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The Non-Legal Role of International Human Rights Law in Addressing Immigration

Lesley Wexler[†]

Current domestic and international law relating to immigration, particularly that favored by countries that draw large number of migrants,¹ tends to favor law enforcement over human rights approaches.² The response to September 11th has exacerbated this tendency to promote law enforcement and security paradigms at the expense of human rights frameworks both at home and abroad.³ In effect, this heightened attention to security means that many states focus on the control of movement across borders through measures such as enhanced penalties for trafficking and unlawful entry, as well as increased funding for border patrols,⁴ while they devote relatively few resources to the promotion and defense of migrants' human rights.⁵

Despite these tendencies, this paper contends that international law has contributed to the development of a human rights discourse and framework applicable to migrants. For instance, in the last twenty-five years, the international community crafted the UN Declaration on the Human Rights of Individuals Who

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¹ Jacqueline Bhabha, *Reforming Immigration Policy*, 24 *Boston Rev* (Summer 2005), available at <<http://bostonreview.net/BR30.3/bhabha.html>> (last visited Jan 12, 2007).

² For example, the recent Protocol to Prevent, Suppress and Punish Trafficking in Persons utilizes a law enforcement approach. See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, Annex II (Dec 12, 2000), available at <http://www.uncjin.org/Documents/Conventions/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf> (last visited Jan 22, 2007).

³ Sandesh Sivakumaran, *The Rights of Migrant Workers One Year On: Transformation or Consolidation?*, 36 *Georgetown J Intl L* 113, 115 (2004).

⁴ Patrick A. Taran, *Human Rights of Migrants: Challenges of the New Decade*, 38 *Intl Migration* 7, 11 (2000).

⁵ *Id* at 12.

Are Not Nationals of the Country in Which They Live, the UN Convention on the Protection of the Rights of All Migrant Workers and Their Families, and the Recommended Principles and Guidelines on Human Rights and Human Trafficking. International institutions also created the Special Rapporteur of the Commission on Human Rights on the human rights of migrants and hosted the 2001 World Conference Against Racism, Racial Discrimination and Related Intolerance.

Yet many lament the uselessness of soft law's aspirations, the difficulties of getting states to join treaties, and question whether treaties and other international law instruments constrain states' and individuals' behavior. For instance, Judge Sergio Garcia Ramirez declared in an advisory opinion dealing with undocumented migrants that "[a]nnouncing rights without providing guarantees to enforce them is useless. It becomes a sterile formulation that sows expectations and produces frustrations."⁶ This paper responds to such critics by suggesting that such concerns overlook some of international law's potentially important non-legal functions as well as its less traditional, more indirect movement into domestic practice. In particular, this paper hypothesizes that international human rights treaties that deal specifically with migrants' rights (hereafter referred to as "immigration human rights treaties") may provide some small but meaningful gains for migrants by: (1) influencing non-binding regional processes; (2) contributing to the development and dissemination of best practices; and (3) producing and codifying a human rights discourse. If such an account is correct, the emphasis on whether states formally adopt international law obscures some of the less obvious benefits of developing immigration human rights treaties and their related regimes.

This paper proceeds in three sections. First, it briefly sketches out the need for the protection of migrants' human rights. Rather than provide a lengthy defense of human rights, this paper presumes their general value as well as their value within the more particularized immigration context⁷ and instead identifies the more common and egregious human rights viola-

⁶ Advisory Opinion No. 18/03, *Juridical Condition and Rights of the Undocumented Migrants*, 69(h), Inter-Am Ct Hum Rts (Sept 17, 2003) (Ramirez concurring), available at <http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf> (last visited Jan 26, 2007).

⁷ While many scholars have lodged serious critiques of human rights, such as that they embody a western perspective, are too vague, and focus too heavily on political and civil rights rather than social and economic rights, this paper relies on those that have answered these critiques elsewhere.

tions faced by migrants. In so doing, this first section details some of the harms faced by all migrants, as well as those more relevant to trafficked and smuggled individuals.

This paper uses the push-pull hypothesis of immigration to document and explain the recent migration explosion. This theory suggests that receiving countries possess "pull" factors such as relative economic, social, and political advantages that draw migrants in whereas sending countries suffer economic, social, and political hardships that "push" migrants out.⁸ Given these forces, the international community unsurprisingly developed legal arrangements to deal with the implications of such widespread migration. The next section provides a brief history and some details about of a subset of these international arrangements, immigration human rights treaties and their related regimes.

In the final section, the article develops the three main hypotheses, and in so doing draws from three distinct literatures. First, the article suggests that treaties can be agenda-setting for non-binding regional processes. While political science scholars have begun looking at the effects of such processes more generally, few international law scholars address this phenomenon. This paper hopes to spur some interdisciplinary discourse by suggesting that nonbinding regional processes create a pathway by which international law may reach and influence even those states skeptical about joining international treaty regimes. Non-binding regional processes allow such states to discuss the ideas behind the treaties and cherry pick those provisions best suited to their internal conditions without forcing them to commit to the treaty itself.

Second, the article investigates the way in which immigration human rights treaties may contribute to the development and dissemination of best practices. In so doing, this paper draws on the best practices literature that emerged from the corporate context. While international law scholarship and international law practitioners have already incorporated the concept of best practices, this paper further develops the relationship between its theoretical foundations in domestic law and its application in the international human rights context.

⁸ Alejandro Portes and Jozsef Borocz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 Intl Migration Rev 606, 607 (1989).

Third, this paper conjectures that treaties assist in the production and codification of a human rights discourse. It relies on insights from psychology to demonstrate why language and rhetoric might guide state and individual behavior. It suggests that a change in the framing of the migration problem can alter actual practice. In particular, this paper looks at language's contribution to societies' pervasive moral disengagement from migrants and how that disengagement facilitates the violation of their human rights. It also explores language's potential to reverse this process of disengagement.

Finally, this paper concludes with a snapshot of Italian immigration policy as a case study. Italy provides a discrete example of how international treaties can influence domestic legislation and also highlights some of the difficulties in promoting and enforcing migrants' human rights. This section assesses the role of international law in guiding domestic legislation. It also provides some preliminary evidence about the limitations in implementing such legislation as well as documenting the tangible benefits provided to migrants.

I. INTRODUCTION: BACKGROUND AND HARMS

Migration poses frequent and significant problems for those that undertake it and those they leave behind. Currently, migrant workers and their families comprise about 80–97 million people.⁹ This number includes approximately four million smuggled migrants¹⁰ and another 600–800 thousand trafficked persons.¹¹ Those individuals that choose to migrate generally do so in the belief that migration will help them provide for the “safety, dignity and well-being of themselves and their families.”¹² The numerous reasons for this rapid expansion in migration include armed violence, ethnic and racial conflict, globalization, and environmental degradation in push countries.¹³ They also include greater employment and educational opportunities

⁹ Taran, 38 Intl Migration at 10 (cited in note 4).

¹⁰ United States Government Interagency Work Group, *Report: International Crime Threat Assessment 7* (2001), available at <http://www.unodc.org/unodc/en/speech_2001-01-30_1.html#N_2> (last visited Jan 12, 2007).

¹¹ Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Effort to Stop Human Trafficking*, 74 Fordham L Rev 2977, 2982 (2006); United States Department of State, *Trafficking in Persons Report 6* (2005).

¹² Taran, 38 Intl Migration at 12 (cited in note 4).

¹³ Id at 13.

as well as more expansive religious, political, social, and cultural freedoms in pull countries.

Migrant workers often exist on the margins of their new societies. The plight of migrant workers encompasses all sorts of problems: dangers inherent in smuggling or trafficking; violations of rights in law enforcement of border control; poor living conditions; forced labor; dirty, dangerous, and degrading working conditions; sexual, physical, and emotional abuse; and the inability to get redress from state officials.¹⁴ Even documented migrant workers must contend with employers who routinely charge illegal fees, violate overtime pay laws, and provide wages beneath contractual agreements—if they provide them at all. These migrants often suffer significant limitations on the freedom of their movement and high rates of work-related accidents and injuries.¹⁵

Numerous factors contribute to the discrimination, mistreatment, and violence that plague migrants. Domestic populations often blame migrants for lowering wages and increasing crime.¹⁶ Their presence seemingly threatens the perceived homogeneity or cohesiveness of a local population. Migrants' very "otherness" may facilitate their exploitation, as societies tend to overlook the mistreatment of those already meaningfully excluded from the community.¹⁷ Their foreignness makes them both easy to distinguish from local populations and wary of seeking police protection or legal redress because they fear expulsion or other mistreatment at the hands of the authorities.¹⁸ Such concerns are well founded—as in many places the authorities themselves often participate in human trafficking enterprises.¹⁹ Migrants' anxiety about status and limited legal protections

¹⁴ Jorge Bustamante, *Specific Groups and Individuals: Migrant Workers*, Report of the Special Rapporteur on the Human Rights of Migrants 12, E/CN.4/2006/73 (Dec 30, 2005).

¹⁵ Id. Such injuries stem from both their willingness to take riskier work and their limited understanding of safety warnings provided in a non-native language.

¹⁶ Thomas J. Espenshade and Katherine Hempstead, *Contemporary American Attitudes toward U.S. Immigration*, 30 *Intl Migration Rev* 535, 539–40 (1996).

¹⁷ See Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 *Ind J Global Legal Stud* 137, 146 (2006).

¹⁸ See International Labour Organization ("ILO"), International Organization for Migration ("IOM"), and Office of the UN High Commissioner for Human Rights ("OHCHR"), *International Migration, Racism, Discrimination and Xenophobia* 5 (Aug 2001).

¹⁹ LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 *Geo Wash Intl L Rev* 227, 234 (2003).

make community organizing, unionization, and other collective action difficult, if not impossible.²⁰ Because they cannot vote, are poorly organized, and fear government mistreatment, migrant workers possess limited opportunities to influence domestic legislation.²¹

Of particular note, although currently men slightly outnumber women, the trend is towards the feminization of migration. Both push and pull factors favor this shift. On the push side, gender inequality and discrimination often cause the burdens of poverty and armed conflict to fall disproportionately on women. On the pull side, employers prefer to fill domestic positions and service jobs with women who are thought to be more patient and more willing to silently suffer substandard working conditions.²² Such positions often provide less economic security and fewer benefits than other jobs available to migrants.²³ A similar shift can be detected in the increase in the number of child migrants.²⁴ Both trends are worrisome as the problems of migration are often compounded for women and children who may be trafficked for domestic labor or sexual exploitation.²⁵ In addition, many individuals are re-trafficked numerous times, creating a vicious cycle.²⁶

Empirical evidence suggests the widespread and endemic nature of the various harms experienced by migrants. The UN special rapporteur on the human rights of migrants recently

²⁰ See ILO, IOM, and OHCHR, *International Migration*, at 5 (cited in note 18).

²¹ See Leonard M. Hammer, *Migrant Workers in Israel: Towards Proposing a Framework of Enforceable Customary International Human Rights*, 17 *Netherlands Q Hum Rts* 5, 6, 10 (1999) (describing difficulties of those that migrate to Israel).

²² Noeleen Heyzer, *Plenary Address: Combating Trafficking in Women and Children: A Gender and Human Rights Framework*, UNIFEM 3 (Nov 13–15, 2002).

²³ See Shirley Hune, *Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 25 *Intl Migration Rev* 800, 805 (1991).

²⁴ See *Report of the Asian-Pacific regional seminar of experts on migrants and trafficking in persons with particular reference to women and children*, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance 17–18, A/CONF.189/PC.2/3 (Apr 26, 2001) (“*Report of the Asian-Pacific Regional Seminar*”). The current trafficked population is about 80 percent female and 50 percent children. Chacon, 74 *Fordham L Rev* at 2982 (cited in note 11).

²⁵ See The President’s Interagency Council on Women, U.S. Dept of State, *Pressing Forward to Stop Trafficking in Women and Children* 1 (2000). That being said, it is important to remember many other types of labor trafficking exist. Chuang, 13 *Ind J Global Legal Stud* at 154 (cited in note 17).

²⁶ Thanh-Dam Truong and Maria Belen Angeles, *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children* 11 (Mar 2005), available at <<http://unesdoc.unesco.org/images/0013/001384/138447E.pdf>> (last visited Jan 24, 2007).

commented that migrants confront “a continuing deterioration in the[ir] human rights situation.”²⁷ Migrants themselves report a rising level of violence, though those figures may be evidence of enhanced human rights monitoring.²⁸ Nor does migration seem likely to decrease, given low birth rates in pull countries²⁹ and tumultuous conditions in push countries. Moreover, the spread of globalization increases short-term pressures for migration.³⁰ Even if domestic situations in push countries improve over the long term, those individuals who face relative deprivation as compared to their fellow citizens are still likely to migrate.³¹ Such ongoing developments warrant serious and sustained international attention to the plight of migrants.

