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A MIGRANTS' BILL OF RIGHTS—BETWEEN RESTATEMENT AND MANIFESTO

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These comments first provide a general perspective on the nature of the proposed International Migrants Bill of Rights (IMBR) and then offer some specific observations on the current draft, in particular its provisions on the subject of equality or nondiscrimination, including but not limited to Article 2.

1.

An international migrants' bill of rights could be conceived in a number of ways, each of which would make an important contribution. It could supply a restatement of existing international law on the rights of migrants, compiling and collating provisions from different human rights instruments into a central document. It could flesh out the details of existing instruments by working out the migrant-specific consequences of the more generally stated principles that they contain. Instead, while suppressing detail, it could articulate an aspirational blueprint for the future negotiation of a migrant-specific human rights treaty that goes beyond the rights that existing instruments afford. Or it could amount to a manifesto, a public statement of the ideals and goals of a political movement.

Each of these models suggests, though it does not require, an appropriate form. Restatements often list governing rules accompanied by commentary clarifying some of their ambiguities and documenting the sources of the rules. An elaboration of migrant-specific consequences would presumably identify the generally applicable rules and exhibit the reasoning by which the more detailed rules particular to migrants were deduced. Aspirational blueprints, such as the Universal Declaration of Human Rights, often set forth principles at a level of generality to which states can tentatively agree, postponing the finer-grained questions necessary to give those principles practical operation for later negotiation and consent. A manifesto addresses itself to a wider audience and can leap beyond the existing commitments of states to unaccustomed principles that people should adopt in the future; manifestos often include polemical reasoning about why those principles

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should be adopted (as opposed to arguments that those principles are already in force).

Against this background, how should the draft IMBR be understood? It has elements of all the models just discussed. It currently appears, however, to be a manifesto in the shape of a restatement.

2.

In evaluating a human rights instrument, it may be important to bear in mind three possible aspects of a positive human rights norm.¹ First, a norm that acquires positive status through the agreement of states possesses a *consensual* aspect resulting from their participation in the adoption of the text and/or their ratification of the instrument as binding upon them. Second, the norm possesses a *suprapositive* aspect, to the extent that it gives effect in positive law, directly or indirectly, to extralegal normative conceptions regarding the rights of human beings. Third, the norm may possess an *institutional* aspect, as a positive legal rule imposing duties on government actors, possibly subject to review by the courts or other bodies. Enforceable rules may need to be designed in a manner that facilitates compliance by the dutyholders and effective oversight. Aspirational instruments that neglect institutional concerns may need to be supplemented considerably if they are to be converted into effective legal rules.

We may rightly begin from the deduction that migrants are human beings, and therefore, they have all the universal rights that attach to the human person. This deduction is correct as far as it goes, and it states a truth that non-migrants and states may be prone to ignore or deny. Recalling this truth and making explicit its consequences would serve an important purpose.

Nonetheless, identifying the universal rights that attach to the human person is not always an easy task. Human rights instruments may aid in this inquiry, but several caveats apply. First, human rights instruments do not always recognize a particular right universally: they often articulate certain rights as possessed only by a limited category of persons, such as citizens or residents or persons lawfully within the state's territory. Second, human rights instruments often have express or implied limitations as to their overall scope: they address the rights of persons within the state's territory, persons subject to the state's jurisdiction, or persons connected to the state in some other way. Everyone has human rights, but at a given moment any particular person's rights have practical relevance only with regard to a limited number of states. Third, some human rights instruments articulate broad principles rather than enforceable rules, and accordingly have not been drafted precisely enough to identify the limits of those principles. Thus, putting aside the

1. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1866-72 (2003) (discussing these aspects with regard to individual rights provisions of constitutions and human rights treaties).

fact that not all states have agreed to the content of all human rights instruments, compiling a restatement of migrants' rights that codifies the positive data supplied by existing human rights instruments would require conscious attention to the limitations contained in each of them.

A proposed Bill of Rights can go beyond such a positive compilation. It can call for the abandonment of certain limitations contained in prior instruments. Different types of reasons could be given for such modifications. It could be shown that the prior instruments are contradictory and that provisions they already contain entail a broader set of rights for migrants than their drafters recognized. Or it could be argued that the current limitations are normatively unacceptable, so that positive rules should be modified on suprapositive grounds. Or states might be persuaded that their own interests, or the interests of some relevant subset of states, would be better served by consenting to greater protection for migrants' rights. Arguments of this kind, or sufficient arguments of some other kind, would help the proposal to represent more than the subjective choices of its drafters.

