemly; I have called it ignoble and have sometimes thought of it as outrageous. The purpose of adhering to a treaty is to undertake obligations, in this case to adhere to a common international standard. What sort of convention would you have if every country adhered subject to the reservation that it would not make any changes in its laws? If the Soviet Union made such a reservation, we would, rightly, reject its adherence as fraudulent. . . . Some apparently support such a reservation with the argument that it is necessary because it is unconstitutional or undesirable to make changes in domestic law by treaty. We have always made changes in domestic law by treaty . . . If one did not make domestic law by treaty, there would be no sense in, no need for, a clause that declares treaties to be the supreme law of the land.¹¹¹

Since Professor Henkin issued his scathing critique of human rights treaty ratification restrictions, the United States has ratified seven human rights treaties, including three major United Nations human rights conventions, and as discussed above, has included significant restrictions. It is unlikely that the Migrant Worker Convention would be an exception to this pattern, particularly given the charged political climate with respect to

“*Supreme Law of the Land*,” 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing At Treaties*, 99 COLUM. L. REV. 2154 (1999) with John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

¹⁰⁷ See Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539-540 (1999).

¹⁰⁸ See U.S. ICCPR Reservation 2, in ICCPR Ratification Record, *supra* note 43, at 14.

¹⁰⁹ See International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U. N. T. S. 171, *entered into force* Mar. 23, 1976, at art. 6(5) [hereinafter ICCPR]; see also CRS HANDBOOK ON U.S. TREATYMAKING PROCESS, *supra* note 45, at 291.

¹¹⁰ See U.S. Understanding 2, CRC Child Abuse Protocol Ratification Record, *supra* note 43, at 5.

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

immigration. Indeed, the International Labour Organization raised concerns about moving the migrant worker issue into a UN treaty because of concern that the UN process includes the potential dilution effect of restrictions on ratification, and the ILO Convention process does not.¹¹² Such restrictions lessen the positive impact of ratification, not only on protection for vulnerable groups like migrant workers, but also on the enhancement to the United States' international reputation that ratification brings. In the case of the Migrant Worker Convention, restrictions would have an additional negative effect in that they would affect the United States its leadership vis-à-vis other countries that are still deciding whether and how to ratify. Therefore, while it is likely that ratification of the Migrant Worker Convention would be conditioned, it will be very important to limit restrictions to the greatest possible extent.

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

III. Domestic Law Assessment of the Migrant Worker Convention

Based on interviews with advocates, and with domestic and international government officials, It appears that the Migrant Worker Convention has received virtually no domestic attention in the United States from either civil society, domestic or international government,¹¹³ likely because it is assumed that any attempt to define immigrants as rights holders is a political non-starter. Therefore, none of the relevant actors have completed the work needed to analyze the Convention. Thus, the controversial nature of immigrants' rights leads to a chicken-and-egg problem: until the Convention is assessed and ratification can be debated based on specific concerns, these political assumptions will remain a self-fulfilling prophecy. Some steps are essential to the process of assessing the treaty: 1) a technical legal project to assess the Convention in light of U.S. law, so that interested domestic actors can develop their own positions on the Convention and formulate potential conditions on ratification; and 2) a domestic debate on the relative merit of the Convention in light of U.S. interests and policy aspirations.

¹¹² See Roger Böhning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future*, 25 INT'L MIGRATION REVIEW 698, 702-703 (1991).

¹¹³ See Sherer Email, *supra* note 77; Phone interview with Christi Gaines, Legislative Counsel for Government Affairs Office at the ABA, January 15, 2008; Pécoud Email, *supra* note 89.

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

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

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

The following section analyzes five different types of relationships between the Migrant Worker Convention protections and domestic law. The first is a **clear *de jure* conflict between a domestic norm and the treaty provision, where the treaty provision is the more stringent of the two**. An example of such a norm is Migrant Worker Convention Article 22.9, which states that “[e]xpulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.”¹¹⁴ This provision conflicts with the U.S. rule stripping lost-wage remedies from unauthorized workers whose National Labor Relations Act¹¹⁵ and Title VII rights are violated.¹¹⁶ Thus, at the present moment in U.S. treaty practice, such a conflict is likely to result in a reservation limiting this country's international obligation to the level of protection already afforded by the parallel, conflicting U.S. standard.

Other Migrant Worker Convention provisions **clearly present a less rights-protective standard than domestic law**. The Migrant Worker Convention, for example, provides for freedom of speech¹¹⁷ to a lesser extent than the U.S. Constitution,¹¹⁸ indicating the need for a ratification restriction such as the second U.S. Declaration to its ratification of the ICCPR. ICCPR Ratification Declaration 2 stated that “[f]or the United States, [the ICCPR provision] which

¹¹⁴ UN Migrant Worker Convention, *supra* note 20, art. 22(9).

¹¹⁵ See *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) (stripping NLRA remedies from unauthorized workers).

¹¹⁶ See U.S. Equal Employment Opportunity Commission, Memorandum of Understanding Between The Equal Employment Opportunity Commission and The Office of Special Counsel for Immigration Related Unfair Employment Practices, December 18, 1997.

¹¹⁷ See UN Migrant Worker Convention, *supra* note 75, art. 13.

¹¹⁸ See Helton, *supra* note 87, at 857.

provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.”¹¹⁹

Treaty provisions about which domestic actors will likely not agree – about which *de jure* **conflicts with domestic laws are arguable**, are also useful to identify. An example of such a Migrant Worker Convention provision is Article 18.1, which requires that all migrant workers and family members, including those in undocumented status, have the right to equality with nationals of the [State of employment] before the courts and tribunals.”¹²⁰ Non-governmental advocates are likely to argue that the United States’ restriction on Legal-Service-Corporation (LSC)-funded service to undocumented immigrants¹²¹ violates the Article 18.1 guarantee of non-discriminatory access to the courts.¹²² However, the U.S. government is unlikely to see the LSC restrictions as conflicting with Article 18.1, given the current state of international law, which has rarely considered and does not clearly mandate provision of civil legal services as a matter of human right.¹²³

Additionally, provisions that likely involve **no de jure conflict with domestic law, but do suggest an arguable de facto conflict**, are indicators of issues that may have political traction but little legal relevance to ratification. An example of such a provision is Migrant Worker Convention article 17.1, which requires that “migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person...”¹²⁴ Although there is room for more protective measures to be implemented in the law,¹²⁵ the United States does have an elaborate legal framework for the detention of immigrants¹²⁶ that, if enforced, is unlikely to run afoul of article 17.1. However, the implementation of these domestic standards, and the actual treatment of immigrants in U.S.

¹¹⁹ See U.S. ICCPR Declaration 2, ICCPR Ratification Record, *supra* note 43.

¹²⁰ See UN Migrant Worker Convention, *supra* note 20, art. 18.1.

¹²¹ Legal Services Corporation Act, 42 U.S.C. §2996 et seq (1974).

¹²² See Helton, *supra* note 87, at 854.

¹²³ Although there is "growing international acceptance of a right to legal representation," see Roger Smith, International Obligations and Legal Aid para. 1 (2004), available at www.justiceinitiative.org/activities/ncjr/atj/turkey/materials/smith, only the European Court of Human Rights has found a right to free civil legal services for European countries. See *id.*; see also *Airey v. Ireland* [1979] 2 E.H.R.R. 305 (interpreting Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms to find a right to free civil legal services in some instances). An additional question might arise in that, although it begins with the general statement about equality of protection “before the courts and tribunals,” the other language of Article 18 focuses on rights in criminal proceedings as opposed to civil trials. See UN Migrant Worker Convention, *supra* note 20, art. 18.

¹²⁴ See UN Migrant Worker Convention, *supra* note 20, art. 17.1.

¹²⁵ See, e.g., Human Rights Watch, U.S.: Immigration Detention Neglects Health, March 17, 2009, available at <http://www.hrw.org/en/news/2009/03/17/us-immigration-detention-neglects-health> (calling on the U.S. government to “[i]ssue federal regulations so that the immigration agency’s detention standards have the force of law, and detained individuals and their advocates have recourse to courts to redress shortfalls in health care;” and “[r]evamp policies limiting access to non-emergency services.”).

¹²⁶ Office of Detention and Removal Operations, Operations Manual ICE Performance Based National Detention Standards (Last modified Sept. 15, 2008).

detention facilities, has been the subject of significant controversy and litigation.¹²⁷ For example, U.S. courts have made findings of fact that torture and other forms of abuse have been meted out in immigration detention facilities located in U.S. territory.¹²⁸ Nevertheless, human rights violations such as these are unlikely to be of grave concern to the U.S. government in making the signature or ratification decision, because the Convention does not allow for individual complaints.¹²⁹ Once the treaty was ratified, organizations and individuals could comment to the monitoring committee about the United States' compliance with the treaty, but they could not lodge formal complaints.

Finally, it is important to identify treaty provisions that **arguably involve neither *de jure* nor *de facto* conflict**. An example of this type of provision in the Migrant Worker Convention is Article 20.1, which states that “[n]o migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfill a contractual obligation.”¹³⁰ This provision does not appear to conflict with any legal or actual U.S. practice.¹³¹

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

	De Jure Conflict Unlikely	De Jure Conflict Arguable/Likely
De Facto Conflict Unlikely	Article 20.1 No imprisonment for contractual violation.	<i>ICMW is less protective than U.S. law:</i> Article 13 Allows restrictions on Freedom of Speech that are not found in U.S. law.
De Facto Conflict Arguable/Likely	Article 17.1 Respect for the inherent dignity of detained migrants. (Courts have sanctioned the government for abuses in immigration detention)	<i>ICMW is clearly more protective than U.S. law:</i> Article 25 National treatment with respect to termination of the employment relationship. (US law excludes undocumented workers from monetary remedies for

¹²⁷ See, e.g., *Jama et al. v. Esmor Correctional Services, Inc.*, 22 F.Supp.2d 353 (1998).

¹²⁸ *Id.* See also Valery Joseph Case, Carmen Gentile, “Group Calls for Inquiry into Death of Detainee.” July 15, 2008. <http://www.nytimes.com/2008/07/15/us/15immig.html>. Jane Guskin “Immigration Detention: The Case for Abolition.” August 27, 2008. http://www.huffingtonpost.com/jane-guskin/immigration-detention-the_b_121374.html

¹²⁹ See UN Migrant Worker Convention, *supra* note 20, art. 73 (reporting process).

¹³⁰ See UN Migrant Worker Convention, *supra* note 20, art. 20.1.

¹³¹ ICCPR, *supra* note 109, art. 11 (As reported in the Initial Report, in the United States, imprisonment is never a sanction for the inability to fulfill a private contractual obligation).

		wrongful termination) <i>ICMW is arguably more protective than U.S. Law:</i> Article 18.1 right to equality “before the courts and tribunals” (U.S. law excludes undocumented immigrants from access to LSC-funded civil legal aid)
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B. Comparison of the Migrant Worker Convention with Key U.S. Laws

The Migrant Worker Convention contains seventy-seven substantive articles, which, according to my count, break down into 187 separate points of comparison with U.S. law. Analyzing and sorting every one of these comparison points into the five categories is a substantial project that lies beyond the scope of this Article. However, through selected examples, it is possible to draw some initial conclusions about the potential interplay of the Convention and U.S. law. First, because half of the convention delineates the fundamental human rights guaranteed to *all* migrant workers and family members, including those who are undocumented, a significant portion of the treaty is a recitation of international standards to which the United States has already bound itself by virtue of previous treaty ratifications. Second, of five immigrant worker-related policies identified as having particular importance for the U.S. enforcement branches, two partially conflict with the Convention and three are unlikely to be challenged through the convention.

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

The bulk of the Migrant Worker Convention’s seventy-seven substantive provisions are divided between 1) protections for *all* migrant workers and members of their families, including those who are in an irregular, or undocumented, status,¹³² and 2) protections for legally present and employed workers and family members.¹³³ The provisions that apply to undocumented migrants are, to a great extent, a recitation of international norms to which the United States has already acceded by virtue of previous treaty ratifications.¹³⁴ In fact, twenty-three¹³⁵ provisions of the

¹³² See UN Migrant Worker Convention, *supra* note 20, Part III, Human Rights of All Migrant Workers and Members of their Families, arts. 8-35.

¹³³ See UN Migrant Worker Convention, *supra* note 20, Part IV, Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation, arts. 36-56, and Part V, Provisions Applicable to Particular Categories of Migrant Workers and of their Families, arts. 57-63.

¹³⁴ See, e.g., UN Migrant Worker Convention, *supra* note 20, art. 8 (corresponds to ICCPR art. 12 and CERD art. 5(d)); *id.* art. 9 (corresponds to ICCPR art. 6); *id.* art. 11 (corresponds to ICCPR art. 8); *id.* art. 12 (corresponds to ICCPR art. 18 and CERD art. 5(d)); *id.* art. 13 (corresponds to ICCPR art. 19 and CERD art. 5(d)); *id.* art. 14 (corresponds to ICCPR art. 17); *id.* art. 16 (corresponds to ICCPR art. 9 and CERD art. 5(b)); *id.* art. 17(4)

Migrant Worker Convention merely echo the language of treaties the United States has ratified.¹³⁶ An additional two provisions, which do not correspond to protections already ratified by the United States, do echo the language of the Universal Declaration of Human Rights,¹³⁷ a document that the United States helped to draft¹³⁸ and in favor of which this country voted in 1948.¹³⁹ Moreover, each of these two provisions – protection from arbitrary deprivation of property and right to secondary education for undocumented immigrant children, are both firmly established in U.S. domestic law.¹⁴⁰ Thus, a significant portion of the Migrant Worker Convention overlaps with the United States' existing obligations.

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

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

(containing a more enumerated version of the protections found at ICCPR arts. 8-9), *id.* art. 18 (corresponds to ICCPR arts. 14, 26 and CERD arts. 5(a), 6); *id.* art. 19 (corresponds to ICCPR art. 15); *id.* art. 20 (corresponds to ICCPR art. 11); *id.* art. 22 (corresponds to ICCPR art. 13); *id.* art. 23 (corresponds to Vienna Convention on Consular Relations art. 36, April 24, 1963, 596 U.N.T.S. 261); *id.* art. 24 (corresponds to ICCPR art. 16); *id.* art. 26 (ICCPR art. 22 and CERD arts. 5(d), 5(e)); *id.* art. 27 (corresponds to CERD art. 5(e)); *id.* art. 28 (corresponds to CERD art. 5(e)); *id.* art. 29 (corresponds to ICCPR art. 24); *id.* art. 31 (corresponds to ICCPR art. 27); *id.* art. 39 (corresponds to ICCPR art. 12); *id.* art. 40 (corresponds to ICCPR art. 22 and CERD art. 5(e)); *id.* art. 42 (corresponds to ICCPR art. 25 and CERD art. 5(c)); *id.* art. 43 (corresponds to CERD art. 5(e)); *id.* art. 44 (corresponds to ICCPR art. 23). For a helpful chart comparing the provisions of the ICMW with seven human rights documents, Nafziger & Bartel, *supra* note 87, at *Appendix*.

¹³⁵ Nafziger & Bartel, *supra* note 87, at 789-99. *See also* UN Migrant Worker Convention, *supra* note 20, art. 10 (corresponds to CAT art. 16); *id.* art. 16 (corresponds to CAT art. 14).

¹³⁶ *See supra* note 134.

¹³⁷ *See* UN Migrant Worker Convention, *supra* note 20, art. 15 (corresponds to UDHR art. 17); *id.* art. 30 (corresponds to UCHR art. 26).

¹³⁸ MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE CREATION OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS 38 (Knopf 2000).

¹³⁹ *Id.* Note that the UDHR is a declaration, not a treaty, and therefore is not as a whole formally binding on the United States. *See* Hurst Hannum, "The Status of the UDHR in National and International Law," 25 GA. J. Int'l & Comp. L. 287, 289 (1995-96). Some provisions of the UDHR, such as the prohibition on torture contained in article 5, are now accepted by the United States as binding on this country through the international law devices of customary international law and/or *jus cogens*, Hannum, *supra* at 306. *See also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2nd Cir. 1980) (indicating that the UDHR was part of customary international law), but UDHR Articles 17 and 26 are not among these. Nonetheless, the United States endorsement of the UDHR weight to the argument that the above-mentioned parallel articles in the Migrant Worker Convention (15 and 30) are not foreign to the United States. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

¹⁴⁰ U.S. CONST. amend. V. *See Plyler v. Doe*, 457 U.S. 202, 252 (1982) (holding that undocumented immigrant children have a constitutional right to education, as long as it is being offered to others and Congress has not asserted responsibility in this area).

conflicts.

