

# “The Right to Have Rights”: Undocumented Migrants and State Protection

Jaya Ramji-Nogales\*

## I. INTRODUCTION

We are in the midst of a national conversation, albeit raucous and vitriolic, about questions of membership and belonging. As Congress repeatedly fails to take action on comprehensive immigration reform, the Executive exercises its authority to determine which migrants should be eligible to remain, becoming incorporated into our polity, and which should be deported.<sup>1</sup> Even if President Obama’s executive actions withstand the current legal challenges, many migrants will remain undocumented and vulnerable to exploitation and abuse.<sup>2</sup> This vulnerability is rooted in their inability to call upon the basic protective functions of the state in which they reside for fear of deportation. While undocumented migrants are not technically stateless, they exist in a legal limbo that recalls statelessness. Their state of residence does not recognize their existence; they are for all intents and purposes beyond the reach of their state of nationality. In a world that still grounds the

---

\* Professor of Law and Co-Director, Institute for International Law and Public Policy, Temple University, Beasley School of Law. Many thanks to Dina Kopansky and Andrea Saylor for excellent research assistance.

1. Reuters, *Obama Unveils Sweeping Immigration Reform*, N.Y. TIMES (Nov. 21, 2014, 1:23 AM), <http://www.nytimes.com/reuters/2014/11/21/world/americas/21reuters-usa-immigration-obama.html>; DEP’T OF HOMELAND SEC., *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Feb. 11, 2015); Ashley Parker & Jonathan Weisman, *Rebellion Inside G.O.P. Scuttles Vote on Border Bill*, N.Y. TIMES (July 31, 2014), <http://www.nytimes.com/2014/08/01/us/politics/blow-to-house-gop-leadership-as-border-bill-falters-.html>. At the time of writing, a federal district court in Texas had issued a preliminary injunction blocking the implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents Program as well as an expansion of the Deferred Action for Childhood Arrivals Program. *Texas v. United States*, No. B-14-254 (S.D. Tex. Feb. 16, 2015) (order granting preliminary injunction).

2. *As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program*, MIGRATION POL’Y INST. (Nov. 19, 2014), <http://migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>; Erika Eichelberger, *Obama’s Executive Action Will Protect 5 Million Undocumented Immigrants*, MOTHER JONES (Nov. 20, 2014, 9:21 PM), <http://www.motherjones.com/politics/2014/11/obama-executive-action-immigration-senate>.

protection of basic rights in sovereignty, these *sans-papiers* have signed the wrong political contract.

The solution offered by many advocates is to frame undocumented migrants' rights as international human rights. After all, this set of rights crosses sovereign borders; it offers a universal political contract available to every human being simply by dint of their humanity. At least that's the story that international human rights law tells about itself and that a superficial read might confirm. A closer examination finds that human rights law fails to extend the rights that are most crucial in protecting undocumented migrants against vulnerability.<sup>3</sup> In other words, undocumented migrants' rights are most definitely not international human rights, and international human rights are not as universal as they claim.

Critiques of the concept and framework of international human rights, if not common, are offered in several social science literatures.<sup>4</sup> Though even rarer in legal scholarship, which tends to reify international human rights law as offering solutions to all of the worlds' problems, if we could just convince countries to implement it properly, several legal academics have put forward thoughtful critical perspectives on human rights law.<sup>5</sup> Only a handful of scholars have explicitly extended this critique to the situation of undocumented migrants under international human rights law.<sup>6</sup> Though these scholars are pushing the boundaries of contemporary legal thought, they share a common foremother who grappled with similar concerns more than a half century ago: Hannah Arendt.<sup>7</sup>

This article aims to make explicit the intellectual debt owed to Arendt by analyzing the problems facing undocumented migrants today

---

3. Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 *VAND. J. TRANSNAT'L L.* 699 (2014) (demonstrating that the human rights framework contains significant conceptual gaps when it comes to the undocumented).

4. See, e.g., CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 201–03 (2009); TONY EVANS, *THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE* 30–31 (2005).

5. See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 14–15 (2004); MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL & CULTURAL CRITIQUE* (2002); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003); Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, in 1 *HUMANITY* 47 (2010).

6. See, e.g., *ARE HUMAN RIGHTS FOR MIGRANTS?: CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES* (Marie-Bénédicte Dembour & Tobias Kelly eds., 2011).

7. A new political theory book traces this connection thoroughly and thoughtfully. AYTEN GÜNDOĞDU, *RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS* (2015).

through the lens of ideas she presents in *The Origins of Totalitarianism*. It begins by defining and describing three vulnerable populations: minorities, stateless, and undocumented. The article then presents three central arguments from Arendt's critique of human rights as applied to the minorities and the stateless. It next discusses the striking parallels with the situation of the undocumented today and also explores the differences between the three groups. The article concludes by drawing on those differences to suggest ways to better protect the undocumented from vulnerability in the absence of adequate protection under human rights law.

## II. ARENDT IN CONTEXT

Hannah Arendt is best known for her work as a political theorist focused on questions of power and authority.<sup>8</sup> One of the pre-eminent theorists on the problem of statelessness, Arendt herself was stateless for eighteen years.<sup>9</sup> Born in Germany, she fled to France in 1933 after being imprisoned by the Gestapo.<sup>10</sup> In 1940, Arendt was interned by the Vichy Regime.<sup>11</sup> She escaped after a few weeks and fled to the United States in 1941.<sup>12</sup> Arendt finally obtained U.S. citizenship in 1951, after earning a deep personal understanding of the obstacles facing the stateless in exercising their rights.<sup>13</sup>

Arendt's critique of human rights must be understood within its historical context.<sup>14</sup> *The Origins of Totalitarianism* was first published in 1950, before modern international human rights treaties had been ratified. Her concern was with the Declaration of the Rights of Man and concepts of human rights, rather than the specific international legal frameworks found within the International Covenant on Civil and Political Rights and the other treaties that form the corpus of

---

8. JULIA KRISTEVA, HANNAH ARENDT 3–4 (2001).

9. Richard L. Bernstein, *Hannah Arendt on the Stateless*, PARALLAX, Aug. 2005, at 46–47.

10. SIMON SWIFT, HANNAH ARENDT 10 (2009).

11. *See id.*

12. *Id.* at 11.

