IMMIGRATION AND THE HUMAN RIGHTS DISCOURSE: THE UNIVERSALITY OF HUMAN RIGHTS AND THE RELEVANCE OF STATES AND OF NUMBERS

Ruth Gavison*

The main thesis of this Article is that the tendency to sweepingly use the human rights discourse in immigration contexts may be misguided. Moreover, the expansion of the human rights discourse beyond its natural and critical scope may have negative results and encourage states to act in ways that may harm important interests of immigrants. The unsuitability of applying human rights discourse to many of the core issues of immigration policy derives from three main reasons: First, is the immanent tension between the moral claims that rights are universal and apply to all individuals, and the fact that actual protection of human rights is the primary responsibility of states. Second, is the related distinction between the basic recognition of a human right and the processes of identifying the nature and scope of the duties such recognition involves. Third, are the institutional implications of choosing between the human rights discourse and discussion of policy questions. Issues determined by rights that have already been regulated can and should ordinarily be decided by independent courts; while issues of policy, especially ones that involve extensive enforcement and administrative structures, should be debated, resolved, and implemented by political players. While there are important aspects of immigration that do belong to core human rights in the strongest sense, most typical immigration issues are not, at this stage, matters of universal human rights.

INTRODUCTION

This is not an essay on how to think about issues of immigration and which immigration policies a state should adopt. It is an essay that seeks to raise a theoretical question about the relevance to immigration policy (IP) of what has come to be known as the human rights discourse (HRD). The choice to write about this issue may sound

* Haim Cohn Professor of Human Rights Law, Hebrew University Law Faculty.

I thank the Minerva Center for Human Rights for financial support and Michal Merling and Yifat Naftali for excellent research assistance. The team of the Refugee Rights Clinic at Tel Aviv University Law Faculty provided extremely helpful insights. Earlier drafts of this paper were presented at the Harvard University Safra Center for Human Values (April 2, 2008) the Minerva Center on Human Rights and Immigration led by Chaim Gans (June 11, 2008) and the Minerva and the Public Law Human Rights Forum at the Hebrew University (July 21, 2008). I thank participants of all seminars for their useful suggestions and Dr. Na’ama Carmi for a helpful comment at the forum’s discussion.
surprising: When immigration issues are so pressing in so many places, the choice to trace theoretical tensions and presuppositions may seem detached, misguided, and even heartless. One might think that the first duty of any caring individual is to think about the normative guidelines of IP and find immediate ways to alleviate the suffering of immigrants.

While people of course have the freedom to choose how to spend their time—and this is in itself an important part of academic freedom, which is in turn vital of creative thinking—I think that the challenge is serious. Rushing to find ways to alleviate suffering here and now may mean that people do not reflect enough on the conceptual, normative, institutional, and political aspects of the larger phenomena and processes. At times, this tendency may in fact hinder effective long-term efforts to alleviate human suffering. The theoretical approach advocated here is an illustration of this more general claim.

The Article will detail these claims and provide evidence to support them. Often, NGOs and people who care deeply about the plight of immigrants and their families, seek to respond to it by invoking HRD and arguing that it dictates many answers to central questions within IP.\(^1\) This tendency is based on the special moral and political force of HRD (when compared with arguments about desirable policy). However, this expansive invocation of HRD, despite appearances and even initial successes, and its application to the totality of immigration issues, may in fact be misguided. Moreover, the expansion of HRD beyond its natural and critical scope may have negative results: It may backlash and encourage states to act in ways that may well harm important interests of immigrants; distort the proper relationship within states between different state organs; and harm the policies, the robustness of political discourse and deliberation, and the legitimacy of the courts themselves. Last but not least, the imperialism of HRD may endanger the integrity and effectiveness of this important discourse itself.

The unsuitability of applying HRD to many of the core issues of IP stems from a number of related sets of reasons, which characterize a lot of HRD, but are very dramatic in the context of immigration. First, is the immanent tension between the moral claims of the HRD—the promotion of rights which are universal and apply to all individuals by virtue of their humanity alone—and the fact that actual protection

of human rights is always the responsibility of specific effective governments in states which are very different from one another. Second, is the related distinction between the basic recognition of a universal human right, and the processes of identifying the nature and scope of the duties such recognition involves, the identity of those subject to the duties, and the nature of the mechanisms available—if at all—to enforce these duties. While human rights recognized in international documents are meant to be universal, the task of authoritatively deciding on their scope, and especially the task of in fact promoting them, is relegated to the states and international organizations, which often interpret the rights and their implications in different ways. Third, both states and international organizations recognize a basic distinction between issues determined by rights, which need to be authoritatively decided by applying pre-existing norms in “fora of principle”; and issues that are not regulated in this way, which need to be debated and discussed by the political players (legislatures and executives in states, states themselves in the international arena).

The implication of these features is that the international human rights regime presupposes a global order in which there are different states, each with its own political, social, and economic structure. While all these states are, and should be, governed by human rights norms, which include both Civil and Political (CP) rights and Social, Economic, and Cultural (SEC) rights, it is accepted that there will be different scopes and enforcement of these rights nationally and internationally. These differences are clearest when we come to the alleged duties to actively promote SEC rights, where the relevance of budgetary allocations and of numbers (of both people and required expenditures) mean that the HRD itself accepts—even if only in part and reluctantly—that many of these issues must be left to the political branches of the different states and to their power to form and implement policies. The main human rights constraints in such contexts are mainly those of non-discrimination and due process.

2 States are the primary agents interpreting and enforcing rights, although a number of international agencies and NGOs, as well as some regional political unions, exercise some power in these matters. In fact, when these deliberations are made by non-state organs, complex issues of legitimacy and effectiveness may arise. Often, these international bodies allow a significant “margins of appreciation” to states. At present, the activity of such organs does not require a radical modification of the argument presented in the Article.

3 The distinction is not always clear, on many levels. Often, issues of rights are decided in a “political” way, and at times parties and others seek to transform issues which are clearly political into legal questions. The relative realms are thus themselves deeply contested. Nonetheless, the principled distinction is important.

4 The difference between the International Covenant on Civil and Political Rights (Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]) and the International Covenant on Economic, Social
Immigration demonstrates these tensions most dramatically because they involve in the strongest way both the element of states and that of numbers. First, as mentioned above states are allowed more leeway in matters concerning the rights of their own residents and citizens, when budgetary implications are involved. In addition, the global order presupposing different states grants states more control over their borders and the determination of who may become a member, than over the level of protection of the state’s own citizens and residents, who are already members. This distinction is in fact based on the recognition that since states owe special duties of security, welfare, self determination, and community to their own members, denying them the right to control who may become a member means that states lose control over the scope of their obligations in a way that may threaten their ability to fulfill their duties to the communities living in them. The tensions between the universality of human rights and the power of states to exclude non-members may be strongest in the context of unauthorized immigration: The state cannot be said to have accepted obligations for undocumented immigrants by permitting them to enter; at the same time, they are humans entitled to universal human rights. Thus, an expansive interpretation of the implications of human rights may run contradictory against the necessary power that states may claim in order to control the scope and nature of immigration into the country, which in turn may be necessary for the state to discharge its duties toward the people already living in it.

The structure of the Article follows these claims. First, the nature of human rights and the HRD are discussed (Part I). Part II maps some of the main issues central to the welfare of immigrants and their families and to the integrity of immigration policies. Part III describes the development of the application of HRD to issues of immigration, and the tensions revealed in that application. It is argued that there is indeed a tendency to frame debates about policies in terms of human rights; that this tendency has resulted in deep internal tensions within HRD on immigration issues and that in many cases this has created a serious backlash. The last part concludes that it is best to consider most of the central issues of immigration as issues of policy, to be determined mainly by the political branches of the various states, through regular political processes.

and Cultural Rights (Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]) is not only in the drafting of the duties correlative to the rights (only the right to elementary education is not left in any way to the discretion of states) and in the very different enforcement mechanisms in the two conventions. It is also reflected in the fact that in the ICCPR there is a clause prohibiting any derogation from some rights, whereas such a clause is absent from the ICSECR. For a general discussion of the relations between CP and SEC rights, see Ruth Gavison, The Relationships between Civil and Political and Social and Economic Rights, in GLOBALIZATION OF HUMAN RIGHTS 23 (Jean-Marc Coicaud et al eds., 2003).
and not as issues of human rights which should be decided primarily by courts. The complex social, political, and economic constraints in most countries, affected also by HRD, are—in the long term—a better way to handle explosive immigration issues than the attempt to apply HRD directly and comprehensively to all central issues of immigration.

Having strong and adequate immigration policies—on the national and the international level—is a very pressing need. The formulation and implementation of such policies are often weakened or undermined by the fact that there are conflicts of interests within, and among, states. These policies require a lot of creative planning and designing that may make immigration successful. Such matters cannot be relegated to courts or semi-judicial institutions deciding one case at a time, without the ability or responsibility of seeing the whole picture. At the same time, state organs in many countries do not formulate and implement effective immigration policies, for a variety of reasons. Incentives for them to do so should be found. HRD may be used as one such incentive. However, the limited role of HRD in these cases should not be forgotten, for the reasons mentioned above.

I. FEATURES AND ISSUES OF THE HRD

The twentieth century has often been described as the Human Rights Era. During WWII millions of civilians were killed and unprecedented human atrocities took place. This reality generated the post-war trials in Germany and Japan and the support for an international set of human rights standards. The best reflection of this trend is the Universal Declaration of Human Rights (UDHR) of 1948 and the set of basic human rights conventions that followed it. The conventions have varying enforcement mechanisms, including monitoring bodies that accept reports from parties and offer authoritative interpretations of provisions in these conventions. In addition, a large number of international human rights NGOs have developed, which seek to elaborate on these documents and promote the protection of human rights worldwide by documenting violations, condemning them, and marshalling support for their rectification. One form of rectification is through invoking the protection of human rights in national and international courts.

The HRD\(^5\) generated by these bodies is characterized by a number of central features.

\(^5\) The literature on these subjects is huge. For a general treatment, see the last edition of Henry Steiner and Philip Alston International Human Rights in Context (2007). See also Ruth Gavison, The Constitutional Protection of Human Rights (forthcoming) [in Hebrew].
• Human rights are universal—that is, applicable to all states and all regimes and at all times and under all circumstances. Many of them—unless otherwise specified—are the rights of all humans, irrespective of status, religion, nationality, or gender.

• Human rights are seen as constraints imposed on all states and governments (as well as international organizations) due to the combination of their moral force and international recognition. They are valid and binding on all states and all regimes, regardless of the question whether or not they themselves recognize the rights. Furthermore, rights do not depend on the good will, charity, or willingness of those whose duty it is to respect them. Thus, (human) rights are different from mere wishes, claims, or interests.

• Not only is their binding power based on moral considerations irrespective of political endorsement, human rights are often said to operate as “trumps,” defeating policy considerations that may be operating against them.\(^6\)

Indeed, these features are necessary and critical. If human rights did not have these features, they could not have performed the critical tasks allocated to them after WWII. If states could simply legislate away human rights, the whole purpose and function of human rights would be voided.

