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Irregular Migration in Israel– A Legal Perspective

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Legal Module

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This publication is part of a series of papers on the theme of Irregular Migration written in the framework of the CARIM project and presented at a meeting organised by CARIM in Florence: “Irregular Migration into and through Southern and Eastern Mediterranean Countries" (6 - 8 July 2008).

These papers will also be discussed in another meeting between Policy Makers and Experts on the same topic (25 - 27 January 2009). The results of these discussions will be published separately. The entire set of papers on Irregular Migration are available at the following address: http://www.carim.org/ql/IrregularMigration.

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The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) was created in February 2004 and has been financed by the European Commission. Until January 2007, it referred to part C - "*cooperation related to the social integration of immigrants issue, migration and free circulation of persons*" of the MEDA programme, i.e. the main financial instrument of the European Union to establish the Euro-Mediterranean Partnership. Since February 2007, CARIM has been funded as part of the AENEAS programme for technical and financial assistance to third countries in the areas of migration and asylum. The latter programme establishes a link between the external objectives of the European Union's migration policy and its development policy. AENEAS aims at providing third countries with the assistance necessary to achieve, at different levels, a better management of migrant flows.

Within this framework, CARIM aims, in an academic perspective, to observe, analyse, and predict migration in the North African and the Eastern Mediterranean Region (hereafter Region).

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The CARIM carries out the following activities:

- Mediterranean migration database;
- Research and publications;
- Meetings of academics;
- Meetings between experts and policy makers;
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The activities of CARIM cover three aspects of international migration in the Region: economic and demographic, legal, and socio-political.

Results of the above activities are made available for public consultation through the website of the project: www.carim.org

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Abstract

Two competing views of irregularity in migration dominate the legal debate. The first sees irregularity as a form of deviant behavior that justifies the denial of rights, deportation and the development of negative incentives for illegal migrants. The second holds irregularity to be an outcome of diverse circumstances, some of which are beyond the migrant's control and some of which require the state to adjust its immigration policy. According to this second viewpoint, irregularity should sometimes be addressed by means of regularization, securing rights and strengthening the state's responsibility toward its migrants. The two views clash: (a) over the understanding of who the irregular migrants are and the reasons for their irregularity, (b) over the balance between the state's monopoly on determining citizenship, and the view that *de facto* affiliation with the community and other values such as moral obligation and moral worth can impose on the state recognition of status (c) over the conceptual relationship between uninvited presence and rights, and (d) over the likely effects of granting rights on the inflow of further irregular migrants. This report describes Israel's legal regime in the context of illegal migration. It looks at the reasons for irregularity, possibilities for regularization, extension and the denial of rights to irregular migrants and the debate on the incentives, negative and positive alike, employed by the state for individuals with an irregular status.

Résumé

Le débat juridique sur les questions migratoires est dominé par deux conceptions concurrentes. La première conçoit l'irrégularité comme l'expression d'un comportement déviant qui justifie le déni de droits, l'expulsion et l'adoption de mesures dissuasives de l'immigration illégale. La seconde conçoit l'irrégularité comme la résultante de circonstances diverses, dont certaines échappent à la volonté du migrant et requièrent une intervention étatique afin d'ajuster la politique d'immigration. Selon cette conception, l'irrégularité peut être gérée par le biais de procédures de régularisation, par la garantie de certains droits et la prise de responsabilité par l'Etat à l'égard des migrants. Ces deux conceptions impliquent des prises de position divergentes sur certains points : (a) sur la définition de qui est un étranger en situation irrégulière et sur les causes de cette irrégularité, (b) sur le point d'équilibre entre l'exercice du pouvoir souverain de l'Etat de définir qui est un national et l'obligation morale qui peut reposer sur lui de reconnaître l'existence, de fait, d'une appartenance à la communauté et d'une adhésion à certaines valeurs, (c) sur la relation de causalité entre la présence non désirée sur le territoire et la reconnaissance de droits et enfin (d) sur l'incidence sur les flux migratoires de la reconnaissance de tels droits. Cette contribution décrit le régime juridique israélien dans un contexte d'immigration illégale. Il pointe les causes de l'irrégularité, les opportunités de régularisation, la reconnaissance ou le déni de droits aux « irréguliers » ainsi que les mesures positives ou négatives prises par l'Etat à l'égard des personnes en situation irrégulière.

Introduction

The issue of irregular migration concerns, first and foremost, the tension between individual rights and the state's interests in maintaining its sovereignty and a derivative control over its borders and population. From a legal perspective of sovereignty, irregularity indicates an unwelcomed presence in the state's territory: and the interests of sovereignty mean that the person should be deported. Moreover, it is argued that an unwelcome presence should be addressed by a compete denial of rights. Akin to the law of torts, a trespasser is generally denied any rights of protection and may not sue for harm done while trespassing. Similar outcomes are also justified in terms of *ex-ante* incentives. Any recognition of rights for the unwelcomed individual is likely to motivate others to pursue a similar path and forgo the difficulties of obtaining a formal entry status, or of seeking entry to other states.