13. *Id.* at 9–13; Bernstein, *supra* note 9 at 46–47, 50–51.

14. There are many philosophical debates about the validity of Arendt's famous critique of human rights. *See, e.g.*, PEG BIRMINGHAM, HANNAH ARENDT AND HUMAN RIGHTS: THE PREDICAMENT OF COMMON RESPONSIBILITY 1–3 (2006) (discussing the work of several scholars who raise questions about Arendt's critique of human rights); GÜNDOĞDU, *supra* note 7, at 47–54 (discussing Jacques Rancière's arguments about Arendt's critique of human rights); ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 5–6 (2012) (discussing the work of Seyla Benhabib and Margaret Canovan). This article does not engage with these debates, instead taking her ideas at face value.

international human rights law today. Arendt's critique is also, of course, focused on the situation of forced migrants in Europe after the First and Second World Wars. Though there are many differences between her subject population and the situation of undocumented migrants seeking to enter developed countries in the modern era, her critiques of the concept of human rights are still trenchant when applied to the treatment of the undocumented under contemporary international human rights law.

### III. THE MINORITIES, THE STATELESS, AND THE UNDOCUMENTED

Arendt focuses on two populations in her critique of human rights: the minorities and the stateless. This article defines minorities as nationals of one country governed by nationals of another country,<sup>15</sup> and stateless as those who are without a nationality, having lost their national state or having been denationalized.<sup>16</sup> Arendt provides historical context for these definitions. Her analysis begins with the Paris Peace Conference of 1919.<sup>17</sup> The Peace Treaties that ended World War I redrew the map of Europe. Austria-Hungary was dissolved and the Baltic States were established.<sup>18</sup> This new state ordering created the minorities, as people who considered themselves nationals of different countries were now merged into one country. Arendt explains that the Peace Treaties carved these new compatriots into three groups: one set was awarded the power to govern, a second group was incorrectly assumed to be equal partners in governance, and the remainder became "minorities."<sup>19</sup> In both of the postwar periods, a variety of factors contributed to the growth of statelessness.<sup>20</sup> Some people became stateless for lack of proof of their country of origin, a problem that was exacerbated for those no longer resident in their city of birth.

[S]ometimes their place of origin changed hands so many times in the turmoil of postwar disputes that the nationality of its inhabitants

---

15. See Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AM. J. INT'L L. 641, 641 (1923) (noting that these national minorities might also be linguistic, racial, or religious minorities).

16. See, e.g., Convention Relating to the Status of Stateless Persons art. 1, ¶ 1, Sept. 28, 1954, 360 U.N.T.S. 117 (defining "stateless person" as "a person who is not considered as a national by any State under the operation of its law").

17. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 270 (1976).

18. Miriam Rürup, *Lives in Limbo: Statelessness After Two World Wars*, 49 BULL. GERMAN HIST. INST. 113, 122 (2011).

19. ARENDT, *supra* note 17, at 270.

20. Rürup, *supra* note 18, at 118–21.

changed from year to year . . . ; more often than one would imagine, people took refuge in statelessness . . . in order to remain where they were and avoid being deported to a “homeland” where they would be strangers . . . .<sup>21</sup>

At the same time, many refugees—Armenians, Germans, Hungarians, Russians, Spaniards—who had been forced out of their home countries by revolutions were denationalized by their governments.<sup>22</sup>

This article compares the treatment of the minorities and the stateless under international law with the contemporary position of undocumented migrants vis-à-vis international human rights law. It focuses on the situation of these three groups outside the state’s political boundaries, and the role of international law in ameliorating or exacerbating the vulnerabilities that arise from that location. To that end, I define the undocumented as “individuals without any lawful immigration status or any special claim to protection against deportation.”<sup>23</sup> These are individuals who have neither a visa nor a claim to asylum to fall back on. If they are caught by state authorities, they can be deported at any time. While it is important to remember that individuals move back and forth between different immigration statuses over time, this article explores the applicability of international human rights law to those who are, at that time, beyond the political boundaries of the state. This includes individuals who might actually have some claim to remain but are unaware of that claim, but excludes those who have a lawful status that is in jeopardy because of their criminal convictions. The former are not within the state’s political boundaries until they are made aware of their claim, and the latter remain within those boundaries until after the immigration process upon which my analysis focuses.

Like the minorities and the stateless, undocumented migrants are vulnerable.<sup>24</sup> Because they are unable, for financial and other reasons, to obtain lawful entry papers, the undocumented are forced to take risky journeys to their destination state. Many migrants die en route, facing heat exhaustion and violent criminals in the desert south of the U.S. border or deadly exposure and capsized vessels on sea routes to Europe

---

21. ARENDT, *supra* note 17, at 277–78.

22. *Id.* at 278; Rürup, *supra* note 18, at 118–19.

