

**EQUAL TREATMENT FOR TEMPORARY MIGRANT
WORKERS AND THE CHALLENGE OF THEIR
PRECARIOUSNESS**

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INTRODUCTION

This paper brings together analysis of a labour market problem (the precariousness of temporary migrant workers) and a set of normative principles (principles of equal treatment at international law). It asks: can these principles effectively meet the challenge of the precariousness experienced by temporary migrant workers?

The first part of the paper draws out the key understandings of equal treatment at international law with a focus on rights at work and freedom of employment.¹ It identifies two key understandings of equal treatment of migrant workers: equal entitlement to human rights at work and equal treatment at work more generally. It further explains how the international law regime of equal treatment is fractured along two axes. The first is the status of the migrant worker and the three logics of exclusion that operate (perceived lack of vulnerability, transience of stay in host country, application of other regulatory regimes) with the result that various groups of migrant workers are afforded no or qualified protection. The second axis is the type of work rights, with the freedom of migrant workers to choose their employment enjoying lesser protection. The second part of the paper examines whether the principles of equal treatment at international law can adequately deal with the challenge of the precariousness experienced by temporary migrant workers. It observes how these principles take a strong stance against precarious employment. They do, however, leave the precarious migration status of temporary migrant workers to the discretion of States. This creates a risk that the precarious migration status of such workers — especially workers on employer-sponsored visas, and those in irregular situations — undermines the realisation of these principles in relation to precarious employment.

I. KEY UNDERSTANDINGS OF EQUAL TREATMENT OF MIGRANT WORKERS AT INTERNATIONAL LAW

At international law, the rights of migrant workers are generally governed by three regimes: international human rights law (developed by the United Nations), international labour law (developed by the International Labour Organisation) and international trade law (developed by the World Trade Organisation).² A

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¹ Outside the scope of this paper are important rights relating to social security, social services, education and family reunification.

² In addition, there are also bilateral and regional agreements between countries that deal with migrant workers. See: International Labour Office, *Towards a Fair Deal for Migrant Workers in the Global Economy* 72-85 (International Labor Conference, Report VI, 92nd Session, 2004); Chantal

comprehensive examination of this regulatory mosaic is beyond the scope of this paper. In order to derive the primary understandings of equal treatment of migrant workers at international law, this paper focuses on three key sets of instruments:

- A. the Universal Declaration of Human Rights (UDHR)³, the International Covenant on Civil and Political Rights (ICCPR)⁴ and the International Covenant of Economic, Social and Cultural Rights ('ICESCR')⁵ (collectively known as the International Bill of Rights);
- B. the two International Labour Organisation (ILO) Conventions (and their Recommendations) dealing specifically with migrant workers: the Migration for Employment Convention, 1949 (No. 97)⁶ and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)⁷; and
- C. the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.⁸

A. *The International Bill of Rights: the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*

One principle obvious from the International Bill of Rights is that migrant workers enjoy equal status as human beings. The preambles of the UDHR, ICCPR and ICESCR open with the “recognition of inherent dignity and of the equal and inalienable rights of *all members of the human family*” as “the foundation of freedom, justice and peace in the world.”⁹ This equal status, as these preambles emphasise, implies equal enjoyment of human rights amongst human beings. As expressed by Article 1 of the UDHR, “(a)ll human beings are born free and *equal in dignity and rights*.”¹⁰ Human rights, as the preambles of the ICCPR and ICESCR state, “derive from the inherent dignity of the human person.”¹¹

Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMPARATIVE LABOR LAW AND POLICY JOURNAL 405 (2011).

³ Universal Declaration of Human Rights, GA Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter ‘UDHR’];

⁴ International Convention on Civil and Political Rights, *opened for signature* Dec. 16 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976) [hereinafter ‘ICCPR’]

⁵ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16 1966, 993 U.N.T.S. 3 (entered into force Nov. 3 1976) [hereinafter ‘ICESCR’]

⁶ Migration for Employment Convention (Revised) 1949 (ILO No. 97) *opened for signature* July 1, 1949, 20 U.N.T.S. 79 (entered into force Jan. 22 1952) [hereinafter 1949 ILO Convention].

⁷ Migrant Workers (Supplementary Provisions) Convention, 1975 (ILO No. 143) *opened for signature* June 24, 1975, 1120 U.N.T.S. 323 (entered into force 9 Dec. 1978) [hereinafter 1975 ILO Convention].

⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *adopted by* GA Res. 45/158, U.N. GAOR, 45th sess., UN Doc. A/RES/45/158, Dec. 18 1990, (entered into force July 1, 2003) [hereinafter UN Convention]. A comprehensive examination of the application of these conventions to migrant workers is provided by Ryszard Cholewinski, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT, Part II (1997).

⁹ UNDHR, Preamble; ICCPR, Preamble; ICESCR, Preamble (emphasis added).

¹⁰ UDHR, Article 1 (emphasis added).

¹¹ ICCPR, Preamble, ICESCR, Preamble.

The equal status of migrant workers as human beings entitled to human rights is powerfully reflected in the obligations of States under the International Bill of Rights. The preambles of the UDHR, ICCPR and ICESCR commit United Nations Member States — in effect, all countries of the world¹² to promote “*universal respect* for and observance” of human rights and freedoms.¹³ This is an obligation that generally extends to non-nationals within a State’s territory¹⁴ — all countries are required to promote respect for the human rights of their migrant workers.

Another crucial principle reflected in the International Bill of Rights is that migrant workers enjoy human rights at work.¹⁵ The key articles under the UDHR are Articles 23 and 24, the text of which follows:

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 7 of the ICESCR elaborates upon the guarantee of “just and favourable conditions of work” under Article 23(1) of the UDHR by providing the following:

¹² United Nations, Member States of the United Nations (as at Feb. 23 2012), <http://www.un.org/en/members/>.

¹³ UDHR, Preamble (emphasis added).

