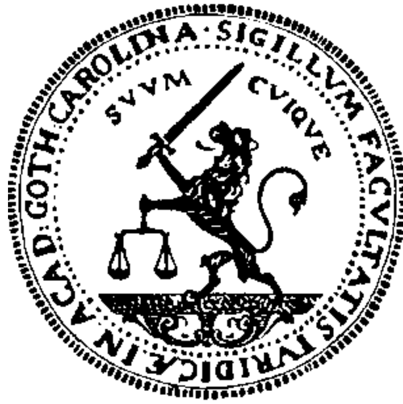

FACULTY OF LAW

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HUMAN

An analysis of the legal protection of undocumented migrants

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“[…] Freedom to leave is what I like

No planning

Better still is the freedom to return

Whenever I wish

Every day is coming and going

Life repeats itself at the station

There are people arriving to stay

There are people leaving forever

There are people who come and go

There are people who want to stay

There are people who just come to look

There are people laughing and crying

And so, arrival and departure

Are only two sides of the same journey

The train that arrive

Is the same train that depart

The time to say hello

It is also the time for good bye […]”

Encontros e Despedidas (1985), by Milton Nascimento

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At 34, I have understood that sometimes it is fine to step back and listen to my inner voice. For the past three years, I have grown as a human; I have come to know myself better. I took this sabbatical time to my personal healing and development, to learn to just see and think about things in a new way and perspective. And I also understood how blessed I am for being able to travel around the world without worry about having my right to freedom of movement denied, while the world faces a refugee and migration crisis of great proportions.

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Gratiam aeternam semper habebo!

Introduction

There is probably no phenomenon which has played a role as important as the one of migrations in the history of mankind. It is because of them that the Earth has been populated, that it has been occupied in all its parts, so that the preponderance of man could take effect over all its elements, and the habitat of man is confounded with the extension of the World itself [1]. Indeed, mobility has always been part of the human condition and essential to the survival of humanity. According to science, the first migrations date back to the arrival of the *Homo Erectus* in Africa, followed by the displacement made by the *Homo Sapiens* to the regions we know today as Europe and Asia, and later to America and Oceania [2].

Following the changes that took place in the last decades of the twentieth century – chiefly among them, the new forms of capitalist production and organization – that reshaped the political, economic and social-cultural landscapes – migration became a more complex issue. In recent history, there have been large migration movements away from Europe as a consequence of over-population and of a great demand for manpower in rapidly developing countries such as the United States, Canada and Australia, as well as certain areas of Africa and Latin America; as well as movements within Asia, mainly originating from China, and within Africa, where entire tribes have searched for better settlement areas [3].

After World War I, the death of more than 15 million people, and another 20 millions of wounded, and the results of the peace treaties caused far-reaching political changes and movements of refugees throughout Europe, and the emphasis of migration shifted from labor-oriented to refugee-oriented migration [4]. The League of Nations had to deal with the protection of minorities within States but also with complicated refugee problems across borders. The process of migration on grounds of persecution, deportation, or population transfers continued during World War II, which undoubtedly marked the history of humanity, since it was the apogee of human cruelty, nuclear horror, institutionalized racism and xenophobia [5].

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[1] Varlez, Louis, *"Les Migrations Internationales et leur Reglèment", 1927,* Recueil des Cours, pp. 169
[2] Pinsky, Jaime, "*As primeiras civilizações",* 2003, Editora Contexto.
[3] Tomuschat, Christian, *"Human Rights: between idealism and realism", (2008), Oxford University*.
[4] Kugelmann, Dieter, *"Migration",* Max Planck Encyclopedia of Public International Law, 2009.
[5] "The pariah Jew and the parvenu Jew are in the same boat, rowing desperately in the same angry sea. Both are branded with the same mark; both alike are outlaws." *See* Arendt, Hannah, *"The Jew as Pariah: A Hidden Tradition"*, in *The Jewish Writings, Kohn*, Jerome (ed), 2007, Schocken Books, p.127.

The balance of this barbarism was the recognition of the need for instruments capable of protecting the human being from the omnipotence of state interests, since it is inexcusable to protect the human being, who is vulnerable to the designs of the State [6].

After World War II, however, labor-oriented migration gained significant momentum, especially concerning emigration from post-war Europe to other continents, totaling more than 6.6 million.[7] These migration movements were directed essentially to North America (44%), South America (27%), and Oceania (18%), but also to Israel, which received about a million migrants [8].

In the post-war period there was also a growth in intra-continental migration and, due to the economic growth in parts of Europe, an increasing trend developed in the early 1960s, away from migration for permanent settlement towards migration of a temporary nature, and from overseas migration to intra-regional migration. It is estimated that up to the early 1970s, when this trend slowed down because of the economic recession, about 13 million people, mainly from agrarian Southern European countries, moved to the more industrialized countries of North-West Europe [9]. In the 1970s and 1980s large-scale migration from developing States grew permanently. As noted by Cançado Trindade, migrations and forced displacements in general, "increased and intensified from the nineties onwards, have been characterized particularly by the disparities in the conditions of life between the country of origin and that of destination of migrants" [10].

It is estimated that over one-fifth of all international migrants are in an irregular situation [11]. Terrorism emerges as the perfect pretext for more stringent restrictions, hidden behind racist and xenophobic sentiments that pervade legislative decisions, under the pretext of national

---

[6] "Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state.." *See* Arendt, Hannah, *"The Origin of Totalitarism: Imperalism*, 1994, Harcourt Brace & Company, p.170.

[7] International Labour Organization, 188th Session of the Governing Body, Nov. 1972, ILO Doc. G. B. 188/5/9.

[8] *Ibidem.*

[9] *Ibidem.*

[10] Cançado Trindade, Antonio Augusto., *'Uprootedness and the protection of migrants in the International Law of Human Rights',* Rev. Bras. Polít. Int. 51 (1): 137-168, 2009.

[11] International Organization of Migration, *"Global Migration Trends: an overview",* 18 December 2014, available at: http://missingmigrants.iom.int/sites/default/files/documents/Global_Migration_Trends_PDF_FinalVH_with%20References.pdf [last accessed 15 April 2017].

security [12]. Rights of migrants have taken a hit in the current context of economic globalization and aggressive anti-terrorism campaign that followed 9/11, which in turn encourages the tendency of States to place their own interests above anything else, even the humanitarian ones [13].

Research Question and Purpose

In this context, the human problems involved in migration are even more serious in the case of irregular migration, and the observed shift towards a validation of undocumented migration leaves migrants particularly vulnerable, therefore susceptible to human rights violations. The research question, then, arises: to what extent international human rights law protects the rights of undocumented migrants?

The research purpose is the examination of the legal protection to undocumented migrants currently in place, visiting concepts and fundamental instruments for the understanding of the subject under the prism of International Human Rights Law.

Method

The thesis was developed adopting three different methods. First and foremost, the classical legal method consisting of legislation scrutiny, bibliographical analysis and jurisprudential investigation, with focus on material and decisions regarding Migration Human Rights in order to identify what aspects of the legislation is to be applied. Secondly descriptive method of research to an important degree, as a way to integrate Expert Committees understanding and explain the jurisprudence adopted by a certain court. Thirdly, the deductive reasoning method was adopted, to a minor extent, in order to fill gaps of concepts that were not expressly described by the law e.g. the definition of undocumented migrant.

[12] Wing Commander P. E. O'Neill RAF, *"The European Union and Migration: Security versus Identity?",* 2006, Defence Studies, Volume 6:3, pp. 322-350

[13] Cançado Trindade, Antonio Augusto., *'Uprootedness and the protection of migrants in the International Law of Human Rights',* Rev. Bras. Polít. Int. 51 (1): 137-168, 2009.

Structure

This study is divided in 5 chapters, each of them tackling a research sub-question that had to be explained in order to conclude the main research question as to what extent International Human Rights Law protects the rights of undocumented migrants.

In Chapter 1, migration is explored from a conceptual standpoint: starting with the meaning of international migration. Regular and Irregular migrants are discerned. Furthermore, the legal understanding of irregular migration as it is used in this thesis will be limited and defined. Finally, the appropriate terminology that should be used in referring to undocumented migrants is also touched upon.

The very circumstances intrinsic to the migration process leave migrants in general in a vulnerable position, e.g. ignorance for the host country's language, culture, legislation, and distance from their families and social networks. That vulnerability is, of course, exacerbated in the case of undocumented migrants. Chapter 2, then, will be dedicated to identifying the main vulnerabilities to which undocumented migrants are exposed.

In Chapter 3, the historical evolution of State Sovereignty is presented to inquire the extension of international human rights law validity within a State's territory today.

In Chapter 4, it is presented a legal review of the rights of migrants in the context of international human rights law, searching for the routes which provides for the protection of undocumented migrants. The Universal Declaration of Human Rights is scrutinized, as well as the core UN (United Nations) Human Rights Treaties, with the study of the interpretation of the most relevant General Comments of the UN Treaty Bodies. The International Labor Organization's Conventions of Importance to the protections of rights of undocumented migrants, namely Conventions 97, 100, 111 and 143 were also studied.

Lastly, because regional instruments can be more persuasive regarding compliance, insofar as the International Court Systems is a part of the regional frameworks, the fifth chapter presents a jurisprudential analysis of the decisions rendered both by the European Court of Human Rights and the Inter-American Court of Human Rights.

1. Irregular Migration: Conceptual Framework

The first sub-question that arises when one studies migration, especially when one wants to understand how/if the existing human rights legislation is enough to protect irregular migrants is the definition of migration itself. The second sub-question is, within the ocean of different human movements as they are observed currently, and all their different causes and goals, how to legally define irregular migration and differentiate it from other kinds of migration such as regular/documented migration, asylum seeking, fleet for environmental disasters, etc.

With that in mind, on this first chapter the meaning of migration will be dealt with. Furthermore, the legal understanding of irregular migration as it is used in this thesis will be limited and defined. Finally, the appropriate terminology that should be used in referring to undocumented migrants is also touched upon.

1.1 The Meaning of Migration

In his classic course at The Hague Academy in 1927, Varlez explained that the word ”migrate” was not utilized prior to the 12th century; in the past, when the migration was done under the orders of a war lord or of a king who wanted to conquer a territory, it was called an invasion; from the 16th century and onwards, the phenomenon of the occupation of vacant lands in the Americas was called colonization; in the end of the 18th century, migrations were associated with the abandonment of the nation by religious or political reasons; as for the word ”migration”, it used to designate the change of habitat of some species, such as birds, and it is only after 1835 that the word ”migrate” is understood as the phenomenon of departure by a foreigner and the spontaneous establishment of individuals on a foreign land[14]. In short,” to migrate is to quit one's country to go somewhere else, be it to reside there momentaneously or to be established there”[15], said Varlez.

In contemporary terms, migration expresses the process of human mobility, and is not yet a recognized term of general international law, rather it was a notion deriving from different fields of international law such as refugee law or the law of migrant workers, as Kugelmann clarifies[16]. Migration is a multifaceted phenomenon with far reaching repercussions for all

[14] Varlez, Louis, *“Les Migrations Internationales et leur Reglèment”, 1927,* Recueil des Cours, pp 172.
[15] Varlez, Louis, *“Les Migrations Internationales et leur Reglèment”, 1927,* Recueil des Cours, pp. 174.
[16] Kugelmann, Dieter, *“Migration”,* Max Planck Encyclopedia of Public International Law, 2009

actors involved, and "it is hardly ever a simple individual action in which a person decides to move in search of better life-chances, pulls up his or her roots in the place of origin and quickly becomes assimilated in a new country. Much more often migration and settlement are a long-drawn-out process that will be played out for the rest of the migrant's life and affect subsequent generations too"[17].

Furthermore, it is also important to emphasize the fundamental difference between international and other forms of migration. International migration implies a movement of the individual between two different political entities – different States with their own legal, political, cultural and socio-economic order - aiming to settle permanently or for longer periods of time.

Hence, for migration being the multifaceted phenomena it is, to make this research feasible, it is paramount to set limits. This research is one within the legal science. Therefore, the definition of migration that will be worked with is a legal one. So, for the purpose of the current work, migration is understood as the as the movement of a "person from one jurisdiction to another and the eventually of a change of membership in an inclusive political community"[18].

Such a multifaceted scenario in the definition, causes and repercussions of migration, is obviously also reflected in the migrants themselves and the way they are classified. Bellow as the different definitions of migrants will be set, as well as the limit as to the one this thesis will work with.

1.2 The Regular and the Undocumented Migrant

On December 18th, 1990, the U.N General Assembly approved the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter "CMW")[19], in an effort to address newfound complexities in the phenomenon of migration. Under the terms of this convention, in its article 5(1)(a), migrant workers and members of their families "are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law

[17] Castle, Stephen; de Haas, Hein; Miller, Mark J., "The Age of Migration: International Population Movements in the Modern World", 2011, Guilford Publications, pp. 25.

[18] Zolberg, Aristide R, "*A Nation by Design: Immigration Policy in the Fashioning of America*", 2006, Harvard University Press, p. 11.

[19] UN General Assembly, *"International Convention on the Protection of the Rights of All Migrants and Members of their Families"*, 18 December 1990, A/RES/45/158, available at: http://www.refworld.org/docid/3ae6b3980.html [accessed 8 September 2016].

of that State and to international agreements to which that State is a party". Therefore, regular migration can be defined as voluntary migration accomplished according to the law of the destination State, in which the migrant has all the required documents - including a visa -and thus is in a situation stipulated by the legal order of that destination country[20].

Then, by opposing concepts, one can find the definition of undocumented migrant. They are one who has not been authorized to enter, remain and work in the State in accordance with its domestic laws or treaties to which such State is a party. Indeed, the aforementioned Convention defines in its article 5(1)(b) that migrant workers and members of their families "are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article". Thus, the complexity of the position of the undocumented migrant is evidenced by the fact that there is no independent legal definition of an 'irregular' or 'undocumented' migrant worker[21]. Indeed, the current international definitions basically accommodate to the State's legal position on this question, meaning that irregular migrants are defined by default with reference to those persons in a regular situation[22].

Moreover, it is important to mention that the term "*illegal migrant*" should be avoided, since "illegal" denotes an idea contrary to the law[23], referring only to acts and behavior, and should not be used to refer to human beings. Consequently, a more appropriate term would be "irregular" or "undocumented" migrants[24].

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[20] Dieter Kugelmann also explains that "[…] regular migration can aim at a permanent residence or settlement in the host State, like in the case of emigration, but it can also aim at a temporary residence, such as in the case of students or scientists." *See* Kugelmann, Dieter, *"Migration",* 2009, Max Planck Encyclopedia of Public International Law.

[21] Cholewinski, Ryszard*, "Migrant workers"*, 2009, Max Planck Encyclopedia of Public International Law.

[22] Cholewinski, Ryszard*, "Migrant workers"*, 2009, Max Planck Encyclopedia of Public International Law.

[23]In this sense, Kugelmann explains that" illegal migration can be understood as migration, deliberately undertaken in defiance of the law, for example migrant smuggling. Irregular migration is migration which cannot be foreseen and therefore is hard to govern, for example refugees fleeing a situation of civil war or natural disaster. While legal migration occurs according to the rules provided by States, illegal and irregular migration may lead to considerable unforeseen problems for States, especially for the States of transit and destination. States try to prevent irregular and illegal migration, since they lack the capacity to govern this kind of migration. Especially vulnerable groups in the process of migration are women and children". See, Kugelmann, Dieter, *"Migration",* 2009, Max Planck Encyclopedia of Public International Law.

[24] UNHCR, "*Panel discussion on Human Rights of Migrants in Detention Centers*, 17 September 2009, available at: http://www2.ohchr.org/english/issues/migration/taskforce/HRC_panel_discussion.htm [last accessed 8 September 2016].

As it will be further discussed below, the main causes of irregular migration are the systematic violations of human rights and/or instability in the wake of conflict, natural disasters or transformations in the socio-economic order[25].

1.3 The Different Types of International Migration

It is not simple to enumerate all the causes of migration, for the phenomenon is as complex as human existence itself, but shortly it can be said that migration might be motivated by:

a) security reasons, concerning persons threatened by natural disasters, internal or international conflicts, threats to individual safety, or persecution (also referred to as "forced migration")[26];

b) socio-economic reasons, linked to a poor economic situation of a state, region or an individual (also referred to as "voluntary migration")[27].

1.3.1 Migrants for Security Reasons

When it comes to individuals' security, International Human Rights Law has specific documents – that will be analyzed in Chapter 4 - requiring States to respect and protect the rights of any person "owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" [28].

