Chapter 4
The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism

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4.1 Introduction

Human rights law aims to provide comprehensive legal protection for fundamental rights. However, this universalist aspiration is often not translated into reality when it comes to the treatment of migrants with irregular status. The protection human rights law affords to such migrants is often diluted – either as a matter of law, or of *de facto* political reality. However, human rights law can still serve as an important tool for challenging exclusionary policies directed against irregular migrants. This chapter sets out to explore when and why this can be the case.

4.2 The Universalist Orientation of Human Rights Law

Human rights are supposed to be universal. By definition, they require every individual to be treated as entitled to a certain baseline level of dignified treatment, irrespective of nationality, race, gender, or any other distinguishing markers. Their universalism is affirmed by the founding text of the modern international human rights movement, namely the Universal Declaration of Human Rights (UDHR). Article 1 of the Declaration states that "all human beings are born free and equal in dignity and rights", while Article 2 asserts that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex…national or social origin…birth or other status".

Indeed, this quality of universality is often regarded as the special ingredient that (i) differentiates human rights claims from other important interests, entitlements, or values, and (ii) gives them a special prioritarian status that justifies why they

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should 'trump' other potentially competing considerations (Tasioulas 2010). What qualifies as a human right is usually defined by reference to accounts of what we owe each other as fellow human beings: these obligations, rooted in our common humanity, are deemed to prevail over other potential reasons for action, such as the obligations we feel we may owe to specific religious, ethnic, or national groups of which we are a member, or to particular ideological end-point goals, or to the state that commands our loyalties as citizens (Griffin 2008). In other words, universality gives force and definition to the concept of human rights: it is both their key distinguishing feature and the source of their normative power.

It is therefore not surprising that the universal scope of rights protection is acknowledged in the major international and regional human rights treaty instruments—which, unlike the UDHR, are binding as a matter of international law upon states which have signed and ratified their provisions. Thus Article 2 of the International Covenant on Civil and Political Rights (ICCPR), the major UN-endorsed international treaty covering core civil and political rights, echoes the language of Article 2 of the Declaration in providing that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, with distinction of status…" The provisions of the other major UN human treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are all expressed in similar universalistic terms (Dupper 2010).

At the regional level, Article 1 of the European Convention on Human Rights (ECHR) similarly provides that state parties "shall secure to everyone within their jurisdiction" the civil and political rights set out in the Convention. So too does Article 1 of the Inter-American Convention on Human Rights as also do multiple provisions of the African Charter of Human and Peoples' Rights and the provisions of the EU Charter of Fundamental Rights. Similarly, the core labour rights standards set out by the International Labour Organisation (ILO) protect all workers regardless of legal status or group affiliation (Merlino and Parkin 2011). In general, international human rights law is thus structured around the idea that every individual is entitled to the protection of their fundamental rights, regardless of nationality or other 'status' (ICJ 2014).

4.3 Rights Universalism in Tension with the Hierarchical Approach of National Law

In contrast, when one looks at the situation at the state level, national law does not treat non-nationals as being on an equal footing as nationals, meaning that sharp distinctions often exist between the legal rights of citizens and others. This is, for

example, the case with US constitutional law, where the US Supreme Court in the immigration case of *Demore v Kim* confirmed in 2003 that it was lawful for Congress to make rules "that would be unacceptable if applied to citizens" (Cole 2003).[1] Similarly, the status of non-national 'aliens' in the UK was historically regulated via the royal prerogative rather than through legislation, meaning that ministers of the Crown could regulate the lives of aliens present on UK soil in a manner that would have been unlawful if applied to UK nationals (Macdonald 2013).

There is therefore an inherent tension between the universalist orientation of international human rights law and the hierarchical approach of national legal systems, which regularly classify non-citizens as possessed of lesser rights than citizens. Given this tension, it is not surprising that issues of migrant rights are a regular flashpoint when it comes to the relationship between these two different categories of legal order—with the treatment of irregular migrants being a particular source of friction.[2]

Within national legal systems, irregular migrants suffer from a double layer of legal exclusion: (i) they are not accorded the special status and associated legal entitlements enjoyed by citizens of the state on whose territory they are present, but also are (ii) regularly denied access even to the lesser privileges accorded to the various classes of migrants who enjoy regularised status within the state concerned. The combined effect of these two layers of exclusion—usually set out in legislation or generated by administrative practice or both—often results in irregular migrants been driven to the margins of society. They can struggle to access basic health care, housing, and education, and are generally denied access to wider forms of social entitlements and the protection of labour law. Furthermore, they are vulnerable to the threat of deportation and other immigration control processes, and often exist in a legal 'grey area' with few of any secured rights to reside, remain, or work in the state in question (Pobjoy and Spencer 2012).