II. INTERNATIONAL LAW AT THE INTERSECTION OF MIGRATION AND HUMAN RIGHTS

Migrants now generally receive greater protections under international human rights law than under domestic law. While much international law governs migrants and their families, including consular protections, bilateral immigration treaties, and universal human rights instruments,³² the explicit intersection of international human rights law and migration occurred only recently.³³ As late as 1983, no international agreement existed on the basic human rights of undocumented or irregular migrants.³⁴ The rapid proliferation of both legal and illegal migration, however, has increased international attention to and cooperation on this issue. This section briefly outlines the most relevant inter-

²⁷ *Human Rights of Migrants Deteriorating, Warns UN Expert* (Iran News Agency Oct 26, 2004), available at <<http://www.un.org/apps/news/story.asp?NewsID=12350&Cr=migrants&Cr1>> (last visited Jan 23, 2007).

²⁸ See ILO, IOM, and OHCHR, *International Migration* at 1 (cited in note 18).

²⁹ Ann D. Jordan, *Human Rights or Wrongs?: The struggle for a rights-based response to trafficking in human beings*, 10 *Gender & Dev* 28, 29 (2002).

³⁰ Rogers Brubaker, *International Migration: A Challenge for Humanity*, 25 *Intl Migration Rev* 946, 949 (1991).

³¹ See *Report of the Asian-Pacific Regional Seminar* at 17 (cited in note 24).

³² These universal human rights treaties include the *Universal Declaration of Human Rights*, the *International Convention on Civil and Political Rights* and the *International Convention on Economic, Social, and Cultural Rights*.

³³ See Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 *Mich J Intl L* 1143, 1145 (2003) (describing that these are relatively new developments despite the obvious linkages to the long standing international human rights norms that emerged to combat the white slavery practice).

³⁴ See Guy S. Goodwin-Gill, R.K. Jenny, and Richard Perruchoud, *Basic Humanitarian Principles Applicable to Non-Nationals*, 19 *Intl Migration Rev* 556, 562 (1985).

national human rights law governing this area and the related institutions and frameworks that have grown up around this area of law. While much international human rights law governs all people and thus *de facto* governs all migrants, this paper focuses on those instruments and regimes that explicitly acknowledge their application to migrants.³⁵

A. International Labour Organization

The International Labour Organization (“ILO”) possesses a longstanding commitment to migrants’ rights³⁶ which has ripened into an awareness of the related issues stemming from trafficking, forced labor, child migrants, and the ill-treatment of undocumented workers. The ILO was the first international organization to provide human rights protections to migrants.³⁷ In preparing for the Treaty of Versailles after World War One, the prevailing parties created the Commission on International Labour Legislation which included the jurisdiction to devise measures to protect migrant workers.³⁸ The Commission drafted the ILO’s constitution, a progressive document which includes provisions that demonstrate a concern for the living and working conditions of migrant workers.³⁹

Yet because of state sovereignty concerns, the ILO did little to actively protect migrants in its early days. Any promotion of equal treatment of migrant workers was accomplished only under conditions of bilateral or multilateral reciprocity—no state would agree to protections of others’ citizens without assurances that their own citizens would be so protected by other states.⁴⁰ In 1949, however, the ILO reversed course and rejected the reciprocity requirement.⁴¹ Because such efforts received little support

³⁵ I have also omitted regional and bilateral accords discussing human rights because this paper is of general application and the number of accords is too numerous. For a discussion of how migrant rights have been integrated into customary international law, see Hammer, 17 *Netherlands Q Hum Rts* at 5 (cited in note 21). This paper also leaves aside a separate framework which deals with refugees and asylum seekers. The linkage of refugees with human rights protections occurred much more explicitly much earlier such as with the Refugee Convention of 1951.

³⁶ Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* 90 (Oxford 1997).

³⁷ *Id.*

³⁸ Michael Hasenau, *ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis*, 25 *Intl Migration Rev* 687, 688 (1991).

³⁹ *Id.*

⁴⁰ *Id.* at 690.

⁴¹ *Id.* at 693.

from western countries then concerned about the ILO's potential inclusion of communist countries,⁴² the ILO shifted to the use of non-binding recommendations to encourage countries to adopt such protections.⁴³ Over time, states have understood ILO Conventions to provide basic or fundamental workers' rights to all migrants regardless of their legal status.⁴⁴

In the 1970s, after a highly visible incident involving the suffocation of migrants in a car crossing the Italian-French border, the ILO began to denounce the trafficking of migrants.⁴⁵ In 1975, the ILO drafted the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143). The Convention most notably obliged states to "respect the basic human rights of all migrant workers"⁴⁶ as well as to take measures against organizations that smuggle, traffic, or employ illegal migrants,⁴⁷ and to allow legal migrants equal treatment with nationals for employment, social security, and individual and collective freedoms.⁴⁸ Given its perceived encroachment on state sovereignty and the ILO's unwillingness to accept states' reservations to the Convention,⁴⁹ most states failed to join the treaty.⁵⁰ This failure, along with other concerns such as the ILO's willingness to cut off remittances and its symbolic relationship with trade unions, caused states to divert the ILO's role in setting human rights standards to the United Nations.⁵¹

⁴² Hasenau, 25 Intl Migration Rev at 694 (cited in note 38).

⁴³ Id.

⁴⁴ Cholewinski, *Migrant Workers in International Human Rights Law* at 103 (cited in note 36).

⁴⁵ Hasenau, 25 Intl Migration at 695 (cited in note 38).

⁴⁶ ILO, Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers No 143, Art 1 (1975).

⁴⁷ Id at Art 3.

⁴⁸ Id at Arts 8, 10, 12.

⁴⁹ Cholewinski, *Migrant Workers in International Human Rights Law* at 91 (cited in note 36).

⁵⁰ Roger Bohning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future*, 25 Intl Migration Rev 698, 699 (1991).

⁵¹ Id at 699–702. Even so, the ILO continues to engage in the application of the human rights discourse to migrant workers. For instance, in November 2003, the ILO committee addressed a complaint arising out of the 2002 Supreme Court decision in *Hoffman Plastic Compounds, Inc v NLRB*, 535 US 137 (2002). In that case, the Supreme Court denied backpay to an unauthorized worker unlawfully fired in violation of his NLRA rights. The ILO found the nonmonetary remedies inadequate and exhorted the United States to implement legislation to provide full monetary remedies to unauthorized workers. ILO, *332nd Report of the Committee on Freedom of Association* 143–54 (Nov 2003), available at <www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf> (last visited Jan 23, 2007) (requesting the United States be kept informed of developments and

B. The United Nations

Given the United Nations' role in promoting human rights more generally, it unsurprisingly took an active role in determining and publicizing the human rights of migrants and their families. Like in other areas, the UN began with exploratory, aspirational soft law, moved to more binding agreements, and ultimately created institutions and designated personnel to help promote protections and to influence state and corporate behavior. UN influence reaches beyond human rights bodies and extends to law enforcement bodies which are often affected by UN human rights bodies and documents. This section provides a brief introduction to the most relevant documents and related regimes.

1. UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.

In 1985, largely in response to the mass expulsion of Asians from Uganda,⁵² the UN General Assembly took an early step towards integrating migrants into the emerging human rights framework. The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live emphasized that all aliens should enjoy a multitude of rights including: life and security of person, the choice of a spouse, the ability to marry and found a family, freedom of thought and religion, and the power to transfer earnings abroad.⁵³ The Convention granted other rights such as the right to leave the country and the freedom of movement, but allowed states to limit their appli-

containing complaints against the government of the United States presented by the AFL and CIO and the confederation of Mexican workers). Four justices in *Hoffman* agreed with the principles promoted by the ILO. See *Hoffman Plastic Compounds, Inc*, 535 US at 153 (Breyer dissenting). The ILO report was steeped in the language of human rights; an example is the following statement:

The question is whether countries can set immigration rules that violate human rights. Fundamental rights cannot be balanced against policy options. Human rights cannot be abrogated to achieve policy goals but rather must always have priority over these goals. Policy options must be formulated in compliance with basic human rights standards.

ILO, *332nd Report of the Committee on Freedom of Association* at 146 (cited in note 51). In addition, the ILO took an active role in drafting the UN convention discussed below.

⁵² Cholewinski, *Migrant Workers in International Human Rights Law* at 72 (cited in note 36).

⁵³ *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live Art 5-1* (Dec 13, 1985), available at <http://193.194.138.190/html/menu3/b/o_nonnat.htm#resol> (last visited Jan 25, 2007).

cability through domestic laws necessary to “protect national security, public safety, public order, public health or morals or the rights and freedoms of others.”⁵⁴ Aliens with legal permission to reside in another state received additional rights, including economic rights like health care and social services, if “undue strain is not placed on the resources of the State.”⁵⁵

Such a declaration imposes no binding legal duties on states, but this soft law initiated the UN’s expansion into migrants’ human rights. Ensuing UN conventions fleshed out many of the Declaration’s dictates.⁵⁶ Moreover courts often cite the declaration as support for a general principle of non-discrimination against aliens.⁵⁷ As compared to the background of existing universal human rights, the Declaration provides only a few new particularized rights for migrants, such as the right to communicate with the consulate,⁵⁸ the right to retain their own language, culture, and tradition,⁵⁹ and the right to transfer earnings abroad.⁶⁰ More importantly, it precipitated the institutionalization of migrants’ human rights.

2. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

This UN convention was opened for signature on December 18, 1990 and entered into force on July 1, 2003. Currently, thirty-four countries have ratified the convention.⁶¹ As no major pull state has joined the treaty,⁶² the UN’s call for action on mi-

⁵⁴ *Id* at Art 5-2, 5-3.

⁵⁵ *Id* at Art 8.

⁵⁶ For example, Art 5(1)(d)’s right to choose a spouse, marry, and found a family and Art 5(1)(f)’s right to retain one’s language, culture, and tradition are both echoed in the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

⁵⁷ See *Appellant A and Others v. Secretary of State for the Home Department*, 17 Intl J Refugee L 117, 150, 157 (2005); Sarah Cleveland, Beth Lyon, and Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers’ Migrant Status*, 1 Seattle J Soc Just 795, 838 (2003).

⁵⁸ *Declaration on the Human Rights of Individuals* at Art 10 (cited in note 53).

⁵⁹ *Id* at Art 5-1(f).

⁶⁰ *Id* at Art 5-1(g).

⁶¹ Ratification Table for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at <<http://www.ohchr.org/English/countries/ratification/13.htm>> (last visited Jan 22, 2007).

⁶² See *id*. For example, the United States seems unlikely to ratify the Convention as it would dictate a serious overhaul of many domestic statutes and court decisions. For instance, treaty ratification would require the overruling of *Sure-Tan, Inc v NLRB*, 467 US 883 (1984) and *Hoffman Plastics Compounds, Inc*, which both deny backpay to mi-

gration issues has particularly emphasized the ratification of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CPRMWF").⁶³

The convention applies to all migrant workers and their families,⁶⁴ although it draws some distinctions based on the migrant's status. The convention declares a list of human rights, including the freedom of individuals to leave any state⁶⁵ and the right to enter and remain in their state of origin.⁶⁶ The treaty also forbids slavery,⁶⁷ forced or compulsory labor,⁶⁸ and the arbitrary deprivation of property,⁶⁹ while allowing freedom of religion⁷⁰ and freedom of expression.⁷¹ Importantly, the treaty entitles migrant workers and their families to "effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions."⁷² If migrants are arrested, they shall be informed of the reasons and the charges and brought promptly before a judge as well as informed of their treaty rights.⁷³ Other protections include the creation of a state duty to disseminate information in a migrant's native language including expulsion decisions,⁷⁴ the right to compensation for unlawful expulsion,⁷⁵ and a require-

grants without valid immigration documents. Congress would have to eliminate provisions criminalizing the hiring of an individual unauthorized to work in the United States. Most importantly, the United States would be forced to allow social services and other public benefits to regular alien workers and the possibility of expulsion would not preclude undocumented workers from receiving government benefits. Arthur C. Helton, *The New Convention from the Perspective of a Country of Employment: The U.S. Case*, 25 Intl Migration Rev 848, 851 (2001).

⁶³ *UN Asks Govts to Protect Migrant Women Workers* (The Press Trust of India Aug 18, 2005), available at <<http://sify.com/news/fullstory.php?id=13920011>> (last visited Jan 22, 2007).

⁶⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ("CPRMWF") at Art 1 (Dec 18, 1990), available at <<http://www.ohchr.org/english/law/cmw.htm>> (last visited Jan 24, 2007).

⁶⁵ See *id.* at Art 8-1 as subject to restrictions "necessary to protect national security, public order, public health or morals or the rights and freedoms of other."

⁶⁶ *Id.* at Art 8-2.

⁶⁷ *Id.* at Art 11-1.

⁶⁸ CPRMWF at Art 11-2 (cited in note 64).

