

Summer 2017

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Recommended Citation

Lisa Reinsberg and Brittany West, *Advancing Migrants' Rights in the United States Using International Law*, 40 HASTINGS INT'L & COMP.L. Rev. 177 (2017).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol40/iss2/1

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Advancing Migrants' Rights in the United States Using International Law

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On September 23, 2016, more than 100 lawyers, advocates, and students gathered in San Francisco for a full-day symposium, *The Human Rights of Migrants: Challenges and Opportunities in California*.¹ They came together to discuss the current threats to migrants' and asylum seekers'² fundamental rights and to learn about the opportunities for enhancing their advocacy through support from regional and international human rights protections. We at the International Justice Resource Center (IJRC)³ committed to organizing this conference, in close partnership with the Center for Gender & Refugee Studies, based on interest from local public interest and legal aid organizations and in view of the increasingly difficult circumstances for migrants and those working to defend their rights in the United States.

Worldwide, an estimated 24.5 million people are refugees or asylum seekers⁴ and 244 million are migrants⁵ living or working in countries other than their countries of citizenship. The United States is home to more than 42 million migrants, including at least 11 million undocumented migrants,

1. The symposium agenda, speaker bios, background materials, and other documentation are available at *The Human Rights of Migrants: Challenges and Opportunities in California*, <http://bit.ly/migrantsrightsCA>.

2. This article will use the term "migrants" to refer collectively to immigrants, including non-immigrant visa holders, refugees and asylum seekers, regardless of status, but not to internally displaced persons.

3. Learn more about IJRC's work on our website, International Justice Resource Center, <http://www.ijrcenter.org/>.

4. UNHCR, Global Trends: Forced Displacement in 2015, at 2, <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>.

5. United Nations Department of Economic & Social Affairs, International Migration Report 2015, at 1, <http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf>.

who collectively make up over 13 percent of the national population.⁶

The current political and social climate in the United States includes the voices of many who resent, fear, or distrust migrants or who want to be seen as prioritizing “law and order.” Even in relatively favorable times, migrants’ identity as foreigners, language fluency, status under the law, economic insecurity, or membership in minority ethnic or religious communities makes them, as a group, particularly vulnerable to abuse at the hands of government and private actors. Such abuses may take place at the border, in detention centers, in the workplace and may be more severe, or more prevalent, for migrants who are additionally vulnerable by virtue of being women, children, persons with disabilities, elderly, LGBTQ, indigenous, or ethnic minorities.

The purpose of this article is to lay out the basic international human rights structures and protections relevant to preventing or remedying abuses of migrants’ rights in the United States.

I. The Relevance of a Human Rights Approach

The “human rights framework” includes a set of principles defining individual (and group) freedoms and government obligations, as well as the bodies that enforce or oversee implementation of those principles. The human rights framework is based in international human rights law, which is created by governments, evolves based on State practice and progressive interpretation, and is shaped and made meaningful, in large part, by advocates. It is relevant to efforts to address discrimination, the rights of workers, conditions of detention, violence against women, and other issues relevant to the lives of migrants because its protections may be stronger than domestic law, such that it provides a complementary set of advocacy tools and opportunities, and migrants’ rights are recognized as human rights.

When local and national authorities are unwilling or unable to ensure respect for migrants’ human rights, the international arena can be an important forum for increasing pressure for reform and gaining concrete advances, such as access to a particular detention center or a change in policy or practice. Human rights bodies, courts, review processes, and experts may issue reports, decisions, or recommendations that may be leveraged for the purpose of advocacy at the national or local level.

6. Migration Policy Institute, Migration Information Source, Frequently Requested Statistics on Immigrants and Immigration in the United States (Apr. 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized Immigrants>.

Moreover, in recent years, the international community's attention has been increasingly drawn to the plight of refugees and migrants, and not just those from Syria or Central America. Our region's key human rights body, the Inter-American Commission on Human Rights (IACHR), has issued four extensive reports on migration and migrants' rights since 2011,⁷ and in recent months the IACHR has called on States to prevent hate speech and hate crimes against migrants,⁸ while United Nations human rights experts reiterated the international legal prohibition on detaining child migrants.⁹ The latest vindication of migrants' rights at the supranational level came in the form of an IACHR decision finding that international human rights law requires the United States to ensure the same level of workplace protections for undocumented migrants as are afforded their documented coworkers.¹⁰ Such statements and decisions can be useful components in a larger advocacy strategy aimed at changing government's behavior or regulatory practices.¹¹

7. Inter-American Commission on Human Rights ("IACHR"), Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System (2015), <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>; IACHR, Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America (2015), <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>; IACHR, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico (2013), <http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf>; IACHR, Report on Immigration in the United States: Detention and Due Process (2010), <http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>.