Article 19(2) of the draft IMBR exhorts international bodies to invoke its provisions in construing the obligations of states under existing human rights instruments. In doing so, Article 19(2) does not distinguish between the provisions of the draft IMBR that accurately restate the content of existing human rights instruments, the provisions that openly innovate, and the provisions that upon closer examination may be found to innovate without saying so. Given that the innovations of the draft IMBR do not currently rest on the consent of states, any use of them would be justified only by the inherent persuasive force of the reasoning that supports them. Conclusory assertions that a particular rule is based on the inherent dignity of migrants do not contribute very much in the way of persuasive force.

3.

The definition of migrant in Article 1(1) is "purposefully broad and inclusive." It includes everyone except persons who are within a state of which they are a citizen or national. That apparently includes migrants of all kinds: legal or illegal, permanent or temporary, private, official or military. From one perspective this broad definition is entirely appropriate, because all of these "migrants" are human beings with human rights, and none of them should be tortured by any state. But it makes the elaboration of an instrument that takes into account the differing situations of all the people it purports to address—including tourists, foreign diplomats, and members of foreign armed forces—extremely challenging.

The draft IMBR includes rights that, unlike the right not to be tortured, might not be owed by all states to all persons. Some persons might properly claim such rights against their own state of nationality, or their state of lawful residence, rather than against the state in which they are present for the

moment. Sometimes articles of the draft obscure this problem by declaring a right and then failing to specify which state owes the migrant the right. Other articles or paragraphs do specify the state, but may do so in ways that require additional justification.

Compare, for example, Article 16(2) and Article 10(3). The former provides: "Migrants who have not yet gained citizenship in their host country shall maintain the citizenship of their country of origin and should as far as possible enjoy all the rights and privileges of citizens of their country of origin." This paragraph appears to articulate a right that migrants outside their country of origin can assert against their country of origin. The content that it guarantees is ambiguous and not clarified by the Commentary; the extent to which it guarantees whatever content it covers ("should as far as possible") is also ambiguous. Still, it makes clear that migrants should be able to look to their states of nationality for some of their rights. It may or may not entail a mandate that states should permit their nationals who reside overseas to vote in national elections.

Meanwhile, Article 10(3) provides: "States should facilitate migrants' participation in the civil and political life of their communities and in the conduct of public affairs." The Commentary indicates that this paragraph is intentionally indeterminate as to the modes of participation that it encourages, but the Commentary does not call attention to the ambiguity of the phrase "their communities." It seems that the paragraph relates primarily to alien suffrage and its lesser substitutes, which facilitate the participation of resident non-nationals in the political life of the state where they reside. However, it does not say explicitly that it applies only to *resident* migrants, and it does not specify whether the right extends to undocumented (i.e., unlawfully present) residents or only to lawfully resident migrants.²

4.

The second sentence of Article 2(1) asserts: "Migrants are entitled to the equal protection of the law on the same basis as nationals of the State in which they reside." Is this simply a drafting error, reflecting inattention to the broad definition of migrant? Or are temporarily present migrants *not* entitled to equal protection on the same basis as nationals?³ Article 2 appears to

2. Undocumented residents are permitted to vote in municipal elections in Takoma Park, Maryland. The draft IMBR and its Commentary do not define the term "undocumented," but context makes clear that it refers to unlawfully present individuals and not individuals who are lawfully present but have somehow lost or failed to obtain the documents to prove it. *Cf.* International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW), arts. 43(1)(d), 61(1), 62(1), G.A. Res. 45/158, U.N. Doc./A/Res/45/158 (Dec. 18, 1990), available at <http://www2.ohchr.org/english/law/cmw.htm>, (defining workers who are "non-documented" or "in an irregular situation").

3. The language could also be interpreted as saying that nonresident migrants are entitled to equal protection of the law in a foreign state on the same basis as the nationals of their home state. Although that set of words is not literally meaningless, it would make no sense as a norm.

regulate both discrimination between different categories of migrants and discrimination between migrants and nationals. Article 2(2) goes on to impose a three-part standard of legitimacy of purpose, objective justification, and reasonable proportionality for separating permissible distinctions from forbidden discriminations.⁴ The Commentary gives this standard some migrant-specific substance by asserting that the degree of justification required by reasonable proportionality should increase “as a migrant’s contact and connection with the host State increase.”⁵

Presumably that criterion gives some basis for treating tourists, foreign diplomats, and visiting members of foreign armed forces less favorably than lawfully resident migrants. What about undocumented migrants? Are their contacts and connections to be judged as equivalent to those of otherwise similarly situated lawfully present migrants? Article 2 and its Commentary are silent or ambiguous on the question of how unlawful presence affects evaluations of proportionality. In contrast, some other provisions of the draft IMBR make explicit their application—or non-application—to undocumented migrants. For example, the Commentary to Article 4 clarifies that the right to due process applies to migrants without lawful status;⁶ Article 5(3) explicitly regulates removal procedures for a migrant “whether or not lawfully within its territory”;⁷ Article 6(1) applies to detention “irrespective of the migrant’s legal status”;⁸ the Commentary to Article 11(2) speaks to the situation of “[u]ndocumented pregnant women”;⁹ Article 13(7) makes the preceding labor rights applicable to migrants “regardless of their legal status”;¹⁰ whereas Article 18(4) addresses derivative family admission rights only in a country in which a migrant “is lawfully settled.”¹¹ Moreover, the Commentary to Article 17 distinguishes between primary education and secondary education, finding it at least potentially nondiscriminatory for the state of residence to exclude “children of illegal migrants” from secondary education on grounds of expense.¹² Here, it appears, unlawful status is a legitimate criterion for allocating government services. This example counteracts the impression that some of the other provisions of the draft IMBR