All these features relate to the normative nature and force of rights. However, another strand in analyzing human rights—and rights talk more generally—has to do with their real influence on social reality. Positivists warned against the dangers of confusing ideals and social norms and advocated theories of rights that would emphasize real enforceability and not mere moral ideal. If one does not have the power or the control to ensure that rights are respected by those bound by them, is it not misleading to talk of rights rather than of claims, wishes, or aspirations?\(^7\)

The success of HRD after WWII is built on the fact that these two strands were combined into an integrated regime. Declarations of moral ideals were meant to be coupled with international recognition, which in turn, through the influence of

\(^6\) An influential spokesperson for this approach is **RONALD DWORKIN, TAKING RIGHTS SERIOUSLY** (1978) and **RONALD M. DWORKIN, Rights as Trumps, in THEORIES OF RIGHTS** (Jeremy Waldron ed., 1984)). See also **Dan T. Coenen, Rights as Trumps, 27 GA. L. REV. 463** (1993).

\(^7\) I cannot go here into this fascinating debate which at times took the form of a debate about moral vs. legal rights, but was then seen as applicable to all rights discourse. For a general account of the debate, see, e.g., **MATTHEW KRAMER, N.E. SIMMONDS, & HILLEL STEINER, A DEBATE OVER RIGHTS** (1998).
international norms on states, would make the violation of human rights difficult and exceptional, and respect for and promotion of the norm, the rule. To some extent, this coupling succeeded, and this is a great achievement of HRD and the Human Rights Era. Nonetheless, this very success created the tensions which are the subject of this Article.

Many factors are responsible for this relative success.\(^8\) In the international arena, it is the high visibility of human rights international bodies, and NGOs, plus the willingness of these bodies and states to use HRD as a way of exerting political and sometimes even military pressures on states.\(^9\) National systems have stronger enforcement mechanisms and NGOs than does the international order, and courts at times invoke constitutional norms, including bills of rights, and international standards, to push their own states and governments in the direction of increased protection. The tendency of national courts to invoke international human rights standards is growing.\(^10\) There is also a tendency to use HRD in international contexts as a means of exerting international diplomatic pressure. Often, these processes generate increased human rights protection (and even more attention to humanitarian considerations, which had been seen in the not too remote past as within the full discretion of states). The increased transparency of violations of rights and international norms in the mass media has also contributed to the effectiveness of political and international pressures to reduce human rights violations.\(^11\)

---

8 The success is relative, because unfortunately there are many violations of core human rights around the world. The success, however, should not only be measured by the reduction in violations of human rights. The fact that such violations are now known and often condemned, and therefore that individuals and states now sometimes find them costly, or at least seek to apologize for them or deny their occurrence, is also a success of the HRD.

9 For an account of the relationships between violations of human rights by states and the limits of the right to intervene by force, see, e.g. Michael Walzer, Thinking Politically: Essays in Political Theory (David Miller ed., 2007).


11 Another important issue of the HR era not discussed here is the way in which these features contribute to the politicization of the HRD, precisely what was sought to be avoided by the notion of universality. What matters are brought to attention or reported, and what matters are raised and resolved in UN bodies, are questions decided not exclusively by the severity or the clarity of the violations. Moreover, the limits of the effectiveness of the HRD should also be recalled: Mass killings in Rwanda and Darfur were allowed to happen and did not result in effective international intervention.
These aspects of the successes of HRD have made it very attractive to cast struggles for political progress and greater social justice, in both the national and the international arenas, as attempts to vindicate human rights. Such attempts take two main forms. One is the political fight to expand the explicit recognition of “new” human rights in conventions or bills of rights, thus transforming claims and interests into recognized human rights through deliberate creation of new norms. The other is an attempt to expand HRD within states and in the international community, by framing many urgent issues as issues of presently recognized human rights (and not just as claims and interests, that seek recognition). At times these strategies are combined in various ways. The second strategy seeks to capitalize on the fact that the universality of human rights means that anything recognized as a human right enjoys moral, and possibly political and even legal, power that may make it unnecessary to gain the support of the political decision-makers to the actual recognition or promotion of those interests, especially recognizing them as rights. Moreover, within states and in HRD of NGOs and interpretive bodies these processes give the power to decide the exact scope of rights and the meaning and extent of the duties imposed by recognizing them to judicial and quasi-judicial organs on both the state and international level.

The Article’s main thesis is the claim that this strength is also a weakness. In both the international community and within states, the realization of this potential means that states may be reluctant to expand the realm of recognized human (or constitutional) rights, since these are seen as imposing effective limits on their discretion to deal with policy issues which may seem critical to their own welfare or identity. Although these tensions have been illustrated by the way HRD has been used over the last decades, they are in fact structural and awareness to them had been present from the very beginning of the adoption of international human rights conventions.\(^\text{12}\)

A first sign of an immanent tension within this complex notion of human rights and its mechanisms and expectations of enforcement is exhibited in the fact that international law recognizes the right of states not to become parties to human rights conventions at all or to include reservations when they do join. On the one hand, a state that chooses not to ratify, or to submit a reservation, is not legally bound by the

\(^{12}\) One example close to home is Count Bernadotte’s proposal that the General Assembly recognizes the right of refugees from the 1947-48 war to return to their homes, while the famous GA Resolution 194 (U.N. Doc. A/RES/194 (III) (Dec. 11, 1948) does not use the language of rights. This has not ended the debate, however, since Palestinians argue that Resolution 194 does recognize a right of return. Another example is the important differences between the non-binding Universal Declaration of Human Rights (G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR]) and the ICCPR and ICESCR (supra note 4).
relevant provisions of the convention. On the other hand, if human rights are indeed universal in the sense noted above, states do not have the power to decide that they are not bound by them. They may still be judged by these norms (even if actual enforcement is not possible against them). Indeed, scholars of international law, and even more so NGOs, often make both kinds of statements: They declare that states are only bound by conventions that they have joined, but also that they should be censured for not keeping obligations imposed by those conventions even if they had not joined them.

The same tension is exhibited in the different enforcement and monitoring mechanisms adopted for different rights within the body of human rights conventions themselves. Initially, the international community only succeeded in proclaiming on December 10, 1948 the UDHR, which is a document expressing aspirations, and does not impose binding obligations. Naturally, the UDHR set a common standard, but the enumerated rights did not come with any qualifying provisions, and there was no institutional mechanism set up to monitor or enhance its implementation. The force of the declaration is primarily moral. The strength of the recognition was expected to be moral and social.

The differences in strength and scope reflecting tensions within the HRD are clearer when we compare the key provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICSECR).

---

13 The tension is further illustrated by the fact that some provisions cannot be derogated. On one level, these are the most important provisions. It makes sense to single them out for “non-derogability.” But are these provisions binding on states that had not ratified at all?

14 For clear illustrations of both statements in the context of HRD on immigration issues on both the international and the state levels, see detailed discussion in Part III below. The ambivalence does not stem from the claim that some such norms have acquired the status of customary international law. The two approaches are used by people discussing the applicability of the ICRMW to states that have deliberately refrained from becoming signatories. See, e.g., the discussion in the UN Report, infra note 50.

15 These two primary human rights conventions were adopted at the same time. While the UDHR treats CP rights and SEC rights in the same way, the two conventions do not. Furthermore, the conventions are much more detailed and qualified than the UDHR (cf. the concise affirmation of the right to life in Article 3 of the UDHR (supra note 12) with the very detailed formulation in Article 6 of the ICCPR (supra note 3). As between the conventions, the obligation under the ICCPR is to “respect and ensure” the rights in it, while under ICSECR it is to “take steps…to the maximum of its available resources …. with a view to achieving progressively the full realization of the rights …” (Article 2(1) of the two conventions, respectively). For a discussion of the monitoring mechanism and the powers under the optional protocol of the HRC, as compared with the absence of such an optional protocol for the ICSECR, see Steiner & Alston, supra note 5, at ch. 9.
The difference between the two conventions relating to the standard of obligation of signatory states suggests that despite claims of universality, the international regime accepts two main and related facts: First, when the recognition of rights, and especially when meeting obligations under this recognition, involves substantial amounts of money, it is not advisable and practical to impose on states obligations that limit their power to formulate social and economic policy. In fact, even within states it is common to draw a very powerful distinction between CP rights and SEC rights.\(^{16}\) Second, while the rights are universal, most of the corresponding duties are imposed on specific states. The effectiveness of meeting these obligations may depend on many features of states, including their own priorities and political and social constraints. This is not only a fact of the matter. Many think this is a desirable aspect of the world order.\(^ {17}\)

It follows that—within human rights constraints—the exact scope of the rights individuals enjoy may legitimately and inevitably depend on the political regime and economic stability of the states involved. Moreover, the international regime of rights also presupposes—to some extent—the integrity and the autonomy of states. This may include some state autonomy in determining who will count as a member of its civic community. Most relevant to our concerns, the level of recognition of (universal) human rights may thus depend on the individual’s civic status of citizenship and residence within a state. This is thus a major immanent tension within HRD itself.

Finally, it is important to recall that these tensions are also reflected in institutional design and relative competence. We say that questions related to the scope of rights need to be decided by an independent “forum of principle” precisely because we want these decisions to be dictated by normative considerations in a way not determined by the preferences and the processes of the political powers that be. Indeed, part of the differences within HRD relate to the fact that courts and semi-judicial organs are not best suited to decide issues of policy involving large-scale budgetary decisions and priorities. For those, the processes, competences, and legitimacy of the political branches that also bear responsibility for results are more suitable. Courts are at their best, and most important, when they decide cases in which a right recognized clearly by the relevant normative order (human, constitutional or legal rights) is violated. In

---

\(^{16}\) Many Bills of Rights in developed countries that had been adopted after the enactment of the ICCPR and ICESCR, such as the Canadian Charter of Rights and Freedoms of 1982 and the UK Human Rights Act of 1998 do not include SEC rights despite the fact that these countries are signatories to the ICSECR.

\(^{17}\) See, e.g., the view presented by Walzer, supra note 9, at ch. 15. See also Ruth Gavison, Taking States Seriously and the HRD: An Essay in Honor of M. Walzer (forthcoming 2010).
such cases, the function of the court is to speak truth to power and hold society to its own values, reflected in its own laws, even against aberrations by the legislature itself. The more controversial the claim of the right or the question whether in this particular case the arrangement is an unjustified interference of the right, the more the relative advantage of the court, and its special competence, are weakened. So we have a process that may be self defeating: Claims of rights are made to make the issue justiciable in the courts and to remove it from the realm of the political branches, but if in fact the issue is not amenable to judicial decision, the process may generate losses in the legitimacy of both HRD and the courts themselves.