8. Press Release, IACHR, International Migrants Day: *Measures to prevent all types of hate speech and advocacy of hatred that tend to incite violence or any other illegal acts against migrants are critical to stop hate crimes* (Dec. 18, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/190.asp.

9. Press Release, Office of the High Commissioner for Human Rights, Children and families should never be in immigration detention – UN experts (Dec. 14, 2016), <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E>.

10. IACHR, Merits Report No. 50/16, Case 12.834, Undocumented Workers (United States of America) (Nov. 2016), <http://www.ijrcenter.org/wp-content/uploads/2016/12/IACHR-Undoc-Workers-USA-Merits-Report-2016.pdf>. (For a summary and analysis of this decision, visit <http://www.ijrcenter.org/2017/01/04/inter-american-commission-finds-undocumented-migrants-entitled-to-workplace-protections/>).

11. For examples and tips on engaging with supranational human rights bodies to protect fundamental rights in the United States, see International Justice Resource Center, Preventing and Remediating Human Rights Violations through the International Framework: Opportunities for Attorneys and Advocates in the United States (2013), <http://www.ijrcenter.org/wp-content/uploads/2013/06/Human-Rights-Advocacy-Manual-U.S.-2013.pdf>; International Justice Resource Center, Advocacy before the Inter-American System: A Manual for Attorneys and Advocates (2014), <http://ijrcenter.org/wp-content/uploads/2014/03/Manual-Advocacy-before-the-Inter-American-System-2014.pdf>; Columbia Law School Human Rights Institute, Using Thematic Hearings at the Inter-American Human Rights Commission to Advance U.S. Human Rights Accountability: A Resource for the Bringing Human Rights Home Lawyers' Network (2016), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/iachr_thematic_hearings_resource_1_0.pdf;

II. The Human Rights of Migrants

Migrants are generally entitled to the same human rights as any other person, including citizens, regardless of their immigration status.¹² While international human rights law specifically addresses migrants' rights in very few treaties,¹³ most major human rights conventions require States Parties to respect and ensure the human rights of all individuals subject to their jurisdiction, regardless of national origin, race, religion, or other status.¹⁴ Any difference in treatment must serve a legitimate government interest and be proportional to achieving that aim.¹⁵

Other common treaty provisions relevant to the rights of migrants include the rights to: exit and enter one's own country, a nationality, freedom from torture, respect for family ties and family unity, and due process in immigration proceedings. In addition to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, some regional human

Columbia Law School Human Rights Institute, Engaging U.N. Special Procedures to Advance Human Rights at Home: A Guide for U.S. Advocates (2015), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/special_rapporteurs_report_final.pdf.

12. See United Nations Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, UN Doc. HRI/GEN/1/REV.9 (VOL.I) (Apr. 11 1986), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6625&Lang=en; Human Rights Council, Resolution 23/20, Human Rights of Migrants, UN Doc. A/HRC/RES/23/20 (June 26 2013), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/23/20. See also, United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families, UN Doc. CMW/C/GC/2 (Aug. 28 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CMW%2fC%2fGC%2f2&Lang=en; Commissioner for Human Rights, Positions on the Rights of Migrants in an Irregular Situation ¶¶ 6-12 (2010), <https://wcd.coe.int/ViewDoc.jsp?id=1640817>; International Justice Resource Center, Immigration & Migrants' Rights, <http://www.ijrcenter.org/thematic-research-guides/immigration-migrants-rights/>.

13. See International Convention on the Protection of the Rights of Migrant Workers and Members of their Families GA Res. 45/158, Dec. 18, 1990, OHCHR; African Union Convention Governing Specific Aspects of Refugee Problems in Africa CAB/LEG/24.3, Sep. 3, 1969, CAB/LEG/24.3; International Labour Organization Migrant Workers Convention, 1975 (No. 143), Dec. 9, 1978, Geneva 60 ILC (June 24, 1975); International Labour Organization, Migration for Employment Convention (Revised), 1949 (No. 97), Jan. 22, 1952, Geneva 32 ILC (Jul. 1, 1949).

14. See, e.g., International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171; American Convention on Human Rights art. 1, Nov. 22, 1969, 1144 U.N.T.S. 144.