4. The Commentary expressly recognizes that adoption of the “reasonable proportionality” requirement amounts to the choice of a more demanding standard employed under some human rights instruments instead of a lower standard employed under other human rights instruments. It asserts that the higher standard is “optimal,” but it does not explain why. The mere fact that a standard makes it harder for states to adopt policies unfavorable to migrants does not make it *per se* superior to another standard.

5. IMBR Network, *International Migrants Bill of Rights: A Commentary*, 24 GEO. IMMIGR. L.J. 411, 425 (2010) [hereinafter *Commentary*].

6. *Id.* at 428-33.

7. IMBR Network, *International Migrants Bill of Rights: Draft in Progress*, 24 GEO. IMMIGR. L.J. 399, 401 (2010) [hereinafter *IMBR*].

8. *Id.* at 402.

9. *Commentary*, *supra* note 5, at 461.

10. *IMBR*, *supra* note 7, at 406.

11. *Id.* at 407.

12. *Commentary*, *supra* note 5, at 485-86.

may create—that states have only two choices with regard to undocumented migrants: either remove them or treat them as if their presence was lawful. On what other occasions, then, would denial of government benefits based on unlawful status be non-discriminatory?

Meanwhile, “[m]igrants” are guaranteed a set of economic and social rights by Article 11.¹³ In particular, Article 11(3) provides that: “Migrants shall be provided access to medical care, social security, and an adequate standard of living, including, food, clothing, and housing.”¹⁴ The Commentary maintains that these are core economic and social rights not subject to the tolerant standard of “progressive realization” (para. 2), but also suggests that what Article 11(3) ensures is merely non-discrimination in access to those rights (paras. 9, 10).¹⁵ Non-discrimination, as in Article 2, requires reasonable proportionality and permits the state to take into consideration “among other factors, the degree of a migrant’s connection to the host State.”¹⁶

I am not sure how much difference there is between saying that lawfully but temporarily present migrants—foreign diplomats, tourists, foreign journalists—have rights against the state in which they are currently present under Article 11(3) as so defined, and saying that they have no such rights and should direct their expectations toward their home country. Perhaps “reasonable proportionality” would permit the state to ignore altogether such questions as whether reasonably priced hotels are available, even if vacationers have a nominal right to access to housing.¹⁷

Article 11(3) is similarly ambiguous about the rights of undocumented migrants, who may intend a longer presence. The Commentary asserts that “[t]his paragraph is at the forefront of State practice by guaranteeing a form of non-discrimination to all migrants.”¹⁸ Does that language entail rejection of the view that states can legitimately use unlawful status as a criterion in allocating housing? If so, with what justification? If not, exactly what position does the draft IMBR take on this subject?

13. *IMBR*, *supra* note 7, at 404.

14. *Id.*

15. *Commentary*, *supra* note 5, at 460-61, 463.

16. *Id.* at 463.

17. The Migrant Workers Convention recognizes an equal right to access to housing for many lawfully admitted workers, but expressly excludes “project-tied workers” and “specified-employment workers” from a right to participation in social housing schemes. *See ICRMW*, *supra* note 2, at arts. 43(1)(d), 61(1), 62(1). “Project-tied workers” are those temporarily admitted to work on a specific project; “specified-employment workers” include a large class of workers temporarily admitted for purposes of employment. *Id.* at art. 2(2)(f), 2(2)(g). Officials of foreign governments are not covered by the ICRMW. *Id.* at art. 3(a). Apparently, however, “project-tied workers” should not exist at all, because the Commentary to Article 11(6) of the draft IMBR clarifies that it seeks to prohibit the practice of admitting a migrant solely for the purpose of working for a particular employer as *per se* abusive.

18. *Commentary*, *supra* note 5, at 463.

5.

Article 2(2) of the draft IMBR expressly provides that distinctions among migrants in the regulation of admission and exclusion must be justified under a standard of “reasonable proportionality.”¹⁹ The Commentary rejects the idea that states are entitled to a margin of appreciation in evaluating their compliance with this requirement.