⁶⁹ *Id.* at Art 15.

⁷⁰ *Id.* at Art 12.

⁷¹ *Id.* at Art 13.

⁷² CPRMWF at Art 16-2 (cited in note 64).

⁷³ *Id.* at Art 16-7. Many of these rights were modeled after the *International Covenant on Civil and Political Rights*. Helton, 25 Intl Migration Rev at 850 (cited in note 62).

⁷⁴ Helton, 25 Intl Migration Rev at 855 (cited in note 62).

⁷⁵ CPRMWF at Art 16-9 (cited in note 64).

ment that states account for humanitarian considerations and length of time of residence in their expulsion decisions.⁷⁶

Although many have criticized the treaty for failing to address the complex forms of discrimination faced by migrant women, such as their vulnerability to sexual exploitation and occupational segregation,⁷⁷ the convention does at least provide for facially equal treatment of the sexes. Both Article 1 and Article 2 make clear that the convention's ambit includes women and forbids sex discrimination. The convention also prohibits "torture, cruel, inhuman or degrading treatment or punishment"⁷⁸ and contains a ban on slavery and forced or compulsory labor,⁷⁹ provisions which can fairly be read to protect women from many forms of violence and sexual abuse. Admittedly, the treaty does nothing to address the fact that women usually end up in low-paying, gender-segregated occupations without the benefits of unionized workplaces, nor that they possess few opportunities for educational and occupational advancement.⁸⁰ The treaty encompasses a first-wave anti-discrimination approach in focusing on equality of initial access rather than a second-generation anti-subordination approach that focuses on equality of outcomes.⁸¹ Yet even such basic protections represent progress by codifying some baselines beneath which states and individuals may not go and may provide a starting point from which to develop further, more nuanced rights and protections.

3. Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants.

In 1999, the UN Commission on Human Rights created the mandate of the Special Rapporteur of the Commission on Human Rights on the human rights of migrants.⁸² The Special Rapporteur

⁷⁶ Helton, 25 Intl Migration Rev at 855 (cited in note 62) (although continued detention of excludable aliens is permitted).

⁷⁷ Sivakumaran, 36 Georgetown J Intl L at 140 (cited in note 3).

⁷⁸ CPRMWF at Art 10 (cited in note 64).

⁷⁹ Id at Art 11.

⁸⁰ Hune, 25 Intl Migration Rev at 805 (cited in note 23).

⁸¹ The CPRMWF has also been harshly criticized by those supporting a strong human rights stance, arguing that the treaty cedes too much to the concerns of state sovereignty and that the treaty unfairly discriminates through its differential treatment of regular and irregular migrants. James A. R. Nafziger and Barry C. Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, 25 Intl Migration Rev 771, 786 (1991).

⁸² See *Special Rapporteur of the Commission on Human Rights on the human rights of migrants*, available at <<http://www.ohchr.org/english/issues/migration/rapporteur>>

teur provides a new means for enforcing migrants' human rights. Under his or her mandate, the Rapporteur may request information from states and individuals; make recommendations to prevent and remedy rights violations; promote the internalization of international human rights norms; and "recommend actions and measures applicable at the national, regional and international levels."⁸³ In carrying out these duties, the Rapporteur may communicate with governments as well as conduct state visits. These efforts generally culminate in an annual report to the Commission of Human Rights. Thus far, the Special Rapporteur has conducted six general reports, four interim reports, and eleven state visits.⁸⁴

The Special Rapporteur works within the greater UN human rights framework while maintaining a particular focus on the CPRMWF.⁸⁵ The Special Rapporteur is also guided by ILO instruments and other applicable UN treaties.⁸⁶ With such a focus, the Rapporteur pays specific attention to how the intersection of gender and age contributes to discrimination.

In 2005, the Rapporteur sent thirty-four communications to twenty-five states.⁸⁷ These communications included information received from individual migrant workers and made reference to both group and individual situations. Some of the communications were drafted with the cooperation of other special rapporteurs.⁸⁸ The report revealed the variety of human rights violations perpetrated against migrant workers, including sexual assault and abuse of domestic workers, mistreatment by manpower agencies, long periods of detention, mass expulsions, and the lack of legal representation. At least fourteen states responded to specific allegations.⁸⁹

The future attention of the Rapporteur will be directed to addressing the problems of irregular immigrants and in particu-

(last visited Jan 26, 2007). In 2005, the mandate was extended for an additional three years.

⁸³ *Id.*

⁸⁴ See Bustamante, *Specific Groups and Individuals: Migrant Workers* at 4, 8 (cited in note 14).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 7.

⁸⁷ Jorge G. Bustamante, *Addendum to the Report of the Special Rapporteur on the Human Rights of Migrants* 3, E/CN.4/2006/73/Add.1 (Mar 27, 2006).

⁸⁸ *Id.* at 5, 9 (including communications produced about violence against women; on trafficking in persons, especially in women and children; and contemporary forms of racism, racial discrimination, and xenophobia and related intolerance).

⁸⁹ *Id.*

lar, calling on states to explicitly recognize the demand for migrant labor in order to preempt the emergence of xenophobic and racist anti-immigrant ideologies.⁹⁰ He will undertake an effort to empirically assess this linkage through data demonstrating the level of acceptance for immigrant labor, indicators of change in anti-immigrant ideologies, and statistics on crimes committed against migrants and sanctions imposed. The Rapporteur has also emphasized the importance of positive representation of migrants.⁹¹

4. 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

In September 2001, the UN sponsored the Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, where delegates attempted to integrate human rights and law enforcement approaches to immigration.⁹² The resulting Durban declaration includes numerous references to migrants and explicitly recognizes the intersection of racial, gender, and migrant discrimination.⁹³ It labels slavery and trafficking as human rights abuses and calls on states to end them.⁹⁴ It also implores states to eliminate any immigration policies inconsistent with the full protection of human rights.⁹⁵ The declaration takes affirmative steps to include migrants as part of a shared humanity by recognizing their positive social and cultural contributions.⁹⁶

Several of the conference papers focused on migration.⁹⁷ These papers emphasized migration as raising “critical issues of identity and difference, and of Self and Other.”⁹⁸ They lauded international human rights treaties, but decried their lack of en-

⁹⁰ See Bustamante, *Specific Groups and Individuals: Migrant Workers* at 11 (cited in note 14).

⁹¹ *Id.* at 14.

⁹² UN Non-Governmental Liaison Service, *Human Rights of Migrants* 1 (Mar 2002), available at <<http://www.unsystem.org/ngls/documents/pdf/roundup/89migrants.PDF>> (last visited Jan 23, 2007).

⁹³ *Durban Declaration* 4, 7 (2002), available at <<http://www.un.org/WCAR/durban.pdf>> (last visited Jan 24, 2007).

⁹⁴ See *id.* at 8–9.

⁹⁵ See *id.* at 10.

⁹⁶ See *id.* at 11.

⁹⁷ See *Report of the Asian-Pacific Regional Seminar* (cited in note 24) (describing the papers presented).

⁹⁸ *Id.* at 7.

forcement.⁹⁹ They emphasized the need for treaty ratification, domestic implementing legislation, and human rights education.¹⁰⁰ They also called for the determination of best practices and regional cooperation. Some concrete steps resulted from this conference as evidenced by police training workshops in Thailand and community based children's rights education in Cambodia.¹⁰¹

5. Recommended Principles and Guidelines on Human Rights and Human Trafficking.

In 2002, the United Nations High Commissioner for Human Rights ("UNHCHR") submitted the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* to the UN Economic and Social Council.¹⁰² Once again, the UN placed human rights at the center of "all efforts to prevent and combat trafficking and to protect and provide redress to victims."¹⁰³ In order to achieve this goal, the guidelines recommend the creation of monitors to assess the human rights impact of anti-trafficking measures along with state reporting requirements.¹⁰⁴ The principles respond to developments in domestic law, for example, the guidelines pick up on new domestic provisions giving protection to trafficking victims in order to facilitate willingness to testify against their handlers.¹⁰⁵ Other requirements include developing state capacity to identify trafficking, standardizing and cooperating over data collection, harmonizing national legal definitions and frameworks, providing protection to trafficked persons, developing root-cause approaches to trafficking, and special measures for child victims of trafficking. The guidelines also call for greater access to remedies, including civil remedies and the right to remain in the country during relevant proceedings. The guidelines also target state involvement in trafficking via law enforcement officials and peacekeepers and other humanitarian and diplomatic personnel.

⁹⁹ Id at 10.

¹⁰⁰ Id at 22.

¹⁰¹ *Report of the Asian-Pacific Regional Seminar* at 24–25 (cited in note 24).

¹⁰² UNHCR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council* 3, E/2002/68/Add.1 (July 2002).

¹⁰³ Id at 3.

¹⁰⁴ Id at 5.

¹⁰⁵ Id at 6–7.

6. Concluding thoughts on international law.

By way of caveat, this paper fully acknowledges the numerous weaknesses and shortcomings of international law and of these international human rights laws in particular.¹⁰⁶ Many of the aforementioned human rights statements are merely hortatory without even a pretense of binding state or private behavior. States may sign on to these declarations without incurring any meaningful legal obligations. Those instruments that do legally bind states suffer from incomplete membership, weak enforcement measures, and limited resources for implementation. As mentioned earlier, no pull countries and few push countries have ratified the CPRMWF. Other human rights instruments designed to help migrants also have few members and many reservations to major substantive provisions.¹⁰⁷ States rarely recognize such instruments as creating individual rights that can be vindicated in international or domestic courts. Reliance on the naming and shaming function of these treaties proves difficult as states rarely file reports in a timely manner, if they file them at all. Such reports are often cursory and provide little new information to human rights bodies and the international community at large.¹⁰⁸ In addition, international law's protections are often so vague or so watered down by concerns for state sovereignty, that they provide little direction to policy makers. Even in those international law regimes with more direct enforcement mechanisms, state implementation of protections is quite limited.¹⁰⁹

Such criticisms need not be devastating. Soft international law often, though not always, serves as a way station for harder

¹⁰⁶ For a more thorough discussion of these limitations, see generally Lesley Wexler, *Take the Long Way Home: Subfederal Integration of Unratified and Non-self-executing Treaties*, 28 Mich J Intl L 1 (2007).

¹⁰⁷ Nafziger and Bartel, 25 Intl Migration Rev at 785 (cited in note 81).

¹⁰⁸ Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at a Crossroads* 20–21 (Transnational Publishers 2001). For example, the first report submitted under the newly ratified CPRMWF was criticized as superficial and lacking statistics or evidence of implementing legislation. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Status of Ratification of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Apr 2006), available at <http://www.ohchr.org/english/bodies/cmwf/docs/CMW.C.MLI.CO.1_En.pdf> (last visited Feb 22, 2007).

¹⁰⁹ For example, in the wake of the Trafficking Victims Protection Act which calls for states to report new legislation on trafficking, only a handful have done so despite the fact that many have also ratified the CPRMWF and the Palermo Protocols around the same time. United States Department of State, *Trafficking in Persons Report* (June 2005), available at <<http://www.state.gov/g/tip/rls/tiprpt/2005/46608.htm>> (visited Mar 29, 2007).

international law agreements. Even poor implementation and weak enforcement might be a preferable second best option, providing more gains to migrants than a world without international human rights law. While the direct benefits of such law are addressed elsewhere, this paper suggests that traditional scholarship criticizing the weaknesses of immigration human rights treaties overlooks some of the non-legal functions international human rights law may serve. Although recognizing the shortcomings of international law serves an important function, the perfect ought not become the enemy of the good.

III. THE NON-TRADITIONAL ROLE OF IMMIGRATION HUMAN RIGHTS TREATIES

This paper identifies four important functions of international humanitarian law that do not rely on ratification and participation in its regimes. First, immigration human rights treaties can create a framework and a menu for regional consultative processes.¹¹⁰ Second, international human rights laws and their related regimes may also act as an information locus: forcing states to divulge information, educating states, NGOs and civil society about the contours of the problem, and disseminating evidence and compilations of best practices. Third, human rights discourse can help preclude and combat citizens' moral disengagement from the plight of migrants. Such discourse can overcome a focus on the status of migrants by emphasizing their connection to the community. Human rights discourse may also negate the fundamental attribution error that encourages victim-blaming and in turn allows for ill treatment of migrants. In discussing these functions, this paper draws on three distinct literatures often overlooked in the immigration context: political science's recognition of the role of regional consultative processes; corporate governance and the use of best practices; and psychology's description and treatment of moral disengagement and blame attribution theory. Finally, the paper also suggests that international law can provide a first step for the recognition of new protections which may be implemented in domestic law through the regular legislative process.

¹¹⁰ *Welfare of Migrant Workers and Their Families: Principles Concerning Migrant Workers and Their Families Already Embodied in International Instruments Adopted by United Nations Organizations: Report of the Secretary-General*, 26 UN ESCOR Commn for Social Dev 11, UN doc. E/CN.5/564.