23. Ramji-Nogales, *supra* note 3, at 714.

24. See, e.g., Jorge A. Bustamante, *Immigrants’ Vulnerability as Subjects of Human Rights*, 36 INT’L MIGRATION REV. 333, 340 (2002) (describing the threats faced by and precarious status of migrants around the world).

and Australia.<sup>25</sup> If they are caught entering the country without authorization, these migrants are often detained in prison-like conditions.<sup>26</sup> Those who avoid apprehension by border authorities face exploitation at the hands of employers, traffickers, members of their community, and law enforcement alike.<sup>27</sup> Because they can be deported at any time, the undocumented have little recourse against such abuse and mistreatment.<sup>28</sup> Moreover, most undocumented migrants who have resided in a host country for some time build up community and family ties. They live with the constant fear that deportation will rip them away from the lives that they have built, including their spouses and children.<sup>29</sup> This article highlights these two central challenges of being undocumented: the lack of recourse against exploitation due to fear of deportation and the rupture of family and community ties through deportation.

#### IV. INTERNATIONAL HUMAN RIGHTS LAW PROTECTIONS FOR UNDOCUMENTED MIGRANTS

Though international human rights law presents itself as representing universal values, it does little to protect undocumented migrants against exploitation because of their migration status and rupture of family ties. In order to understand the limited scope of international human rights law's protections, these concerns can be framed in the terminology of rights. These are arguably the rights that undocumented migrants would prioritize if they were writing international human rights law; in other words, the existence or non-existence of these rights can be used to test whether human rights law's underlying values are truly universal.

Perhaps the most important for undocumented migrants is the right to territorial security. This is a conservative framing of the interests of

---

25. See, e.g., INT'L ORG. FOR MIGRATION, *FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION* 50, 91, 151–53, 181 (2014), [http://publications.iom.int/bookstore/free/FatalJourneys\\_CountingtheUncounted.pdf](http://publications.iom.int/bookstore/free/FatalJourneys_CountingtheUncounted.pdf).

26. See, e.g., *Detention Profiles*, GLOBAL DETENTION PROJECT, <http://www.globaldetentionproject.org/publications/detention-profiles.html> (last visited May 25, 2015).

27. See, e.g., *Rights on the Line: Human Rights Watch Work on Abuses Against Migrants in 2010*, HUMAN RIGHTS WATCH (2010), <http://www.hrw.org/sites/default/files/reports/wrd1210webwcover.pdf>.

28. See, e.g., *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH 24 (2012), [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf).

29. See, e.g., *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUMAN RIGHTS WATCH 4 (2007), [http://www.hrw.org/sites/default/files/reports/us0707\\_web.pdf](http://www.hrw.org/sites/default/files/reports/us0707_web.pdf).

the undocumented, as it is not a claim to open borders. Instead, this right would protect migrants who have lived in a host country long enough to develop deep social attachments, enabling them to remain by obtaining lawful immigration status. This right need not even be absolute—it could contain limitations based on national security and public order, as those concerns may be viewed as impacting the human rights of residents of the country in question.

Even defined narrowly, the right to territorial security is not supported in any international human rights treaty or any soft law produced by human rights treaty bodies.<sup>30</sup> Indeed, these treaties and interpretive bodies have consistently stated that they do not extend the right to territorial security to undocumented migrants. The United Nations (U.N.) Human Rights Committee, which is the body responsible for interpreting the International Covenant on Civil and Political Rights (ICCPR),<sup>31</sup> has made clear that the treaty “does not recognize the rights of aliens to . . . reside in the territory of a State party.”<sup>32</sup> It turns out that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families protects only certain rights for certain workers. The treaty states in no uncertain terms that it does not offer any right to “regularization” for undocumented migrants or their families.<sup>33</sup> From the perspective of the undocumented migrant, the absence of the right to territorial security is deeply problematic. The right to remain is an essential precondition for the exercise of other rights because the threat of deportation is a fundamental cause of vulnerability.

International human rights law fails to provide undocumented migrants not only with the right to remain but also to fair procedures in determining whether or not they are deportable. Thus, even if international human rights law offered the undocumented a defense to removal, they would not have the right to have that claim adjudicated fairly. The right to procedural due process in deportation proceedings might include protections such as timely notice of the basis for deportation, a meaningful opportunity to be heard, open access to evidence presented against the migrant and a chance to respond to such

---

30. See Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 *YALE J. INT'L L.* 389, 404–05 (2009) (describing human rights treaty bodies).

31. International Covenant on Civil and Political Rights art. 28, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

32. Human Rights Comm., General Comment 15, *The Position of Aliens Under the Covenant*, ¶5, U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. I) (May 27, 2008) [hereinafter General Comment 15].

33. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 35, July 1, 2003, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

evidence, a neutral decision-maker, judicial review, and even government-funded legal representation and interpretation. While the ICCPR awards non-citizens lawfully in the territory certain rights in removal proceedings, the same protections do not apply to the undocumented.<sup>34</sup> The U.N. Human Rights Committee has interpreted the procedural due process clause in the ICCPR as inapplicable to undocumented migrants.<sup>35</sup> The same is true for regional human rights law in the developed world; the European Convention on Human Rights awards procedural due process protections in immigration proceedings only to migrants lawfully present.<sup>36</sup>

Though these provisions of human rights law denying the right to procedural due process in immigration proceedings is applicable in most migrant-receiving countries, there is some support for the existence of this right in softer forms of human rights law. The Migrant Workers Convention provides the right to a written expulsion decision in a language the migrant understands and the right to contest the basis for expulsion.<sup>37</sup> That treaty, however, carries little weight, given that it has not been ratified by the countries that host most undocumented migrants.<sup>38</sup> The Drafting Committee of the U.N. International Law Commission has provisionally adopted draft articles that provide for the right to notice and a hearing as well as government-funded representation and interpretation for undocumented migrants present in the relevant state for at least six months.<sup>39</sup> These articles are not yet binding, as they have yet to be submitted to the U.N. General Assembly for codification.<sup>40</sup> Regional human rights law also offers a different view of

---

34. ICCPR, *supra* note 31, at art. 13.

35. According to the Human Rights Committee's General Comment 15:

[I]f the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. . . .