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

a. The Convention Does Not Mandate Legalization

The Convention explicitly places no obligation on States Parties to expand visa numbers or engage in legalization of undocumented immigrants. Article 35 of the Convention states that “Nothing in the present part of the Convention [Part III, relating to unauthorized workers and undocumented family members] shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are [undocumented]...or any right to such regularization of their situation...”¹⁴² The Convention underscores this point in Article 34, noting that “Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from...the obligation to comply with the laws and regulations of...the State of employment.”¹⁴³ Thus the Convention does not purport to take any position on the bedeviled legalization question that has increasingly preoccupied Congress since America’s last wide-scale regularization in 1986. Article 69.1 does direct States Parties to “take appropriate measures” to ensure that the presence within their territory of migrant workers and families in an “irregular situation” (undocumented status) does not persist. However, Article 69.1 does not suggest what measures States Parties should take, leaving the means to individual states’ immigration regimes.

b. Arguable *De Jure* Conflict with Expedited Removal as Applied in the Interior

Expedited removal is a process by which foreign nationals can be summarily removed from the United States after an interview with border enforcement officials.¹⁴⁴ Minimal safeguards for identifying and protecting asylum seekers, U.S. citizens and permanent residents are included in the process, but over the twelve-year history of the expedited removal program, the efficacy of

¹⁴¹ See *European Assessment of the Treaty*, *supra* note 38, at 51-52.

¹⁴² UN Migrant Worker Convention, *supra* note 20, art. 35.

¹⁴³ *Id.* art. 34.

¹⁴⁴ See *e.g.* 8 U.S.C. §§ 1225, 1228 (an immigration officer need only conduct a preliminary screening to determine admissibility before removal) (2009).

these protections has been questioned.¹⁴⁵ Moreover, in 2004, the Bush administration began utilizing expedited removal against undocumented individuals discovered up to 100 air miles in from the borders.¹⁴⁶

Articles 22 and 23 of the Migrant Worker Convention do provide various due process protections in expulsion, but appear not to set limits on decisions of non-admittance. In fact, the U.S. representative to the Working Group, along with other delegations, made several statements to the effect that such was their understanding. In 1981, early in the negotiations, several delegations stated that the Convention needed a provision on “the question of non-admittance of undocumented migrant workers at ports of entry in countries of destination.”¹⁴⁷ However, the official record of the discussions does not reveal that such a provision was ever drafted. In the discussions about the Article 23 guarantee of the right to consular access in expulsion proceedings, the Argentinean and U.S. representatives stated that consular access rights “should not be applicable to persons who have not yet entered the country concerns who have been turned back at ports of entry.”¹⁴⁸ The United States further argued that the right to consular access “should not necessarily apply to all those who are apprehended as illegal migrants shortly after crossing the border of the country concerned.”¹⁴⁹ In 1987, during the second reading of article 22, the German representative stated his opinion that “the notion of expulsion included the specific case of a migrant worker who has to be expelled immediately after arriving in a country where he was not accepted.”¹⁵⁰ The Italian representative responded immediately, stating “that the article [22] addressed the case of a migrant worker who might be expelled from the territory of a State and not to be the case of a migrant worker who had not yet entered the territory of that State.”¹⁵¹

Later still, in 1989, the United States touched on the issue again during the discussion of Convention Article 79. Article 79 states that “[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.”¹⁵² In the reported discussion of this language, the U.S. representative

¹⁴⁵ See KAREN MUSALO, THE EXPEDITED REMOVAL STUDY: EVALUATION OF THE GENERAL ACCOUNTING OFFICE’S SECOND REPORT ON EXPEDITED REMOVAL, 18-19 (October 2000), available at http://w3.uchastings.edu/ers/reports/10-00_rep1.pdf (last visited February 2, 2009).

¹⁴⁶ A Congressional Research Service report lays out the history of the expanding use of expedited removal by the United States: “From April 1997, to November 2002, expedited removal only applied to arriving aliens at ports of entry. In November 2002, it was expanded to aliens arriving by sea who are not admitted or paroled. Subsequently, in August 2004, expedited removal was expanded to aliens who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. southwest land border, and can not establish to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter. In January 2006, expedited removal was reportedly expanded along all U.S. borders.” ALISON SISKIN AND RUTH ELLEN WASEM, CRS REPORT FOR CONGRESS RECEIVED THROUGH THE CRS WEB: IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS Summary Page (updated May 15, 2006), available at <http://openers.com/document/RL33109/> (last visited Dec. 19, 2008).

¹⁴⁷ See *November 1981 Working Group Report*, *supra* note 27, para. 64.

¹⁴⁸ See *June 1989 Working Group Report*, *supra* note 67, para. 76.

¹⁴⁹ See *id.*

¹⁵⁰ See *June 1987 Working Group Report*, *supra* note 64, para. 102.

¹⁵¹ See *id.*

¹⁵² UN Migrant Worker Convention, *supra* note 20, art. 79.

stated that “his delegation understood the word ‘admission,’ in this article, in its broadest concept, to encompass all terms and conditions pursuant to which migrant workers and members of their families may enter and remain in the United States...”¹⁵³

Despite the ambiguity introduced by the German representative’s statement regarding the definition of expulsion, the better conclusion is that the Convention does not regulate refusal of entry at ports of entry and at the border.

There is, however, another feature of current U.S. expedited removal policy that may arguably come under the purview of Article 22. To the extent that the curtailed processes of expedited removal are enforced from within the *interior* of the United States, the action is likely to be defined as expulsion and thus regulated by the Convention. After the expansion of expedited removal and its concomitant checkpoints into the interior, the American Civil Liberties Union used census data to conclude that “fully TWO-THIRDS of the United States’ population lives within this Constitution-free or Constitution-late Zone...[and that n]ine of the top 10 largest metropolitan areas as determined by the 2000 census, fall within the Constitution-free Zone...Some states are considered to lie completely within the zone: Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island and Vermont.”¹⁵⁴ Should future administrations choose to continue to exercise this expansive authority, it is unlikely that the application of expedited removal within such a broad swath of the United States will be viewed as “non-admittance” as opposed to expulsion. Once defined as expulsion, the expedited removal from the interior would be liable to due process analysis by the Committee.

Currently, immigration advocates are urging the Obama administration to limit the scope of expedited removal to the border itself and ports of entry,¹⁵⁵ and/or to seek repeal of the policy altogether.¹⁵⁶ The United Nations High Commissioner for Refugees has been critical of expedited removal policies in the United States¹⁵⁷ as well as in Europe,¹⁵⁸ where the practice originated. The Migrant Worker Committee, the UN body that monitors the ICMW, has commented negatively on Mexico’s law that permits the executive branch to immediately deport any immigrant for any reason.¹⁵⁹ Mexico’s law is less protective of due process than U.S. expedited removal, but the attention paid to Mexico’s law does underscore the fact that due

¹⁵³ See *June 1989 Working Group Report*, *supra* note 67, para. 13.

¹⁵⁴ See AMERICAN CIVIL LIBERTIES UNION, FACT SHEET ON U.S. "CONSTITUTION FREE ZONE," available at <http://www.aclu.org/privacy/37293res20081022.html>.

¹⁵⁵ Shoba Sivaprasad Wadhia, IMMIGRATION POLICY: TRANSITION BLUEPRINT, 9-10 (Nov. 16, 2008), available at http://65.36.162.162/files/ImmigrationTransitionBlueprint_2008.pdf.

¹⁵⁶ *Id.*

¹⁵⁷ See Office of the United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, 1 (Feb. 1999).

¹⁵⁸ See Office of the United Nations High Commissioner for Refugees, *UNHCR Observations on the European Commission’s Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 2 (2005).

¹⁵⁹ See Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico, CMW/C/MEX/CO/1 para. 13 (Dec. 20, 2006).

process in removal from the interior is liable to scrutiny.

Viewed through the lens of the Article 22 due process limitations on expulsion, American expedited removal from the interior would likely violate the Convention on several grounds. At a minimum, it would conflict with the Article 22.4 requirement of review of the expulsion decision. Moreover, Article 22.6's requirement that expelled migrant workers be afforded a "reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities"¹⁶⁰ would also likely not be met. Thus, to the extent that expedited removal from the interior could be viewed as expulsion, both of these provisions would likely conflict with U.S. domestic law. In the ratification process, the U.S. government is likely, therefore, to seek a restriction on ratification that leaves the United States free to pursue interior-expedited-removal. It is important to remember, however, that the port-of-entry expedited removal proceedings that are actually statutorily mandated are unlikely to present an issue under the Migrant Worker Convention. It is only expedited removal from the interior, which can be repealed at the will of the Executive, which likely runs afoul of the Convention.

c. The Convention Does Not Challenge Border Policies

The majority of illegal immigration into the United States¹⁶¹ takes place along this country's 1,969-mile¹⁶² border with Mexico. The United States spends heavily on border-crossing prevention, an estimated \$1.7 billion in fiscal year 2002.¹⁶³ Border control funding increased 519% between 1986 and 2002, and border staffing increased 221% in the same period.¹⁶⁴ Border control is such a clear priority of the United States government, that one of the few significant pieces of immigration-related legislation to pass during the George Bush Administration was the "Secure Fence Act of 2006."¹⁶⁵ The Migrant Worker Convention does not specifically mention border control, but clearly anticipates that it will be used as an enforcement tool. Article 68 directs States Parties to collaborate on "measures to sanction illegal or clandestine movements,"¹⁶⁶ stating that "measures to be taken to this end shall include...measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families."¹⁶⁷ To the extent that U.S. domestic actors – government and civil society alike - raise concerns about the humaneness¹⁶⁸ of the United States' border control strategies, these concerns

¹⁶⁰ See UN Migrant Worker Convention, *supra* note 20, art. 22.4.

¹⁶¹ See Pew Hispanic Center, Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow, <http://pewhispanic.org/files/reports/94.pdf> (59% of the United State's illegal immigrant population comes from Mexico).

¹⁶² See U.S.- Mexico Continental Boundary Map, available at http://www.ibwc.state.gov/Files/US-Mx_Boundary_Map.pdf

¹⁶³ See DEBORAH WALLER MEYERS, US BORDER ENFORCEMENT: FROM HORSEBACK TO HIGH-TECH 10 (November 2005), available at <http://www.migrationpolicy.org/ITFIAF/publications.php> (last visited August 17, 2008) (chart).

¹⁶⁴ *Id.* at 21 (chart).

¹⁶⁵ See The Secure Fence Act of 2006, Pub.L. 109-367 (Oct. 26, 2006).

¹⁶⁶ UN Migrant Worker Convention, *supra* note 20, art. 68.1.

¹⁶⁷ *Id.* art. 68.1(b).

¹⁶⁸ See, e.g., Meyers, *supra* note 163, at 22; INS' Southwest Border Strategy, Resource and Impact Issues Remain

might be addressed in the context of the Convention Article 9 right to life,¹⁶⁹ just as it has already come up in the context of the right to life protection contained in the ICCPR.¹⁷⁰ A recent decision of the Inter-American Commission on Human Rights of the Organization of American States, disallowing a complaint against the United States alleging that U.S. border policies violate the right to life, lends weight to the assumption that UN monitors are likely to take a cautious approach to the border enforcement issue.¹⁷¹ This assumption is likely to be an important element of any American debate on ratifying the Convention, to the extent that advocates and officials pressing for signature and ratification would need to dispel concerns as to whether the Convention would hamper U.S. sovereignty over its borders.

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

Several Convention articles offer substantive immigration protections to legally present workers aimed at protecting family reunification. Article 38 requires States of employment to “make every effort to authorize [legally present] migrant workers and [family members] to be temporarily absent without effect upon their authorization to stay or to work.”¹⁷² With regard to workers who are lawful permanent residents, the United States does precisely this, permitting LPR-status immigrants to travel abroad for up to six months at a time without running any risk of jeopardizing their status. With regard to temporary entrants, however, no such provision for temporary travel is made, creating a *de jure* conflict between Article 38 and U.S. law.

Article 44.2 directs that States Parties “take measures that they deem appropriate and that fall within their competence to facilitate the reunification of [authorized] migrant workers with their spouses [or equivalents] as well as with their minor dependent unmarried children,” and directs that “on humanitarian grounds, [States Parties] shall favourably consider granting equal treatment to other family members of migrant workers.”¹⁷³ As to the first requirement, the language “take measures that they deem appropriate” prevents this clause from conflicting with domestic law. However, the second phrase requires examining whether those family

After Seven Years 24-26 (August 2, 2001), available at www.gao.gov/products/GAO-01-842 (last visited August 17, 2008) (documenting the increase in deaths at the border and discussing the then-INS’s attempts to reduce the death rate).

¹⁶⁹ See UN Migrant Worker Convention, *supra* note 20, art. 9.

¹⁷⁰ See Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev.1 para. 34 (December 18, 2006) (expressing concern about militarization of the U.S./Mexico border) [hereinafter 2006 Human Rights Committee Concluding Observations on the United States].

¹⁷¹ See generally, e.g., *Victor Nicolas Sanchez et al. v. (“Operation Gatekeeper”) United States*, Inter-American Commission on Human Rights, Report N^o 104/05, Petition 65/99 (October 27, 2005), available at <https://www.cidh.oas.org/annualrep/2005eng/USA.65.99eng.htm> (dismissing petition alleging that border policies led to deaths of petitioners in violation of the American Declaration of the Rights and Duties of Man, for failure to exhaust domestic remedies); David C. Baluarte, *Challenging Mandatory Deportation Before the Inter-American Commission on Human Rights: The Hope of Smith and Armendariz vs. United States*, 12 *Bender’s Immig. Bull.* 1718 (Dec. 1, 2007) (describing a pending petition challenging mandatory U.S. deportation for past convictions of minor crimes).

¹⁷² UN Migrant Worker Convention, *supra* note 20, art. 58.2.

¹⁷³ *Id.* art. 44.2.

reunification protections that are in place are being extended to “other family members.” This, too, is a weak requirement, using the mandating language of “shall favourably consider,” but if that language were interpreted to be binding, the U.S. domestic immigration system would present a *de jure* conflict with Article 44.2 as well. There are numerous instances in U.S. law of more favorable treatment for nuclear as opposed to extended, or “other” family members.¹⁷⁴ Similarly, if “favourably consider” is interpreted to be binding, Article 50.1 raises a *de jure* conflict. Article 50.1 requires States to “favourably consider” granting family members of deceased or divorced migrant workers authorization to stay and to take into account the length of time already resided in that State.¹⁷⁵ These provisions, though arguably weakly worded, raise potential conflicts that would likely require either a change in U.S. law to guarantee conformance or spark a restriction on ratification. Moving toward modifying U.S. law on this point would better comport with the United States’ obligation under International Covenant on Civil and Political Rights Article 23.1 to treat the family as “the natural and fundamental group unit of society[,] entitled to protection by society and the State.”¹⁷⁶

e. The Convention Does Not Challenge Worksite Enforcement

Because the U.S. immigration regime provides few opportunities for legal migration by poor and middle-class foreigners,¹⁷⁷ the United States economy currently makes jobs available to at least 7.2 million unauthorized immigrants.¹⁷⁸ Bringing down this number is frequently cited as a goal by all branches and levels of government.¹⁷⁹ Over the past five years, the Executive branch has expanded its use of worksite raids in order to address the phenomenon of unauthorized work.¹⁸⁰ In 2002, Immigration and Customs Enforcement (ICE) made “25 criminal and 485

¹⁷⁴ See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 277-280 (5th Ed. 2003) (describing the top U.S. family immigration preference categories as spouses and unmarried children, with married children, parents and siblings accorded lower preference).

¹⁷⁵ UN Migrant Worker Convention, *supra* note 20, art. 58.2.

¹⁷⁶ See ICCPR, *supra* note 109, art. 23.1.

¹⁷⁷ See Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 587-590 (2004) (describing “the immigration law bottleneck that prevents laborers from gaining visas to enter the United States legally for work”).

¹⁷⁸ For the proposition that there are currently 7.2 million unauthorized immigrant workers in the United States, see PEW HISPANIC CENTER, FACT SHEET, THE LABOR FORCE STATUS OF SHORT-TERM UNAUTHORIZED WORKERS, (April 13, 2006), available at <http://pewhispanic.org/files/factsheets/16.pdf> [hereinafter PEW UNDOCUMENTED WORKER COUNT]. For the link between the low brown-collar visa numbers and illegal work, see MAUDE-TOUSSAINT COMEAU, ET AL., OCCUPATIONAL ATTAINMENT AND MOBILITY OF HISPANICS IN A CHANGING ECONOMY, A REPORT TO THE PEW HISPANIC CENTER 23-25 (2005), available at <http://www.pewhispanic.org/files/reports/59.1.pdf>.