The perspective of sovereignty clashes with that of individual rights. From this perspective, individuals carry rights that place obligations on states and other individuals regardless of their immigration status. While they are not entitled to political rights, as the political sphere has been arguably undermined by their unwelcome presence, they are entitled to civil rights and arguably also to social and economic rights. , . They are further entitled to some rights in the private sphere, such as remuneration for work that was performed, despite their unwelcome presence in a given state. Moreover, there are differences between various categories of unwelcomed individuals, and many cannot be simply portrayed as individuals who crossed the borders in total disregard of the state's sovereignty. Irregularity is produced by the state itself as part of its general migration scheme, and is based on a mix of nationalist and economic interests. According to this view, irregularity is not necessarily a status that is chosen but one that is thrust upon the migrant. For example, some migrant workers overstay their working visa, but their visa expired for reasons that are not their own fault[1]; some seek asylum and are present in the state for a long time because the asylum system is extremely slow; some seek to join their families who have been split up by controversial borderlines of religion.[2] Hence, the simple portrayal of the irregular migrant as a trespasser is inaccurate. Some were invited on limited grounds, but were then affected by circumstances beyond their control. According to this view, stripping them of rights would have only a marginal effect on the state's control of borders

The two views clash: (a) over the understanding of who the irregular migrants are and the reasons for their irregularity, (b) over the balance they draw between the state's power to determine who is allowed to enter the state, and the state's responsibility to recognize that immigration status should reflect the actual affiliation with the community (c) over the conceptual relationship between an uninvited presence and rights, and (d) the likely effects of granting rights on the inflow of more irregular migrants.

In the following commentary I will discuss each of the four questions, highlighting the prevailing views and ask how they are anchored in the current state of the law.

[1] This problem was particularly acute until 2006, when the working permit was granted to a particular employer and linked with the visa. Hence, if a care-worker's employer died or if a construction worker's employer failed to pay his wages, the termination of the employment relationship also rendered the worker illegal. This so-called 'binding arrangement' and its consequences are explained in greater detail, infra.

[2] Given that Israel's fundamental principle of migration is an affiliation with Judaism, families composed of members from different religions face particular difficulties in securing a status for the non-Jewish members. Examples of these situations will be described infra.

A. Categories of irregular migration

The various forms of irregularity cluster under the term of "*illegal presence*". The emphasis of this term is on the illegality of a given presence in Israeli territory, which distinguishes the formal term from more popular terms such as "illegal workers". Generally, the formal term is more benign because it does not assume a worker is illegal, and rather confines illegality to that worker's presence. Otherwise stated – it is justly not the person who is illegal, but the particular act of unwelcome presence. However, despite this nuance, there is political and legal slippage between the two concepts and it is often assumed that an illegal presence justifies the abolition of rights.

The term "illegal presence" does not capture the diversity of irregularity and is based first and foremost on the category of migrant workers. This bias can be prescribed to the dual nature of Israeli immigration law where Jews are granted citizenship by the Law of Return, regardless of their motivation for entering the state, while non-Jews are granted citizenship or residence on the basis of narrowly defined and strictly enforced categories. For years the major challenge of irregularity was that of non-Jewish workers, first from the Occupied Territories and later from various countries all around the world. Some Palestinian workers were admitted to work in Israel on the condition that they did not stay overnight ('frontier' or 'daily' workers'), while others worked without a permit and were, therefore, 'irregular', even if they did return home at the end of the day. Migrant worker whose massive entry started in 1993 were only lawful if they held a visa and a working permit. Those who overstayed their visas, or entered as tourists and stayed in Israel were thus deemed to be 'illegally present'. It must, therefore, be emphasized that irregularity may not have amounted to a full violation of entry requirements for either of the two groups.

Moreover, it would be wrong to associate all irregularity in the sense of illegal presence with informality in the labor market. Palestinians who worked with a permit yet remained to sleep unlawfully in Israel or migrant workers who overstayed their visa and continued to work were not wholly outside the formal labor market.

The term 'illegal presence' is not identical with irregularity or informality. Nor does it capture the full array of different types of unwelcome presence. Several other avenues for the unwelcome presence of non-Jews exist. Some overlap with work-oriented migration, while others do not. Among the former, the most important group is that of asylum seekers whose numbers have been rising since approximately 2003: though there were already signs of such a rise before that date. A small share of these asylum seekers are recognized as refugees, escaping some of the atrocities now taking place in several African regions, while others escape from a general climate of political unrest and lack of security. Among the countries of origin for asylum seekers are Sudan, Eritrea, Darfur, Congo and the Ivory Coast. Others attempt the asylum avenue given the tight control over labor migration, their motivation being for the most part economic, itself tied to movement away from politically unstable regimes. The asylum process in Israel is currently very slow, and during the application process (which can last for a couple of years) asylum seekers are in an ambiguous status. Given that many cross the borders by foot, they are termed 'infiltrators', the meaning of which is discussed below. Some are detained, others work in agricultural villages and some make a living in Tel-Aviv. Sometimes they are given an unqualified work permit, other times a conditional one (e.g. for a particular employer or a particular region), and sometimes they are denied the right to work altogether. There are also instances of collective permission for residence that do not though amount to a full granting of asylum.[3] From this we see that during their lengthy period of waiting asylum seekers are treated as having different levels of 'irregularity' ranging from something akin to the 'illegal presence' status to those who have equivalent rights to lawful migrant workers.