¹⁴ See ICCPR, Article 2; ICESCR, Article 2. An important exception to this obligation is provided by Article 2(3) of ICESCR which states the following:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

¹⁵ Some human rights do have a more restricted application in relation to migrants: see UDHR, Article 21 (the right to take part in government of an individual’s country); ICCPR, Article 12(1), (the right to liberty of movement and freedom to choose residence for individuals “lawfully within the territory of a State”); ICCPR, Article 13, (protection in the event of expulsion for aliens “lawfully in the territory of a State Party”); ICCPR, Article 25, (the rights of citizens to take part in representative government, to vote and to have access to public service). Note the restricted scope of certain rights: i.e. political rights and procedural rights upon expulsion (UDHR and ICCPR). See Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 52-53 (1997).

The States Parties to the present Covenant recognize the right of *everyone* to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (emphasis added)

Two other articles of the ICESCR are relevant here: Article 6 which obliges State Parties to “recognize the right to work, which includes the right of *everyone* to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”;¹⁶ and Article 8(1)(a) which obliges State Parties to ensure “(t)he right of *everyone* to form trade unions and join the trade union of his choice . . .”¹⁷

These various principles — equal status of migrant workers as human beings and their equal entitlement to human rights at work — mean that States have to equally protect the human rights at work of local and migrant workers. In other words, there is a principle of equal treatment in ensuring the human rights at work of migrant workers. Does this, however, imply that local and migrant workers should enjoy the same rights at work, that is, equal treatment in relation to work in general? This is not necessarily so. In general, human rights provide minimum standards, a floor of protection. From this perspective, local and migrant workers could enjoy unequal conditions at work provided both groups enjoy their human rights at work. For instance, the human right to “periodic holidays with pay” (as provided by Article 24 of the UDHR and Article 7(d) of the ICESCR) does not necessarily preclude local workers enjoying more paid holidays than migrant workers provided the latter group are entitled to “periodic holidays with pay.” Indeed, the UDHR, ICCPR and ICESCR do not expressly prohibit States discriminating on the basis of nationality with the

¹⁶ ICESCR, Article 6 (emphasis added).

¹⁷ ICESCR, Article 8(1)(a) (emphasis added).

prohibition on discriminating based on “national origin”¹⁸ not considered to extend to nationality.¹⁹

While these points suggest that the International Bill of Rights permits — within broad limits — discrimination in terms of the working conditions of migrant workers, there are considerations that point the other way. First, the list of attributes in the prohibition against non-discrimination under the International Bill of Rights have been considered illustrative or inclusive and key UN human rights committees have concluded that the prohibition does extend to nationality. This does not mean that there is an absolute prohibition on discriminating on the basis of nationality: such discrimination is permissible if it is pursuant to a legitimate state aim and proportionate to that aim.²⁰

Further, the content of human rights at work does expressly stipulate equal treatment (of local and migrant workers) in certain areas. Article 23(2) of the UDHR requires “equal pay for equal work”; Article 7(a)(i) of the ICESCR similarly provide for “equal remuneration for work of equal value.” Article 7(c) of the ICESCR further dictates “(e)qual opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.”

There is also a persuasive case that the right to “just and favourable conditions of work”²¹ implies the principle of equal treatment in relation to working conditions. After all, central to the notion of justice — including justice at work — is the maxim, “treat like cases alike.”²² This would suggest that migrant status alone is not a sufficient ground for differential treatment in terms of working conditions. Take, for example, control over working hours (an aspect of working conditions that includes but goes beyond the right to rest and leisure set out in the UDHR and ICESCR): an employer that allocates “unsocial” hours to migrant workers who are in a similar situation to local workers is, arguably, breaching the right of the migrant workers to just working conditions.

In summary, the International Bill of Rights clearly provides for several understandings of the principle of equal treatment: migrant workers enjoy equal entitlement to human rights at work; migrant workers enjoy equal rights to local workers in relation to equal pay for equal work and the opportunity to be promoted. There is also an implied connection between human rights at work and the principle of equal treatment in relation to work in general; as we will see later, this connection is made explicit in the UN Convention.²³

¹⁸ UDHR, Article 2; ICCPR, Article 2(1); ICESCR, Article 2(2).

¹⁹ Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 48, 51, 57 (1997).

²⁰ See Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality* 22 *GEORGETOWN IMMIGRATION LAW JOURNAL* 177, 178-179 (2008).

²¹ UDHR Article 23(1); ICESCR, Article 7.

²² This is often traced to Book 5 of Aristotle’s *Nicomachean Ethics*. See: *THE NICHOMACHEAN ETHICS OF ARISTOTLE*, translated by F.H. Peters (Keegan Paul, Trench, Tubner & Co., 6th ed. 1895).

²³ See text accompanying *supra* note 49-50.

B. ILO Conventions (and their Recommendations)

1. *Migration for Employment Convention (Revised), 1949 (No 97) and Migration for Employment Recommendation (Revised), 1949 (No 86)*²⁴

The Preamble to the ILO's Constitution identifies "(the) protection of the interests of workers when employed in countries other than their own"²⁵ as one of the key priorities of the organisation. In 1949, the 1949 ILO Convention was adopted together with its Recommendation.²⁶

While there might be some ambiguity as to whether the International Bill of Rights gives rise to a principle of equal treatment in relation to working conditions of migrant workers, the position of the 1949 ILO Convention is clear: lawfully admitted migrant workers are entitled to *at least* equal treatment in relation to their working conditions insofar as these conditions are regulated by law or governmental action. The key article is Article 6(1)(a) which states the following:

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
 - (a) insofar as such matters are regulated by law or regulations, or are subject to the control of administrative authorities —
 - (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
 - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining.

The principles that can be gleaned from Article 6(1)(a) are that *migrant workers have equal status as workers*; and that *such status entitles them — at the very least — to equal treatment at work*. These principles are distinct from (and complement) the principles of equal status of migrants as human beings and equal entitlement to human rights at work, as reflected in the International Bill of Rights. Indeed, these latter principles are not expressly provided by the 1949 ILO Convention. While Article

²⁴ Migration for Employment Recommendation (Revised) 1949 (ILO No. 86), International Labor Conference, 32th sess., 1 July 1949.