This argument rests on a combination of conceptual, normative and pragmatic grounds. There is a connection between the nature of human rights and the function they are supposed to perform. To be truly universal, rights cannot be very detailed. They must reflect core interests of people who do not depend on the contingent circumstances of states and societies. To defeat the will of majorities and to bind states and societies against their will, the moral force of these rights must be extremely compelling. The combination of these two yields the conclusion that rights should be taken in a “thin” way, so that they indeed constrain majorities only when the challenged arrangements are clear violations of core human rights. Expanding HRD beyond this “thin” conception is thus not justified. The normative element is therefore connected to the nature of human rights and their characteristics. At the same time, invoking HRD beyond its scope may well lead to a loss of legitimacy of the courts and the HRD itself. The two elements are distinct. Loss of legitimacy may be caused even if the courts are indeed doing what they must do. This is why it is often the case that courts do not have the courage to prevent violations or to declare them illegal. Even so, claims of rights may be endorsed by courts when they are not justified, and some political actors may support such moves, when others might argue that this is an “imperialistic expansion” of the HRD. The discussion hence presupposes that we do have a set of standards that allows us to evaluate judicial or other alleged authoritative interpretation of rights and HRD and that the finality of judgment is not necessarily a conclusive proof of the validity of the determination whether the invocation of HRD was justified. Attending to the nature and limits of HRD may thus have pragmatic importance as well.

The point is relevant not only to the stage of decision of cases. It is even more relevant to the context of enforcement and implementation. In other words, the question is not only the actual decision in a particular case and even the help given to the individual involved in that decision. Often the invocation of HRD is aimed at triggering and achieving serious social and political changes. However, where the
issues involved are of complex social, cultural, and political dimensions, changes cannot be achieved by a series of judicial decisions alone. Such social and political change requires a long term integrated effort and allocation of all kinds of resources by the totality of political and social forces. Definition of an issue as a matter of human rights to be decided by the courts is often incapable of achieving this change. Moreover, it may lead to a tendency to litigate cases instead of investing time and effort in the necessary social, political, and economic work required for change. As is demonstrated in Part III, these problems have a special effect with respect to issues of immigration.

II. FEATURES OF ISSUES OF IMMIGRATION

Immigration, mass immigration, is a major phenomenon of the twentieth and twenty-first centuries. Hardly a week passes without a public discussion of immigration debates and policies all over the developed world. It is interesting to note that debates about immigration often cut across “usual” political divisions. Moreover, immigration is not only a moral and political issue relating to the life and welfare of individuals. Huge economic, social, and political interests are also involved.

Migration is influenced by various factors, including poverty; war; natural disasters; demographic, wage, and employment differentials; population density and pressure on natural resources; urbanization; and technological advances in transportation. Economic possibilities created by globalization inevitably encourage worker migration—whether legal or illegal—to industrialized countries. In particular, western European countries and Japan have aging populations—so that more nationals leave the domestic workforce than enter into it, creating a dire need for working hands, especially in labor-intensive professions. These aging populations have also

---


contributed to shortages of healthcare workers in many industrialized states. These jobs are increasingly filled by migrants.\textsuperscript{20}

During the 1990s, the rate of migration worldwide grew at 6\% a year. There are currently about 200 million people living outside their countries of birth, and more than 86 million economically active migrants in the world, about 32 million of which are in developing regions.\textsuperscript{21}

Many of these migrants never return to their state of origin. Developed countries\textsuperscript{22} now have to deal with large numbers of people who do not have legal status as permanent residents in them but are clearly not short-term visitors.\textsuperscript{23} The picture becomes even more complex when large numbers of these long-term de facto residents have either entered the country illegally or remained in the country after their visas had lapsed, and thus have became illegal (or “undocumented”) “residents.”

It is thus not surprising that the literature on various aspects of immigration, policy and rights, is huge and growing quickly. For the purposes of this Article, only a sketch of those features of (mass) immigration issues, which are most relevant to both the attraction of HRD and to its serious limitations, is needed. The humanitarian aspects of immigration are not discussed. Rather, the Article explores the implications of the fact that immigration is a large-scale phenomenon, and that granting rights in contexts of immigration may thus create serious incentives which might affect the scope and the identity of immigration waves, in a way that under the logic of rights cannot easily be regulated or limited.

Typically, mass migration situations affect the interests of a number of “players.” First, are the immigrants themselves, and their members of family—nuclear as well as broader. Second, are the destination, or receiving, countries. Third, are the countries of origin. To add to the complexity, there may be tensions among the interests of sub-

\textsuperscript{20} Id
\textsuperscript{21} Id.
\textsuperscript{22} For developed countries this is a structural, permanent, challenge. Many developing countries have to deal with very large waves of refugees or people seeking refuge who are escaping civil war or persecution in their own, neighboring countries. At times, these movements are temporary and short, but at times the dangerous situation persists.
\textsuperscript{23} Dealing with waves of immigration has not been confined to recent decades. The U.S. population was based on such waves of immigration from the start. Most of the colonial powers have had large streams of citizens of previous colonies who moved into the “mother” countries before the rules of citizenship were changed to prevent this. In fact, the intensity of present issues of immigration is often related to the fact that in many countries there already exist large non-assimilated communities, many of whose members enjoy legal status, that attract more immigrants, and thus heighten the sense of threat to the local community and its way of life. Yet, I am concerned with issues of present immigration policy. These background conditions should of course be taken into account.
groups within these three large players. Thus “veteran” immigrants may be reluctant to see their status threatened by new immigrants; different economic and political sectors within a receiving state may have different attitudes to immigration from various sources (especially when there are large communities of the same cultural and national group within the state); and some elements in countries of origin may have different attitudes to the fact that many of their citizens seek to immigrate and integrate successfully in other countries.

A general caveat is required: Immigration issues may vary in scope and features among states. To understand the phenomena and to resolve questions, one needs to look at the issues in detail and in context. Nonetheless, there are some structural issues common to many states receiving immigration that are related to general and structural features of the phenomena of immigration. These are the Article’s main focus.

Immigrants are people who would like to move from their countries, either temporarily or on a permanent basis, to another country. Immigrants naturally seek a place that may provide their basic needs, in particular the needs that could not be adequately met in their country of origin. These needs include security, employment, income, freedom and opportunity. Security here involves not only security from physical or other threats, but also the security of the freedom to stay where one is and to make the new society one’s home.

Immigration usually involves a major loss for immigrants. Naturally, they would like to minimize that loss. Thus, immigrants would prefer an opportunity to associate with people of their own culture, and to enjoy the opportunity to live with their families. Many immigrants would also like the opportunity to maintain their culture, and pass it on to their children, even if this culture is different, and possibly incompatible, with the culture of the receiving country. In addition, immigrants want to feel at home and of equal dignity in their new place. Therefore they would prefer to be treated on equal terms with the veteran members of the community they have joined. In short, the main concerns of immigrants are that they be allowed to enter, stay, and work within their chosen countries, and that they enjoy levels of welfare and freedom similar to those of the general population.

While these interests are common to all immigrants, it may be useful to distinguish between three broad categories of immigrants, whose circumstances may be different, and who may be covered by different legal regimes and policies: labor immigrants,24

---

24 Following the convention, I use “migrant workers” to refer to both people who intend to immigrate on a permanent basis from the start and those who are admitted on a temporary basis
asylum seekers, and immigrants seeking family unification. In all of these groups, some claim legal status and immigration permission before they arrive, some ask for status when they are legally within the country, and some ask for it despite the fact that they entered the country, or have been staying in it, illegally. At times, people move from one category to the other. That is what happens when a temporary labor migrant (documented or undocumented) marries a citizen of the state, and seeks to stay in the country on the basis of the family relationship. The distinction is important because there are clusters of issues that pertain to one group and not to others. The duties of states toward refugees and asylum seekers are stronger than their duties toward other prospective immigrants. The issues of temporary labor migrants (heavy sums paid in advance for right to come; dependence on employers and risk of exploitation; enforcement of limits to labor agreements; low expected levels of cultural integration within receiving countries) may be different from those of immigrants seeking family unification.

The size of labor migration and asylum seekers may be substantial, and it depends to a large extent on the geopolitics of the receiving countries vis-à-vis the countries of origin. Recent events in South Africa provide a good illustration. Developments in Israel’s southern border are also a case in point. Countries often have special immigration arrangements for family members of their citizens and residents. The priority in immigration giving to relatives, especially spouses and minor children, is seen as a humanitarian benefit or even a civic right for a country’s citizens and residents. The assumption was that this would not be a phenomenon of large proportions, since people usually prefer to marry within their own community and that this arrangement would balance itself out by movement into the country and movement outside of it. Both these assumptions were plausible when the moves

only. However, this inclusive definition may be misleading because most asylum seekers and family migrants also seek work and status. A more relevant distinction between migrant workers is the one between those seeking permanent status and those intending to come for a short period.


26 In 2008, the number of immigrants crossing Israel’s border with Egypt was over 8000, a significant rise from previous years and a result of developments in African states such as Sudan and Ethiopia, changes in Egyptian policies toward refugees and asylum seekers from such countries, including a trend of returning them to their home countries, and the availability of help in crossing the long land border. See Avineri, Orgad, & Rubinstein, supra note 19.

were between countries of similar social and economic status and when the cultural identity of countries was pretty well defined. Developed countries today, especially those with large minority communities whose cultural communities live in poorer areas with less political freedom, discover that family immigration is an extensive and substantial process that may make a significant contribution to demographic, social, and economic concerns within the country.\textsuperscript{28}

\textit{Many states which are destination for immigrants} in fact encourage immigration\textsuperscript{29} and develop their immigration policies in an attempt to meet many of these expectations and hopes of immigrants. They want to make immigration a success—not only for the immigrants and their families, but for the public interest of the state as a whole. However, that usually goes with a very selective IP, that limits the right to immigrate to those who may integrate well both economically and culturally, and to those who express a commitment to integrate in this way.\textsuperscript{30} Indeed, some of the current immigration issues are the results of lessons drawn from immigration policies of the past.\textsuperscript{31}


\textsuperscript{29} Some countries encourage immigration because they are large and under-populated and require additional population (such as Canada and Australia and the U.S. in the past). Other countries seek immigration because their population is not young enough to support the workload and welfare benefits of the older population as is the case in many countries in Europe. Lastly, some countries encourage immigration to be employed in jobs that the local population either does not want to perform or cannot perform in a competitive manner. These countries often encourage responses to these needs that will not permanently upset the present cultural composition of their society. Some use temporary workers—this has proven problematic in many countries since a large number of these workers usually prefer to remain in that country; others, seek to actively assimilate immigrants into the mainstream culture.

