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# Why Human Rights Fail to Protect Undocumented Migrants

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## Abstract

In this article, I depart from the factual difficulties of undocumented migrants to access a state's protection mechanisms for avowedly universal human rights. I relate this aporia to two competing conceptions of territorial jurisdictions. Drawing on the Convention on the Rights of the Child and the Migrant Workers Convention, I separate the sphere of the political community (the *polis*) and that of the household (the *oikos*) in developing a political theory of undocumented migration. It rests two central tenets: one is a tributary transaction between sending state and host state, in the course of which the undocumented migrant worker is offered without conditions attaching, yet with the hope of remittances flowing in return. This offering relates to the *oikos*, which makes available a limited degree of protection under labour law. The second is a contractual form of submission by the undocumented migrant worker, which is structurally analogous to the master-slave relationship developed in Hobbes' defense of war slavery. This is related to the *polis*, which denies all meaningful political activity to the undocumented migrant (as reflected in the denied right to found labour unions). Finally, drawing on Werner Hamacher's work, I analyse how human rights are intrinsically related to a position of privacy, which escalates into a form of isolation under the structures producing undocumented migrants.

## Keywords

undocumented migrants; human rights; international law; slavery; *polis*; *oikos*

## 1. Introduction

In writing this text, I was driven by the following problem. While human rights are practically inaccessible to undocumented migrants, this inaccessibility apparently does not detract from claims that human rights are universally applicable.<sup>1</sup>

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<sup>1</sup> In an international law context, such universality could be expressed as follows. Human rights provided for in international legal norms are universal if and only if every human present on state territory or within state jurisdiction is protected by such rights, or being able to effectively claim protection. In this text, I disregard from the situation of human being outside state territory and jurisdiction and also from what could be loosely termed human rights provision through actors other than states, such as private persons, NGOs or state agents acting *ultra vires*.

How, I asked myself, is this possible? Could it be that human rights law produces this inaccessibility itself, due to some technical reason which I somehow had missed in my studies? Could it be that the general public, and, indeed, myself as part of it, let ourselves be seduced by an untenable claim of the universality of human rights? Or would it simply be necessary to research this issue in a more thorough way to break through to a technical argument of international law, demonstrating that human rights after all can be safely and successfully claimed by undocumented migrants?

I think that a technical breakthrough in legal argumentation is rather unlikely, although I am happy to remain attentive to any opening in this direction. However, what I mainly wish to accomplish with this text is to map a set of factors which, taken together, render a sufficient explanation of undocumented migrants' inability to participate in the universality of human rights.

Political theorists have produced literatures on sovereignty, on the right to have rights and other topics that are quite relevant to the issues raised in this text.<sup>2</sup> And international lawyers have been researching the position of undocumented migrants, although, it seems to me, with lesser intensity than appropriate, given the crucial importance of the issue for the universality claim of human rights law.<sup>3</sup> Research that takes both disciplines as a point of departure appears to be rare. Hence, my text is an attempt to interlace positive law and political thought relating to undocumented migrants with each other. More precisely, I shall treat human rights law as an empirical phenomenon. I will contrast my observations of the law with texts within the discipline of political theory that have addressed sovereignty, slavery and the right to have rights. What I hope to achieve is to give myself a better account of the relationship between undocumented migrants and human rights law.

My argument unfolds in five steps. First is the attempt to understand why it is so difficult for undocumented migrants to argue formal violations of human rights law. Drawing on the Convention on the Rights of the Child, I seek to explain why these difficulties are hard to remedy with formalist legal strategies (Section 2). This brings me to the role played by territorial jurisdiction in Section 3. On the basis of Lindahl's reflexive nomos, I conclude that the undocu-

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<sup>2</sup> Within political theory, a debate on the "right to have rights" has challenged the very universality of human rights protection, typically drawing on the example of the stateless person or the refugee. problematized claims of an universal entitlement to human rights regardless of civic membership. A widely accepted point of departure for this debate is Hannah Arendt's *The Origins of Totalitarianism* (Cleveland: Meridian, 1958).

<sup>3</sup> Within human rights law, however, existing studies verge towards the collection of evidence on the position of undocumented migrants and its analysis as potential violations of states' obligations under human rights law. While political theory often comes across as dystopian, taking an interest in the persistent discrimination of the undocumented migrant, human rights lawyers never seem to stop making gestures towards a universal application of the hard law of human rights, with an at times surprising neglect of formal impediments.

mented migrant, whose bodily presence is a tangible reality, is nevertheless incapable of appearing jurisdictionally. Drawing on two Heideggerian concepts, I suggest that we should liberate our thinking from the assumed linkage between territory and political community.

In a second step, I introduce the distinction between *oikos* and *polis* as a heuristic tool. Drawing on the Migrant Workers Convention, it enables me to demonstrate that undocumented migrant workers are subject to a tributary transaction between their Southern country of origin and host states in the North. They are accorded a limited protection in the *oikos*, effectuated through labour law, while fully subjected to the *polis* and thus unable to invoke the protection of constitutional law or international human rights law (Section 4).

In a third step, I analyze the politico-legal subjection of the undocumented migrant worker with Mary Nyquist's reconstruction of Hobbes' defense of slavery at the core of his sovereignty concept (Section 5). The fourth step is an attempt to show how the undocumented migrant is insulated from attempts to be "given" human rights by a host state. Drawing on the logical construction of rights, I will also demonstrate that "giving" human rights to undocumented migrants would be logically equivalent to a humanitarian intervention, and therefore with an option rather than an obligation for states (Section 6).

Fifth, I will seek to explain the roots of the undocumented migrant's submission into privacy by drawing on Werner Hamacher's reading of Karl Marx's *On the Jewish Question*. I come to the rather counterintuitive conclusion that international human rights law in conjunction with the political thought conditioning its contemporary understanding actually contribute to the subjection of the undocumented migrant (Section 7). This is, of course, all the more problematic as human rights law is typically taken to be an antidote to such subjection.

## 2. The Aporia of Human Rights Law

For obvious reasons, undocumented migrants evade any contact with state authorities that typically leads to the consequence of deportation. As this risk calculus is hard to make, many avoid all contact with the state. However, the vindication of entitlements under human rights law presupposes that the migrant entertains contacts with state organs one way or the other. Therefore, undocumented migrants in hiding represent the hard case for those arguing the human rights of migrants. While it is uncontroversial for many that such migrants are generally entitled to human rights by virtue of their humanity, it remains patently unclear how this entitlement relates to the state's power to exclude by virtue of its personal and territorial sovereignty.<sup>4</sup> The relationship between that power of states

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<sup>4</sup> With the term "exclude", I refer to the formal denial of single rights (as e.g. the right to health) as well as to removal from state territory, e.g. by way of expulsion, which denies a whole bundle of rights.

and the human rights-claims of undocumented migrants is therefore unstable.<sup>5</sup> This instability produces not only very real difficulties for migrants. It also confronts us with an aporia in thinking the universality of human rights law. How can it be that enjoyment of a set of human rights amongst which there are a number of “immediately applicable” economic and social rights<sup>6</sup> is systematically barred for a group of humans with a clear and pressing need? Would not the whole system of human rights law fail its stated universalist purposes if it failed that group?

I would like to understand the structure of this aporia. It assembles elements related to time and space. Time, as there is a mesh of relations comprising multiple trade-offs between present and future human rights and state sovereignty;<sup>7</sup> space, as we are faced with international boundaries of states as much as the spatial boundaries observed by the undocumented migrant or the state organs executing removal orders.<sup>8</sup> Juridically, relations of temporal fulfilment often provoke reasoning on the concept of sovereignty, whereas spatiality of norms brings us to consider issues of jurisdiction. Considering all of these elements laterally appears to be tiresome and pointless, considering them in a hierarchical order dangerously prejudicial. Therefore, I prefer to start out by looking at the prob-

<sup>5</sup> “Human rights claims” denotes the potentiality of benefits flowing from obligations under international human rights law.

<sup>6</sup> Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Read in conjunction with articles 2.3 and 4, this implies that there is an obligation to provide for the rights enunciated in the Covenant at a level less than full from the moment the Covenant binds a state. This obligation is “immediately applicable”, while the obligation to fully realize recognized rights emerges gradually over time and is contingent on “available resources”.

<sup>7</sup> One oft-invoked example of a temporalization of human rights is when undocumented migrants perseverance in legal limbo because they hope that their children might be able to access human rights in the long run. Access to education plays a central role both for undocumented migrants and for domestic policy makers, generating legislation and court cases. In *Plyler v. Doe*, the U.S. Supreme Court struck down Texas legislation barring access to high-school education for undocumented migrant children. 457 U.S. 202 (1982). The 2008 *South California Illegal Immigration Reform Act* makes aliens unlawfully present ineligible to attend higher education in the state. 2008 S.C. Acts 280 (2008), § 17.

<sup>8</sup> Here are two examples for the role played by spatiality. Is it appropriate that police officers seek out undocumented migrants in places of worship? Should school premises shall be pacified from police seeking to implement detention and removal orders. The latter issue was discussed in a Swedish Governmental Inquiry into the right to education for children lacking residence permit (SOU 2007:34). The Inquiry Committee stated that there was no practice of police raids at school premises in search of undocumented migrant children, why there was no imminent need to curtail the competence of police authorities to access school premises. SOU 2007:34, *Skolgång för barn som skall avvisas eller utvisas* (Stockholm: Fritzes, 2007), p. 206.

lem of undocumented migrants in an empirical manner, as a legal issue of international law.

I choose to begin with a scrutiny of how it is staged in the area of children's human rights for two reasons. First, it allows me to consider a setting where paternalistic statecraft is strong and express, while the voice and influence of the beneficiaries is mute and absent. Secondly, this exercise of is less influenced by strategic considerations (as would be the case of rights from which adults benefit). This is so because children are usually not seen as decision-takers in the migratory process and are therefore less prone to be targeted with norms designed to discourage migrants' strategic behaviour. The U.N. Convention on the Rights of the Child (hereinafter CRC)<sup>9</sup> is one of the most successful human rights treaties in terms of the large number of states being parties to it (193 states out of 203 states worldwide). The CRC is comprehensive in content, featuring civil, political as well as economic, social and cultural rights, and even echoing state obligations under international humanitarian law. For all these reasons, it would be reasonable to expect the CRC to be relevant for migrant children.