¹⁷⁹ See, e.g., *The Agenda: Immigration*, available at <http://www.whitehouse.gov/agenda/immigration/> (listing as one of the new Administration’s goals to “Remove Incentives to Enter Illegally: Remove incentives to enter the country illegally by cracking down on employers who hire undocumented immigrants.”); see also Ordinance 2006-18 Illegal Immigration Relief Act Ordinance, available at http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf (ordinance of Hazelton, Pennsylvania, punishing local businesses who hire unauthorized immigrants).

¹⁸⁰ See Lorraine Schmall, *Worksite Enforcement of U.S. Immigration Laws*, Northern Illinois University Professor’s Column 8 (August 20, 2008), available at <http://law.niu.edu/law/faculty/column.shtml> (last visited September 5, 2008).

administrative arrests” in worksite raids, numbers that have increased every year since, and in 2007 ICE made 863 and 4077 arrests, respectively.¹⁸¹ Compared with the number of companies and individuals employing unauthorized workers in the United States, these are low numbers,¹⁸² but the increase has nevertheless been dramatic and well publicized.¹⁸³ Any administration assessing the Migrant Worker Convention will be concerned that it would not foreclose the use of this enforcement tool. The Convention does not specifically address worksite enforcement measures, and no provision appears to challenge the use of worksite raids. Indeed, Convention Article 68.2 directs that States Parties “shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation.”¹⁸⁴

One common critique of worksite enforcement raids by the U.S. government is that they target workers rather than employers.¹⁸⁵ If the United States were to ratify the Convention, likely the Committee would not scrutinize the use of worksite raids as a matter of policy, but rather it would examine how rights-protective those raids are. In its definition of “adequate and effective measures to eliminate [unauthorized] employment,” the Convention mandates that States Parties shall sanction employers “whenever appropriate.”¹⁸⁶ Apart from this statement, the Convention does not inquire into the ratio of employer-to-employee sanctions. Therefore, this domestic critique is likely to be contained in a debate over whether the United States is sanctioning employers “whenever appropriate.” A second common critique is that some raids are carried out in an abusive manner.¹⁸⁷ This concern is not specifically addressed in the Convention, but could be incorporated in the Article 10 protection against torture and cruel, inhuman or degrading treatment or punishment,¹⁸⁸ or the due process, consular and detention protections in criminal prosecution.¹⁸⁹ However, given that these ICMW articles mirror provisions of the ICCPR, 10 mirrors article 7, clause 1 of the ICCPR,¹⁹⁰ this protection is already in place for migrant workers in the United States and would not create new obligations for the United States.

Article 68 states that unauthorized workers’ “rights vis-à-vis their employer arising from employment shall not be impaired by [enforcement] measures.”¹⁹¹ The U.S. Executive generally maintains that worksite enforcement is supportive of labor rights. For example, the ICE webpage on worksite enforcement currently carries the following language:

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Anna Gorman and Andrew Blankstein, *Massive sweep deports hundreds - More than 1,300 are arrested as U.S. officials target immigrant criminals in Southland*, L.A. TIMES, October 3, 2007, available at <http://articles.latimes.com/2007/oct/03/local/me-immig3>; See Associated Press, *Hundreds Nabbed in Immigration Raid*, April 19, 2006, available at <http://www.msnbc.msn.com/id/12393925/>

¹⁸⁴ UN Migrant Worker Convention, *supra* note 20, art. 68.2.

¹⁸⁵ See Schmall, *supra* note 180, at 7.

¹⁸⁶ See UN Migrant Worker Convention, *supra* note 20, art. 68.2.

¹⁸⁷ See NATIONAL NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS (NNIRR), *OVER-RAIDED, UNDER SIEGE: U.S. IMMIGRATION LAWS AND ENFORCEMENT DESTROY THE RIGHTS OF IMMIGRANTS*, 5-10 (January 2008), available at http://www.nnirr.org/resources/docs/UnderSiege_web2.pdf.

¹⁸⁸ See UN Migrant Worker Convention, *supra* note 20, art. 10.

¹⁸⁹ See *id.* arts. 16, 18.

¹⁹⁰ See ICCPR, *supra* note 109, art. 7 cl. 1.

¹⁹¹ *Id.*

Illegal workers frequently lack the employment protections afforded those with legal status and are less likely to report workplace safety violations and other concerns. In addition, unscrupulous employers are likely to pay illegal workers substandard wages or force them to endure intolerable working conditions. In addition to alleviating the potential threat posed to national security, ICE's efforts also prohibit employers from taking advantage of illegal workers. ICE's Worksite Enforcement Unit also helps employers improve worksite enforcement of employment regulations.¹⁹²

In contrast, the argument made by most civil society actors is that worksite enforcement increases fear, causing workers in the many work settings that are never raided to refrain from asserting their workplace rights.¹⁹³ This debate, carried into the treaty monitoring process, would likely be framed in terms of whether raids are taking place in a way that impairs worker rights; in other words, worksite enforcement would likely be found to be *de jure* compliant with the Migrant Worker Convention but arguably *de facto* non-compliant. As the Migrant Worker Committee typically functions, the Committee would likely publish in its periodic commentary on U.S. treaty compliance a statement urging the government to take steps to better protect worker rights in its enforcement actions. As argued at greater length below, any negative reputational effect of this type of reporting would be far outweighed by enhancement of the United States international stature as a result of participating more fully in the Migrant Worker treaty regime.

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

In the fuller assessment of the Convention that this article intends to encourage, differences between U.S. law and the Convention will be identified. However, as was emphasized earlier in this article, U.S. human rights treaty ratifications typically include a restriction on ratification that states that the provisions of the treaty are “non-self-executing;” in other words, that no provision may be invoked in domestic U.S. courts unless the legislature has “executed” that provision in domestic legislation.¹⁹⁴ This provision, along with the various substantive restrictions that are likely to limit ratification, appears to block domestic law from any real change in the absence of legislative implementation.¹⁹⁵ At the same time, even a ratification fettered by numerous restrictions can have an impact on domestic law, by bringing domestic actors into indirect contact with new standards.

¹⁹² See, e.g., U.S. Immigration and Customs Enforcement, Worksite Enforcement, available at <http://www.ice.gov/pi/worksite/> (last visited on August 17, 2008).

¹⁹³ Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.C.L. L. Rev. 345, 404 (2001), stating that “. . . because courts are unwilling to recognize the punitive nature of deportation and the criminalization of immigration law, undocumented workers who assert workplace rights remain vulnerable to deportation.”

¹⁹⁴ See *supra* Section II.D.

¹⁹⁵ See Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599-695 (2008) (parenthetical) and Carlos M. Vázquez, *Judicial Enforcement of Treaties: Self-Execution and Related Doctrines*, 100 Am. Soc'y Int'l L. Proc. 439-448 (2006) (parenthetical). See generally, U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? (Richard Lillich ed.) (1981).

The history of the juvenile death penalty might seem to challenge this gradualist image. In 1992, the United States ratified the International Covenant on Civil and Political Rights,¹⁹⁶ reserving to itself the right “to impose capital punishment...for crimes committed by persons below 18 years of age.”¹⁹⁷ This reservation constituted a direct exclusion of article 6(5) of the ICCPR, which banned the juvenile death penalty.¹⁹⁸ Although the United States never removed the reservation, in 2005, the U.S. Supreme Court banned the juvenile death penalty, referring tangentially to international and comparative law in its analysis.¹⁹⁹ However, it is unlikely that the ratification of the Covenant lay behind this domestic about-face. To the extent that the Supreme Court’s ban on the juvenile death penalty came about through the influence of international forces, it was almost certainly the overwhelming weight of comparative (foreign) law, not international standards, that was persuasive to the Court.²⁰⁰ Even if the ICCPR ratification had weighed heavily with the Court, which was unlikely given the explicit reservation to Article 6(5), 13 years was hardly a speedy transformation. Moreover, many other examples of *de jure* conflicts between U.S. law and human rights treaties (shielded by restrictions on ratification and therefore arguably not constituting treaty violations) remain standing more than a decade after ratification.²⁰¹

Thus, in the future debate on ratifying the Migrant Worker Convention, the U.S. reversal on the juvenile death penalty should be neither cause for hope in the migrant worker rights community nor cause for alarm in the anti-immigration community. Given the dearth of comparative information available regarding guest worker program protections and unauthorized immigrant worker rights,²⁰² it is unlikely that U.S. courts would, in the near term, rely on the Migrant Worker Convention in any challenge to sensitive U.S. migrant worker policies. Thus, ratification of the Convention would enrich U.S. law and involve the country in much-needed self-examination process, but would not threaten U.S. sovereignty. As noted above, this limited domestic role for ratified human rights treaties was not the original vision for the UN human rights treaty regime,²⁰³ but it is the likely short-term domestic legal effect of ratification of the Migrant Worker Convention in this country. As discussed in the next section, there are many reasons for this country to ratify the Convention beyond the Convention’s immediate domestic

¹⁹⁶ See ICCPR Ratification Record, *supra* note 43.

¹⁹⁷ See *United States of America Reservation 2*, ICCPR Ratification Record, *supra* note 43.

¹⁹⁸ See ICCPR, *supra* note 109, art. 6(5).

¹⁹⁹ See *Roper v. Simmons*, 543 U.S. 551, 567 (2005).

²⁰⁰ See KENNETH ANDERSON, FOREIGN LAW AND THE U.S. CONSTITUTION. Policy Review, No. 131, pp. 33-50, June-July 2005; Policy Review, No. 131, pp. 33-50, June & July 2005. Available at SSRN:

<http://ssrn.com/abstract=771124>; Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. Pa. J. Int'l L. 169, 233 (2007) (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005)) [hereinafter Lyon, *Tipping the Balance*].

²⁰¹ See, e.g., U.S. Reservation 5, ICCPR Ratification Record, *supra* note 43, (restricting application of ICCPR articles 10 and 14 to allow the United States to try juveniles as adults) and 2006 Human Rights Committee Concluding Observations on the United States, *supra* note 170, at 9 (expressing concern about U.S. treatment of juveniles as adults for the purposes of criminal prosecution).

²⁰² See Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows*, in ANNE F. BAYEFESKY (ED.), HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN HONOUR OF JOAN FITZPATRICK AND ARTHUR HELTON 551, 571-580 (2005) [hereinafter Lyon, *Pull Governments out of the Shadows*].

²⁰³ See *supra* Section II.D.

legal impact.

IV. Ratification Assessment of the Migrant Worker Convention

The following section argues that ratifying the Migrant Worker Convention would help the United States in its search for both a more stable migration system and a more rational and efficient process for achieving policy reform. The Migrant Worker Convention ratification would likely be beneficial to the United States in five general areas. First, ratification would enable policy reform by shifting the political climate; second, it would improve the lot of migrant workers; third, it would encourage identification and examination of best practices; fourth, it would advance foreign policy goals; and fifth, it would engage a growing but estranged political minority: Latin Americans.

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

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

there is a prevailing sense of vaguely negative indifference [to the Convention in Europe], in which genuine concerns are combined with simple misunderstanding; and this, when confronted with a skeptical public and media, has led to the governments of the region generally adopting the path of least resistance. Broadly speaking, until the public perception of migrants in general, and irregular migrants in particular, changes from an undesirable necessity to an understanding of them as rights-bearing individuals, the political incentive to inaction in this regard will remain; ratification of the ICRMW, however, should be viewed as not merely the end result of such a transformation, but also as one of the key means of its achievement.²⁰⁴

If ratification of the Migrant Worker Convention is seen in Europe as a way of moving public opinion off the notion that undocumented immigrants are "an undesirable necessity" in favor of the notion that they are "rights-bearing individuals," in the United States it might be said that ratification of the Migrant Worker Convention is a way to move people from the notion that there is a way to screen out immigrant flows and in the direction of acceptance that immigrants are an inevitable part of the U.S. economy. This section argues that debate and ratification of the Migrant Worker Convention, by exposing the public to the concept of immigrants as rights-holders, might further this process.²⁰⁵ As Professor Jules Lobel notes in his study of social

²⁰⁴ *European Assessment of the Treaty*, *supra* note 38, at 87.

²⁰⁵ For an argument in favor of viewing unauthorized immigrant workers as the proper subjects of human rights

change litigation and political movements, the success or failure of a legal strategy cannot be judged merely by the outcome of the particular strategy;²⁰⁶ nor can it be measured in the short term.²⁰⁷ Professor Lobel quotes Frederick Douglass: “even if every battle was unsuccessful, constant but peaceful struggle would hasten the ultimate coming of needed reforms.”²⁰⁸

Illegal immigration is the central political preoccupation of a significant portion of the American public, and one of the top issues of the Presidential elections.²⁰⁹ In a September 2007 poll of three politically key states, 34-37 percent of Republicans stated that they could not vote for someone who did not share their view on illegal immigration, and 12-24 percent of Democrats polled indicated the same.²¹⁰ All sides of this policy debate are able to agree that they dislike illegal immigration. Every interest group has a different reason to feel negatively about illegal immigration: from the far right rule of law proponents who see sneaking across the border and working illegally as a serious infraction, to ethical employers who do not like the uncertainty and risk of hiring clearly unauthorized workers, to undocumented immigrants themselves, who feel it is in their best interest to emigrate and send money home, but all of whom would prefer to do so legally and in dignity.

What the country cannot agree to is how to solve the problem. Proponents of punishment advocate enforcement: using border deployment and deportations to rid America of the problem. Employers recommend expanded visa programs that allow for a reliable supply of brown-collar workers that come with lower overhead costs (in the form of cheaper housing, less regulation, and fewer rights) than are involved with hiring locals. Advocates for the working poor of all nationalities urge that enforcement focus on workplace rights such as equal pay, to improve working conditions and to limit employer incentives to hire unauthorized immigrants. Undocumented immigrants point to their record of contributions to America and advocate for a path to earned legalization. Various interest groups who are more politically powerful or sympathetic, such as agricultural employers and undocumented children who have achieved academic success in America, urge targeted legalization programs that would relieve the situation of their particular constituencies. However, the more the undocumented population grows and demands lawmakers’ attention, the more politically difficult a solution becomes. Until public opinion can coalesce around a solution, even minor adjustments to the status quo will remain beyond America’s grasp.

Meanwhile, U.S. immigration laws place the Executive branch in a chronic, untenable position. The Executive cannot meaningfully enforce the existing, tight visa restrictions on brown-collar

protections, *see* Lyon, *Tipping the Balance*, *supra* note 200, at 193.

²⁰⁶ *See* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 264-266 (2003).

²⁰⁷ *See id.* at 266-267.

²⁰⁸ *See id.* at 267 (citing ROBERT CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 793 (2002)).

²⁰⁹ *See* The Great Immigration Panic, Editorial, N.Y. TIMES, Jun. 3, 2008, available at http://www.nytimes.com/2008/06/03/opinion/03tue1.html?_r=1&scp=10&sq=2008+election%2C+illegal+immigration&st=nyt.

²¹⁰ *See* LOS ANGELES TIMES/BLOOMBERG: PRESIDENTIAL PICKS IN EARLY CAUCUS AND PRIMARY STATES: STUDY #546 25 (2007). The three states are Iowa (34% of Republicans polled and 13% of Democrats polled), South Carolina (35% and 12%, respectively), and New Hampshire (37% and 24%, respectively). *Id.*

labor migration, because to do so would threaten the status quo for hundreds of thousands of American businesses. At the same time, sealing the border is logistically and ethically untenable. Thus, in the short term, there is no enforcement route out of the problem. Despite the fact that the United States is the richest country on earth, the Executive branch cannot enforce laws that many citizens of the United States are urging it to carry out. The figures of 12 million undocumented residents and 6.2 million unauthorized working immigrants are arguably as excessive as underage drinking, highway speeding, and tax evasion in the annals of American rule of law failures.

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

After years of close Congressional attention, public demonstrations, and Executive support for immigration reform, however, the pro-enforcement lobby has blocked all attempts at significant legislation. This failure extends even to politically well-grounded proposals like the agricultural jobs bill. This bill would have legalized the status of undocumented farm workers, and it was forged by a hard-won agreement of industry and worker rights groups. Its failure illustrates that the American public is extremely difficult to educate about two politically unpopular truths regarding brown-collar labor migration: first that labor migration is inevitable, and second, that border control and deportation are insufficient enforcement tools. Therefore, the U.S. government will have to carry on providing symbolic enforcement of an increasingly absurd mandate. In aid of this mission is the only relevant legislation that *has* achieved passage in recent years is the Secure Fence Act of 2006, which devoted significant additional monies to construction and enhancement of the U.S.-Mexican border fence.