²⁵ International Labor Organisation, Instrument for the Amendment of the Constitution of the International Labour Organisation 1997 (International Labor Conference, 85th sess, 19 June 1997) (not yet entered into force), Preamble, ¶[2]

²⁶ There was an earlier Convention – the Migration for Employment Convention of 1939 – which did not come into force as it was not ratified by a single State: see Leah Vosko, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* 62-64 (2010); Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 93 (1997).

6(1)(a) guarantees parity between the working conditions of local and lawfully admitted migrant workers, it does not necessarily provide a level of protection compatible with the human rights of these migrant workers — this depends on the level of protection afforded to local workers. For example, if the human rights at work of local workers are not protected, there is correspondingly no guarantee under Article 6(1)(a) of the protection of the human rights at work of lawfully admitted migrant workers. Equal breaches of human rights of local and migrant workers are fully compatible with Article 6(1)(a).

Importantly, the principle of equal treatment at work for migrant workers is not fully realised under the 1949 ILO Convention and its Recommendation. These instruments provide a splintered system of protection (or as Vosko describes it “a multi-tiered framework for migrant workers’ protection.”)²⁷ The protection provided is fractured on two key axes. First, there is the status of the migrant worker. Three groups of migrant workers are completely excluded from the 1949 ILO Convention and its Recommendation: frontier workers; short-term entry by members of the liberal professions and artists; and seamen.²⁸ Two distinct logics of exclusion appear to be operating here: a perceived lack of vulnerability (members of liberal professions and artists) and transience of stay in the host country (short-term entry) particularly of workers whose habitual place of residence is not the country of employment (frontier workers and seamen).

Other groups of migrant workers received qualified protection. Article 6(1)(a) extends only to “immigrants lawfully within its territory.” Outside its scope are migrant workers in irregular situations, for instance, those who have entered the territory without authorisation, or those who entered lawfully but have breached laws resulting in a lack of authority to stay. Moreover, self-employed migrant workers, whilst coming within the scope of Article 6(1)(a), do not benefit from clauses of the 1949 ILO Convention and its Recommendation that apply only to “migrants for employment,” that is, persons who migrate from one country to another with a view of being employed otherwise than on their own account.²⁹ Here again, there is (qualified) exclusion presumably on the basis that self-employed workers do not need protection.

In addition, there are migrant workers who enjoy superior rights. “Migrants for employment” admitted on a permanent basis enjoy additional rights under the 1949 ILO Convention, including protection against being deported to their country of origin because of an inability to work due to illness or injury sustained after entry.³⁰ The 1949 ILO Recommendation also has a model bilateral agreement which confers additional entitlements on these workers.³¹

²⁷ Leah Vosko, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* 82 (2010).

²⁸ 1949 ILO Convention, Article 11(2); 1949 ILO Recommendation, Article 3.

²⁹ 1949 ILO Convention, Article 11(1); 1949 ILO Recommendation, Article 1(a).

³⁰ 1949 ILO Convention, Article 8(1).

³¹ 1949 ILO Convention, Annex: Model Agreement on Temporary and Permanent Migration for Employment, Including Migration of Refugees and Displaced Persons

The second axis of the fracture concerns the type of work rights. Article 6(1)(a) of the 1949 ILO Convention extends to most of the areas covered by the human rights at work that are provided under the UDHR and the ICESCR (remuneration, working conditions including working hours and leisure, membership of trade unions). There is, however, one crucial exception — freedom to choose employment. This freedom, which is recognised by Article 23(1) of the UDHR and Article 6 of the ICESCR, is not mentioned in Article 6(1)(a) of the 1949 ILO Convention; indeed, the Convention as a whole makes no reference to this freedom. Rather, there is the entreaty in Article 16 of its Recommendation that State Parties to the 1949 ILO Convention do the following:

1. Migrants for employment authorised to reside in a territory and the members of their families authorised to accompany or join them should as far as possible be admitted to employment in the same conditions as nationals.

2. In countries in which the employment of migrants is subject to restrictions, these restrictions should as far as possible —

(a) cease to be applied to migrants who have regularly resided in the country for a period, the length of which should not, as a rule, exceed five years; and

(b) cease to be applied to the wife and children of an age to work who have been authorised to accompany or join the migrant, at the same time as they cease to be applied to the migrant.

*2. Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143) and Migrant Workers Recommendation, 1975 (No 151)*³²

The preceding discussion has underlined how the International Bill of Rights expresses the principle that of migrant workers have equal status as human beings and, therefore, enjoy equal entitlement to human rights at work. It also drew out how the 1949 ILO Convention reflected different principles: migrant workers had equal status as workers, and hence, are entitled to equal treatment at work. Both sets of principles are provided for in the 1975 ILO Convention and its Recommendation.³³

The principles of equal status of migrant workers as human beings and their human rights at work are reflected in the first Article which obliges Member States for which the 1975 ILO Convention is in force to “respect the basic human rights of all migrant workers.”³⁴ Under the 1975 ILO Convention, “migrant worker” has an identical definition to “migrant for employment” in the 1949 ILO Convention and, importantly, includes migrant workers who do not have lawful authorisation to stay and/or work in

³² Migrant Workers (Supplementary Provisions) Convention, 1975 (ILO No. 143) *opened for signature* June 24, 1975, 1120 U.N.T.S. 323 (entered into force 9 Dec. 1978) [hereinafter 1975 ILO Convention].

³³ Migrant Workers Recommendation, 1975 (No. 151) International Labor Conference, 60th sess., 24 July 1975 [hereinafter 1975 ILO Recommendation].

³⁴ 1975 ILO Convention Article 1.

the country of employment³⁵ — under this Article, migrant workers in irregular situations also have human rights.