[25] Castles, Stephen, "Irregular Migration: Causes, Patterns, and Strategies", 2012, Global Migration Issues, volume 1, pp. 117-151.
[26] Mármora, Lelio, "Derechos *humanos y políticas migratorias",* Revista de la OIM sobre Migraciones en América Latina, Volume 8:2-3, 2000.
[27] Kugelmann, Dieter, *"Migration",* Max Planck Encyclopedia of Public International Law, 2009.
[28] UN General Assembly, *"Convention Relating to the Status of Refugees"*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 1 (A) (2), available at: http://www.refworld.org/docid/3be01b964.html [last accessed 11 October 2017].

Additionally, recent developments in the way the legislation is interpreted and applied has widen its scope to embrace persons displaced by environmental disasters in an interpretation that has been adopted by countries such as Australia, Brazil, Canada, Saudi Arabia and Russia[29].

These two cases of migration for security reasons explained above, namely refugees and environmentally displaced people, are entitled to documents which, as we discussed in the previous section put them in the regular migrants' category.

However, there are other kinds of persecution that under current international law have no specific nor evident protection. Such cases encompass victims of domestic violence, certain LGBT minorities and victims of gang crimes[30]. Many of these individuals see no alternative than fleeing their country of nationality arriving at their country of destiny with no legal support. Such individuals, because they were not granted an asylum status, fall into the category of irregular migrants.

1.3.2 Migrants for Socio-Economic Reasons

An Economic Migrant is someone who emigrates from one region to another seeking improved standard of living because the conditions or job opportunities in the migrant's region are insufficient. As detailed above, the United Nations uses the term migrant worker[31]. Migrant workers are considered as regular workers when they have a long-term or temporary permit to reside and work in the country where they moved to.

In recent years, however, the so-called "flexibility" in labor relations, amidst the globalization of the economy, has generated work insecurity and growing fear of unemployment and/or *de facto* unemployment, which has been accompanied by increased international mobility, especially, of workers who do not have permits to reside and work on their destinations. As

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[29] Bayes Ahmed, *"Who takes responsibility for the climate refugees",* International Journal of Climate Change Strategies and Management, 2018, Volume 10:1.
[30] UNHCR, *"Guidance Note on Refugee Claims Relating to Victims of Organized Gangs"*, 31 March 2010, available at: https://www.refworld.org/docid/4bb21fa02.html [last accessed 11 July 2018].
[31] UN General Assembly, *"International Convention on the Protection of the Rights of All Migrants and Members of their Families"*, 18 December 1990, A/RES/45/158, available at: http://www.refworld.org/docid/3ae6b3980.html [accessed 8 September 2016].

opposed to regular workers, workers who do not possess the adequate documents to work in a certain country fall into the category of irregular migrants[32].

Notwithstanding, in many countries, irregular migration is tolerated, because the priority is the control of entry and not the repression to fraudulent activities [33,34].

Either way, migratory movements are often a response to drastic transformations in the political and economic context of a community at a point in time[35]. Indeed, "the complex issue of migration involves a multitude of dimensions. As a consequence, it has to be understood as a process, implying economic, sociological, political, and legal aspects"[36]. However, as stated before, the focus of this research is the international legal aspects of it migration.

1.3.3 Migrants for family reunification

Family reunification is a recognized reason for migration in many countries because the presence of one or more family members in a certain country, enables the rest of the divided family or only specific members of the family to migrate, to relocate.

1.4 Conclusion

As a result of the study of the definitions of migration presented in this chapter, the scope of this thesis was limited to international migration, defined here as the movement of a person between sovereign countries with a purpose of establishing themselves permanently or for longer periods of time.

After the analysis of different classifications of migration, aiming at answering the second research sub-question - how irregular migration is legally defined? - it was verified that such

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[32] Cançado Trindade, A. A., *"Uprootedness and the protection of migrants in the International Law of Human Rights",* Rev. Bras. Polít. Int. 51 (1): 139-140, 2009.

[33] "Using interviews with 103 'immigrant-dependent' employers in three southern California counties, the study reveals that the employer sanctions violations are numerous and that violators feel relatively protected from detection and punishment. It then traces both the prevalence of this crime and the impunity felt by violators beyond a simple cost/benefit analysis on the part of employers to the nature of law itself." *See* Cavalita, Kitty*,"Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime"*, Law and Society Review, Vol, 24, No. 4(1990), pp. 1041-1070.

[34] Holland, Laura H.,*"Government Contractors hiring Undocumented Migrants: National Security Implications and Solutions"*, Public Contract Law Journal, Vol. 36, No. 2(2007), pp. 263-276.

[35] Castro, M. G., *Migrações Internacionais e Políticas: algumas experiências internacionais",* 2001, CNPD.

[36] Kugelmann, Dieter, *"Migration",* 2009, Max Planck Encyclopedia of Public International Law.

definition is not directly expressed by International Human Rights Law instruments. It is a definition by default. Hence, the meaning of irregular migration should be inferred from opposing it to the legal meaning of regular migration. Irregular migration is, therefore, the act of relocating to a new country without the necessary permit, visa or document necessary to authorize someone to legally live and work in that jurisdiction.

One can conclude, therefore, that irregular migrants are anyone who, regardless of their background or cause for moving, has relocated to a new country without the necessary permits and/or other necessary documentation to do so. It was also concluded that the terminology *illegal* migrants is not adequate. For that reason, the more proper terms: undocumented migrants and irregular migrants will be used interchangeably throughout this thesis.

Having defined irregular migrants, to understand to what extent current International Human Rights Law protects them, it is necessary to identify if they are exposed to special vulnerabilities, which will be dealt with in the following chapter.

2. Vulnerabilities of Undocumented Migrants

In order to answer the main research question, that is, to what extent can current international law protect the rights of irregular migrants, other sub-questions that surface are: what kind of protection do undocumented migrants need? are they exposed to especial vulnerabilities? This chapter will be dedicated to identifying the main vulnerabilities to which undocumented migrants are exposed.

The very circumstances intrinsic to the migration process leave migrants in general in a vulnerable position, e.g. ignorance of the host country's language, culture, legislation, and distance from their families and social networks. That vulnerability is, of course, exacerbated in the case of undocumented migrants. The lack of state protection through the refusal of certain public services or access to justice aggravates the situation of vulnerability and facilitates the occurrence of human rights violations[37].

Undocumented migrants are particularly liable to human rights violations, meaning that they face innumerous challenges and many times are denied of any possibility of exercising many of their rights. One of the main obstacles is that, if their irregular status is exposed, they can face charges for working clandestinely or they can be deported. Most often, both. The need for a hidden existence in the host country leaves irregular migrants more exposed to and unprotected against practices such as servitude, sexual exploitation, arbitrary detention, denial of labor rights and xenophobia[38]. It is understood, therefore, that the very motivation of irregular

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[37] "Bearing in mind the situation of vulnerability in which migrants frequently find themselves, owing, inter alia, to their absence from their State of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation […] Deeply concerned at the manifestations of violence, racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants, especially women and children, in different parts of the world …" *See* UN General Assembly, *Resolution Adopted by the General Assembly [on the report of the Third Committee (A/54/605/Add. 2)] 54/166, Protection of migrants*, 24 February 2000, A/RES/54/166, available at: http://www.refworld.org/docid/3b00f35bc.html [accessed 22 April 2018].

[38] Rodríguez Pizarro, Gabriela. "*Violaciones a los derechos humanos de las migrantes en la actual dinámica de las migraciones en América",* in: Migraciones y derechos: reunión de personas expertas, Instituto Interamericano de Derechos Humanos, 2004, p. 133-156.

migrants also renders them more vulnerable to human rights abuses perpetrated in the country of destination[39].

Additionally, in the name of national security, States with increased and continuous influx of migrants have adopted stronger migration control policies. There is resistance to implementing effective protection measures for irregular migrants, and a stronger exercise of the police function in borders to curb migratory flows[40]. What is meant to generate security, in turn, creates other problems and criminal activities. It stimulates trade of document falsification, human trafficking and smuggling, as well as certain forms of violence[41] to which undocumented migrants are more susceptible.

However, there are other more specific human rights vulnerabilities that will be argued about in the following points.

2.1 Most Common Vulnerabilities

2.1.1 Vulnerabilities in the Work Place

Despite the fact that increased irregular mobility benefits the need of certain industries, labor rights are often denied to migrants in irregular situations. Contrary of what one should expect, large contingents are found in positions of substantial disadvantage *vis-à-vis* their new

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[39]Advisory Opinion OC-18/03, *"Juridical Condition and Rights of Undocumented Migrants"*, OC-18/0, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, paras 112-117, available at: http://www.refworld.org/docid/4f59d1352.html [accessed 8 September 2016].

[40] Cançado Trindade, Antonio Augusto, *"Elements for a Human Rights Approach to the Phenomenon of Forced Migration Flows" I*n: *Workbooks on Migration*, International Organization for Migration, 2001, p.15.

[41] "[…] el control migratorio se ha convertido en un elemento fundamental de las políticas de seguridad nacional. El endurecimiento de los controles migratorios no ha resultado en la disminución de los flujos migratorios, pero si ha contribuido a hacer más difícil, costoso y peligroso el viaje. La falsificación de documentos, la violencia común, el trafico de migrantes, la trata de personas, los viajes en medios de transporte que no ofrecen condiciones de seguridad, se han convertido en parte de la migración, acentuando la percepción del inmigrante como infractor de la ley y aumentando su condición de vulnerabilidad." *See* Olea, Helena., *"Los Derechos Humanos de las Personas Migrantes: Respuestas del Sistema Interamericano,"* in: *El Sistema Interamericano de Derechos Humanos y los derechos de los migrantes, mujeres, pueblos indígenas, niños, niñas y adolescentes*, 2004, Instituto Interamericano de Derechos Humanos, p. 11-18.

employers[42] in their host country, ranging from degrading circumstances to work conditions analogous to slavery[43].

Many irregular migrant workers suffer racism and other forms of discrimination in the workplace. They also work hours that extend far beyond the legally accepted standards and earn less than minimum hourly wages. There are often cases when irregular migrant's wages are withheld by the employer, due to alleged debts. Other times, passports are held, making it impossible for them to free themselves of abhorrent work conditions and even to return home[44].

If, in one hand, it is obvious that a country's nationals can also be subjected to some of the human rights abused described above, in the other hand, besides fearing deportation if they report their perpetrators, undocumented migrants are often treated as criminals [45]. Nonetheless, employers who hire undocumented migrants are rarely prosecuted by Justice[46], despite

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[42] "[…] una vez que llegan al país de destino, los inmigrantes no autorizados deben continuar viviendo en la clandestinidad. Los empleadores y las autoridades conocen la imposibilidad de los migrantes no autorizados de solicitar protección en caso de abuso o violación de las normas, lo que resulta para ellos en condiciones de trabajo violatorias de la ley, en la imposibilidad de acceder a bienes y servicios como el resto de la población y en su propia renuencia a solicitar protección estatal cuando son victimas de delitos o de faltas administrativas, o cuando requieren de atención a necesidades especiales. Adicionalmente, en los procesos penales y migratorios de los que son parte, no se garantiza adecuadamente el debido proceso, ni a nivel normativo ni a nivel practico. En concreto, se observan deficiencias en los servicios de traducción, en la información sobre la protección consular y en la existencia de un amplio margen de discrecionalidad en los actos administrativos, entre otros." *See* Olea, Helena., *"Los Derechos Humanos de las Personas Migrantes: Respuestas del Sistema Interamericano",* in: *El Sistema Interamericano de Derechos Humanos y los derechos de los migrantes, mujeres, pueblos indígenas, niños, niñas y adolescentes*, 2004, Instituto Interamericano de Derechos Humanos, p. 11-18.

[43] UN General Assembly, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian (A/HRC/15/20/Add.4)]*, 30 August 2010, para. 51, available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.20..Add.4_en.pdf [accessed 22 February 2018].

[44] For example, "(...) once they arrive in the country of destination, unauthorized migrants must continue to live in irregular conditions. Employers and authorities are aware of the inability of undocumented migrants to seek protection in the event of abuse or violation of the rules, resulting in conditions of work that violate the law, the inability to access goods and services such as the rest of the population and their own reluctance to request state protection when they are victims of crimes or administrative misconduct, or when they require attention to special needs." *See* Medina Cuenca, A. *"Migration, trafficking in persons and other related figures, and the criminal protection of normal migratory traffic in Cuba"*, 2014, Journal of Law and Social Sciences, vol. 7, p. 26-27.

[45] "Using interviews with 103 'immigrant-dependent' employers in three southern California counties, the study reveals that the employer sanctions violations are numerous and that violators feel relatively protected from detection and punishment. It then traces both the prevalence of this crime and the impunity felt by violators beyond a simple cost/benefit analysis on the part of employers to the nature of law itself." *See* Cavalita, Kitty*,"Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime"*, Law and Society Review, Vol, 24, No. 4(1990), pp. 1041-1070.

[46] Holland, Laura H.,*"Government Contractors hiring Undocumented Migrants: National Security Implications and Solutions"*, Public Contract Law Journal, Vol. 36, No. 2(2007), pp. 263-276.

committing tax crimes, crimes against social security, and human rights violations[47]. Under such conditions, the lack of inspection on employers of undocumented migrant workers contributes to the maintenance of the channels of irregular migration [48].

2.1.2 Vulnerabilities in the Access to Health

Health vulnerabilities are twofold: 1) the stress of migration conditions make migrants more exposed to heath risks and 2) the access to health care is more difficult or even impossible.

The process of migrating changes habits that affect health and well-being. Such situation may hinder a migrant's access and use of health services due to characteristics inherent to migration: lack of understanding of the local procedures and health system, language barriers, cultural differences. On this scenario, undocumented migrants are also more vulnerable because either they fear that accessing health care will expose their irregular status or because few are the countries who grant such category of migrant's access to healthcare [49].

As stated by the Special Rapporteur on the right to health, undocumented migrants "may face extreme health risks during transit owing to hazardous conditions such as being cramped or hidden in boats or trucks. They may also face physical and sexual violence during transit" [50].

In addition, despite several countries have regulations establishing access to health to all people, gaps between theory and practice remain, especially when it comes to irregular migrants[51]

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[47] "To prevent exploitation of irregular migrants by employers, employment intermediaries or agents, smugglers and traffickers. The exploitation of ir- regular migrants is well documented. They are paid lower salaries than national or lawfully present migrant workers; if dismissed they are of- ten unable to obtain money owing from employ- ers; and they are rarely protected by social secu- rity legislation. Moreover, they can also be ex- ploited by smugglers and traffickers, which, in the latter case in particular, can place them in a position akin to slavery or forced labour." *See,* OSCE, *"VIII. Measures to Prevent or Reduce Irregular Labour Migration"* (2010), p.161. Available at : https://www.osce.org/eea/19253?download=true [last accessed 18 August 2018].

[48] Rea, Andrea, *"Le travail des sans-papiers et la citoyenneté domestique"*, in Peraldi, Michel, *"La fin des norias"* (2002), Maisonneuve et Larose, p. 459-478.

[49] Leclere, F.; Jensen, L.; Biddlecom, A. E., *"Health care utilization, family context, and adaptation among immigrants to the United States",* Journal of Health and Social Behavior, Washington, 1994, v. 35:4, pp. 370-384.

[50] UN Human Rights Council, *"Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health",* 15 May 2013, A/HRC/23/41, para. 3, available at: https://www.refworld.org/docid/51a5cb094.html [last accessed 20 February 2019].

[51] Broring, G. et al., *"Access to care: Privilege or right? Migration and HIV Vulnerability in Europe".* Woerden: European Project AIDS e Mobility, 2003.

hindering access and use of health services as it may be conditioned by different levels of barriers and obstacles, especially legal and structural [52].

2.1.3 Vulnerabilities in the Access to Education

Even though certain countries in Europe such as Italy[53], Germany[54] and the Netherlands[55] have recognized and granted the right to have access to education to undocumented migrants irrespective of national policy and approaches, "considerable obstacles on the ground prevent children from accessing this basic entitlement" [56].

In practice, in order to exercise the right to education, the undocumented migrant will need to disclose the irregularity of his situation when enrolling to the national school systems[57], at the risk of being reported, since the State has to establish the rules regarding entry and foreign citizens in their territory. Such a situation that, as discusses above, prevents undocumented migrants to report abuse in the work place, f from seeking adequate medical care, also prevent undocumented migrants from enrolling their children in school[58], meaning that following generations will also be in disadvantage.