Nonetheless, the CRC hardly does more than reflecting the unstable relationship between exclusionary sovereign power and a migrant child's human rights claim. The question of how migrant children are to claim or enjoy human rights is not addressed in the text of the Convention, although the phenomenon of migration is implied to exist in article 21 (on "inter-country" adoption) and article 22 (on children seeking refugee status or considered as refugees). Article 22 has been phrased so as to carefully avoid even the slightest hint of a right to legal residence for its beneficiaries.

Strikingly, no state seems to deny the applicability of human rights to undocumented migrants. What states appear to do is rather to reserve the right to create and uphold laws regulating the entry, presence and exit of non-citizens. A fine specimen of an explicit reservation is the one filed by New Zealand:

Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly.<sup>10</sup>

This suggests that there must be an authority prior to the obligations assumed with the ratification of the Convention. Germany and the UK have filed reservations of largely analogous content (of which the UK reservation was later withdrawn with regard to its metropolitan territories).<sup>11</sup> These three reservations may affect all rights stipulated in the CRC.

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<sup>9</sup>) Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

<sup>10</sup>) New Zealand, Reservations, 6 April 1993.

<sup>11</sup>) Germany made the following declaration upon ratification:

One of the central provisions of the CRC is the prohibition of discrimination in its article 2:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

This prohibition includes discrimination on grounds of national origin. Belgium has taken care to explain in an interpretative declaration that the quoted provision “does not necessarily imply the obligation for states automatically to guarantee foreigners the same rights as their nationals”.<sup>12</sup> This is, I would think, the expression of an interpretive position which other states find so uncontroversial that they see no need to make it explicit. It conforms very well with principles on the personal and territorial sovereignty of states that form part of general international law.

Analytically, these reservations do not necessarily restrict the enjoyment of human rights outright. What they might restrict is the enjoyment of such rights at a certain time and in a certain place: here and now on the territory, within the jurisdiction of the state in question; or in the future and somewhere else. It would logically allow for a referral of the undocumented migrant to the enjoyment of human rights in another country after her leaving, or being removed from, the host country.

Therefore, simply stating that “undocumented migrants in hiding have no human rights” cannot be a correct description of the rights and obligations currently stated under international law. It is quite another matter that undocu-

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Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.

Germany, Declarations, 6 March 1992

The relevant part of the UK's reservation upon ratification reads as follows:

c) The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.

Reservations by the UK, 16 December 1991. On 18 November 2008, the UK Government informed the Secretary-General that it wished to withdraw this reservation in respect to the territory of the United Kingdom, but emphasised its continued applicability to dependent territories.

<sup>12</sup> Belgian Interpretative Declarations, 16 December 1991, para. 1.

mented migrants in hiding live in way that can be described by saying that they “lack” or “are denied” human rights. This gap between law and practice would be theoretically unproblematic, if we were able to identify a concrete violation of human rights obligations by a state as its cause. Doing that seems to be hard, however. I shall try to explain why.

### 3. Jurisdiction: Divisible or Bundled?

Anna is a school-aged undocumented migrant child, whose parents wish her to benefit from, say, the right to education in the state where the family is clandestinely present. At the same time, Anna’s parents are afraid that the local school might leak the presence of removable persons to other authorities responsible for the enforcement of immigration law.<sup>13</sup> Will an attempt to send their child to school end up in the deportation of the whole family? Or, worse still, will Anna be deported alone?

Might a dose of legal formalism help here? A straightforward line of argument a human rights lawyer could run by us goes like this. In the seminal *Bankovic* case, the Grand Chamber of the ECtHR was “satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial”.<sup>14</sup> Undocumented migrant are without doubt physically present on the territory of their host state. Therefore, they come under its jurisdiction, and their jurisdictional presence triggers human rights obligations. As long as a given undocumented migrant, as Anna in my example, is present on its territory, the state to which it belongs is obliged in relation to her. So far, so good. But what exactly is it that the state is obliged to do, or to refrain from doing?

<sup>13</sup>) This question can attain a surprising complexity. Let us assume that Anna and her parents stay in Hamburg, Germany. Section 87 of the German Law on Residence, Labour and Integration of Foreigners on Federal Territory (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet*, 30 July 2004 BGBl. I p. 1950) obliges all authorities to report the presence of an undocumented migrant to the aliens authorities. From this, it would seem to follow that a school would be obliged to reveal the presence of an undocumented migrant child to the local aliens authority. However, in a number of interpretive moves by the Hamburg authorities, it has been established that questions related to the existence of a residence permit are beyond the official competence of schools. Therefore, schools in Hamburg have no reporting obligations, which would seem to be an *interpretatio contra legem* to any outsider. This must be extremely confusing for any undocumented migrant assessing the risks accruing from his or her child’s presence at school. D. Vogel, M. Assner, E. Mitrovic and A. Kühne, *Leben ohne Papiere: eine empirische Studie zur Lebenssituation von Menschen ohne gültige Aufenthaltspapiere in Hamburg. Eine Feldstudie im Auftrag des Diakonischen Werks Hamburg* (Hamburg: Diakonie Hamburg 2009). Available at [http://www.diakonie-hamburg.de/fix/files/doc/Leben\\_ohne\\_PapiereLF.pdf](http://www.diakonie-hamburg.de/fix/files/doc/Leben_ohne_PapiereLF.pdf).

<sup>14</sup>) *Bankovic and Others v. Belgium and Others*, Judgment of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001–XII, para. 59. Drawing primarily on examples of domestic jurisdiction issues, Ford concludes that “territorial jurisdiction categorizes the elements over which authority is to be exercised primarily by area, and secondarily, if at all, by type”. R.T. Ford, ‘Law’s Territory (A History of Jurisdiction)’, 97 *Michigan Law Review* (1999), pp. 843–930, at p. 852.



Consider that Anna's parents do abstain from contacting a local school due to their apprehensions. Is it not for the migrant to articulate a specific claim so as to trigger the responsible state's conduct in accordance with a given human rights obligation? Are Anna's parents actually forbearing a human rights claim by doing so? These questions emerge from a perspective emphasising individual choice. It resonates well with liberal conceptions of human rights, allocating the risks of a human rights claim entirely with the migrant. What is more, it preserves the indivisibility of state jurisdiction. Accordingly, it is not for the migrant to choose *à la carte* which forms of state jurisdiction to engage, e.g. by activating welfare jurisdiction, but simultaneously demanding the inertia of immigration jurisdiction.<sup>15</sup> Rather, from this perspective, jurisdiction is an all-or-nothing concept, assembling powers that are beneficial with those which are detrimental for a given individual.

Obviously, I could also take a different position. I could claim that human rights entail a specific form of legal immunity, protecting the migrant when filing a claim for, say, entitlements under the right to health. This immunity would prevent the state from exploiting the opportunity for swift deportation arising when the migrant is in contact with, say, a public hospital to claim these entitlements.<sup>16</sup> If this perspective shall prevail, Anna's parents may send her to school without risking detention and removal. It splits jurisdiction into separable sub-entities. The migrant could very well engage welfare jurisdiction (under which health and education sort), without subjecting herself to immigration jurisdiction.

These considerations bring me to a question decisive for the applicability of human rights law: is the concept of "jurisdiction" divisible or not? The CRC as well as other human rights treaties plainly determine the rights-bearer to be per-

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<sup>15</sup> I am not entirely happy with this dichotomy, because the delimitation of welfare benefits vis-à-vis migrants could be said to engage as much welfare jurisdiction as it engages immigration jurisdiction. Linda Bosniak presents this problem through two type-cast positions. One is supporting convergence, that is, being "hard outside and hard inside"; the other implies believing in separation, that is, being "hard outside, soft inside". "For the convergence advocates, boundaries act legitimately on the inside as well as at the border, whereas for the separationists, those boundaries must be confined (more or less) to the territorial frontier." L. Bosniak, *Citizens and Aliens: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006), p. 123. She remains sceptical towards both positions, because, "[u]nder real world conditions, border and interior are inevitably imbricated, most directly and graphically in the person of the alien". *Ibid.*, p. 124.

<sup>16</sup> The ECtHR has declared in *Čonka v. Belgium* that Belgian authorities were in violation of the ECHR when they lured a group of undocumented migrants to the premises of the authorities under a false pretext to then detain them as part of deportation proceedings. The Court's position obviously revolves around the issue of wilful deceit. There is no indication whatsoever that it would be denying ECHR rights to detain and remove an undocumented migrant who reports to the authorities by her own will and on the basis of her own calculations on the risks entailed by contacts with the authorities. In all, this position would seem to endorse a liberal image of the undocumented migrant as a rational actor. The state is prohibited to tamper with her will-formation by providing false information. Over and above that, *Čonka v. Belgium* does not do very much for our question of jurisdiction. *Čonka v. Belgium*, 5 February 2002, ECtHR, Appl. No. 00051564/99.

sons within a state's "jurisdiction".<sup>17</sup> As stated earlier in this Section, the jurisdictional competence of a state is held to be primarily territorial. Yet nowhere in the body of international legal norms is there any indication of how this jurisdictional competence is to be construed: does it favour the first or the second position, does it support divisibility or non-divisibility? As the reservations quoted earlier<sup>18</sup> illustrate, certain states have taken, and continue to take measures that beg exactly this question and therewith render it even more imposing.

Yet I think that international law's referral to territory is helpful after all, because it brings me to reflect on *how law makes spatial appearance and presence intelligible*. Much of the discursive power made available in the concept of jurisdiction flows from its association to territory. Once the borders of a jurisdiction have been politically and legally determined, it seems that the space *inside* is somehow transforming itself into a natural given, into a prepolitical fact beyond question. A seductive image emerges: territory is cast as always having been a natural attribute of a political community. But this leaves me wondering whether territory can be perceived independently from this political community, and whether this community owes a legal obligation towards a person who is physically located in this inside space delimited by state borders, but who is not – or at least not yet – member of the political community. So how shall I understand the relationship of a political community and the space it renders first into "territory", and subsequently into jurisdiction?

