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Protecting the universal human rights of
illegal migrants



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Benedict Springbett

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| Student Officer: | Benedict Springbett |
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Introduction

Migration has always been a feature of human life; *homo sapiens* probably originated in modern-day Ethiopia before colonising the rest of the world. Although modern transport makes migration easier than ever before, migration between countries has been common for most of recorded human history. As old as migration itself is the restriction of migration: in Renaissance Europe, foreigners were often discriminated against on grounds of religion, and would commonly be charged fees before being allowed to work (Schrover).

Modern immigration policies are much more sophisticated instruments that aim to influence both the amount of migration to a country, as well as the origins of the people who arrive. The former is commonly achieved through quotas and caps. Although the latter originally meant altering the races of migrants, it nowadays refers to prioritising certain skills, backgrounds and income levels (Czaika and Haas 489–90). Immigration laws are, however, not always followed, with many immigrants either entering a country without proper documentation, or staying longer than their visa allows. Such migration is referred to as ‘illegal migration’.

Illegal migration, like all migration, is not the product of a single cause but rather millions of individual decisions. It is usually motivated by economics, either by a desire to increase income or as a response to economic uncertainty in the country of origin (Garip 426). Family and community ties in the destination country are also a common motivation for all forms of migration (426).

If one accepts the proposition that rights are natural and unalienable, rather than granted by law, illegal immigrants should have the same rights as all other human beings. Most importantly, these include the right to education and health, the right to fair working conditions, the right to housing, as well as the right to be free from prejudice and xenophobia.



Definition of Key Terms

Migrant

There is no single definition of the term ‘migrant’ and defining it is complicated. It usually applies to people who move to a different place to improve their opportunities and living conditions. (*Glossary on Migration* 40). They make a free choice to move, and are able to return to their original country. The term ‘migrant’ thus excludes refugees, who do not move out of free will, and who are unable to return to their home country (Edwards).

‘Migrants’, however, are often also defined in terms of their foreign birth or foreign citizenship; this poses problems with discussing naturalised citizens who were born abroad, or those born in the country who hold foreign citizenship (Anderson and Blinder 3). ‘Migrants’ can also be defined in terms of how long they spend in a particular country, as per the UN’s recommendations on migration statistics; these define ‘migrants’ as those who move to a different country for at least three months (Lemaitre 2).

Illegal migrant

An illegal migrant is a migrant “without a residence permit authorising them to regularly stay in their country of destination” (“Who are Undocumented Migrants”). This includes migrants who violate restrictions placed by a residence permit, who overstay visas, or who cross borders in a clandestine manner (Vollmer 3).

It should be borne in mind that the term ‘illegal migrant’ is controversial, due to its connotations of criminality, and because calling a person ‘illegal’ denies them their humanity and also implies they are not in possession of their fundamental equality before the law (Bicocchi and LeVoy 5). Following General Assembly Resolution 3449, this report will hereafter refer to “irregular migrants” (paragraph 2). Terms such as ‘undocumented migrants’ or ‘unauthorised migrants’ are also preferable to ‘illegal migrant’.

Asylum seeker

An asylum seeker is a person who is waiting to be legally recognised as a refugee (*Glossary on Migration* 8). They are thus *not* irregular migrants; Article 31 of the 1951 Refugee Convention protects asylum seekers who are unlawfully in the country that they are seeking asylum in (*Myths Facts and Solutions* 4). The only circumstance in which an asylum seeker can become an irregular migrant is if they are refused asylum and remain in the country in which they sought refuge (*Irregular Migrants* 4).



Refugee

A person's status as a refugee implies that it is too dangerous for them to return home, and that denying their right to asylum has "potentially deadly consequences". (Edwards). Those who are recognised as refugees by a state are known to be threatened by persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinions" in their home country (*Glossary on Migration* 53). People recognised as legitimate refugees are thus *not* irregular migrants.

General Overview

Despite their rights being theoretically guaranteed without discrimination, irregular migrants are among the groups most vulnerable to human rights abuses in all countries. Irregular migrants are found in every country, with the United States, India, and Russia probably having the greatest number of undocumented migrants ("The Top 10 Illegal Immigration Destinations"). Exact figures as to their populations, however, are impossible to find, since irregular migrants rarely reveal themselves to governmental authorities for fear of their status being found out. It should also be borne in mind that, although this section focusses to a large extent on the situation in the United States, and to a lesser extent in the European Union, immigration laws and the extent of irregular immigration vary greatly between countries.