[3] Such permission was granted for a group from Cote d'Ivoire.

A third category of irregularity that touches at the margin of the labor market is that of those women who are trafficked by the sex industry. While formally they are classified as being in a status of 'illegal presence' their situation deserves sympathy given the coercive and abusive way in which they are recruited. At the same time, the fact that some entered or infiltrated Israel while knowing the implications of their entry, as well as moral repugnance for their profession, leads to a countervailing view, one in which these women are held to be 'corrupt'. The difference between their status and that of migrant workers is that there are special provisions for aiding them in the legal process against the traffickers as well as a year of rehabilitation after they are found. Thus, their highly irregular nature is countervailed by state-sponsored measures to aid them.[4]

Some forms of irregularity are not concerned with labor issues altogether. One such category is that of family unification between Jews and non-Jews. There are several sub–categories here. These include (a) parents and close relatives of Jewish residents and citizens (who are not Jewish themselves), (b) non-Jewish foreign spouses of Jewish Israelis and (c) foreign-Arab spouses of the Arab citizens of Israel. The first group(a) has special procedures that are mentioned in the following section. The second category (b) stems from the rule holding that a Jewish man or woman who married (or co-habits with) a foreign non-Jew in Israel must wait for a period of 4-7 years, during which the validity of their marriage will be assessed annually, so as to avoid fictitious marriages, charades that are intended to grant domestic residence to migrant workers.[5] The third group has been the target of a contested law that prevented the entry of foreign Arabs (from the OT and from enemy states) who married Arabs with Israeli citizenship.[6] The law was upheld by the Supreme court by a narrow margin of 5 to 4 and after amendment was brought to judicial review again – the outcome of which review is still pending.[7] Common to these three groups is a temporary or permanent resistance of the state to grant lawful status to individuals who are within the territory for reasons of family and kinship.[8]

Finally, there is a category that ties the labor-related and non-labor related categories: the children of migrant workers. These are children who were born in Israel or who immigrated to Israel with their parents and grew up in Israel, subjectively viewing Israel as their homeland. However, because they are not Jewish, and because of their parents' illegal presence, they remain without status in Israel (Kemp 2007).

To conclude, from a legal perspective irregularity is linked to an unlawful physical presence on Israeli territory . Non-legal perspectives only partially overlap with this view. As demonstrated here, not all persons who are illegally present are outside the formal labor market. Nor are all in a situation of complete illegality, and not all motivations for temporary and partial status are alike.

Irregularity, therefore, seems to demarcate a host of legal statuses that deviate from standard migration processes. However, just as not all irregular forms of migration are linked with informal labor markets, an illegal presence is not always the result of social deviance. Alluding to the two views outlined in the introduction, illegal presence does not necessarily conform with the analogy of

[4] The Prohibition on Human Trafficking Law (2006) The major problem is that of slack enforcement. See, The Hotline for Migrant Workers, The Legal System's Handling of Human Trafficking (2008) [Hebrew].

[5] Section 7 to the Israeli Citizenship Law. This was the matter under review in Supreme Court HCJ 3648/97 Stemka V. Minister of Interior Affairs PD 53(2) 728. Variations in the procedure are dependent, inter alia, on whether the couple is married or merely co-habiting, whether they got married within or outside Israel, whether one was a citizen and resident of Israel or whether both immigrated to Israel. Internal Procedures of Ministry of Interior Affairs, 5.2.0008-5.2.0011.

[6] Israeli Citizenship Law (Temporary Provision) (2003, later amended 2006)

[7] Supreme Court HCJ 7052/03 Adalah and others V. Minister of Interior Affairs(14.5.2006); Supreme Court HCJ 544/07 ACRI V. Minister of Interior Affairs (petition pending). See generally on this case – Peled (2007).

[8] These three groups are the most typical among a much broader range of cases and situations of family reunification cases.

trespassers. Illegal presence might be a form of deviance from the community's claim over its territory in the form of sovereignty and the administration of its borders. But illegal presence can also be an outcome of circumstances; changes in immigration policy that do not foresee the consequences for all those who are affected; overly harsh immigration controls that do not resonate with the community's values; temporary measures and the like. In these circumstances, the community's norms may not address irregularity at the same level of moral condemnation.

Moreover, it is useful to consider that regularity and irregularity are part of the same continuum. Irregular forms are partially being regularized by the provision of partial rights and temporary protection. The flip side of the coin is that regular migrants are constantly being pushed towards irregularity as the state limits their rights and seeks to guarantee their short-term presence.[9] Designating an individual as being legally or illegally present is a very general legal construct that seeks to justify a given demarcation of rights.