The principles of equal status of migrant workers as workers and their equal treatment at work are reflected in Article 10 of the 1975 ILO Convention which provides:

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.³⁶

Like the 1949 ILO Convention, the 1975 ILO Convention also has a fractured system of protection along two key axes: the status of migrant workers and the type of rights guaranteed. However, the contours of the overall system are slightly different. With respect to the first axis, Article 10 of the 1975 ILO Convention (like its predecessor, Article 6 of the 1949 ILO Convention) only applies the principle of equal treatment at work to migrant workers and members of their families “lawfully within” the territory of a State.³⁷ Article 9(1) of the 1975 ILO Convention, however, provides a crucial caveat by stipulating that “the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment, remuneration, social security and other benefits.” In theory,³⁸ this Article extends the principle of equal treatment at work to migrant workers in irregular situations with work already performed (past employment). As a result, these workers will be entitled to equal rights in relation to the many key work entitlements — notably, wages and leave entitlements — that accrue upon the performance of work.

In other respects, the 1975 ILO Convention is more exclusionary compared to the 1949 ILO Convention. Two logics of exclusion were discernible in relation to the 1949 ILO Convention: exclusion based on perceived lack of vulnerability and exclusion based on transience of stay in the host country. The 1975 ILO Convention adds a third logic — exclusion based on the application of other regulatory regimes. Excluded from its scope are “persons coming specifically for purposes of training or education.”³⁹ Presumably, the justification for this exclusion is that the employment of international students should be governed by the regulation of international education rather than the regulation of migrant workers.

³⁵ 1975 ILO Convention Article 11(1). See text accompanying *supra* note 29.

³⁶ Article 2 of the 1975 ILO Recommendation reaffirms and extends these principles to vocational training and social services.

³⁷ See Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 132-135 (1997).

³⁸ Whether or not the principle of equal treatment can be effectively enforced in relation to irregular migrant workers is moot, see text accompanying *supra* note 79-83.

³⁹ 1975 ILO Convention, Article 11(1)(d).

The 1975 ILO Convention also presses further the two logics of exclusion found in the earlier Convention. With exclusion based on a perceived lack of vulnerability, the 1975 ILO Convention, in a way similar to the 1949 ILO Convention, does not apply to “*artistes and members of the liberal profession* who have entered the country on a short-term basis.”⁴⁰ Under the 1975 ILO Convention, however, self-employed migrant workers enjoy even fewer rights. The 1949 ILO Convention excluded self-employed migrant workers from key clauses but still guaranteed such workers equal rights at work under Article 6(1)(a). These workers are, however, not entitled to equal rights at work under the 1975 ILO Convention, as Article 10 of this Convention applies to “migrant workers” and their family members, and, as defined under the 1975 ILO Convention, “migrant workers” do not include self-employed migrant workers.⁴¹

As with exclusion based on the transience of stay in the host country, three groups of workers excluded from the 1949 ILO Convention are also outside the scope of the 1975 ILO Convention (frontier workers; short-term entry by artists and members of the liberal professions and seamen). The 1975 ILO Convention provides for a further exclusion: “employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.”⁴² This exclusion seems breathtakingly broad. It will apply to temporary migrant workers who are on fixed-term contracts directed at particular tasks or duties. This may result in the exclusion of many temporary migrant workers: their temporary residence will typically mean contracts that are limited in duration; and for many of these workers, the reason they were brought into the host country would be to perform particular tasks or projects.⁴³

Like the 1949 ILO Convention, the 1975 ILO Convention is also fractured according to the type of work rights guaranteed, with freedom of employment receiving lesser protection compared to other rights at work. In strong contrast to the earlier Convention though, the 1975 ILO Convention expressly acknowledges this freedom (while subjecting it to certain conditions). Article 14 of the 1975 Convention provides that:

A Member may —

- (a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws

⁴⁰ 1975 Convention, Article 11(2)(b)(emphasis added).

⁴¹ 1975 ILO Convention, Article 11(1).

⁴² Article 11(1)(e).

⁴³ It has been suggested that this clause “essentially concerns persons with special qualifications who go to a country to carry out specific short-term technical assignments”: Roger Bohning, *The Protection of Migrant Workers and International Labour Standards* 26(2) INTERNATIONAL MIGRATION REVIEW 133, 136 (1988) (emphasis added). While this may be true, the text of the clause does not require that there be “special qualifications.”

or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;

...

(c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.⁴⁴

Article 14 of the 1975 ILO Convention clearly provides for stronger protection of freedom of employment than the 1949 ILO Convention. Indeed, it has been described as a "remarkable achievement which, at least on its face, greatly decreases state control over the employment of migrant workers and contributes to the overall reduction of their exploitation."⁴⁵

The inclusion of Article 14(a) was, however, "very controversial"⁴⁶ (and the reason why Australia did not vote for 1975 ILO Convention).⁴⁷ It is not difficult to understand why in Australia and more generally, states will be resistant towards granting too much freedom of employment to migrant workers. These schemes are usually directed at addressing perceived labour shortages. A crucial way in which they do so is by restricting temporary migrant workers to areas where such shortages are perceived to exist. In other words, some restrictions on employment mobility, or freedom of employment, are *inherent* in such schemes. That said, these restrictions can take different forms and be of varying intensity. If the shortage to be addressed is that faced by a specific employer, severe restrictions often ensue, with the temporary migrant worker usually tied to a particular employer performing specific kind of work. On the other hand, if the shortage to be met is that faced by an occupation, this can point to restrictions in terms of occupational choice (but not employers); if the shortage to be addressed is that faced by an industry then restrictions could only relate to the choice of industry in which the worker is to be employed.