Causes of irregular migration

Sociologists have analysed the causes of all migration as being a mixture of 'push' and 'pull' factors. The former refer to undesirable conditions in the home country, while the latter refer to better perceived conditions in the destination country. Both 'push' and 'pull' factors are usually economic in nature. Push factors generally include a lack of employment or difficulty finding jobs, as well as poverty (*Migration and Globalization* 9); in the future, climate change is likely to be a further push factor for irregular migration (Jayaram). Migrants can also be 'pushed' by a desire to diversify household risk in the face of economic uncertainty: that is to say, the earnings in the destination country that are sent back home allow for a steadier stream of income if there are economic shocks in the country of origin (396). Pull factors mainly revolve around a desire to maximise income by migrating to destinations with higher wages (396); this is often linked to greater demand for labour in the destination country (*Migration and Globalization* 14). Finally, family or community ties to the destination will increase the likelihood that a person migrates (Garip 396–7).



The fact that a migrant's status is irregular is more often due to administrative issues than because of unauthorised border crossings. In many cases, a regular migrant becomes irregular due to a change in their immigration status, often because they do not have the correct permit for residence or employment ("Who are Undocumented Migrants"). This is often caused by restrictive immigration policies that do not allow for change in a person's status, or by bureaucratic issues (Flynn and Düvell 4).

It should be borne in mind that in many cases, irregular migration is economically 'superior' to regular migration, responding much more dynamically to the labour needs of an economy. In the USA, irregular migrants move to the country when the economy is doing well and to regions with high job growth (Hanson 5). Regular migration, however, is out of step with the realities of the current labour market (5), with migration policy reflecting the labour market of several years prior.

Discrimination and xenophobia

Xenophobic attitudes towards all migrants are widespread, but in particular towards irregular migrants. They are often blamed for crime and societal ills, and it is a common belief that illegal migrants abuse health services and steal jobs (Karagueuzian and Verdier-Chouchane 8); nearly half of Americans believe that immigrants take scarce resources (Marouf 141). Additionally, all immigrant groups, irregular or otherwise, are sometimes held to pose a symbolic threat to the culture of the host nation (Stephan et al. 2231), and the language of discussion in MEDCs about irregular migration is often cast in starkly moral tones, viewing irregular migrants as undeserving or inherently criminal (Marouf 141). In some cases, this borders on outright racist statements about threatening the majority ethnic group (130). The less overtly harmful form of xenophobia is the stereotyping faced by migrants, in particular irregular migrants. These stereotypes tend to revolve around the idea that their presence is linked to violence and crime (Fryberg et al. 3), and that they are simultaneously lazy and workshy, while simultaneously taking jobs away from non-migrant workers (Altman).

Health and access to healthcare

Article 12 of the International Covenant on Civil and Political Rights recognises "the right ... [to] the highest possible standards of physical and mental health" (51). This right, however, is rarely realised for irregular migrants, whose ability to be healthy is restricted both by their social exclusion, as well as by a lack of ability access to healthcare.

Although there is no association between migration and infectious diseases (Semza 4), the poverty faced by irregular migrants themselves is linked to ill-health. Irregular migrants are very vulnerable to HIV/AIDS, with "[i]njection drug use and sexual exploitation

[being] potential risks associated with illegal immigration status that increase HIV exposure” (MacPherson 612). In several countries there is a significantly higher prevalence of unintended pregnancies among irregular migrants (Wolff et al. 99–100), with there also being difficulties for pregnant irregular migrants in accessing prenatal care (98).

By and large, irregular migrants are employed in low-wage, low-skill jobs that do not provide health insurance, and most governments restrict access to public healthcare programmes for irregular migrants; they are thus left without any access to healthcare. Within the EU this is common practice. Access to emergency care is not restricted within the EU, with some exceptions (Terminski 463), since such care has been defined by the Council of Europe as a basic human right (Gray and van Ginneken 3). Irregular migrants do, however, often have difficulty accessing healthcare without revealing their irregular status. In some cases, such as Germany’s (8), the irregular migrant is required to register for healthcare; registering can reveal their irregular status to authorities, and some countries such as Spain require proof of residence (6) that many irregular migrants will usually not have. These policies are most of the time implemented to deter irregular migrants, or to reduce the burden on the health system, although evidence is scant as to their actual effectiveness (3).