A. Regional and International Consultative Processes

Given the limits on existing state solutions and the need for multilateral cooperation,¹¹¹ many states increasingly use regional and international approaches to develop their migration policies.¹¹² One prominent new strategy involves states' employment of regional consultative processes ("RCPs"). These informal, non-binding fora allow states to share information, develop a common understanding of migration issues, and lay the foundation for later domestic legislative action.¹¹³ RCPs' regional orientation and interactions with each other may also facilitate the harmonization of state policies and practices.¹¹⁴

Many RCPs deal specifically with migration issues. They include the Intergovernmental Consultations on Asylum, Refugees and Migration Policies (Europe, North America, and Australia), the Puebla Process (Northern and Central America), the Manila Process (Asia), the Migration Dialogue for Southern Africa¹¹⁵ and the Soderkoping Process (Eastern Europe). These groups meet regularly and are becoming part of established multilateral state practice.

RCPs play an important role in allowing states to incorporate immigration human rights instruments into their policy-making. Human rights treaty regimes often aim for universal membership, but the non-binding nature of RCPs, along with their policy of limiting membership¹¹⁶ may actually increase state involvement with international law. RCPs can encourage states to follow parts of a treaty they deem desirable, even if they have not ratified the treaties.¹¹⁷ Many RCPs view international law as agenda setting. For instance, Frederique Channac describes the role of RCPs as "[taking a] global approach to problem solving such as reminding states of their international legal obli-

¹¹¹ Frederique Channac and Colleen Thouez, *Shaping International Migration Policy: The Role of Regional Consultative Processes*, 29 *W Eur Pol* 370, 372 (2006).

¹¹² *Id.* at 371.

¹¹³ *Id.* at 384.

¹¹⁴ *Id.* at 371.

¹¹⁵ Frederique Channac and Colleen Thouez, *Convergence and Divergence in Migration Policy: The Role of Regional Consultative Processes* 5–6 (Jan 2005), available at <<http://www.gcim.org/attachements/GMP%20No%2020.pdf>> (last visited Jan 23, 2007).

¹¹⁶ *Id.* at 4.

¹¹⁷ Amanda Klekowski von Koppenfels, *Informal but Effective: Regional Consultative Processes as a Tool in Managing Migration*, 39 *Intl Migration* 61, 75 (2001) (noting that "the non-binding nature [of RCPs] may, in fact, encourage States to follow the general intentions of an agreement, while permitting them to find their own way and pace of doing so").

gations or presenting best practices on world-wide challenges like irregular migration.”¹¹⁸ In so doing, he suggests RCPs provide a fora to aggregate data and train on international standards.¹¹⁹ So intergovernmental organizations such as the International Organization for Migration (“IOM”) and the UNCHR often convene conferences and seminars for the RCPs to help develop their understanding of international law.¹²⁰ The workshop culture allows an “in-depth exchange on specific, practical issues” and at least one RCP encourages bilateral meetings to further enhance cooperation.¹²¹

Some early empirical evidence supports these contentions about RCPs’ promotion of international law and international law norms.¹²² For instance, the Manila Process issued an official statement highlighting the need to protect migrants’ human rights and the importance of the CPRMWF in facilitating this objective.¹²³ Similarly, the Puebla Process includes an objective to ensure full respect for existing provisions of migrants’ human rights. In order to achieve this objective, the Puebla Process conducted seminars on human rights that promote awareness of and ratification of the CPRMWF.¹²⁴ These seminars have fostered concrete actions such as the development and elaboration of regional guidelines and the use of the UNCHR to conduct training exercises as well as the drafting of a human rights training proposal for migration officers.¹²⁵

Another promising example, the Soderkoping Process,¹²⁶ uses human rights law to help set and disseminate best practices for migration policies and border migration.¹²⁷ The Secretariat of

¹¹⁸ Channac and Thouez, *Convergence and Divergence in Migration Policy* at 11 (cited in note 115).

¹¹⁹ *Id.* at 8.

¹²⁰ Channac and Thouez, *Shaping International Migration Policy* at 382 (cited in note 111).

¹²¹ Michele Klein Solomon, *International Migration Management Through Inter-State Consultation Mechanisms* 8 (July 5, 2005), available at <http://www.un.org/esa/population/meetings/ittmigdev2005/P13_MKSolomon.pdf> (last visited Mar 30, 2007).

¹²² Channac and Thouez, *Convergence and Divergence* at 11 (cited in note 115).

¹²³ Klekowski von Koppenfels, *Informal But Effective* at 76 (cited in note 117).

¹²⁴ See generally Emilio Alvarez Montalban, *Seminar on Human Rights and Migrants: Identifying Core Rights of Concern to Migrants* (Apr 23–24, 1998), available at <http://www.rcmvs.org/pagina_n5.htm> (last visited Mar 30, 2007).

¹²⁵ Regional Consultation Group on Migration, *Plan of Action: Regional Conference on Migration 7–8* (Nov 27–29, 2006), available at <http://www.rcmvs.org/Plan_of_Action_v.2006.pdf> (last visited Feb 22, 2007).

¹²⁶ *The Soderkoping Process*, available at <<http://soderkoping.org.ua/page2864.html>> (last visited Jan 24, 2007).

¹²⁷ *Id.*

the Soderkoping Process has emphasized the need for human rights training in the area of immigration¹²⁸ and is actively researching international law. The Soderkoping Process has published a study on the human rights of undocumented migrants which provides an overview of the international human rights framework.¹²⁹ It has already created action plans which “contain commitments in favor of specific actions to promote common values such as respect of democracy and human rights and minorities.”¹³⁰ Over the long term, the Soderkoping Process also seeks to provide institutional support for “the strengthening of the capacity of national asylum, migration and border systems to deal with asylum, migration and border management related issues with adherence to human rights norms, EU standards and international standards.”¹³¹

In addition to the purely regional groups, Switzerland initiated an international consultative mechanism, the Berne Initiative, which draws on the RCP model.¹³² The Berne Initiative includes eighty participating governments along with many NGOs and academics.¹³³ The Berne Initiative seeks to provide a common reference document for a comprehensive migration policy, a policy framework for the development of administrative structures, an evaluation tool to assist states in reviewing and developing their own policies, and opportunities for training and capacity building for government officials.¹³⁴ The Berne Initiative relies heavily on international law and has commissioned an expert study on migration and international legal norms.¹³⁵ This compilation of effective practices draws on “existing legal princi-

¹²⁸ *Senior Level Review Meeting: Conference Materials* 14 (May 12–13, 2005), available at <<http://soderkoping.org.ua/page70.html>> (last visited Jan 25, 2007).

¹²⁹ Luca Biccocchi and Michele LeVoy, *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (Mar 2007), available at <<http://soderkoping.org.ua/page66.html>> (last visited May 17, 2007).

¹³⁰ *Id.* at 27.

¹³¹ *Id.* at 55.

¹³² Channac and Thouez, *Convergence and Divergence* at 15 (cited in note 115) (noting that the Berne Initiative is designed to complement RCPs and relies on them for “information retrieval and for validation of its findings”).

¹³³ *Id.* at 14.

¹³⁴ The Berne Initiative, *International Agenda for Migration Management: Common Understandings and Effective Practices for a Planned, Balanced, and Comprehensive Approach to the Management of Migration* 7–9 (Dec 16–17, 2004), available at <<http://apmrn.anu.edu.au/publications/IOM%20Berne.doc>> (last visited May 16, 2007).

¹³⁵ Michele Klein Solomon and Kerstin Bartsch, *The Berne Initiative: Toward the Development of an International Policy Framework on Migration* 3 (Apr 1, 2003), available at <<http://www.migrationinformation.org/Feature/print.cfm?ID=114>> (last visited May 16, 2007).

ples including those related to the protection of the rights of migrants.”¹³⁶ The Berne Initiative has also developed an International Agenda on International Migration and a non-binding policy framework to guide further actions.¹³⁷

That being said, not all RCPs foster the integration of immigration human rights law. As the United States and other powerful actors can shape some RCPs’ agendas, they can keep human rights off the table if they so desire.¹³⁸ Similarly, the choice of particular government officials has limited most RCPs’ discussions of human rights and few include representatives from civil society,¹³⁹ although this design feature may be changing.¹⁴⁰ Some skeptics have even suggested that the RCPs “coordinate[d] restrictive policies at the highest possible level, while agreeing to protect migrants at the lowest possible level.”¹⁴¹ As many RCPs limit access to internal documents to participating governmental actors,¹⁴² assessing the veracity of this claim is difficult. Moreover, not all RCPs rely on immigration human rights treaties to guide their agendas. For instance, the Budapest Process seems more influenced by the law-enforcement approach of the Convention on Transnational Organized Crime.¹⁴³ Thus, the Budapest

¹³⁶ Solomon, *International Migration Management Through Inter-State Consultation Mechanisms* at 17 (cited in note 121).

¹³⁷ *Id.* at 14.

¹³⁸ Channac and Thouez, *Convergence and Divergence in Migration Policy* at 8 n 23 (cited in note 115).

¹³⁹ Global Commission on International Migration, *Report: Migration in an Interconnected World: New Directions for Action 70* (Oct 2005), available at <<http://www.gcim.org/attachements/gcim-complete-report-2005.pdf>> (last visited Mar 30, 2007).

¹⁴⁰ Jessica F. Green and Colleen Thouez, *Global Governance for Migration and the Environment: What Can We Learn from Each Other?*, Global Migration Perspectives No 46 10 (Aug 2005), available at <<http://www.gcim.org/attachements/GMP%20No%2046.pdf>> (last visited Mar 30, 2007).

¹⁴¹ Commission on Human Security, *Final Report: Human Security Now 47* (2003), available at <<http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf>> (last visited Mar 30, 2007) (citing a 2001 IOM report).

¹⁴² See, for example, *Inter-Governmental Consultations on Asylum, Refugees and Migration Policies* 1, available at <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/rcps/gcim/IGC_Contribution_to_IOM_workshop_UPDATED.pdf> (last visited Jan 25, 2007) (limiting access to IGC Participating States and Organizations).

¹⁴³ The UN Convention on Transnational Organized Crime and supplemental protocols dealing with human trafficking and smuggling were completed in 2000. *United Nations Convention against Transnational Organized Crime* (2000), available at <http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf> (last visited Jan 25, 2007). The underlying convention asks states to criminalize participation in an organized criminal group, laundering criminal proceeds, and corruption, as well as set up mechanisms for jurisdiction, international cooperation, and extradition. *Id.* at Arts 5, 6, 8. The convention makes no explicit mention of human rights, although each state is to take measures to provide victims with assistance, protection, access to compen-

Process focuses on the reduction of irregular migration and the harmonization of entry policies with some limited attention to refugee protections.¹⁴⁴

Thus, this paper hypothesizes that immigration human rights treaties are most likely to influence RCPs where some underlying state commitment to human rights already exists. The states in the RCPs have to be willing to put human rights on the agenda, but once that happens, RCPs provide fora that lower the costs of sharing information, developing best practices, and increasing states' capacity to promote and enforce migrants' human rights. Preliminary evidence supports some optimism about the role of at least some RCPs. Their nonbinding nature has accelerated information exchange among states.¹⁴⁵ RCPs have changed some states' perception of migration issues and even caused a few tangible legislative changes.¹⁴⁶ Finally, many RCPs are developing detailed action plans with a human rights focus, which should guide future state policies.¹⁴⁷ While scholars need to remain attentive to whether states implement such action plans, the RCPs have provided a new mechanism by which states can draw from international human rights law.

B. Best Practices

International humanitarian law may also play another role as a promoter of best practices in the field of immigration. A systematic study of what makes particular companies excel,¹⁴⁸ in which scholars distilled management practices common to suc-

sation, and a role in criminal proceedings. Id at Art 25. The Protocol against the smuggling of migrants by land, sea, and air also emphasizes law enforcement. This Protocol suggests information sharing and other types of inter-state cooperation along with strengthened border controls. *Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime* Art 10, 11, and 14 (2000), available at <http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf> (last visited Apr 13, 2007).

¹⁴⁴ International Centre for Migration Policy Development, *The Development of the Budapest Process Since the Rhodes Ministerial Conference* 9 (Oct 11–12, 2004), available at <<http://www.icmpd.org/upliadimg/The%20development%20of%20the%20Budapest%20Process%20Annexes.pdf>> (last visited Jan 22, 2007).

¹⁴⁵ Klekowski von Koppenfels, *Informal But Effective* at 66 (cited in note 117).

¹⁴⁶ Solomon, *International Migration Management Through Inter-State Consultation Mechanisms* at 10 (cited in note 121) (mentioning Fiji and Panama).