\textsuperscript{30} These are generalizations which need to be specified. Germany, for example, for years went by \textit{jus sanguinis} and refused to grant citizenship to labor immigrants and their children, even after they had lived in Germany for years. This policy has become unacceptable, and now Germany has developed a new immigration policy that stresses the willingness of immigrants to integrate into German culture as a condition precedent for immigration. See Patrick Weil, \textit{Access to Citizenship: A Comparison of Twenty Five Nationality Laws in Citizenship Today: Global Perspectives and Practices} 17, 25 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

\textsuperscript{31} For example, some countries that had embraced ardent multiculturalism and a generous policy of family unification—and allowing immigrants to form non-assimilating communities of various cultures—may now think that adoption of the same has resulted in a loss of civic cohesion that may be threatening the identity, stability, and welfare of the state and its population. For a thoughtful analysis on this subject, see Ian Burama, \textit{Murder in Amsterdam: The Death of Theo Van Gogh and the Limits of Tolerance} (2006).
Despite the efforts of many states and organizations, the lot of immigrants is often quite hard. Some people dismiss these hardships as reflections of racism and a general hate of “Others” and conclude that its remedy is the enactment and enforcement of better laws against racism. While there may be some of that, often the clash of economic and cultural interests is quite substantial and very real. When this is the case, moralizing is not enough. A close analysis of these interests and anxieties is required, and a credible response to them should be a part of the integrated IP that is adopted and enforced.

Protecting immigrants covers more than securing their physical safety and requires the fairness of working conditions. An additional serious issue is the legal status of such immigrants, their ability to bring in their families, or their chances of gaining permission to stay—with their families—in the destination country. Moreover, once persons stay in a country for a long period of time—even if illegally—their cultural identity becomes associated with that of the host country, and the prospect of returning to their home countries may become difficult. This is especially true for migrants’ children, who were born and raised in the host country. All available options—requiring them to leave, entitling them to status without their parents, or allowing the parents automatically to acquire status themselves—may raise serious policy issues. Immigration thus creates a host of questions relating to the rights of people to enjoy their family life.

In addition to mere numbers and to social and economic implications of large scale immigration, we need to pay attention to cultural differences and to the nature of the integrative mechanisms in the destination countries. Large immigration and pluralistic countries with strong assimilating mechanisms can absorb without risk, larger groups of immigrants, who may be expected to integrate successfully into the national culture. Smaller countries, with a dominant ethnic or religious culture, who do not encourage assimilation, may face risks of an identity crisis and instability created

---

32 Such conflicts exist not only between local groups and immigrants, but within groups of immigrants themselves. Documented immigrants may resent the prevalence of undocumented immigrants, whose presence in the country may cause them to be suspect and exposes them to searches and suspicion. They may even resent legalization of undocumented immigrants fearing that this might endanger their own hard-won gains. Finally, women in some immigrant communities may resent being forced to marry men from the “homeland” who may not be willing to grant them the liberty and modernity they want to enjoy within the receiving country. Similarly, there may be serious conflicts of interests within receiving countries. Employers may want to use cheap unskilled labor; and those who benefit from this service may push for the increase of this labor force, despite possible damaging implications to the rate of unemployment and minimum pay wages in their own society as well for the civic cohesion of the society in question.
by the fact that immigrants of different cultures create non-assimilating communities that in time may threaten the majority culture and its way of life.

Social and economic factors of immigration are many and diverse. The addition of energetic people into the labor market may be very welcome in countries with full employment and shortages of labor. Yet, the picture may be very different in countries with high unemployment. Even in the latter, however, it may well be the case that residents and citizens are unwilling to perform some jobs that need to be done and are happily performed by foreign workers. However, these workers, especially if their stay is illegal, are often exploited, thus creating tensions among workers in the same country and incentives to oust people who are protected by labor laws or conventions in favor of aliens who are willing to work for less because their base is in a much poorer country.

For countries of origin, the picture is also complex. Under HRD people have a right to leave every country, so countries of origin’s interests mainly concern the ability of “their” migrants to send money back home and to count as members of their original states and cultures. At times, they prefer that these people maintain connections with the country of origin and their families. They would thus usually prefer laws in host countries that encourage absorption without forced assimilation. This is the case when workers are unskilled. The picture may be more complex when migrants are highly skilled and educated. Countries of origin may be very reluctant to have such skilled members move to other countries. Furthermore, a strong immigrant community in a destination country may affect the receiving country’s policies concerning the country of origin and further immigration from it (primarily via family unification).

Clearly, the extent of immigration, the plight of immigrants, and the very high incentives to immigrate and the complex implications of immigration and absorption

33 Although in the not-too-distant past, some countries refused to let their citizens leave, prohibited them from removing property from the country, and demanded reimbursement of education costs and other benefits that were enjoyed by the immigrants in their country of origin.

34 A major issue is dual citizenship. Previously, many countries voided one’s citizenship if she voluntarily applied for a different one, and many countries demanded the revocation of one’s previous citizenship upon being naturalized in a new country. Both these arrangements have been relaxed over time. For a systematic analysis, see Yaffa Zilbershats, The Human Right to Citizenship (2002); see also Peter J. Spiro, Beyond Citizenship: American Identity After Globalization (2008).

35 This is the situation now in some states of the U.S. in relation to Mexican immigration. See Spiro, supra note 34. For an obvious illustration of the fact that these interests and attitudes may in fact be conflicting see the discussion of the history of the ICRMW (infra Part III). The first version, drafted by states of origin, was not seen as acceptable by receiving countries.
patterns create a need to take IP very seriously. If we do not grant a right to immigrate—under which everyone is permitted to choose where he lives and receiving states are under an obligation to accommodate—there will always be serious gaps between the wish or need of people to move and the wish of states not to admit them. Some of these conflicts of interests may cause heartbreaking difficulties. Humanitarian stakes are very high as well as implications for states, their stability, markets, social and economic welfare, and their identity.

It is quite natural that people concerned with the lot of immigrants tend to look to HRD as a tool for dealing with the issues. After all, HRD is meant to act as a constraint against putting our interests before our moral commitments. On the one hand, immigrants and associated issues is a subject that invokes this needed constraint in a very powerful way. On the other hand, in many contexts, immigration does pose serious challenges to destination states. The complexity of the factual situations—such as the large number of immigrants that may be involved and states inability to effectively control the extent of immigration to their territory—may suggest that the strong features of the HRD are not suitable for many of the critical issues of immigration policies. Moreover, this is not simply a case of rights of individual immigrants versus states’ interests, where states are stronger and may afford to treat immigrants with empathy and dignity. This may well be a case of rights (and interests) of the immigrants against rights (and interests) of the individuals and the groups in the receiving country as well as of the state that has to accommodate those rights and interests.

Mapping the interests concerning immigration may be helpful in identifying ways of effectively regulating immigration through incentives. If it is agreed that states have the right to control admission, what are states allowed to do to discourage people from immigrating illegally? Under the human rights regime, successful crossing of the border, both legally or illegally, entitles many benefits and guarantees and is likely to encourage illegal immigration rather than discourage it. Again, a tension exists between the state’s right to prohibit entrance and its duty to protect the rights of those who violated its laws by entering it illegally.

Similarly, a major dilemma of (illegal) immigration is the question of legalization policy. On the one hand, legalization seems the right and the decent thing to do once a large number of illegal immigrants are known to be present in the country for a

\[36\] Former U.S. President Bush had tried to pass an immigration package including a broad legalization component, but the program was defeated in congress. See Vote Dashes Bush Immigration Plan, BBC News, June 29, 2007, available at http://news.bbc.co.uk/2/hi/americas/6250756.stm.
long time.\textsuperscript{37} On the other hand, repeated legalization simply confirms the knowledge that if immigrants “lie low” long enough—the illegality of their entrance will be forgotten. When a country cannot police its borders effectively (e.g., particularly if they are composed of long land borders) control of immigration by a demanding IP may be weakened significantly by waves of illegal immigration that will inevitably be legalized.

Another issue is that of the working conditions of labor migrants. The fact that they, especially those who are illegal, are vulnerable, may make them willing to compromise on their working conditions in comparison to other workers in the receiving country and creates a serious incentive for abuse by employers. Human right activists often reason that the only way to remove this incentive is by insisting that migrant workers, documented as well as undocumented, enjoy the same pay and working conditions as local workers. This might indeed be true. However, the difficulty in enforcing labor law often means differential working conditions even among local workers. Enforcement of such a law may, in fact, create even larger discrepancies between documented and undocumented migrant workers.\textsuperscript{38}

Some claim that illegal immigration is driven by such deep interests and needs that it cannot be stopped. This may indeed be the case, to some degree; however, how this observation affects immigration policies is unclear. Open borders are likely to generate much more immigration than the size of illegal immigration under a strict policy, even if it cannot be fully enforced.

\section*{III. Immigration Issues and HRD}

Initially, immigration was one of the issues that went clearly beyond HRD, mainly because human rights conventions grant the human right to \textit{leave} every country including the immigrant’s native country, but only have a right to \textit{enter her own country}.\textsuperscript{39} The power and the authority of states to determine whether a non-citizen

\textsuperscript{37} This is even more so in countries that grant citizenship—at once or at maturity—to anyone born within the country (i.e., France and the U.S.).

\textsuperscript{38} The main catch concerning the work conditions of undocumented migrant workers stems from the fact that there will always be illegal migrants. If the effective cost of hiring them becomes higher, the demand for their services will be reduced. But since these workers are desperate for work, the supply side will ultimately capitulate first and migrants will be forced to offer their work for less to find jobs at all. To learn more about the ICRMW and undocumented migrants, see Linda S. Bosniak, \textit{Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention}, 25 \textit{INT’L MIGRATION REV.} 737 (1991).

\textsuperscript{39} UDHR, \textit{supra} note 12, pmbl., art. 2, 1 2; ICCPR, \textit{supra} note 4, art. 12(2).
(or resident) will enter their territory, for how long and for what purpose, was seen a central feature of sovereignty and initially was founded on the presupposition that while all the rights included in human rights documents were “human” and belonged to all humans, the duties corresponding to some of them—such as conferring the right to vote—extended only to citizens. All people had rights to participate in the political life of their countries, but these same rights could not be extended beyond its borders.40

However, this “picture” presupposed that most people would live most of the time in their native countries and would only travel, by permission, for short periods of time to other countries and is entitled there too to the protection of the right to life, non-discrimination, and dignity. However, rights to self-determination, culture, and social security would only be guaranteed within the countries to which they “belonged.” Immigrants would move from one place to the other only after their legal status in the destination country was arranged; acquire rights in the destination state according to its laws; and would negotiate, to the best of their ability, the loss that they were willing to incur by leaving their own country.

Part II shows that this picture—even if it was true in the past—is now obsolete.41 It also indicates that the main concern here is not to provide explanations or general guidelines about what the answers to hard immigration questions should be, nor even to map the exact scope of the relevance of general HRD to these issues. Rather, the goal is to highlight some of the developments within HRD in immigration contexts, on the international, as well as on state level, in order to provide the basis for the discussion in the conclusion concerning the proper relationship between IP and the HRD.