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[52] "[undocumented migrants are] subject to additional obstacles in the context of access to medicines owing to their uncertain legal status, cultural and linguistic differences and exclusion from health insurance schemes and social security systems". *See* UN Human Rights Council, *"Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health",* Expert consultation on access to medicines as a fundamental component of the right to health, 15 March 2011, A/HRC/17/43, para. 34, available at: https://undocs.org/en/A/HRC/17/43 [last accessed 20 February 2019].

[53] Finotelli C.; Sciortino, G., *"The Importance of Being Southern: The Making of Policies of Immigration Control in Italy",* European Journal of Migration and Law, 2011, pp. 119-138.

[54] Cyrus, N., "Undocumented Migration: Counting the Uncountable – Data and Trends across Europe*",* Country Report Germany, 2009.

[55] PICUM – Platform for International Cooperation on Undocumented Migrants, *"Undocumented Children in Europe: Invisible Victims of Immigration Restrictions",* Brussels, 2008, p. 32.

[56] The European Committee of the Regions (CoR), *"Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union",* European Union, 2011, p.14. Available at: https://cor.europa.eu/en/engage/studies/Documents/protecting-fundamental-rights-irregular-migrants.pdf [last accessed 20 February 2019].

[57] PICUM – Platform for International Cooperation on Undocumented Migrants, *"Book of Solidarity",* Brussels, 2008, p. 32.

[58] UN Committee on the Rights of the Child, *"Undocumented Children: Barriers to Accessing Social Rights in Europe",* 28 September 2012, United Nations. Available at: https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/Submissions/PICUM.pdf [last accessed 14 Augus 2017].

2.1.4 Undocumented Migrant Women and extra-vulnerabilities

Undocumented women migrants are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labor, and their access to minimum labor rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of migration laws and placed in detention centers, where they are vulnerable to sexual abuse, and then deported [59].

Female undocumented migrants are also more vulnerable to the exploitation of coyotes (human smugglers) being often victims of rape and gender based violence by those agents and often trapped into networks of human trafficking [60].

2.1.5 Undocumented Migrant Children

Growing numbers of adolescent girls and boys migrate outside their country of origin, in search of improved standards of living, education or family reunification. For many, migration offers significant social and economic opportunities. However, it also poses risks, including physical harm, psychological trauma, marginalization, discrimination, xenophobia and sexual and economic exploitation and, when crossing borders, immigration raids and detention.

Several adolescent migrants are denied access to education, housing, health, recreation, participation, protection and social security. Even where rights to services are protected by laws and policies, adolescents may face administrative and other obstacles in gaining access to such services, including: demands for identity documents or social security numbers; harmful and inaccurate age-determination procedures; financial and linguistic barriers; and, as their adult counter-parts, risk that gaining access to services will result in detention or deportation [61].

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[59] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General Recommendation No. 26 on women migrant workers", 5 December 2008, CEDAW/C/2009/WP.1/R, para. 22. Available at: https://www.refworld.org/docid/4a54bc33d.html [last accessed 02 March 2019].

[60] Tello, Amanda, *"The Untold Stories of Female Migrants",* Witness for Peace. Available at: http://witnessforpeace.org/the-untold-stories-of-female-migrants/ [last accessed 04 March 2019].

[61] UN Committee on the Rights of the Child (CRC), *"General Recommendation No. 20 on the implementation of the rights of the child during adolescence"*, 6 December 2016, CRC/C/GC/20, para. 76. Available at: https://www.refworld.org/docid/589dad3d4.html [last accessed 02 March 2019].

2.2 Conclusion

From the studies and analyses conducted in this chapter aiming at answering the sub-questions: what kind of protection do undocumented migrants need? are they exposed to especial vulnerabilities? It can be concluded that while regular migrants struggle with vulnerabilities in their new destination, the situation of undocumented migrants is even more precarious, as they are often easier targets for exploitation and cannot count with legal protection from the State, especially due to the fear of imprisonment and/or deportation [62].

Irregular migrants' access to education and right to the highest attainable standard of health are particular hindered because enjoying such rights can mean that their irregular status would be revealed.

Undocumented migrants also encounter serious vulnerabilities in the workplace. The asymmetry of power between the worker and the employer combined with the aforementioned angst of being uncovered mean that gross human rights abused will continue unreported.

Female undocumented migrants face a double ground of vulnerability, especially regarding sexual exploitation and gender based violence. Children and adolescent undocumented migrants are also more exposed to human rights violations.

Having identified the most common vulnerabilities to what an irregular migrant is exposed to and what kind of protection they especially need, the sub-questions regarding state's sovereignty arise and that will be the theme of the next chapter.

[62] OSCE Office of Democratic Institutions and Human Rights Conference Report: "Europe Against Trafficking in Persons", Belin, 15-16 October 2001. Available at: https://www.osce.org/odihr/14651?download=true[last accessed 14 November 2017].

3. Irregular Migration and State Sovereignty

Having answered the sub-questions arisen so far, aiming to move towards the understanding of to what extent international law protects the rights of undocumented migrants, it is also necessary to inquire the extension of international human rights law validity within a State's territory.

On this subject, one of the major challenges in the relationship between migration and international law is to understand the complex position of States [63]. States are sovereign over the definition of migration rules in their jurisdiction, which confers them the right to manage the admission of foreigners [64]. On the other hand, they are also party in human rights instruments which confer these rights characteristics such as universality, inalienability and interdependence. Hence, the subject of State's Sovereignty will be contemplated in this chapter.

3.1 Definition

In simple terms, Sovereignty is the right each State has to regulate its own public order, and to that end it is entitled to legislate for everyone within its territory [65]. It is because a state is Sovereign, that it has the power to issue regulations and impose decisions that govern various aspects of people's lives – domestic and foreign – within its territory, including the conditions of admission and stay [66].

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[63] Tilly, Charles, "Coercion, Capital, and European States", (1990), Blackwell Publishers.

[64] The relativism of international law may thus lead to a clash between the unilateral legal claims of states, as each state is free to assess the scope of the obligations it has assumed and is on an equal footing with every other state as regards the interpretation of its commitments. As Combacau has noted,' international norms are relative because their scope varies according to states' commitments: each state which has actively or passively subjected itself to the effects of those norms, is bound by them to every other state which has done the same. To be sure, the sovereign state must comply with international law, but it is up to each state to assess the requirements of that law in each situation and in each specific case. *See* Carrillo Salcedo, Juan Antonio, *"Reflections on the Existence of a Hierarchy of Norms in International Law",* (1997), The European Journal of International Law, Volume 8, p. 583-595.

[65] Vaughan, Lowe; Staker, Christopher, "Jurisdiction", in Evans, Malcolm D. (ed.), "International Law". Oxford, UK: Oxford University Press, 2010, p. 313.

[66] Carreau, Dominique, *"Droit International"* (1994), Pedone, p. 311-314.

State Sovereignty also means that States are entitled to make their own effective decisions regarding which international treaties they will be a party of, and which norms will be incorporated to the national level considering their own cultural, social and legal traditions [67].

3.2 Historic Evolution of the Concept of Sovereignty

In the early decades of the 20th Century, Hegel's idea of absolute sovereignty deeply influenced international law. According to the Hegelian philosophy, the dichotomy between natural law and positive law is dissolved through the identification between the real and the rational. For tributaries of the Hegelian system, the law is rational because it is law, meaning that the authority (will) makes the law because it is wisdom (reason) [68]. The Hegelian perception between the real and the rational found resonance in reality and in other currents of thought, since the law put by the State became virtually the sole source of law [69,70].

The visions of a truly universal system that was attempted by the League of Nations [71], with the implementation of the Permanent Court of International Justice (hereinafter PCIJ) was supplanted by the emergence of legal positivism, which personified the state, giving it autonomy of will that would consequently reduce the human rights granted to individuals. This way, the "will" of the state became the prevalent paradigm in international law. On the one hand, it hindered the understanding of the international community, and, on the other, it weakened international law itself, reducing it to a strictly intergovernmental law [72]. Still, the bonds of international cooperation were hardened if compared with before the advent of the League of Nations.

A couple of decades later, in the aftermaths of WWII and all its horrendous happenings, "the normative foundations of the international legal order have shifted from an emphasis on state security – that is, security as defined by borders, statehood, territory, and so on – to a focus on

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[67] Robert Araujo, Father, "*Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law"*, (2000), Fordham International Law Journal, Volume 24:5, p. 1477 – 1532.
[68] Lafer, Celso, *"A Reconstrução dos Direitos Humanos – um diálogo com o pensamento de Hannah Arendt"*, (2009), Editora Companhia das Letras, p. 41-42.
[69] Cançado Trindade, Antônio Augusto, "*El futuro de La Corte Interamericana de Derechos Humanos"*, (2004), Corte Interamericana de Direitos Humanos e Alto Comissariado das Nações Unidas, p.63.
[70] Cançado Trindade, Antônio Augusto, *"A Carta das Nações Unidas uma leitura constitucional"*, (2012), Del Rey, p. 82.
[71] Blanche E. C. Dugdale and Wyndham A. Bewers, *"The Working of the Minorities Treaties"*, (1926), Journal of the British Institute of International Affairs, Volume 5:2, pp. 79-95.
[72] Neff, Stephen C., "A Short History of International Law", in Evans, Malcolm D. (ed.), "International Law". Oxford, UK: Oxford University Press, 2010, pp. 21-27.

human security, the security of persons and peoples" [73]. The United Nations (hereinafter UN) was created signaling the awakening of a new international order, approaching States of the Kantian ideal of perpetual peace [74].

A rising international order requires international treaties, conventions and various types of legal instruments to be built and maintained [75]. These documents regulate relations between countries and commit them to a normative standard with collective intention. Most international norms are addressed to the State, not the individual [76]. On a public international law level, States relate to one another. States are the ones responsible for decisions aimed at individuals – nationals or migrants [77]. There is no legal entity hierarchy superior to the State in international law capable to force a state to sign a pact with another state or groups of states, therefore, when a state joins a pact it does so as an exercise of its sovereignty and because of its own interests. With their interests in mind, States make use of their Sovereignty to give away to be international order power over themselves.

3.3 The Evolution in the Concept of Sovereignty

The development of the Charter of United Nations (hereinafter UN Charter) [78] and its approval by 50 countries [79] at the time of its initial composition demonstrates international community's re-found respect for the human being and the protection of human rights as a common interest. In other words, States' general interest shifted from the territorial perspective, which caused the

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[73] Teitel, Ruti, *"Humanity's Law*", (2011), Oxford University Press, p.4.
[74] Kant, Immanuel, "À paz perpétua", (2010), L&PM.
[75] United Nations, *"Uphold International Law",* available: http://www.refworld.org/docid/45139acfc.html [accessed 20 April 2018].
[76] Janis, Mark W., "*Individuals as Subjects of International Law"*, (1984), Cornell International Law Journal, Volume 17:1.
[77] Individuals - unlike States and organizations - are not themselves involved in the production of the international normative body, nor do they have any direct and immediate relationship with this body of norms. There are many international texts aimed at protecting the individual. However, flora and fauna are also subject to protection by norms of the law of the people, without having been intended, therefore, to assign legal personality. It is true that individuals and companies already enjoy personality in domestic law, and that this virtue could have repercussions at the international level inasmuch as the law of the people would not have been limited to protecting them. However, it would have been able to attribute them the ownership of Rights and Duties - which is unthinkable in the case of legally protected but depersonalized things such as forests and submarine cables. *See* Rezek, José Francisco, *"Direito Internacional Público: Curso Elementar",* (1998), Saraiva, p. 158-159.
[78] United Nations, "Charter of the United Nations, (1945), 1 UNITS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html [last accessed 17 May 2016].
[79] UN Foundation Blog, *"UN History: What is Ratification?",* 2015, available: http://unfoundationblog.org/un-history-what-is-ratification/ [accessed 30 November 2017].

collapse of classic territorial sovereignty meaning that human rights protection weakens the notion of non-interreference in internal affairs, which results in a softer version of the concept of absolute sovereignty, where "[…] states have no authority to violate human rights law that they can delegate to the United Nations, and whatever authority has been properly delegated by the UN Charter will not displace independent state obligations to comply with human rights law" [80].

Moreover, the international interdependence became a reality in which the sovereign insular paradigm cannot remain. The economic imperative requires greater fluidity and adaptability to the legal reality for the territories, which would be, in a sense, a form of defense against the excesses of State power.

That said, it is no longer acceptable for a State to use its sovereignty as a shield for not complying with international human rights norms or having its observation of said norms investigated.

3.4 Conclusion

Examining the subjected of Sovereignty in order to answer the sub-question: What is the extension of international human rights law validity within a State's territory? It can be concluded that, as a general rule, States detain the monopoly of the control of mobility over their territories, meaning that no one can enter a State's territory without its express agreement or authorization [81]. Generally speaking, there is no organization superior to the State forcing it to admit foreigners in its territory [82]. In other words, States have the right and the authority not to allow in their territory individuals who do not have their consent and take actions to remove such individuals from their domains.

However, the changes resulting from the new dynamic in the world order that emerged after WWII, with the creation of the UN, have contributed to the newfound democracy in the international society, since, in addition to the State, new actors have become participants in the

[80] Paust, Jordan J., *"The UN Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity",* (2010), Harvard International Law Journal, Volume 51.
[81] Torpey, John, *"Coming and going: On the State Monopolization of the Legitimate 'Means of Movement'",* 1998, American Sociological Association, vol. 16:03, p. 239-259.
[82] Friedmann, W., *"The Growth of State Control Over the Individual, and Its Effect Upon the Rules of International State Responsibility",* 1938, 19 Brit. Y. B. Int'L L. 118, p. 142-43.

international arena, such as individuals and non-governmental organizations [83]. Indeed, to the extent that they keep a direct relation with the international instruments of human rights, individuals are conceived as subjects of international law [84]. Thus, despite the State's undisputed sovereign right to determine its own migration rules for its territory, it must comply with international human rights standards, granting undocumented migrants the rights of all treaties it is party. After all, the act of taking party in a treaty, of signing a pact, is also an exercise of Sovereignty.

A catalogue of international treaties was agreed in pursuance of forms of protection of aiming at the recognition and realization of human rights. The next step towards answering the main research question will be to analyze such treaties and understand their applicability to the undocumented migrants. In this context, the next chapter will focus on the international legal framework for the protection of migrants in an irregular situation.

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[83] According to Dupuy, "international law was, until recently, almost exclusively an interstate law. Certainly, there were, apart from states, some subjects of the droit des gents, but their small number did not allow their recognition. They were only exceptions to the principle of monopoly by the state as a subject of international law. The advent, in the late nineteenth century and again after the First World War, of international organizations, did not seem to profoundly affect the structure of international society. This was due, firstly, to quantitative considerations: these organizations were still scarce, with not enough weight in international relations, because of their fable competences and, secondly, to qualitative considerations resulting from the predisposition of doctrine and of rulers to see in international organizations a simple framework for interstate activities and deny them the quality of subject of the law of nations. Thus, the League of Nations itself has not been granted a legal status comparable to that afforded to states. Such shallow analysis is also no longer possible. Since World War II, international organizations and non-governmental organizations are more than a thousand" *See* Dupuy, René-Jean, *"Le Droit des Relations entre les Organisations Internationales",* (1960), Recueil des Cours de l'Académie de Droit International de la Haye.
[84] Cassese, Antonio, *"International Law",* (2008), Oxford University Press, pp. 142-150.

4. International Human Rights Framework for the Protection of Undocumented Migrants

To accurately understand the extent of protection of undocumented migrants under the current international human rights law framework, it is absolutely necessary to identify such framework and analyze it, in order to determine the applicable provisions.

The conventional way of creating norms to rule the interaction between subjects of international law is through treaties, which generate rights and obligations for the parties with the force of law and mandatory compliance according to the common law principle of *pacta sunt servanda* [85]. In this sense, the UN Charter was the first universal treaty recognizing inherent rights belonging to all human beings, consolidating the importance to protect human rights for the maintenance of international peace. However, its composition was not enough to protect all human beings, and other treaties were established in order to install a legal framework for the specific protection of different human rights.

Consequently, at the international level, human rights are contained in numerous international treaties and declarations. There are some treaties, agreements and declarations that were signed and ratified by a great number of member countries of the UN, spread around the globe. The collection of such documents is called the Universal System of Human Rights Protection. In this chapter, specific instruments of the global system will be studied, so the next research sub-question can be analyzed: what are the current mechanisms of protection applicable to undocumented migrants?

4.1 The Universal System: a definition

The United Nations has created a global structure for protecting human rights, based largely on its Charter, non-binding declarations, legally binding treaties and on various activities aimed at, as discussed in the previous chapter, advancing democracy and human rights throughout the world.