Article 14 of the 1975 ILO Convention is agnostic as to the type of restriction on freedom of employment but requires through sub-clause (a) that any such restrictions cease after two years (or after the completion of the first work contract). This is a significant limit on the duration of such restrictions — it ensures that such restrictions are imposed for a relatively short period. Article 14(c), on the other hand, does allow indefinite restrictions on accessing "limited categories of employment or functions where this is necessary in the interests of the State." Such restrictions must, however, take a particular form: they can extend only to restricting access to limited categories of employment (i.e. prohibiting temporary migrant work in particular occupations) and do not permit restricting temporary migrant work to limited occupations (i.e. requiring temporary migrant worker to perform certain kinds of work). Also, they are only permissible when it is demonstrated that it "is necessary in the interests of the state."

⁴⁴ This text is repeated in Article 6 of 1975 ILO Recommendation.

⁴⁵ Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 110 (1997).

⁴⁶ *Ibid* 109.

⁴⁷ Roger Bohning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future* 25(4) *INTERNATIONAL MIGRATION REVIEW* 698, 699 (1991).

*C. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*⁴⁸

The International Bill of Rights and the ILO 1949 and 1975 Conventions have treated the principles of equal entitlement to human rights at work and equal treatment at work as distinct. An important aspect of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Convention) is that it brings these two principles together — under this Convention, equal treatment at work is an aspect of human rights at work.

The UN Convention defines a “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁴⁹ This definition includes migrant workers in documented/regular situations as well as those in undocumented/irregular situations.⁵⁰ In contrast with 1975 ILO Convention which affirms the “basic human rights of migrant workers” without elaboration, the UN Convention has a lengthy Part III entitled “Human Rights of All Migrant Workers and Members of their Families.” Included in this Part are two key articles dealing with rights at work; Articles 25 and 26. The text of these articles warrants reproduction below:

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not

⁴⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *adopted by* GA Res. 45/158, U.N. GAOR, 45th sess., UN Doc. A/RES/45/158, Dec. 18 1990, (entered into force July 1, 2003) [hereinafter UN Convention].

⁴⁹ UN Convention, Article 2(1).

⁵⁰ See definition in UN Convention, Article 5.

be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Article 26

1. States Parties recognize the right of migrant workers and members of their families:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

These articles and their placement within Part III of the UN Convention (Human Rights of All Migrant Workers and Members of their Families) signal a crucial shift in the understanding of equal treatment in international law. They imply that the principle of human rights at work of migrant workers requires equal treatment at work. Underlying this appears to be the notion that the equal status of migrant workers as workers follows from the equal status of migrant workers as human beings.

An important effect of this shift is that migrant workers in irregular/undocumented situations are also entitled to equal treatment at work. Unlike the guarantee of equal treatment under Article 6 of 1949 ILO Convention and Article 10 of 1975 ILO Convention, Articles 25 and 26 extend not only to migrant workers lawfully admitted but also to those who are in an irregular situation — Article 25(3) makes this clear.

This is not to say that this distinction is irrelevant under the UN Convention. Like the ILO Conventions, the UN Convention differentiates protection according to the status of the migrant workers. Migrant workers and their family members who are in regular/documented situations have rights in addition to the human rights enjoyed by all migrant workers. Set out in Part IV, these rights include the right to form trade unions,⁵¹ thereby providing ‘two-tier protection’ in relation to trade union rights.⁵²

⁵¹ UN Convention Article 40(1).

The logics of exclusion discernible from the ILO Conventions also inform the UN Convention. The logic of excluding migrant workers based on the application of other regulatory regimes appears to have resulted in the UN Convention not applying to the following group of workers: students and trainees; certain workers sent to the country of employment by States or international organisations; and refugees and Stateless persons.⁵³

Various groups of migrant workers appear to be excluded from protection because of the transient nature of their stay in the host country. Part IV (Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation) has qualified application to frontier workers; seasonal workers; itinerant workers; project-tied workers; and specified-employment workers.⁵⁴ Seafarers and workers on offshore installations who have not been admitted to take up residence and engage in a remunerated activity in the host country are completely outside the scope of the UN Convention.⁵⁵ Also, the logic of exclusion based on a perceived lack of vulnerability expresses itself through the qualified application of Part IV rights to self-employed workers⁵⁶ and the complete exclusion of migrant workers taking up residence in a host country as investors.⁵⁷ It is also present with the exclusion of specified-employment workers, an exclusion which extends to migrant workers who engage "for a restricted or defined period of time in work that requires professional, commercial, technical or other highly specialized skill."⁵⁸

The other key axis upon which the protection extended under the UN Convention is fractured concerns the type of work rights. As with the ILO Conventions, freedom of employment receives lesser protection. Despite such freedom being recognised as a human right under the UDHR⁵⁹ and the ICESCR,⁶⁰ it does not find a home in Part III of the UN Convention (Human Rights of All Migrant Workers and Members of their Families). Rather, it is dealt with in Part IV (Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation). As such, only migrant workers (and family members) in a documented/regular situation are entitled to freedom of employment under the UN Convention.

The key clause dealing with freedom of employment of migrant workers in a regular/documented situation is Article 52:⁶¹

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or

⁵² Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 164 (1997).

⁵³ UN Convention Article 3.

⁵⁴ UN Convention Part V. Definitions of the various groups of workers are provided by Article 2(2).

⁵⁵ UN Convention 3(f).

⁵⁶ UN Convention Article 63. This article was inserted due to efforts to restrict the protection of the UN Convention to migrant workers perceived to be vulnerable: Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 152 (1997). 'Self-employed worker' is defined by Article 2(2).

⁵⁷ UN Convention Article 3(c).

⁵⁸ UN Convention Article 2(2)(g)(ii).

⁵⁹ UDHR Article 23(1).

⁶⁰ ICESCR Article 6(1).

⁶¹ UN Convention Article 53 is the provision dealing with freedom of employment of the family members of migrant workers in a regular situation.

conditions.