International human rights law devoted a specific convention to the issue of refugees and asylum seekers, which were a particular group of people with a pressing need for status out of their countries after WWII.42 Since then, the treatment of refugees has been institutionalized on a permanent basis. Subsequently, human rights law dealt with immigration issues as part of the concepts of freedom of movement and

40 ICCPR, supra note 4, art. 12 (4) provides: “No one shall be arbitrarily deprived of the right to enter his own country.” It is clear that exercising this right depends upon interpretation of the phrase “his own country,” which is laid out by the U.N. Human Rights Committee in ICCPR, General Comment No. 27: Freedom of Movement (art. 12) U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

41 I do not want to create the impression that in premodern times people did not migrate. Jews were in fact quite good at it. Even moves from less developed into more developed parts of the world were common. For a fascinating historical study, see Audrey Macklin, Historicizing Narratives of Arrival: The Other Indian Other, in STORIED COMMUNITIES: NARRATIVES OF CONTACT AND ARRIVAL IN CONSTITUTING POLITICAL COMMUNITY (Hester Lessard, Rebecca Johnson, & Jeremy Webber eds., forthcoming 2010).

42 Infra note 46.
rights to family, but immigration legislation on a whole usually reflected the right of states to control immigration. Some constraints on IP were imposed by International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and some regulations were created by international bodies that were associated with labor issues. More recently, a special human rights convention was devoted to issues of labor immigration.

In the following sketch of some features of this varied international regulation of immigration issues, special attention is drawn to: tendencies to invoke HRD in the immigration contexts, failures and successes that occurred in the process, and occasional backlashes after such successes when states or authorities sought to devise policies to avoid the newly-declared right. Clearly, there is a need for consistent, fair, effective, and pre-publicized IPs. In many countries, such policies do not exist, and their absence, in turn, generates the tendency to rely too heavily on HRD and its institutional basis.

A. INTERNATIONAL HUMAN RIGHTS DOCUMENTS

The United Nations Convention Relating to the Status of Refugees is one of the first human rights documents enacted by the UN and has been signed and ratified by many states. This statement in itself supports the claim that the rights defended under it are indeed considered universal by most states, despite the fact that it imposed limits of their sovereignty in matters of immigration. The same cannot be said for the international convention dedicated to the rights of immigrant workers and their families. The comprehensive instruments that the UN and International Labour

---

43 Id.
45 ICRMW, supra note 1.
46 In this Article, I do not concentrate on any particular state since its thrust is general and theoretical. However, while there are many similarities in the manner in which receiving states handle immigration issues, there are also many important differences; thus, a study of the issue of immigration must attend to specific details in the relevant country. In fact, if this modest claim is accepted than acceptance of my main contention—the HRD cannot, on its own, determine immigration policies—is not far behind.
47 United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 1989 U.N.T.S. 137. The Convention is yet another illustration of the complexity of the HRD in the context of rights of aliens. Refugees have rights not to be sent back to where they face the risk of death or harm, but they do not have a right to settle in the country of their de facto residence.
Organization (ILO) have developed to protect the rights of migrant workers are widely-known.\(^{48}\) The reluctance of labor-receiving states to ratify them and broaden the rights afforded to migrant workers, combined with both the UN’s and the ILO’s lack of effective enforcement mechanisms, render these conventions almost hollow.\(^{49}\) Thus, examining the convention in some detail would be a good indication of immanent tensions and would also illustrate the limitations of applying the HRD framework to some aspects of IP.

The ICRMW is the most recent UN human rights treaty to come into force, but it was not the first attempt to address the issue of migrant workers within international law. In 1978, the ILO—the international organization most suitable to handle workers’ rights—published the ILO Convention No. 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity. However, many developing labor-exporting countries felt the ILO was disposed to representing the interests of developed countries and to limiting work-related immigration. The distrust in the ILO is manifested by the fact that the ICRMW was framed outside the ILO, as one of the seven core international human rights UN treaties.\(^{50}\)

The history of the ICRMW begins in the 1970s when Mexico and Morocco—two major exporters of workers—began promoting a covenant to defend the rights of their expatriates. Their initiatives led to a General Assembly resolution to create a working group which, over the next decade, drafted the ICRMW. Despite the resolution, many developed countries preferred to remain within the confines of the ILO. In other words: The ICRMW was controversial before it was even drafted.

In 1981, the working group published the first draft of what was to eventually become the ICRMW. Yet, the developed countries objected to this draft, which they felt encouraged illegal labor traffic. At that stage, several European countries (led

\(^{48}\) The International Labour Organization (ILO) was founded in 1919 as part of the Treaty of Versailles. In 1964, the ILO became the first UN specialized agency; its main aims are to promote work-related rights, encourage decent employment opportunities, enhance social protection, and strengthen dialogue in handling work-related issues. For further information, see the ILO official site http://www.ilo.org/global/lang--en/index.htm (last visited Apr. 16, 2010).


by Spain, Italy, and Norway) adopted the project, and the document they drafted elucidated the balance that underlies the ICRMW to this day; namely, the balance between the need to curtail illegal immigration and the protection of migrant workers’ interests.

The ICRMW was set for ratification in 1990, but only entered into force after 13 years (on July 1st, 2003). To date, it has only been ratified by 37 states\(^\text{51}\) (compared to over a hundred states that are party to other core human rights instruments), none of which is a major labor-receiving state.\(^\text{52}\)

The ICRMW is a lengthy, complex document that was composed in an effort to accommodate two rival interests within one convention: the need to protect the basic human rights of individual migrants with the sovereign right of states to control the entry of non-nationals to their territories, and the interest of the international community as a whole to limit the extent of illegal migration.

Part II of the ICRMW includes one article (Article 7) that deals with the principle of non-discrimination. Part III (Articles 8 to 35), deals with the “human rights of all migrant workers (documented and undocumented alike) and include the rights to dignity, freedom of opinion and speech, freedom from torture, and due process. But it also contains additional significant rights. Thus, Article 12(4) imposes a duty on states to respect the rights of parents to “ensure the religious and moral education of their children in conformity with their own convictions.” Article 25 determines the principle of equality of migrants with local workers on all issues of direct conditions of work (like pay, hours of work, etc.). This arrangement cannot be derogated from in contracts (Article 25(2)), and states are required to make sure that this guarantee applies to all workers irrespective of their status (Article 25(3)). Article 31 imposes a duty on states to “ensure respect for the cultural identity of migrant workers and members of their families.” However, Article 34 imposes a duty on the migrants themselves “to comply with the laws and any regulations … or the obligation to respect the cultural identity of the inhabitants of such states.”\(^\text{53}\)

\(^{51}\) See http://www2.ohchr.org/english/bodies/ratification/13.htm (last visited Apr. 17, 2010).

\(^{52}\) Perhaps with the exceptions of Argentina and Libya, which is also becoming an important transit country for irregular migrants from sub-Saharan Africa traveling to Europe. Mexico and Morocco increasingly receive migrant workers and are also significant transit countries. See Ryszard Cholewinski, The Human and Labor Rights of Migrants: Visions of Equality 22 GEO. IMM. L.J. 177, 187 (2008).

\(^{53}\) Part III of the ICRMW can be roughly divided into 3 categories: First, the group of basic rights that already exist in the different human rights convention, e.g., the right of life. Second, general rights that had been fitted to migrants’ situation, e.g., Article 16. These rights focus on the special
IMMIGRATION AND THE HUMAN RIGHTS DISCOURSE

35 clarifies that this part does not confer a right to regularize one’s status and that its provisions are subject to Part III—addressing the need for all state parties to cooperate to eradicate illegal immigration.

Part IV of the ICRMW (Articles 36-56), which leans toward the interests of legal individual immigrants, grants documented workers and their families rather extensive rights. This part contains, for instance, state obligations to facilitate the reunification of migrant workers with their spouses as well as with their minor, dependent, unmarried children (Article 44(2))\(^{54}\) and to ensure the equality of their treatment with nationals in terms of access to housing, including public housing (Article 43(1)), which is significantly broader than the equality requirements in Article 35 noted above. Legal migrant workers are entitled also to the full welfare benefits of the employment state, including unemployment benefits and protection against dismissal (Article 54). There are also articles on exclusionary arrangements with particular employers, the availability of which is significantly limited (Articles 51, 52).\(^{55}\)

In contrast, Part VI attempts to accommodate the states’ sovereignty; it is notable that the name of this part of the convention is “Promotion of sound, equitable, humane and lawful conditions in connection with international migration.” The first article in this part, Article 64, specifies the goal of these conditions in international migration and adds that “due regard shall be made not only to labor needs and resources, but also to the social, economic, cultural and other needs of migrant workers … as well as to the consequences of such migration for the communities concerned.” This section is noteworthy both because it talks about needs and not rights, and because it explicitly adds into the equation the interests of communities in the receiving states.

\(^{54}\) See ICRMW, supra note 1, art. 44(2). I return to this section below. There are conflicting interpretations of this section among NGOs. The section itself states:

1. State parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. State parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses … as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favorably consider granting equal treatment … to other family members of migrant workers.

Note that this section is not written in the language of rights and obligations at all.

\(^{55}\) Granting this wide range of rights to the documented immigrants de facto equalizes their situation to the status of the residents in the states of employment. Note that these benefits do not depend on the length of stay of the migrant worker in the receiving country nor on the answer to the question is her status temporary or permanent.
The part provides, inter alia, that “States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation” (Article 68(a)). According to this part, the implementation of the provisions relating to the protection of all migrant workers, including irregular migrants, is a means of coping with the problem of illegal workers. The sovereignty of states to decide who shall enter their territories is not affected by this convention, which is concerned only with the treatment of migrant workers and their families during the migration process. While this part imposes a concurrent an obligation on states to end situations of illegal migration (Article 69) it also imposes a duty to have special authorities dealing with issues of immigration, including the facilitation of the immigrant’s return to their native country (Articles 65, 67).

*Part VII* addresses the elaborate monitoring and enforcement mechanism of the convention, and *Part VIII* includes some important general provisions; the first being Article 79, which provides that states are bound by the provisions of this convention but the convention does not affect their right to “establish criteria governing admission of immigrant workers and their family members …” Article 82 prohibits the renunciation of these rights, and Article 88 prevents the exclusion of a group of migrants from the application of the convention.

**B. Basic Tensions within the ICRMW**

Close analysis of the convention discloses that it does not succeed, for a variety of reasons, in designing a coherent framework to regulate work migration. One of these reasons is that the tension between respecting the rights of states to control entrance of aliens into their territory and the duty of states to protect extensive rights of “undocumented” workers is too great. The message sent by the convention is thus confusing. It concurrently creates an incentive for states to cooperate in the prevention of illegal migration and incentives for prospective immigrants to try and “jump” borders and “lie low” while being exploited by employers due to their vulnerability.

Recently, the UN Educational, Scientific and Educational Organization published a report that tried to explicate why, despite being involved in the drafting of the ICRMW, no European country has yet ratified it.56 The reporters concluded that “a prevailing sense of vaguely negative indifference, in which genuine concerns are combined with

56 The UN Report, *supra* note 50.
simple misunderstanding” seemed to exist.\textsuperscript{57} The report’s conclusion expressed the hope that this “misunderstanding” could be resolved in a manner that would enable the ICRMW to influence the development of migration legislation in Europe.