Ideological differences notwithstanding, there seems to be a limited number of ways to tell the story of this relationship. I can discern two dominating modes: one drawing on *physis*, a form of normative power derived from the natural unity of space, the other on *nomos*, a Greek term signifying *inter alia* the originary delimitation of land. In his elaboration of a "right to visit" (*Besuchsrecht*), Kant proceeds to posit the fact that the Earth is formed as a globe as a normative point of departure. The form of the Earth, so his argument goes, makes humans meet each other sooner or later, no matter how they disperse on its surface. So Kant's right to visit remains tethered to a peculiar species of natural law, from which he proceeds to a weak freedom of movement, replicating the natural encounter of humans dispersing around the globe.<sup>19</sup> This freedom makes the migrant appear as a human in a foreign territory in order to present herself for potential encounters. Yet the host society – the first occupant of that territory – has every right to remove her if this does not result in her peril. Hence, it seems that the ballistic mode of Kant's thinking keeps the migrant eternally moving.

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<sup>17</sup> See article 2 CRC.

<sup>18</sup> See Section 2 *supra*.

<sup>19</sup> With its ballistic mode of thought, this could very well be a loan from Newtonian physics. I. Kant, *Zum ewigen Frieden: ein philosophischer Entwurf* (Frankfurt: Reclam, 1984) [1795]. Translation in W. Schwarz, *Principles of Lawful Politics. Immanuel Kant's Draft Toward Eternal Peace* (Ahlen: Scientia, 1988).

She can only appear in the capacity of a *migrating* human, a human ultimately characterized by her ability and propensity to disappear – or to be made to disappear. This describes accurately Anna's situation and that of all undocumented migrants today: their capacity to appear in the *polis*, as the beneficiaries of its human rights obligations, is strictly limited to their being detainable and ultimately removable. It seems that the discursive power of this construction lies in its nexus to nature “as such”, as well as a scientific mode of analogizing nature in the ordering of human relations.

I am afraid that Anna's predicament will largely remain unaltered even if we think it through the *nomos* rather than Kant's *physis*. Take Hannah Arendt and Carl Schmitt, who developed two quite different accounts of how *nomos* and political community relate to each other. Schmitt used the pasture and Arendt the city wall as *paradigmata* for the constitution of law-making communities. While Arendt emphasized the emergence of a public space for politics from this delimitation, Schmitt foregrounds the prepolitical and potentially violent taking of land as a condition for communal sharing.<sup>20</sup> With Schmitt, this “taking” of land is set prior to societal sharing, dividing and using. This excludes the appearance of an undocumented migrant as a legitimate claim holder, or rather, it casts such a claimant as a revolutionary challenge. Claims from outsiders on the basis of territorial presence can simply not be represented within an established Schmittian *nomos*. Where they succeed, these claims constitute at most a new and violent form of *nemein* – the taking of land. With Schmitt, we imagine each location of inhabited land as catering strictly and exclusively to one *polis*. The nexus between soil and *polis* is the very fabric of political legitimacy, into which Schmitt's distinction between friend and foe is woven.<sup>21</sup> Schmitt's *nomos* leaves no choice but to think jurisdiction as indivisible.

Different is the case of Hannah Arendt's conception of *nomos*, which Hans Lindahl has developed further in a 2006 piece.<sup>22</sup> Arendt claims that bounded space is constitutive for political community. Lindahl's work adds a reflexive layer to Arendt's *nomos*, which has important consequences for my question on jurisdiction. Importantly, Lindahl rejects the idea that the bounding of space is a

<sup>20</sup> H. Arendt, *On Revolution* (London: Penguin, 1990) [1963], p. 275. Carl Schmitt accords the Greek verb *nemein* – the taking of land, or, in German, *Landnahme* – priority before the emergence of the *nomos*. C. Schmitt, ‘Nomos-Nahme-Name’, in C. Schmitt, *Staat, Grossraum, Nomos: Arbeiten aus den Jahren 1916–1969* (Berlin: Duncker & Humblot, 1995), pp. 573–91, as quoted in Lindahl, *infra* note 22, p. 901, note 32.

<sup>21</sup> Consider Schmitt's conception of the partisan, whom he endows with a specific linkage to the land defended against the foreign occupant (which he describes as the partisan's tellurian character). C. Schmitt, *Theorie des Partisanen, Zwischenbemerkungen zum Begriff des Politischen* (Berlin: Duncker & Humblot, 1963), pp. 26–7. Also, Schmitt's major post-1945 treatise is quite openly premised on the intrinsic justice of Mother Earth, *justissima tellus*. C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003) [1950], p. 42.

<sup>22</sup> H. Lindahl, ‘Give and take: Arendt and the *nomos* of political community’, 32 *Philosophy & Social Criticism* (2006), pp. 881–901.

pre-political act, which needs to come “first” before a community comes into existence. Instead, he includes the “taking of land” into the politics of a community, which renders *nomos* into a reflexive conception. “[P]ower”, as Lindahl has it, “is never merely ‘in’ space, power also always *spatializes*”.<sup>23</sup> He suggests that “*nemein*, as the act of positing boundaries, is the self-manifestation of a ‘political unity’”<sup>24</sup> and concludes that “[s]pace appears as a unity to the members of a community, because *nomos* is constituted reflexively”.<sup>25</sup>

For Lindahl,

*nomos* involves two correlative dimensions. The first is normative, and concerns a claim about the common interest of a polity. To be common, an interest must be bounded, and this means that a legal order necessarily selects certain interests to grant them legal protection and discards other interests as legally irrelevant. The second dimension is physical, insofar as the legal order’s claim to common interests is determined by means of boundaries that partition space. More precisely, the two dimensions of *nomos* manifest themselves in boundaries, which are alike normative and physical. This explains, on the one hand, why boundary crossings are normative no less than physical events, and, on the other, why boundaries are variable, even though their physical positioning does not change an inch (e.g. when import tariffs for foreign goods are increased or decreased, depending on which interest is endorsed). I shall refer . . . to territory as the concrete unity of both dimensions; as manifested in the boundaries of a legal order, this concrete unity is the mode of spatiality captured by the term *nomos*.<sup>26</sup>

I would like to approach Anna’s situation in the light of Lindahl’s text. Anna can stand in front of Stockholm’s city hall and point to a map of the Swedish realm, which places Stockholm within its international boundaries. Anyone standing with her there will concur that she is, or rather, “must be” on Swedish territory.<sup>27</sup> But it is quite another matter if Anna, or her parents, try to make that correspondence of her body’s location and a cartographic representation of that location work politically or legally. Simply put, the map does not tell us whether Anna can go to school without risking deportation. Rather, we would need to look to the politico-legal power structures that work through the map. As Richard T. Ford observes, it is the coincidence of cartographic technology and political normativity that makes the concept of jurisdiction productive.<sup>28</sup> While Anna has access to the former, this is not the case for the latter. Jurisdictional presence, Ford reminds me, “is a relationship that refers to the physical and is analogous to the physical, but is something other than physical”.<sup>29</sup>

As jurisdiction rests on territory, I find Lindahl’s conceptualization of territory as a concrete unity of both normative and physical dimensions to be useful.

<sup>23</sup>) Lindahl, *supra*, p. 885.

<sup>24</sup>) *Ibid.*, pp. 886–887.

<sup>25</sup>) *Ibid.*, p. 887.

<sup>26</sup>) *Ibid.*

<sup>27</sup>) The confirmation that Anna “must be” on Swedish territory expresses what we might call a geographic normativity, but it concurrently makes a tacit reservation about the legal-political normativity.

<sup>28</sup>) Ford, *supra* note 14, p. 853.

<sup>29</sup>) *Ibid.*, p. 905.

Anna's boundary transgression is indeed both physical and normative. Her pointing out her location on a map of Sweden signifies an invitation to form a polity around the common interest of all children's right to education. Yet this gesture is in itself not enough to bring about such a political community. As long as a future community willing to let her go to school here and now has not formed itself, she will be absent from the unified space of the political community imagined as the Kingdom of Sweden. Regardless of her physical positioning, she will not *appear*, she will not be *present*, unless the person she is speaking to is an official tasked to implement immigration laws. In the perception of that person, she will indeed appear and be present – however, only in her capacity as a detainable and removable person.

True, the latter conclusion is identical to those flowing from Kant's right to visit and Schmitt's *nomos*. But, different from Kant and Schmitt, Arendt and Lindahl avoid pre-political factors as natural law or violent occupation as primordial determinants of access to protection and agency in and through a political community. Rather, the territory of a political community is determined by an instantaneous politics of boundaries.<sup>30</sup> Instantaneous it is, because Anna's invitation may be responded to by a teacher admitting her to class without reporting her presence to immigration authorities. This acceptance, iterated over and over, has growing politico-legal reverberations. With Lindahl, I can imagine overlapping political communities claiming overlapping spaces as "theirs". In the following Section, I shall explore two such communities, namely the workplace and the state, in their relation to the undocumented migrant worker.

Before doing so, I would like to focus on a feature in Arendt's and Schmidt's accounts that disturbs me. These owe much to a rudimentary building: the Schmittian fence and the Arendtian wall, both man-made materializations of the boundary. In his 1954 essay on "*Building, Dwelling, Thinking*", Martin Heidegger wrote:

What the word for space, *Raum*, *Rum*, designates is said by its ancient meaning. *Raum* means a place cleared or freed for settlement and lodging. A space is something that has been made room for, namely within a boundary, Greek *peras*. A boundary is not that at which something stops but, as the Greeks recognized, the boundary is that from which something *begins its presencing*. That is why the concept is that of *horismos*, that is, the horizon, the boundary. Space is in essence that for which room has been made, that which is let into its bounds.<sup>31</sup>

Seen such, Anna cannot point to her body and the map of Stockholm without concurrently pointing to the border of the realm. From the horizon of the politi-

<sup>30</sup> Against this, one may object that if the political derives from the *polis*, then we cannot use our understanding of the political to explain the *polis*. S. Elden, 'Rethinking the *Polis*. Implications of Heidegger's questioning the political', *19 Political Geography* (2000), pp. 407–422, at p. 413.

<sup>31</sup> M. Heidegger, 'Building, Dwelling, Thinking', in M. Heidegger, *Poetry, Language, Thought* (New York: Harper Collins, 2001) [1971], pp. 141–160, at p. 153.

cal community, this means that she cannot raise the issue of human rights without raising that of a state's personal sovereignty. The presencing of her body invariably starts from the border that she illegally passed (in a topographical or administrative sense). So far, so good, and perhaps not so different from my conclusions earlier in this Section.

But the argument does not end here. Albeit in different ways, Kant, Schmitt and Arendt all let a political community originate with space. Schmitt and Arendt emphasize the necessity of this co-originality for the law to emerge. Not so Heidegger, who concerns himself with the opening of a place rather than territory, with preservation rather than law. This makes his work topical for a discussion on the place of Anna's body, being a question prior to that of the territory on which jurisdiction is premised.