¹⁴⁷ United Nations Department of Economic and Social Affairs, *World Economic and Social Survey: International Migration* 199 (2004), available at <<http://www.un.org/esa/policy/wess/wess2004files/part2web/part2web.pdf>> (last visited Mar 30, 2007).

¹⁴⁸ Consider Thomas J. Peters and Robert H. Waterman, Jr., *In Search of Excellence: Lessons from America's Best-Run Companies* (Harper 1982).

cessful corporations, gave rise to the concept known as “best practices.”¹⁴⁹ The study’s designers phrased these practices at a high level of generality rather than providing replicable corporate micro-policies. The study revolutionized corporate practices and has been particularly influential in corporate governance. The theory and lessons of best practices have recently been transplanted into various domestic and international law settings.¹⁵⁰ In general, the development and implementation of best practices makes most sense in situations where (a) coordinating action yields large benefits or (b) underlying problems are “complex, resource-intensive, and open to a wide range of approaches.”¹⁵¹ So, for instance, best practices have improved performance in both the antitrust context where coordination problems frequently arise,¹⁵² and the health care field where complexity predominates.¹⁵³

Immigration seems like a field ripe for the development and dissemination of best practices as migration is a complex, resource intensive problem, with a variety of potential solutions. Many states, NGOs, and corporations are experimenting with different policies in this area, yet most states know little about existing or potential international human rights for migrant workers,¹⁵⁴ much less how to best implement these rights. As many of the states plagued by human rights violations have limited resources, the use of best practices can help narrow the range of possible choices and lower the cost of designing policies to prevent and ameliorate these problems.

Immigration human rights treaties may prove to be a fruitful source of best practices. First, they create a rhetorical and institutional framework from which to develop and generate best practices. In theory, international law’s aspirational and hortatory language guides what constitutes a best practice by creating

¹⁴⁹ Id at 13–16.

¹⁵⁰ David Zaring, *Best Practices*, 81 NYU L Rev 294, 300 (2006).

¹⁵¹ Id at 301.

¹⁵² See US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* 1, available at <<http://www.usdoj.gov/atr/public/international/docs/200405.htm>> (last visited Dec 4, 2006).

¹⁵³ See Kristin Madison, *Regulating Health Care Quality in an Information Age* 40 UC Davis L Rev 3, 15 (forthcoming 2007) (copy on file with author).

¹⁵⁴ Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows* 551–52 (Apr 2006), available at <<http://ssrn.com/abstract=897752>> (last visited Mar 30, 2007).

and codifying shared goals and objectives.¹⁵⁵ Second, once states identify such shared goals and objectives, treaty bodies and related conferences and rapporteurs can develop metrics to determine when those goals and objectives are satisfied. For example, some committed to developing immigration best practices explicitly view international law as both a framework and a metric setting device.

Reviewing the commitments made and goals set by governments in the [international law] agreements . . . is important because it provides a framework within which we can discuss specific practices which assist in the settlement and integration of immigrants. In addition, these agreements represent efforts by governments to hold each other accountable. From a human rights perspective, the best ones aim at articulating and encouraging states to aim at a higher level of rights and protection for immigrants.¹⁵⁶

Finally, these same treaty bodies and related events may aggregate information and assess which domestic policies should be considered best practices.¹⁵⁷ For instance, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) is developing a best practices database using “carefully documented case histories.”¹⁵⁸ In so doing, UNESCO considers the consistency of its best practices with the dictates of the CPRMWF.¹⁵⁹ Moreover, the UNESCO approach to best practices focuses on human rights and the destructive impact of trafficking rather than the criminal aspects of illegal immigration.¹⁶⁰

Similarly, the IOM hosted an international regional workshop on “Best Practices Concerning Migrant Workers and their

¹⁵⁵ International Organization for Migration, *Best Practices Concerning Migrant Workers and their Families* 9 (June 19–20, 2000), available at <http://portal.unesco.org/shs/en/file_download.php/8a55e7dc0d85ad5906a8346a5d7ec049santiago.pdf> (last visited Mar 30, 2007) (detailing an International Organization on Migration seminar dedicated to best practices which relied on ILO conventions and the CPRMWF as the most relevant human rights documents).

¹⁵⁶ Timothy Owen, *Migrant Workers: Best Practices Regarding Integration and Citizenship* II (June 19–20, 2000), available at <<http://ceris.metropolis.net/Virtual%20Library/other/owen3/owen3.html>> (last visited Jan 22, 2007).

¹⁵⁷ Sivakumaran, 36 *Georgetown J Intl L* at 149 (cited in note 3).

¹⁵⁸ Synnove Bendixsen and Paul de Guchteneire, *Best Practices in Immigration Services Planning* 1 (2004), available at <http://www.unesco.org/most/migration/article_bpimm.htm> (last visited Mar 30, 2007).

¹⁵⁹ *Id.* at 2.

¹⁶⁰ Truong and Angeles, *Searching for Best Practices* at 36 (cited in note 26).

Families.”¹⁶¹ Thirty-four western hemisphere countries, including the United States, participated.¹⁶² One seminar within that workshop identified best practices as specific state programs within different areas. For example, the seminar listed Mexico-US cooperation on border protection to reduce crimes against migrants, Costa Rica’s decision to allow Nicaraguans renewable residence after Hurricane Mitch, the development of RCPs such as the Puebla Process, and programs designed to achieve immigration integration as promoted by the CPRMWF as best practices.¹⁶³

Such information can reach even non-ratifying countries. The best practices are often made publicly available on websites. Non-treaty members may also encounter such compilations at RCPs or through other international networking opportunities. Workshops aimed at capacity building are also likely to deploy such best practices.

Of course, this discussion raises the question of whether states need international law to develop best practices or whether states can look to purely domestic practices or other sources of international norms. This paper modestly claims that international law is necessary, rather than sufficient, to develop and disseminate best practices in this area.¹⁶⁴ That being said, some evidence suggests that states might prefer best practices gleaned from international law more than other options. Interna-

¹⁶¹ They produced the report, *Best Practices Concerning Migrant Workers and Their Families* (cited in note 155).

¹⁶² *Id.* at 2.

¹⁶³ *Id.* at 5–7, 21.

¹⁶⁴ For instance, bilateral social security agreements designed to increase the portability of workers’ benefits have been identified as a best practice. Robert Holzmann, Johannes Koettl, and Taras Chernestky, *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* 9, 35 (Sept 2005), available at <<http://www.gcim.org/attachements/TP2.pdf>> (last visited Mar 30, 2007) (noting the relative lack of implementation of the ILO and the CPRMWF in this area). In addition, the United States Trafficking in Persons report also assembles a brief description of what constitutes best practices. United States Department of State, *Trafficking in Persons Report: II. International Best Practices*, available at <<http://www.state.gov/g/tip/rls/tiprpt/2004/33186.htm>> (last visited Mar 30, 2007). Yet because human rights are a less dominant priority, the Trafficking In Persons report shifts the emphasis of what constitutes a best practice toward law enforcement. Human rights organizations would not include many of the programs and legislation described in the Trafficking In Persons report as best practices. Best practices need not be limited to the development of national or federal legislation. Model subfederal legislation is also possible, as is being developed in the United States in response to trafficking and the TVPA. See Ellen L. Buckwalter, et al, *Modern Day Slavery in Our Own Backyard*, 12 *Wm & Mary J Women & L* 403, 428–31 (2006). Best practices could also develop through other mechanisms such as NGOs, but even these groups tend to use international law as a baseline to help guide their work.

tional law regimes save on the costs of forcing each individual state to aggregate information about other states' domestic practices. In addition, without international or regional regimes, best practices of individual states are not often readily available.¹⁶⁵ International law regimes are likely to have experts involved in developing the metrics for what counts as a best practice, whereas individual states may lack the resources to acquire the same degree of expert involvement. The ongoing nature of international law regimes also means they have the institutional capacity to update best practices and adjust for new circumstances. They often create fora to disseminate and discuss these practices. In addition, international law seems likely to foster the harmonization of state policies more quickly and easily than other sources. Given the states' need to constantly interact with one another on migration issues, such harmonization might prove quite helpful. So this paper hypothesizes that international law might be a particularly valuable source of best practices, but states and scholars should reserve their judgment until some time has passed and better empirical evidence is available.

Ultimately, the real inquiry is not whether immigration human rights treaties can influence best practices, as that seems very likely, but whether those best practices are themselves valuable. While a comprehensive examination of that question exceeds this paper's scope, this section introduces some of the main criticisms of the best practices concept, and attempts to show how they might be addressed in the immigration human rights context.

First, for example, if the relevant actors lack a shared consensus of what they wish to maximize, best practices are unlikely to satisfy varied preferences. In the corporate context, most parties agree on a main goal of wealth maximization—through profits and avoidance of liability—but many contexts, like immigration, require the balancing of multiple objectives. In the immigration context, states lack a consensus on the meaning or the objectives of best practices.¹⁶⁶ International law can assist this process by providing external criteria to measure what counts as success and which approaches ought to be impermissible or disfavored. The very process of creating international law can help create consensus by forcing states to come to an agreement about what they value.

¹⁶⁵ Lyon, *New International Human Rights* at 554 (cited in note 154).

¹⁶⁶ See Truong and Angeles, *Searching for Best Practices* at 36 (cited in note 26).

Second, when programs are poorly implemented or when situations present overwhelming complexity, policymakers and information gatherers may fail to distill or to update what actually constitutes a best practice.¹⁶⁷ For example, an entire corporate governance industry has developed to create and disseminate best practices. While these best practices lack binding authority, most corporations comply with them most of the time.¹⁶⁸ Scholars have criticized the adoption of these best practices as many of the standards lack evidentiary support.¹⁶⁹ Much empirical evidence suggests that the metrics chosen by larger corporate governance firms “do not reliably predict firm performance.”¹⁷⁰ The failure of corporate governance best practices may be because either (1) corporate governance does not affect firm performance and thus best practices dictate a useless list to guide behavior or (2) the industry has improperly calibrated the metrics used to measure corporate governance and thus they measure the right things, but measure them badly. Similarly, some suggest that identifying individual programs or policies as best practices is a poor fit in the immigration context as the problem is too complex and not enough field research has been conducted.¹⁷¹

That being said, interested groups are developing sources for the necessary guidelines and some metrics to measure the best practices in this field already exist. For example, to determine what qualifies as a best practice in the context of protecting human rights, UNESCO suggests accounting for: (1) “the administrative dimension of a policy,” (2) “the means of validating outcomes,” (3) “the socio-anthropological dimension of social entities designated as target groups,” and (4) the interpretation of the migrants’ needs.¹⁷² Given that metric, UNESCO interprets best practices as those that are innovative, sustainable, replicable and make a difference in recipients’ lives.¹⁷³ Non-treaty states

¹⁶⁷ Eric A. Hanushek, *What if There Are No ‘Best Practices?’*, 51 *Scottish J Pol Econ* 156, 171 (2004) (concluding no best practices can be found in school resource settings).

¹⁶⁸ Paul Rose, *The Corporate Governance Industry* 42 (on file with the author) (explaining that corporations do so in order to avoid liability under fiduciary duties).

¹⁶⁹ For a discussion of such criticisms, see *id.* at 28.

¹⁷⁰ *Id.* at 32.

¹⁷¹ *Id.* at 3.

¹⁷² Rose, *The Corporate Governance Industry* at 28 (cited in note 168).

¹⁷³ Bendixsen and Guchteneire, *Best Practices in Immigration Services Planning* (cited in note 158).

can evaluate programs developed in responses to treaties and determine if they satisfy such guidelines.

The process is too new to draw any meaningful conclusions, but reports like those presented to the World Conference on Racism seem likely to provide the necessary information to design metrics to measure best practices.¹⁷⁴ So international law reporting requirements may provide the data necessary to help determine what constitutes a successful program.

The implementation of best practices might also stifle some gains that would otherwise come to fruition. Best practices have often been critiqued as “one-size-fits-all” approaches.¹⁷⁵ Case-by-case evaluation might better allow innovation.¹⁷⁶ For example, best practices may stymie innovation when too narrowly defined or too frequently mimicked. In addition, policymakers may mistakenly adopt policies ill-suited to local or idiosyncratic conditions or fail to make relevant adaptations.¹⁷⁷ Just as the corporate approach requires an ability to determine what can be replicated and what needs to be adapted—these concerns are particularly acute in the immigration context since human rights need to be socially and culturally grounded in order to succeed.¹⁷⁸

While certainly a relevant concern, some international law influenced best practices reflect an understanding of the importance of context. For example, at a best practices workshop, one commentator noted:

In many cases a service or program which works well for one group of immigrants in one context, may not work at all for another group in another context. Difference in language, ethnoracial and socioeconomic background, as well as circumstances of migration are factors which may call for program adjustments.¹⁷⁹

Likewise, UNESCO balances its attempts to distill successful strategies with an attempt to make best practices context-dependent based on the political, historical, cultural, socioeco-

¹⁷⁴ *Report of the Asian-Pacific Regional Seminar at 24–25* (cited in note 24) (noting the importance of national institutions).