The imposition of this standard as a universal requirement for admission criteria is an innovation of the draft. Initially, it is unclear whether this provision is undermined by an unintended conflict with the definition of “migrant,” because would-be migrants who are still within their state of nationality and applying for visas or attempting to board airplanes are outside the coverage of the definition.²⁰ Does the restriction on admission policies apply only to migrants who have already succeeded in arriving in the receiving state, or at least have succeeded in leaving their own state by boarding an aircraft or ship, and if so why should we stop there? A similar problem arises with regard to Article 5 on removal. Article 5(1) regulates actions by which a migrant is “removed from the territory of a State, or refused entry at the borders of a State.” Article 5(3) provides fuller procedures for “seeking to remove a migrant whether or not lawfully within its territory,” and apparently this means “within its territory, whether or not lawfully so,” because the Commentary asserts: “Paragraph 3 affirms the basic procedural limitations on the ability of States to remove migrants already within their territory. These provisions, unlike paragraph 1, do not regulate exclusion or other decisions made at the border *or outside the territory of States.*”²¹ Does the latter phrase then mean that Article 5(1) does apply to admission decisions made prior to arrival at the state’s border, despite its language, or even despite the definition of “migrant”? In particular, does Article 5 apply to visa denials and refusals of permission to board airplanes, as well as refusals at the border?

Next, Article 5(5) provides that migrants shall not be “deported or refused entry at the border of a State” for engaging in protected activities. The Commentary describes this rule as “affirm[ing] the specific content of the prohibition on nondiscrimination as well as migrants’ civil, political, cultural and social rights *in the context of exclusion and removal,*”²² thus apparently omitting the different context of denial of visas outside the territory of the

19. *IMBR*, *supra* note 7, at 400.

20. The Migrant Workers Convention avoids this problem by defining “migrant worker” as including a person who “is to be engaged” in employment in a foreign state, and by making its provisions applicable prior to departure from the state of nationality. *ICRMW*, *supra* note 2, at arts. 1(2), 2(1). It does not, however, recognize the broad right of equality proposed in the draft IMBR.

21. *Commentary*, *supra* note 5, at 435.

22. *Id.* at 436 (emphasis added). Tangentially, were economic rights omitted from this list by inadvertence? Or for some normative reason? Or as a recognition, rare in the draft IMBR, that Article 2(3) of the ICESCR permits developing states to limit the economic rights of non-nationals?

state. Thus, Article 5 also raises the question of whether the draft IMBR's nondiscrimination principle reaches would-be migrants or only those who have already migrated. Perhaps, however, all these conflicts are unintentional, and the proposal to subject admission policies to a proportionality test does not depend on the fortuity of whether the would-be migrants have left their home country.

Even if Article 2(2) does make this fortuity determinative as a matter of definition, the question would remain how it applies to migrants who present themselves at the border of states without a necessary visa because they applied for one and were denied. Can they be refused *ipso facto* for lack of a visa, because that procedural requirement satisfies Article 2(2), or should we look behind the lack of visa to the reasons why the visa was denied? In the latter case, those earlier reasons are the basis on which the migrants, who are now rights-holders under Article 2(2), have been refused entry, and those reasons must be nondiscriminatory.

What justifies the proposal in Article 2(2)? The Commentary asserts that its test "represents the optimal compromise between protecting sovereign functions that predate the development of international human rights law and safeguarding the welfare of migrants." One might ask why the goal of "safeguarding the welfare of migrants" was universally implicated by admissions policies. Is the assumption that "fundamental human dignity" entails that everyone on earth has a *prima facie* liberty of entry to every country, absent sufficient countervailing interests? (The claim that individuals should not be denied entry for degrading reasons such as racial discrimination might justify some equality-based limits on admission policies, but would not go nearly so far as draft Article 2(2) does.) The vision of universal freedom of travel has some attraction in a globalizing world,²³ but states have been consistently reluctant to endorse the concept of a general right of entry. Taking Article 2(2) together with Article 11(1), it appears that all would-be labor migrants have a *prima facie* liberty of access to the labor market of any state.

Nervous as states may be about applying equality to rights of entry in principle, they would be especially concerned about submitting such a right to third-party adjudication. As previously mentioned, Article 19(2) of the draft IMBR exhorts international bodies to invoke its provisions in construing the obligations of states under existing human rights instruments. The result would be that not only measures affecting refugees and family members of existing state residents, but all measures limiting access to the state's territory, on grounds such as public health, economic policy, congestion, or fiscal capacity, would be subject to independent review, with no margin of appreciation, by an external body. It may require additional

23. Cf. GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 125-28 (1996) (considering the possibility of a *prima facie* constitutional liberty to enter the United States).

argument to demonstrate why such a regime would strike an appropriate balance between the rights and welfare of migrants and the rights and welfare of non-migrants.

In closing, I congratulate the authors on the progress that they have made in this valuable project. I would also emphasize that some of my comments prompted by the draft may lose their pertinence as that project develops further.