In "*Building, Dwelling, Thinking*", his primordial move is to establish dwelling as the basic character of human being, and preserving as the basic character of dwelling. Building is an expression of man's preservation of the unit of earth, sky, mortals and immortals (or, in Heidegger's terminology, the *gathering of the fourfold*). Man's buildings – houses, bridges, walls, fences – determine localities and, ultimately, space. If we adopt this approach, the wall and the fence attain a different – and less exclusionary – significance as conferred on them by Schmitt and Arendt respectively. Conversely, the house and the bridge grow in significance as compared to the fence and the wall. The emphasis on dwelling unconditionally presences those undocumented migrants who have found a home, however precarious, on the territory of a host state. And the emphasis on preserving expose and give significance to the work carried out by undocumented migrants. From a Heideggerian point of view, these meanings are eminently political: "perhaps the [*polis*] is that realm and place around which everything question-worthy and uncanny turns in an exceptional sense."<sup>32</sup> It is precisely the precarious situation of the undocumented migrant, the questions provoked by it, not at least on human rights, that makes her eminently political, that positions her at "the site of the abode of human history".<sup>33</sup>

All other accounts of space, territory and jurisdiction end in the conclusion that the undocumented migrant is incapable of appearing jurisdictionally as anything else than a detainable and removable person. She is, it seems so far, the "man of human rights" solely on condition that she is removed to "enjoy" her

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<sup>32</sup> M. Heidegger, *Hölderlin's Hymn "The Ister"* (1996), p. 100, as quoted by Elden, *supra* note 30, p. 413. The original's Greek term has been transcribed as *polis*.

<sup>33</sup> Heidegger *supra*, p. 100. Elsewhere in this issue, on pp. 173–191, Markus Gunneflo with Niklas Selberg draw on Rancière's paradox of human rights: "the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not." J. Rancière, "Who Is the Subject of the Rights of Man?", 103 *South Atlantic Quarterly* (2004), p. 41. There is an intriguing overlap in the Heideggerian conception of the political as the uncanny and most worthy of question and the paradoxical expression this finds in the Rancièrean dictum.

rights elsewhere. '[T]he jurisdictional "market" always bundles',<sup>34</sup> as Richard T. Ford put it: welfare jurisdiction comes with immigration jurisdiction.

Intriguingly, the Heideggerian emphasis on dwelling resonates to some extent with inclusionary positions taken in U.S. policy debates on undocumented migration. In a remarkable piece,<sup>35</sup> Stephen Legomsky maps the field of opinions and opinionated research on undocumented migrants (mainly in the U.S.). Proponents of a tough approach tend to focus on the aggregate effect of the undocumented population *qua* group, and cast it as one of *lawbreakers* while proponents of a lenient approach believe that undocumented migrants should be seen as individuals and understood as *residents* first and foremost. I think that the lawbreaker label draws on an imagination of community whose members "have in common what is most properly their own; they are the owners of what is common to them all".<sup>36</sup> What those breaking immigration laws threaten to do is to take away this property of commonality.

This can be contrasted to Esposito's conception of community, which pivots on the very act of giving, (the *munus* in *communis*), and therewith on removing what is properly one's own.<sup>37</sup> This resonates with the the labour of preserving, central to Heidegger's concept of dwelling. Is the Heideggerian line of thought capable of altering my conclusion on the bundling effect of jurisdiction? I think so. Rather than providing an answer to it, it escalates the very question of jurisdiction, rendering it inevitable. What we are facing in this question is quite simply the historical presencing itself. Its ready-made, alternatives derived from law or precedent loose their power and thus augment our sense of urgency. Our understanding of undocumented migration might tilt into a radically different one. It is, however, not the subject of the present text. But Heidegger's concepts of dwelling and preserving give me a further reason to explore a context where both are taking place: the household (*oikos*). I shall turn to it in the following Section.

#### 4. *Oikos* and *Polis*

As has already emerged, the community imagined to make up the contemporary state is commonly associated with the model of the Greek city-state, *polis*. This would seem to render the specific community between citizen and undocu-

<sup>34</sup> Ford, *supra* note 14, p. 844.

<sup>35</sup> S. Legomsky, 'Portraits of the Undocumented Immigrant: A Dialogue', 44 *Georgia Law Review* (2009), pp. 65–160.

<sup>36</sup> R. Esposito, *Communitas* (Stanford: Stanford University Press, 2010), p. 3.

<sup>37</sup> Esposito, *supra*, p. 7. In Legomsky's piece, supporters of the lenient approach, although they stress residency and the "moral rights" accruing from it, end up in a tragic reconfirmation of sovereignty. Therewith, they happen to reconfirm the hardliners' conception of community as well. Legomsky, *supra* note 35, p. 73.

mented migrant to be analogous to that of the *oikos* – originally understood as the household, which bundled men together with women and slaves and thus joined the free with the unfree and the political with the apolitical in order to ensure “subsistence and prosperity”.<sup>38</sup>

The meaning of the term *oikos* shifted in different historical contexts. Moving from antiquity to medieval times, *oikos* acquired an entrepreneurial layer, as emerges from Youval Rotman’s research on byzantine slavery:

Traditionally, the scholarship has considered medieval slaves primarily as domestics, but I have shown that they figured in the artisanal and agricultural labor force and thus fulfilled the same functions as wage workers. . . . As for domestic functions, what is now called a “house” does not correspond to the medieval notion of the Byzantine *oikos* and its components. That unit was not limited to habitation but formed an economically autonomous family unit that also included dependents, both male and female. These subordinates of the master of the *oikos* were grouped under a new term, “my people”, whose dependency, whether in an urban or rural environment, was economic.<sup>39</sup>

To illustrate what form the *oikos* might take today, in the present context of undocumented migration, I would like to extend the range of empirical material and involve another human rights treaty into my reasoning. It is the 1990 International Convention on the Protection of the Rights of All Migrant Workers and their Families<sup>40</sup> (hereafter Migrant Workers Convention, abbreviated as CMW). While the Migrant Workers Convention was negotiated across the North-South divide with the active involvement of both states sending migrants and states receiving migrants, none of the 42 parties can be found in the affluent North, in the labour-importing oil economies or in countries as China or India.<sup>41</sup> On the face of it, the treaty clearly was and is the South’s project. This notwithstanding, its monitoring mechanism remains a hard sell even amongst sending states (who should have comparatively less to fear from it than countries receiving migrant labour), illustrated by the fact that only two of the states parties to the CMW chose to opt into it.<sup>42</sup>

<sup>38</sup> J.-L. Nancy, ‘Is Everything Political?’, 2 *CR: The New Centennial Review* (2002), pp. 15–22, at p. 17.

<sup>39</sup> Y. Rotman, *Byzantine Slavery and the Mediterranean World* (Cambridge: Harvard University Press, 2009), p. 130.

<sup>40</sup> International Convention on the Protection of the Rights of All Migrant Workers and their Families, 18 December 1990, entry into force 1 July 2003, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990). At the time of writing, the number of parties was at 42 as of 3 February 2010, which is a telling contrast to the 193 parties to the CRC.

<sup>41</sup> At the time of writing, European parties to the CMW are Albania, Bosnia and Herzegovina and Turkey. All three are predominantly sending countries, which have significant stocks of expatriates on foreign labour markets.

<sup>42</sup> Neither individual nor inter-state complaints can presently be considered by the Committee on Migrant Workers set up under the CMW, as a minimum of ten states need to opt in to make the Committee competent for such monitoring. Presently, only two states have made relevant declarations. Guatemala has declared itself willing to mandate the committee to consider inter-state (art. 76 CMW) and individual claims (art. 77 CMW), while Mexico has rendered a declaration on individual claims only.



One of the main reasons for the reluctance of states in the North is said to be that the CMW addresses the rights of undocumented migrants as well.<sup>43</sup> All migrants and members of their families are entitled to the minimalist list of rights in Part III of the CMW, whether they are documented or not. The rights contained in Part III are mostly pre-existing civil and politics rights, which states would be obliged to ensure under other treaties already. A limited number of economic, social and cultural rights are added or specified (the contentious social security right in article 27.1 CMW is an example). There is a right to join a trade union, take part in its meetings and seek its aid and assistance, yet there is no right to actively start a trade union (article 26 CMW). Yet the specification of rights need not work to the benefit of undocumented migrants. While the ICESCR contains a broadly formulated right to health to which persons present in the jurisdiction of a party are entitled, the CMW merely obliges parties to make emergency health care accessible to undocumented migrants (article 28).<sup>44</sup> On the other hand, children of undocumented migrants have a “basic right of access to education on the basis of equality of treatment with nationals of the State concerned”, replicating the obligations flowing from article 13 ICESCR.

Further articles protect against destruction of documents by others than public officials (article 21 CMW), accord a right to transfer earnings (article 31), and a right to information (article 33 CMW). To assure potential parties that there are no hidden risks in Part III, there is an explicit bar to deduce a right to regularization from these rights in article 35 CMW.<sup>45</sup>

Part IV of the Migrant Workers Convention exclusively caters for documented migrants (article 36 CMW). This part opens up for equal access and participation clauses related e.g. to education and health services (see articles 43.1 and 45 CMW), and, perhaps most prominently, the right to form associations and trade unions (article 40.1 CMW) and to political participation (articles 41–42 CMW).

<sup>43</sup> One of the few documented examples I was able to find is the Dutch government’s position, which expresses concern on article 27 (giving access to social security to both documented and undocumented migrants). See Letters from the Dutch government, made available at <http://www.december18.net/node/1755>. Canada expresses concern at what it considers to be drafting mistakes that could lead *inter alia* to extraterritorial effects. *Ibid.*

<sup>44</sup> Article 28 reads as follows:

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

<sup>45</sup> Article 35 reads:

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in part VI of the present Convention.

The Migrant Workers Convention obliges state parties to provide remedies against potential violations of the rights listed in it (article 83 CMW). Yet any such complaint may alert enforcement authorities on the undocumented status of the complainant, leading to detention and removal. It matters little whether the rights are originally violated by the host state and its agents or by private actors such as employers. As the move to vindicate human rights under the CMW with the host state may be countered by expulsion, any move to vindicate labour-related rights with an employer may be responded to with the threat of informing the authorities of the irregular presence of the migrant in question. By way of example, the undocumented migrant worker's right not to have her identity or travel documents destroyed by an employer (article 21 CMW) has a limited punch or, at worst, none at all. Any remedy might come at the price of expulsion, which renders the rights of Part III of the CMW practically non-exigible for undocumented migrants. In the following, therefore, I have to be attentive to the interplay of state agents and private agents, of host country and employer in articulating how the situation of the undocumented migrant worker is structured.