Aside from the Universal Declaration of Human Rights, there are nine core international human rights treaties. Each of these treaties has established a committee of experts to monitor

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[85] Crawford, James, *"The Creation of States in International Law",* (1979), Oxford University Press, pp. 79-83.

implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns. We will follow with studying each of the main treaties. The optional protocols will fall out of the scope of this thesis.

4.1.1 The Universal Declaration of Human Rights

Adopted unanimously in 1948 by the United Nations General Assembly, the Universal Declaration of Human Rights (hereinafter UDHR)[86] is an essential landmark in the evolution of human rights. It created a universal system of values and protections featuring the individual front and center. Prepared by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed as a common standard for all nations. It established, for the first time, fundamental human rights to be universally protected.

Despite being originally formulated as soft law[87], the UDHR holds an important role within the political-juridical system as it "provides as template for national law-making, and forges, a continuum between the international protection of human rights and their protection under public law"[88]. Moreover, the UDHR has time and again been recalled in resolutions of international conferences and in resolutions of the United Nations Security Council as well as the General Assembly. This demonstrates that it has entered the body of common legal principles, which are no longer challenged because of their origins [89].

The UDHR established a new paradigm in international law and put on the horizon the possibility of the individual being considered its subject and recipient. Moreover, the UDHR proposes the social and international order to make sure human rights can be fully realized and that human beings should be subject only to the restrictions placed by law, which cannot contradict the purposes and principles of the United Nations.

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[86] UN General Assembly, *"Universal Declaration of Human Rights"*, 10 December 2048, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html, [last accessed 31 March 2019].

[87] Soft law is "usually refers to any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behavior". *See* Shelton, Dinah, "International Law and Relative Normativity", in Evans, Malcolm D. (ed.), *International Law.* Oxford, UK: Oxford University Press, 2010, pp. 159-160.

[88] Gordon Brown (ed.), "*The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World",* Cambridge Open Book Publishers, 2016, pp. 34.

[89] Tomuschat, Christian, *"Human Rights: between idealism and realism",* Oxford University, 2008, pp. 63-64

The new understanding brought by the UDHR ensures greater legal protection to the rights of vulnerable groups and individuals in society. Consequently, civil, political, economic, social and cultural rights will be declared as interdependent and indivisible from each other, and fundamental for the development of democracy.

With the increasing recognition of the individual in the international field and the number of migrants in the world, the UDHR is increasingly becoming a parameter to regulate relations between receptive States and migrants [90]. Some of the dispositions of most concern for irregular migrants contained in the UDHR is the principle of equal treatment between a State's national and foreign citizens, with no tolerance for discrimination on grounds of race, nationality, religion or economic power.

Regarding the material constitution of the States, it should be noted that article 8 of the UDHR defines that "everyone has the right to an effective remedy by the competent national courts for acts violating the fundamental rights granted by the constitution or by law" [91]. It is therefore evident that ensuring access to justice must be extended not only to nationals but also for every human being. So, a person's right to an effective remedy shall not depend of their migration status.

This concerns the universality precepts of human rights [92] and, therefore, the judicial system of States that ratified the UDHR shall not refuse to grant judicial provision in cases where there has been violation of the fundamental rights of an alien, whether a migrant in a regular or in an irregular situation. It is important to stress that the access to justice here established refers to

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[90] UNHRC, *"Improving Human Rights-Based Governance of International Migration"*, available at: https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf, [last accessed 02 March 2019].

[91] UDHR, Article 8.

[92] "[…] considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens" See* Advisory Opinion OC-18/03, *"Juridical Condition and Rights of Undocumented Migrants"*, OC-18/0, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, para 101, available at: http://www.refworld.org/docid/4f59d1352.html [accessed 8 September 2016].

the right to an effective remedy[93], for instance, it is essential to observe the rules of due diligence including the provision of free justice, when necessary.

Nonetheless, despite its importance to the protection and guarantee of human rights, the UDHR lacks mechanisms to ensure effective implementation for each Member States, therefore, other treaties and conventions to complement the UDHR[94]. The International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic Social and Cultural Rights (hereinafter ICESR) together form the legally binding counterpart of the UDHR. The three instruments together make up what is commonly referred to as 'the international bill of rights'[95]. They will be studied in the subsections bellow together with the other treaties that form the core of International Human Rights Law.

4.1.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The International Convention on the Elimination of All Forms of Racial Discrimination[96] (hereinafter CERD) was adopted in 1965 and entered into force in 1989. Currently, 179 countries are party. It recognizes on its preface the principles of equality and human dignity, according to what the entire convention shall be interpreted. It is an essential document to be analyzed aiming at finding provisions applied to the protection of undocumented migrants because, on a great deal of irregular international migration involves a person relocating to a country where they will be a racial minority[97].

Article 1, paragraph 1, of ICERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has

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[93] ICJ, "*Migration and International Human Rights Law"*, Practitioners Guide no. 6, Chapter III, Section II, Title 1.

[94] "[…] According to Verdross, « le caractère non-obligatoire de la Déclaration résulte enfin du fait que la Commission préparatoire décida d'accomplir sa tâche par étapes, en élaborant d'abord la recommandation de' l'Assemblée sur les droits de l'homme, pour arrêter ensuite les termes d'un projet de Convention sur la même matière." *See* Verdross, Alfred., *"Idées Directrices de L'Organisation des Nations Unies"*, (1953), Recueil des Cours de l'Academie de Droit International de la Haye, p. 25.

[95] UN, "What are the two Covenants?", available at: http://2covenants.ohchr.org/About-The-Covenants.html [accessed 21 September 2016].

[96] UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at : https://www.refworld.org/docid/3ae6b3940.html [Last accessed 17 March 2019].

[97] Crangle, Jack *"Left to Fend for Themselves : Immigration, Race Relations and the State in Twentieth Century Northern Ireland"*, Journal Immigrants and Minorities : Historical Studies in Ethnicity, Migration and Diaspora.

the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" [98]. Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality.

However, the Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee), on its "General recommendation XI on non-citizens" noted that article 1, paragraph 2 has on occasion been interpreted as absolving States parties from any obligation to report on matters relating to legislation on foreigners[99]. The Committee, therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation[100].

Especially, the Committee clarifies that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights[101]. On a more recent recommendation about the same topic, "General Recommendation 30 - Discrimination against non-citizens" the Committee re-states the same recommendations[102], and adds that although some rights, such as the rights to participate in elections may be reserved for citizens, citizens, human rights are, in principle, to be enjoyed by all persons. The committee further affirms that "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law"[103].

[98] CERD, para. 1.
[99] UN Committee on the Elimination of Racial Discrimination, *"General Recommendation XI on non-citizens"*, 1992, para.1.
[100] UN Committee on the Elimination of Racial Discrimination, *"General Recommendation XI on non-citizens"*, 1992, para.1.
[101] UN Committee on the Elimination of Racial Discrimination, *"General Recommendation XI on non-citizens",* 1992, para.1.
[102] UN Committee on the Elimination of Racial Discrimination, *"General Recommendation XXX on Discrimination Against non-citizens"*, 1 October 2002, para. 2.
[103] UN Committee on the Elimination of Racial Discrimination, *"General Recommendation XXX on Discrimination Against non-citizens"*, 1 October 2002, para. 3.

It becomes crystal clear, then, that for the Committee, the principles of equality and non-discrimination apply to protection of undocumented migrants. No discrimination shall be made between nationals and non-nationals on the protection and enjoyment of their human rights regardless of the non-national's documentation status.

4.1.3 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was concluded on 16 December 1966, entered into force 23 March 1976. Currently, 179 countries are party. The ICCPR is, out of the universal system, the human rights instrument that deals more specifically with the human rights of first generation, also called civil liberties or personal freedoms. Such rights intend to limit the state interference in the life of individuals. However, despite intended to address traditional civil and political rights, the ICCPR also contains reference to economic, social and cultural rights. The ICCPR, on its preface, recognizes on its preface the principles of equality and human dignity, that guide the interpretation of the Covenant.

Moreover, the ICCPR, expressly adds to the body of the Covenant's text the principle of equality and non-discrimination. Article 2 obliges the signatory States to commit themselves to respect and ensure the rights set forth in the Covenant to all individuals within their territory and subject to their jurisdiction. The principle of equality and non-discrimination is one of the most important principles of law when it comes to the protection of irregular migrants and the reach of their human rights. After all, it is one of the most important principles when it comes to the protection of undocumented rights, as it assures that, lacking proper documentation, does not equal their alienation from human rights protection.

As a matter of fact, as it is going to be studied on Chapter 5, the Interamerican Court of Human Rights regards the principle of equality and non-discrimination as a principle of customary international law and a norm of jus cogens, that must be observed by all States.

As the primary freedom is freedom of the body, Article 8 of the ICCPR prohibits any kind of illegal detention. Aligned with that, and especially in connection the rights of migrants, the Human Rights Committee (hereinafter, HRC) – the body of independent experts that monitors implementation of the ICCPR by its State parties – issued General Comment No. 35, that reads as follows:

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security[104].

Furthermore, ICCPR enshrines several dispositions about the due process of law and legal remedies, that can be even more important for undocumented migrants due to their increased vulnerabilities and probability to need such remedies to amend possible breaches of their rights. For instance, article 14 declares that "all persons shall be equal before the courts and tribunals...". Article 26 provides that all persons are equal before the law and thus, "the law shall prohibit any discrimination on any ground such as race, color sex, language, religion, political or other opinion, national or social origin, poverty, birth or other status".

In that sense, the HRC issued, on General comment No. 32, the understanding that: "the guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" [105].

Regarding effective legal remedy, the HRC also adds that:

> if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defense [106].

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[104] UN Human Rights Committee (HRC), *"General Recommendation no. 35, Article 9 (Liberty and security of person)",* 16 December 2014, CCPR/C/GC/35, para.2.
[105] UN Human Rights Committee (HRC), *"General Recommendation no. 32, Article 14, Right to equality before courts and tribunals and to fair trial",* 23 August 2007, CCPR/C/GC/32.
[106] UN Human Rights Committee (HRC), *"General Recommendation no. 13, Article 14 (Administration of Justice), Equality before the Courts and the Rights to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984.*

Thus, the ICCPR aside from enshrining the principles of equality and non-discrimination, is also paramount as to the right to due process of law and effective legal remedy to human rights.

4.1.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR[107] was as well concluded 16 December 1966, entered into force 3 January 1976. Currently, 169 countries are party. Though it is viewed as the most authoritative pronouncement on economic, social and cultural rights, it was inspired by the European Social Charter[108], which was adopted five years before. In contrast to civil and political rights, which are basic negative rights in nature, economic social and cultural rights are generally programmatic and subject to progressive realization. The ICESCR was the first legal instrument for defense, implementation and legal obligation to economic, social and cultural rights.

The ICESR preamble includes the principles of equality, non-discrimination and the inherent dignity of the person. In addition, art. 2, para. 2 expressly adds to the body of the Covenant's text the principle of non-discrimination, reading as " the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Committee of Experts for the implementation of the ICESCR, a body of 18 independent experts that monitors implementation of the Covenant by State parties (hereinafter The Committee), has issued a general comment specifically about how the principle of non-discrimination inserted on article 2, para. 2 should be interpreted, expressly stating that the convention is applied to: "to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation" [109].

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[107] UN General Assembly, "*International Covenant on Economic, Social and Cultural Rights"*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html [accessed 15 September 2016].

[108] Council of Europe, "*European Social Charter (Revised)"*, 3 May 1966, ETS 163. Available at: https://www.refworld.org/docid/3ae6b3678.html [accessed 15 September 2016].

[109] UN Committee on Economic, Social and Cultural Rights (ICESR), "*General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)"*, 2 July 2009, E/C.12/GC/20. Available at: https://www.refworld.org/docid/4a60961f2.html [accessed 15 February 2019].

When it comes to the relevance for the protection of undocumented migrants from the vulnerabilities they are especially exposed, the ICESCR provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[110]", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties to achieve the full realization of this right".

The CESCR, on its General Comment No. 14 makes it clear that this right shall be extended to undocumented migrants, the following:

> "In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy(…) " [111].

Moreover, the ICESCR, in its Article 7, ensures the right to decent work and non-discrimination among men and women regarding opportunity and remuneration, which makes the study of this document particularly important because, as noted in chapter 2 of this thesis, undocumented migrants are particularly susceptible to exploitation in the work place.

The Committee reiterates that equality applies to all workers without distinction based on race, ethnicity, nationality, migration or health status, disability, age, sexual orientation, gender identity or any other ground [112].

No doubt remains, then, that the ICESR is applicable to the protection of human rights of undocumented migrants for it recognizes the principles of equality and non-discrimination, but

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[110] UN Committee on Economic, Social and Cultural Rights (ICESR), "*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)"*, 11 August 2000, E/C.12/2000/4 para.1. Available at: https://www.refworld.org/docid/4538838d0.html [accessed 15 February 2019].

[111] UN Committee on Economic, Social and Cultural Rights (ICESR), "*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)"*, 11 August 2000, E/C.12/2000/4 para. 34. Available at: https://www.refworld.org/docid/4538838d0.html [accessed 15 February 2019].

[112] UN Committee on Economic, Social and Cultural Rights (ICESR), "*General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23* para. 11. Available at: https://www.refworld.org/docid/5550a0b14.html [accessed 15 February 2019].

it guarantees rights that cushion irregular migrants from the vulnerabilities they are most exposed to, such as the right to health and the right to decent work.

4.1.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of Discrimination against Women [113] (hereinafter CEDAW) came into force on 3 September 1981. Since then, it has been described as the international bill of rights for women. Currently, 189 States are party [114]. The CEDAW addresses the various aspects of discrimination faced by women and provides measures aimed at ensuring *de facto* and *de jure* equality of women and men and the overall protection of women against discrimination.

The CEDAW is especially important for the protection of female undocumented migrants, because, for being women, they face a double ground of vulnerabilities, especially relating to sexual exploitation and domestic violence, as discussed in chapter two.

Discrimination against women is defined in Article 1 as “"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

In Article 2 of the CEDAW, States oblige to adopt action to counter discrimination against women on the civil, political rights sphere and in Article 3, States oblige to counter discrimination against women on the economic, social and cultural sphere. This makes CEDAW an endorser of the ICCPR and the ICESCR.

[113] UN General Assembly, “*Convention on the Elimination of All Forms of Discrimination Against Women”,* 18 December 1989, United Nations, Treaty Series, vol. 1249, p.13. Available at: https://www.refworld.org/docid/3ae6b3970.html [accessed 15 April 2016].
[114] UNHRC, “*Status of Ratification: Interactive Dashboard”*. Available at: http://indicators.ohchr.org [accessed 15 February 2019].

The Committee of Experts for the implementation of the CEDAW (hereinafter the CEDAW Committee), has issued General Recommendation No. 26 [115], exclusively about women migrant workers, where it recognizes specific responsibilities to host-countries, as follows:

> (...) Protection of undocumented women migrant workers: the situation of undocumented women needs specific attention. Regardless of the lack of immigration status of undocumented women migrant workers, States parties have an obligation to protect their basic human rights. Undocumented women migrant workers must have access to legal remedies and justice in cases of risk to life and of cruel and degrading treatment, or if they are coerced into forced labor, face deprivation of fulfilment of basic needs, including in times of health emergencies or pregnancy and maternity, or if they are abused physically or sexually by employers or others. If they are arrested or detained, the States parties must ensure that undocumented women migrant workers receive humane treatment and have access to due process of the law, including through free legal aid. In that regard, States parties should repeal or amend laws and practices that prevent undocumented women migrant workers from using the courts and other systems of redress. If deportation cannot be avoided, States parties need to treat each case individually, with due consideration to the gender-related circumstances and risks of human rights violations in the country of origin".

This comment is a clear statement that the Convention is to be generally applied to protect undocumented migrant women.

Regarding access to education, another point of vulnerability studied on chapter 2, the CEDAW Committee also issued General Recommendation 34 on the right of girls and women to education recognizing the especially negative impact on the education of undocumented migration for girls and women of school age and advising States to take action to mitigate such effects[116].

When it comes to work with dignity, the Committee has also made recommendations, specifically about undocumented rural women and undocumented migrants seasonal farm workers, stating that States should "ensure legal protection for the rights of rural women

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[115] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General Recommendation No. 26 on women migrant workers", 5 December 2008, CEDAW/C/2009/WP.1/R. Available at: https://www.refworld.org/docid/4a54bc33d.html [last accessed 02 March 2019].