An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.

General Comment 15, *supra* note 32, at ¶ 6, 9, 10.

36. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 7, art. 1, Nov. 22, 1984, E.T.S. No. 117; *Nolan v. Russia*, No. 21512/04, ¶ 48 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91302>.

37. Migrant Workers Convention, *supra* note 33, at art. 22.

38. MASSIMO FRIGO, INT'L COMM'N OF JURISTS, MIGRATION AND INTERNATIONAL HUMAN RIGHTS: A PRACTITIONERS' GUIDE 43–44 (2014), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf> (noting that none of the most developed countries are parties to the Convention).

39. Sean Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AM. J. INT'L L. 164, 164, 166–67 (2013).

40. *Id.* at 168 (explaining that the International Law Commission, on which Professor Murphy

procedural due process rights in immigration proceedings. The Inter-American Commission on Human Rights has interpreted the American Declaration of the Rights and Duties of Man as requiring that “in the context of immigration proceedings that include the sanction of deportation, . . . heightened due process protections apply.”<sup>41</sup> These opposing perspectives on human rights law protections relating to procedural due process do not offer much real-world protection to undocumented migrants given their limited applicability.

Given the widespread mistreatment they face precisely because they lack lawful migration status, the right to non-discrimination based on immigration status is fundamental to ensuring a secure existence for undocumented migrants. Again, international human rights law offers extremely limited protections against discrimination based on immigration status. The ICCPR is often portrayed as a treaty focused on promoting the principle of equality through non-discrimination rights.<sup>42</sup> Yet the ICCPR fails to explicitly reference immigration status in its long lists of grounds for non-discrimination.<sup>43</sup> The treaty’s drafters specifically excluded even nationality from these non-discrimination grounds, apparently so that they were not obligated to offer certain civic, political, and property rights to non-citizens.<sup>44</sup> The ICCPR could have been subject to progressive development through the “other status” ground for non-discrimination, but the U.N. Human Rights Committee has not interpreted this broadly worded clause to include immigration status.<sup>45</sup> Similarly, the non-discrimination clauses in the Migrant Workers Convention and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) do not explicitly enumerate

---

sits, intends to complete and adopt these articles in 2015).

41. *Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 ¶ 63 (2010); Organization of American States, *American Declaration of the Rights and Duties of Man*, art. XXVI, O.A.S. Res. XXX (1948).

42. See, e.g., Human Rights Comm., General Comment 18: Non-discrimination, ¶ 1, U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. I) (Nov. 10, 1989).

43. ICCPR, *supra* note 31, at art. 2(1) (requiring States Parties to ensure all rights in the Convention without distinction based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”); *id.* at art. 26 (requiring equal protection of the law on the same grounds).

44. Annotations on the Text of the Draft International Covenants on Human Rights, ch. VI, ¶ 181, U.N. GAOR, 10th Sess., U.N. Doc. A/2929, at 61–62 (July 1, 1955); Rep. of the Third Comm., Draft International Covenants on Human Rights, ¶ 113, U.N. Doc. A/5000, at 33 (Dec. 5, 1961) (“[I]t was generally felt that . . . the denial of certain civic or political rights to aliens . . . [did not] constitute[] discrimination within the meaning of article 2[6].”).

45. See, e.g., General Comment 15, *supra* note 32, at ¶ 6 (“[O]nce aliens are *allowed to enter the territory of a State party* they are entitled to the rights set out in the Covenant.”) (emphasis added).

immigration status as a protected ground.<sup>46</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) goes one step further, explicitly allowing distinctions based on immigration status.<sup>47</sup>

Some international human rights law enables discrimination on the basis of immigration status by cordoning off certain rights for those lawfully present. Even the U.N. Migrant Workers Convention delineates certain rights, such as the rights to family unity and equality of treatment as to housing, education, and other social services, as inapplicable to the undocumented.<sup>48</sup> Similarly, the International Labor Organization's Convention Concerning Migration for Employment refuses to extend protection against employment-related discrimination and social security benefits to the undocumented.<sup>49</sup> And the International Labor Organization's Migrant Workers Convention does not protect the undocumented against discrimination in opportunity and treatment with respect to employment.<sup>50</sup>

Though the text of international human rights treaties enables discrimination against undocumented migrants on certain grounds and fails to offer explicit protection on other grounds, treaty interpretive bodies have been more protective of the rights of the undocumented to be free from discrimination based on immigration status. The Committee on Economic, Social, and Cultural Rights has interpreted the ICESCR to apply to undocumented migrants.<sup>51</sup> The Committee on the Elimination of Racial Discrimination has interpreted the language of CERD permitting differential treatment based on immigration status to apply

---

46. Migrant Workers Convention, *supra* note 33, at art. 1(1); International Covenant on Economic, Social, and Cultural Rights art. 2(2), Jan. 3, 1976, 993 U.N.T.S. 3 (prohibiting "discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

47. International Convention on the Elimination of All Forms of Racial Discrimination art. 1(2), Jan. 4, 1969, 660 U.N.T.S. 196 (permitting "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.>").