I will now take a brief look at the consequences of this bifurcation into two subsets of migrants, drawing on the two issues of equal access to health and education on one hand, and the right to association on the other.

#### 4.1. *Tributary Inequality*

At the outset, it should be recalled that it will be the sovereign decision of recipient states whether or not a migrant worker will be documented. This, in turn, governs whether this migrant worker and his or her family will fall under the ambit of, say, a right to equal access to health services under the CMW. These rights are usually central in domestic policy debates on undocumented migrants, as the Swedish case illustrates.<sup>46</sup> So, even if a Northern state as Sweden<sup>47</sup> or Belgium<sup>48</sup> against all odds would ratify the Migrant Workers Convention, *it would*

<sup>46</sup> See Gunneflo with Selberg this issue, pp. 173–191. For an overview of practices in EU countries and an argument for liberalised access to health services for undocumented migrants, see R. Romero-Ortuño, 'Access to health care for illegal immigrants in the EU: should we be concerned?', 11 *European Journal of Health Law* (2004), pp. 245–272.

<sup>47</sup> See the contributions in this issue by Gunneflo with Selberg, 12(2) *European Journal of Migration and Law* (2010) 173–191; and Alexander, 12(2) *European Journal of Migration and Law* (2010) 215–240.

<sup>48</sup> Belgium is a wonderful example. In an answer to a parliamentary question, the Belgian government affirmed that it had no plans to sign or ratify the CMW. It held that 'a number of departments expected serious difficulties because certain clauses in the convention contradict a number of aspects of Belgian law and regulations' (House of Commons 2002–2003, *Bull.* 3, no. 23). This claim was effectively refuted in a thoroughly researched article, where it is shown that ratification would require no major legal changes to Belgian legislation. D. Vanheule et al., 'The Significance of the UN Migrant Workers' Convention of 18 December 1990 in The Event of Ratification by Belgium', 6 *European Journal of Migration and Law* (2004), pp. 285–321.

imply no legal duty to open access to the full gamut of health services beyond emergency care for undocumented migrants. This is all the more remarkable as Swedish income tax obligations, which are ultimately funding such benefits, potentially extend to undocumented migrants as well.<sup>49</sup>

It merits a moment of consideration: the CMW specifically addresses the human rights of migrant workers, yet it manifestly fails to require identical basic benefits across the whole register of human beings falling under its ambit. Instead, it codifies a fundamental inequality of two groups of human beings, dependent on their migratory status. Regrettably, the Convention's title is in denial about this differential treatment, when it alludes to "the rights of *all* migrant workers and their families" (my emphasis). I should add, though, that this distinction in treatment between undocumented migrants and documented persons is not exclusive to the CMW. In a number of rulings on family unity, the European Court of Human Rights has interpreted the right to family life to imply less favourable treatment for undocumented migrants in its proportionality test.<sup>50</sup>

As the Migrant Workers Convention is being so modest in its demands on parties, the question why the North remains reluctant to embrace it becomes even more imposing. The costs of being bound are low, and the actual distinctions between documented and undocumented migrants made in the practice of receiving states are legitimized rather than outlawed. What is more, would not a ratification counter and reduce the persistent ambiguity of other human rights obligations, which might lend themselves to the interests of undocumented migrants? Seen from the perspective of migration control, the very text of the Migrant Workers Convention is, at least, explicit about undocumented migrants and their families *not* having access to health and other contentious services. Compared to the Convention on the Rights of the Child, which offers an opening to being construed in favour of undocumented migrants (if we are to accept that jurisdiction is no monolithic concept, see my reasoning at the end of Section 2), this should be appealing to states as Germany, New Zealand or the UK, whose reservations to the CRC I have quoted above.<sup>51</sup>

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<sup>49</sup> See the contribution by Tjernberg in this issue; 12(2) *European Journal of Migration and Law* (2010) 149–171.

<sup>50</sup> With a few exceptions, family reunion cases are declared as inadmissible when applicants failed to comply with immigration law requirements (such as being present without a residence permit). See, e.g., *Benamar v. the Netherlands*, Judgment of 5 April 2005, ECtHR, Application No. 43786/04. I am grateful to Hannah Helmink for making me aware of the nuances of ECtHR case law in this regard.

<sup>51</sup> Could an alternative explanation be that recipient states in the North fear that the CMW Committee will embark on extensive interpretations of the rights accorded to undocumented migrant workers, carving out a right not to be removed in the long run? A look at the case law of the CAT Committee on art. 3 CAT shows that such developments would not be entirely unreasonable to expect of a body composed by both Southern and Northern experts. However, states can commit themselves under the CMW without opting into monitoring. Also, monitoring does not formally produce obligations for respondent states to implement the views adopted by the Committee of the CMW. A residual risk would be that the CMW Committee establishes interpretations of the CMW that might be seen as identical with

One way to think this is that sending states in the South are offering up part of their labour force (one that is usually thought to be “unskilled” from a Northern perspective) for a heavily discounted price.<sup>52</sup> To be sure, the costs of this discount will be borne by the individual migrant labourer and her or his family. However, I think a market transaction metaphor is too rigid to capture the forms of exchange at work here, as it would background the avowedly central role of a sovereign decision not to remove undocumented migrants.

Another, and I think more productive approach would be to see the codification of inequality as a tributary transaction by state parties in the South, who can but hope for some form of grace in return by the non-parties of the North which receive undocumented migrants. This tributary transaction is strongly hierarchized, setting it apart from lateral forms of gift-giving, which potentially create a community of reciprocal gift-givers. In Part III of the CMW, we encounter instead a submissive form of gift-giving, leaving sending states of undocumented migrants with no hope for and no entitlement to reciprocity by the recipient state. The relevance of this approach is, I think, supported by the fact that the flow of remittances (monies sent home by migrant workers, on which labour-exporting economies in the South generally depend to an important degree) remains ultimately within the discretion of the host state in its exercise or non-exercise of the sovereign right to remove undocumented migrants. To let the remittances of undocumented labour flow is surely no obligation under international law, but very much an autonomous, gracious move by the recipient state of undocumented migrants. To abstain from removing an individual undocumented migrant worker is but to refrain from something a state would be entitled to under foundational norms of international law, that is, an act of forbearance.

Here lies the explanation why the North is so disinterested in ratifying the Migrant Workers Convention. This disinterest rejects any notion of a reciprocal, gift-exchanging community between North and South and confirms the hierarchical

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those rendered from the application of arts. 31–33 of the 1969 Vienna Convention on the Law of Treaties and therefore authoritative. Nonetheless, given the language of the CMW and the optional character of monitoring, I do not believe that fears related to monitoring can explain the position taken by Northern states to a sufficient degree.

<sup>52</sup> Ball and Piper provide an example from the Philippines, a country which has developed a sophisticated apparatus for exporting its labourers in order to promote remittance incomes. Albeit geared *prima facie* at documented migrant workers, the following example has bearing on undocumented migrant workers as well. In 1995, a new Migrant Workers and Overseas Filipinos Act (RA 8042) changed the regulatory framework, curtailing oversight and control by the main Filipino authority in the area. Ball and Piper suggest that, while the act had its focus on the human rights protection of Filipino workers abroad, it was “based on a strong endorsement of neo-liberal, free trade thinking underpinned by the notion of deregulation. In so doing, however, the Philippine State embraces a victim discourse with respect to the broader process of globalisation, where the provision of labour to meet international demand is outside its ability to control”. R. Ball and N. Piper, ‘Globalization and Regulation of Citizenship – Filipino Migrant Workers in Japan’, *21 Political Geography* (2002) 1013–1034, at p. 1022.

relationship to which the South's undocumented migrants remain tethered. By making this gesture, state parties in the South corroborate the that the undocumented migrants they deliver indeed are disposable. North and South thus fully converge on the point of disposability.

#### 4.2. *Non-Politics*

I would like to switch back from the relationship between sending and receiving states to that between undocumented migrant worker and employer, and the state legislation affecting it. The workplace which employs an undocumented migrant is the contemporary counterpart to antiquity's *oikos*: it might be a restaurant, a construction company or a private household. The point of the *oikos* is that it brings together the free and the unfree, the political and the apolitical, the documented with the undocumented in order to produce subsistence or profit. The inter-state transactions which I just sketched up serve to frame and condition relationships in this *oikos*.

What does it mean in this context that undocumented migrants are denied an active right to association under the Migrant Workers Convention?<sup>53</sup> Surely, undocumented migrants remain free to seek their luck in pre-existing trade unions, which reminds of the equal right of rich and poor to sleep under the bridges of Paris. These trade unions are historically moulded by the nation state, and were tailored to promote and protect the interests of workers with citizenship or a residence permit, who typically wish to defend their wages against lower bids by undocumented migrants.<sup>54</sup> Any community between documented and undocumented workers will either solely serve to defend the wages of the former, or rely on their idealism, solidarity or grace. Both options imply a hierarchical structure, between the strong and the weak, between benefactors and beneficiaries.<sup>55</sup>

Undocumented migrants remain barred, however, from creating organizations of their own design that could address threats unique to them: exploitation of their precarious situation on the labour market and threats of detention and expulsion from state territory. This entails two interrelated consequences. First, these unique threats, which would raise something of a scandal if directed against citizens or documented migrants, will remain isolated from and insignificant to the political processes of the nation-statist community. Second, the undocumented migrant is personally denied the agency to address an issue which he or she, with all likelihood, considers to be intimately related to self-preservation. As

<sup>53</sup> See Section 4 *supra*.

<sup>54</sup> It would be interesting to map parallels between the discursive figure of the "strike breaker" on industrialized labour markets of the 1920s and -30s and that of the "illegal alien" on the contemporary labour market.

<sup>55</sup> There are interesting examples of trade union strategies in Spain actively involving undocumented migrants into labour market policy. However, they do not detract from the point that the inferior political capacity of the undocumented migrant will persist even among kindly unionists.

her voice in the *polis* is not recognized (and therewith not recognizable),<sup>56</sup> I wonder whether the undocumented migrant worker's can act out her interests in the *oikos* and enjoy the protection of the law in some sense.