[116] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General Recommendation No. 36 (2017) on the rights of girls and women to education", 16 November 2017, CEDAW/C/GC/36, para. 47 and 50.
Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_36_8422_E.pdf [last accessed 02 March 2019].

migrant workers and access to remedies, protecting both documented and undocumented rural women migrant workers from discrimination or sex-based exploitation and abuse" [117].

4.1.6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [118] (hereinafter CAT) was adopted on 10 December 1984. It is an international human rights instrument, under the review of the United Nations, that aims to prevent torture around the world. Currently, 165 countries are party [119]. CAT is an expansion of Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. CAT on its preface, recognizes the principles of equality and human dignity. Such principles guide the interpretation of the document.

The CAT requires states to take effective measures to prevent torture within their borders, and it is of great importance for the protection of undocumented migrants, because in Article 3, it forbids States to expel, extradite or return persons to their home country if there is reason to believe they will be tortured. Torture is defined in Article 1 as:

> "(...) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[117] UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General Recommendation No. 34 (2016) on the rights of rural women", 7 March 2016, CEDAW/C/GC/34, para. 90. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/34&Lang=en [last accessed 02 March 2019].

[118] UN General Assembly, "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment",* 10 December 1984, United Nations, Treaty Series, vol. 1465, p.85. Available at: https://www.refworld.org/docid/3ae6b3a94.html [accessed 15 April 2016].

[119] UNHRC, "*Status of Ratification: Interactive Dashboard"*. Available at: http://indicators.ohchr.org [accessed 15 February 2019].

The CAT codifies the matter of customary international law of absolute and non-derogatory character of the prohibition of torture [120]. Therefore, there is no doubt that the convention is applicable to the protection of undocumented migrants, in the cases where they are victims of torture.

Moreover, the Convention also prohibits inhuman or degrading treatment or punishment, which, as analyzed in Chapter 2, undocumented migrants are vulnerable to. In that regard, the Committee of Experts for the implementation of the UNCAT (hereinafter The Committee), has issued a General Recommendation No. 2, clarifying that:

> "The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above" [121].

It remains obvious that, being a norm of *jus cogens*, the prohibition of torture also applies to undocumented migrants. Accordingly, the Committee also extends the prohibition against inhuman and degrading treatment or punishment to all individuals supported by the principle of equality and non-discrimination.

4.1.7 Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child (hereinafter CRC) came into force on 2 September 1990. It sets out the civil, political, economic, social, health and cultural rights of children. It is

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[120] UN Committee Against Torture (CAT), "*General Comment No. 2: Implementation of Article 2 by States Parties",* 24 January 2008, CAT/C/GC/2., para. 1. Available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 15 March 2019].

[121] UN Committee Against Torture (CAT), "*General Comment No. 2: Implementation of Article 2 by States Parties",* 24 January 2008, CAT/C/GC/2., para. 21. Available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 15 March 2019].

the convention with most adhesion: 196 countries are party [122]. The Convention generally defines a child as any human being under the age of eighteen, unless a country's national law recognizes an earlier age of majority.

It is a fact that all children can be rendered vulnerable by the particular circumstances of their lives. However, in times of severe constraints, as generally is the life of undocumented migrants, undocumented migrant children's rights are mostly at stake. The fear of having their migration status exposed, often prevents undocumented migrant parents to enroll their children into school or to assure their children receive proper medical care, as explained in Chapter 2. More often than not, children arrive to their destination countries unaccompanied of a parent or adult tutor. The analysis of CRC is, therefore, of utmost importance to identify the international human rights norms applied to the protection of undocumented migrants.

The CRC's preamble includes the principles of equality, non-discrimination and the inherent dignity of the person. In addition, art. 2, para. 2 expressly adds to the body of the Covenant's text the principles of equality and non-discrimination, reading as:

> "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".

Aligned with that, the Committee of Experts for the implementation of the CRC (hereinafter the committee), has issued a General Comment No. 6 Treatment of unaccompanied and separated children outside their country of origin, where it clarifies that

> "The principle of non-discrimination in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a

[122] UNHRC, "*Status of Ratification: Interactive Dashboard"*. Available at: http://indicators.ohchr.org [accessed 15 February 2019].

> child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant (…)" [123].

The CRC committee repeats the same understanding in a number of other general comments [124,125], leaving no doubt that the convention shall be applied also to all children, regardless of their migration status, making it suitable for the protection of undocumented migrant children.

4.1.8 Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [126] (hereinafter ICMRW) entered into force on 1 July 2003. It is the convention with least adhesion: only 54 States are currently party [127]. It sets a moral standard, and serves as a guide and stimulus for the promotion of migrant rights in each country, with specific rules for the recruitment of aliens. It was a consolidation of several of the International Labor Organization Conventions – which will be studied in section 4.2.

As presented on Chapter 1, the ICMRW defines regular and irregular migrants on Article 5, as follows:

> For the purposes of the present Convention, migrant workers and members of their families:
> (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

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[123] UN Committee on the Rights of the Child (CRC), "*General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin",* 1 September 2005, CRC/GC/2005/6, para. 18. Available at: https://www.refworld.org/docid/42dd174b4.html [accessed 05 March 2019].

[124] UN Committee on the Rights of the Child (CRC), "*General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child",* 1 July 2003, CRC/GC/2003/4. Available at: https://www.refworld.org/docid/42dd174b4.html [accessed 05 March 2019].

[125] UN Committee on the Rights of the Child (CRC), "*General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)",* 17 April 2013, CRC/C/GC/17. Available at: https://www.refworld.org/docid/51ef9bcc4.html [accessed 05 March 2019].

[126] UN General Assembly, *"International Convention on the Protection of the Rights of All Migrants and Members of their Family Members"*, 18 December 1990, A/RES/45/158, available at: http://www.refworld.org/docid/3ae6b3980.html [accessed 8 September 2016].

[127] UNHRC, "*Status of Ratification: Interactive Dashboard"*. Available at: http://indicators.ohchr.org [accessed 15 February 2019].

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article [128].

The ICMRW also establishes a minimum standard of rights [129] to be observed by the Member States in relation to migrant workers and their families. On its preamble, the instrument recognizes that the situation of irregular migrants is even more serious than the situation of regular migrant.

The primary purpose of this Convention is to protect the human rights of migrants in a regular or in an irregular situation and ensure that there is no arbitrary interference with their families, or with their rights to freedom and security.

The ICMRW was the first international convention to address the issue of irregular migration from a human rights perspective, conferring recognition and substantial rights to all migrants [130], as it does provide rights to equality and due process to migrant workers and their families, regardless of the regularity of their legal status [131]. Part I of the CMW majorly encompasses definitions and Part II includes only 1 paragraph on equality and non-discrimination. According to the Committee of Experts for the implementation of the CMW (hereinafter The Committee) "Part III of the Convention protects the rights of all migrant workers and members of their families, including those in an irregular situation" [132]. The Committee also adds the following:

> The rights guaranteed to migrants in an irregular situation in other international human rights treaties often have a wider scope than their counterparts in Part III of the Convention. These treaties also contain additional rights. The rights guaranteed in those treaties generally apply to everyone, including migrants and other non-nationals, without

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[128] Chapter 1, ICMRW.

[129] Juhani, Lonnroth, *"The International Convention of the Right of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation"*, 25 Int'l Migration Rev. 710 (1991).

[130] Article 13 of the Universal Declaration of Human Rights provides that "everyone has the right to freedom of movement and residence within the borders of each state" and that "everyone has the right to leave any country, including his own, and to return to his country". It does not, however, explicitly establish the right to residence beyond the borders of the individual's country of nationality: It only ensures the right of movement, to leave and to return to one's country. In other words, the right to emigrate does not translate into the right to immigrate. See Browlie, Jan; Goodwin-Gill, *"Basic Documents on Human Rights"*, Oxford University Press, 2006, pp. 362, 610-637.

[131] Kapur, Ratna, *"Erotic Justice: Law and the New Politics of Postcolonialism"*, (2005).

[132] UN Committee on the Protection of the Rights of All Migrant Workers and Member of Their Families, "*General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families",* 28 August 2013, CMW/C/GC/2, para. 6. Available at: https://www2.ohchr.org/english/bodies/cmw/docs/CMW_C_GC_2_ENG.PDF [accessed 05 September 2015].

> discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including immigration status [133].

In other words, "[…] together with the more general human rights treaties, the existing international legal instruments for protecting migrant workers lay out a comprehensive set of civil, political, economic, social, and other rights for migrant workers, including the right to equal protections under labor laws, antidiscrimination laws, and family laws. In particular, the CMW articulates a broad set of rights for migrants, including those living and/or working abroad illegally" [134].

Further, the conventional standard seeks to harmonize the conduct of States and encourage the creation of appropriate measures to prevent and eliminate the trafficking and recruitment of clandestine workers. Currently, part of the doctrine draws attention to violations that are more serious by the State because of their migration policies and borders against the human rights of migrants, questioning the legitimacy of entry barring [135]. Numerous issues of human life go beyond internal competences of the State to constitute matters of international interest, in which the States have obligation to respect, notably the case with the right of migrants. For this reason, during the negotiation process of this instrument, the most controversial issue was undoubtedly irregular migration, evoking the difficult compatibility between the protection of the human rights for migrants and the criminalization of migration, as crucially this convention is based on the equal treatment of migrants and nationals [136].

Notwithstanding, when it comes to specific vulnerabilities, the ICMRW requires not just equal treatment under labor law for nationals and migrants, but also that they are informed of their rights in general, in a language that they can understand, with access to legal aid in case of

[133] UN Committee on the Protection of the Rights of All Migrant Workers and Member of Their Families, "*General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families",* 28 August 2013, CMW/C/GC/2, para. 8. Available at: https://www2.ohchr.org/english/bodies/cmw/docs/CMW_C_GC_2_ENG.PDF [accessed 05 September 2015].

[134] Ruhs, Martin, *"Rethinking International Legal Standards for the Protection of Migrant Workers"*, AJIL UNBOUND Rev. 2017:111.

[135] Pécoud, Antoinel, *"International migration, border control and human rights: Assessing the relevance of a right to mobility",* (2006), Journal of Borderlands Studies, Volume 21:1, available at: http://lastradainternational.org/lsidocs/626%20intl_migration_brder_cntrl_070402.pdf [last accessed 20 July 2016].

[136] Juhani, Lonnroth, *"The International Convention of the Right of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation"*, 25 Int'l Migration Rev. 1991:710.

deportation or imprisonment [137]. It places a very special attention to the right of education of migrant children, demonstrated by the Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, which states the following:

> "The Committees strongly urge States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions. States should also develop effective firewalls between educational institutions and immigration authorities and prohibit the sharing of students' data as well as immigration enforcement operations on or near school premises, as these practices limit or deprive migrant children or children of migrant workers in an irregular situation of their right to education. To respect children's right to education, States are also encouraged to avoid disruption during migration-related procedures, avoiding children having to move during the school year if possible, as well as supporting them to complete any compulsory and ongoing education courses when they reach the age of majority. While access to upper-level education is not compulsory, the principle of non-discrimination obliges States to provide available services to every child without discrimination on the basis of their migration status or other prohibited grounds" [138].

Although granting rights to any migrant regardless of their legal status, the ICMRW does not deal with the obstacles set by migration laws of States and their respective restrictions. Therefore, the main receiving countries have not signed it.

4.1.9 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities [139] (hereinafter CRPD) came into force on 3 May 2008. It is intended to protect the rights and dignity of persons with disabilities.

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[137] EU, *"Protecting the human rights of irregular migrants: the role of national human rights structures",* (2008), Joint European Union-Council of Europe Programme, available at: http://unipd-centrodirittiumani.it/public/docs/p2p_200806_migrants_1.pdf [accessed 20 March 2018], p. 17.

[138] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23. Available at: https://www.refworld.org/docid/5a12942a2b.html [accessed 19 February 2019].

[139] UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: https://www.refworld.org/docid/45f973632.html [accessed 19 February 2019].

Currently, 177 countries are party [140]. The State parties are required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities and ensure that they enjoy full equality under the law.

The CRPD, on its Article 1, clarifies that the terminology ‘persons with disability’ encompasses those who “have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” [141]. Article 3 recognizes the principles of equality and non-discrimination and human dignity.

This instrument is important for the protection of undocumented migrants because they, too, can be person with disability. Moreover, the CRPD gave special attention for the liberty of mobility and nationality and, aside from the Convention on Protection of the Rights of All Migrants Workers and Members of Their Families, it is the only instrument that brings the word migration and migrant in its body. Article 18.1 reads as follows:

> “Liberty of movement and nationality
> 1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
> (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
> (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
> (c) Are free to leave any country, including their own;
> (d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country”. [142]

In other words, the convention is applied to the protection of the rights of undocumented migrants, because it recognizes the principles of equality and non-discrimination. Further, it prevents that documentation to immigrate is denied on the grounds of disability, making a valuable legal basis for remedy in case an undocumented migrant fall into situation due to the denial of their papers on the grounds of being disabled.

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[140] UNHRC, “*Status of Ratification: Interactive Dashboard”*. Available at: http://indicators.ohchr.org [accessed 15 February 2019].
[141] CRPD, Article 1.
[142] CRPD, Article 18.1.

4.2 The International Labor Organization

The International Labor Organization (hereinafter ILO) was historically responsible for the protection of the rights of migrant workers and, due to the vulnerabilities of undocumented migrant workers on the workplace analyzed on Chapter 2, it is an obvious organization to their protection, reason why it will be studied in the next point.

The ILO's first Constitution laid out the rationale for the Organization, spelled out its aims and purposes as well as its detailed design and also identified certain "methods and principles for regulating labor conditions which all industrial communities should endeavor to apply, so far as their special circumstances will permit which are of special and urgent importance [143].

As Cassese notes, "states were encouraged not only to draft and accept international conventions (on equal remuneration on the employment of women and minors; on night shift; on freedom of association, and so on), but to fulfill these new obligations as well" [144]. The vision of the original ILO's Constitution was taken a step further towards the end of the Second World War in a powerful declaration, which was adopted by the Organization at the Conference held in Philadelphia in 1944, and subsequently incorporated into its Constitution.

The Declaration evokes four fundamental principles of international labor law [145]. The first principle establishes that 'labor is not a commodity', meaning that people should not be treated as inanimate commodities, capital, another simple factor of production, or resources. Instead, people should be treated as human beings with accorded dignity and respect.

The second principle expresses that 'freedom of expression and of association are essential to sustain progress', confirming the participation of the society in the Rule of Law and guaranteeing manifestation of thought and wide possibility of association in the country.

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[143] Rodgers, Gerry; Lee, Eddy; Swepston; Van Daele, Jasmien, *"The International Labour Organization and the Quest for Social Justice, 1919-2009"*, ILR School Cornell University, 2009, available at: https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com.br/&httpsredir=1&article=1052&context=books [last accessed 20 January 2018].
[144] Cassese, Antonio, *"International Law",* Oxford University Press, 2008, pp. 171-173.
[145] International Labour Organization, *"ILO Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organization"*, 1919. Available at: https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf [3 April 2016].

The third principle states that 'poverty anywhere constitute a danger to prosperity everywhere', expressing that extreme poverty and social exclusion violate human dignity.

Finally, the fourth principle stipulates that 'the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join them in free debate and democratic decision for promotion of the common welfare. These principles provide a minimum standard of protection of migrant workers, regular or otherwise and realizing them, implementing them into reality, continues to frame the action of the ILO.

In the same line, the Declaration on Fundamental Rights at Work [146] reaffirms States' obligation to respect, promote and commit to the basic rights of workers. It was adopted in 1998 to commit its member states to respect and promote principles and rights in four categories (regardless of their ratification of the relevant Conventions): freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation. The declaration makes not distinction between regular or irregular workers, nor between documented and undocumented migrants.

4.2.1 Conventions 100 and 111

Conventions 100 and 111 of the ILO represent a breakthrough against discrimination, when it comes to the law applicable to the rights of migrants. Convention 100[147] of 1951, prohibits gender-based payment discrimination, and compels the state to comply with and promote the principle of equal pay for all workers, regardless of gender.

Convention 111[148], in its turn, establishes that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, economic security and equal opportunity". Furthermore, it states that discriminatory practices constitute human rights violation. Thus, by analyzing the

[146] International Labour Organization, *"Declaration on Fundamental Principles and Rigths at Work"*, 1988.

[147] International Labour Organization, "*Declaration concerning Equal Remuneration for Men and Women Workers for Work of Equal Value"*, 23 May 1951.

[148]International Labour Organization, *"Declaration concerning the aims and purposes of the International Labour Organisation"*, 10 May 1944.

two conventions through the perspective of lens of migration, generally speaking, to impose differential treatment to the migrant regarding the area of labor relations, is a breach of their human rights.