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

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

to run risks to enter or work illegally in this country would require targeted development assistance aid to reduce the push factors.

Despite the post-9/11 political atmosphere, the Bush administration has made genuine attempts to educate the American public on this issue by putting pressure on employers who flout immigration laws. For example, the administration took on WalMart in a high-profile immigration prosecution, expanded workplace raids and prosecutions against employers of unauthorized workers, and enlisted state and municipal localities for workplace raids. Most important are two employer-focused initiatives that the administration has quietly advanced. Firstly, early in the administration, the Social Security Administration began to blanket the country with social security “no-match” letters, alerting employers when the numbers under which earnings were reported did not match the employees’ names. Currently, employers are under no obligation to fire employees about whom a no-match letter has been issued. However, in August 2007, the Administration issued regulations requiring employers to fire employees who do not furnish proof of a legal right to work within ninety days of the no-match letter.²¹¹ The Administration’s second key initiative that proactively involves employers in immigration enforcement has been the government’s continued promotion of “E-Verify,” which provides a way for employers to confirm an employee or prospective employee’s work authorization status.²¹² However, as these policies played out, the regulatory impact fell generally on workers and on scrupulous employers rather than on unscrupulous employers.

The Bush Administration also demonstrated its view of the importance of the “demand” element of illegal migration in litigation before the Supreme Court, in a case called *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*²¹³. In that case, an employer appealed the decision of the District of Columbia Circuit Court of Appeals. Hoffman Plastic Compounds, Inc., had fired a group of workers who voted to form a union. The National Labor Relations Board ordered repayment of damages that included back pay, or the pay lost as a result of the unlawful firing. The employer appealed, arguing that unauthorized workers should not receive pay for work for which they were not legally “available.” The Solicitor General’s brief for the National Labor Relations Board cited an earlier Circuit Court opinion that “the limited backpay award reduces employers’ incentives to prefer undocumented workers (the IRCA’s goal), reinforces collective bargaining rights for all workers (the NLRA’s goal) and protects wages and working conditions for authorized workers (the goal of both Acts).”²¹⁴ The *Hoffman Plastic Compound* dissent endorsed the administration’s view, stating that “the National Labor Relations Board’s limited back pay order will not interfere with the implementation of immigration policy. Rather, it

²¹¹ On October 28, 2008, the Department of Homeland Security published a “Supplemental Final Rule” which DHS hoped would address a concern with its prior final rule which had led to the rule being subject to an injunction order. Although DHS has motioned to have the injunction lifted, the judge has not lifted the injunction as of March 24, 2009. There is not expected to be a resolution to the issue until at least the end of March 2009. NAFSA:

Association of International Educators. Available at

http://www.nafsa.org/regulatory_information.sec/no_match_letter_rule.

²¹² See U.S. Citizenship and Immigration Services, E-Verify, available at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>.

²¹³ 535 U.S. 137 (2002).

²¹⁴ *Hoffman Plastic Compound, Inc. v. NLRB*, 2000 U.S. Briefs 1595 at 10 (U.S. June 18, 2001).

reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent.”²¹⁵ The five-Justice majority, however, found that “recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts [the Immigration Reform and Control Act].”²¹⁶

These failed efforts of a Republican administration to bring about immigration reform and influence the Supreme Court in favor of unauthorized immigrant worker rights demonstrate a significant alignment of interests between the left and the right political establishments in favor of softening public opinion on migrant workers. As argued above, a movement of public opinion in this direction is not in the best interest of any but the most committed anti-immigration policymakers, because the vast majority of politicians in both parties would like to bring about some type of comprehensive immigration reform, and anti-immigrant public sentiment has thwarted numerous serious efforts to do so. It stands to reason, then, that for most federal government actors, a potential downside of pursuing ratification of the Migrant Worker Convention would be its potential to spark a controversy that would inflame public opinion *against* migrant worker rights.

This potential is not of great concern, however. It is certainly possible that a first step toward ratification, such as a Senate hearing or Presidential signature on the treaty, could spark a hue and cry against ratification. Controversy would likely arise on several counts. As discussed above, the traditional American concern about human rights treaties, namely the protection of sovereignty and the flaws of the United Nations, would arise. This particular Convention would generate concerns about the fact that it explicitly protects an unpopular group - unauthorized workers – and, depending on the situation at the time of the controversy, about the fact that there are few other ratifications by countries of employment. It may even be possible that the Executive would decide to reverse itself, as did President George W. Bush in the wake of President Clinton’s signature on the Rome Convention establishing the International Criminal Court,²¹⁷ although this was generally considered to be an extreme act²¹⁸ and the nature of the concerns about the ICC were quite different.²¹⁹

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

²¹⁵ Hoffman Plastic Compound, Inc., 535 U.S. at 153.

²¹⁶ *Id.* at 150.

²¹⁷ Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Court Treaty*, American Society of International Law, May 2002, http://www.asil.org/insigh87.cfm#_edn1.

²¹⁸ See Human Rights Watch, United States "Unsigning" Treaty on War Crimes Court, available at <http://www.hrw.org/en/news/2002/05/05/united-states-unsigning-treaty-war-crimes-court> (calling the Bush Administration action “an unprecedented diplomatic maneuver”).

²¹⁹ See Bradley, *supra* note 217.

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

1. Ratifying Would Improve the U.S.-Mexico Relationship

Ratification of the Migrant Worker Convention would favorably impact the United States' relationship with Mexico, a key partner in both trade and drug interdiction, because it is a major country of origin for immigration into America. Currently, Mexico is the top country of origin for both legal and illegal immigration into this country,²²⁰ and the Mexican government's political and material support for immigrants in the United States is widely documented.²²¹ With roughly ten percent of its electorate living in the United States²²² and boosting the Mexican economy through remittances,²²³ the Mexican government is strongly motivated to advocate for its expatriates.²²⁴ Mexico has been publicly critical of the United States' failure to regularize the status of undocumented Mexicans, and has backed formal complaints in numerous international fora concerning U.S. labor and death penalty policies.²²⁵ Despite the fact that Mexico itself is a major immigrant-receiving country,²²⁶ the Mexican government has helped establish immigrant-protective international law standards. For example, Mexico took a significant leadership role in the formation of the Convention. A Mexican representative chaired the treaty formation working

²²⁰ Migration Policy Institute, *US in Focus: Mexican Immigrants in the United States* (April 2008), available at <http://www.migrationinformation.org/USfocus/display.cfm?id=679#1>.

²²¹ See Ginger Thompson, *Fox Urges Congress to Grant Rights to Mexican Immigrants in U.S.*, N.Y. TIMES, Sept. 7, 2001, at A6, available at <http://www.nytimes.com/2001/09/07/world/fox-urges-congress-to-grant-rights-to-mexican-immigrants-in-us.html?scp=6&sq=Mexico's%20support%20for%20immigrants&st=cse>. See also Ginger Thompson, *Mexico's Leader Says He'll Persevere on Migration*, N.Y. Times, Nov. 30, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9C07EED71431F933A05752C1A9639C8B63>.

²²² See Migration Policy Institute, *supra* note 220.

²²³ A Pew Hispanic Center Poll dated January 2006 found that 58% of adult Mexicans living in the United States had sent money to someone in Mexico over the past year. Poll results available at <http://pewhispanic.org/questions/?qid=1714184&pid=54&ccid=54#top>. See also Mexico received approximately \$25 billion dollars in remittances in 2007. The World Bank Migration and Remittances Factbook 2008. Available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Top10.pdf>. See also *Remittances May Buoy Developing Countries Caught in Financial Crisis*, The World Bank, November 24, 2008, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21996712~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>. (The average value of remittances sent by Mexican migrants has remained in the \$340-\$350 range per transaction since 2005).

²²⁴ See Thompson, *supra* note 221.

²²⁵ See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (March 31) (Medellin Case) (Mexico alleged that the U.S. failed to notify Mexican citizens accused of crimes in the U.S. that they had a right to notify their consulate through the Vienna Convention), Inter-American Court of Human Rights, *The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, OC-16/99, October 1, 1999 Series A No. 16 (suggesting that foreign nationals be informed that they can seek assistance from their consulate prior to giving a statement and that the death penalty should not be executed where there was not consular notification) and Inter-American Court of Human Rights, *Legal Status and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003, Series A No. 18 (recognizing that individual rights guarantees apply to migrants, regardless of their immigration status) [hereinafter *OC-18*].

²²⁶ Mexico received 644,361 immigrants in 2005, making up 0.6% of the population. The World Bank Migration and Remittances Factbook 2008. Available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Mexico.pdf>.

group throughout the ten years of negotiations.²²⁷ Mexico's commitment to the Convention continued in the form of its early ratification of the Convention – Mexico was only the eleventh country to ratify²²⁸ - and now is manifested in its active engagement with the Migrant Worker Committee.²²⁹ Given Mexico's concern for its nationals in the United States, belief in international law mechanisms, and history as one of the primary sponsors of the Convention, the Mexican government would likely view positively a serious examination of the Convention by the United States.

2. Ratifying Would Increase World Leadership vis-à-vis the Global South

Ratification of the Migrant Worker Convention would likely increase U.S. influence with other countries of migration origin, in addition to Mexico. One of the most commonly advanced arguments in favor of the United States past human rights treaty ratifications has been that, by subjecting itself to international scrutiny, this country becomes a more credible and effective advocate with countries that it attempts to influence on rights questions.²³⁰ In a recent meeting with the Department of State officials responsible for reporting to the Committee on the Elimination of Racial Discrimination, the official representing the National Security Administration repeated this assertion.²³¹ This argument has been raised to support ratification of treaties that primarily implicate domestic concerns. It seems that the foreign policy effect of participation in the Migrant Worker Convention regime would be even more pronounced than with respect to other human rights treaties, because this country has ratified only one other treaty with an exclusive focus on foreign nationals. That treaty is the Refugee Protocol,²³² but refugee protection and migrant worker protection are very different from one another. It stands to reason that countries of origin would not pursue protection for refugees, who are claiming persecution in their countries, as they might for their citizens who are economic migrants. Therefore, if Southern countries indeed credit U.S. human rights treaty participation to the extent that the U.S. foreign policy branches report, the effect is likely to be even more pronounced in the case of the

²²⁷ See, e.g., *November 1980 Working Group Report*, *supra* note 27; *November 1981 Working Group Report*, *supra* note 27; *June 1982 Working Group Report*, *supra* note 27; *November 1982 Working Group Report*, *supra* note 27; *June 1985 Working Group Report*, *supra* note 27; *October 1985 Working Group Report*, *supra* note 65; *October 1986 Working Group Report*, *supra* note 60; *June 1987 Working Group Report*, *supra* note 64; *June 1989 Working Group Report*, *supra* note 67 (listing Antonio Gonzalez de Leon of Mexico as the Chairman of the Working Group). In the last year of negotiations, Mexico's Claude Heller took over as Chairman. See Report of the Economic and Social Council, Report of the open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/45/2 (October 21, 1989); *June 1990 Working Group Report*, *supra* note 27.

²²⁸ See International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families New York, 18 December 1990, available at <http://www2.ohchr.org/english/bodies/ratification/13.htm>.

²²⁹ See, e.g., Committee on the Protection of the Rights of all Migrant Workers and Members of their Families: Consideration of Reports Submitted by States Parties under Article 73 of the Convention: Initial Reports of States parties due in 2004: Mexico CMW/C/MEX/1 (November 18, 2005), <http://daccessdds.un.org/doc/UNDOC/GEN/G05/451/76/PDF/G0545176.pdf?OpenElement>.

²³⁰ See KAUFMAN, *supra* note 53, at 197-98.

²³¹ See Beth Lyon, *Memorandum to 9/11 Committee* (Jan. 17, 2008) (on file with author) (describing meeting on January 16, 2008) [hereinafter 2008 CERD State Department/NGO Meeting Notes].

²³² Note that one provision of the Convention Against Torture relates to foreign nationals. Article III of the Convention forbids States Parties from deporting immigrants to countries where they would experience torture. See 1465 UNTS 85, Article III (1984). The other human rights treaties that the United States has ratified provide only limited explicit treatment of foreign nationals.

Migrant Worker Convention. Moreover, if the United States were to move forward in the ratification process in advance of other countries of employment, the positive influential impact with countries of origin would undoubtedly be enhanced.

Similarly, the Convention's current lack of ratifications by wealthier countries of employment²³³ presents an unusual opportunity for the United States vis-à-vis its allies in the industrialized world. The industrialized world has been relatively more prompt than the United States to ratify the United Nations' other human rights treaties. As described in the chart contained below at Appendix II, for the three major UN human rights treaties it has joined, the United States averaged 270 months between promulgation and ratification.²³⁴ By contrast, the other nine nations in the list of the top countries of migrant employment (Russia, Germany, Ukraine, France, Saudi Arabia, Canada, India, the UK, and Spain)²³⁵ took an average of 98 months after promulgation to ratify the same three treaties.²³⁶ In fact, of these nine countries, only Saudi Arabia, which has not yet ratified the Civil and Political Rights Covenant, has a higher average promulgation time than the United States.²³⁷ Taking the lead in ratifying – or simply signing- the Migrant Worker Convention would be noted by wealthy countries that are beginning to consider ratification and would give the United States, to a far greater extent than have the past ratifications, a human rights leadership moment that this country badly needs as it attempts to convince its industrialized world allies to support its foreign policy priorities. Even if individual countries of employment were to view U.S. steps toward ratification as a negative development because they do not want to be pressured into making a similar commitment, signature and ratification would be a modest but undisputable sign of leadership at a time when the U.S. human rights record has been tarnished by multiple incidents of torture of foreign nationals in U.S. military prisons²³⁸ and post-9/11 restrictions on domestic civil liberties.²³⁹

3. U.S. Ratification Would Encourage Additional Ratifications

U.S. signature or ratification of the Migrant Worker Convention could convince other countries of employment to give more serious consideration to the treaty. The participation of other

²³³ See Status of Ratification for ICMW, available at

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=138&chapter=4&lang=en>.

²³⁴ See *infra* Appendix II: Treaty Ratification Timing by Top Ten Countries of Migrant Employment.

²³⁵ See World Bank for Reconstruction and Development, *Top 10, in Migration and Remittances Factbook* (2008), available at

<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDECPROSPECTS/0..contentMDK:21352016~pagePK:64165401~piPK:64165026~theSitePK:476883,00.html> (this list refers to the top ten countries of migrant employment numerically as opposed to per capita).

²³⁶ See *infra* Appendix II: Treaty Ratification Timing by Top Ten Countries of Migrant Employment. Note that two of these countries have not yet ratified one of the three treaties. Saudi Arabia has not yet ratified the Covenant on Civil and Political Rights (ICCPR) and India has not yet ratified the Convention Against Torture (CAT). See *id.*

²³⁷ See *id.*

²³⁸ See also The Torture Report, Editorial, N.Y. TIMES, Dec. 17, 2008, at 42, available at

<http://www.nytimes.com/2008/12/18/opinion/18thu1.html?scp=6&sq=Guantanamo+torture&st=nyt>.

²³⁹ See also Spies, Lies and Wiretaps, Editorial, N.Y. TIMES, Jan. 29, 2006, available at

<http://www.nytimes.com/2006/01/29/opinion/29sun1.html?scp=10&sq=domestic+civil+liberties&st=nyt>.

countries is frequently cited in human rights treaty ratification debates in the United States,²⁴⁰ and human rights treaties' track records is relevant to the ratification processes of other countries as well.²⁴¹ It is likely that a decision by the United States to endorse the treaty, even with multiple limitations on ratification, could influence other potential signatories. Given the limited participation by countries of employment in the Convention, the United States could meaningfully advance the state of international law on this issue by influencing other wealthy countries' ratification processes. Moreover, ratification by other industrialized countries would offer greater protection to American citizens who are themselves migrant workers living and working abroad, the majority of whom, by last reported figures, are in industrialized countries.²⁴²

4. Ratifying Would Enable the United States to Shape Interpretation of the Convention

By not participating in the Convention's monitoring regime, the United States and the other countries of employment are losing the opportunity to influence the Committee's interpretations of the document. The treaty went into force in 2003,²⁴³ and the Committee convened for the first time in 2004.²⁴⁴ Throughout its first years in operation, the Committee is not only forming its working methods and priorities, but is also giving sustained consideration to the provisions of the Convention, the first time the international community has done so since the negotiations in the 1980s. The other UN human rights monitoring bodies have made it a practice not only to comment on individual member states' compliance, but also to issue periodic statements, called "General Comments," contain general interpretations of particular provisions of the treaty the monitor,²⁴⁵ and over time the Committee on Migrant Workers will be doing the same.²⁴⁶ The closer access and contact that comes with treaty ratification and monitoring participation would give the United States greater opportunity to anticipate and influence these interpretations.