Strikingly, there is empirical evidence that the undocumented migrant is accorded a strictly limited legal standing in the *oikos*. Let me name three examples. First, the Inter-American Court held in its 2003 *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants*<sup>57</sup> that once an employment relationship is established with an undocumented worker, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment".<sup>58</sup> Second, as shown by Andreas Inghammar,<sup>59</sup> a 2009 European Union directive has entitled undocumented migrant labourers to back payment and affords them the right to take juridical proceedings against an employer in this regard.<sup>60</sup> Third, in a recent case, MigrAr, the German counseling initiative for undocumented migrants, has successfully pursued the payment for 39 months of work owed by an employer to an undocumented migrant worker in a 2009 case on behalf of one of its clients. To push the case, MigrAr chose mediation proceedings under German civil law (*Güteverhandlung*). Mediation proceedings open an avenue to legal redress, because they do not require that the undocumented migrant worker in question presents herself in court. A settlement was reached on behalf of the claimant, who continued to work as an undocumented migrant labourer.<sup>61</sup> Third-party representation is not necessarily unique to German labour law.<sup>62</sup>

Are we witnessing a broad movement towards the justiciability of undocumented migrant workers' human rights here? Not so. What the three examples do show is that only a vicarious form of justiciability is recognized, which is strictly limited to the domain of *labour* law and therewith related to the *oikos* rather than the *polis*.<sup>63</sup> To be sure, the vindication of labour law entitlements always takes place through a kindly proxy: the Inter-American Court pronounced

<sup>56</sup> See Gunneffo with Selberg.

<sup>57</sup> *Juridical Condition and Rights of the Undocumented Migrants*, 17. September 2003, Inter-Am. Ct. H.R., Advisory Opinion OC- 18/03, [hereinafter Advisory Opinion]. Available at [http://www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html).

<sup>58</sup> Advisory Opinion, *supra*, para. 134.

<sup>59</sup> 12(2) *European Journal of Migration and Law* (2010) 193–214.

<sup>60</sup> There is no implication that judicial proceedings on back payments in any way impact on removal. See *Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, adopted on 18 June 2009. OJ L 168/32 of 30 June 2009, art. 6. See also Inghammar's contribution in this issue; 12(2) *European Journal of Migration and Law* (2010) 193–214.

<sup>61</sup> C. Dohler, 'Schuften für einen Euro die Stunde', *Die Zeit*, No. 47, 12 November 2009, p. 96.

<sup>62</sup> By way of example, Swedish procedural rules would allow trade unions to represent an undocumented migrant worker in proceedings on the violation of a collective agreement by an employer. Different from certain German trade unions, their Swedish counterparts appear not to be interested in this option. I am indebted to Andreas Inghammar for pointing this out to me.

<sup>63</sup> Even in these areas, evidence supporting continued restrictivity can be identified. A few months before the Inter-American Court issued its Advisory Opinion quoted above, the U.S. Supreme Court

its advisory opinion at the request of a state on behalf of no undocumented migrant in particular, and the German Court ruled in favour of an absentee claimant who continued to live the same precarious and marginalized life after the settlement. The intermediaries – as the government of Mexico or the German counseling organisation MigrAr – advanced the interests of undocumented migrants merely in their capacity as undocumented migrant *workers*. At stake in all three examples is a set of subsistence conditions securing their functioning in the labour market. It is equally obvious that her exclusion from the *polis* through constitutional and international law remains firmly in place.

Why is this limited justiciability of entitlements under labour law accorded at all? Why is it important to the state, I wonder, to keep undocumented migrants workers salaried and reasonably safe in their workplace, if the goal of removing them is uncontested? The line taken by drafters of the CMW is that labour law safeguards are a deterrent to hiring undocumented migrant workers. If their labour is priced at the same level as that of documented workers, no rational employer would hire them. However, as long as justiciability presupposes vicarious legal action, as in the German case, and the network of benevolent counselors is thin, the rational employer will deem a lawsuit to be a relatively unlikely risk. Empirically, the deterrence argument is unconvincing.

I think that there are quite different reasons for the emergence of limited justiciability under labour law in the North. To appreciate them fully, I need to draw on the regular labour market of advanced economies, where citizens and documented migrants work. In this labour market, a double move towards informalization and increased mobility has taken place during the past decades.<sup>64</sup>

Informalization has been analysed by Slavnic, who elaborates its role in the transition from Fordist to post-Fordist economies. Slavnic liberates the term “informal” from being exclusively associated to economically marginal activities by undocumented migrants and their employers. He lets it denote a wider sway of processes, generally swapping stability for flexibility in various aspects of employment relations.<sup>65</sup> Here is his argument. Earlier, labour markets rested on a nation-statist paradigm and were characterised to a large extent by stable and bureaucratized relationships between employers and employees. Work conditions were to a large extent collectively bargained. The state supported these relation-

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had ruled that an undocumented worker was not entitled to backpay under the National Labor Relations Act as a remedy for wrongful termination for union activity:

We... conclude that allowing the [respondent National Labour Relations] Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. *Hoffman Plastic Compounds v. NLRB*, 27 March 2002, U.S. Supreme Court, 535 U.S. 137 (2002), p. 13.

<sup>64</sup> Z. Slavnic, ‘Political Economy of Informalization’, *3 European Societies* (2009), pp. 1–21.

<sup>65</sup> *Ibid.*, *supra*, p. 4.

ships through labour legislation and welfare provision, with the latter “de-commodifying” labour, that is, linking it to the redistribution of resources through the welfare system. For a couple of decades, however, labour relationships have typically become less stable, less bureaucratized and less dominated by collective bargaining. States opened avenues towards more flexibility by adapting its social and labour laws. The welfare offer was gradually scaled back and labour moved into a phase of recommodification.<sup>66</sup>

Extrapolating Slavnic’s reasoning, I think that the position of the individual worker is now discursively constructed as flexible, competitive, willing to adapt to changing conditions and driven by entrepreneurial self-perception. Also, in labour markets as much as society at large, mobility was gradually transformed into a key value, although freedom of movement is still only for a relatively narrow elite.<sup>67</sup>

The undocumented migrant worker incarnates those ideals. She is the prototype worker of informalization: maximally mobile, minimally dependent on the welfare state and incapable of collective bargaining. Simultaneously, her case proves that the structural imposition of mobility is at work independently of a legal freedom of movement. This is, I think, of some importance to the question why a minimalist labour rights protection kicks in for undocumented migrant workers. If mobility and informality are discursively idealized, those behaving in conformity with these ideals are given legal means to defend themselves to the degree necessary to defend these ideals. The German labour law remedies in my third example above are crafted to serve exactly that purpose, neither less nor more. If the informal sector is economically and ideologically important to the functioning of advanced capitalist economies, those working within it need to be assured only those rights which secure that the sector can maintain its workforce. Otherwise put, exploitation finds its limits in systemic sustainability, which, in turn, presupposes a measure of individual survival, a survival for which salary payments are the only safeguard. In the *oikos*, the *status* of the undocumented migrant as a productive worker is legally guaranteed.<sup>68</sup>

Yet while the undocumented migrant worker is socially and legally embedded in the *oikos*, her relationship to the *polis* imagined to bracket that *oikos* is one of

<sup>66</sup> *Ibid.*, p. 11.

<sup>67</sup> “[L]iberty of circulation which has always been a rare and unequally shared advantage rapidly becomes the principal stratifying factor of modern and post-modern projects”. Z. Bauman, *Globalization: The Human Consequences, European Perspectives* (Cambridge: Polity Press, 1998), p. 22.

<sup>68</sup> There are historical precedents to state interventionism preserving the productivity of unfree labour. “The legislation of Hadrian [whose reign lasted from 76–138 AD, author’s remark] was the first to grant a significant place to the slave. Most characteristically, the slave for the first time earned the right to lodge a complaint – in very special cases, it should be added – against his own master. The same emperor’s legislation dealt with cruelty against slaves and made the crime of castration equivalent to homicide...” Rotman, *supra* note 39, at 169. As the children of slaves would be slaves, too, castration had a direct bearing on the reproduction of a labour force critical to the imperial economy. The same goes for other aspects of self-preservation by the Slave, from then on endorsed and protected by civil law.



complete subjection. The denial of an active right to association simultaneously bars any attempt to free herself politically from the bonds into which her host state and the recipient state cast her. Let me revert to Maine's idea that the shift from status to contract is a core marker of societal progress.<sup>69</sup> By contrast to documented workers, the undocumented migrant worker cannot contract herself out of her predicament, and is therefore entirely determined by her status, in the *oikos* as much as in the *polis*. Maine believed the dominance of status to be a marker of feudalism, while the move towards modernity and industrialisation implied a concomitant emphasis of contract.<sup>70</sup> Indeed, undocumented migrant workers live and are made to live in a space as much as in a time apart.

### 5. A Covenant on Servitude?

I have now considered how the Migrant Workers Convention reflects the structure of the tripartite relationship between state-*polis*, workplace-*oikos* and the disenfranchised individual. What emerges is the confinement of the undocumented migrant's agency to the *oikos* and what seems to be a once-and-for-all subjection to the *polis* without any political standing in return. What is the source of this radical subjection? Is it an auto-subjection, effectuated by the migrant herself? Or is it subsumed in the tributary transaction between sending and receiving state?

I think that the disentanglement of the undocumented migrant can only be explained as an amalgamation of auto-subjection and alter-subjection through an inter-state transaction. Yet I would hesitate to describe this amalgamation as being the *cause* of her disentanglement and disposability. The Migrant Workers Convention and other contemporary norms of international law are no isolated phenomena, no historical singularities – if they were, we would be scandalized by what we would very likely perceive as legalized apartheid. Rather, these norms appear to us so normal, so matter-of-fact-like, because they correspond neatly to figures of political thought which have become so widespread to be almost forgotten.

To make good on this claim, I will draw on the groundbreaking work of Mary Nyquist on Hobbes' defenses of slavery, in which the relationship between master and slave is deduced from the power over life and death that a victor holds over the vanquished.<sup>71</sup> First Grotius and later Hobbes, Nyquist argues, posit the victor's *forbearance* to take the life of those vanquished in battle as central,<sup>72</sup>

<sup>69</sup> “[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.” H. Sumner Maine, *Ancient Law* (New York: Henry Holt, 1864), p. 165.