15. See, e.g., Committee on Elimination of Racial Discrimination (CERD), *General Recommendation No. 30: Discrimination against non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3 (19 Aug. 2004).

rights instruments also explicitly include a right to seek and obtain asylum.¹⁶

However, migrants' human rights and, especially, their freedom of movement may be limited in some circumstances. States are permitted to manage migrants' entry, exit, and stay on their territory, subject to some restrictions.¹⁷ States may also limit migrants' rights with regard to voting and standing for political office.¹⁸ With regard to economic, social, and cultural rights, international instruments often allow States Parties to guarantee fewer privileges to migrants or to deny some rights to unauthorized migrants.¹⁹ For example, article 2(3) of the International Covenant on Economic, Social and Cultural Rights indicates, "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

Each country's particular legal obligations – and the remedies available to an individual migrant – will depend somewhat on which treaties the State has ratified. Whatever rights are guaranteed to migrants in a particular State, international human rights law demands that the government respect, protect, and fulfill those rights. This means not committing violations themselves, preventing and punishing violations by others, and taking the steps required to make it possible for people to exercise their human rights.²⁰

16. See, e.g., African Charter on Human and Peoples' Rights art. 12(3); American Convention on Human Rights art. 22(7), Nov. 22, 1969, 1144 U.N.T.S. 144.

17. The right to seek asylum is a recognized human right, and international law prohibits *refoulement*, or the return of a migrant to a country where he or she is at risk of being subjected to torture or serious human rights violations. Once a migrant has been lawfully admitted, the State may generally not restrict his or her freedom of movement, residence, or exit. See, e.g., United Nations Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/REV.9 Vol. 1 (April 11, 1986), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6625&Lang=en; María-Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship* 34(1) (2015), *Refugee Survey Quarterly* 11-42; International Justice Resource Center, *Asylum & the Rights of Refugees*, <http://www.ijrcenter.org/refugee-law/>.

18. See, e.g., International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 41, 42(3); International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171; United Nations Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/REV.9 Vol. 1 (April 11, 1986), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6625&Lang=en.

19. See, e.g., European Social Charter 1961, arts. 13(4), 19; *but see*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43.

20. See, e.g., International Justice Resource Center, *Overview of the Human Rights*

III. Oversight and Enforcement Mechanisms

A system of supranational monitoring bodies and courts oversee States' adherence to their human rights obligations. These mechanisms include: universal bodies with the potential or actual authority to monitor human rights in every country of the world and hemispheric, continental or other regional bodies. Of course, various actors at the national level can also play a role in implementing and enforcing human rights law.

The United Nations has 193 Member States and oversees human rights through a variety of mechanisms. Some of these apply to all UN Member States and others apply only to the States who have agreed to participate in the specific mechanism. There are four general categories of UN human rights entities: 1) the ten treaty-based bodies that oversee implementation of specific human rights conventions in the States that have ratified them; 2) "special procedures," appointed independent experts whose monitoring is focused on a specific theme or country; 3) the Universal Periodic Review, through which UN Member States review one another's human rights practices; and, 4) policymaking and discussion bodies like the UN Human Rights Council and General Assembly, which are composed of government delegates, who help set standards and identify issues of concern.

One of the ten treaty bodies, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families,²¹ is specifically focused on migrants' rights. Two special procedures, the Special Rapporteur on trafficking in persons, especially women and children²² and the Special Rapporteur on the human rights of migrants,²³ also address rights relevant to migrants.

The structures at the regional level are very similar, and also include treaty-based bodies, special procedures, and policy setting bodies. The three main, robust regional human rights systems are in Africa, the Americas, and Europe.²⁴ Both the African and Inter-American systems

Framework, <http://www.ijrcenter.org/ihr-reading-room/overview-of-the-human-rights-framework/>.

21. *See, e.g.*, International Justice Resource Center, Committee on Migrant Workers, <http://www.ijrcenter.org/un-treaty-bodies/committee-on-migrant-workers/>.

22. International Justice Resource Center, Special Rapporteur on Trafficking in Persons, <http://www.ijrcenter.org/un-special-procedures/special-rapporteur-in-trafficking-in-persons-especially-women-and-children/>.

23. *See, e.g.*, International Justice Resource Center, Special Rapporteur on the Human Rights of Migrants, <http://www.ijrcenter.org/un-special-procedures/special-rapporteur-on-the-human-rights-of-migrants/>.

24. *See* International Justice Resource Center, Regional Systems, <http://www.ijrcenter.org/regional/>.

have established special mechanisms to monitor migrants' rights in their regions.²⁵ Each system has two bodies, with complementary functions, and a different number of States have agreed to participate in each body.