Whether or not such policies fulfil their aims is unclear. What is not debatable is the impact on irregular migrants: in some cases, those who are unable to pay may simply run away from a hospital where they are being treated (*Migrants in an irregular situation* 37). A more common strategy, in countries that use a health insurance based system, is to pretend to be another person who is covered by health insurance (37). Not only does this undermine the basis of a health insurance system, but it can put migrants in great danger if there are complications during their treatment (38); for instance, if the irregular migrant and the person they are impersonating have a different blood type.

Many irregular migrants, however, simply do not use healthcare systems. In the United States, irregular migrants are significantly less likely to use emergency care, with worse-educated irregular migrants who have been in the country for shorter times being least likely to use it (Wallace et al. 21). Undocumented migrants are also less likely to have a regular source of care (Ortega et al. 2358), they have worse experiences with healthcare (2358), and they have fewer routine visits from a doctor than would be expected (2359). There is often a lack of knowledge among irregular migrants about the extent to which they are entitled to healthcare (De Vito et al. 16), and language and cultural barriers can hinder their ability to access proper care (16–7).



Labour rights

Arguably *the* major concern of protecting irregular migrants' rights is the field of labour rights. In general terms, these rights include the right to associate and organise as employees, the right to bargain collectively, and the right to equality of opportunity in the workplace (Bicocchi and LeVoy 18). International Labour Organization Convention no. 143 aims to ensure that a migrant does not become irregular simply by losing their job, and aims to ensure that pay and work-related benefits are provided to irregular migrants on an equal basis (19); similarly, Article 7 of the International Covenant on Economic, Social and Cultural Rights codifies the right to safe and healthy working conditions, and to equal opportunities within the workplace, while Article 25 the International Convention on the Protection of the Rights of All Migrant Workers guarantees "treatment not less favourable than that which applies to nationals of the State of employment".

International human rights law therefore strives towards broad equality for all workers, whether migrant or non-migrant, and whether irregular or regular. These rights, however, are rarely realised in practice. Many states in the USA require all employers to check the documentation of irregular migrants, an act that greatly decreases their ability to move jobs; this in turn depresses their wage growth, with irregular migrants' wages being considerably lower than those of their regular counterparts ("Wage War"). Irregular migrants in the United States are barred from receiving monetary compensation if they are illegally fired for joining a union (Cunningham-Parmeter 1363), and many states further restrict the ability for irregular migrants to be compensated for illegal discrimination, sexual harassment claims or injuries in a workplace (1364).

Deportation

Rules regarding deportation vary between countries, with the United States usually only allowing deportation when an irregular migrant has committed a crime (Casselman), while the United Kingdom allows for deportation in many more circumstances, in particular when a visa is overstayed (Farrant 5).

Deportations often do not respect the rights of the irregular migrants concerned. In particular, allowing any irregular migrant to be deported puts those who have been in the country for decades at risk, while using police forces as immigration officers creates tensions between irregular migrants and the police ("The right way to deport people"). Additionally, policies whereby deportations happen before all rights to appeal have been exhausted breaches an irregular migrant's right to family life (Lea).



This right to family life is undoubtedly violated in the case of deportation, especially in the case of parents, with children with deported parents suffering “psychological distress” (Capps et al. 6). This is rarely remedied by mental healthcare, in part due to irregular immigrants’ reduced access to healthcare (21). Additionally, more than 91% of deported migrants are male, which often causes families to lose a breadwinner (10); a study in the United States showed that family income dropped 70% in the months after the arrest of a parent (10).

Major Parties Involved

Frontex

The European Border and Coastguard Agency, usually known as Frontex, is an EU agency in charge of border control of the Schengen Area, the group of European countries that have abolished passport control between their borders. It is thus responsible for preventing unauthorised border crossings into the Schengen Area, and enables “swift and reliable exchanges of information regarding ... illegal [sic] immigration”. (“Mission and Tasks”)

India

India has the second largest number of irregular migrants in the world, most of them coming from Bangladesh. In the 1980s, the influx of irregular immigrants caused civil agitation in Assam State, leading to mostly ineffective attempts by the government to mitigate the issue. Unusually, the country does not have a policy of distinguishing between irregular migrants and legitimate refugees. (Tripathi)

International Organization for Migration

The International Organization for Migration (IOM) seeks “humane and orderly migration”, and supporting states with irregular migration forms a part of its strategic focus (“Mission”). Although the rights of irregular migrants are only one part of its mission, the Organization does recognise the specific issues faced by irregular migrants (*Migration in the 2030 Agenda* 41); instead, its focus is on reducing irregular migration and replacing it with regular migration, rather than on protecting the rights of migrants who are already undocumented (“Immigration and Border Management”).