<sup>70</sup> *Supra*.

<sup>71</sup> M. Nyquist, ‘Hobbes, Slavery and Despotical Rule’, 106 *Representations* (2009) 1–33.

<sup>72</sup> *Ibid.*, pp. 12–13.

reconnecting early modern political thought to the Roman *jus gentium* on war slavery and thus creating traction for practices of transatlantic slavery. Remarkably, Nyquist elaborates in her reading of Hobbes core texts, he makes “the slave mastery the prototypical form of sovereignty”,<sup>73</sup> arguing a principal similarity between the slave, the child and the citizen when it comes to subjection under the sovereign.<sup>74</sup> The military adversary subdued is then the prototype for all disadvantaged beings who are somehow governed and maintained by a sovereign who wishes to “take caution”<sup>75</sup> against future risks emanating from them.

In tracking this heritage, I am not interested in indicting undocumented migrant labour, international law or human rights by association with the emotively and historically resonant term of slavery.<sup>76</sup> Yet, I do wonder whether the disenfranchisement reflected in the Migrant Workers Convention and in the reservations to the Convention on the Rights of the Child is produced – or reproduced – by an arguably Hobbesian conception of sovereignty at large.<sup>77</sup>

### 5.1. *Submission?*

Nyquist’s analysis, which I will be guided by in the following presentation of Hobbes’ thinking, emphasizes that the productive elements in his doctrine of war slavery are the “irresistible might” of the victor and the fear of the vanquished captive. In Hobbes’ account, however, subjection and enslavement of the vanquished does not occur automatically due to this imbalance of power. Rather, the captive contracts him- or herself into subjection by the victor-turned-master. “It is not therefore the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant” as Hobbes stresses in Chapter 20 of *Leviathan*. By this covenant, the victor becomes master, the vanquished a servant

<sup>73</sup> *Ibid.*, p. 10.

<sup>74</sup> “In every commonwealth and household wheter there are slaves [servi] what the free citizens and children of the family have more than the slaves is that they perform more honourable services in commonwealth and family, and enjoy more luxuries.” Th. Hobbes, *De Cive*, 2.9.9, in R. Tuck (ed.), *On the Citizen/Thomas Hobbes* (1998), p. 111, as quoted by Nyquist, *supra* note 70, p. 11. See also Nyquist, *supra* note 70, pp. 8–9.

<sup>75</sup> Th. Hobbes, *Elements of Law*, 1.14.13, in F. Tonnies (ed.), *The Elements of Law: Natural and Politic* (1969), p. 73–4, as quoted by Nyquist *supra* note 70, p. 2.

<sup>76</sup> See, e.g., S. Scarpa, *Trafficking in Human Beings – Modern Slavery* (Oxford: Oxford University Press, 2008). The term “slavery” is used polemically without considering the implications of analogies between practices in antiquity, in the early modern age and in the 21 century. Slavery in antiquity is covered on one page, apparently in order to justify the book’s title (Section 1.2). Its essential similarity, or even identity, with trafficking is assumed rather than argued. Scarpa’s monograph is but one example of the widespread use of the term slavery as a shrill metaphor in the trafficking context.

<sup>77</sup> Nyquist’s point is that Hobbes’ justification of slavery out of the juridico-military situation of battle captivity is fundamental to the way he develops his conception of sovereignty. He derives the relationship between sovereign and subject from that between master and slave, which makes slavery into a foundational idea of community. Nyquist, *supra* note 70, p. 13.

and both leave the state of nature and enter what Nyquist terms a “little body politic”.<sup>78</sup>

For the vanquished, entry into the enslaving covenant is still a choice, if only one with a life-threatening alternative: “for who would not loose the liberty that nature has given him... if they feared not death in the retaining of it?”<sup>79</sup> The victor, too, is at liberty to covenant. “Nor is the Victor obliged by an enemies rendring himselfe (without promise of life,) to spare him for this his yeedling to discretion; which obliges not the Victor longer, than in his own discretion hee shall think fit.”<sup>80</sup>

Here, Hobbes draws on what Nyquist terms a “more than questionable etymological derivation of servire (to serve) from servare (to serve)”,<sup>81</sup> originally elaborated by Grotius. “The Name of Slaves, Servi, (Pomponius tells us) arose from this, that Generals sold their Prisoners, thereby preserving them from Death”.<sup>82</sup>

Taking Hobbes to the context of undocumented migration, we find similarities as well as differences. A precondition for saving migrant workers and their families is that they be prepared to serve through their labour (otherwise, they would fall outside the definition of beneficiaries in article 2 CMW). The amalgamation of saving and serving can be found with the purposes of the Migrant Workers Convention, as expressed in its preamble:

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition, Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,...

These paragraphs locate threats to the undocumented migrant with “certain employers”, i.e. in the *oikos* rather than the *polis*. As I have shown earlier, though, it is the potential interplay between *oikos* and *polis* which is at the source of the undocumented migrant’s precarious situation. This said, I should add that states obviously would have avoided incriminating themselves when formulating the CMW preamble.

The vanquished characteristically surrenders to the victor in battle (who represents the *polis* rather than the *oikos* at this moment), to only thereafter turn

<sup>78</sup> Nyquist, *supra* note 70, p. 15.

<sup>79</sup> Hobbes, *Elements*, *supra* note 75, as quoted by Nyquist, *supra* note 70, p. 3.

<sup>80</sup> Hobbes, *Leviathan*, 2.20, in R. Tuck (ed.), *Leviathan/Thomas Hobbes* (Oxford: Oxford University Press, 1996), p. 141, as quoted by Nyquist, *supra* note 70, p. 23.

<sup>81</sup> Nyquist, *supra* note 70, p. 12.

<sup>82</sup> H. Grotius, *The Rights of War and Peace*, in R. Tuck (ed.), *The Rights of War and Peace/Hugo Grotius* (Oxford: Oxford University Press, 2005), 3:7.5.1, 1364, as quoted by Nyquist, *supra* note 70, p. 12.

<sup>83</sup> Migrant Workers Convention, Preamble, paras. 13–14.

into a captive. Not so the undocumented migrant, it would appear. She seems to be marked by the opposite, that is, the avoidance of any contact with representatives of the *polis*.

Yet this avoidance may be mutual for the undocumented migrant and the host state, which alters the situation significantly. Where the host state for discretionary reasons does not seek out and remove the undocumented migrant, a coordinated behaviour emerges: mutual forbearance. The state forbears to remove, although removal would be lawful, yet the undocumented migrant forbears to raise any rights claim, yet such claims would be lawful under international human rights law. There is a mutual securitisation in this forbearance, just as in the case of the war slavery covenant, where the victor spares the life of the captive, if only for the moment, and the vanquished accepts a form of servitude so depleted of all autonomy that it eliminates renewed risks to the victor.

In Nyquist's formulation, "Hobbes theorizes submission to absolute sovereign power as an act of voluntary self-servitude that is simultaneously an act of self-preservation".<sup>84</sup> This is precisely the net outcome of the double submission to *polis* and *oikos* performed by the undocumented migrant worker. In conclusion, I think it would be helpful to start reading international human rights law in terms of Hobbes' war slavery theory to understand how it contributes to such submission.

## 5.2. *Exit from the State of Nature?*

The parallel I wish to draw presupposes the imagination of forces well as violent of the "irresistible might" of the victor's military force threatening the subdued. As earlier stated, Hobbes saw the covenant of war slavery opening an exit from the state of nature in the battlefield.<sup>85</sup> In what sense have today's undocumented migrants passed through a state of nature?

One response is obvious: Northern states do actually claim that there is a "fight" against illegal migration going on.<sup>86</sup> This is borne out in a very real sense: borders are increasingly fortified, walled and militarized, and migrants regularly

<sup>84</sup> Nyquist, *supra* note 70, p. 13.

<sup>85</sup> *Ibid.*

<sup>86</sup> Allusions to the "fight" or "combat" against "illegal migration" and "human smuggling and trafficking" have been and still are commonplace in Northern policy documents. The recently agreed Stockholm Programme, setting policy priorities of the EU in the "Area of Freedom, Security and Justice", contains indicative language, although the tone is less bellicose than a decade ago:

The European Council is convinced that effective action against illegal immigration remains essential when developing a common immigration policy. The fight against trafficking in human beings and smuggling of persons, integrated border management and cooperation with countries of origin and transit, supported by police and judicial cooperation, in particular must remain a key priority for this purpose.

Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Doc. No. 17024/09, Brussels, 2 December 2009, 6.1.6, p. 66.

lose their lives in efforts to pass them.<sup>87</sup> Persons travelling to destination countries without permit to enter them are, as a rule, dependent on the services of intermediaries as smugglers, travel agents and suchlike. Towards its low-budget end, smugglers' strategies to circumvent or overcome border controls become increasingly risky. As a low-budget migrant, there is a very real danger of losing one's life in migrating, and states make sure to keep it this way by exploiting both natural obstacles as the open seas, deserts or mountains and by adding man-made ones as walls, fences and military surveillance technology.

A second response, complementary to the first, but, in my view, delivering a more poignant linkage to the Hobbesian heritage, pivots on the discursive construction of sending states in the South. From a Northern vantage point, the South is regularly characterized by its inability to safeguard human rights, and cast as corrupt and violent. This imagery locates Southerners in a Hobbesian state of nature. Therewith, the voluntary status change of a person passing international borders and becoming an undocumented migrant acquires a transgressive significance. This transgression would parallel the one taking place when the captive enters the covenant. Removal from a Northern host state would then be tantamount to a push back into the state of nature, where the risk (of death) seems so much greater and less calculable than in the condition of an exploited undocumented migrant worker. It follows, then, that being an undocumented migrant worker is a choice; a choice marked by the same rationality as inspires the vanquished to prefer slavery over death.<sup>88</sup>

## 6. State Obligations and the Public-Private Divide

Well-intentioned persons and organizations repeatedly call upon states to give human rights to undocumented migrants. Under the Hobbesian conditions explored above, and, in particular, the location of undocumented migrants in the *oikos* rather than the *polis*, I wonder how these calls can be understood. What does it mean for the relationship between human rights and the undocumented

<sup>87</sup> See, e.g., T. Spijkerboer, 'The Human Costs of Border Control', *Briefing Paper, European Parliament, IP/C/LIBE/FWC/2005–23/SC1*, quoting one source documenting some 7,000 deaths at European borders in the period from 1993–2006. See also Legomsky, *supra* note 35, p. 78, with further references to US debates on the correlation of intensified border enforcement and border deaths.