Each regional and universal human rights mechanism has separate and distinct functions. However, each engages in at least one of the following activities: adjudicating State responsibility for violations alleged in individual complaints, periodic reviews based on State reporting, emergency protection, country visits, interpreting treaties through advisory opinions or general comments, general human rights promotion, and policy recommendations.

IV. The United States' Human Rights Obligations

The United States has human rights obligations at both the universal and regional levels. Its legal commitments include the United Nations treaties on civil and political rights, torture, racial discrimination, and certain rights of children.²⁶ These instruments include provisions particularly relevant to migrants, such as the prohibitions of torture and slavery, the right to liberty, right to due process, right to nondiscrimination, and the right to freedom of movement. The bodies charged with overseeing implementation of each of these four treaties review the United States' progress through periodic reporting, in which civil society may also participate.²⁷ The United States has

25. See International Justice Resource Center, Rapporteurship on the Rights of Migrants, <http://www.ijrcenter.org/regional/inter-american-system/rapporteurship-on-the-rights-of-migrants/>; International Justice Resource Center, Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, <http://www.ijrcenter.org/regional/african/special-rapporteur-on-refugees-asylum-seekers-migrants-and-internally-displaced-persons/>.

26. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 212; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, May 25, 2000; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May 25, 2000, Adopted by G.A. Resolution A/RES/54/263.

27. See International Justice Resource Center, Human Rights Committee, <http://www.ijrcenter.org/un-treaty-bodies/human-rights-committee/>; International Justice Resource Center, Committee Against Torture, <http://www.ijrcenter.org/un-treaty-bodies/committee-against-torture/>; International Justice Resource Center, Committee on the Elimination of Racial Discrimination, <http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-racial-discrimination/>; International Justice Resource Center, Committee on the Rights of the Child, <http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-rights-of-the-child/>.

not, however, accepted any of these bodies' individual complaints processes. Separately, its human rights practices are also scrutinized through the Universal Periodic Review and through the monitoring, including country visits, of UN special procedures.²⁸

As a member of the Organization of American States (OAS), the United States is also among the countries that adopted the American Declaration of the Rights and Duties of Man. While this instrument is not generally considered legally binding in and of itself, it does form the basis of the Inter-American Commission on Human Rights' review of human rights practices in the United States. Specifically, IACHR has jurisdiction to review the United States' compliance with the American Declaration because the United States is a party to the OAS Charter.²⁹ The IACHR accepts complaints against the United States by individuals (and groups) alleging violations of the American Declaration, making it the only formal, supranational, individual human rights complaint process in which the U.S. participates. The IACHR has heard several complaints against the United States related to the human rights of migrants.³⁰

V. Choosing a Strategy

In developing a human rights advocacy strategy, a key component is deciding which systems and bodies to approach. While the United States' ratification of human rights treaties and acceptance of human rights oversight has been limited, advocates do have options. Some of the considerations include the limitations on each body's jurisdiction or mandate, the outcome sought, the timing and duration of each process, what procedural requirements apply, and any practical or logistical barriers (such as language or location) involved. For example, only the IACHR and UN special procedures are authorized to address emergency situations of potentially irreparable harm, and to carry out country visits. The IACHR is

28. See, e.g., UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: United States of America*, UN Doc. A/HRC/WG.6/22/USA/1 (Feb. 13, 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/024/66/PDF/G1502466.pdf?OpenElement>.

29. See, e.g., IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States ¶ 53 (Mar. 23, 2015), <http://www.oas.org/en/iachr/decisions/2015/USPU12833EN.pdf>.

30. See, e.g., IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States of America, <http://www.ijrcenter.org/wp-content/uploads/2016/12/IACHR-Undoc-Workers-USA-Merits-Report-2016.pdf>; IACHR, Report No. 81/10, Merits (Publication), Case 12.562, Wayne Smith, Hugo Armendariz, United States of America, <http://www.oas.org/en/iachr/decisions/merits.asp>.

unique in deciding individual complaints and in holding public hearings on cases and issues of concern. However, petitioners must generally satisfy various prerequisites, including exhausting national court proceedings, before submitting a complaint to the IACHR. The UN treaty body reviews and Universal Periodic Review occur approximately every four years, but lead to extensive and detailed recommendations for changes in State policy and practice.

Of course, an additional key consideration is the extent of government participation. Advocates should educate themselves on the degree to which federal or local authorities participate in the relevant proceeding and what additional relationship building and advocacy will be required to make government engagement and implementation more likely.

International human rights advocacy can be a viable and useful strategy for those working on behalf of migrants, even (or especially) in challenging domestic political environments. Before engaging in such advocacy, however, advocates must be well versed in the opportunities, limitations, and challenges of the human rights framework.