4.2.2 Conventions 97 and 143

However, taking into consideration the vulnerabilities of migrant workers, the ILO also establishes two specialized conventions: Convention 97 [149],and the Convention 143 [150] in 1975. These two conventions recommend an effort of the Stated towards divulging information that could facilitate the migration process and ensuring that immigrants receive equal treatment and same rights as national workers, regardless of nationality, race, religion or sex. Notwithstanding, for opposing granting rights to non-nationals, States that largely receive undocumented migrants have not become signatories of these two conventions [151]. Which does not diminish the importance of these conventions.

Convention 97 is very important for the protection of migrants, since it establishes equality of opportunities and treatment between migrant workers in a regular situation and national workers regarding compensation issues, working hours, child labor and women, social security, amongst other rights provided for in national legislation of the host State. Although Convention 97 does not directly address the issues related to undocumented migrants, it presented the fundamental guidelines of treatment of the migrant worker, which later led to other international treaties and paved the way for more inclusive migration policies.

Convention 143, in its turn, was adopted at a time when certain migration related issues, such as the smuggling and trafficking of migrant workers, attracted the attention of the international community. This international instrument included articles related to irregular migration and the issue of human trafficking, thus contemplating a new dimension of the problem. Convention 143 also contains a series of rights that must be granted to all migrant workers, regardless of

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[149] International Labour Organization *"Convention concerning Migration for Employment"*, 22 January 1952.

[150] International Labour Organization, *"Convention concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers"*, 09 December 1978.

[151] International Labour Organization, *"Aplication of International Labour Standards 2016 (I)",* available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_448720.pdf [last accessed 20 April 2018].

the regularity of their status - fundamental rights such as the right to social security, trade union and cultural rights.

Besides, Convention 143 is partially devoted to irregular migration and interstate collaborative measures deemed necessary to prevent it, binding States to respect the basic human rights of all migrant workers. It also included specific paragraphs on cultural rights, which presents a series of rights that must be protected with respect to all migrant workers, regardless of its legal status. In addition, it is concerned with not just the reduction of irregular migration, but also in the assertation of human rights [152].

4.3 Conclusion

In order to answer the main research question, this chapter was set out to accurately understand the extent of protection of undocumented migrants under the current international human rights law framework. The main research sub-question of this chapter was: what are the current mechanisms of protection applicable to undocumented migrants? The first step, then, was to identify the legislation that composed this framework.

With this in target, the first International Human Rights Law instrument analyzed was the UDHR. The UDHR, although considered by many authors as a document of soft law, has time and again been recalled in resolutions of international conferences and in resolutions of the United Nations Security Council as well as the General Assembly, making it clear that it encompasses common legal principles, which are no longer challenged because of their origins.

Both the ICESCR and the ICCPR were also analyzed due to their status of Human Rights Bill. They both have caused significant changes in the legal system of member States since the protection of human rights becomes a key factor in the coexistence of people in the international community [153]. The ICESR contains rights that are directly related with the vulnerabilities to which undocumented migrants are exposed such as the right to health. The ICCPR provides for the right to due process and effective remedy, in the cases these rights are breached.

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[152] Ruhs, Martin, *"Protecting Migrant Workers: The Case for a Core Rights Approach",* in McAuliffe, M. and M. Klein Solomon, "*Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration"*, IOM, 2017.
[153] Griffin, James, *"On Human Rights"*, (2008), Oxford University Press, pp. 195-6.

Neither the UDHR, the ICCPR, nor the ICESCR mention the words migration. In fact, only two out of the other seven of the instruments that, together, compose the Core Instruments of International Human Rights Law, mention the specific words *migrants* or *migration.* What can be noted is that later instruments -- that were adopted after migration, because of the needs of the globalized economy combined with advances in transportation technology became a global phenomenon – deal with migration. In that sense, the ICMRW, a convention that was adopted to deal exclusively with the topic of migration, came into force in 2003. The CRPD, that came into force in 2008, also have an article targeting the right to movement that also tackles international migration.

The same trend can be observed with the General Comments and Recommendations of the Treaty Bodies and the ILO conventions. If, the first comments do not discuss the issue of migration, recent comments very explicitly interpret the conventions as applicable to protect the rights of undocumented migrants.

The most important, however, is that the UDHR, the ICCPR and ICESCR and the other seven core binding instruments, in a way or another, in both their preamble *and* in their body, recognize the principles of equality and human dignity, and should be interpreted and applied according to them. This fact alone could be enough to conclude that undocumented migrants are entitled to the protection of all nine instruments. In fact, as will be discussed in Chapter 5, the Interamerican Court of Human Rights Understands the principles of equality and non-discrimination as norms of peremptory norms. Moreover, if only two of these treaties have specific dispositions on migration, all of them have specific articles tackling particular vulnerabilities faced by irregular migrants, assuring that protection shall be given by all persons without discrimination of any status.

Again, that is also the understanding of absolutely *all* Experts Committees. The Commitees, without exception, point out that, as a general rule the rights enshrined in the human rights treaties are applied to all individuals in a States territory and/or under their jurisdiction, including irregular migrants. Among the exceptions few accepted are the right to citizenship and the right to run or participate in elections. Even acts that relate to a State's border control, such as detention, shall be conducted in accordance to human rights law and case by case, after due process.

To continue targeting the main research question, another sub-question is raised: what about the regional instruments? To what extent the regional systems of human rights protection apply to the rights of irregular migrants? What is the jurisprudence of the international courts? This will be the theme of the next chapter.

5. The Regional System of Human Rights Protection

The UN is host to an extremely diverse group of member states, with varying economic, social, cultural and political histories. The UN, thus, affects more nations and many more individuals than any regional institution could. This comes with the price of the necessity to define rights in a cautious manner, as it must accommodate these differences in its mechanisms for protecting human rights as they are outlined in treaties and declarations. Reasonably so, these instruments may be less assertive or lack in strict enforcement as compared to those of regional systems as the later also count with Courts to apply the law.

In other words, broad agreements allow the UN to shelter a spectrum of different viewpoints, but regional instruments can be more persuasive regarding compliance, insofar as the International Court Systems is a part of the regional frameworks. For that reason, the analysis of the instruments and their jurisprudence and how they perceive and protect undocumented migrants a very important sub-question for this research and will follow on this chapter. It is also important to clarify that, although the importance of the African System is recognized, this study will focus on the European and the Inter-American Systems.

5.1 The European System

The European continent suffered great devastation from the effects of World War II. Decided to undermine the possibilities of a new war to happen, leaders throughout the region gathered to renew the efforts of peacekeeping and cooperation. As a result, in 1949, the Council of Europe (COE) was created. The Council, which was originally created by 10 members, currently gathers 45 member-states with over 875 million people and is a forum for dialogue for over 400 NGOs with consultative status [154].

[154] Council of Europe, *"The Council of Europe at 70"*. Available at: https://70.coe.int/home/ [last accessed 01 March 2019].

The Council of Europe is based on principles of pluralist democracy, human rights, and the rule of law. Additionally, it is concerned with promoting European culture and diversity, consolidating and maintaining democratic stability, and promoting economic strength. The COE headquarters are located at the *Palais de l'Europe* in Strasbourg (France).

5.1.1 The European Convention on Human Rights

Aiming at advancing the rule of law, human rights, and democracy the COE signed, in 1950, the European Convention on Human Rights (hereinafter ECHR or Convention) [155]. Currently, 47 States are party. Differently from the UDHR, there is no doubt that the ECHR is a binding instrument.

When it comes to the rights of undocumented migrants, the ECHR, in the same model of the UN treaties, brings in its body a specific article honoring the principle of equality and non-discrimination. Article 14 reads as:

> "Prohibition of discrimination
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 16 goes further, limiting the interpretation of articles 10, 11 and 14 ensuring they are shall not be read as a means to limit the political activity of aliens.

The ECHR is referred as 'a constitutional instrumental of European public order' [156], as while Contracting States are allowed to enter reservations under the Article 57, both when signing or ratifying the Convention, this permission is limited to particular provisions of the Convention[157]

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[155] Council of Europe, *"European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14"*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 8 March 2018].

[156] *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, § 75, available at: http://www.refworld.org/cases,ECHR,402a07c94.html [accessed 16 July 2018].

[157] *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, § 75, available at: http://www.refworld.org/cases,ECHR,402a07c94.html [accessed 16 July 2018].

to the extent that any law then in force in the territory of the relevant Contracting Party is not in conformity with the provision. That said, reservations of a general nature are prohibited[158].

This opinion, clarifies the nature of the engagements within the ECHR as the "convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms embodies; as it is shown by the Article 14 […] the convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels " [159].

It is an important interpretation when it comes to the right of undocumented migrants, as it will detailed bellow. It can be understood that although the States parties of the ECHR have control over their borders and of whom they allow into their territories, the convention is applied within the jurisdiction of all parties, without distinction, and human rights breaches committed on the subordinate levels shall also be addressed.

5.1.2 The European Court of Human Rights

The European Court of Human Rights (hereinafter ECtHR) is located in Strasbourg, France. It was established by the ECHR in 1950, and held its first session on 1959 [160].

The Council of Europe's Parliamentary Assembly elects the judges to the Court. The Court accepts applications of instances of human rights violations from individuals as well as states. However, it is rare for a state to submit allegations against another state, unless the violation is severe. In order for an application to be accepted by the Court, all domestic legal remedies available to the applicant must have been exhausted. Amongst the various themes analyzed by the ECtHR in its broad body of work, the human rights of migrants have been recurrent, making it paramount to analyze some of these cases.

According to the Article 1 of the ECHR ("obligation to respect Human Rights), everyone within the jurisdiction of the State party benefits from the rights and freedoms enumerated in the

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[158] *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, § 76, available at: http://www.refworld.org/cases,ECHR,402a07c94.html [accessed 16 July 2018].

[159] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, § 239, available at: http://www.refworld.org/cases,ECHR,3ae6b7004.html [accessed 16 July 2018].

[160] The Global Human Rights Education and Training Centre (HREA), available at: http://www.hrea.org/?doc_id=365 [accessed 01 March 2019].

ECHR[161]. In this sense, this article exempts nationality as a requirement for protection meaning that it is also applied to migrants, including undocumented migrants[162]. Nonetheless, some of the provisions defined in the ECHR are exclusive for citizens or documented migrants – the other provisions protect citizens and foreigners under the jurisdiction of the State, regardless of their residence status[163].

Additionally, the ECHR establishes in its article 34 ("individual applications") the right to petition the European Court by which any individual, non-governmental organization or group of individuals may report that they are victims of human rights violations protected by the Convention[164] or its protocols [165]. Therefore, petitioning individuals are the true plaintiffs before the international human rights courts: the mandatory jurisdiction[166] of these would be the indispensable supplement of the right for individual international petition. Together they are the basic pillars of international protection, the mechanism of human emancipation vis-à-vis the State[167]. The right to petition also extends to irregular migrants.

As stated above, Article 14 of ECHR ("prohibition of discrimination"), expressly prohibits discrimination that does not require absolute equality in treatment for all cases, namely, the principle of non-discrimination is not absolute in the ECHR. The Convention expressly allows

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[161] Article 1 of the ECHR provides specifically that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." *See* Council of Europe, "*European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14"*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 8 March 2018].

[162] Council of Europe, "Parliamentary Assembly, Resolution 1509 (2006) Human rights of irregular migrants", available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456 [last accessed 16 May 2017].

[163] Goodwin-Gill, Guy S., *"The Refugee in International Law",* Oxford University Press, 2007, p. 244-257.

[164] Article 34 of the ECHR: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." *See* Council of Europe, "*European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols" Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 8 March 2018].

[165] On the Protocol 11, the optional clauses were replaced by mandatories clauses, establishing the possibility of victims of human rights violations and their representatives to submit demands directly to the ECtHR. *See* Council of Europe, *"Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby"*, 11 May 1994, ETS 155, available at: http://www.refworld.org/docid/42ef8c812.html [accessed 8 July 2017].

[166] ECHR, Article 32.

[167] Cançado Trindade, Antônio Augusto, *"Os Tribunais Internacionais Contemporâneos"*, FUNAG, 2013, p. 27.

differential treatment. For example, States may detain foreigners, thus avoiding their illegal entry in their territory, as well as imposing restrictions to the political activities of foreigners in the country[168]. Under International Law, the Strasbourg Court recognizes the legitimate and sovereign right of each State to legislate on migration, and therefore control the entry and residence of foreigners in its territory as well as the expulsion of those convicted of crimes[169].

The ECtHR understands that Article 4 also imposes negative obligations to the States so that there is no violation of the rights guaranteed therein[170], but it also imposes a positive obligation[171] to adopt the provisions in criminal law that cover these violating practices of human rights.

In *Silladin v. France*[172] case, the ECtHR strengthens existing European case law on positive obligations by re-affirming that, although the Member States have the possibility to refuse the provision of certain social services to undocumented migrants and the right to remove them according to the migration policies, they have the duty to ensure that such privileges are not used as forms of threats for the purpose of exploitation of those individuals. In addition, this sentence recognized the obligation of States to ensure the absence of infringement of certain

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[168] "This is particularly true concerning their political and residence rights. Thus, aliens are denied political rights irrespective of their length of residence in a country and certain other rights and freedoms of aliens may be limited on a number of grounds (e.g., family life, freedom of association). Safeguards against the expulsion of aliens are only procedural and may be overridden, even if they are lawfully present in a country". See Lambert, Helene, *"The Position of Aliens in Relation to the European Court of Human Rights"*, Human Rights Files, No. 8 Council of Europe Publishing, 2007.

[169] *Hilal v. The United Kingdom*, 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001, available at: http://www.refworld.org/cases,ECHR,3deb99dfa.html [accessed 16 July 2018].

[170] *Rantsev v. Cyprus and Russia*.

[171] "[…] the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that Governments have positive obligations, in the same as under Article 3 for example, to adopt criminal-law which penalise the practices referred to in Article 4 and to apply them in practice. See, *Siliadin v. France*, Application no. 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005, available at: http://www.refworld.org/cases,ECHR,4406f0df4.html [accessed 9 November 2016].

[172] In the case of *Siliadin v. France*, trafficking in human beings was considered by the European Court of Human Rights for the first time. The applicant, a female Togolese national who lived in Paris, had served as an unpaid servant for several years as minor and her passport was confiscated. Relying on Article 4 of the European Convention (Prohibition of slavery and forced labour), the applicant submitted that French criminal law did not afford her sufficient and effective protection against the "servitude", or at the very least against the "forced and compulsory" labour which in practice had made her a domestic slave. In this case, the Court considered that the applicant had, at the least, been subjected to forced labour and held in servitude within the meaning of Article 4 of the Convention. However, the Court held that it could not be considered that the applicant had been held in slavery in the traditional sense of that concept.

human rights, regardless of nationality or migration status of the person subjected to such violation [173], thus recognizing the application of this provision to the rights of undocumented migrants.

The relevance of migration related issues is observed throughout the ECHR text and its protocols. Amongst those established rules, Article 5 ("right to liberty and security") allows for the detention of migrants who enter the Member State irregularly or are under deportation. However, it determines that all persons deprived of liberty shall be informed in the language they understand about the reasons for detention, conversely imposing restriction and additional guarantee to foreigners.[174]

In this regard, the ECtHR reaffirmed, in *Galliani v. Romania,* the understanding that the provision of detention in the national legislation is not enough in order to be in line with the provisions of the ECHR: it is necessary that the procedures described in the law are respected and are in compliance with the legal due diligence[175]. This way, the Court ensured a minimum standard of treatment acceptable of the foreign national. This decision shows that the detention referred to in Article 5 (1) (f) of the ECHR[176] is mainly applied to undocumented migrants and asylum seekers. However, the detention of a migrant in a regular situation, as a rule, does not justify a deportation process, once the arrest is due to a crime committed by the migrant. Thus,

[173] Council of Europe, *"Recommendation 1523(2001) Concerning Domestic Slavery)"*, 26 June 2001, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16924&lang=en [accessed 8 November 2016].

[174] ECHR, Article 5.