48. Migrant Workers Convention, *supra* note 33, at art. 36–56.

49. Int'l Labor Org., Convention Concerning Migration for Employment art. 6, July 1, 1949, C097. The same is true of the European Convention on the Legal Status of Migrant Workers article 1(1), which does not cover any of the three rights on which this section focuses. Council of Europe, European Convention on the Legal Status of Migrant Workers, Nov. 24, 1977, E.T.S. No. 093.

50. *See* Int'l Labor Org., Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers art. 9–10, June 24, 1975, C143.

51. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, ¶ 30, U.N. Doc. E/C.12/GC/20, at 9 (July 2, 2009).

only where proportional to the achievement of a legitimate aim.<sup>52</sup> The Inter-American Court of Human Rights contests the U.N. Human Rights Committee's approach even more sharply, interpreting both the American Convention on Human Rights and the ICCPR to prohibit discrimination against undocumented workers in the terms and conditions of work.<sup>53</sup>

The right to family unity offers the most promise in protecting undocumented migrants against deportation. International human rights law chooses a restrictive definition of family unity, focusing on the right to remain in a country so as not to be separated from one's family rather than the right to enter a country in order to be reunified with one's family. Family is also defined relatively narrowly to include only spouses and minor children.<sup>54</sup>

From this starting point, the U.N. Human Rights Committee has awarded procedural due process protections to undocumented migrants in two cases by grounding them in right to family life and the right of citizen children to protection as minors.<sup>55</sup> Though the European Court of Human Rights has a large body of cases drawing on the right to family unity to strike down deportation orders, the majority of these cases involve lawfully present immigrants ordered deported based on criminal convictions.<sup>56</sup> In the three cases the court has decided involving

---

52. Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination Against Non-Citizens, ¶ 4, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2002). The Committee also recommends that public educational institutions be open to children of undocumented immigrants. *Id.* at ¶ 30.

53. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No.18, ¶ 169 (Sept. 17, 2003).

54. *See, e.g.,* Madafferi v. Australia, 8 Selected Decisions of the Human Rights Committee Under the Optional Protocol 259, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

55. *Id.*; Winata v. Australia, 7 Selected Decisions of the Human Rights Committee Under the Optional Protocol 174, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

56. *A.A. v. United Kingdom*, App. No. 8000/08 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106282>; *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 (1985); *Al-Nashif v. Bulgaria*, App. No. 50963/99 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60522>; *Amrollahi v. Denmark*, App. No. 56811/00 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60605>; *Baghli v. France*, 1999-XIII Eur. Ct. H.R. 169; *Bensaid v. United Kingdom*, 2001-I Eur. Ct. H.R. 303; *Berrehab v. Netherlands*, App. No. 10730/84 (Eur. Ct. H.R. 1988), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57438>; *Bouchelkia v. France*, App. No. 23078/93 (Eur. Ct. H.R. 1997), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58014>; *Boughanemi v. France*, App. No. 22070/93 (Eur. Ct. H.R. 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57991>; *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119; *C. v. Belgium*, App. No. 21794/93, 12 Eur. Ct. H.R. 915 (1996); *Chair v. Germany*, App. No. 69735/01 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83809>; *Ciliz v. Netherlands*, 2000-VIII Eur. Ct. H.R. 265; *El-Boujaïdi v. France*, App. No. 25613/94 (Eur. Ct. H.R. 1997), <http://hudoc.echr.coe.int/sites/eng/>

undocumented migrants—i.e., those who were not lawfully present at the start of deportation proceedings—it did not find a violation of the right to family life.<sup>57</sup> Though it has not directly addressed the right to family unity in a case involving undocumented migrants, the Inter-American Commission on Human Rights has signaled a willingness to interpret the right to family unity to include the undocumented.<sup>58</sup> All in all, international human rights law does not offer significant protections in the areas that arguably matter most to undocumented migrants. Perhaps most importantly in drawing parallels with Arendt's work, the right to territorial security is not available under any international or regional human rights treaty or treaty body interpretation.

#### V. ARENDT'S CRITIQUE OF HUMAN RIGHTS: THE MINORITIES AND THE STATELESS

Arendt's critique of human rights, issued prior to the existence of the international human rights treaties discussed above, focused on the Minority Treaties. Both at and subsequent to the Paris Peace Conference in 1919, the League of Nations created a system of unilateral declarations, bilateral treaties, and multilateral treaties (essentially bilateral treaties with one nation and the Allied Powers) aimed at protecting minorities in Eastern Europe.<sup>59</sup> The Minority Treaties have

---

pages/search.aspx?i=001-58099; *Jakupovic v. Austria*, App. No. 36757/97 (Eur. Ct. H.R. 2003), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60917>; *Kaushal v. Bulgaria*, App. No. 1537/08 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100309>; *Kaya v. Germany*, App. No. 31753/02 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81338>; *Keles v. Germany*, App. No. 32231/02 (Eur. Ct. H.R. 2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70824>; *Kiyutin v. Russia*, 2011-II Eur. Ct. H.R. 29; *Lamguindaz v. United Kingdom*, App. No. 16152/90 (Eur. Ct. H.R. 1993), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57831>; *Lupsa v. Romania*, 2006-VII Eur. Ct. H.R.349; *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301; *Mehemi v. France*, App. No. 25017/94 (Eur. Ct. H.R. 1997), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58098>; *Mokrani v. France*, App. No. 52206/99 (Eur. Ct. H.R. 2003), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65778>; *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802 (1991); *Nasri v. France*, App. No. 19465/92 (Eur. Ct. H.R. 1995), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57934>; *Radovanovic v. Austria*, App. No. 42703/98 (Eur. Ct. H.R. 2004), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61720>; *Sezen v. Netherlands*, App. No. 50252/99 (Eur. Ct. H.R. 2006), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72207>; *Üner v. Netherlands*, 2006-XII Eur. Ct. H.R. 129.