Of course, if the United States decides to eschew the Convention altogether, then the interpretation given to the treaty's provisions might seem to be irrelevant. However, international law standards can be imported into domestic law in several ways other than through treaty ratification. Most notably in the United States, courts are bound to apply international law if it has risen to the level of *jus cogens* and/or customary international law,²⁴⁷ and they are permitted

²⁴⁰ See KAUFMAN, *supra* note 53, at 197-98.

²⁴¹ See Pécoud & Guchteneire, *supra* note 3, at 258-259.

²⁴² See AMERICAN CITIZENS ABROAD, AMERICAN CITIZENS LIVING ABROAD BY COUNTRY (2002), available at <http://www.aca.ch/amabroad.pdf> (noting that, in 1999, 17% of Americans abroad lived in Canada, 28% lived in Europe, 4% lived in Israel, 2% lived in Australia, 2% lived in Japan, and .4% lived in New Zealand). Notably, 25% of Americans living abroad are in Mexico, a country that has already ratified the Convention. See *id.*

²⁴³ See UN Migrant Worker Convention, *supra* note 20, art. 22(9).

²⁴⁴ See OHCHR Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at <http://www.unhchr.ch/html/menu2/6/cmw/>.

²⁴⁵ ANNE BAYEFISKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 5 (2001).

²⁴⁶ See Committee on Migrant Workers, available at http://portal.unesco.org/shs/en/ev.php-URL_ID=4313&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html (stating that "The Committee will also publish its interpretation of the content of human rights provisions, known as general comments on thematic issues.").

²⁴⁷ See, e.g., REST 3d FOREL § 111(1) (stating that international law and international agreements of the United

to use international law as persuasive authority.²⁴⁸

In addition, an opportunity to influence the law at the international level is particularly important for countries in the Americas, given the current lack of a similar instrument at the regional level, and also given the Inter-American human rights system's demonstrated interest in the issue of migrant workers.²⁴⁹ International human rights standards that are already clarified can provide a persuasive context for shaping new standards at the regional level. Influencing the interpretation of the Migrant Worker Convention offers the United States a meaningful opportunity to shape the ultimate development of regional law.

States are law of the United States and supreme over the law of the several States); *Id.* § 111(4) (stating that “customary international law is considered to be like common law in the United States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State courts.”); *Id.* § 111 Reporters’ Notes 3 (stating that “the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 (2d Cir.2003), quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 811 (2d Cir.1980), quoting *Paquete Habana*, 175 U.S. 677, 694, 20 S.Ct. 290, 44 L.Ed. 320 (1900)); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1145 (7th Cir. 2001).

The most likely development of *jus cogens* in the field of migrant worker rights is the norm of non-discrimination. In 2003, the Inter-American Court of Human Rights 2003 asserted that non-discrimination has now risen to the level of *jus cogens* and is thus a binding global norm. See *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*. OC-18/03. Inter-American Court of Human Rights (IACrHR). 17 September 2003. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/425cd8eb4.html>. The Inter-American Court applied non-discrimination to unauthorized immigrant workers, declaring that non-discrimination gives them the right to equality of treatment with other workers. See *id.* at 53. Note that a country can avoid the imposition of customary international law by objecting to the norm. *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993), citing REST 3d FOREL § 102 Comment d. However, given that the United States has not engaged the treaty even to the extent of accepting or rejecting particular provisions, it has not placed any such rejections on record.

²⁴⁸ See *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 2483 (2003) (stating that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries”); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (recognizing that “[t]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of “cruel and unusual punishments,” citing *Trop v. Dulles*, 356 U.S. 86, 102-03, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). See also Daniel J. Frank, *Constitutional Interpretation Revisited: the Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 IALR 1037, 1037 (March 2007); but see *id.* at 1039 (stating that “[t]he current composition of the Supreme Court may compromise the continued use of foreign law as persuasive authority on certain American constitutional issues”).

For a discussion of the possible approaches a U.S. court might take in looking to international standards on unauthorized workers as persuasive authority, see Lyon, *Tipping the Balance*, *supra* note 200, *passim*.

²⁴⁹ The Inter-American Commission on Human Rights has convened two *ad hoc* situation hearings on migrant workers in the United States, see Rebecca Smith, *Human Rights at Home: Human Rights As an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 285, 308-309 (2007) [hereinafter Smith, *Human Rights at Home*]. Inter-American Commission on Human Rights, *Chapter II, Legal Bases and Activities of the IACHR During 2006*, in ANNUAL REPORT OF THE IACHR 2006 PARA 19, at <http://www.cidh.org/annualrep/2006eng/Chap.2.htm#124th>. The Commission also has in place a Special Rapporteurship on Migrant Workers and their Families, see Case Law, available at <http://www.cidh.org/Migrantes/migrants.caselaw.htm>. In 2003, the Inter-American Court of Human Rights issued a landmark advisory opinion on the rights of unauthorized workers, see OC-18, *supra* note 225, and it has issued various other decisions touching on the rights of migrants. See *supra* note 225 & text. Moreover, a regional convention on migrant workers is currently in force in Europe. See Council of Europe, *European Convention on the Legal Status of Migrant Workers*, 24 November 1977. ETS 93, available at <http://www.aca.ch/amabroad.pdf>.

By participating in this regime, the United States would have a significantly greater opportunity to urge its preferred interpretations. For example, a U.S. national would likely gain a place on the Committee. The Committee members²⁵⁰ are nominated by the States Parties and elected by secret ballot.²⁵¹ States Parties are permitted to nominate their own nationals,²⁵² and the Convention instructs States Parties to cast their votes with “due consideration” to “equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems.”²⁵³ This explicit assurance of participation for the nationals of States of employment recognized the polarity inherent in the migrant worker rights field and is borne out by the current operations of the Committee selection process. Presently, both Mexico and Turkey, the two most significant countries of employment in State party status with the Convention, have nationals serving on the Committee.²⁵⁴

Mexico’s participation on the Committee has implications which, from the U.S. government’s perspective, likely cut both ways with regard to ratification. First, as a participant in shaping international law, it seems all the more urgent for the United States to engage with the Committee as a State Party, as this country’s own principal source country for migration²⁵⁵ is actively engaged in shaping the interpretation of the Convention. However, the fact that Mexico, at least currently, has a national on the Committee also raises the concern that allowing a Mexican national to participate in the concluding observations regarding U.S. compliance with the treaty would result in outcomes less favorable to the U.S. government position. The former argument, however, should outweigh the latter, for several reasons.

First, the Committee selection process is such that partisan influence is more likely to play a role in the general interpretive function than in individual country determinations. Member states are expected to appoint “experts of high moral standing, impartiality and recognized competence in the field”²⁵⁶ who serve in their individual capacity.²⁵⁷ The opportunity to shape the General Comments is an important one, and therefore gaining a role in the interpretation process is worth the slightly heightened risk of unenforceable, negative language directed at this country over particular policy issues. Moreover, engagement yields understanding on both sides and can therefore lead to mutually satisfactory approaches.

²⁵⁰ Currently there are ten committee members. See UN Migrant Worker Convention, *supra* note 20, art. 72.1(b).

After the Convention has garnered its forty-first ratification, the committee will grow to fourteen members. See *id.*

²⁵¹ See *id.* art. 72(2)(a).

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ As of September 2008, Francisco Alba of Mexico and Mehmet Sevim of Turkey are serving on the Committee. See <http://www2.ohchr.org/english/bodies/cmw/members.htm>.

²⁵⁵ In 2007, there were 11.7 million foreign born people from Mexico living in the U.S., accounting for 30.8% of all immigrants in the U.S. Migration Policy Institute, *available at*

<http://www.migrationinformation.org/USFocus/display.cfm?ID=714#7>. Approximately seven million people originating from Mexico were in the United States without authorization, 59% of the total number of unauthorized U.S. residents in 2007. U.S. Department of Homeland Security. “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007” *available at*

http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf.

²⁵⁶ See UN Migrant Worker Convention, *supra* note 20, art. 72(1)(b).

²⁵⁷ See *id.* art. 72(2)(b).

As a party to the treaty, the United States would also be able to help immigrants in other national settings, by educating the Committee – and, by extension, other participating countries - about its own best practices vis-à-vis migrant workers. For example, a common concern of migrant worker advocates in the global south world is the condition of immigrants in detention. As noted above,²⁵⁸ the United States has an elaborate set of standards in place for the protection of immigrant detainees that could be of persuasive value for other countries. Another example of a creative practice in the United States is its system of training and licensing non-lawyers, including law students, to represent immigrants on a *pro bono* basis before the Department of Homeland Security and the Immigration Courts.²⁵⁹ In other countries that may lack robust legal aid services for immigrants, this model could be of utility. By airing unique policies that successfully implement treaty standards, the United States can support the development of international law.

C. Engaging with the Convention Would Educate U.S. Officials on Best Practices

Participating in the Convention monitoring process would be a valuable opportunity for the United States to identify foreign best practices in the treatment of migrant workers. This author has argued elsewhere that next to no comparative research is being carried out at either the advocacy, academic, or government levels regarding the treatment of unauthorized immigrant workers,²⁶⁰ which form the focus of 28 substantive provisions of the Migrant Worker Convention.²⁶¹ Legal migration for work has received more attention,²⁶² both at the regional level and internationally. However, these fora do not provide the same opportunities for identifying best practices as would the Migrant Worker Convention process.

According to the Organization of American States, at least 20 initiatives, sponsored by more than 14 inter-governmental organizations, currently focus on migration in the Americas.²⁶³ These programs are sponsored by sub-regional arrangements such as MERCOSUR,²⁶⁴ regional bodies such as the Organization of American States and the Regional Conference on Migration (known as the Puebla Process),²⁶⁵ and by international organizations such as the International

²⁵⁸ See *supra* Section III.A.

²⁵⁹ See 8 C.F.R. 292.1-292.2 (2008) (creating a category of “Certified Representatives” who may provide legal services at no charge to indigent immigrants).

²⁶⁰ See Lyon, *Pull Governments out of the Shadows*, *supra* note 202, at 571-581.

²⁶¹ See UN Migrant Worker Convention, *supra* note 20, at Sec. III, arts. 8-35.

²⁶² OIM, Martin, Southern Poverty Law Center, Human Rights Watch

²⁶³ See PERMANENT COUNCIL OF THE ORGANIZATION OF AMERICAN STATES SPECIAL COMMITTEE ON MIGRATION ISSUES, SUMMARY OF CURRENT PROGRAMS DEALING WITH MIGRATION IN THE AMERICAS: OAS GENERAL SECRETARIAT AND INTERNATIONAL, REGIONAL AND SUBREGIONAL ORGANIZATIONS, OEA/Ser.G, CE/AM-36/08 rev. 1, at 23 (June 18, 2008) (English version), available at <<http://www.oas.org/consejo/specialcommittees/Special%20Committe%20Migration.asp>> (passim) (scroll down to “Migration Programs”).

²⁶⁴ See *id.* at 23.

²⁶⁵ See *id.* at 23-24.

Organization on Migration,²⁶⁶ the International Labour Organization,²⁶⁷ and the International Red Cross.²⁶⁸ Most of these initiatives, which range from standard-setting to community trainings, provide the opportunity to identify and replicate best practices in migration policy. At least half of these programs are concentrated in the global south and do not focus on the treatment of migrant workers within the countries of employment.²⁶⁹ Only a sub-activity of one of them, the Pan-American Health Organization's Hispanic Forum project on Latino occupational health in the United States, maintains a concentrated focus on U.S. policies.²⁷⁰ Only two, the OAS Inter-American Commission on Human Rights and the International Labor Organization, have examined migrant workers in the United States from a rights perspective, and these instances have been relatively *ad hoc*.²⁷¹

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

²⁶⁶ See *id.* at 15-16.

²⁶⁷ See *id.*

²⁶⁸ See *id.* at 21.

²⁶⁹ See *id. passim* (Ten of the twenty initiatives named focus on sending country policies, and one lists no activities to date).

²⁷⁰ See *id.* at 18-19.

²⁷¹ The ILO Committee on Freedom of Association heard one complaint regarding the union rights of U.S. unauthorized workers, see *Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments*, 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) (holding that the right to freedom of association requires that the United States reverse its policy that limit labor rights remedies for unauthorized immigrant workers), but the United States has not responded to the Committee's requests that the United States provide follow-up progress reports. See *Case No. 2227 (United States)*, in *335th Report of the Committee on Freedom of Association*, GB.291/7, 291st Session (November 2004) 18, available at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb291/pdf/gb-7.pdf> (expressing regret at the United States' failure to report on its implementation of the 2003 ruling). The Inter-American Commission on Human Rights has convened two *ad hoc* situation hearings on migrant workers in the United States, see Rebecca Smith, *Human Rights at Home: Human Rights As an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285, 308-309 (2007) [hereinafter Smith, *Human Rights at Home*]. Inter-American Commission on Human Rights, *Chapter II, Legal Bases and Activities of the IACHR During 2006*, in ANNUAL REPORT OF THE IACHR 2006 PARA 19, available at <http://www.cidh.org/annualrep/2006eng/Chap.2.htm#124th>, and a case against the United States is pending with the Inter-American Commission. See *Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America*, brought by Sarah Paoletti, University of Pennsylvania Transnational Legal Clinic; Claudia Flores, ACLU Women's Rights Project; Rebecca Smith, National Employment Law Project (Nov. 1, 2006), available at http://www.aclu.org/images/asset_upload_file946_27232.pdf. See also American Civil Liberties Union Press Release, *Undocumented Workers Bring Plea for Non-Discrimination to Human Rights Body* (Nov. 1, 2006), available at <http://www.aclu.org/immigrants/discrim/27235prs20061101.html>.

countries. The value added by this process will increase as more countries of employment ratify the convention and educate the Committee on their own best practices.

The Committee reporting process²⁷² mirrors to a large extent the monitoring mechanisms of the CAT, CERD and ICCPR, and over the past 15 years the U.S. government has developed a corps of officials who are experienced with liaising between the relevant agencies and the various UN committees in these reporting processes.²⁷³ The Migrant Worker process would, then, be familiar to the United States and, with a mere five-year periodicity, will not be burdensome.

Although the Migrant Worker Committee could be a useful policy educator, it should be noted that the Executive has not been aggressive in implementing the recommendations arising from the proceedings of the other UN human rights committees. During the Bush Administration, the Department of State circulated the Concluding Observations issued by the committees, but did not feel obligated to make additional efforts to examine or alter policies in light of committee concerns.²⁷⁴ The view of that administration was that committee pronouncements are non-binding.²⁷⁵ At the same time, President Clinton issued an executive order in 1998 creating an inter-agency body charged with implementing international human rights obligations,²⁷⁶ creating an indirect mechanism for follow-up on Committee pronouncements.

The reporting process itself would likely be the biggest benefit of ratification for policy advocates in the near-term. The three Committee-monitored Conventions to which the United States is a party are more general in nature than the Migrant Worker Convention. They also involve much more settled, Constitutional law than the ICMW. Debating the details of the temporary worker program with a Committee of experts may be more productive for the United States than, for example, discussing its widely criticized Guantánamo Bay policies with the Committee Against Torture. America's guestworker program is a relatively more obscure program²⁷⁷ that would derive a concomitantly greater benefit from international monitoring. Each reporting cycle of the other U.S.-ratified human rights treaties sees increasingly robust participation by U.S. civil society.²⁷⁸ This pattern would likely play out with the Migrant Worker

²⁷² For a full description of the Committee process, *see* UN Migrant Worker Convention, *supra* note 20, arts. 72-77.

²⁷³ *See* 2008 CERD State Department/NGO Meeting Notes, *supra* note 231.

²⁷⁴ *See id.*

²⁷⁵ *See id.*

²⁷⁶ *See* Implementation of Human Rights Treaties, December 10, 1998, 63 FR 68991, Exec. Order No. 13107, 1998 WL 34332076 (Pres.).