<sup>88</sup> There is a privileged exit from this type-cast state of nature: refugeehood under the 1951 Refugee Convention or under complementary forms of international protection. While not being the subject of this article, both forms of protection offer a form of emancipation for a select and limited group of persons originating from states in the South. It is important to recall, first, that the unqualified invocation of human rights violations outright is not enough to acquire international protection. Second, credibility testing offers an important filter which only those can pass who are found to subject themselves to a Westphalian sovereignty narrative. See J. Beard and G. Noll, 'Parrhêsia and Credibility: The Sovereign of Refugee Status Determination', 18 *Social & Legal Studies* (2009), pp. 455–477.

migrant that the *polis* as the prototypical space for implementing human rights is per definition inaccessible to her?

I describe this exclusion as a form of privacy in relation to the public sphere of the state *polis*. Doing so enables me to argue that any conduct “giving” human rights to undocumented migrants in hiding needs to overcome this boundary between public and private. In rights theory, such boundaries make a considerable difference. Positing a negative obligation – that is, a norm prohibiting a certain conduct by the sovereign in the conduct of public affairs – will not be enough, as the issue at stake is removed into a private sphere. The private sphere would potentially require that the human rights obligation be a positive one, that is, an obligation which prescribes that the state not only refrains from certain conduct in the public sphere, but also actively pursues a policy giving effect to a right. Such a policy will typically have interventive effects. It will disrupt the status quo, rearticulate boundaries or simply transgress them.

Why is this important in our case? As I have attempted to show, undocumented migrant workers are absent from the *polis* while concomitantly being subjected to the privacy of the *oikos*. To argue that a state is obliged to penetrate the private sphere of the *oikos* and to “bring” human rights to the undocumented migrant worker, I would need to show that relevant human rights obligations a) feature positive obligations, and b) that these positive obligations possess the requisite strength to penetrate this specific public-private divide.

This helps me to properly understand why human rights for undocumented migrant workers are so severely restricted in the Migrant Workers Convention. Take the right to health, which is limited to emergency healthcare for undocumented migrant workers, as we saw above. I interpret this to mean that only the emergency healthcare component of the right to health has the requisite strength to positively oblige state parties to provide urgent and life-saving treatment to undocumented migrant workers. Other components of the right to health, as regards non-urgent, yet necessary forms of treatment, are simply not strong enough to pierce the particular public-private divide between *polis* and *oikos*.

More demanding is the case of undocumented migrants that do not work or belong to the family of an undocumented migrant worker. As argued earlier, these migrants are only capable of presencing in the *polis* in order to be detained and removed. Beyond that, they simply remain incapable to enter the *polis* or the *oikos* in any sense. They are inter-national in the proper sense of the word. Here, positive obligations would need to be very strong in order to oblige a state to “bring” human rights to an undocumented migrant. Let me point to another form of intervention into the private sphere wholly outside *polis* and *oikos*: a “humanitarian intervention” or an intervention carried out by invoking the responsibility to protect. Why are these analogous to a state “bringing” human rights to an undocumented migrant? To be sure, a humanitarian intervention reaches outside the *polis* of the intervening state, yet not necessarily into a wholly

internal, or private sphere of the state targeted. As human rights violations are subject of legitimate international concern, such an intervention also reaches into the aforementioned sphere of the “inter-national”. Which is precisely what a state needs to do that wishes to actively extend human rights protection to undocumented migrants.

There is no indication in the international treaty law of human rights or in state practice that obligations flowing from it are endowed with the requisite additional strength to make humanitarian interventions, or interventions linked to the responsibility to protect *obligatory*. States remain free to intervene, where preconditions are fulfilled, but have no duty to do so.<sup>89</sup> Given the structural analogy between the case of humanitarian intervention and that of undocumented migrants, it follows from a rights theory approach that states remain free to “bring” human rights to undocumented migrants, yet lack a duty to do so.

## 7. Christianity, Privacy and the Undocumented Anti-Man of Rights

How come, I asked myself at the outset, that undocumented migrants’ inability to claim and therewith access human rights fails to affect the conception of universally applicable human rights? Any attempt to address this problem through methods of legal formalism invariably bring us to the jurisdictional self-reflection of the *polis* onto a territory. I have tried to show that the presencing of the undocumented migrant in such a territorial jurisdiction always reflects the transgression of its borders, and therefore cannot be severed from the imperative of removal. As long as the *polis* remains the vantage point of our intuitions, human rights are always set a time and a space apart. Heidegger’s understanding of space, dwelling and the political might offer a way out this logic of disposability.

Yet, as a matter of law, even though undocumented migrants are excludable, they are not necessarily excluded outright. Tracking undocumented migrant workers into the *oikos*, I found that they are assigned a strictly limited range of rights under the Migrant Workers Convention. This I could explain in three moves. First, through the Convention, the South offers a discount on undocumented migrant workers’ rights as a tribute to the North, which controls the flows of remittances without any restraint in international law. Second, while undocumented migrant workers lack an active right to association, they are nonetheless accorded a limited legal standing in the *oikos*, expressed in domestic labour law.

<sup>89</sup> The 2005 World Summit Outcome Document – arguably the most relevant source to date for tracking states’ agreement on a “responsibility to protect” – locates the responsibility to protect with that state on whose territory a threatened population is present. In a subsidiary fashion, “the international community, through the United Nations” is entitled rather than obliged to “help protect populations” from specified forms of harm. It should be recalled that the World Summit Outcome Document is far from being or impacting hard law. *World Summit Outcome*, General Assembly resolution 60/1, 2005, paras. 138–139.

Third, I was able to show that these patterns of inequality correspond all too well to established modes of thinking sovereignty, expressed in Hobbes' defense of war slavery. It culminates in the image of submission *qua* contract, which applies as much to the war slave as to the undocumented migrant.

Up to here, all I know is that human rights are related to *polis* and *oikos* in a way that makes the failure of their universality always appear as a result of the individual's choice. Not only do human rights invite us to think their protective reach in an exaggerated manner, they also seduce us to locate responsibility for the absence of protection with the individual undocumented migrant rather than the state. Whence this seduction?

Drawing on Werner Hamacher,<sup>90</sup> I would argue that it is traceable to the rift between political man and social man, reflected already in Tertullian's dictum *Nobis nulla magis res aliena quam publica* (nothing is more alien to Christians than public matters of the empire).<sup>91</sup> Christianity manifested itself in its claim to the universality of human interiority and internal sociality acquired at the price of its separation from the political. Protestant Reformation set off the democratic revolutions of the sixteenth and eighteenth century, continues Hamacher, and reformed Christianity "put into effect its principle of the universal equality of individuals (that is, of the individual's unmediated bond with God and the community), and assumed the form of modern democracy – a form that we still inhabit today".<sup>92</sup> For Hamacher, the modern state is therefore structurally Christian.

At this point, Hamacher delves into Marx's "On the Jewish Question". Marx suggests that the "political form of democracy is Christian, because in it the human – and not just one man but every man – counts as the sovereign and supreme being". Marx goes on to argue that the human in his "unsocial aspect, his contingent existence, as he is given beneath the domination of inhuman conditions and elements – this man is, in a word, the human who is not yet a real being of the species". In this, I can easily recognize the undocumented migrant, who, in her contingent existence, is "not yet" the man of human rights. She will be, once she is regularized or removed, but as an undocumented migrant, she can be no more than "given beneath the domination of inhuman conditions and elements". This does not explain, though, why this separation poses no problem to an avowedly egalitarian and, to speak with Hamacher, "structurally Christian" state.

The decisive historical move in Hamacher's reading of Marx is that the modern state "confesses itself as a state" and therewith constitutes "a state that abstracts

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<sup>90</sup> W. Hamacher, "The Right to Have Rights (Four-and-a-Half Remarks)", 103 *South Atlantic Quarterly* (2004), 343–356.

<sup>91</sup> Tertullian, *Apologeticum* (Cambridge: Cambridge University Press, 1917), p. 38, as quoted in Hamacher, *supra*, p. 343.

<sup>92</sup> Hamacher, *supra* note 89, p. 344.



itself from the religion of its member”. While this moves enables the state to attain the universality which earlier only belonged to the *ecclesia* as a community of faith, this comes at the price of severing all ties to the internal sociality of its members.

The “sovereignty” of man, while put into effect in the political state, is not yet a social reality. The Christian distinction as declared by Tertullian thus dominates, according to Marx, even when the *res publica* is no longer *res aliena*, but has become the *res publica christiana*, now brought to virtual universality in the form of political democracy. This distinction, however, and more painfully the rift, still remains between political state and human society, since democracy knows the human only as the citizen “estranged” and “alienated” from the human, as the political being who is separated from himself as a social being, as the human who stands in opposition to every other human – and thus democracy, although dedicated to the idea of an undivided, universal humanity, knows the human only as “the human in opposition to the human,” and knows man only as anti-man. The state, while being structurally Christian, is the political form of the undoing of Christianity. Essentially homogenizing and conformist, the democratic state form comes to its perfection by instituting an unbridgeable rift between the human and itself – thereby dissolving the very concept and the very essence of the human that it continues to promulgate.<sup>93</sup>

Anyone at the threshold of the state will experience the opening of this rift in herself. The undocumented migrant may invoke human rights (that is, the political) or her belonging to humanity (that is, the social), yet she is bound to fail by doing either. If the undocumented migrant claims her human rights, all she does is to place herself firmly in the mere privacy of the man of rights – a privacy different from that enjoyed by members of the *polis* in that it is not protected by the neutrality of a “state confessing itself as a state”. If the undocumented migrant invokes her being human, what she addresses is a spirit of “the presocial and antisocial *bellum omnium contra omnes* of Hobbes’s state of nature – a condition in which it is not *the essence of society* that is realized, but rather the *essence of difference*”.<sup>94</sup> For the undocumented migrant, claiming human rights is positing herself as political and social anti-man. Claiming human rights is therefore a way of assuming the position of a Hobbesian captive. Through this claim, she does no less than to contract herself into submission.

<sup>93</sup>) Hamacher, *supra* note 89, pp. 345–6.

<sup>94</sup>) K. Marx, *On the Jewish Question* (1844), p. 150, as quoted by Hamacher, *supra* note 89, p. 348.