57. *Benhebbba v. France*, App. No. 53441/99 (Eur. Ct. H.R. 2003), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65765>; *Boujlifa v. France*, App. No. 25404/94 (Eur. Ct. H.R. 1997), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58106>; *Dalia v. France*, App. No. 26102/95 (Eur. Ct. H.R. 1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58130>.

58. Report on Immigration in the United States: Detention and Due Process, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 78/10 ¶ 98 (2010).

59. Rosting, *supra* note 15, at 646–53; *see also* Blanche E. C. Dugdale & Wyndham A. Bewes,

been hailed as a precursor to international human rights law, lauded for protecting the rights of national minorities in Europe.<sup>60</sup>

Arendt had a different view of the Minority Treaties. In her view, national governments did not want to be responsible for protecting minority nationalities.<sup>61</sup> Through the Minority Treaties, the League of Nations enabled this refusal.<sup>62</sup> The minorities were not entitled to domestic protection, but instead only to international protection at the hands of the League of Nations, which was of course composed of representatives of states.<sup>63</sup> The European powers who ran the League did not want to have their sovereignty restricted—in other words, they did not want to be forced to protect minority nationals—so they could not similarly restrict the sovereignty of new states.<sup>64</sup>

This is the first of three critiques that offer parallels to the contemporary limitations of international human rights treaties with respect to the undocumented. Arendt explains that, in the case of the Minority Treaties, decisions about which rights are protected and how are made by sovereigns, so these rights will be restricted by the interests of these sovereigns. The central problem that arises is that certain crucial rights are completely excluded from international protections. They are dismissed from the discourse as “not rights” or not even worth talking about.<sup>65</sup> In Arendt’s words,

some secondary rights, such as speaking one’s own language and staying in one’s own cultural and social milieu, . . . were halfheartedly protected by an outside body, but other more elementary rights, such as *the right to residence and to work, were never touched.*<sup>66</sup>

Why does this happen? Why do sovereign nations determine the scope of human rights, which ostensibly come from the people? This gets us to the core of Arendt’s critique of human rights: sovereignty. Treaties, even international human rights treaties, are agreements between sovereign states; they will always reflect state interests.<sup>67</sup> This

---

*The Working of the Minority Treaties*, 5 J. BRIT. INST. INT’L AFF. 79 (1926).

60. CAROLE FINK, *DEFENDING THE RIGHTS OF OTHERS: THE GREAT POWERS, THE JEWS, AND INTERNATIONAL MINORITY PROTECTION, 1878-1938* xvii (2004).

61. See ARENDT, *supra* note 17, at 270–73.

62. *Id.* at 270–72.

63. *Id.* at 272.

64. *Id.* at 272–73.

65. Ramji-Nogales, *supra* note 3, at 706–07.

66. ARENDT, *supra* note 17, at 276 (emphasis added).

67. “[I]nternational law . . . still operates in terms of reciprocal agreements and treaties between sovereign states.” *Id.* at 278.

problem is exacerbated when it comes to migration. As Arendt explains, “Sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion.’”<sup>68</sup> The European powers jealously guarded their control over two key tools: repatriation and naturalization.<sup>69</sup> Fearing mass influxes of migrants, they wanted to retain the power to send these migrants back to where they came from and to prohibit mass applications for citizenship. The parallels with the modern day are so apt as to hardly require spelling out. In the contemporary world, developed nations want to retain the power to expel migrants and to limit the numbers of migrants who have a political voice. This results in serious limitations on international human rights protections for the undocumented.

Arendt draws a helpful distinction between sovereigns, noting that “[m]odern power conditions . . . make national sovereignty a mockery except for giant states.”<sup>70</sup> Only certain sovereigns are able to make decisions about which rights are included in the pantheon of human rights and about how these rights will be enforced. The less powerful sovereigns have a given set of rights and obligations thrust upon them, and play little role in determining the scope and applicability of human rights.

Arendt brings a second critique to bear on the Minority Treaties: the situation of non-nationals, minorities, as exceptional. Under the Minority Treaties, rights attached to nationality. Only nationals could be citizens and enjoy the full protection of national legal institutions.<sup>71</sup> People of different nationalities needed protection under the League of Nations—an exceptional law separate and apart from domestic legal system.<sup>72</sup> Arendt notes that this approach “left the system itself untouched.”<sup>73</sup> The existence of a separate class of people enabled exclusion and mistreatment without challenging or tainting the domestic legal order. This was a system of legalized exclusion and second-class citizenship, much as we see today with undocumented migrants.

Arendt’s third critique relates to the Declaration of the Rights of Man as applied to the stateless.<sup>74</sup> She labels the Declaration as a “turning point in history,” a shift from divine law as the source of rights to

---

68. *Id.* at 298.

69. *Id.* at 281–82.

70. *Id.* at 269.

71. *See id.* at 276.

72. *Id.* at 272.

73. *Id.* at 276.

74. *Id.* at 291.

political rights that were sourced in every human being.<sup>75</sup> Human rights were to be used where individuals needed protection against state sovereignty and societal arbitrariness. These were allegedly “inalienable” rights, sourced in humans who were the only sovereign in matters of law.<sup>76</sup> Arendt notes, however, that this claim is founded on erroneous assumptions about emancipation:

[I]t turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.<sup>77</sup>

In other words, people were never really emancipated; they were always reliant on state protection.