²⁷⁷ A New York Times website search of articles using the term "guest worker program" turned up 249 results in the time period Jan 1, 2006 to Mar. 24, 2009. A second New York Times website search for the term "Guantanamo Bay" turned up 1,136 results over an identical time period. Results can be seen at <http://query.nytimes.com/search/query?frow=0&n=10&srcht=a&query=guest+worker+program&srchst=nyt&hdlquery=&bylquery=&daterange=period&mon1=01&day1=01&year1=2006&mon2=02&day2=10&year2=2009&submit.x=19&submit.y=12> and <http://query.nytimes.com/search/query?frow=0&n=10&srcht=a&query=Guantanamo+Bay&srchst=nyt&hdlquery=&bylquery=&daterange=period&mon1=01&day1=01&year1=2006&mon2=03&day2=24&year2=2009&submit.x=42&submit.y=14>.

²⁷⁸ *See, e.g.*, U.S. Human Rights Network, U.N. to Probe U.S. Human Rights Abuses: U.S. Non-Profits Submit 465-Page "Shadow Report" Detailing Abuses at Home: Treatment of Immigrants, Katrina Survivors among Issues to be Reviewed (July 5, 2006), *available at*

Convention. The next section examines why domestic non-governmental advocates might value the Migrant Worker Convention and its monitoring process sufficiently to prioritize working toward ratification.

D. Ratification of the Convention Would Benefit Civil Society

Assessing a new human rights treaty is not merely a process of gauging the legal implications and political sensitivity of its provisions. These considerations are certainly critical to the inquiry, but they are not all encompassing. In order for review of a potential ratification to advance domestically, civil society must value it sufficiently to pursue ratification. Over the past fifteen years, various domestic migrant worker rights groups have made forays into international advocacy, airing concerns about domestic conditions with international bodies such as the Inter-American Commission and Court, and the International Labour Organization. However, as this author has argued elsewhere, there has been little sustained effort to import international standards into domestic advocacy,²⁷⁹ and virtually no attention given to the Migrant Worker Convention.²⁸⁰ Working to ratify the Migrant Worker Convention would represent a meaningful shift in modality for U.S. migrant workers and their advocates, requiring that they articulate and justify a broad range of international standards for domestic audiences. It has already been noted above that the battery of reservations, understandings and declarations with which the United States is likely to limit ratification would rob the treaty of virtually any immediate enforceability.²⁸¹ Given this reality, why should pro-migrant rights civil society expend limited resources advocating for ratification?²⁸²

Depending on the restrictions on ratification, the Convention offers some substantive attractions to the migrant worker rights advocacy community: is somewhat more protective of family reunification for documented workers than U.S. law, it calls for due process in expulsion decisions, and it calls for equal workplace rights remedies for all migrant workers.²⁸³ These are important concerns for the migrant worker rights community. Furthermore, although many of the Convention's protections have been read into other treaties via monitoring body interpretation,²⁸⁴

http://www.ushrnetwork.org/files/ushrn/images/linkfiles/Press_Release_UN_probe_US_human_rights_abuses.pdf; NGO Information relating to United States of America, US Human Rights Network, available at <http://www2.ohchr.org/english/bodies/cerd/cerds72-ngos-usa.htm>.

²⁷⁹ Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT'L. L. & FOREIGN AFF (forthcoming May 2009) [hereinafter Lyon, *Changing Tactics*]. There have been a few domestic efforts to import international norms in the United States, but compared with the work of other advocacy communities, these have been quite sparse. These "exceptions that prove the rule" include a group of claims lodged under the Alien Tort Claims Act on behalf of immigrant workers, a visit by the UN Rapporteur on Migrant Worker Rights and some efforts to implement NAALC recommendations. *See id.*

²⁸⁰ *See supra* Section II.B.

²⁸¹ *See supra* Section II.D.

²⁸² Professor Meg Satterthwaite raised the resource concern in a 2005 article, arguing that "a dominant focus on the Migrant Workers' Convention could be detrimental – not only because such a focus would siphon off needed energy more wisely placed elsewhere... but also because it would allow states to minimize the obligations they owe to women migrants under existing human rights law regardless of their decision to sign, ratify, or ignore this new treaty." Satterthwaite, *supra* note 87, at 2.

²⁸³ *See* UN Migrant Worker Convention, *supra* note 20, arts. 44, 50.

²⁸⁴ *See* Satterthwaite, *supra* note 87, at 63.

the Convention details rights that have not yet been extended in other settings.²⁸⁵ Additionally, by its very structure, the Convention offers a comprehensive examination of the temporary worker experience that is lacking in any other treaty. Finally, as a general statement of the principle that migrant workers are rights-bearers, the Convention would fill a symbolic void in protection for this vulnerable population. The United States has not ratified the ILO conventions on migrant workers, and the NAFTA side agreement on labor has no substantive provisions; it requires only that governments enforce the laws already on the domestic books.

Moreover, based on the experiences of the advocates working with the other UN treaty monitoring processes, the Migrant Worker Committee's monitoring work would likely provide various advocacy opportunities for migrant workers. The first is that the process provides useful access to policymakers. The Department of State is the agency that is primarily responsible for reporting to the Committee, but, as noted above, other government agencies whose work implicates the treaty protections participate in meetings leading up to the process, and most send representatives to Geneva for the hearings.²⁸⁶ Non-governmental organizations have direct input into Committee proceedings, via written reports and meetings with Committee members.²⁸⁷ Although Concluding Observations are not directly enforceable in court, advocates can use them for policy advocacy and for community organizing²⁸⁸ and empowering a group that is extraordinarily fearful and afraid of retaliation for asserting its rights.²⁸⁹ Secondly, interaction with and detailed pronouncements from the Migrant Worker Committee can invigorate a base that feels beset by post-9-11 enforcement measures, increased loss of life at the border, and legal setbacks such as *Hoffman Plastic Compounds*, failed immigration reform, and the loss of federal legal aid funding for undocumented immigrants.²⁹⁰ The U.S. migrant worker community has already shown itself to be interested in transmitting concerns to international monitors,²⁹¹ in the Migrant Worker Committee, it would find an expert body that is fully focused on many of its issues. For these reasons, ratification of the Convention is worth exploring by U.S. civil society.

E. Criticisms of the Convention

²⁸⁵ See *id.* at 2.

²⁸⁶ See Committee for the Elimination of Racial Discrimination, Summary Record of the Presentation of States Parties in Conformance with Article 9 of the Convention, Fourth through Sixth Periodic Reports of the United States, CERD/C/SR.1853 (Feb. 28 2008) (in French; English translation not yet available) (summarizing the United States' most recent presentation to the CERD Committee, in which multiple government officials made presentations); See 2008 CERD State Department/NGO Meeting Notes, *supra* note 225 (noting that at the meeting multiple government agencies mentioned they would be attending the hearings).

²⁸⁷ See UN Migrant Worker Convention, *supra* note 20, art. 74(4); Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies: Addendum, HRI/GEN/3/Rev.1/Add.1 3 13 (May 7, 2004) (Rule 28, noting that the Committee "may invite" "national human rights institutions, non-governmental organizations, and other bodies" to submit "written information" relating to its work).

²⁸⁸ See Samper Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1895-96 (2007). See also Lyon, *Tipping the Balance*, *supra* note 200, at 217-241.

²⁸⁹ See, e.g., Catherine K. Ruckelshaus, Testimony of Catherine K. Ruckelshaus: National Employment Law Project: Hearing Before the United States Congress House of Representatives Committee on Oversight and Government Reform: Adequacy of Labor Law Enforcement in New Orleans 10 (June 26, 2007), available at <http://domesticpolicy.oversight.house.gov/documents/20070703121612.pdf>.

²⁹⁰ See Smith, *Human Rights at Home*, *supra* note 249, at 294-98; Lyon, *Changing Tactics*, *supra* note 279.

²⁹¹ See Lyon, *Changing Tactics*, *supra* note 279.

Each of the core UN human rights treaties that the United States has considered ratifying, including the three that the United States has actually ratified, has been the subject of criticism. Some of the criticisms are generic, having been raised in the context of virtually every ratification debate. Examples of these generic criticisms include potential threats to U.S. sovereignty,²⁹² or the possibility that the treaty will hamper the United States by requiring bureaucratic monitoring procedures.²⁹³ Each ratification process has also surfaced treaty-specific criticisms, often the concern that United States is actually more protective of human rights than some passages of the treaty in question, and, conversely, that ratifying a treaty will require changes in a particularly sensitive area of domestic law.²⁹⁴ The following section considers criticisms specific to the Migrant Worker Convention, including its place within the broader human rights regime, its scope of coverage, and technical issues such as the treaty's complexity and its provisions regarding permissible limitations on ratification. In keeping with the present article's focus on the Convention's prospects in the United States, the following section highlights U.S.-based articles, either written with a view to the U.S. context or simply produced by U.S. commentators. In this section I agree with some of these concerns, but conclude that they are not significant enough to warrant disengagement with the Convention.

1. Substantive Criticisms

The Migrant Worker Convention is the subject of various substantive criticisms regarding the scope and coverage of its provisions. Many of these criticisms argue that the Convention is *over-inclusive*. Commentary faults the Convention for making mention of trafficking, for leaving vague the quantum and timing of work that might qualify a worker for protection, for overlapping with other treaties, in particular the Refugee Convention. Perhaps most significant of the over-inclusion concerns relates to the controversial decision to provide explicit coverage for unauthorized workers and their undocumented family members in the Convention. The following discussion points out that most, though not all, of these concerns are raised in the 1991 article by Professors Nafziger and Bartel, and intervening events have altered, with regard to at least some of these issues, the analytical landscape. The Convention is also the subject of *under-inclusion* criticisms. The critiqued omissions include 1) the Convention's notable failure to provide a right to regularization of status for long-term undocumented residents and workers, 2) the Convention's failure to ensure that workers who assert their rights under the Convention will not face deportation as a result of that assertion; and 3) the Convention's failure to address the unique and pressing concerns of women migrant workers.

a. Over-Inclusiveness Concerns

Over-inclusiveness concerns center on four areas of protection. These are the fact that the Convention addresses the issue of trafficking, the fact that it leaves vague the quantum and timing of work needed to trigger treaty protection, and the Convention's protections that overlap

²⁹² Kaufman, *supra* note 56, at 204-205.

²⁹³ John R. Bolton and John Yoo, *Restore the Senate's Treaty Power*, N.Y. Times (Jan. 4, 2009), available at http://www.nytimes.com/2009/01/05/opinion/05bolton.html?_r=1.

²⁹⁴ See Kaufman, *supra* note 56, at 129.

with existing instruments. Most significantly, the Convention's explicit inclusion of protections for unauthorized workers and undocumented family members is most likely to be controversial in any ratification debate. The following discussion addresses the first three of these concerns in turn, concluding that the Convention appropriately covers these areas. The question of the Convention's treatment of unauthorized workers is then addressed in the following section.

1. Trafficking

In their 1991 article, Professors Nafziger and Bartel objected to the Convention's preambular statement that "appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights."²⁹⁵ The authors argued that a "separate instrument to address the problem of trafficking in undocumented aliens, that is, workers in an irregular situation, is preferable to the incorporation of anti-trafficking provisions in a more general human rights instrument, so as to stigmatize those aliens. The lot of undocumented workers is bad enough without enlisting a new corpus of human rights law, in effect, against them."²⁹⁶

I agree that a separate anti-trafficking enforcement treaty was warranted, and indeed in the year 2000 the Economic and Social Council promulgated The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.²⁹⁷ The United States ratified the Protocol in 2005.²⁹⁸ This instrument involves significantly different goals than the Migrant Worker Convention, although the populations it is intended to assist, and in some cases intended to punish, certainly overlap.

However, I do not agree that including the issue of trafficking in the Migrant Worker Convention was inappropriate. Protecting migrant worker rights and reducing human trafficking are mutually supportive efforts, and, properly pursued, anti-trafficking enforcement should not be an act of stigmatization. Anti-trafficking enforcement can and should be protective of victims of trafficking. For example, Article 7 of the anti-trafficking Protocol requires States Parties to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently...giv(ing) appropriate

²⁹⁵ See *id.* Preamble.

²⁹⁶ Nafziger & Bartel, *supra* note 87, at 788.

²⁹⁷ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, available at (last visited February 10, 2008).

²⁹⁸ See Status as at: 06-03-2009 10:23:15 EDT: Chapter XVIII: Penal Matters: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15, November 2000, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=376&chapter=18&lang=en> (visited March 6, 2009). In 2005 the United States also ratified a parallel protocol on human smuggling. See Status as at: 06-03-2009 10:23:15 EDT: Chapter XVIII: Penal Matters: 12 .b Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=377&chapter=18&lang=en> (visited March 6, 2009).

consideration to humanitarian and compassionate factors.”²⁹⁹ This type of policy, which is reflected in U.S. law,³⁰⁰ is in keeping with the Migrant Worker Convention’s protection focus.

In addition, it is important to note that not all “workers in an irregular situation” are trafficked – in the United States, for example, estimates are that fewer than 20,000 people are trafficked into this country each year,³⁰¹ as compared with 7.2 million unauthorized workers.³⁰² The vast majority of undocumented immigrants were smuggled at their own request,³⁰³ and roughly thirty percent entered legally and overstayed or otherwise violated their status.³⁰⁴ The two groups – unauthorized workers and trafficking victims - should not be conflated, but their shared need for protection is appropriately addressed through the Migrant Worker Convention’s preambular call for anti-trafficking enforcement.³⁰⁵

2. *Quantum and Timing of Work*

Professors Nafziger and Bartel also object to the Convention’s Article 2 definition of a migrant worker because it suggests that *past* labor alone can qualify one for Convention protection. Professors Nafziger and Bartel further point out that Article 2 leaves open how much remunerated activity is necessary to qualify as a migrant worker.³⁰⁶ Neither of these issues was controversial at the drafting stage, and neither conflicts with principles of U.S. employment law.

Article 2.1 of the Migrant Worker Convention states that “[t]he term “migrant worker” refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” The concern is that, under this definition, which took nearly the entire decade of negotiation to iron out,³⁰⁷ individuals who no longer work, or who worked for very brief periods of time, might be accorded protection under the Convention. This concern

²⁹⁹ See *id.* art. 7(1)-(2).

³⁰⁰ See 8 U.S.C. § 1101(a)(15)(T) (2009) (establishing a visa category for “victim[s] of a severe form of trafficking”).

³⁰¹ U.S. DEPARTMENT OF JUSTICE, ET AL., ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 2004 (June 2004), available at http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf (estimating that between 14,500 and 17,500 people are trafficked annually into the United States).

³⁰² See PEW UNDOCUMENTED WORKER COUNT, *supra* note 178.

³⁰³ See JAMES LOUCKY ET AL., IMMIGRATION IN AMERICA TODAY: AN ENCYCLOPEDIA 335 (2006) (noting that 75% of undocumented immigrants entering from Latin America are smuggled); see also Ko-lin Chin, Smuggled Chinese (1999) (noting a figure of 50,000 Chinese nationals smuggled into the United States per year).

³⁰⁴ UNITED STATES GENERAL ACCOUNTING OFFICE, OVERSTAY TRACKING: A KEY COMPONENT OF HOMELAND SECURITY AND A LAYERED DEFENSE 10 (May 2004), available at <http://www.gao.gov/new.items/d0482.pdf>.

³⁰⁵ Similarly, I disagree with the argument that the Migrant Worker Convention should not have included a call for enforcement measures. See Nafziger & Bartel, *supra* note 87, at 784. It is true that a climate of enforcement chills rights and brings inevitable abuses. At the same time, employer sanctions may move political will toward legalization, and a treaty including rights for undocumented migrant workers without endorsing enforcement would be even more politically un-saleable than the Migrant Worker Convention has heretofore proven to be.

³⁰⁶ See Nafziger & Bartel, *supra* note 87, at 786.

³⁰⁷ See Juhani Lönnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, XXV INT’L MIGRATION REV., 710, 715, 719, 720, 723, 731 (1991) (discussing the protracted negotiations about what migrant workers would be included for protection in the Convention).

was apparently not aired during the treaty negotiations³⁰⁸ and likely does not impinge on U.S. law. For example, many of the provisions of the Convention relate to rights that logically survive termination of the employment relationship under U.S. law, such as the right to remuneration and overtime for work performed,³⁰⁹ due process in deportation³¹⁰ (which typically follows termination of the employment relationship) or protection for temporary workers who have lost their jobs.³¹¹ Therefore, inclusion of former workers in the Convention is appropriate. Moreover, the original decision to include family members of migrant workers in the Convention likely means that many former workers would fall within the treaty's mandate even if they were no longer considered migrant workers.