United States

It has been estimated that irregular migrants make up about 5% of the United States's workforce ("Wage War"), and 8% of all children in the United States have at least one parent who is an irregular migrant. The country is the single largest destination for irregular immigration in the world ("Top 10 Illegal Immigration Destinations"). Despite being a nation of (mainly) immigrants, the United States' attitudes towards irregular migration have been varied. Before the adoption in 1986 of the Immigration Reform and Control Act, the country took a "*laissez-faire* attitude" towards irregular migration (Chishti et al.), having repealed the original system of quotas based on national origin ("The Immigration Act of 1924").

Despite popular perception, a quarter of irregular immigrants in the United States are not Hispanic, with about 270 000 being Chinese out of a total of 11 million (Yee) and 60% of irregular immigrants overall have been in the country for more than ten years. Over a million have returned to their home country since 2007 (Frum). Furthermore, although its President claims otherwise, more irregular immigrants in the United States have overstayed a visa rather than crossing the country's southern border, and the proportion of felons among irregular immigrants is lower than for the rest of the population (Yee).

Timeline of Key Events

For the most part, there are few 'key events' relating to irregular migration, and those that do exist are for the most part relate to the evolving law on irregular migrants. It is important to remember that the history of irregular migration is made up of the separate decisions of millions of people, and not just changes in governmental policies.

| Date | Description of Event |
|-----------------|---|
| 1979–85 | Assam, an Indian state bordering Bangladesh, sees agitation against irregular migrants within the state. Demanding the expulsion of migrants, a student-led movement caused civil disobedience and inter-ethnic violence. (Baruah 1184) |
| 14 June 1985 | The Schengen Agreement is signed, which abolished border controls between several EU member states. Although it has made irregular immigration within the EU easier, it has also allowed much closer cooperation between EU member states in the field of migration. (Lungescu) |
| 6 November 1986 | The United States enacts the Immigration Reform and Control Act of 1986 (IRCA). This carried out the first ever widespread amnesty programme for irregular migrants in America. It also, however, made knowing employment of irregular migrants a crime |



and required employers to verify the regularity of their workforce (Chishti et al.)

27 March 2003

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the US Supreme Court rules that irregular migrants are not entitled to backpay after being illegally fired (Cunningham-Parmeter 1396–70).

11 December 2009

The European Union (EU) adopts the Stockholm Programme, which aims to co-ordinate policy on irregular migrants between member states (Carrera and Merlino 1–2). In particular, it aims to criminalise irregular migrants who knowingly gain employment within the EU (5).

Early 2017

Following the election of an unprecedentedly anti-immigrant President on a wall-building platform, irregular border crossings into the United States decline by 40% (Frum).

UN Involvement, Relevant Resolutions, Treaties and Events

Although it has not often involved itself specifically in questions of irregular migration, the General Assembly has tended to promote the rights of “all migrant workers”, most notably in the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and their Families. Resolutions, most recently 70/147, have used similar language, calling for the protection of all migrants “regardless of their immigration status” (2). The General Assembly has thus not sought to provide measures specifically for irregular migrants, and the New York Declaration for Refugees and Migrants focussed on “[r]eduction of the incidence and impact of irregular migration” (22), and not on protecting the rights of those migrants who already have an irregular status. In a similar vein, resolution 69/229 merely called for “ensur[ing] safe, orderly and regular migration” (4) and made no mention of the rights of irregular migrants.

- Measures to ensure the human rights and dignity of all migrant workers, 9 December 1975 (**A/RES/3449**)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990 (**A/RES/45/158**)
- International Migration and Development, 19 December 2014 (**A/RES/69/229**)
- Protection of Migrants, 17 December 2015 (**A/RES/70/147**)
- New York Declaration for Refugees and Migrants, 19 September 2016 (**A/RES/71/1**)

Previous Attempts to Resolve the Issue

There has never been a comprehensive attempt to resolve the issue of irregular immigration, in part because the problem is so large-scale that it would be impossible to



solve outright. Irregular migration will always continue, and past evidence suggests that migrants' irregular status greatly hinders the protection of their human rights.