[175] In *Galliani v. Romania*, the applicant, Paola Galliani, was an Italian national who on 19 January 1998 entered Romania with a tourist visa which was valid until 2 February 1998. She was repatriated to Italy on 7 May 2000. The case concerned her complaint that, even though no expulsion proceedings had been brought against her at the time, she was unlawfully arrested and placed in custody from 4 to 7 May 2000. She also complained that she was not informed of the reasons for her arrest or given access to a court which would examine its lawfulness. She relied on Article 5 §§ 1 (f), 2 and 4 (right to liberty and security), Article 10 (freedom of expression) and Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens). The Court held unanimously that there had been a violation of Article 5 §§ 1 (f) and 4 and that that finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage Ms Galliani had sustained. The Court further held unanimously that there had been no violation of Article 5 § 2 and declared the remainder of the application inadmissible. *See Galliani v. Romania*, Application no. 69273/01, Council of Europe: European Court of Human Rights, 7 June 2008, available at: http://www.refworld.org/cases,ECHR,4b4f0b5a2.html [accessed 19 January 2017].

[176] ECHR, Article 5 (1) (f): "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

applicant, in order to verify the possibility of violation of this article, the court restricts the right to freedom of migrants in an irregular situation for application of this specific rule [177].

One of the most contentious cases related to undocumented migrants brought to the assessment of the Court involved Article 8 of the ECHR ("right to respect for private and family life"). It was the case of *Rodrigues da Silva and Hoogkamer v. The Netherlands*[178], where the Court's effort to establish arbitrary criteria for family reunification of migrants in irregular situation reflects the '*Boultif* criteria'[179] for expulsion and deportation of foreigners. These general standards include the important consideration: whether family life was created at a time when the persons involved were aware that the migration status of one of them was such that the

[177] "*Any deprivation of liberty under Article 5 (1) (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible [...]".* See *Chahal v. The United Kingdom*, Application no. 70/1995/576/662, Council of Europe: European Court of Human Rights, 11 November 1996, para. 113, available at: http://www.refworld.org/pdfid/3ae6b69920.pdf [accessed 19 April 2018].

[178] "The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorize family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999)." *See Rodrigues de Silva and Hoogkamar v. The Netherlands*, Application no. 50435/99, Council of Europe: European Court of Human Rights, 31 January 2006, para 39, available at: http://www.refworld.org/cases,ECHR,464dcaca2.html [accessed 24 November 2016].

[179] "1. Whether there was an interference with the applicant's right under Article 8 of the Convention; 2. Whether the interference was 'in accordance with the law'; 3. Whether the interference pursued a legitimate aim; 4. Whether the interference was 'necessary in a democratic society'". *See Boultif v. Switzerland*, Application no. 54273/00, Council of Europe: European Court of Human Rights, 2 August 2001, para. 39-48, available at: http://www.refworld.org/cases,ECHR,468cbc9e12.html [accessed 30 April 2018].

persistence of that family within the host state would from the outset be precarious [180]. Under these circumstances, the ECtHR found that “it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8” [181].

Furthermore, the ECtHR’s reasoning in *Rodrigues da Silva Case* illustrates the potential of Article 8 to effectively grant undocumented migrants a right to regularize their legal status. Nonetheless, the Court reiterated that “persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them’ [182].

In *Sisojeva et al v. Latvia*, the Court confirms that the Article 8 extends to situation of irregular residents in principle; however, it ratifies that:

> “[…] article 8 cannot be constructed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyze the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone’.[183]

Additionally, the ECtHR reaffirmed in this sentence its case law for the effect that, although the State has the right to regulate the entry and exit of non-nationals in its territory, this cannot interfere in private and family life, in case the measure is not legal or does not have a purpose or it is not considered necessary [184].

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[180] *Jeunesse v. the Netherlands*, Application no. 12738/10, Council of Europe: European Court of Human Rights, 3 October 2014, para 108, available at: http://www.refworld.org/cases,ECHR,584a96604.html [accessed 18 March 2018].

[181] *Rodrigues da Silva and Hoogkamar v. The Netherlands*, para 39.

[182] *Rodrigues da Silva and Hoogkamar v. The Netherlands*, para 43.

[183] *Sisojeva and Others v. Latvia*, 60654/00, Council of Europe: European Court of Human Rights, 15 January 2007, para 91, available at: http://www.refworld.org/cases,ECHR,4667e00a2.html [accessed 15 September 2018].

[184] “Where children are involved, their best interests must be taken into account … the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Whilst alone they cannot be

As stated earlier in this chapter, Article 16 of the ECHR encompasses that freedom of expression, freedom of assembly and association, and the prohibition of discrimination prevent the Member-State from imposing restrictions on the political activity of aliens.

Regarding the right to freedom of assembly and association described at the article 11 of the ECHR, the court uses the three criteria defined in paragraph 2 and repeatedly applied in case law[185], for evaluating the chances of violation of certain rights enshrined in the ECHR. These include, namely, if it was prescribed by law, if pursued the legitimate purposes, and if necessary in a democratic society. Thus, in the case of irregular migration, the ECtHR understands that the irregularity of the migratory status of a person is not sufficient to justify a violation of his/her right to freedom of assembly, recognizing the presence of important standards relating to the right to association and assembly of undocumented migrants. On the other hand, it recognizes that such rights may be restricted, provided they respect the criteria of exception[186].

5.1.3 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (CFR) enshrines certain political, social, and economic rights for European Union (EU) citizens and residents into EU law. It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. However, its then legal status was uncertain and it did not have full legal effect until the entry into force of the Treaty of Lisbon on 1 December 2009 [187]. All members of the EU are party.

Under the Charter, the European Union must act and legislate consistently with its terms, and the EU Court will strike down legislation adopted by the any EU institution that contravenes it.

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decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it." *See Jeunesse v. The Netherlands*, para 109.

[185] *Cisse v. France*, Application no. 51346/02, Council of Europe: European Court of Human Rights, 9 April 2002, available at: http://www.legal-tools.org/doc/b26edf/pdf/ [accessed 13 November 2016].

[186] Council of Europe, *"The exceptions to Articles 8 to 11 of the European Convention on Human Rights"*, (1997) available at: hhttp://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf [accessed 13 July 2017].

[187] Craig, Paul; Grainne De Burca; P.P. Craig (2007), "*Chapter 11 Human Rights in the EU", EU Law: Text, Cases and Materials*, Oxford University Press, p. 15.

The Charter applies to the Institutions of the European Union and its member states when implementing European Union law.

Nowadays, the European Union[188] is the most paradigmatic example of regional subordination of the primacy of international standards. The State-owned European Constitutions cannot violate Community law. They must respect and preserve its effectiveness, under penalty of judicial condemnation by the European Court of Justice[189]. However, the formation of regional blocks does not solve the need to international law on migration, because while the world is divided into regional blocks there will be the possibility, at least theoretical, that people from countries not belonging to a block immigrating to such a block, or the migration between blocks. In addition, if such agreements allow the freedom of movement on one hand, on the other they restrict the right to free settlement, the right to migration itself.

The legal treatment given by the organization to irregular migrants has three main objectives.[190] The first goal is to prevent the outflow of migrants from their countries of origin; thus, border control begins long before the access to the destination countries through visa restriction policies and agreements with the countries bordering the EU to prevent migrants from crossing their borders. The second goal consists of preventing migrant entry into EU territory by isolating the borders according to the economic interests of Member States. Finally, the third goal refers to the interest in removing unwanted migrants from European territory.

Such efforts to control migration show that the EU recognizes migration as an issue to be handled through defensive measures, e.g. the intensification of border police, which suggests

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[188] Janis, M. W., "*Individuals as Subjects of International Law"*, (1984), Cornell International Law Journal, Volume 17:1.

[189] "It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as either its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitucional charter [...]". *See* European Court of Justice, *"Case 294/83 Parti Ecologiste Les Verts v. European Parliament"*, (1986), ECR 1339, para. 23, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0294&from=EN [last accessed 17 august 2017].

[190] Martínez, Escamilla, *"La Inmigracíon como delito: Un análisis politico-criminal, dogmático y constitucional del tipo básico del art. 318 bis CIP"*, Atelier, 2007.

an antagonistic view of the migrant [191]. This perspective tends to turn migrants into intruders, stigmatizing them as soon as they are not beneficial to propel the host country's economy [192].

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In 2008, the EU adopted the Return Directive in 2008 [195], which envisages the use of punitive measures in the treatment of irregular migration control. The directive recommends greater control and defining standards and procedures used for the return of third-country nationals with irregular status. The migrant is seen as a potential threat, and the directive grants procedural autonomy and discretion for EU members to return undocumented migrants voluntarily or by force. In addition, Article 15 [196] allows member states to arrest migrants during the expulsion procedure for a period of up to 6 months, and that may be extended for up to 12 months. And, when it comes to Article 9 [197], most cases present a decision to return undocumented migrants, accompanied by an entry ban to EU.

Therefore, in the case of the European Union, we see the employment of armed criminal expulsion policy as penal treatment directed to irregular migration, which highlights the

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[191] European Migration Network, *"Practical Measures for Reducing Irregular Migration"*, (2012) available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/gr_20120314_irregularmigration_en_version_final_en.pdf [accessed 8 April 2018].

[192] De Lucas, Javier, *"Inmigracion y globalizacíon acerca de los presupuestos de una política de inmigracíon"*, (2003), Revista Eletrónica del Departamento de Derecho de la Universidad de La Rioja, vol. 1, available at: http://www.unirioja.es/dptos/dd/redur/numero1/delucas.pdf [accessed 9 May 2017].

[193] European Migration Network, *"Practical Measures for Reducing Irregular Migration"*, (2012) available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/gr_20120314_irregularmigration_en_version_final_en.pdf [accessed 8 April 2018].

[194] De Lucas, Javier, *"Inmigracion y globalizacíon acerca de los presupuestos de una política de inmigracíon"*, (2003), Revista Eletrónica del Departamento de Derecho de la Universidad de La Rioja, vol. 1, available at: http://www.unirioja.es/dptos/dd/redur/numero1/delucas.pdf [accessed 9 May 2017].

[195] European Union: Council of the European Union, *"Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals"*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: http://www.refworld.org/docid/496c641098.html [accessed 8 January 2017].

[196] Directive 2008/115/, article 15.

[197] Directive 2008/115/, article 9.

adoption of criminal law with the implementation of penal measures aimed at combating irregular migration [198].

These measures put the irregular migrant in an even more delicate situation, as they risk deportation if they decide to report their irregular and degrading work conditions. Therefore, this criminal law model[199] leaves the migrant even more vulnerable to human rights violations. Leaving irregular migrants on the margins of citizenship without the right to have rights in the country with no bonds of nationality or residence, the host State perpetuates the cycle of exclusion of these individuals in the name of the principle of legality.

Concerning the detention, a Court of Justice of the European Union (heretofore "CJEU") has recently found that the detention of migrants in punitive environments is contrary to international human rights standards and, therefore, ruled that migrants pending removal must not be kept in prisons even if there is no dedicated immigration facility in that part of the State. [200]

For the CJEU, the Member states have the obligation to keep third-country nationals in an irregular situation in specialized detention facilities. This decision certainly helps to ensure that migrants are not subjected to the same detention regime as criminal detainees in the EU. It is a positive step towards the removal of such heavy stigma from migrants.

5.2 The Inter-American Human Rights System

The American Convention on Human Rights (hereinafter IACHR) was adopted in 1969 and came into force on 18 July 1978. Currently, 24 States are party. Although it does not bring any express mention to the rights of migrants, in the same fashion as other human rights legislation,

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[198] Donini, Massimo, *"El ciudadano extracomunitario: de 'objeto material' a 'tipo de autor' em el control penal de la inmigracíon"*, (2009), Revista Eletrónica de Ciencia Penal y Criminologia, Volume 5:72.

[199] Council of Europe: Commissioner for Human Rights, *"Criminalization of Migration in Europe: Human Rights Implications"*, (2010) available at: https://rm.coe.int/16806da917 [accessed 8 April 2018].

[200] *Adala Bero v. Regierungspräsidium Kassel and Ettayebi Bouzalmate v. Kreisverwaltung Kleve*, Joined Cases C-473/13 and C-514/13, European Union: Court of Justice of the European Union, 17 July 2014, available at: http://www.refworld.org/cases,ECJ,53ccd13e0.html [accessed 7 January 2017].

it includes a non- discrimination clause with respect to the rights contained the Convention (Art. 1).

Most importantly, the IACHR determines in article 64 [201] that the organization's Member States can resort to the Inter-American Court of Human Rights for the interpretation of the Convention and treaties related to human rights protection.

The Inter American Court of Human Rigths (hereinafter ACtHR) was established in 1979 as an autonomous international judicial system of the Organization of American States (hereinafter "OAS"), exercising the function of interpreting and applying the IACHR. Moreover, the IACtHR is responsible for clarifying various issues concerning the prevalence of human rights in the American continent, thus contributing to the understanding and the consolidation/ edification of those rights in the region.[202].

Such characteristics, combined with the fact that the region presents great intra-State mobility, makes the study of the Inter American System very relevant to the study of the international protection of irregular migrants. This study, then, will follow with an analysis of the ICAtHR most relevant advisory opinions in the topic of irregular migration.

The IACtHR has stated, in its Advisory Opinion[203] 15/9,7 that "[…] while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does

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[201] "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." *See* IACHR, Article 64.

[202] "[…] the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law. On the international law plane, for example, because the advisory jurisdiction of the International Court of Justice extends to any legal question, the UN Security Council or the General Assembly might ask the International Court to render an advisory opinion concerning a treaty which, without any doubt, could also be interpreted by this Court under Article 64 of the Convention. Even a restrictive interpretation of Article 64 would not avoid the possibility that this type of conflict might arise." *See* Inter-American Court of Human Rights, *"Advisory Opinion OC–01/82 on the 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights", 24 September 1982,* para.50, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf [accessed 16 February 2016].

[203] Whenever conceptualizing general obligation to respect human rights and ensure their free exercise, the IACtHR noted that human rights involve limits that, if disrespected, must be investigated, penalized

have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure" [204]. Lastly, it should be clarified that even in contentious cases submitted to the Court in which the respondent State may be the subject to binding decisions, the discretionary power to continue to hear a case lies with the Court, even if the party bringing the case notifies the Court of its intention to discontinue it, the fundamental guiding principle for the Tribunal is its responsibility to protect human rights. [205]

When it comes to undocumented migrants, the IACtHR issued the important Advisory Opinions OC-16/99[206] and OC-18/03[207], declaring the rights applicable to this vulnerable group of individuals. These opinions constitute a milestone in the protection of rights on that area. The Court expressly recognized the extreme vulnerability characterizing the migrants[208], and imposed on States the obligation to ensure additional guarantees provided to other individuals in their territory.

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and punished in order to repair the damage caused to the victims. Along the same line of thinking, the Court has developed extensive case law as both advisory and consulting body, in pursuit of full responsibility of the State in case of violation of human rights.
The IACtHR's Advisory Opinion has a preventive, collaborative and persuasive role; which while not directly protecting human rights of individuals, it contributes for the strengthening of the principles that permeates the mechanism of protection that guides the American protection system. In this context, "[…] the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto." *See* Inter-American Court of Human Rights, *"Advisory Opinion OC–01/82 on the 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights", 24 September 1982,* para.52, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf [accessed 16 February 2016].

[204] Inter-American Court of Human Rights, *"Advisory Opinion OC–15/97 on the Reports of the Inter-American Commission on Human Rigths", 14 November 1997,* para.26-27, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_15_ing.pdf [accessed 26 February 2016].

[205] Supra.

[206] Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants", 17 September 2003,* available at: http://www.refworld.org/docid/4f59d1352.html [accessed 16 February 2016].

[207] Inter-American Court of Human Rights, *"Advisory Opinion OC–16/99 on the right of information on consular assistance in the framework of the guarantees of the due process of law", 1 October 1999,* available at: http://www.unhcr.org/protection/migration/4bfb8da09/inter-american-court-human-rights-advisory-opinion-oc-1699-right-information.html [accessed 16 February 2016].

[208] "Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents)". *See* Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants", 17 September 2003,* para. 112, available at: http://www.refworld.org/docid/4f59d1352.html [accessed 16 February 2016]..

Moreover, the Court does not seem to establish distinctions between groups of migrants based on regularity of their status, except when it comes to the right to reside in the country[209], since it recognizes control of migratory influx and residence in the territory of the State as elements of State sovereignty.

5.2.1 Advisory Opinion OC-16/99

Advisory Opinion OC-16/99 (on the right of information on consular assistance in the framework of the guarantees of the due process of law) deals with the right to communication about the possibility of consular assistance for all who are detained in a country other than their country of origin. In this case, the IACtHR recognized the peculiar position of vulnerability of migrants, as well as the need to apply mechanisms capable of supplying this circumstance, promoting the material equality of these people in comparison to nationals.

