

Undocumented Migrants and International Law

Author : Angela Banks

Tagged as : [Immigration](#)

Date : June 30, 2016

Jaya Ramji-Nogales, [“The Right to Have Rights”: Undocumented Migrants and State Protection](#), 63 **Kan. L. Rev.** 1045 (2015).

International human rights are often described as universal rights. The universality of this legal regime leads many people to view it as an appropriate resource for addressing the plight of undocumented migrants. Yet the legal protections provided within the international human rights regime are often unavailable to undocumented migrants, or the rights that are most important to them are not protected. International and immigration law scholars rarely acknowledge these limitations, which makes Professor Jaya Ramji-Nogales’ article such an important contribution. *“The Right to Have Rights”: Undocumented Migrants and State Protection* provides an excellent analysis of the limits of international human rights law in protecting undocumented migrants.

Two of the central challenges that undocumented migrants face are vulnerability within their states of residence due to their limited “recourse against exploitation due to fear of deportation” and “the rupture of family and community ties through deportation.” (P. 1050.) The rights to territorial security (by which Ramji-Nogales means the right to remain in one’s state of residence), family unity, and the absence of discrimination due to immigration status are important rights for addressing undocumented migrants’ central challenges.

To examine the ability of international human rights law to address these challenges, Ramji-Nogales uses Hannah Arendt’s critique of human rights law in **The Origins of Totalitarianism** as a template. Accordingly, Ramji-Nogales explores (1) the fact that sovereign states decide what rights will be protected and how; (2) the idea that certain groups’ rights are exceptional and protected outside of the domestic legal order; and (3) that individuals’ dependence on sovereign states to protect their individual rights limits the ability of international human rights law to protect undocumented migrants. Arendt found these factors hindered protecting the rights of minorities and stateless individuals, and Ramji-Nogales finds the same for undocumented migrants.

First, while international human rights are conceptualized as universal rights, they actually exclude the rights that are the most important to undocumented migrants. International human rights treaties are state-created instruments, and as a result, “sovereignty interests are deeply embedded in these treaties.” (P. 1060.)

Second, undocumented migrants are exceptional and outside of the international human rights regime. In a number of critical ways, international human rights treaties exclude undocumented migrants from protection. For example, no international human rights treaty supports a narrow right to territorial security. The United Nations Human Rights Committee (“HRC”) is the body responsible for interpreting the International Covenant on Civil and Political Rights (“ICCPR”). The HRC has noted that the ICCPR “does not recognize the rights of aliens to ... reside in the territory of a State party.” (P. 1051.) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families “states in no uncertain terms that it does not offer any right to ‘regularization’ for

undocumented migrants or their families.” (*Id.*) The universal claims of the international human rights framework are only plausible if undocumented migrants are understood as being legitimately outside of the system.

Finally, human rights protection depends on state enforcement, and undocumented migrants “have no political voice, and are largely excluded from legal protections in their host states.” (P. 1061.) In order for the international human rights regime to be useful for undocumented migrants, the state protection gap has to be addressed. In a state-created system, state interests significantly shape what substantive rights will be protected and how. Additionally, the enforcement of protected rights depends on having a state act on one’s behalf.

Ramji-Nogales proposes three responses to the state protection gap. First, undocumented migrants could utilize a social movement approach in which they build networks, exchange information, publicize issues that are important to them, and engage in protests. This approach would allow undocumented migrants to “openly challenge the political determinations that define the scope of international human rights law” without relying on the state (P. 1063).

Second, migrant-sending states could demand better treatment of their nationals in receiving states. Undocumented migrants’ home states would discuss the harms their nationals face and work to have receiving states recognize as rights the issues important to undocumented migrants.

Finally, Ramji-Nogales discusses a multilateral approach in which a number of migrant-sending states create a “permanent institution to contextualize the situation of undocumented migrants and advocate for equal treatment.” (P. 1064.) This strategy would differ from current multilateral approaches to coordinate state migration action because it would “aim to radically restructure discussion around the undocumented.” (*Id.*)

Ramji-Nogales acknowledges the challenges and shortcomings for each of these responses: the coordination challenges involved in organizing a social movement; the comparative power differential between social movements and states; the limited political power of migrant-sending states vis-à-vis receiving states; and the conflicting interests that sending states may have because they simultaneously may be both sending and receiving states.

While none of these responses to the state protection gap offer a guaranteed solution, they begin an important conversation for immigration and international human rights law scholars. Until recently there has been little acknowledgement of the very limited role that international human rights law has been able to play in addressing the needs of undocumented migrants. By identifying specific substantive and institutional challenges, Ramji-Nogales provides a framework that immigration and international human rights scholars and advocates can use to reimagine an international legal regime that is truly universal.

Cite as: Angela Banks, *Undocumented Migrants and International Law*, JOTWELL (June 30, 2016) (reviewing Jaya Ramji-Nogales, “*The Right to Have Rights*”: *Undocumented Migrants and State Protection*, 63 **Kan. L. Rev.** 1045 (2015)), <https://lex.jotwell.com/undocumented-migrants-and-international-law/>.