Many states have offered 'amnesty' programmes for irregular migrants, which offer them regularised status. Amnesty programmes' success is largely dependent on their implementation; eligibility often requires a minimum time spent in the country, and sometimes also requires the migrant to be in employment (Devillanova 4). The prospect of regularised status has been shown to raise the proportion of irregular migrants in employment (5), even though this may come with a reduction of bargaining power, with irregular migrants being willing to accept any job with low wages in order to become regularised (25). Despite fears it could increase levels of irregular migration, there is also little evidence to suggest that the most notable amnesty programme, that carried out in the United States by the 1986 Immigration Reform and Control Act (IRCA), increased levels of undocumented immigration to the country (Linder 14).

Within the European Union (EU), migration policy is concurrently decided by the EU itself and its member states. In 2009 the European Commission adopted the Stockholm Programme, to provide a comprehensive policy framework on *inter alia* irregular migration in the EU. The Programme proposes the criminalisation of irregular migrants who intentionally gain employment (Carrera and Merlino 6), as well as requiring states "to issue a return decision to any TCN [third country national] staying irregularly on their territory [i.e. deport them]", provided that the rights and dignity of the migrant in question are respected (6–7). It also aims to "facilitate minors' return to their countries of origin" (8), and the Programme has generally been implemented by member states (*A Descriptive Analysis*). Despite this, the Stockholm Programme is "far from following an evidence-based approach" (Carrera and Merlino 32), with the Programme simply criminalising irregular migrants as well as those who aim to help them (33); this stands in contrast to the approach taken in the United States, where not all irregular migrants are seen as criminals. Additionally, the Programme has not addressed the gap between the economic and social rights that irregular migrants hold in theory and the extent to which they are denied their rights by member states (33).

Possible Solutions

Simply attempting to remove irregular migrants themselves, either by deporting them or by trying to stop them coming in the first place, does nothing to protect their rights. Solutions to the issue must focus on protecting the universal rights that all irregular migrants should possess, while recognising that they have in some cases – but not all – broken laws.



In effect, a cultural shift is required to see irregular migrants as the holders of rights rather than 'illegals'.

Some deportations are, however, inevitable, for instance of asylum seekers who are judged not to be legitimate refugees. When a migrant's status is in doubt, they are commonly detained, and often in a manner that is not consistent with their right to human dignity. In particular, it has been suggested that detention be only used sparingly, and when it is used it should not resemble a prison (US Conference of Catholic Bishops 161); additionally, decisions on when to deport irregular migrants should be made by judges rather than governmental bodies (161), in order to ensure respect for the right to due process; the right to appeal immigration decisions must also be protected. When parents have been deported, international co-ordination could take place to reunite their children in the country they have been deported to (Capps et al. 15), as well as providing mental health care to such children (20–2). Finally, the migrants who are targeted for deportations should be those who have actually committed a serious crime, rather than all irregular migrants ("The right way to deport people").

In the field of labour rights, member states could adopt a common policy for the rights of all workers, regardless of their status (Carrera and Merlino 34); such a policy ought to be in accordance with the fundamental International Labour Organization conventions on human rights, in particular ensuring freedom to join a trade union and to collectively bargain, as well as preventing discrimination in employment (Bicocchi and LeVoy 18). Additionally, irregular migrant workers should be informed of their rights (LeVoy and Verbruggen 6), and increased membership of trade unions would allow for greater collective bargaining powers (7); in particular, unionisation could be increased by lowering membership fees and removing the impression that unions will give away information about irregular migrants to state authorities (44–5). Finally, by inspecting workplaces governments are better able to penalise employers who abuse workers, in particular vulnerable irregular migrants (105).

Regularisation of irregular migrants should continue; such programmes also end the unclear state of many irregular migrants, being neither allowed to remain but unlikely to be deported (Whiteman), although amnesty programmes should not limit workers' bargaining power by forcing them to take low-paid jobs in order to become regularised (Devillanova 25).

Integrating irregular migrants into societies will both allay fears that they are a threat to peoples' ways of life, as well as preventing irregular migrants from becoming pariahs. Integration strategies can include increasing access to healthcare, in particular by allowing irregular migrants to gain coverage in state-provided health insurance systems, as well as explicitly including irregular migrants in health policies (Gray and van Ginneken 9).



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