It is telling that the very well-written UN Report fails to grasp the significance of the concerns expressed by developed countries in face of the ICRMW. The convention significantly limits the discretion which states exercise at present, and which they want to continue to exercise, as to elements of their IP. For example, countries have different regimes for (documented) migrants who have been in the country many years, and for migrants who have just been admitted to the country. The ICRMW does not. It imposes on the host state the whole package of duties toward documented migrants (for medical care, social benefits etc.) the day they enter the country. A study of the immigration laws of EU countries notes that on many important issues, these laws do not meet the convention’s requirements. Thus, the claim that host states are reluctant to sign and ratify the convention because of a “misunderstanding” is incorrect.

This becomes even clearer when we look to the charged issue of family unification. The UN Report justly notes that the convention stops short of granting migrant workers \textit{a right} to family unification. Yet, NGOs claim such a right exists under the convention, and some state courts do in fact order the state to grant such rights despite the lack of internal legislation specifying its existence.\textsuperscript{58}

Developed countries have substantial, political reasons not to join the convention which stem from the resistance and resentment by major forces within their political communities. But at least some of these attitudes are not only based on “racism” and xenophobia. Their citizens are afraid of the threat to their cultural way of life by militant non-assimilating migrant communities; they are afraid to lose their jobs to immigrants; and they may resent the fact that cheap, illegal labor makes it impossible for them to earn a decent salary. The fact that these concerns were not explicitly raised by states when asked to explain their reluctance to sign the convention is, in itself, significant. History, as well as political correctness, makes it difficult to distinguish between arguments against immigration that are indeed justified by the interests and the welfare of the population of the host country and the sentiments and the prejudices that have inspired violent racism in the past. Indeed, some of these material concerns may be mistaken (in most cases migrant workers do not negatively affect the chances

\textsuperscript{57} \textit{Id.} at 88.

\textsuperscript{58} See Hanny Ben Yisrael & Oded Feller, No State for Love: Violations of the Right to Family of Migrant Workers, \textit{available at} http://oded.feller.googlepages.com/NoStateForLove.pdf (last visited Apr. 18, 2010); \textit{see also} HCJ 11437/05 Kav LaOved v. The Interior Ministry (the petition filed by human rights organizations is currently pending before the High Court of Justice).
and conditions of work of local, unskilled workers). Some of the resentment may be based on prejudices and not on well-based apprehensions. The response, however, should not be limited to a simple moral condemnation of the opposition. It must address the apprehensions on the merits and respond to them in a way that alleviates the fears and includes in the relevant policies ways of securing the rights to welfare and culture of the local population. Once this is done—more liberal and progressive IP are likely to gain support among the population of host countries.

Refraining from such credible efforts, while invoking the obligations of states under the HRD, is in fact likely to generate a backlash against both migrant workers and the HRD itself.

C. IMMIGRATION ISSUES IN THE HUMAN RIGHTS COMMITTEE

The elaborate mechanisms of the ICRMW have not generated to-date a significant body of interpretation.\(^{59}\) It should therefore be interesting to see how other international human rights bodies dealt with issues of immigration. A major institution which is authoritatively interpreting and enforcing human rights law is the Human Rights Committee (HRC). Not surprisingly, the HRC has looked in detail into Article 12 of ICCPR (freedom of movement) and rights to the family, and applied them to a number of cases in which a complaint was lodged against the immigration laws of signatory countries.

It is important to recall: International human rights bodies are supposed to impose on states duties to change their conduct, to not follow their own laws, or to modify them, only when this is required by a solid interpretation of the human rights provisions. Adjudicating that state X could not act in a certain way toward individual Y because that conduct violated human rights norms must mean that no state could act in that way toward anyone and follows from the universality of human rights and their power to invalidate all states’ national norms. It seems that if a state is acting under immigration laws that are plausible and fair, both in terms of substance and process, a feeling that a particular result was possibly unjust should not be the basis of a human rights determination against the state. Hard cases may make bad law,

---

\(^{59}\) The “Information Kit on the United Nations Convention on Migrants Rights” briefly refers to the interpretation of ICRMW, but focuses mainly on providing a background of the Convention and the obstacles to ratification. See International Migration Programme, http://portal.unesco.org/shs/en/files/3454/11401039211English_Kit.pdf/English%2BKit.pdf (last visited Apr. 18, 2010). For example, it determines that “the Convention does not create new rights for migrants but aims at guaranteeing equality of treatment and the same working conditions for migrants and nationals.” Id. at 7. We saw that this may not in fact be the case.
and good laws may generate hard cases. Acknowledging such possibilities is very
different, however, from deciding that the state has acted in violation of international
human rights norms.60

However, even such international professional bodies do not always resist the
temptation to identify what they think is a just result with a finding of a claim of
right, as illustrated by two immigration cases that were adjudicated by the HRC. In
Stewart, the first case, and a very difficult case, the HRC majority upheld the result of
Canada’s immigration laws, advocating a cautious attitude to a country’s immigration
laws. In Winata, the second, the majority reversed and opined that Australia should
grant status against its immigration laws, against a strong dissent. The two decisions
are hard to reconcile: The latter, it is argued, does not exhibit the required caution.
While the outcome reached was indeed generous to the complainants, finding that it
was required by international human rights law was a mistake.

Stewart was a British citizen born in Scotland in 1960, who had immigrated to
Canada with his family when he was 7 years old. Most of Stewart’s family—including
two children who were living with his ex-wife—lived in Canada as well. Nonetheless,
he had never applied for Canadian citizenship and was a permanent resident. Under
Canada’s Immigration Act, Stewart was ordered to be deported because of a large
number of criminal convictions. He submitted a complaint to the HRC, claiming that
the deportation violated his rights under the ICCPR, in particular the right to freedom of
movement or the right to enter one’s country (Article 12) and right to family (Articles 17
and 23).61 The majority found that Canada was not Stewart’s “own” country since he was
a British national and it had been his own decision not to acquire Canadian citizenship.
His deportation under Canada’s laws was therefore legal and not in violation of a state
party obligation. Consequently, the effects on his family relations were neither arbitrary
nor unlawful. The dissenting six members thought that under the circumstances of the
case, Canada should have been regarded as Stewart’s country under Section 12(4) of the
ICCPR, despite the fact that he was only a permanent resident.62

60 I am not referring here to a decision by the HRC that a country did not act legally according to
its own legal system. This is a far reaching statement because states’ courts enjoy finality within the
system and there is a strong presumption that they know best how to interpret the laws of the state.
Nonetheless, a decision of this sort allows the state to change its practices so that they are seen as
corresponding to its own laws. My observation relates to a situation where the HRC determines that
a state’s law is “unconstitutional” in terms of international HR law.
62 A detailed discussion of the interpretation of “his country” in Article 12 goes beyond the scope
of this Article. The Stewart decision provides a good discussion. See also HRC, General Comment
No. 27, supra note 40.
The dissenters in *Stewart* were in the majority in the *Winata*, a case involving two Indonesians who had entered Australia on short-term visas, had stayed there unlawfully, and given birth to a son in the country. The day after the son was granted Australian citizenship—because he had been born in the country and had resided there for ten years—his parents asked for a protection visa and requested permission to migrate to Australia under a parents’ visa. However, under Australian law this type of visa is only granted to applicants who are outside the country at the moment of application and only 500 applications are granted yearly. Following this route might have therefore resulted in the parents having to spend a long time outside the country before they could be admitted as citizens. The parents’ application for a protection visa was denied and they filed a complaint with HRC.

The HRC majority determined that the decision not to allow the parents to stay in Australia caused an interference with the family’s life since the decision effectively meant that the parents would have to leave with the son or that they would have to leave him behind. Regardless, both options would mean serious disturbance of family life. The majority found that the long duration of the (illegal) stay and the fact the son only knew life in Australia meant that removal of the parents would be arbitrary as well. It also violated the son’s rights to special protection as a minor under Article 24. The majority further stated that Australia was under an obligation to ensure that such violations would not occur again. And requested notification of the state’s action within 90 days.

Four HRC members dissented; they thought the ICCPR did not address the issue of removing minors from a country and thus the issue should not have been admissible. On the claim of interference with the family, they found—that so long as the state party was well within its own immigration laws, and there was no claim that those laws were themselves a violation of rights—its action was not arbitrary.

While it may be “nice” of Australia to have more generous immigration laws, is it under a duty to have them? Yet, in fact, this is what the HRC declared. We should

---

65 They also tended to think deportation was not an “interference” under the convention, because the unity of the family was not threatened by it. A strong case was also made that this decision may in fact cause a backlash by leading states to be much more intrusive in looking for illegal immigrants in order to prevent the recurrence of situations like these.
note that the Winatas did not argue that Australia was “their country,” despite the fact that their Indonesian citizenship had lapsed because of their long absence from it. After all, they had stayed in Australia illegally. The Winata case seemingly exhibits the tendency to invoke HRD to produce “good results,” without searching carefully for a source of the duty that should be imposed on all states.

If there is such a right, Stewart should have acquired Canadian citizenship under Canadian laws. It had, after all, been his country and home since the age of seven. And his children lived there. Yet Canada was still allowed to deport him. The Winatas were not eligible for citizenship, had deliberately violated the laws, and had applied for status on the very day their son received citizenship. This is the type of conduct, absent good faith, that the laws of Australia seek to discourage. It is hard to see how an international human rights body can require a state under such circumstances to give status to individuals as a matter of universal human rights.66

D. FRAMING OF IMMIGRATION ISSUES WITHIN NATIONAL LAW

Finally, the general tendency to invoke HRD in immigration contexts may be found within receiving states as well. While the legal framework is different in each country, the structure of trends may be similar. Israel case law may thus illustrate more general structures; some illustrate general immigration issues, while others are special to Israel’s unique immigration challenges: the complex rationale of the Law of Return67 that creates a preference for Jews in immigration; the internal Jewish debate about the identity and self-identification of who is a Jew; and security issues stemming from the ongoing armed conflict with some of Israel’s neighbors, which is made even more complex by the fact that some of these territories are still occupied by Israel under international law and that Palestinian residents of these territories are related by family and ethnic origin to members of the Palestinian minority within Israel itself.

In most countries, issues of immigration—whether particular or more general—are debated within the framework of domestic, not international, law.68 This is

66 Australia’s response does not decide the issue, but the state informed the HRC that it did not change it laws because it found the dissent more persuasive. Australia’s response highlights another important feature of international HR law—views of the HRC are recommendations and not binding decisions.