2. For any migrant worker a State of employment may:
 - (a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;
 - (b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:
 - (a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;
 - (b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Freedom of employment under Article 52 is more qualified than the freedom provided under the 1975 ILO Convention: while Articles 52(2) and 52(3)(a) of the UN Convention roughly correspond to Article 14 of the 1975 ILO Convention, Articles 52(3)(b) and 52(4) provide additional circumstances when the freedom of employment of regular migrant workers and their families may be circumscribed. Not surprisingly, one commentator has concluded that this Article “significantly undermine(s) the progress made in this area by Article 14(a) of the ILO Convention No 143.”⁶²

⁶² Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 163 (1997).

II. THE CHALLENGE OF PRECARIOUSNESS TO EQUAL TREATMENT OF TEMPORARY MIGRANT WORKERS

Precarious work has become a characteristic feature of labour markets in advanced capitalist economies.⁶³ With the rise of temporary migration, there is growing recognition that, in many instances, temporary migrant work is precarious.⁶⁴

In the first instance, precarious work can be understood as work associated with heightened insecurity. In this sense, the notion of precarious work seeks to capture forms of work that depart from the function of the standard employment relationship in providing labour market security; departures that often deviate from the pattern of full-time continuing work with a single employer; the traditional form of the standard employment relationship.⁶⁵

Like other workers, temporary migrant workers can experience *precarious employment*. This is work characterised by four forms of labour market insecurity: 1) degree of uncertainty of continuing employment; 2) degree of control over the labour process including control over working conditions, wages and pace of work (linked to presence/absence of trade unions); 3) extent of regulatory protection; and 4) level of income.⁶⁶

In addition — and this is a crucial point — temporary migrant workers can experience *precarious migration status*. As Goldring, Berinstein and Bernhard explain, such status stems from the lack of certain rights enjoyed by permanent residents and citizenship: 1) limited work authorization; 2) the right to only remain in the country on a temporary basis; 3) dependence on a third party for one right to be in the host country (such as a sponsoring spouse or employer); 4) lack of social citizenship rights available to permanent residents and citizens (e.g. public education and public health coverage).⁶⁷

⁶³ See Leah Vosko, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* (2010); Leah Vosko, Martha MacDonald and Iain Campbell, *Introduction: Gender and the Concept of Precarious Employment*, in Leah Vosko, Martha MacDonald and Iain Campbell (eds.), *GENDER AND THE CONTOURS OF PRECARIOUS EMPLOYMENT* 1-25 (2009); Arne Kalleberg *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 *AMERICAN SOCIOLOGICAL REVIEW*, 1-22 (2009).

⁶⁴ Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, *COMPARATIVE LABOR LAW AND POLICY JOURNAL* (2012) (forthcoming); Leah Vosko, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* (2010); Bridget Anderson, *Migrations, Immigration Controls and the Fashioning of Precarious Workers*, 24 *WORK, EMPLOYMENT AND SOCIETY* 300-17 (2010); Luin Goldring, Carolina Berinstein, and Judith K. Bernhard, *Institutionalizing precarious migratory status in Canada*, 13(3) *CITIZENSHIP STUDIES* 239-65 (2009).

⁶⁵ Gerhard Bosch, *Towards a New Standard Employment Relationship in Western Europe* 42(4) *BRITISH JOURNAL OF INDUSTRIAL RELATIONS* 617 (2004)

⁶⁶ Gerry Rodgers, *Precarious Work in Western Europe: The State of the Debate* in Gerry Rodgers and Janine Rodgers (eds), *PRECARIOUS JOBS IN LABOUR MARKET REGULATION: THE GROWTH OF ATYPICAL EMPLOYMENT IN WESTERN EUROPE* 1 (1989); John Burgess and Iain Campbell, *The Nature and Dimensions of Precarious Employment in Australia*, 8 (3) *LABOUR AND INDUSTRY* 5-21 (1998).

⁶⁷ Goldring, Berinstein, Bernhard, *supra* note 64, 240-241 (2009).

Can the principles of equal treatment at international law effectively deal with this challenge of precariousness? When considering the precariousness experienced by temporary migrant workers, we see that principles of equal treatment at international law do directly address the precariousness of their employment. Subject to two caveats outlined below, the UN and ILO Conventions generally protect temporary migrant workers.⁶⁸ Hence, the principle of equal entitlement to human rights at work (provided in the International Bill of Rights, the 1975 ILO Convention and the UN Convention) means that labour standards, whether it be in legislation or other industrial instruments like collective agreements, should protect the human rights at work of temporary migrant workers. The principle of equal treatment at work (set out in ILO Conventions and the UN Convention) further means that these labour standards should equally apply to temporary migrant workers.

The first caveat concerns workers excluded from the scope of these principles. With the exception of the International Bill of Rights,⁶⁹ these principles do not universally apply to temporary migrant workers. There are numerous exclusions driven by the logics of perceived lack of vulnerability, transience of stay in the host country and the application of other regulatory regimes. These result in certain groups of temporary migrant workers falling outside the scope of one or more the conventions. The 1975 ILO Convention and the UN Convention do not apply to international students who often have work rights;⁷⁰ the 1975 ILO Convention also has a broad exemption for temporary migrant workers on fixed-term contracts directed at specific tasks or projects.⁷¹

The second caveat concerns practice. Securing the principle of equal treatment in practice will, of course, not be an easy task given particular vulnerabilities of temporary migrant workers (lack of familiarity with laws of the host country including their workplace laws; lack of proficiency in the language of the host country; financial need; possible lack of status in the workplace given the perception that they are temporary; possible discrimination in the workplace).

What is perhaps the most potent vulnerability of temporary migrant workers is their precarious migration status. Despite this, the principles of equal treatment at international law - and the key conventions more generally — leave this unregulated. This is implicit in the ILO Conventions which do not specifically address the matters implicated by precarious migration status, and explicit in the case of the UN Convention which states in Article 79 that "(n)othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and their families."

It might seem now that the principles of equal treatment at international law are Janus-faced: while acting against the precarious employment of temporary migrant

⁶⁸ Roger Bohning, *The Protection of Temporary Migrants by Conventions of the ILO and the UN*, Paper presented at the workshop on 'Temporary Migration: Assessment and Practical Proposals for Overcoming Protection Gaps', Geneva, (Sept. 18-19, 2003).