The second concern about Article 2.1, regarding its failure to establish a minimum period of employment, *does* resonate slightly with U.S. law. Some labor and employment regimes require minimum periods of work to trigger eligibility, for example some workers' compensation schemes³¹² and social security.³¹³ These exclusions were created to lessen the financial burden on employers and ensure sufficient pay-ins to fund the system.³¹⁴ However, these domestic law considerations are misplaced in the context of the Convention. Protection under the Convention should be triggered by any period of work because, by definition, even a short period of work was preceded by a migration experience and will likely be followed by a second migration experience. It seems unlikely that a foreign national would immigrate into the United States, and then work for one day in order to claim the benefits of the Convention's protection. The Convention would provide such an individual no right to legalize and likely no other immigration benefit.³¹⁵ A worker who worked even very briefly in the United States should have the baseline protections that the Convention offers. Moreover, unlike the Social Security system, the Convention does not look to its beneficiaries to finance its operations.

3. Overlap with other Treaties

Professors Nafziger and Bartel argued that the section of the Migrant Worker Convention protecting all workers and family members mirrors existing rights, and “may obfuscate or obscure the enforcement of both the Convention and corresponding human rights instruments

³⁰⁸ See *id. passim* (discussing various debates about what migrant workers would be covered, but not mentioning the question of previously employed migrant workers or briefly employed migrants).

³⁰⁹ See UN Migrant Worker Convention, *supra* note 20, art. 25.1 & 25.1(a).

³¹⁰ See *id.* art. 22.

³¹¹ See UN Migrant Worker Convention, *supra* note 20, art. 49.

³¹² See JOSEPH W. LITTLE, ET AL., WORKERS' COMPENSATION: CASES AND MATERIALS (5th Edition 2004) 110-111 (noting that some state workers' compensation exclude from coverage “casual employees” whose employment is “sufficiently transitory or temporary.”). Excluding a worker from coverage solely on the basis of the temporariness of the work performed is, however, likely a minority rule as among the states. See JACK B. HOOD, WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS IN A NUTSHELL 43 (1999).

³¹³ See 42 U.S.C. 402, 414(a) (2009); 20 C.F.R. § 404.120(a) & § 404.310 (2009) (stating that in order to qualify for old-age social security benefits, a recipient must have accrued six quarters of work).

³¹⁴ See Social Security Administration, Legislative History: 1939 Amendments, *available at* <http://www.socialsecurity.gov/history/reports/1939no3.html> (stating that “Under an insurance program, to be eligible for benefits a worker should have made some minimum contribution.”)

³¹⁵ See *supra* Sections III.2.a & III.2.d.

that are designed to protect everyone, including migrant workers.”³¹⁶ The United States raised this concern in its preliminary statement to the Working Group in 1980.³¹⁷ However, the United States did not raise this concern again. Indeed, in the next year’s 1981 round of Working Group sessions, the United States supported a proposal that the Convention include a separate listing of rights owed to undocumented migrants.³¹⁸

The contention that the Convention provision mirrors provisions of pre-existing treaties is certainly correct. In fact, in their article raising the overlap concern, Professors Nafziger and Bartel demonstrate the parallel nature of 23 protections between the ICMW and the ICCPR.³¹⁹ However, the existence of overlap between the Migrant Worker Convention’s protections for all workers and family members and other human rights treaties would not hinder the United States’ treaty compliance. To the extent that the specific language of analogous treaty provisions differs, presumably countries that have ratified both would need to ensure that their domestic laws conform to whichever of the two standards is most rights-protective. Should treaty monitoring committee *interpretations* of analogous provisions differ, the U.S. government would simply be presented with the opportunity to urge the interpretation that is in this country’s best interests, much as do advocates and lower courts when confronted with a split between the U.S. Circuit Courts of Appeal.

The human rights treaties currently binding on the United States already contain overlapping language. For example, as Professors Nafziger and Bartel’s research demonstrates, Article 5 of the International Convention on the Elimination of All Forms of Race Discrimination (CERD) also contains an extensive set of fundamental rights that overlap with the International Covenant on Civil and Political Rights (ICCPR).³²⁰ The United States has ratified both of these treaties. A survey of the United States’ country reports to those bodies as well as the relevant Concluding Observations does not reveal any problems raised by overlapping protections, wording differences or conflicting interpretations.³²¹ Nor has the concern about overlapping language been raised against ratification of the Migrant Worker Convention in the non-ratifying countries that recently published reports on their assessments of the treaty.³²²

³¹⁶ Nafziger & Bartel, *supra* note 87, at 787.

³¹⁷ See *November 1980 Working Group Report*, *supra* note 27, Annex VI, para. 3 (preliminary written proposal of the United States emphasizing “[t]he importance of avoiding overlap or conflict with existing multilateral, regional and bilateral instruments or arrangements”). Note that, after making this point in the first year of negotiations, the United States did not raise this concern again. In the next year’s (1981) round of Working Group sessions, the United States supported a proposal that the Convention include a separate listing of rights owed to undocumented migrants. See *November 1981 Working Group Report*, *supra* note 27, para. 30.

³¹⁸ See *November 1981 Working Group Report*, *supra* note 27, para. 30.

³¹⁹ See Nafziger & Bartel, *supra* note 87, at 789-799, Appendix.

³²⁰ See *id.* (noting that CERD Article 5 protections, such as the right to leave and enter one’s state of origin and the right to freedom of thought, conscience and religion, overlap with ICCPR articles 9, 12, 14, 18, 19, 22, 25, and 26). The CERD can be found at Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly on 21 December, 1965, GA Res 20/2106; in force 4 January, 1969 [hereinafter CERD].

³²¹ See, e.g., Human Rights Committee Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America: Addendum: Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee CCPR/C/USA/CO/3/Rev.1/Add.1 (February 12, 2008).

³²² CANADIAN ASSESSMENT OF THE TREATY, *supra* note 11, *passim*; EUROPEAN ASSESSMENT OF THE TREATY, *supra*

It may be that the Convention will ultimately be abandoned because it simply cannot garner the country of employment ratifications to make it worth the expense to monitor. The Convention should not, however, be replaced with protocols or even amendments to existing treaties of broader application, as Professors Nafziger and Bartel suggest.³²³ The utility of a single Convention focusing on this population is that it allows a group of specialists to focus on all the issues relating to an important and challenging policy concern such as immigrant workers. In addition, the United Nations has already determined that population-specific human rights treaties are appropriate, as evidenced by the Women's Convention, the Convention on the Rights of the Child, and the Convention on Persons with Disabilities. Subsets of broader population-focused treaties have been addressed through protocols, for example the Protocol to the Convention on the Rights of the Child dealing with the human rights of child soldiers,³²⁴ but that is an approach would be quite distinct from what Professors Nafziger and Bartel suggestion, which would amount to adding a protocol to one or more treaties of broad application for a large population such as migrant workers. Nor can the many challenges faced by migrant workers be addressed merely through interpretation of broader documents.

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

note 38, *passim*; ASIA ASSESSMENT OF THE TREATY, *supra* note 39, *passim*; Z.H. A. ZAYONCHKOVSKAYA, THE PROTECTION OF THE RIGHTS OF MIGRANTS IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE AND THE CIS AND PERSPECTIVES OF JOINING THE 1990 UN CONVENTION, in UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS/2004/MC/6 REV (July 1, 2004), *available at* <http://unesdoc.unesco.org/images/0013/001395/139533E.pdf> (assessing the treaty for non-ratifying countries: Armenia, the Czech Republic, Estonia, Hungary, Kazakhstan, Moldova, Russia, Ukraine, and Uzbekistan, and for ratifying countries: Azerbaijan and Kyrgyzstan) [hereinafter EASTERN EUROPEAN ASSESSMENT OF THE TREATY]; KHADIJA ELMADMAD, ED., LES MIGRANTS ET LEURS DROITS AU MAGHREB: AVEC UNE RÉFÉRENCE SPÉCIALE À LA CONVENTION SUR LA PROTECTION DS DROITS DE TOUS LES TRAVAILLEURS MIGRANTS (2004), *available at* <http://portal.unesco.org/shs/en/files/6407/11400026311LIVRE.pdf/LIVRE.pdf> (assessing the Convention for non-ratifying country Tunisia and ratifying countries Algeria and Morocco) [hereinafter NORTH AFRICAN ASSESSMENT OF THE TREATY]; ROBYN IREDALE, IDENTIFICATION OF THE OBSTACLES TO THE SIGNING AND RATIFICATION OF THE UN CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS 1990: CHINA (Asia Pacific Migration Research Network Working Paper No. 16) (December 2005), *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=9165&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter CHINA ASSESSMENT OF THE TREATY]; OLAIDE A. ADEDOKUN, THE RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, in UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS/2003/MC/7 (October 13, 2003), *available at* <http://unesdoc.unesco.org/images/0013/001395/139534E.pdf> [hereinafter NIGERIAN ASSESSMENT OF THE TREATY]; BABACAR SALL, MIGRATION DE TRAVAIL ET PROTECTION DES DROITS HUMAINS EN AFRIQUE: LES OBSTACLES À LA CONVENTION INTERNATIONALE SUR LA PROTECTION DES DROITS DE TOUS LES TRVAILLEURS MIGRANTS ET DES MEMBRES DE LEUR FAMILLE EN AFRIQUE SUBSAHARIENNE (Études UNESCO sur les migrations – no. 2, 2007), *available at* <http://unesdoc.unesco.org/images/0015/001525/152536F.pdf> [hereinafter CAMEROON ASSESSMENT OF THE TREATY].

³²³ See Nafziger & Bartel, *supra* note 87, at 788.

³²⁴ See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

beyond those enjoyed by refugees.”³²⁵ The authors offer as an example the fact that the Refugee Convention provides national treatment in the right to work.³²⁶ However, this provision and the Migrant Worker Convention provisions on employment are not analogous. Refugee Convention Article 17 is a direct intervention into *migration law*, because it requires that states parties allow refugees to work legally. The refugee convention goes far beyond the migrant worker convention, which explicitly does not purport to effect basic immigration quotas and allocations, including the decision about which immigrants may legally work. The most the Migrant Worker Convention does is to inject humanitarian factors for consideration into expulsion and visa extension decisions,³²⁷ and require States Parties to offer portability of temporary visas from one employer to another.³²⁸ Thus, the Migrant Worker Convention, in the example cited, does not go beyond the Refugee Convention.

b. Protection for Unauthorized Workers and Undocumented Family Members

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

The political concern relating to the Convention’s explicit protections for unauthorized workers is the controversiality of protecting people who have, by definition, violated immigration law. Public opinion around the world is negative about undocumented immigrants,³²⁹ and during the early discussions of the Migrant Worker Convention, the negotiators debated whether to place unauthorized workers within the ambit of the Convention and which rights to accord them.³³⁰ The decision was taken, however, to follow the precedent set by the more recent of two ILO Conventions on Migrant Workers, ILO Convention 143, which preceded and informed the Migrant Worker Convention, and includes protections for unauthorized workers.³³¹ Additionally,

³²⁵ See Nafziger & Bartel, *supra* note 87, at 787. The 1991 article also argues that the ICMW extends rights beyond those extended to other aliens and to citizens, *see id.*, but did not provide examples.

³²⁶ See Nafziger & Bartel, *supra* note 87, at 787 n. 72.

³²⁷ See *supra* Section III.B.2.d.

³²⁸ See UN Migrant Worker Convention, *supra* note 20, arts. 51-52.

³²⁹ See, e.g., John Judis, *Phantom Menace: The Psychology Behind America's Immigration Hysteria*, The New Republic, (Feb. 13, 2008), available at

<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=19878>; Jonathan Storm, Ed., *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa* (The Southern African Migration Project Migration Policy Series No. 50, 2008), available at

<http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat50.pdf>; Antonello Nusca, *More Immigrants Feeling Unwelcome in Europe*, USA Today (June 10, 2008), available at http://www.usatoday.com/news/world/2008-06-09-Rome_N.htm.

³³⁰ See Bosniak, *supra* note 18, at 325-26.

³³¹ See ILO 143, *supra* note 14, arts. 1 & 9. Note that the ILO also issued a supplementary recommendation on migrant workers in 1975, which again called for worker rights protections for unauthorized workers, to include

the 1985 U.N. General Assembly Declaration on the Human Rights of Individuals who are not Citizens of the Countries in Which They Live, after “factious debates”³³² does include protections for undocumented immigrants.³³³ The decision to include unauthorized workers in the Migrant Worker Convention was, however, a departure from the European precedent, which concluded a regional treaty in 1977 that explicitly excludes unauthorized workers.³³⁴ In 2007, the Association of Southeast Asian Nations (ASEAN) issued the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, which, though much shorter and more general than a treaty, nonetheless explicitly offers some limited protection to unauthorized workers.³³⁵ Moreover, in the years since the Migrant Worker Convention negotiators grappled with the tension between human rights and political reality, the legal rights of unauthorized workers have gained some footholds in international law. The UN Committee on the Elimination of Racial Discrimination has interpreted the Convention on the Elimination of Racial Discrimination to provide equal workplace rights for unauthorized workers.³³⁶ The Inter-American Court has issued an advisory opinion establishing the same principle through the American Declaration on the Rights and Duties of Man right to equality of treatment.³³⁷ The Committee on Freedom of Association of the International Labour Organization has also held that the right to freedom of association applied equally in all respects, including the available legal remedies, to unauthorized workers.³³⁸

There seems to be little doubt that by offering protection to unauthorized workers, the framers of the treaty risked what has been to date the result; most countries of migrant employment have shunned the treaty. However, the inclusion has been supported by subsequent legal

equal workplace rights. *See* Recommendation concerning Migrant Workers, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R151>.

³³² *See* Bosniak, *supra* note 18, at 314.

³³³ *See* UN General Assembly, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live : resolution / adopted by the General Assembly*, 13 December 1985. A/RES/40/144. Online. UNHCR Refworld, *available at*

<http://www.unhcr.org/refworld/docid/3b00f00864.html> 5-10; *see also* Bosniak, *supra* note 18, at 314.

³³⁴ *See* European Convention on the Legal Status of Migrant Workers, Art. 1.1, *available at*

<http://conventions.coe.int/Treaty/EN/Treaties/Html/093.htm> (defining a migrant worker as “a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment”).

³³⁵ *See* ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers General Principle 1 *available at* <http://www.12thaseansummit.org.ph/innertemplate3.asp?category=docs&docid=23>.

³³⁶ *See* U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, GENERAL RECOMMENDATION NO.30: DISCRIMINATION AGAINST NON CITIZENS, Jan. 10, 2004,

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument) (stating that unauthorized workers “are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.”)

³³⁷ *See* Juridical Condition and Rights of the Undocumented Migrants, OC-18/03 Op. Inter-Am. C.H.R. (Sept. 17, 2003) [hereinafter OC-18], *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf. This article refers to the case as OC-18, the designated acronym for opinión consultiva, the Spanish translation of the term “advisory opinion.” “OC” is generally used to refer to these cases in the Inter-American system whether the decision referenced is in English, Spanish, or Portuguese. For the purposes of this article, the author used an English translation. *See also* Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers’ Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 558 (2004).

³³⁸ *See supra* note (271).

developments, and continues to be justified by the humanitarian situation of these workers. Undocumented status tracks numerous other indicia of vulnerability, such as race, poverty, poor-country origin, trauma survivorship, and lower education level,³³⁹ underscoring the need for careful attention to baseline rights. So long as international law is unwilling to disturb national sovereignty with respect to regulating the availability of brown-collar visas, international law should acknowledge the resulting hierarchies. Because undocumented immigrants are so vulnerable, the Convention's explicit application of basic rights to them provides the Migrant Worker Committee with a more effective mandate for exploring and shoring up their situation within each State Party.