68 An exception to this rule is the case of refugees or asylum seekers, in which the norms of international and national law are supposed to complement each other.
not surprising since, as we have seen, most developed states have not signed the ICRMW. Thus, debates about immigration issues in Israel apparently should be based on rights granted by Israeli law and human rights; whether or not these rights were recognized under international law should have no relevance, or at least very minimal relevance, to the decisions of courts in Israel. Nonetheless, local NGOs invoke HRD in this context on many issues. Similarly, the ambiguity in this matter by the authors of the UN Report themselves was noted above, who recognize the fact that the convention is not binding on non-party states, but nonetheless perceive the norms as representing valid and universal human rights norms which are—in principle—binding on all.69

In what follows, some Israeli cases and clusters of cases are used to illustrate the general theses of this Article:

1. IP is very complex and must be sensitive to context and numbers. Accordingly it is best to design and implement it with a broad and systematic view, taking the economic, social, political and humanitarian issues together. Since this kind of policy requires a broad perspective and diverse mechanisms—it is unlikely that HRD and courts deciding one case at a time can do an adequate job on such issues.

2. Courts, as they should, often react to the humanitarian features of particular cases. Judicial decisions therefore should be analyzed with the idiom “Hard Cases Make Bad Laws” in mind;

3. Yet legislatures are often controlled by special interests or paralyzed by them and the reality may well be that the rights of immigrants, both those already in the country as well as prospective ones are violated. Courts may be needed to trigger changes and impose constraints.

4. Courts that systematically decide immigration issues based on HRD without attention to systemic concerns may create a backlash for both immigration arrangements and HRD itself.

Two examples from Israel of these processes of international norms, HRD rhetoric, victories in courts, and backlashes in policy are noted. One is the cluster of rights of migrant workers. The other is the issue of family immigration, which has gained high visibility in all developed countries and has gained a special urgency and relevance in Israel because of the controversy over the Citizenship and Entry into Israel Law

---

69 See UN Report, supra note 50, at 60, which refers to the “political obstacles” in ratification.
(Temporary Order) of 2003,\textsuperscript{70} which limits the right of Israelis to confer status in Israel on their family members from the Occupied Territories and some other enemy states.

1. Rights of (Temporary) Migrant Workers

Israel’s official policy is to admit migrant workers on a temporary basis in order to meet demands that cannot be met by local workers. The regime that applies to migrant workers depends on the occupation of the worker and its need in society; a good example of a needed work force in the Israeli society is carers of the elderly or people with disabilities. Others work in the construction industry or in agriculture. Originally, each worker was admitted after a license was issued to a particular employer in Israel, and the worker became “attached” to that employer. Any deviation from that “attachment” resulted in the migrant worker becoming an undocumented worker and as such vulnerable to deportation.

This “attachment” created an unacceptable situation for migrant workers who became totally dependent on their employers. Some employers abused the workers, held their passports, and even demanded that they work for others—thus making their stay in the country illegal against their will. Moreover, many workers could not afford early termination of their work since they had paid large sums of money in order to come to Israel. NGOs petitioned the Supreme Court sitting as the High Court of Justice (HCJ) and argued that the “attachment” should be stopped and that migrant workers should have the freedom to move freely among employers licensed to hire them. The HCJ, in a strong unanimous decision, held that the “attachment” procedure was indeed a serious violation of the workers’ rights\textsuperscript{71} The provisions at hand did indeed violate human rights of migrant workers, and the court should be applauded for making this declaration (as should the NGOs for taking the case to court). However, a few years following this landmark decision the improvements are still very limited.\textsuperscript{72} NGOs returned to court and registered a complaint of contempt of court, but the Court’s ability to force an acceptable implementation was limited.\textsuperscript{73}

\textsuperscript{70} Citizenship and Entry into Israel (Temporary Order) Law, 2003, S.H. 544. 2
\textsuperscript{72} In some branches, such as carers, workers are now attached to special manpower companies that are licensed by the state and ensure the rights of the workers are respected. Workers keep their own passports and are free to ask to change the employers if there is no suitability. However, in other branches de facto attachment to employers still obtains.
\textsuperscript{73} Since the day of the original opinion, HCJ 4542/02, in March 2006, the Israeli Supreme Court issued 15 orders, the most recent of which dates from the Dec. 3, 2009, available at http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx.
This predicament is not specific to this case; court can declare a given state of affairs illegal, but it cannot create an alternative arrangement that would strike a better balance between efficacy and the interests of employers, the state and the workers. In such situations, courts’ efficacy is completely dependent on the government, which is often lax in making any changes due to pressure from employers and man-power companies.

The lesson of this unfinished story is that while there are issues in which a clear determination invoking HRD is indeed required, this is not in itself sufficient to provide a workable framework to address the issues on the ground. Changing this reality depends on a combination of an acceptable policy, institutions capable of implementing it, and consistent enforcement. 74

Israeli jurisprudence in this field also provides a dramatic illustration of the “hard cases make bad law” argument. Care workers are given a five year visa. To prevent them from changing their temporary status to a more permanent one very severe restrictions are imposed on them, such as the demand not to become pregnant. Inevitably, at times workers did not meet the requirement, got pregnant and even gave birth. Often, the employers agreed that the worker finds ways to take care of the child here. However, when the visa lapsed, many such workers were encouraged by human rights NGOs to demand to prolong their stay, claiming that their children knew no other place, and taking them out of the country would mean sending them into “cultural exile.” To preempt this move, the state started giving workers who gave birth a choice between leaving with the child or sending the child to be cared for by its family. 75 In part, this very stern policy came after NGOs successfully invoked the HRD to create a reality under which workers who gave birth to children in violation of their visa conditions could not be deported with their children when the visa lapsed.

The following dramatic case illustrates how the wish to avoid specific hardships may lead to the adoption of decisions that may be generalized into very bad policies. In this case, the worker’s employer died after four years of the worker’s stay in the country. The rules determine that under such circumstances, the worker cannot use her full five-year visa. (If a person is employed by one employer and an attachment is formed, the worker is permitted to stay until her services are no longer needed,

74 For a discussion of the contribution of courts to the development of immigration policies see Ofer Sitbon, The Role of Courts in Israel and France in Designing the Policy towards Migrant Workers, 10 MISHPAT UMIMSHAL 273 (2006). The issue is of course of general relevance. See ROSENBERG, supra note 18.

75 See Kav LaOved v. The Interior Ministry, supra note 58.
but the government seeks to minimize these cases). While the worker acted legally and sought clarifications, she was assigned to help another elderly in need, and that employer asked that she be allowed to stay on. Based on policy, the government declined the application, but the court, moved by the needs of the new employer, decided in the worker’s favor. The state appealed the decision, but before the case was even heard the new employer died and thus the petition was moot. Later, the Court upheld the government’s policy on its merits.

2. FAMILY IMMIGRATION

Family unification with members from “hostile” countries is a very different issue. Family unification in general has gained great visibility because many countries imposed strict limits on “general” routes of immigration, making family immigration a substantial part of all immigration. As mentioned above, most developed countries have special arrangements privileging close family members of people who are citizens and residents. In fact, this sort of immigration was supposed to be the least problematic because its chances of integration were highest. Moreover, the numbers did not raise concern because of the combination of three reasons. First, most people preferred to marry people of their own culture and country. Second, states assumed that someone who chose to unite in them with a citizen would also want to integrate fully into mainstream society. Third, it was expected that family immigration would run in all directions, and thus the country would integrate some spouses of citizens but lose some citizens who would go after their foreign spouses. The demographic and cultural implications would not be substantial. Hence a large number of states had arrangements granting spouses of citizens the right to enter, reside and naturalize.

77 AA 2190/06 The State of Israel v. Bueno Gemma [2008].
78 See Rubinstein & Orgad, supra note 28.
79 A brief introduction of the history of the Israeli law is necessary. Section 7 of the Citizenship Law (Nationality Law, 1952, S.H. 146) creates a special arrangement for spouses and family members, explicitly exempting them from some of the regular conditions of naturalization under Section 5. However, the decision itself was still seen to depend on the discretion of the Minister of Interior: HCJ 3648/97 Stamka v. The Minister of Interior [1999] IsrSC 53(2) 728 changed this and declared a duty to grant all such applicants a gradual naturalization process. Thus the arrangement limiting discretion in such cases is in fact judge-made (the Court in Stamka also voided a policy that required alien spouses staying in the country illegally to leave the country in order to have their application reviewed). The law on family immigration in Israel must now be read against the background of the Family Unification case—HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. The Minister of Interior [May 14, 2006] (unpublished)—in which a debate developed on just this
However, in many countries these assumptions proved inaccurate, and many states started developing immigration legislation and policies that limited the right of citizens to naturalize their spouses and children.\footnote{80}

This complex development will not be discussed here. But the backlash effect of judicial victories can be shown. NGO representatives point out—rightly from their point of view—the enormous importance to people of having the liberty to not choose between their country and their family. As already pointed out, the ICRMW also recognized the special importance of letting people live with their families and not making them choose between employment and family.\footnote{81} Many courts are moved by the tragedies of families that will be torn apart by strict immigration laws. Courts may thus decide to refer a case back to the humanitarian committee or even to rule that in the pending case that family member should be allowed to stay. States have now become aware that once a romantic relationship has been established—it is very difficult to deport an alien, and thus created even more stringent demands. One example is the government’s refusal to provide an entrance visa to a person who comes to visit a recently divorced friend, lest the two decide to become a couple!\footnote{82}

\footnote{80}{See, e.g., the debates in Denmark, The Netherlands, and in the U.S. The U.S. maintains the principle of family immigration and this route of immigration represents the highest among immigration routes in the country. The only conditions for the sponsorship of immediate relatives are that the sponsor can support the relative in question. The U.S. does not allow this mechanism for illegal immigrants. In both The Netherlands and Denmark, lenient immigration policies for relatives were replaced by stringent requirements. See the terms for granting a visa to family members of U.S. citizens at the U.S Citizenship and Immigration Services website, http://www.uscis.gov/portal/site/uscis. “New to Denmark,” the official portal for foreigners and their integration lists the requirements for family reunification in Denmark, http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/family_reunification.htm. See also A Test for the Migrant to The Netherlands, YNET, Mar. 12, 2006, available at http://www.ynet.co.il/articles/0,7340,L-3226536,00.htm [in Hebrew].

\footnote{81}{For the application of the ICRMW’s provisions to Israel by NGOs, see Ben Yisrael & Feller, supra note 58.}

\footnote{82}{See the case reported in laissez passer on December 14, 2007, http://www.mehagrim.org/2007/12/blog-post_14.html. Rubinstein & Orgad also document the claim that the abuse of marriage as a means to migrate to developed countries, led many countries to tighten the conditions of family’s immigration (supra note 28). For more about the different approaches to regulation of migration, see...
While each specific case may be heartbreaking, especially against the background of restrictive immigration policies, this form of immigration may indeed account for a large part of the immigration that is allowed. Moreover, it may well be that patterns of family immigration increase the size of non-assimilating immigrant communities and strengthen the tendencies of these communities to resist integration. Thus family immigration may upset delicate balances between political and cultural groups and increase perceived threats to the culture of the majority. It is important to remember that Israeli legislation limiting the ability of Israeli citizens to grant status to their family members from hostile or enemy countries was proposed in the context of the intensification of hostilities between Israel and the Palestinians.