Overcoming the simple dichotomy between regular and irregular (legal and illegal) migrants is important, because of the danger of overlapping this dichotomy with a simple view of right and wrong. Situations of irregularity should not all be treated in the same way. Some justify the taking of measures, such as deportation, while others may best be dealt with by having the State legalize the irregular migrant. Section (b) will look into situations of regularization, while section (c) will look, instead, at the extension of rights, including rights in deportation proceedings.

B. State sovereignty and irregularity – making the irregular regular through migration law

A state's sovereignty over its borders and its power to determine who is admitted and who should stay is considered to be one of the fundamental prerogatives of the state. It is argued that illegal presences not only infringe the state's sovereignty, but also carry with them high economic costs, and, therefore, that the phenomenon should be eliminated.[10] This viewpoint is constantly emphasized by the state and reiterated by the courts and serves as the grounds for limiting, *de-facto*, judicial review over decisions regarding immigration.[11]

An important effect of the abovementioned principle is that though illegal presence does not undo all migrants' rights, it does serve, in itself, as a barrier for legalization. So, while the options for non-Jews to obtain a legal status are limited, it is even more difficult to move from a state of illegality to a state of legality. An act of illegal presence is seen as an act of violation of the state's sovereignty, and therefore should be condemned, rather than rewarded through legalization. As recently noted by the Supreme Court:

> "illegal presence in itself, particularly in the Israeli reality where the respect of the rule of law is not at its peak, and where there are many holes in the immigration wall that are brought to the knowledge of this court, and where the field of foreign workers is particularly difficult to police and enforce, should light a red warning sign to the court. The legislature provided exceptionally generous arrangements in the field of care-work, entitling some workers to provide long-term care for dependents…. But this valve of discretion cannot be used for those who are illegally present … The court should not reward illegal presence".[12]

[9] Cf Supreme Court Admin Appeal 2190/06 State of Israel V. Bueno Gemma and Rosa Lampert (14.5.2008).

[10] Report of the Committee on Devising Policy regarding non-Israeli Workers (September 2007) – chapters – introduction, 6 and conclusion.

[11] Limited judicial review over immigration matters and the current controversy

[12] 2190/06, supra, section 6 in Justice Rubinstein's majority decision.

Exceptions to this general rule are scarce,[13] but they all draw on an intuition that an illegal presence is sometimes less morally reprehensible than what the court described in the previous passage. The following are several examples of situations in which irregularity, in the sense of unwelcome presence, can be regularized.

1. For migrant workers employed in domestic work, the legislature extended the permitted length of stay beyond the previous maximum period of 5 years. This is a weak demonstration of an exception to the general rule for two accumulative reasons. First, the extension is only to workers whose presence was legal in the first place. Second, the *raison d'être* of this arrangement is not that these workers deserve or are entitled to an extension (as is often the argument underlying naturalization processes or a grant of amnesty), but that those who receive the care rely on the care-provider and adjust to change with difficulty.
2. For other migrant workers, there are several ways to become regularized. These, however, requires a clarification. Until 2006 the common practice was for migrant workers who ceased their work for a designated employer to lose their visa as well, and hence immediately they were stamped as 'illegally present' : this regardless of the reason they left the job - whether they were sacked because they sought better pay, or because they received no wages whatsoever. This was considered to be a 'binding arrangement' which in 2006 was held by the Supreme Court to be unconstitutional.[14] Workers who found themselves illegally present within the first year of stay in the country were treated with more discretion, under the assumption that they were still not familiar with the necessary "know-how" of local culture, law and politics.[15] Following the Supreme Court's decision there were various attempts to provide more options for workers to move from one employer to another, hence reducing the need for irregularity as the only option in the event of the termination of the employment relationship with a designated employer.[16] However, there are strong indications that despite the abolition of the binding arrangement, its logic is sustained and regularization in the form of a permit to seek a new employer is not easily available for workers.[17]
3. A more general approach to legalization was adopted under the term of "closed skies" which was intended to cease the issuance of new work permits (close the skies leading to Israel) and provide regularization of migrant workers who are already in Israel but whose presence is illegal. The details of this policy have changed over the years, and were not always successful. A prominent obstacle to their success are economic interests, as many middle-men profit from migration.[18] The most recent policy holds that workers who have lost their employment and made attempts in good faith to find another employer and whose presence in Israel does not exceed 51 months, are entitled to request an extension. As previously noted, exceptions for irregular (undocumented, illegally present) migrant workers are only made if the length of illegal presence does not exceed a year and when the migrant has not been arrested more than once for illegal presence.[19]

[13] There were attempts to strictly regulate this principle and narrow the exceptions. For example – the Government's decision no. 3806 (26.6.2005) calling to legislate a law on impressible presence in Israel.

[14] Binding arrangement

[15] Cite the case regarding the 1 year presumption

[16] See generally Ministry of Interior Affairs, Procedure 5.2.0022 (last updated 3.1.2008). For a critique of the slack adjustment to the court's instructions, see …

[17] See the report prepared by the Workers' Hotline and the Hotline for Migrant Workers, Freedom Inc. (2007) [http://www.hotline.org.il/english/pdf/Corporations_Report_072507_Eng.pdf].