¹⁷⁵ *Id.* at 28.

¹⁷⁶ *Id.* at 45.

¹⁷⁷ Zaring, 81 NYU L Rev at 316, 325 (cited in note 150).

¹⁷⁸ Truong and Angeles, *Searching for Best Practices* at 5–6 (cited in note 26).

¹⁷⁹ Owen, *Migrant Workers: Best Practices Regarding Integration and Citizenship* at I (cited in note 156).

nostic, and institutional environment.¹⁸⁰ In addition, RCPs might be ideally situated to take abstract international law principles and translate them into context-sensitive best practices. As RCPs often limit membership to those with shared interests and geographic proximity, local conditions may often be similar across member states.

The next several years should provide scholars with the necessary evidence to determine whether international law and its regimes have successfully distilled best practices in this area and whether non-member states have implemented them effectively. So rather than offering an answer, this section merely suggests that immigration human rights law helps develop and disseminate best practices, but that further work needs to be done looking at specific programs and recommendations to determine if they really satisfy the goals and objectives of such law.

C. Discourse

This paper also suggests that immigration human rights treaties can provide a discursive framework to improve the actual condition of migrants by tempering urges to otherize, dehumanize, and blame migrants. International law formation and dissemination can draw together an epistemic community of scholars, human rights activists and state actors interested in focusing on the human element of the migration issue. This paper hypothesizes that such a coalition might displace or at least supplement other frameworks through which individuals filter the identities of migrants. In making this suggestion, this section draws heavily on insights gleaned from the psychology literature which emerged to illuminate such related phenomena as genocides, mass killings, and victim blaming. Such studies and observations seem helpful in explaining the exclusion of certain populations from domestic communities and the need for law's protective and expressive force.

Realists and other international law skeptics frequently criticize the formation and promotion of human rights treaties as largely symbolic. In particular, critics have vociferously lodged this complaint in the migration area.¹⁸¹ These international law

¹⁸⁰ Bendixsen and Guchteneire, *Best Practices in Immigration Services Planning* at 4–5 (cited in note 158).

¹⁸¹ See Fitzpatrick, 24 *Mich J Intl Law* at 1151 (cited in note 33) (lamenting that “[t]he OHCHR and anti-trafficking NGOs made significant progress in constructing a new identity for trafficked persons as victims of severe human rights abuse, rather than as

pessimists seemingly use terms like “symbolic” or “rhetorical” as code words to convey the argument that human rights treaties possess little or no value. Yet the symbolism and rhetorical power of international law itself can be quite meaningful in constructing migrants’ identity through a human rights lens and contesting dominant perspectives of migrants as purely criminal or security threats.

Many of the serious human rights violations faced by migrants probably stem from their extreme societal exclusion. As detailed in Part I, migrants’ otherness often makes them targets for abuse with limited official recourse. Once migrants are placed outside the norms of domestic communities, individual actors and states can more easily morally disengage from them. In this context, the manifestations of moral disengagement include the creation of inhumane working conditions not unlike slavery and concentration camps as well as the perpetuation of widespread and systemic physical, emotional, and sexual abuse.

An understanding of moral disengagement and its triggers help illustrate how policymakers might comprehend and combat the presence of such exclusionary behavior. Moral disengagement has been defined as the slow “process of detachment by which some individuals or groups are placed outside the boundary in which moral values, rules, and considerations of fairness apply.”¹⁸² Such identification and exclusion of a defined group encourages people to act inhumanely in the face of situational inducements.¹⁸³ For instance, some scholars rely on moral disengagement, rather than the presence of sadism or intrinsic evil, to explain the Germans’ treatment of Jews, gypsies, homosexuals, and disabled persons during the Holocaust.¹⁸⁴ Once a group has been recast as subhuman, society regards members of that group as not only lacking normal sensitivities, but also as requiring harsh means to influence their actions.¹⁸⁵ In other words, ordinary people and governmental agents begin to believe that only

criminals and illegal migrants[; s]ince implementation of the Trafficking Protocol remains in the hands of national law enforcement and migration authorities, however, this success may prove to be largely symbolic”).

¹⁸² James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* 186 (Oxford 2002).

¹⁸³ Albert Bandura, et al, *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71 *J Personality & Soc Psych* 364, 366 (1996).

¹⁸⁴ Consider Waller, *Becoming Evil* (cited in note 182).

¹⁸⁵ Bandura, et al, 71 *J Personality & Soc Psych* at 366 (cited in note 183).

ill treatment and punishment will induce acceptable behavior from these outcasts.

Such moral disengagement is not inevitable; rather, psychologists suggest individuals possess a variety of mechanisms to encourage others, whether at the individual or societal level, to submit to moral disengagement. These processes include: (1) the combined dehumanization of perceived victims and blame of them for bringing the suffering on themselves; (2) the use of moral justification to redefine harmful conduct as honorable for the individual, group, or society; (3) the exoneration of bad behavior by comparison to worse behavior engaged in by the ostracized social group; (4) the creation of sanitizing language which deflects attention from the true nature of the exclusionary and dehumanizing acts; (5) the denial of individual agency of action; and (6) the downplaying or reconstituting of harm experienced by the ostracized social group.¹⁸⁶

The current treatment of migrants involves many of the processes that lead to moral disengagement. For instance, some communities perceive trafficked individuals as mere animals incapable of joining civilized society,¹⁸⁷ and as ingrates who have brought on their bad conditions by making the decision to migrate.¹⁸⁸ Similarly, states and disgruntled groups justify harsh treatment of migrants by the state as necessary to preserve the greater good of the society—they contend that some may have to suffer in order to maintain resources for those who were there first. Governments and media might recast those harsh actions as better than those actions committed by the subclass of deviant migrants.¹⁸⁹ Institutional power can also create conditions ripe for dehumanization as when authority figures exercise coercive

¹⁸⁶ Albert Bandura, *The Role of Selective Moral Disengagement in Terrorism and Counterterrorism*, 121, 124–36, in Fathali M. Moghaddam and Anthony J. Marsella, eds, *Understanding Terrorism* (Am Psych Assn 2005).

¹⁸⁷ See James Buchanan, *Some Third World Immigrants Want to Stone Women* (Feb 1, 2007), available at <http://www.whitecivilrights.com/third-world-immigrants-want-to-stone-women_708.html#more-708> (last visited June 13, 2007).

¹⁸⁸ Betsy Streisand, *LA Chooses Sides: Cops vs. Aliens*, *US News & World Rep* 10 (Apr 15, 1996) (“Instead of directing their anger at the out of control Riverside County Sheriff’s deputies, many LA residents turned on the people who were hit. Callers overwhelmed local talk-radio shows with arguments that illegal aliens who sneak into this country, take American jobs and don’t pay taxes should be content with whatever they get, including multiple blows with nightsticks. [One caller said. . .] ‘those wetbacks got what they deserved.’”).

¹⁸⁹ For example, many see immigrants as responsible for a disproportionate share of crime in European cities. Fabio Quassoli, *Making the Neighborhood Safer: Social Alarm, Police Practices and Immigrant Exclusion in Italy*, 30 *J Ethnic & Migration Studies* 1163, 1165 (2004).

control over others and lack adequate constraints on their power.¹⁹⁰

Once triggered, however, moral disengagement is not an irreversible condition. Early experimental work suggests concerted efforts at humanization successfully counteract tendencies toward human cruelty.¹⁹¹ These studies reveal that such efforts foster interpersonal empathy even when it has not emerged naturally or has been dampened by external influences. In particular, seeing so-called “others” depicted as in-group members can “arouse empathic reactions to the[] joys and sufferings [of those previously seen as others].”¹⁹² Experiments also highlight the difficulty of abusing humanized persons—that people in positions of power behave much less punitively against personalized victims.¹⁹³ The recognition that a potential victim “has an actual identity, with flesh and blood and family” often triggers self restraint on the part of potential abusers.¹⁹⁴ In other words, people find dehumanization and subsequent abuse more difficult to undertake when the potential aggressors perceive an other as “an individual, independent and distinguishable from others, capable of making choices, and entitled to live his own life on the basis of his own goals and values.”¹⁹⁵ Thus, getting society to view potential and actual victims as simultaneously autonomous agents and also as a meaningful part of the larger, interdependent society can prevent or even reverse moral disengagement.¹⁹⁶

These experiments and observations have obvious implications for the role of international human rights law, although few legal scholars have pointed them out directly. Herbert Kelman, a noted psychologist working in this area, suggests “us[ing] every opportunity to individualize the targets of violence, at home or abroad. . . protest[ing] all implications that there are groups . . . that are subhuman and fair game. No attempt to exclude from the human community a group . . . must remain unchal-

¹⁹⁰ Albert Bandura, *Mechanisms of Moral Disengagement*, in Walter Reich, ed, *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* 181 (Cambridge 1990).

¹⁹¹ Bandura, et al, 71 *J Personality & Soc Psych* at 371 (cited in note 183).

¹⁹² Bandura, *The Role of Selective Moral Disengagement* at 138 (cited in note 186).

¹⁹³ Bandura, et al, 71 *J Personality & Soc Psych* at 371 (cited in note 183) (discussing Milgram shock experiments).

¹⁹⁴ Waller, *Becoming Evil* at 274 (cited in note 182).

¹⁹⁵ Herbert C. Kelman, *Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimiziers*, 29 *J Soc Issues* 25, 48 (1973).

¹⁹⁶ *Id* at 48–49 (noting that the development of community requires seeing others as “part of an interconnected network of individuals who care for each other, who recognize each other’s individuality, and respect each other’s rights”).

lenged.”¹⁹⁷ In particular, he urges the importance of “challeng[ing] such attempts [to exclude groups from the human community] when they are made by public officials, and especially by officials who speak with the highest authority.”¹⁹⁸ This paper theorizes that international law may be just such an effort. It allows states to lend their voices to the individuation of migrants and their inclusion within state communities. States can accomplish such efforts through the emphasis of migrants’ humanity through their ties to families, the language used to describe migrants’ status, and the rejection of victim blaming.

A brief examination suggests the international law instruments discussed in Part II have codified such a humanizing approach. The human rights framework, as first promulgated in the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live and more clearly articulated in the 1990 CPRMWF, attempts to humanize migrants. For example, the Declaration emphasizes their right “to protection against arbitrary or unlawful interference with privacy, family, home or correspondence” as well as “the right to choose a spouse, to marry, to found a family” and the “right to retain their own language, culture and tradition.”¹⁹⁹ It reminds states that migrant workers are “social entities with families” and are “more than labourers or economic entities.”²⁰⁰ The CPRMWF also grants migrants the right of family reunification and its text stresses that migrants, like other people, derive meaning from “the family [as] the natural and fundamental group unit of society [which is] entitled to protection by society and the State.”²⁰¹ The CPRMWF preamble emphasizes the vulnerability of migrants and the difficulties experienced by scattered families. In addition to the Section I protections of the CPRMWF, specific provisions identify the need to provide protections in a non-discriminatory manner²⁰² and that “migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural iden-

¹⁹⁷ *Id.* at 56.

¹⁹⁸ *Id.*

¹⁹⁹ *Declaration on the Human Rights of Individuals* at Art 5-1(b), (d), (f) (cited in note 53).

²⁰⁰ Taran, 38 *Intl Migration* at 17 (cited in note 4).

²⁰¹ CPRMWF at Art 44 (cited in note 64).

²⁰² *Id.* at Art 7.

tity.”²⁰³ Similarly, the UN sponsored Conference Against Racism, Racial Discrimination, Xenophobia and Related Discrimination produced the Durban declaration which takes affirmative steps to include migrants as part of a shared humanity by recognizing their positive social and cultural contributions.²⁰⁴

Human rights treaties and their related regimes also humanize migrants through the language by which they identify them. Such international law rejects the construction of identity through terms like “illegals,” “irregulars,” or “undocumented,” which focus on status rather than personhood and emphasize criminality rather than humanity. The choice to call someone a migrant worker or individual rather than illegal or undocumented worker may subtly influence perceptions of whether the person belongs to that community. While the earliest documents relied on the term “alien,”²⁰⁵ the CPRMWF and the Special Rapporteur of the Commission on Human Rights on the human rights of migrants, the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and The Recommended Principles and Guidelines on Human Rights and Human Trafficking all use the language of “migrants” and “migrant workers.” Such a choice is mirrored in the Soderkoping Process. Whether such choices influence the language choices of those state actors involved in these processes, or filter down to the general population, remains to be seen.