Again, the real issue is not that of family immigration as such. Clearly, if there are no issues of numbers and cultures or issues of armed conflicts and fear of destabilization or of terrorist activities, the right to live in one’s country with one’s chosen spouse, even if the spouse is an alien, does seem like a fairly reasonable, decent, and natural policy to adopt. Most countries would indeed grant such rights. But these rights cannot be made into HR that are beyond the power of states to change if the circumstances are such that this route of immigration may mean a large wave of uncontrolled immigration that adds to non-assimilating immigrant groups that does not integrate into the host country culture and does not integrate into its civic and economic life. If the policy results in a large influx of new citizens from hostile or enemy countries, it should be in the power of the state to change the policy.

Refusing requests of immigration may indeed cause suffering and hardship to the petitioners. Invoking HRD may allow judges to not only decide in their favor, but also allow them to disregard that “hard cases make bad law,” as well as the policy of the government. In many cases, the judicial decision concentrates on the human story involved; while it usually does justice in the situation, it does not attend to the wider implications.  

It is not a commendable idea that immigration decisions by courts in particular cases determine a country’s immigration policies. But this is precisely what may happen when the decisions invoke HRD rather than being presented as ad hoc decisions;

Brendan Mullan, The Regulation of International Migration: The United States and Western Europe in Historical Comparative Perspective (Institute for Public Policy and Social Research & Michigan State University). See also Ben Yisrael & Feller, supra note 58, on changes in policy preventing women who gave birth to send the child away and stay here to work, based on the understanding that this coerced separation is too harsh and may not withstand public and judicial review.  

83 See, e.g., AppPet (Jerusalem) 735/03 Chan de ho v. The Minister of Interior (unpublished) [July 17, 2003].
when the doctrine of *stare decisis* is applied; and when the petitions are submitted with the assistance from human rights NGOs, which are eager to generalize their victories. Courts are aware of the importance of state sovereignty and of the right of the state to determine who enters its borders. Yet when the migrant’s predicament is serious, and the situation urgent, courts may feel the state can afford to be generous toward them. When courts pursue invoking HRD, this may affect the state’s policy itself. Indeed, it is known that, historically, the granting of rights to migrants and especially to migrant workers mainly occurred in courts. Despite the fact that ideally, IP should be determined by the states within the constraints of HRD, many states simply refrain from developing and implementing such policies, and in their absence, it is hard to complain when courts step in to do what they can, even if they must work with their own tools—case by case decisions, and generalizations—which are less than optimal. Yet, even then it should be conceded that this process is not ideal. In many states, governments lack incentives for articulating consistent, fair, and humane immigration policies that account for both the interests of states and the welfare and interests of the migrants. Thus, it may be the case that courts can be the right organs to create these incentives by making it mandatory for legislatures to act.

**Conclusions: Immigration Policies and HRD**

There is no question that the human misery and the social, cultural, and economic issues created by the complex reality of immigration—legal and illegal; those of labor migrants and those seeking asylum (recognized as refugees or refused such a recognition)—are among the largest and most pressing problems of the age.

The seriousness of the challenge does not relate only or mainly to the mere phenomenon of immigration. All states can afford to alleviate hardship and admit and naturalize a small number of migrants (or refugees, or spouses of citizens). The complexity starts when it is no longer a small number but rather a large number. But while policy and humanitarian considerations are very well suited to accommodate numbers (recall the quota in the Australian law of immigration), HRD often does not have that flexibility. More than that, once a benefit is granted to one person, the principle of non-discrimination may require that it will be given to all unless a

---

84 See, e.g., HCJ 4370/01 Lafka v. The Minister of Interior [2003] IsrSC 57 (4) 920.
significant and justified distinction can be shown. This may be fatal to coherent and effective policy on matters involving numbers.

In some cases, the successes of human rights NGOs in pressing for immigrants’ rights have created a backlash in the attitude of countries to immigration. This is because courts often tend to invoke general norms or use previous decisions as precedents to justify their decisions under the Rule of Law. If these general norms are perceived as posing a threat to important interests of the destination states—they may be pushed to explicitly change their policies and laws to respond to the new challenges. One striking example is the fact that many countries (e.g., The Netherlands and Germany) now impose demands on entrance into the country that had previously only been applied to naturalization, and the old regime was adequate when a long stay within the country was not seen as conferring rights to status. Once it became clear that courts would make it hard to deport individuals after they had stayed in the country for a long time without legal status, and that people who have stayed in the country legally for a long time would be granted a right to be naturalized, countries started adopting stricter entrance policies. A victory for immigrants invoking their rights meant that acquiring a permit to enter the country and stay there for a short period of time became more difficult for potential future immigrants.

A similar process took place as courts and HRD applied the collective cultural rights granted to members of minority groups not only to native groups but extended them to immigrant communities as well. Thus, states found that such new communities may also present a challenge to their own culture and values, without the similar background conditions that native groups in the territory shared (like language and religion). It may follow that states will become reluctant to admit more immigrants who may join these communities or may limit rights that had been granted to them.


87 Na’ama Carmi, Immigration Policy, 2 L. & ETHICS HUM. RTS. 387 (2008), may be read as another illustration of the same structure, this time via Article 27 of the ICCPR (repeated as we saw in ICRMW) concerning the rights of immigrants to culture. The article refers to the challenge to the state when mass immigration could change the relation existing between majority and minority groups within the state, and accordingly affect the culture of the state. Under these circumstances, Carmi argues that the duty of states under international human rights law to protect rights of minority groups might serve as an incentive to restrict immigration endangering the character of the state. For a powerful analysis of the fact that rights of immigrants in the democratic West have been more vulnerable to contemporary trends than rights of national minorities (or of indigenous peoples), see WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY (2008).
At the same time, it must be recalled that some of the very hard issues related to the treatment of immigrants and the resentment of groups within states against immigrants, are often the result of misguided treatment of immigrant communities, which cause immigrants to be marginalized and live in hopeless ghettos and slums. These tensions and problems have become more pronounced in countries like France, where anyone born in the country may become a citizen, while the assimilating effect of schools failed because the quality of education in some immigrant communities was ignored.88

As noted, the UNESCO analysis of the refusal of European states to sign the ICRMW is revealing. On the one hand, the authors present the provisions very accurately and minimize their implications to support their claim that states should not be afraid to sign. On the other hand, they discuss the desired attitudes we should seek to develop among host countries as if the convention reflects full-fledged rights, imposing correlative duties on states. This strong normative analysis, however, is precisely what makes states reluctant to sign. States simply do not want to undertake these additional obligations. So long as the validity of conventions depends on the agreement of states—we are not likely to see any serious expansion of human rights protection related to immigration.

In short, the actual scope of immigration, especially illegal immigration, the way immigrants are treated by receiving countries, and the claims immigrants are making on their host countries, are often framed in terms of HRD. In some cases this is supported by international bodies and by state courts. Often, once this happens, a backlash in legislation or practices, designed to avoid the need to follow the recently declared rights, can be expected. Bearing this trend in mind, states can be expected to be extremely wary about theories or documents seeking to impose on them duties in matters of immigration that are based on HRD.

However, clarifying that immigration issues are best dealt with in systematic and humane policies, combined with effective and humane implementation, cannot be seen as the end of the debate. In many countries there is no comprehensive and coherent policy that seeks to deal with issues of immigration, starting from policing the borders, through a state mechanism that may effectively deal with asylum seekers to hasten the decisions made in their cases and to find them interim solutions in either the host country or elsewhere where they are not subject to risks of life or liberty. It

88 See CURRENT IMMIGRATION DEBATES IN EUROPE: A PUBLICATION OF THE EUROPEAN MIGRATION DIALOGUE, supra note 82.
seems that in many countries these are extremely charged issues. When possible, the authorities prefer to let matters be while addressing emergency situations, making it harder for immigrants or asylum seekers to reach their territories, and adopting very restrictive immigration guidelines. Courts, on the other hand, if they are to intervene, often must use the language of rights which is by definition generalized. Once NGOs become important players, immigrants are not just individual one-time-players. The struggles concern the norms as well as the welfare of individual immigrants or asylum seekers.

As the ICRMW reminds us, a serious and integrated IP that deals effectively with all these issues is critical. Such policies must involve the operation of various authorities concerning entry, welfare, health, education, and integration, as well as relations among immigration receiving countries and the countries of origin. A policy like that cannot be established and implemented by courts through adjudication. Those who care for the plight of migrants must consider the possibility that they might help them more if they support a comprehensive immigration and integration policy. However, they then will run the risk that the immanent tensions in their work will make their lives almost untenable.\footnote{See the candid and sharp discussion of Jacqueline Bhabha, \textit{Internationalist Gate Keepers: The Tensions Between Asylum Advocacy and Human Rights}, 15 \textit{Harv. Hum. Rts. J.} 151 (2002), describing such tensions in the work of advocates for seekers of asylum.}

It should be stressed again, that the thesis that HRD is unsuitable for attending to many of the core issue of mass immigration does not mean that HRD is not applicable at all to immigration issues. Unfortunately, some migrants do risk both life and dignity in their desperate attempts to improve their lives. Stressing the limits of the HRD does not mean that anything goes. Core human rights to life and due process and to not be tortured \textit{are} universal. They do apply to people simply because they are human. Other rights do apply to categories of immigrants. The right of refugees not to be returned to where they face serious danger is recognized by international law and the convention granting it was ratified by most developed countries. Labor immigrants are entitled to fair wages. The state should see to it that they are not exploited by those who facilitate their temporary immigration. Migrant workers should also not be exploited by their employers. But these rights do not include, as \textit{human rights}, the right to be admitted, the right to remain, or the right to extend rights of admission to family members.\footnote{In many Western countries, domestic law does grant people some rights irrespective of their status. These rights of course apply to all immigrants in that country. But the scope of these rights is much narrower than that of the HRD.}
Unfortunately, the twenty-first century is likely to continue to be an era when large numbers of people will desperately want to move to more developed, richer, or safer countries. If the world is to remain as it is now—and if states are to continue to be able to maintain a degree of autonomy—many of those wishing to immigrate will be denied entrance and status in the states in which they want to live. In terms of human suffering and frustration and in terms of distributive justice, the world will not be a “pretty place.” If HRD will be exclusively used to address these issues—there will be no conceptual and cognitive space to design policies that will help decide who shall be admitted and who shall be denied. Only such policies, coupled with effective mechanisms of cooperation, enforcement, protection of the rights of immigrants and their integration may make the prospects of immigrants and immigration better. Rights do not usually allow these kinds of considerations.

The realization of the enormity of the challenge and of the importance that the integrity of the HRD be maintained should lead to the humble understanding that granting more rights will not necessarily make things better. Such humility may be better for the prospects of both the HRD and the welfare of immigrants than human rights triumphalism.