[18] Mundlak CARIM report Dec. 2007 on circular migration

[19] Ministry of Interior Affairs, internal memo dated 17.1.2008.

4. Another course for regularization was devised, again after judicial intervention, for the children of migrant workers. Following several amendments the current procedures grant the Ministry of Interior Affairs discretion to grant temporary residency to children who have lived in Israel for at least six years, who entered the country before the age of 14, who speak Hebrew and study in school and whose parents originally entered the country with a valid permit. While the children are accorded permanent stay visas, their family (parents and siblings) are granted temporary stay visas until the child reaches the age of 21. At that time the rest of the family can apply for permanent stay visas as well. This procedure is considered exceptional and has been applied only to a small group that applied in 2006.[20]
5. There are limited routes for the regularization of parents of Israeli citizens, when these parents do not have citizenship and when they have no children in other countries.[21] Similar processes exist for the naturalization of children and grand-children.[22] These procedures evolved out of the humanitarian exception described in sub-section viii.[23]
6. At the margins of regularization we also need to consider the relationship between irregular migrant workers and the asylum process. As noted in the introduction, of the thousands of asylum seekers in Israel, many may not qualify as refugees. However, their attempt to seek asylum is a means of identifying a procedure for lawfully recognizing their presence in Israel, the option of legalizing their stay as migrant workers not being available. I will not elaborate on this option as the asylum regime in Israel is demonstrating a general incapacity to deal with the large number of refugees who have entered Israel since 2007. At present, refugee status is hardly ever granted, and most asylum seekers become irregular as well. There is a clear concern that the asylum process is being used to bypass work migration processes, and hence the concern of irregularity on one track overshadows the process of regularization on the other.[24]
7. A temporary stay for victims of trafficking is granted given for humanitarian reasons. The current procedures allow the Ministry of Interior affairs to grant the victims up to one year from the time that they testify in court, or from the time of application (if they choose not to testify in court). The most important factor in deciding whether to grant the stay is the likelihood of rehabilitation.[25]
8. The humanitarian exception. This is the final and residual track for regularization. In 1994 the Supreme Court held that the Minister of Interior Affairs must investigate requests for citizenship or residency on an individual basis, and that the standards for such review were at that time a matter of broad discretion, unwritten and therefore impossible to review. Although the court did not intervene in the considerations of the Minister on that particular occasion it communicated that the humanitarian exception must be based on written procedures and structured discretion.[26] An inter-ministerial committee was established to review humanitarian requests, and an internal procedure for this matter was drafted. The committee deals with these cases on a case-by-case basis, and these are occasionally reviewed by the District Administrative Courts. The Courts emphasize that non-Jews have no intrinsic entitlement for citizenship or residency, and that they

[20] Governmental Decision No. 156 from 18.6.2006.

[21] Ministry of Interior Affairs, Procedure 5.2.0033 (last updated 18.1.2007).

[22] Ministry of Interior Affairs, Procedure 4.5.0001 (last updated 1.1.2008); procedure 5.2.0027 (last updated 1.8.2005).

[23] See section 33 in Tel-Aviv Administrative Court 2887/05 Alexeiv Sergei V. Minister of Interior Affairs (2007).

[24] I will elaborate on the crisis of the asylum regime in Israel in a separate CARIM paper.

[25] Ministry of Interior Affairs, Procedure 6.3.0006 (last updated 1.8.2005); 6.3.0007 (last updated 1.6.2007)

Also Cf. Administrative Court (Jerusalem) 00889/07 Olga Tin V. Ministry of Interior Affairs (3.1.2008) <Court upheld the state's denial of a permit because the victim continued to work in prostitution throughout the process of applying for the permit>

[26] Supreme Court HCJ 1689/94 Harari V. Minister of Interior Affairs PD 51, 15

are only entitled to having their application discussed in accordance with the general principles of administrative law for humanitarian reasons. Humanitarian concerns will only be recognized in exceptional circumstances.[27] The Court generally does not interfere with the workings of the committee, but it did hold that the *a priori* barring of a humanitarian claim is unreasonable;[28] or that the denial of residency to stateless persons who cannot be deported to another country, without any established procedures for handling statelessness merits further investigation and a temporary residence permit.[29] The Courts, however, emphasized that not every case of family separation requires the Court's intervention for humanitarian reasons. Generally, it seems the Court tends to intervene where there are defects in the administrative procedure, rather than on terms of substance.

There are two categories of "irregulars" whose options of being regularized are formally almost null, and *de facto* even less. The first category is that of infiltrators not to mention individuals who are from enemy countries and are present illegally. The second is that of Palestinians from the Occupied Territories. Restrictions on both groups are usually justified, first and foremost, for security reasons, over and above the general problem of illegal presence. Embedded in these considerations are also demographic concerns.