The stateless revealed this reality in stark terms. They had lost legal status in all countries.<sup>78</sup> The stateless couldn’t turn to their home government or to their host government for protection. Without state protection, the stateless were located “outside the pale of the law.”<sup>79</sup> Arendt describes this situation as problematic for both the stateless and for society.

According to Arendt, “[t]he stateless person, without the right to residence and without the right to work, had of course constantly to transgress the law.”<sup>80</sup> The stateless could be subject to imprisonment without having committed any crimes. Even worse, from Arendt’s perspective, is that “the entire hierarchy of values which pertain in civilized countries was reversed in his case.”<sup>81</sup> For the stateless, it was better to become a criminal because at least then she would be recognized as human before the law.

Arendt also highlights the “damage suffered by the very structure of legal national institutions when a growing number of residents had to live outside the jurisdiction of these laws and without being protected by any other.”<sup>82</sup> Governments responded to this predicament by placing it in the hands of the police.<sup>83</sup> Thus arose the danger of “gradual

---

75. *Id.* at 290–91.

76. *Id.* at 291.

77. *Id.* at 291–92.

78. *Id.* at 294.

79. *Id.* at 286.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 287.

transformation into a police state”—the larger the stateless population as a percentage of the population as a whole, the greater the risk.<sup>84</sup> Arendt links this growth of police power with the “disgracefully little resistance” met by the Nazis from local police forces in occupied countries.<sup>85</sup>

Beyond the loss of legal status, the stateless lost their political community.<sup>86</sup> As Arendt explains, “[t]he fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.”<sup>87</sup> It was not the loss of specific rights that was so problematic, but the loss of a polity in which any of those rights are guaranteed.<sup>88</sup> This was ostensibly the role of human rights—to establish a global polity that guaranteed rights to all humans by virtue of their simple humanity—but the situation of the stateless and minorities showed otherwise. In Arendt’s words, “[t]he very phrase ‘human rights’ became for all concerned—victims, persecutors, and onlookers alike—the evidence of hopeless idealism or fumbling feeble-minded hypocrisy.”<sup>89</sup>

#### VI. SHARED AND DISTINCTIVE VULNERABILITIES: THE UNDOCUMENTED

This section applies Arendt’s three critiques of human rights protections for the minorities and the stateless to international human rights law’s contemporary treatment of the undocumented. Her insights present shared and distinctive vulnerabilities that suggest ways in which the undocumented might protect themselves against exploitation and abuse despite the failures of international human rights law.

For both the treaties and policies governing the minorities, the stateless, and undocumented migrants today, Arendt’s critique that sovereigns decide which rights will be protected holds true. Though international human rights law claims to represent universal values, the content of these allegedly “universal rights” exclude those that are most important to the undocumented. Arendt offers an obvious explanation for this contradiction: these treaties are drafted by representatives of states and must be ratified by state institutions. In other words, sovereignty interests are deeply embedded in these treaties.

---

84. *Id.* at 287–88.

85. *Id.* at 288–89.

86. *Id.* at 293.

87. *Id.*

88. *Id.* at 297.

89. *Id.* at 268.

To be clear, this article does not claim that having sovereignty interests in treaties is a problem *per se*—the problem arises when a treaty claims to protect all rights but doesn't do so adequately. We see here the masking of state interests behind the costume of rights protection. This is problematic because international human rights law's universal frame disguises political choices. These choices—determining which norms are used to establish what set of rights for which group of people—are deeply rooted in politics and culture.<sup>90</sup> International human rights law's claims to universality obscure these political choices and entrench them in a milieu beyond politics.<sup>91</sup> In other words, these political decisions, now framed as universal rights, can no longer be questioned as political, as they are said to represent the values of all of humanity.

Arendt's second critique, of the situation of non-nationals as exceptional, is also an apt description of the contemporary status of undocumented migrants. The undocumented are exceptional even from international human rights law. As Arendt notes, this approach leaves the system untouched. If the undocumented are exceptional, it is possible to pretend that we have a robust and even universal system of human rights—it's just that those people, the undocumented, aren't included. This situation is problematic because it erases certain perspectives from the discourse.<sup>92</sup> In contrast to the story it tells about itself, international human rights law doesn't protect every human being, but instead creates hierarchy of suffering in which those outside its scope are dismissed from the discourse. Again, this not an inherent problem; it becomes problematic because international human rights law frames itself as universal. International human rights law claims that the rights it offers are inherent in all of humanity—but this story turns out to be true for only some of humanity.

Finally, Arendt's insight that human rights protections for the stateless and the minorities depended on state enforcement is equally apt with respect to the undocumented today. Undocumented migrants have no political voice, and are largely excluded from legal protections in their host states. International human rights law assumes emancipation where there is none; it ignores global economic disparities that prevent both the undocumented and their home states from protecting them.<sup>93</sup> This point of course highlights an important distinction between the undocumented

---

90. Ramji-Nogales, *supra* note 3, at 708–10.

91. *Id.* at 709.

92. *Id.* at 707.

93. *See id.* 710–12.

and the minorities and the stateless—though the undocumented come from states that have little power on the world stage, they have not completely lost their ties to their own nation.

#### VII. FILLING THE STATE PROTECTION GAP

In a world in which sovereigns alone wield the ability to enforce human rights, the undocumented, like the minorities and the stateless, are vulnerable because they face a gap in state protection. Arendt's reflections on the situation of the minorities and the stateless offer some suggestions as to how the undocumented might overcome this lacuna.