In addition to humanizing migrants through drawing attention to their family and community connections, human rights treaties and discourse can also indirectly influence the treatment of migrants by countering domestic communities’ tendencies toward victim-blaming. Victim-blaming is often a manifestation of the fundamental attribution error—the proclivity to attribute behavior and outcomes to individual qualities rather than situational factors.²⁰⁶ So, for example, a society might see the plight of migrants as resulting from the migrants’ low moral worth, rather than stemming from the often impossible conditions and choices that they face. In turn, the fundamental attribution error is at least partially explained by the just world theory—the belief that the individuals possess control over the world and that the world is fundamentally just and thus good things happen to good

²⁰³ Id at Art 17.

²⁰⁴ *Durban Declaration* at 11 (cited in note 93).

²⁰⁵ *Declaration on the Human Rights of Individuals* at Art 1 (cited in note 53).

²⁰⁶ Susan T. Fiske and Shelley E. Taylor, *Social Cognition* 67 (Random House 1984).

people, whereas bad things happen to bad people.²⁰⁷ Accepting the role of randomness and luck in outcomes challenges people's need to believe in the fairness of the world. This belief in a just world is not a mere belief, it serves an important psychological function: it allows "one to invest in long-term goals and to do so according to society's rules for deservingness."²⁰⁸

As a result of the fundamental attribution error and the belief in a just world, when one sees something bad happen to individuals or groups, one often engages in victim blame and derogation.²⁰⁹ This tendency is magnified when society perceives victims as meaningfully different from the relevant community or if their suffering is likely to be ongoing and difficult to remedy.²¹⁰ Conversely victim-blaming is dampened when the people suffering are seen as similar to the witness,²¹¹ as empathy triggered by similarities can muffle or trump the instincts aroused by the belief in a just world.²¹² So, in this context, the belief in a just world allows individuals to continue believing that if they behave well, they will be treated well. The poor treatment of migrants stems not from bad luck or structural constraints or the uncontrollable and inhumane behavior of others, but because "they" fundamentally differ from "us" and act differently and deserve different outcomes than "we" do.

The fundamental attribution error as instigated by the belief in a just world may also influence victim behavior. Like external observers, the belief in a just world may encourage many victims, particularly women, to believe that they deserve what happens to them.²¹³ Such beliefs may manifest themselves as either behavioral blame such as "I chose to migrate, therefore I deserve what happens to me in the process," or character-based blame such as "I am a bad person, and therefore deserve it when bad

²⁰⁷ Id.

²⁰⁸ Carolyn L. Hafer and Laurent Begue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 *Psychological Bull.* 128, 144 (2005).

²⁰⁹ Id. at 134.

²¹⁰ Melvin J. Lerner and Leo Montada, *An Overview: Advances in Belief In a Just World: Theory and Methods*, in Leo Montada and Melvin J. Lerner, eds, *Responses to Victimization and Belief in a Just World* 1, 2 (Plenum 1998); Claudia Dalbert, *Belief in a Just World, Well-Being, and Coping with an Unjust Fate*, in Montada and Lerner, eds, *Responses to Victimization* 87, 101.

²¹¹ Sharon Lamb, *The Trouble with Blame* 92 (Harvard 1996); Lerner and Montada, *An Overview* at 4 (cited in note 210).

²¹² Leo Montada, *Belief in a Just World: A Hybrid of Justice Motive and Self-Interest*, in Montada and Lerner, eds, *Responses to Victimization* 217, 243 (cited in note 210).

²¹³ Lamb, *The Trouble with Blame* at 25 (cited in note 211).

things to happen to me during the migration process.”²¹⁴ Studies of both Vietnam lottery number “losers” and paralysis victims confirm this type of self-blame in the face of randomness or accidents.²¹⁵ Victims may artificially construct fairness in given situations, and they will use this to internally justify the situation. So even terrible abuse and other human rights violations come to be seen as fair and deserved. This self-blame in turn leads to “less reported injustice, less anger, and weaker attempts at change.”²¹⁶

Manifestations of the fundamental attribution error are not preordained; humans learn such responses and these reactions can be overcome. Attribution theory suggests that when third parties blame victims for their plight, outsiders will feel anger, yet when third parties blame situational causes, outsiders will feel pity.²¹⁷ Altering notions about blame is difficult, but emerging social norms about child abuse and rape show that notions about blameworthiness can be changed.²¹⁸

International human rights law challenges the fundamental attribution error and the belief in a just world. Many states currently target enforcement efforts against trafficking victims while allowing virtually free reign to traffickers, corrupt officials, exploitative employers, and complicit customers. Such a focus supports a blame-the-victim mentality.²¹⁹ In contrast, the human rights framework emphasizes the victims’ relative lack of control over trafficking related problems and responsibility for ill treatment as well as emphasizing the pull factors that make recipient countries share in the responsibility for the negative outcomes. For instance, the CPRMWF highlights the vulnerability of migrants due to situational factors²²⁰ and the Special Rapporteur of the Commission on Human Rights on the human rights of migrants assigns blame to states or individuals that oppress mi-

²¹⁴ Fiske and Taylor, *Social Cognition* at 86 (cited in note 206).

²¹⁵ Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* 124–25 (Plenum 1980).

²¹⁶ Hafer and Begue, 131 *Psychological Bull* at 150 (cited in note 208).

²¹⁷ Bandura, et al, 71 *J Personality and Soc Psych* at 372 (cited in note 183).

²¹⁸ Lamb, *The Trouble with Blame* at 7 (cited in note 211) (describing the blame-shifting process). Moreover, compensating or helping victims is an alternate mechanism to maintain a belief in a just world. Hafer and Begue, 131 *Psychological Bull* at 135 (cited in note 208). Thus, treaties that encourage state assistance to migrants may fulfill the same basic desires as blaming strategies.

²¹⁹ Fitzpatrick, 24 *Mich J Intl L* at 1155 (cited in note 33) (describing how trafficking victims are often targeted by enforcement measures).

²²⁰ CPRMWF at Preamble (cited in note 64).

grants, shifting fault onto the culpable party. Best practices may also operate to remind states and individuals to include migrants as a part of the relevant social community. For instance, the International Organization for Migration conceptualizes best practices as a way to bridge the gap between international human rights law and the consideration of migrants as “different, exploitable and outcast.”²²¹ As mentioned above, when victims are seen as part of the in-group, it makes individuals more concerned about their plight.

While treaties and treaty regimes can help create and disseminate a human rights discourse to construct a humane identity for migrants, such discourse is a necessary, but not sufficient condition for improved treatment of migrants. Rather, this paper’s linguistic claim is a humble one—not all human rights language is persuasive, nor does it necessarily reach its intended audience. The mere existence of international law does not guarantee successful dissemination of human rights discourse. Yet the substance and the language used in immigration human rights treaties might reach individual community members in a number of ways. First, for those countries that ratify the treaties, the treaty becomes a binding obligation, often enshrined in domestic legislation. More importantly for this paper, RCPs and the media may pick up on the language used in the treaty and by involved policymakers. NGOs and other third parties, including sub-national governmental units, may be influenced by such treaties and in turn, start using such language. National human rights institutions may disseminate the principles through their outreach and education programs.²²² Of course, NGOs and governmental entrepreneurs still have to choose to employ this discourse over other potential discursive frames such as law enforcement or criminalization. Some early evidence suggests the discourse of human rights can enter domestic practice,²²³ but at this time, it is too early for more than optimistic predictions.

²²¹ International Organization for Migration, *Best Practices* at 3 (cited in note 155).

²²² C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 Am U Intl L Rev 259, 276–79 (2004) (describing the various functions of national human rights institutions).

²²³ For example, the former Assistant Secretary of State for Democracy, Human Rights and Labor discussed trafficking as a violation of “virtually the entire spectrum of rights protected in the Universal Declaration of Human Rights.” He also humanized the victims by making them similar to those people we do care about, stating “[s]ome of the young girls . . . were no older than my own thirteen-year old daughter. The experience reminded me that trafficking hits us so hard because it so often involves children like our own.” Harold Koh, Testimony before the House Committee on International Relations

D. A Case Study: Italy's Voluntary Integration of International Law

This paper concludes with a brief case study of Italy's voluntary integration of the CPRMWF, a treaty which it has not ratified. Rather than conduct an exhaustive investigation of Italy's immigration policies, this section provides a discrete example of how unratified international law influences domestic law. Finally, this section notes some of the domestic push-back on Italy's pro-international-law stance and the difficulties of implementing human rights legislation.

In the last twenty-five years, an increasingly large number of illegal migrants have settled in Italy²²⁴ and thus Italy has become more concerned with how to balance the provision of migrants' rights with border controls.²²⁵ Italy's large informal economy and the proliferation of small enterprises seeking cheap labor attract many migrants²²⁶ who now comprise about two percent of the domestic population.²²⁷ Common migrant occupations include housekeeper, street vendor, agricultural day laborer, construction worker, and manufacturing employee.²²⁸

Despite its non-ratification of the CPRMWF,²²⁹ others often laud Italy for using an immigration model based on treaty dictates, with strong protections for migrants' rights.²³⁰ Many migrants believe they can freely obtain medical care and easily acquire lodging and that the police are relatively tolerant of the

(Sept 14, 1999), available at <<http://canberra.usembassy.gov/hyper/1999/WF990914/epf211.htm>> (last visited Jan 22, 2007).

²²⁴ Most immigrants come from ex-eastern bloc countries like Albania, Poland, and Romania, followed by African and Asian countries. Anna Triandafyllidou, *Nation and Immigration: A Study of the Italian Press Discourse*, 5 *Social Identities* 65, 65 (1999).

²²⁵ Lydia Morris, *The Ambiguous Terrain of Rights: Civic Stratification in Italy's Emergent Immigration Regime*, 25 *Intl J Urban & Regional Rsrch* 497, 498 (2001).

²²⁶ Giovanna Zincone, *Italy-Main Features of Italian Immigration Flows* 1 (n.d.), available at <<http://www.mmo.gr/pdf/library/Italy/Main%20features%20of%20Italian%20immigration%20flows.pdf>> (last visited Feb 10, 2007), also available in J. Niessen, ed, *Policy Recommendations for EU Migration Policies* (German Marshall Fund of the US 1991).

²²⁷ Emilio Reyneri, *The Role of the Underground Economy in Irregular Migration to Italy: Cause or Effect?*, 24 *J Ethnic & Migration Stud* 313, 313 (1998). Italian borders are increasingly difficult to cross, so most illegal workers enter by legal means and overstay their visas. *Id.* at 314.

²²⁸ *Id.* at 316-18.

²²⁹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Status of Ratification* (cited in note 108).

²³⁰ *Ensuring Human Rights Protection in the Countries of Destination: Breaking the Cycle of Trafficking* 34 (Sept 23-24, 2004), available at <<http://humantrafficking.org/publications/252>> (last visited Jan 23, 2007).

migrant population.²³¹ Moreover, Italy has offered five different forgiveness periods for immigrants, most recently in 1998.²³² So the conventional wisdom has been that Italy is a rather friendly place for migrants.²³³

Despite the view that Italy has a tolerant attitude toward both regular and irregular migrants, many of its immigration laws of the last twenty-five years were rather restrictive.²³⁴ In an instance of the initiation of the moral disengagement described above, Italian scholar Giuseppe Scortino depicts the early 1990s anti-immigration legislation as part of the mechanism by which immigrants were constructed as “a symbolic category easily differentiated from the natives and functioning as a reserve other.”²³⁵ Such concern about migrants gave rise to a moral panic which in turn led to further anti-immigration legislation.²³⁶ In particular, nationwide immigration acts increased border controls through surveillance, the use of the military, and heightened penalties for smuggling.²³⁷ Scortino suggests this law and order approach stemmed from

the dominant rhetorical vision of immigration as a phenomenon out of control. . . . The more that prospective immigrants [were] portrayed as huddled masses trying to enter the country by any means and at any cost, the more difficult it [was] to see them, once entered, as rational and deserving people with whom to share willingly a common space.²³⁸

The popular press depicted immigration as an epochal event and people often spoke of immigrants as invaders.²³⁹ Politicians emphasized the importance of Italy’s cultural authenticity and

²³¹ Reyneri, 24 *J Ethnic & Migration Stud* at 315 (cited in note 227).

²³² Morris, 25 *Intl J Urban & Regional Rsrch* at 499 (cited in note 225).

²³³ Giovanna Campani, *Immigration and Racism in Southern Europe: The Italian Case*, 16 *Ethnic & Racial Stud* 507, 513 (1993).

²³⁴ Giuseppe Scortino, *Planning in the Dark: The Evolution of Italian Immigration Control*, in Grete Brochmann and Tomas Hammar, eds, *Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies* 233, 237 (Oxford 1999) (describing an administrative freeze on work permits in 1980s).

²³⁵ *Id* at 254. Immigration served as “a symbol of the difficulties and contradictions of Italian society: the poor delivery of social services, the problems of housing, the ‘management’ of the labour market . . . and the spread of the informal economy.” Campani, 16 *J Ethnic & Racial Stud* at 511 (cited in note 233).