Individuals from enemy countries generally enter the state as infiltrators, usually crossing the border with Egypt.[30] The proposed law on infiltration, which is discussed at greater length in the following section, provides harsh measures for the detention and return of infiltrators. Moreover, they cannot be regularised given their status. Section 6 of the Internal Procedures for Handling Asylum Seekers in Israel holds that the State "keeps the right not to absorb in Israel and not to grant a staying visa to citizens of enemy-country…" While the state keeps its discretion in these areas, its policy is consistent throughout.

Palestinians also find regularization extremely difficult. Of particular importance is The Law of Israeli Citizenship (Temporal Order) which denies family unification except in exceptional humanitarian circumstances. However the humanitarian exception here is weakened by the statement that the presence of a family (including spouse or children) in Israel does not qualify as a humanitarian reason, and that it is valid to impose a quota on the number of humanitarian permits.[31]

C. Rights and irregularity – making the irregulars into regulars by extending rights

As noted, there is a continuum between 'regular' and irregular' migration. One dimension of this continuum is that it is wrong to assume that the regular side provides all rights, while the irregular side provides none. However, most forms of illegal presence are accompanied by a broad absence of rights. I will examine in this context three categories of rights:

[27] This general policy was repeatedly upheld by the Supreme Court. CF: Supreme Court HCJ 4182/97 Markovitz V. Minister of Interior Affairs (1997); Supreme Court HCJ 3403q97 Enkin V. Minister of Interior Affairs, PD 51(4) 522; Supreme Court HCJ 2828/00 Svetlana Kovlevski V. Minister of Interior Affairs PD 57(2) 21.

[28] Cf. Jerusalem Administrative Court 101/07 Abu Niah V. Minister of Interior Affairs (2007); Haifa Administrative Court 1037/03 Larissa Feldman and others V. Minister of Interior Affairs (2004).

[29] Tel-Aviv Administrative Court 2887/05 Alexeiv Sergei V. Minister of Interior Affairs (2007)

[30] Currently the list of enemy countries includes Iran, Afghanistan, Lebanon, Libya, Sudan, Syria, Iraq, Pakistan, Yemen and Gaza (these countries are listed in the first Appendix to the Law of Citizenship).

[31] Section 13A1 of the law.

i. Social rights

The provision of social rights is one of the most significant advantages of partial citizenship stati. That is, many migrants would be willing to compromise their political rights to secure social and economic rights. A general statement of the law would propose that people who are illegally present in Israel are not accorded rights.[32] However, of the various social rights it is important to identify three that do exist.

First, health care is guaranteed in states of emergency under the Patients' Rights Law (1996). This is far from being adequate health coverage, and it stems from the assumption that every person is entitled to life-saving emergency treatment regardless of whether he or she is insured. More extensive treatment is only provided by an NGO – Physicians for Human Rights, which receives some contingent funding from the state. The fact that one of the major health providers for illegally present people is a voluntary NGO reflects the way in which the state has distanced itself from this problem, notwithstanding the fact that it provides funding to the clinic.[33] However, it should also be emphasized that even for documented foreign nationals, rather than taking responsibility for health care, the state initiated special private insurance. As to children of undocumented workers, a special voluntary arrangement has been in place since 2001.[34]

The right to education for children is secured because mandatory education applies to all children on Israeli territory, and the law makes no reference to citizenship status. This right applies to children from ages 5 to 16 (tenth grade).[35]

Finally, for years it was possible for employers to pay National Insurance fees to insure their workers, even if illegally present in Israel, against workplace accidents (and two other lesser branches in the National Insurance scheme – a one time maternity payment and rights in the event of employer bankruptcy or dissolution). In 2003, the National Insurance Law was amended so that those who are illegally present are not entitled to National Insurance benefits, even if their employers pay the necessary contributions to the National Insurance scheme.[36] Following a petition to the Supreme Court by the Association for Civil Rights in Israel, the National Insurance Institute clarified that it will continue to provide all benefits in kind (e.g., rehabilitation and medical treatment following a workplace accident, hospitalization for giving birth); survivors' benefits; debts that are covered by the National Insurance (in situations of bankruptcy, or to hospitals following permissible hospitalization), and one-time benefits such as maternity leave. But National Insurance will no longer cover monthly monetary allowances while the person is illegally present in Israel.[37]

Other social rights are either not available or remain to be clarified in future judicial proceedings. For example, the right to housing is partially covered by the Foreign Workers Law (1991) and should arguably be accorded to individuals who are illegally present as well: though this claim has not yet been tested.[38] The right to work is clearly not available unless permitted explicitly (as is the case with

[32] It should also be noted that migrant workers and other 'regular' stati of residence in Israel are not necessarily guaranteed full access to social rights either. See Mundlak (2007).