A related concern relates to the structure of the Convention's protections for unauthorized workers. According to Professors Nafziger and Bartel, "providing one set of rights for *all* migrant workers and another for *documented* workers alone poses enormous problems of interpretation and implementation. The distinction may also threaten principles of humanity and justice."³⁴⁰ Moreover, the Convention's structure has a historical antecedent: ILO 143 is also structured to include one set of rights for all migrant workers and additional rights for authorized workers.³⁴¹ Although the resulting protection scheme may seem complicated, and also may seem to endorse the underlying hierarchies in a way that may be philosophically disturbing, the dualist nature of the Convention is a compromise that achieves the treaty's goals as efficiently as possible given the existence of the strong documented-undocumented distinction in most workplaces. As argued above, a treaty that purports to protect migrant workers without providing protections to the unauthorized would fail both classes of worker. Moreover, the Migrant Worker Convention does not only distinguish between authorized and unauthorized workers. The Convention also breaks out brief particularized protections for other sub-classes of migrant worker, for example frontier workers³⁴² and seasonal workers,³⁴³ much as the Convention on the Elimination of Discrimination Against Women addresses particular protections to rural women.³⁴⁴

A third concern regarding the Convention's treatment of unauthorized workers involves the protections that are omitted. Although the Convention broke new ground in establishing rights for the unauthorized, including many protections that remain unique to the Convention,³⁴⁵ some omissions have been the subject of criticism. The first and most glaring is the lack of any right to legalization of status for long-term residents. As Professor Bosniak states, despite its groundbreaking protections, the Convention is "a staunch manifesto in support of state territorial

³³⁹ See Constance de la Vega and Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L. J. 35, 36-45 (2005); See Jorge A. Bustamante, *A Dialectical Understanding of the Vulnerability of International Migrants*, in HERNAN VERA AND JOE R. FEAGIN, EDS., HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 161, *passim* (Handbooks of Sociology and Social Research 2007).

³⁴⁰ Nafziger & Bartel, *supra* note 87, at 787. Professors Nafziger and Bartel did not elaborate on the problems the distinction would cause. See *id.*

³⁴¹ See ILO 143, *supra* note 14, *passim*.

³⁴² See UN Migrant Worker Convention, *supra* note 20, art. 58.

³⁴³ See *id.* art. 59.

³⁴⁴ See CEDAW, *supra* note 7, art. 14.

³⁴⁵ See Bosniak, *supra* note 18, at 334-45.

sovereignty.”³⁴⁶ The lack of opportunities for legal brown-collar migration is, arguably, the underlying cause of a host of many human rights violations that undocumented immigrants experience. However, as Professor Bosniak concedes, including such a right to legalize would have been enormously politically difficult.³⁴⁷ Most significantly, Professor Bosniak objects to the Convention’s failure to guarantee that undocumented individuals who assert their rights under the Convention will not be then placed into deportation proceedings as a result of the assertion.³⁴⁸ I agree that such a provision would have been an important and appropriate resolution of the rights-sovereignty tension between that the Migrant Worker Convention so starkly embodies.

c. Gender and Migrant Workers

Professor Meg Satterthwaite critiques the Convention for its silence on the issue of gender and migrant worker rights. She rightly points out that that the Convention fails to provide any explicit protection from the *gendered* forms of exploitation and violence that migrant worker face.³⁴⁹ Professor Satterthwaite also compares the robust ratification record of the six other longstanding UN human rights treaties with the slow pace of the Migrant Worker Convention.³⁵⁰ Based on these observations, Professor Satterthwaite rightly argues that ratification of the Convention should not be the sole focus for governments and advocates concerned about developing the law on this issue. Professor Meg Satterthwaite argues that, rather than focusing exclusively on ratification efforts for the Convention, migrant worker advocates should direct their energies toward ensuring that more widely ratified human rights treaties are interpreted so as to extend protection both to migrant workers in general, and to women migrant workers in particular.³⁵¹ The monitoring process of the Migrant Worker Convention promises a concentrated examination of this community that Professor Satterthwaite’s approach cannot provide, but if the Convention is not more widely ratified, this benefit will be limited. Moreover, Professor Satterthwaite’s intervention clearly points up the age of the Convention – drafted today, it would doubtless include explicit provisions on women migrant workers. This is not an uncommon problem; most of the other major human rights treaties are older than the Migrant Worker Convention, and contemporary concerns can be incorporated through the use of protocols and interpretations. Professor Satterthwaite’s argument also underscores the lack of civil society advocacy resources discussed above.

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

Professors Nafziger and Bartel raise several technical issues about the Migrant Worker Convention. Two of these concerns relate to the Convention’s enforcement scheme. First, the

³⁴⁶ See *id.* at 316, 339.

³⁴⁷ See *id.* at 338.

³⁴⁸ See *id.* at 336.

³⁴⁹ See Satterthwaite, *supra* note 87, at 2-4.

³⁵⁰ See *id.* at 2.

³⁵¹ See *id.*, *passim*.

authors point out that the Convention lacks a reciprocity clause, an omission that “may inhibit ratification and accession to the convention.”³⁵² Second, the authors argue that the treaty’s injunction forbidding governments to exclude application of entire treaty sections, or to exclude entire migrant categories from protection - creates a danger of “complicated sub-regimes” of exclusions and obligations. The concern is that if only small subsets of exclusions are permitted will needlessly complicate Convention member states’ map of obligations. The following section argues that these features of the Convention are entirely appropriate to human rights treaties in general and to the Convention in particular. Finally, the 1991 article lodges a concern about the complexity of the treaty. As argued in this section, although I agree that these observations are factually correct, I do not feel that they should preclude ratification of the Convention.

a. Reciprocity

The 1991 article argues that the lack of a reciprocity clause weakens the Convention. A reciprocity clause is a mechanism that allows states parties to avoid their own treaty obligations when other states parties breach the treaty.³⁵³ This lack may well be a weakness, but it should not, as the authors of the 1991 article suggest, prevent governments from ratifying the Convention. International law expert Liesbeth Lijnzaad argues that the general failure of human rights treaty states parties to protest treaty reservations taken by other states parties is a failure of reciprocity.³⁵⁴ However, this is an omission that the Convention shares with other human rights treaties.³⁵⁵ None of the other eight “core” UN human rights treaty includes such a clause. In fact, Japan was criticized when it ratified the Convention Against Torture with a reservation imposing a reciprocity requirement.³⁵⁶ Dr. Lijnzaad maintains that human rights treaties “have a validity well beyond the bounds of reciprocity.”³⁵⁷

The fact that the actual beneficiaries of the conventions are civilians rather than states, together with the objective nature of the rights might suggest that no exchange of benefits between the ratifying states took place. This is incorrect. The most essential benefit is the fact that human rights will be regulated at the international level. . . . There are often other benefits involved in negotiating and acceding to a human rights treaty. These will not be retributions in the shape of favourable provisions in an international legal instrument, but may take the form of extra-legal remunerations, such as an improvement of the States’ international standing, the proof of being a respectable member of the international community.³⁵⁸

³⁵² See Nafziger & Bartel, *supra* note 87, at 786.

³⁵³ See Restatement (Third) of Foreign Relations Law § 801 (1987).

³⁵⁴ LIJNZAAD, *supra* note 95, AT 112.

³⁵⁵ See *id.* at 110-111.

³⁵⁶ See *id.* at 111. The Convention Against Torture can be found at Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

³⁵⁷ See *id.*

³⁵⁸ See *id.*

Furthermore, the Vienna Convention on the Law of Treaties specifically exempts “provisions relating to the protection of the human person contained in treaties of a humanitarian character” from its general rule permitting parties to a treaty from terminating or suspending the operation of a treaty as a result of a material breach by another party.³⁵⁹ The Vienna Convention’s *travaux préparatoires* suggest that “treaties of a humanitarian character” includes human rights treaties.³⁶⁰ Finally, the U.S. Restatement of the Law of Foreign Relations takes the position that a government (“State A”) may not take countermeasures against another government (“State B”) by suspending either human rights norms or minimum protections provided to the aliens of State B.³⁶¹ Given these multiple protections against unilateral suspension of human rights treaty provisions, in particular in the treatment of aliens, the Migrant Worker Convention’s lack of a reciprocity clause is appropriate to the treaty’s status as a human rights treaty.

b. Non-Exclusion of Worker Categories

Article 88 of the Migrant Worker Convention forbids states that are joining the Convention to “exclude the application of any Part of it, or...[to] exclude any particular category of migrant workers from its application.”³⁶² This provision is significant because it prevents ratifying states from excluding undocumented immigrants from protection. The authors of the 1991 article criticize this provision, arguing that Article 88 raises a concern about “complicated sub-regimes of international obligations among States Parties because states parties can exclude application of individual provisions but can’t exclude the application of an entire ‘Part.’”³⁶³ This criticism is misplaced because it does not account for the fact that none of the other major UN human rights treaties forbids states parties from excluding application of individual provisions or small clusters of rights.³⁶⁴ The concern that complicated sub-regimes will arise does not seem to be bearing itself out, at least based on the limited record of the 41 ratifications to date. Only 28 limitations on ratification have been registered to date,³⁶⁵ creating a ratio of ratification-to-exclusions that is not significantly different from the three “core” UN human rights treaties that the United States has ratified.³⁶⁶ While this rate of exclusions likely arises in part from the fact that countries of origin have ratified the Convention, each of the ratifying countries does host some migrants, and even the two states parties that host significant numbers of migrants –

³⁵⁹ See United Nations, Vienna Convention on the Law of Treaties, art. 60.5, Jan. 27, 1980, 1155 U.N.T.S. 331.

³⁶⁰ See RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 169-170 (2002) (citing United Nations Conference on the Law of Treaties, II, at 112 (remark by Switzerland)).

³⁶¹ See *id.* at 218 (citing Restatement III, 41 para. 711 comment q and para. 905 and reporter’s note 2).

³⁶² See UN Migrant Worker Convention, *supra* note 20, art. 88. Note that by its own terms the Convention does not protect various categories of migrants: 1) individuals working for international agencies or performing various diplomatic functions; 2) foreign investors; 3) refugees; 4) stateless persons; 5) students and trainees; and 6) seafarers and offshore workers who have not been admitted for employment. See *id.* at art. 3.

³⁶³ See Nafziger & Bartel, *supra* note 87, at 785.

³⁶⁴ See ICCPR, *supra* note 109, *passim*; Convention Against Torture, *supra* note 356, *passim*; CERD, *supra* note 320, *passim*; ICESCR, *supra* note 56, *passim*; CRC, *supra* note 85, *passim*; CEDAW, *supra* note 7, *passim*; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 *passim* (Dec. 13, 2006) [hereinafter CRPD].

³⁶⁵ See ICMW Ratification Record, *supra* note 29.

³⁶⁶ Compare CAT Ratification Record, *supra* note 43, *passim* (reflecting 146 states parties and 71 reservations, understandings and declarations) with ICMW Ratification Record, *supra* note 29, *passim* (reflecting 41 states parties and 28 reservations).

Turkey and Mexico – registered relatively fewer restrictions on ratification³⁶⁷ than the United States has in its ratification of other treaties.³⁶⁸ Moreover, the greater length of the Convention would seem to lead to more exclusions, a prediction that has not been borne out. However, until more countries of employment analyze the Convention, it will not be clear which provisions, if any, wealthy countries are likely to eschew. In any event, it is not clear that the inability to avoid responsibility for entire parts of the Convention, or to exclude entire categories of migrants, would lead governments to exclude a patchwork of provisions.

Indeed, the more likely risk of Article 88 is the possibility that it will deter governments from ratifying the Convention at all, because they cannot exclude the category of undocumented workers from protection. However, as Professor Linda Bosniak argues, Article 88 “goes a long way to protecting the purpose and integrity of the instrument.”³⁶⁹ In sum, having decided that protecting all migrant workers is a core value of the Convention, requiring that ratifying countries sign onto at least some protections for the unauthorized ensures that the document stands true to the consensus reached by its negotiators.

c. Complexity

Professors Nafziger and Bartel argue that the Convention is a complex document³⁷⁰ that should be replaced by efforts at clarifying that existing rights apply to migrants and a “separate, concise instrument” containing “special protections that take account of the unique status and problems of migrant workers.”³⁷¹ The Migrant Worker treaty is certainly more specialized than human rights treaties of more general application, and it is lengthy. Its 71 substantive provisions significantly exceed the other major UN human rights conventions.³⁷² However, a longer and more specialized document does not mean a more burdensome compliance process. Indeed, as the first 34 provisions aimed at *all* migrant workers substantially mirror existing treaty obligations,³⁷³ in order to clarify protection for unauthorized workers – a major reason is why the document is so lengthy – a great deal of the reporting would be synergistic with the U.S. government’s ongoing compliance work. Moreover, because much of the Convention involves one government regime – the temporary worker program³⁷⁴ – a relatively discrete number of

³⁶⁷ See ICMW Ratification Record, *supra* note 29 (showing that Turkey registered one reservation and four declarations, and that Mexico registered only one limiting reservation). Note also that Mexico took the unusual step of consenting to the Migrant Worker Committee’s jurisdiction over individual complaints. See *id.*

³⁶⁸ See ICCPR Ratification Record, *supra* note 43 (showing that the United States registered five reservations, five understandings, and three declarations); CERD Ratification Record, *supra* note 43 (showing that the United States registered three reservations, one understanding and one declaration); CAT Ratification Record, *supra* note 43 (showing that the United States registered two reservations, five understandings (one with multiple sub-parts) and one declaration).

³⁶⁹ Bosniak, *supra* note 18, at 339.

³⁷⁰ Nafziger & Bartel, *supra* note 87, at 784.

³⁷¹ *Id.* at 788.

³⁷² See ICCPR, *supra* note 109 (27 substantive provisions); Convention Against Torture, *supra* note 356 (16 substantive provisions); CERD, *supra* note 320 (7 substantive provisions); ICESCR, *supra* note 56 (15 substantive provisions); CRC, *supra* note 85 (45 substantive provisions); CEDAW, *supra* note 7 (16 substantive provisions); CRPD, *supra* note 364 (30 substantive provisions).

³⁷³ See *supra* Section IV.E.1.a.3.

³⁷⁴ See UN Migrant Worker Convention, *supra* note 20, arts. 36-56.

agencies and officials would be responsible for reporting on the most detailed provisions.

V. Conclusion

The time has come for the United States to take stock of the United Nations Convention on Migrant Worker Rights. The Convention is one of the United Nations' nine major in-force human rights treaties, of which, to date, the United States has ratified four. The history of these previous ratifications supports U.S. ratification of the Migrant Worker Convention. Because of the United States' extremely cautious human rights treaty ratification practice, and also because the Convention does not challenge U.S. immigration priorities, ratifying the Convention would be no threat to U.S. sovereignty. The substantive legal effects of such a move would likely be muted in the short- and medium- term. Moreover, the Convention takes no position on controversial immigration policies such as legalization, border enforcement and worksite raids. Instead, the Convention focuses on protecting migrant workers' fundamental human rights and ensuring fundamental employment rights on an equal basis with other workers.

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

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

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

The United States has developed the world's largest per capita undocumented immigrant population, one of the world's most deadly peacetime borders, and the most poverty-stricken low-income workforce in the industrialized world. Most agree, on humanitarian, labor, fiscal, international relations and security grounds, that this is a problem that needs to be addressed. Yet, except for policies of increased enforcement, domestic policy reforms proposals have failed politically. Signature and ratification of the Migrant Worker Convention would re-frame the debate on migrant labor and refocus attention on non-enforcement solutions to illegal immigration, allowing the United States to start on the path toward a rational global approach to low-paid labor migration.

Appendix I: U.S. Human Rights Treaty Signature and Ratification Pattern

Last updated: August 15, 2008

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

Appendix II: Treaty Ratification Timing by Top Ten Countries of Migrant Employment

Last updated: March 20, 2009

Treaty Country by rank in migrant employment	ICERD		ICCPR		CAT		Average Days Between Promulgation and Ratification, by Country
Date of Promulgation	12/21/1965		12/16/1966		12/10/1984		
United States Ratification	10/21/1994	10,532	10/21/1994	10,172	10/21/1994	3603	8102 days/270 months**
Russia Ratification	2/4/1969	1142	10/16/1973	2497	3/3/1987	814	1484
Germany Ratification	5/16/1969	1243	12/17/1973	2559	10/1/1990	2122	1975
Ukraine Ratification	3/7/1969	1173	11/12/1973	2524	2/24/1987	807	1501
France Ratification	7/28/1971	2046	11/4/1980	5073	2/18/1986	436	2638
Saudi Arabia Ratification	9/23/1977	4295	not signed not ratified calculated using 3/20/2009	15,436	9/23/1997	4671	8134
Canada Ratification	10/14/1970	1759	6/19/1976	3474	6/24/1987	927	2053
India Ratification	12/3/1968	1079	4/10/1979	4499	signed not ratified calculated using 3/20/2009	8867	4815
UK Ratification	3/7/1969	1173	5/20/1976	3444	10/8/1988	1399	2005
Spain Ratification	9/13/1968	998	4/27/1977	3786	10/21/1987	1046	1943
Average Days Between Promulgation		2544		5346		2469	2937

and Ratification, by Treaty							
				Total Average	3453 days/115 months**	Average leaving out U.S.	2936 days/98 months**

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

** average “months” calculated by dividing days by 30