In that trial, the Court held that although the Vienna Convention on Consular Relations[210] has as its main goal the establishment of a balanced inter-State relations, Article 36 (1) (b) [211] guarantees the right of migrant' subject to detention to be informed promptly on the right to communicate with the respective consulate. Such right is individual and essential for the realization of other fundamental rights, such as due process and judicial guarantees[212].

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[209] "The Court has concurred with the conclusion of the United Nations Human Rights Committee, in its General Comment No. 27, where it establishes that freedom of movement and of residence consist, inter alia, of the following: a) the right of those lawfully in the territory of a State to move about freely in that State and to choose their place of residence; and b) the right of each person to enter their country and remain in it". *See* Caso de la Massacre de Mapirán vs. Colombia, Series C No. 122, Inter-American Court of Human Rights (IACrtHR), 15 September 2005, para 168, available at: http://www.refworld.org/cases,IACRTHR,4f5a2c042.html [accessed 20 February 2017].

[210] United Nations, *"Vienna Convention on Consular Relations",* 24 April 1963, available at: http://www.refworld.org/docid/3ae6b3648.html [accessed 16 December 2016].

[211] Vienna Convention on Consular Relations, Article 36 (1) (b).

[212] "Aliens facing criminal prosecution – especially, although not exclusively, those who are incarcerated – must have the facilities that afford them true and full access to the courts. It is not sufficient to say that aliens are afforded the same rights that nationals of the State in which the trial is being conducted enjoy. Those rights must be combined with others that enable foreign nationals to stand before the bar on an equal footing with nationals, without the severe limitations posed by their lack of familiarity with the culture, language and environment and the other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realist avenues to justice, then procedural guarantees become rights 'in name only', mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory." *See* Inter-American Court of Human Rights, *"Advisory Opinion OC–16/99 on the right of information on consular assistance in the framework of the guarantees of the due process of law",* 1 October 1999, Concurring Opinion of Judge Sergio García-Ramíez, available at:

5.2.2 Advisory Opinion OC-18/03

Advisory Opinion OC-18/03 (on the Juridical Condition and Rights of Undocumented Migrant) addresses the human rights of undocumented migrant workers. The IACtHR believes that the irregular condition of migrants does not pose an obstacle to guarantee the human rights of migrant workers in an irregular position. The deprivation of one or more rights on grounds of irregular status of a migrant worker is absolutely incompatible with the duties of the Member States to ensure non-discrimination and equal and effective protection of the law that imposes said provisions [213]. The Court declared the indissoluble bond between the duty to respect and guarantee human rights and the principle of non-discrimination [214]. This way, the State cannot deny to any person the rights enshrined in the treaties, since it has the general obligation to respect and ensure the fundamental rights of all under its jurisdiction, under the common denomination of international responsibility.

In this context, the IACtHR in its Advisory Opinion OC-18/03 ratifies the understanding regarding the formation of a *jus gentium*. The opinion holds the duty of States to respect and ensure the human rights of migrants in the light of the basic principle of equality and non-discrimination, adding that any discriminatory treatment regarding these rights should generate the international responsibility of States. The States have clear responsibilities to the human being and thus cannot condition the observance of the principle of equality before the law and non-discrimination to the goals of their migration policies [215].

Furthermore, the IACtHR stated that the principles of equality and non-discrimination are part of the *jus cogens*[216], consisting of a peremptory norm of international law which is applicable

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http://www.unhcr.org/protection/migration/4bfb8da09/inter-american-court-human-rights-advisory-opinion-oc-1699-right-information.html [accessed 16 February 2016].

[213] Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants*", 17 September 2003, para. 101 and 173 (4).

[214] Committee on Economic, Social and Cultural Rights, *"General Comment No. 20",* 2009, para. 13; and *Gaygusuz v. Austria*, Application No. 17371/90, European Court of Human Rights, 16 September 1996.

[215] "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." *See* ICJ, *"Barcelona Traction, Light and Power Company",* (Belgium v. Spain), 5 February 1970, para. 33.

[216] "As a basis for my analysis of the *jus cogens* concept, I will adopt two assumptions. First, I will take for granted that in the language of international law, the term *jus cogens* denotes a set of legal norms. To that extent, the point of departure chosen for the present article is identical to the one used for Article 53 of the Vienna Convention [...]. Secondly, I will assume the *jus cogens* norm typically to be a norm

to all States, regardless of whether they are signatories to certain international treaties. In regard to the rights of migrant workers, the Courts stated that labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense.

For the IACtHR, a person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination" [217].

It is worth remembering that, the IACtHR affirms to be plausible the distinction by the State between regular and irregular migrants and between migrants and nationals, provided it is reasonable, objective and does not violate human rights.[218] However, the Court ruled the

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having a regulative character. […]. When a norm is used to identify some behavior or state of affairs as either prescribed, prohibited, or permitted, it is said to have a regulative character. When instead a norm is used to create an institutional fact, it is said to have a constitutive character. […] Certainly, the proper definition of a legal norm is a matter of debate, but I will not here engage in this philosophical polemic any more than is absolutely necessary, considering the purpose at hand. Hence, I will confine myself to establishing two propositions generally practiced in the analysis and systemization of international law. Arguably, participants of the international law discourse accept them as a matter of course: (1)A legal norm is not to be identified with the utterance or utterances by which we assume the norm to be expressed.[…] (2) In order fully to reconstruct the contents of a legal norm having a regulative character, we need to be able to state, first, the specific kind of conduct or state of affairs prescribed, prohibited, or permitted, and, secondly, each and every single condition on which the prescription, prohibition, or permission is to be dependent, including to whom it applies" *See* Linderfalk, Ulf, *"The Effect of 'Jus Cogens' Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?"* (2007), The European Journal of International Law, Volume 18, pp. 853-871.

[217]Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants*", 17 September 2003, para. 133.

[218] "118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all person who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason. 119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human

impossibility for States to subordinate the human rights of migrants, in particular labor rights of undocumented migrants,[219] to their migration policies, due to the obligations enshrined in the 1966 International Covenants and other obligations *erga omnes*.

Moreover, in the Case of the Street Children,[220] the IACtHR stated that the right to life comprises not only the right of all persons not being deprived of life arbitrarily, but also the right to having access to the conditions needed to lead a dignified life. Cançado Trindade points out that the humanist conception of international law must overcome the positivist position, as a way to ensure a binding protection system that guarantees universal hospitality [221].

In this context, while human rights are widely recognized and determined at the international level by the UDHR, other international treaties, effective political protection is still lacking. State intervention is the most effective obstacle to the exploitation of human beings, national or migrant. The mere fact that several States have made international commitments to protect human rights has not removed the difficulties of obtaining international consensus on the treatment to be given to migrants in general. Still, it is up to the national legislator to establish rules and mechanisms of protection for these individuals. Thus, it is still a long way for the construction of an effective apparatus for the protection of the human rights of migrants in an irregular situation.

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rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity." *See* [218] Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants", 17 September 2003,* available at: http://www.refworld.org/docid/4f59d1352.html [accessed 16 February 2016].

[219]"In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship." *See* Inter-American Court of Human Rights, *"Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants*",17 September 2003, para 134.

[220] *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala,* Inter-American Court of Human Rights (IACtHR), 19 November 1999, available at: http://www.refworld.org/cases,IACRTHR,4b17bc442.html [accessed 1 July 2017].

[221] Cançado Trindade, Antônio Augusto, *"A Humanização do Direito Internacional"*, Del Rey, 2006, p. 28.

5.3 Conclusion

This chapter's goal was to answer the sub-questions: to what extent the regional systems of human rights apply to protect the rights of undocumented migrants? What is the understanding and jurisprudence of the international courts in this regard?

Analyzing the extension to each the ECHR is applied to undocumented migrants, we can conclude that the Court pursues a balance between State Sovereignty and the Principle of Equality and Non-discrimination. In an attempt to find an answer for this conundrum, the prevalent understanding is that neither Sovereignty nor Equality and Non-Discrimination are absolute.

The Court understands that the convention creates a network of objective positive and negative obligations, which benefits from collective enforcement. In the understanding of the Court, the ECHR obliges both higher authorities of the Contracting States, but also subordinate levels. Further, the Court interprets Article 1 (Obligation to respect Human Rights) as extensive to everyone under a State's jurisdiction, including undocumented migrants. The Court also understands that the right of individual petition, prescribed on Article 34 can also be enjoyed by undocumented migrants. Such interpretations, mean that an irregular migrant who has had their right breached by any authority of a state can complain before the Court.

In other words, the ECtHR legitimates the right of a State to legislate on migration, and control the entry and residence of foreigners in its territory. However, it also determines that it should be done after due process, e.g. all persons deprived of liberty shall be informed in a language they understand about the reasons for detention. Additionally, the ECtHR reaffirmed that, although the State has the right to regulate the entry and exit of non-nationals in its territory, this cannot interfere in private and family life, in case the measure is illegal or unnecessary.

It is also an understanding of the ECtHR that Article 14 (Prohibition of Discrimination) does not require absolute equality. If, in one hand, the prohibition of slavery and servitude is an absolute right where the Court makes no distinctions about the migratory status, in the other, certain rights are treated differently in different circumstances.

For example, the ECtHR legitimates the expulsion of those undocumented migrants convicted of crimes, notwithstanding this is not applicable to documented migrants or nationals. Further, Member States have the possibility to refuse the provision of certain social services but they

also have the duty to ensure that such privileges are not used as forms of threats for the purpose of exploitation of those individuals [222].

When it comes to the European Union, it is observed that, in spite of the express provision on equality and non-discrimination in the CFR, an emphasis in State Sovereignty has been growing steep since 2008, with the adoption of Return Directive, which envisages the use of punitive measures in the treatment of irregular migration, to the point that irregular migrants face risks of being imprisoned as criminals.

However, the Court of Justice of the European Union most recent jurisprudence is that the detention of migrants in punitive environments is contrary to international human rights standards migrants pending removal must not be kept in prisons.

Regarding the Inter-American System, the Convention recognized the principle to equality and non-discrimination. However, the IACtHR goes much further, identifying such principles as norms of *jus cogens*, applicable to all states States, regardless of whether they are signatories to certain international treaties. However, the IACtHR does accept the distinction by the State between regular and irregular migrants and between migrants and nationals, provided it is reasonable, objective and does not violate human rights.

[222] Article 2 establishes differentiations between nationals and aliens with respect to the freedom of movement, restricting the right to freedom of movement and residence to those who are legally in the territory of the Member State. *See* Council of Europe, *"Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto"*, 16 September 1963, ETS 46, available at: http://www.refworld.org/docid/3ae6b3780.html [accessed 8 July 2017].

Conclusion

This research set out to answer the question of what extent International Human Rights Law protect and rights of undocumented/irregular migrants.

Migration was defined as the relocation of an individual across two different jurisdictions. Undocumented/irregular migrants was defined, by exclusion, according to Article 5(1)(b) of the Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW), as an individual who, regardless of their background or cause for moving, has relocated to a new country without the permit, visa or document necessary to authorize someone to legally live and work in that jurisdiction. The best terminology was identified; while illegal migrants was found inadequate, undocumented and irregular migrants were found to be synonymous and were used interchangeably throughout this study.

Particular human rights vulnerabilities, faced mostly or more hardly by irregular migrants were identified. Undocumented migrants are more vulnerable at the workplace, being easier targets for exploitation and servitude. They also face great difficulties to enjoy the right to the highest attainable standard of health and access education. Such difficulties are, to a large extent, originated in the fear of having the irregularity of their migration status exposed. Women and children are also more exposed to human rights violations, such as sexual exploitation.

Despite the historic view of State Sovereignty being absolute, since post-WWII, with the creation of the UN, States, aiming at achieving lasting peace, and under the customary law principle of *pacta sunt servanda*, have exercised their Sovereignty to engage into universal accords that privilege human rights. Such accords are, then, mandatory to all parties. Currently, it is the general understanding that States detain the monopoly of the control of mobility into their territories. As rule a State has the right and authority not to allow in their territory individuals who do not have consent and take actions to remove such individuals from their domains.

Although only one of the core UN human rights instrument is dedicated to the subject of migration and only two out of nine bring the word migrant or migration, all of them include the principles of equality and non-discrimination both in their preamble and enshrined in one of their articles. This, alone, could be enough to conclude that undocumented migrants are entitled to protection under all these instruments. The principles of equality and non-discrimination is

a common argument amongst the Treaty Based Committee of Experts, to justify undocumented migrant's entitlement to the different human rights.

However, all of the nine core instruments of the universal system possess specific articles tackling specific vulnerabilities faced by irregular migrants, such as the right to health and the right to work with dignity. *All* Experts Committees, without a single exception, have general comments clarifying that virtually *all* the rights in the treaties are applied to *all* individuals within a State's territory documented or not - the exceptions being the right to take part in elections and the right to acquire citizenship. E.g. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child have issued a joint general comment urging states to develop an effective firewall between education institutions and immigration authorities, among other measures, to make the access of education of undocumented migrants, especially undocumented migrant children attainable.

When it comes to the regional system for human rights protection, all documents researched - the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the American Convention on Human Rights – expressly recognize the principle of equality and non-discrimination. The regional courts strive to balance States Sovereignty over their borders with the Principle of Equality and Non-Discrimination. The prevalent understanding is that neither Sovereignty nor Equality and Non-Discrimination are absolute.

The IACtHR does recognize the control of migratory influx and residence in the territory as elements of State Sovereignty. It also accepts the distinction between regular and irregular migrants and between migrants and nationals provided it is reasonable, objective and does not violate human rights. However, the IACtHR understands the principles of equality and non-discrimination as a norm of *jus cogens* with *erga omnes* effect, applicable to all states regardless of whether they are signatories to certain international treaties. For the court, the lack of a migration document is not proportional to the violation of an individual human rights.

The ECtHR also legitimates the right of a State to legislate and control the entry and residence of aliens in their jurisdiction. But it also understands that *all* individuals under the jurisdiction of a State-party are entitled to the rights enshrined in the ECHR and that undocumented migrants have the right to petition seeking to remedy human rights violations. So, the court requires that the border control exercised by States shall be done respecting the individual's

human rights, such as due process – which is also the understanding of the UN Human Rights Committee. Moreover, the right to regulate border flux cannot interfere in private and family life, in case the measure is illegal or unnecessary.

The ECtHR considers that equality shall not be absolute and rights are treated differently according to circumstances. In the same fashion as the IACtHR, the prohibition to slavery and servitude is absolute. However, documented migrants and nationals who commited crimes are protected from expulsion which is not the for the undocumented migrants. Additionally, as long as not used as threats and exploitation, States can refuse the provision of certain social services to undocumented migrants.

In the European Union there has been observed, since the last ten years, the strengthening of States Sovereignty with the use of punitive measures in the treatment of irregular migration. However, the Court of Justice of the European Union's jurisprudence is clear that the detention of migrants in punitive environments is contrary to international human rights standards.

In summary, the current framework for human right protection, both universal and regional, do protect irregular/undocumented migrants to a great extent. If, in one hand, to be let in or out of a jurisdiction is, almost always, a discretionary act of a state, the human being carries with them the status of being human wherever they go. And, with a few exception of rights that are reserved to nationals or to documented migrants – such as the rights to participate in elections and to acquire citizenship.

However, there is a great discrepancy between what the legal instruments preach and the reality of human rights implementation. In this context, international human rights courts can play an important role as interpreters of human rights treaties. These courts have the opportunity - and the challenge - to impose changes in the practices adopted by the states in the internal sphere so that, at a later time, they adopt a proactive stance towards realizing the rights migrants in an irregular situation.

Given the *status* of 'irregular' cannot prevail over the over human condition of undocumented migrants, the Judiciary has the important role of assisting in the management of an existential minimum, as regards the contents and boundaries of the actions and omissions of other State offices. Furthermore, despite the controversy about International and Regional Courts ability to protect human rights, a number of cases concerning violations of the rights and freedoms of

migrants have been brought before them. Thus, even if decisions taken on international and regional perspective are not fully complied with by the States, one cannot deny that said decisions constitute at least an effective way to pressure society and States to change their policies.

Nevertheless, there is a long path to be taken for the construction of an effective aspect for the protection of the human rights of undocumented migrants. Giving this scenario, it is necessary to confront the issue of these by his humanness, fundamental rights and guarantees coated as access to justice, which are essential, so he can legally request the cessation of the violation of rights. Lastly, there is no claim for a lack of supervision and control, but that each State favors the development of policies bringing greater prestige to the human dimension involved in irregular migration. The ideal for a migratory policy is not to close the borders, but to regulate and manage the migration flows, along with the coexistence of people of different origins and cultures, in all cases respecting the international and regional system of human rights.

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