[33] In early 2008 PHR threatened to close the clinic because the State ceased its funding, thus leaving undocumented workers, asylum seekers and other 'irregulars' without

[34] For documented migrant workers – see: Foreign Workers Law (1991, 1999 amendment); For children, see <add>

[35] Mandatory Education Law (1949)

[36] Section 324B to the National Insurance Law (1995, consolidated version)

[37] Supreme Court HCJ 1911/03 ACRI V. National Insurance Institute (12.11.2003)

[38] Recently some asylum seekers were documented as sleeping in public parks or in shelters in Tel-Aviv in hideous living conditions. Whether the state has responsibility to provide shelter is a matter that can be analyzed according to

some asylum seekers). In sum, given the limited scope of social rights that legally present foreign nationals enjoy, the scope of rights granted to those who are illegally present is only slightly narrower.

ii. Rights in employment

Surprisingly the question of applying employment rights to individuals who are illegally present has never been thoroughly discussed and since the early 1990s, with regard to Palestinian workers from the OT, it has simply been assumed that they apply. Lacking an explicit analysis in the case-law, this position can be explained in a twofold fashion. First, an illegal presence in Israel is wholly separable from an employment contract and does not affect its validity. Second, though an illegal presence voids the contract such contracts can be enforced by the Court.[39] The difference between the two options is that the latter relies on the Court's discretion, while the first requires automatic implementation. In general, employment contracts are respected and while the court will not require the contract to be continued, it does enforce backpay, all social benefits derived from statutory labor standards as well as contractual rights. These are awarded regardless of whether the employee remains in the country or has been deported. Thus, there is generally a strong line drawn between the prescription of employment rights and immigrants' rights. However, it is clear that people who worked while illegally present in Israel face more difficulties in bringing their case to the court for fear of deportation or other sanctions. Some cases of this type have been published, and the Labor Court has attempted to help them, for example, by means of collecting preliminary testimonies before the plaintiff leaves the country.

iii. Rights in deportation

The process of detention and deportation has been distinguished by the legislature and the Courts from arrest and punishment in criminal proceedings. This has not been done by suggesting that one is harsher than the other, but mostly as a means to justify differential standards.

Following a petition to the Supreme Court by human-rights organizations, the Law of Entry to Israel was amended in 2001 and a section on detention and deportation has been added. This amendment marked a considerable improvement on the legal situation that preceded it, but the standards remained significantly lower than criminal proceedings.

The law holds that any person who is illegally present in Israel can be detained. Within 24 hours the detainee must be interviewed by a representative of the Ministry of Interior Affairs who may decide to keep the detainee in detention or, under special and extraordinary circumstances, release them with or without conditions (including bail). The detention must be reviewed by a "Tribunal for the Review of Illegally Present Detainees" – a quasi-judicial body. The judge is not authorized to withdraw the decision to deport, but can change the conditions of detention. The law of evidence does not apply in these proceedings, and administrative problems (e.g., translation) render it difficult to apply. The Attorney General, however, has emphasized the need to expedite the process and to avoid

(Contd.)

international law (the view of the author is that it does) but there has been no formal (judicial or legislative) statement on this matter thus far.

[39] The Law of Contract (General Part) (1973), Sections 30-31. According to S. 30m an illegal contract is a contract that in its execution requires a breach of the law. Hence an employment contract with an undocumented employees will be illegal. However, section 31 grants the courts discretion to uphold an illegal contract, taking into consideration the circumstances, who should be assigned the blame for concluding the illegal contract and who should be assigned the loss. The general view of employment contracts holds that employers are responsible for the validity of the employment contract and therefore should be assigned the blame, and hence – perform their obligations under the employment contract.

detention without review for more than four days. Petitions filed by human-rights organizations against this arrangement have been flatly denied by the Supreme Court, which holds that the state has done what was needed to improve the process of detention and deportation.[40]

Decisions to detain and deport, as well as decisions regarding the conditions of detention have been reviewed extensively over the last few years, by both the District Administrative Courts and by the Supreme Court. In a study conducted by Gil & Dahan (2006) it was found that between 2001 and 2005 most petitions were denied. The authors provide many references that indicate the judges' attitude that illegal presence is a severe wrong in itself, a violation of the state's sovereignty, and opens the way for others to follow track.

The problem of infiltrators, that is individuals who cross the borders by foot, has received a different response. This problem applies mostly to asylum seekers and to trafficked women. The situation of infiltrators can be addressed by the above-mentioned Law of Entry to Israel, but there is also a *sui generis* arrangement - the Law of Infiltration Prevention (Offense and Jurisdiction) (1954). The law allows the State to detain infiltrators from enemy countries without judicial review. The law holds that infiltration is an offense with punishment of up to 5 years (compared to one year punishment for illegal presence). The tribunal that is established by law to handle these cases is staffed by soldiers in the IDF and not by professional judges. The law is extremely vague on many matters pertaining to the rights of those detained and grants extensive powers to the state. Until a few years ago instances of infiltration were rare and usually related to security. A strong connection between infiltration and asylum seekers is relatively new. Detentions of infiltrators began in 2004, without disclosure whether there are people detained, without revealing their names, and, as mentioned, without short or even mid-term judicial review. A petition against the use of this harsh arrangement was filed in 2006 and is still pending.[41] At the same time, criminal punishment is not commonly used and it seems that the asylum system currently tends to deport (including 'hot returns' at the border), or to hold subjects in detention during the long process of assessing petitions for asylum.