⁶⁹ See text above accompanying *supra* note 9-17.

⁷⁰ See text above accompanying *supra* note 39, 53.

⁷¹ See text above accompanying *supra* note 42-43.

workers, they leave the precariousness resulting from their migration status at the discretion of states. Yet, by neglecting to deal with the precarious migration status of such workers, the effectiveness of these principles in addressing their precarious employment might come undone. Potentially subverting the realisation of these principles is the deep relationship between the precarious employment of temporary migrant workers and their precarious migration status: *their precarious migration status is inextricably linked to a risk of precarious employment.*

There are two groups of temporary migrant workers for whom this risk arises in an acute way: temporary migrant workers brought under labour migration schemes and temporary migrant workers in irregular or undocumented situations.

With the first group of workers, precarious migration status stems from restrictions on freedom of employment, restrictions which are built into the design of temporary labour migration schemes. The continued ability of workers brought under such schemes to stay in the country of employment is usually dependent upon ongoing employment. This means such workers have no real freedom to be *unemployed* in the country of employment, even for the purpose of seeking better employment. Also, there can be accompanying restrictions on the range of employers, occupations and industries where such workers can be employed.⁷² These restrictions are particularly severe when these workers are on visas sponsored by their employers. These visas usually tie the ability of these workers to stay in the host country to their continued employment by their sponsoring employer, thereby heightening their dependence on their employers.

Employer-sponsored visas create a serious risk of precarious employment simply because workers on such visas are in a heightened state of dependence on the employer. Like other workers, they are dependent upon the employer for employment and wages but this dependence is necessarily more acute for two reasons. First, continued employment by a sponsoring employer is necessary for the authorisation to remain in the host country — loss of a job does not just mean a loss of wages but (eventual) loss of the ability to legally stay in the host country. Second, restrictions on freedom of employment reduce their ability to lessen their dependence on a particular employer. For those who hope to be sponsored by their employer for a permanent visa, there is also an additional source of dependence.

Such dependence may result in a lack of compliance with labour regulation (including regulation that reflects the principles of equal human rights at work and equal treatment at work). There are two main situations of non-compliance here, both of which are highly resistant to detection by outside parties:

- non-compliance through complicity (where the temporary migrant worker and sponsoring employer jointly engage in the breach of labour standards) (e.g. the temporary migrant worker agrees to work in excess of maximum working hours in the hope of the employer sponsoring her/his permanent residence);

⁷² See text above accompanying *supra* note 47.

- non-compliance through unilateral employer actions — here the workers are not complicit but do not seek to exercise their rights because of the precariousness of their migration status, particularly due to fear of deportation.

The precarious migration status of temporary migrant workers on employer-sponsored visas does not, of course, always produce such situations of non-compliance. There can be countervailing circumstances: the culture and practices of the sponsoring employer may discourage illegal behaviour; the temporary migrant worker may have significant labour market power due to labour market demand or his or her level of skill and/or income; and vigorous efforts on the part of statutory agencies and unions may ensure that labour regulation is effectively enforced in relation to temporary migrant workers. Immigration regulation may also act to lessen the dependence of these workers on their employers in various ways: it may allow easy change of sponsoring employers; it may loosen the nexus between employment and residence by allowing a lengthy “grace” period where the worker can remain in the country while unemployed, thereby enabling more effective job search efforts; and it may provide for genuine pathways to permanent residence other than through employer sponsorship.

The lines of the connection between precarious migration status and precarious employment in the case of temporary migrant workers brought under labour migration schemes can now be drawn more clearly. The precarious migration status of such workers, in particular, its restrictions on employment brings about a heightened dependence on the employer especially for those on employer-sponsored visas. This in turn may result in non-compliance with labour regulation, including those reflecting the principles of equal treatment, thereby posing a risk of precarious employment.

We have seen earlier that the source of this risk — precarious migration status — is not adequately addressed by principles of equal treatment at international law. More than this, the fractured regime of these principles creates a key vector in transmuting precarious migration status into precarious employment. The crucial point here concerns restrictions on employment mobility. Under the ILO Conventions and the UN Convention, freedom of employment is afforded lesser protection compared with other rights at work. Under both the 1975 ILO Convention and the UN Convention, restrictions on such freedom — of whatever severity — are permitted provided they cease after two years of employment.⁷³ Permitted within this period are restrictions that tie a migrant worker to a particular employer.⁷⁴

Even worse, key groups of temporary migrant workers fall outside this two-year rule. Here the logic of excluding migrant workers because their stay in the host country is transient has a particularly profound impact on *temporary* migrant workers. The position of temporary migrant workers on fixed-term contracts with specific tasks (or projects) has already been canvassed — the 1975 ILO Convention does not apply to such workers. Project-tied workers and specified-employment workers, while

⁷³ See text above accompanying 44,62.

⁷⁴ Fudge, *supra*, note 64, 32.

generally within the scope of the UN Convention, are not entitled to the rights it provides in relation to freedom of employment.⁷⁵

These two groups of excluded workers overlap with the exclusion in the 1975 ILO Convention: project-tied workers are migrant workers admitted to the host country for a defined period to work solely on a specific project of their employers;⁷⁶ specified-employment workers include migrant workers sent by their employers for a defined period of time to the host country to perform a specific assignment or duty.⁷⁷ The exclusion of specified-employment workers, however, goes far beyond the exclusion in the 1975 ILO Convention by extending to migrant workers who engage "for a restricted or defined period of time in work that requires professional, commercial, technical or other highly specialized skill."⁷⁸ The aspect of the specified-employment workers exclusion means that skilled temporary migrant workers do not enjoy the protection of freedom of employment under the UN Convention.