²³⁶ Scortino, *Planning in the Dark* at 240 (cited in note 234).

²³⁷ *Id* at 245.

²³⁸ *Id* at 249.

²³⁹ *Id* at 254.

ethnic purity and “legitimised, at least to a certain extent, the practice of social exclusion of immigrants in everyday life.”²⁴⁰ The delayed processes of regularizing immigrants also fostered such moral disengagement by increasing the linkages between immigrants and native criminals. The grouping of immigrants and criminals in turn served to “confirm[] the ethnic stereotypes and delay[] the growth of social control mechanisms internal to migration networks.”²⁴¹ The heightened domestic anxiety spawned numerous violent incidents against immigrants²⁴² and anti-immigration demonstrations proliferated.²⁴³

Despite harsh immigration laws and negative rhetoric from both the popular press and government officials, international law helped facilitate Italy’s eventual movement to a more progressive stance on the treatment of migrants. International immigration human rights law influenced Italy in two ways. The first, and more traditional route, involves the implementation of its treaty duties. For instance, in 1981, Italy signed ILO convention No. 143 on irregular migration.²⁴⁴ Within four years, the Italian government created domestic divisions to monitor the instantiation of migrants’ rights. The law that eventually emerged from the domestic implementation of its treaty duties provided generous rights for migrant workers, rights such as equal pay for equal work, family reunification, and a vague right to cultural identity.²⁴⁵

More interestingly, despite its failure to ratify the CPRMWF, Italy looked to this treaty in designing its 1998 Turco-Napolitano Law,²⁴⁶ the first comprehensive Italian immigration law.²⁴⁷ As a result, this law embodies many human rights principles. The goals of the legislation include: safety and security measures for the benefit of Italian citizens, pluralism and com-

²⁴⁰ Triandafyllidou, 5 *Social Identities* at 74 (cited in note 224).

²⁴¹ Sciortino, *Planning in the Dark* at 249 (cited in note 234).

²⁴² Triandafyllidou, 5 *Social Identities* at 66 (cited in note 224); Campani, 16 *J Ethnic & Racial Stud* at 517 (cited in note 233).

²⁴³ Campani, 16 *J Ethnic & Racial Stud* at 518 (cited in note 233).

²⁴⁴ Human Rights Documentation Center, International Service for Human Rights and South Asia Human Rights Documentation Center, *The Rights of Migrant Workers: Keeping the Issue on Track 3* (Jan 2001), available at <<http://www.hrdc.net/wcar/ThinkPaper6.rtf>> (last visited Mar 31, 2007).

²⁴⁵ Sciortino, *Planning in the Dark* at 237 (cited in note 234).

²⁴⁶ Taran, 2 *Intl Migration* at 18 (cited in note 4).

²⁴⁷ Amnesty International, *Italy: Invisible Children-The Human Rights of Migrant and Asylum-Seeking Minors Detained Upon Arrival at the Maritime Border in Italy 7* (2006), available at <<http://web.amnesty.org/library/print/ENGEUR300012006>> (last visited Jan 25, 2007).

munication measures to produce mutual respect between citizens and migrants, and most notably, full rights for legal immigrants and basic rights for undocumented immigrants.²⁴⁸

In particular, the legislation reflects a concern for the familial, housing, and cultural needs of migrants. Legislators expanded mechanisms for legal entry, including visas for family reunification.²⁴⁹ No mandatory waiting periods exist, judges adjudicate family reunification claims quickly, and newly entering spouses no longer need wait a year before working.²⁵⁰ The Turco-Napolitano Law provides individuals who have been trafficked with a special residence permit,²⁵¹ and also creates temporary hosting centers. Under the law, some migrants have access to public housing.²⁵² The act also foresees the use of cultural mediators, funds multicultural programs, and provides support for migrants to maintain both their native language and Italian.²⁵³

Moreover, the Turco-Napolitano Law provides a generous set of rights to migrants. Documented immigrants receive rights comparable to Italian citizens for civil rights,²⁵⁴ job placement, pensions, public health, and housing. Undocumented migrants receive rights to all "essential health services and treatments."²⁵⁵ Undocumented minors have the right to public education. No requirement exists "to check individual requests for entry against the availability of workers already present."²⁵⁶

Such changes have also been reflected in government and popular speech. For instance, the statement of the Italian Minister of Foreign Affairs at the 55th General Assembly of the UN reflects what may be "a notable shift in official approaches to immigration policy."²⁵⁷ This statement focused simultaneously on the need to preserve immigrants' dignity and the need to filter such policy through UN rules.²⁵⁸ In addition, this government official recognized that "[a] Europe built on fear, for example,

²⁴⁸ Zincone, *Italy-Main Features of Italian Immigration Flows* at 2 (cited in note 226).

²⁴⁹ Morris, 25 *Intl J Urban & Regional Rsrch* at 501 (cited in note 225).

²⁵⁰ *Id* at 503.

²⁵¹ Decree-Law No. 40 of 6 Mar 1998 (Gazz. Uff. No. 286 of 25 July 1998) at Art 20.

²⁵² Morris, 25 *Intl J of Urban & Regional Rsrch* at 504 (cited in note 225). Given Italy's current housing crunch, many cities ignore this policy. *Id*.

²⁵³ Decree-Law No. 40 of 6 Mar 1998 at Arts 38, 39, 40, and 42.

²⁵⁴ *Id* at Art 2.

²⁵⁵ *Id* at Art 35.

²⁵⁶ Morris, 25 *Intl J Urban & Regional Rsrch* at 497, 501 (cited in note 225).

²⁵⁷ Editorial, *An Italian Statement on International Migration*, 26 *Pop & Dev R* 849, 849 (2000).

²⁵⁸ *Id* at 850.

would ultimately cast immigrants as the imaginary enemy, as a race apart. Any effort to overcome such negative stereotyping should be applauded, such as the Conference on Racism.”²⁵⁹ Some political discourse still reflects a view of immigrants as generally being an other within the Italian community,²⁶⁰ but even those that do this condemn xenophobia and the exploitation of undocumented workers.²⁶¹ Similarly, an ethnographic study of Foreigner Office employees reveals a strong value of seeing each immigrant as equal before the law²⁶² and demonstrates flexibility in favor of migrants in promoting family reunification.²⁶³ Studies of popular discourse reveal that the importance of human rights prevents Italians from explicitly blaming immigrants for their conditions.²⁶⁴ As one commentator notes, immigration discourse is

closely intertwined with notions of human rights, solidarity and multiculturalism. Ethical principles of justice and respect for cultural difference, social values, in particular solidarity towards the poor, and political notions, such as equality and fairness, are used to defend the social rights of immigrants and the need to regularise those who are already established in Italian territory.²⁶⁵

Such language suggests a marked change from attitudes expressed during the moral panic of the 1990s.

Yet in practice, the Turco-Napolitano Law has also been used to repress immigrants.²⁶⁶ The law contains new restrictions on the repeated renewals of residence permits.²⁶⁷ It also allows administrative and extra-judicial detention for some migrants as well as limiting access to some professions to Italian or EU citi-

²⁵⁹ *Id.*

²⁶⁰ Anna Triandafyllidou, *The Political Discourse on Immigration in Southern Europe: A Critical Analysis*, 10 *J Community Applied Soc Psych* 373, 380 (2000).

²⁶¹ *Id.* at 381.

²⁶² Anna Triandafyllidou, *Immigration Policy Implementation in Italy: Organizational Culture, Identity Processes and Labour Market Control*, 29 *J Ethnic & Migration Stud* 257, 271, 276, 283 (2003) (noting such values are often selectively applied in practice).

²⁶³ *Id.* at 279.

²⁶⁴ Triandafyllidou, 10 *J Community Applied Soc Psych* at 383–84 (cited in note 260).

²⁶⁵ *Id.* at 384.

²⁶⁶ See Annamaria Rivera and Paola Andrisani, *Analytical Study on Discrimination and Racist Violence in Italy: 2000–2002* (Sept 2002).

²⁶⁷ See Decree-Law No. 40 of 6 Mar 1998 at Art 12. See also Morris, 25 *Intl J Urban & Regional Rsrch* at 502 (cited in note 225).

zens.²⁶⁸ In addition, legislators have pushed back against the Turco-Napolitano Law. The 2002 Bossi-Fini Law modified the Turco-Napolitano Law in several ways. In particular, Bossi-Fini restricts family reunification to dependent children that experience total invalidity (lack of health) and for parents over the age of sixty-five that have no other children in their country of origin.²⁶⁹ This law also expands the deportation²⁷⁰ and detention power of the state.²⁷¹ So many migrants, including minors, find themselves in detention centers without the ability to challenge the lawfulness or arbitrariness of their detention.²⁷² That being said, the Bossi-Fini Law does not repeal the antidiscrimination components of the Turco-Napolitano Law nor does it dismantle any other of the social or family rights of immigrants.²⁷³

Thus, migrants are likely better off than they were in the early 1990s. For instance, the number of family reunification permits has substantially increased along with greater enrollment of foreign students and more jobs for immigrants and a decrease in the wage gap.²⁷⁴ Italy implemented the human rights aspects of the Turco-Napolitano Law with concrete benefits accruing to immigrants.²⁷⁵ The popular press changed its depictions of migrants to emphasize their mistreatment and downplay the use of racial categories.²⁷⁶ Of course, many migrants still suffer from abusive work conditions and ill treatment by the authorities,²⁷⁷ and many experience discrimination and racist vio-

²⁶⁸ Annamaria Rivera and Paola Andrisiani, *National Analytical Study on Racist Violence and Crime* 45 (2005).

²⁶⁹ *Bossi-Fini Law*, no. 189/2002, available at <http://www.unitn.it/en/internazionale/189/law_189_2002.htm> (last visited Jan 25, 2007).

²⁷⁰ *National Demonstration in Rome Against the Bill Bossi/Fini!* (Feb 23, 2002), available at <<http://no-racism.net/article/578>> (last visited Jan 23, 2007).

²⁷¹ Amnesty International, *Italy: Invisible Children; The Human Rights of Migrant and Asylum Seeking Minors Detained Upon Arrival at the Maritime Border in Italy* 3 (2006), available at <<http://web.amnesty.org/library/print/ENGEUR300012006>> (last visited Jan 25, 2007).

²⁷² *Id* at 1.

²⁷³ Giovanna Zincone, *The Making of Policies: Immigration and Immigrants in Italy*, 32 *J Ethnic & Migration Stud* 347, 366 (2006).

²⁷⁴ Giovanna Zincone, *A Model of Reasonable Integration: Summary of the First Report on the Integration of Immigrants in Italy*, 34 *Intl Migration Review*, 956, 956–57 (2000).

²⁷⁵ *Id* at 963. See also Lauren M. McLaren, *Anti-Immigrant Prejudice in Europe: Contact, Threat Perception, and Preferences for the Exclusion of Migrants*, 81 *Social Forces* 909, 930 (2003) (hypothesizing that a culture of human rights dampens the hostility Europeans feel toward immigrants).

²⁷⁶ Giuseppe Sciortino and Asher Columbo, *The Flows and the Flood: The Public Discourse on Immigration in Italy, 1969–2001* 9 *J Mod Ital Stud* 94, 107 (2004).

²⁷⁷ Annamaria Rivera and Paola Andrisani, *National Analytical Study on Racist Violence and Crime: RAXEN Focal Point for Italy* 33–34 (2005), available at

lence.²⁷⁸ Yet the CPRMWF moved into domestic legislation and counteracted the processes of moral disengagement.

Such evidence suggests that immigration human rights treaties can help effectuate modest gains even in countries that do not ratify them. Without sustained political support, however, they will not achieve major social change. Thus, advocates may wish to help states develop mechanisms to effectively disseminate the human rights message of the legislation and of the treaties.

CONCLUSION

Immigration human rights treaties, regimes, and discourse help construct a new vision for the treatment of migrants and their families. While the direct influence of international law on state practice through ratification and domestic implementation may be limited, international law influences states and societies through many different mechanisms. This paper emphasizes the alternate influences of human rights treaties through agenda setting for regional consultative processes, the dissemination and distribution of best practices, and the creation of a universalizing, humanizing discourse that can counter moral disengagement from migrants.

None of these non-legal functions guarantee an improvement in the condition of migrants, but some early optimism seems warranted. RCPs are attentive to the existence of immigration human rights treaties and are developing action plans that incorporate some of their insights. Groups distilling and disseminating migration best practices use treaties to help guide their objectives and their measurements. Finally, international law provides a mechanism to codify and publicize a discourse that emphasizes the humanity rather than the otherness of migrants which can help forestall moral disengagement.

<<http://eumc.europa.eu/eumc/material/pub/RAXEN/4/RV/CS-RV-NR-IT.pdf>> (last visited Apr 2, 2007).

²⁷⁸ *Id.* at 29.