In a recent proposal to amend the Infiltration Law, most of its problematic aspects remained.[42] Following the original law and its mode of implementation, the proposed law distinguishes between infiltrators from enemy-countries and those who hold citizenship of other countries. This may be justifiable on security grounds, but it runs against the principle of non-discrimination among refugees of different nationalities. Moreover, among the enemy-countries listed there is the Gaza strip, a matter that may be argued to go beyond mere security. The implications of this mean that an individual from an enemy country can be imprisoned for up to 7 years. At the same time the proposed law introduces a form of quasi-judicial review which did not exist before. Finally, the proposed law also regulates the act of "hot return" (returning an infiltrator when caught at the border).

D. The Law's impact on patterns of irregular migration

To conclude, the rules described here reflect a general legal consensus regarding the desirable balance between irregularity as a violation of sovereignty versus the individual rights framework. The balance is strongly tilted towards redressing the violation of sovereignty. Most of the legal rules that are

[40] Supreme Court HCJ 6535/03 The Hotline for migrant Workers V. minister of Interior Affairs. The

[41] These facts appear in the petition flied by the Hotline for Migrant Workers in Supreme Court HCJ 3270/06 The Hotline for Migrant Workers V. IDF and others. I only rely on the fact that the petition reveals and that have been affirmed by the military forces. The petition is still pending as the State promised to install a judicial review process; however one is yet to be arranged.

[42] The Government's Proposed Law, #381 (1.4.2008).

concerned with rights or with the options of regularization have evolved from judicial comments in cases that were initiated by human rights NGOs. This aptly demonstrates the general evolution and development of Israel's immigration law. The structure of the debate is mostly structured on the basis of balancing fundamental rights and values: state sovereignty, security and even budgetary limitations on the one hand, and human rights, due process and humanitarian concerns on the other.

In this debate, a lesser role is accorded to the discussion of incentives. The basic assumption is that granting rights to people who are illegally present will encourage more entrants, and that denying rights will, instead, discourage them. The equation is therefore that from a utilitarian point of view all rights are detrimental to the state's future capacity to control borders. This assumption has never been tested, but for the context of the 'binding arrangement'.[43] The binding arrangement has been found to be a failure, not only from the rights perspective, but also from a utilitarian point of view because it actually pushed documented migrant workers into a state of irregularity. The equations devised to identify this process are based on the capacity to be regular and the benefits of being a documented worker against the costs of residing illegally – the probability of being deported and generalized rights' denial. Thus, with regard to the binding arrangement it was found that the capacity to remain documented was low as were the benefits, whereby being irregular meant a higher risk of deportation but much higher economic benefits (Ida 2004).

Judges continuously assume that the effects of granting rights are likely to place a heavy burden on Israel's borders. This is an important justification in the development of case law. The case of the 'binding arrangement' suggests that sometimes law does not have the expected effects. As long as migration is viewed as an individual decision that is based on economic pull and push forces, the incentives assumption is probably an adequate working hypothesis. However, if migration decisions are also socially embedded (family reunifications), made without choice (trafficking), or made because of grave economic circumstances (e.g. migrant workers who already paid high sums to arrange for their entry) – then the effects of granting rights may not be as significant as assumed. The references throughout this commentary indicate that procedures for assessing irregularity (whether those intended for regularization or for deportation) are only gradually becoming public and remain under judicial review. It is unlikely that further due process should encourage an irregular migration tidal wave. Neither should some substantive rights be expected to create such an incentive (school education for children), although others can be hypothesized to have a much greater effect (health, and clearly the right to work). Similarly, not all avenues of regularization are expected to have a significant influence on the number of migrants (e.g., the rehabilitation period for trafficked women, as it is assumed that women do not make decisions on being trafficked on the basis of the probability that they will be caught and sent to rehabilitation).[44]

Moreover, the denial of rights and the migrant's 'last resort' of remaining on irregularly also carry social costs, including employers' abuse of rights, wage undercutting of documented and domestic workers, and a general sense of lawlessness that damages the social fabric. Thus, the under-utilization of measures such as the 'closed sky' policy and amnesty also carry future costs and not only socially-favored deterrence.

Thus, it seems that further attention must be accorded at both policy frontiers: (a) identifying the appropriate balance of sovereignty and rights, (b) the assessment of how legal rights and duties affect future considerations of migrants, as well as local players. At present, Israeli immigration law is rapidly and developing patch-work. Attempts at rationalization and devising a general policy have thus

[43] On the binding arrangement see supra part (b)(ii) .

[44] It should be emphasized that I am not suggesting that according rights is a matter that should be decided merely on the basis of a utilitarian calculus.

far failed. This can be best demonstrated by the failed attempt at formulating an overreaching immigration policy in Israel. The report of the Rubinstein Committee, which was commissioned to initiate such a move has been described by the press as 'gathering dust'.[45] While its recommendations were contested, as is only natural with any draft for a comprehensive immigration policy, it could have been a preliminary move for initiating a necessary public debate on the distinction between irregular and regular migrants and its implications.

[45] See the legal report on Israel in the 2008 CARIM annual report.

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