Another group of temporary migrant workers whose precarious migration status clearly threatens to result in precarious employment are those in irregular or undocumented situations.⁷⁹ They do not come within the scope of the principle of equal treatment at work as set out in the 1949 ILO Convention;⁸⁰ and they are entitled to equal treatment at work only in relation to past employment under the 1975 ILO Convention.⁸¹

On the other hand, the principles of equal treatment under the UN Convention extend fully to these workers.⁸² Despite this, realisation of these principles in this context is remarkably fraught. Bosniak captures this well:

The real problem with the Convention, and one that seriously limits its efficacy as a human rights instrument for undocumented migrants, is that its provisions protecting states' sovereign prerogatives to control immigration will often effectively undermine or defeat the rights it provides to migrants. Efforts to exercise rights prescribed in the Convention may well expose the migrants to expulsion and punishment for immigration-related violations. At the very least, the continued vulnerability of these migrants to prosecution for

⁷⁵ UN Convention Article 61(1) (project-tied workers); Article 62(1) (specified-employment workers). The exclusion of specified-employment workers from the protection in relation to freedom of employment was inserted to meet the demands of Australia, Canada and the United States of America: Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment 152* (1997); Roger Bohning, *The Protection of Temporary Migrants by Conventions of the ILO and the UN*, *supra* note 68.

⁷⁶ UN Convention Article 2(2)(f).

⁷⁷ UN Convention Article 2(2)(g)(i).

⁷⁸ UN Convention Article 2(2)(g)(ii).

⁷⁹ Of the various Conventions examined by this paper, only the UN Convention defines migrant workers in irregular or undocumented situations, see Article 5.

⁸⁰ See text accompanying *supra* note 29.

⁸¹ See text accompanying *supra* note 37-39.

⁸² See text accompanying *supra* note 51-52.

immigration violations will limit their ability and willingness to exercise the rights guaranteed to them.⁸³

There is no doubt here that “the process of irregular migration poses a set of exceptionally complex dilemmas for the theory and practice of international human rights.”⁸⁴ Bosniak⁸⁵ and Cholewinski⁸⁶ have characterised this as a “tension” or “schism” between protecting the rights of migrant workers and the principle of state sovereignty. This results in Cholewinski posing the question whether “rights for illegal migrants versus prevention of illegal migration” are “two irreconcilable principles?”⁸⁷

These characterisations are not inaccurate, especially when discussing the obligations imposed by international treaties. But there is another way of describing the difficulty of enforcing the rights of migrant workers in irregular situations. The difficulty can be seen more as a conflict between different exercises of state sovereignty, that is, between two domestic law regimes; immigration law and labour law. The dilemma in the case of migrant workers in irregular situations is that enforcement of immigration law is likely to undermine enforcement of labour law. Viewing the dilemma in this way does not mean the practical issues are any less complex but they do make questions of principle more tractable. This has the advantage that reform options like immunity from prosecution in relation to information provided in the exercise of labour rights and the progressive regularisation or amnesty for workers in irregular situations are not necessarily seen as infringements on the sovereignty of the host countries.⁸⁸

The discussion so far has focussed on the challenge of realising the principles of equal entitlement to human rights at work and equal treatment at work for temporary migrant workers. There is another broader challenge to these principles: is their realisation compatible with precarious employment? Do they in this sense offer a hollow promise of egalitarianism?

Two situations pose this challenge. The first is when the industry in which temporary migrant workers are employed is characterised by precarious employment (of both local and migrant workers).⁸⁹ As Cholewinski has argued, “a problem arises (in relation to the principle of equal treatment) if the treatment that nationals themselves

⁸³ Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention* 25(4) INTERNATIONAL MIGRATION REVIEW 737, 759 (1991). See also Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 190-192 (1997).

⁸⁴ *Ibid* 741.

⁸⁵ *Ibid* 751-758.

⁸⁶ Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 138 (1997).

⁸⁷ *Ibid* 188.

⁸⁸ Bosniak, *supra* note 83, 760-762 (1991); Laurie Berg, *At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law* 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1, 20-32 (2007).

⁸⁹ Fudge, *supra* note 64, 33.

receive is hardly adequate.”⁹⁰ The second situation is when an industry has a concentration of temporary migrant workers in precarious employment.⁹¹

In both cases, however, the principles of equal treatment would seem to be efficacious. The principle of equal entitlement to human rights at work provides a floor of rights in both cases — a substantive minimum is promised by this principle. Moreover, the principle of equal treatment at work is not solely benchmarked against the working conditions of workers in same industry (who are in precarious employment in both of the above scenarios). It is also calibrated to other labour standards (including national standards and standards in other industries or occupations).⁹² If the benchmark of industry working conditions proves too low a denominator — as in the scenarios above — it can be challenged through the application of other benchmarks.

CONCLUSION

The international law regime of equal treatment may offer a pyrrhic victory to temporary migrant workers. In the first instance, the principles of equal treatment — whether of human rights or equal treatment more generally — apply to these workers. In this way, they act against the precarious employment of these workers. The realisation of these principles in relation to temporary migrant workers is, however, undermined by their various exclusions especially those based on the transience of the migrant worker’s stay in the host country. More generally, their realisation may be undercut by their failure to address the precarious migration status of temporary migrant workers. The key point here is that precarious migration status of these workers is inextricably linked to a risk of precarious employment, a risk that is especially significant with workers brought under labour migration schemes and those in irregular situations.

⁹⁰ Ryszard Cholewinski, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 107 (1997).

⁹¹ Fudge, *supra* note 64, 32.

⁹² See Joo-Cheong Tham and Iain Campbell, *Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation* (Centre for Employment and Labour Relations, Working Paper No. 50, 2011), available at [http://celrl.law.unimelb.edu.au/files/CELRL_Working_Paper_No__50_-_March_2011_\(FINAL\).pdf](http://celrl.law.unimelb.edu.au/files/CELRL_Working_Paper_No__50_-_March_2011_(FINAL).pdf). See also Bohning, *The Protection of Migrant Workers and International Labour Standards*, *supra* note at 43, 133, 137.