Prior to World War II, the minorities provided one successful example of how to potentially overcome the problem at the heart of Arendt's first critique—that human rights treaties depend on sovereign states for enforcement and that sovereigns are particularly jealous of their powers in the immigration context. When establishing the Minority Treaties, the League of Nations and the Allies created separate treaties with each country as if the minorities did not extend beyond the borders of the respective states.<sup>94</sup> None of these treaties were true multilateral treaties in the vein of contemporary international human rights treaties, which include numerous states as parties.

In response to this shortcoming, the minorities created the “Congress of Organized National Groups in European States.”<sup>95</sup> Rejecting the label “minorities,” they called themselves “nationalities” instead.<sup>96</sup> This group extended their power beyond territorial borders so they could make their weight felt throughout Eastern and Southern Europe.<sup>97</sup> Unfortunately, because the group was composed primarily of Germans and Jews, it disintegrated in 1933 when the Jewish delegation sought its participation in protesting the Third Reich's mistreatment of Jews.<sup>98</sup> Despite its untimely demise, this group offers an important lesson about the potential power of cross-border groups in challenging sovereignty and recreating political community.

Today, we might call the Congress a “counter-hegemonic transnational network,” or a social movement.<sup>99</sup> This approach offers a

---

94. See Dugdale & Bewes, *supra* note 59, at 80.

95. ARENDT, *supra* note 17, at 273.

96. *Id.* at 273–74.

97. *Id.* at 274.

98. *Id.*

99. Peter Evans, *Fighting Marginalization with Transnational Networks: Counter-Hegemonic Globalization*, 29 CONTEMP. SOC. 230, 233, 240 (2000); see also MARGARET E. KECK & KATHRYN

group-based conceptual framework for resolving vulnerability, enabling mobilization outside of state institutions.<sup>100</sup> Social networks “resignify[] what counts as political and who gets to define what’s political . . . .”<sup>101</sup> By using such an approach, undocumented migrants could openly challenge the political determinations that define the scope of international human rights law. They could also challenge the depiction of the undocumented as exceptional. Using social networks and protests, the undocumented could build networks, exchange information, and publicize issues important to them.<sup>102</sup> In other words, through this approach, undocumented migrants could emancipate themselves, creating their own forum in which to express their political voice.

There are, of course, shortcomings to a social movements approach to protecting the undocumented. As the Congress example illustrates vividly, social movements are difficult to coordinate, given the variety of actors and interest involved. These groups have few financial resources, and far less power than law or states.<sup>103</sup>

While the social networks solution draws on the similarities between the undocumented and the stateless, it’s also important to remember that one big difference between undocumented migrants and the stateless is that the former still have a nationality, and their state of nationality should care about them given that they send home large amounts of remittances that contribute substantially to the economy in the home state. This suggests a state-based approach in which governments of migrant sending states demand better treatment of nationals abroad. Rather than the undocumented publicizing the problems that they face, their home states could discuss these harms and expand conceptions of rights, contesting the depiction of the undocumented as exceptional. We see this happening to some extent with the inter-American human rights system’s contestation of international treaty bodies’ interpretations of international human rights law.

This state-based approach might take the form of a bilateral process between undocumented migrants’ home states and host states. The migrant-sending states could highlight the economic benefits to migrant-

---

SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); RAJAGOPAL, *supra* note 5, at 238–39.

100. Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 1, 14–16 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

101. RAJAGOPAL, *supra* note 5, at 244.

102. KECK & SIKKINK, *supra* note 99, at 200.

103. Ramji-Nogales, *supra* note 3, at 760–61.

receiving states from the migrants' labor in demanding better treatment.<sup>104</sup>

A media strategy could be used to bring these issues onto the global political stage, removing them from the insulation of international human rights law. Migrant-sending states might even bring lawsuits before international legal bodies such as the UN Human Rights Committee or the International Court of Justice to challenge the treatment of their nationals abroad.<sup>105</sup> Beyond these more assertive acts, migrants' home states could engage in diplomatic protection activities, setting up structures both at home and abroad to assist their nationals.<sup>106</sup>

These strategies, too, have their shortcomings. For developing nations, these approaches are not only expensive but also risk political and economic backlash from powerful states. That brings up another point from Arendt's critique: that sovereignty is real only for powerful nations. Reliance on a state-based protection approach means that citizens of less powerful states won't be protected. Moreover, political elites in migrant-sending states may not be willing to represent undocumented migrants, who likely come from less privileged backgrounds than those making political decisions in their home states.

These problems suggest a third option, which is a multilateral process or coalition.<sup>107</sup> A group of migrant-sending states might create a permanent institution to contextualize the situation of undocumented migrants and advocate for equal treatment. International and regional mechanisms already exist to coordinate state approaches to migration. This approach would differ from current efforts in that it would aim to radically restructure discussion around the undocumented. Though a multilateral approach addresses some of the limitations of a bilateral approach, it still has its shortcomings. Many powerful migrant-sending states are also migrant-receiving states, which may limit their willingness to protect non-citizens. Moreover, though a multilateral process would give rise to less political backlash, or be more able to respond to such backlash, it would still be on the receiving end of negative responses from powerful migrant-receiving states. As a result, and because its members would have differing priorities and interests, a multilateral state-based approach would face coordination problems.

Arendt's writings offer a wealth of insights pertinent to the

---

104. *Id.* at 751–52.

105. *Id.* at 754–55.

106. For examples of countries that are currently undertaking such efforts, see *id.* at 752–54.

107. *Id.* at 755–58.

contemporary problems faced by undocumented migrants. This article has explored just three of her critiques, finding similarities and differences between the treatment of the minorities and the stateless under international law in her day and the situation of undocumented migrations under international human rights law today.