This vulnerable status is analogous to the concept of 'bare life' outlined in the work of theorists such as Agamben and Arendt, who argued that individuals denied political and/or socio-economic membership of a body politic were in effect deprived of the shelter of a civil identity and left in a rightless limbo (Agamben 1998; Arendt 1968; 147–82). This 'bare life' analysis fits the situation of irregular migrants in national law well: their lack of legal entitlement to participate in the life of the society that surrounds them, or even to contest the terms of their exclusion, makes them vulnerable to a comprehensive denial of their human needs (Rancière 2004; Schaap 2011).

However, at the level of international law, irregular migrants fall squarely within the universalist scope of human rights guarantees such as Article 2 ICCPR and

[1] *Demore v. Kim*, 538U.S. 510, 4 (2003), in turn quoting the earlier case of *Mathews v. Diaz*, 426U.S. 67, 80 (1976). In *Demore*, the Supreme Court concluded that a non-national could be detained by the immigration authorities for lengthy periods pending deportation, unlike the case with US nationals.

[2] See e.g. *Üner v The Netherlands* (2007) 45 EHRR 14; *AP (Trinidad & Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551.

Article 1 ECHR, with their requirement that states secure the rights of all individuals within their territory. Furthermore, their vulnerability—the way in which they are often reduced to the status of 'bare life'—would appear to run counter to core human rights values on account of how it exposes them to the risk of loss of shelter, separation from family, lack of means of subsistence, and exposure to the unconstrained coercive power of the state. As such, they would appear to be prime candidates to benefit from the universalist ambitions of human rights law.

The fact that irregular migrants come within the protective scope of human rights instruments has been repeatedly emphasised by a range of international organisations, including the UN and the Council of Europe. Such organisations have consistently argued that states should adopt a 'human rights approach' to migration control by focusing on protecting the human dignity of irregular migrants when implementing removal policies and regulating their access to social support, education, and health care, and so on.

Thus, for example, the UN High Commissioner for Human Rights (UNHCHR), in conjunction with the UN Global Migration Group (GMG), declared in 2010 that the "irregular situation which international migrants may find themselves in should not deprive them either of their humanity or of their rights. As the Universal Declaration of Human Rights states: all human beings are born free and equal in dignity and rights" (UNHCHR/GMG 2010). This statement was accompanied by a range of criticisms of existing state policies and practices, including a call for measures to be taken in conjunction with civil society to "respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfil the rights necessary for them to enjoy a life of dignity and security". Similarly, the Council of Europe Commissioner for Human Rights in 2007 called for a rights-centred approach to irregular migration, and set out a range of policy recommendations for putting this approach into effect, with the aim of ensuring that state policy strikes "a proper balance between protecting the rights of all those who are inside or at its borders, and maintaining control of the borders" (Council of Europe 2007).

Other bodies such as the World Health Organisation (WHO), the UN Committee on Migrant Workers (CMW 2013), the UN Committee for the Elimination of Discrimination against Women (CEDAW 2008), the International Commission of Jurists (ICJ 2014), the UN Special Rapporteur on the Rights of Migrants (Pizarro 2004) and even—in qualified terms—the UN General Assembly (UNGA 1985) have also called for the application of this 'human rights approach' to the situation of irregular migrants.

At the national level, NGOs, migrant support groups, and human rights campaigners have similarly campaigned for states to adopt a rights-focused approach to immigration control. Such campaigns have often invoked the universality of human rights to make the case as to why, for example, irregular migrants should be able to access primary health care, housing, and other forms of essential state support or to contest attempts to deport, detain, or otherwise subject them to treatment not generally afforded to other persons.

4.4 The Limits of Human Rights Law as It Applies to the Situation of Irregular Migrants

However, this appeal for a 'human rights approach' to the problem of irregular migration covers over some unresolved tensions. If one takes a closer, more detailed look at the substantive content of human rights law and its impact on the situation of irregular migrants, then some gloss begins to come off the picture. Sometimes human rights guarantees lack any impact due to what can be described as 'external' constraints on their impact. At other times, factors 'internal' to international human rights law dilutes the protection it should offer to irregular migrants if it were to remain in full concordance with its universalist aspirations. Furthermore, there are times when international human rights law is simply silent—meaning that it has not generated clear standards in areas of particular relevance to the situation of irregular migrants, often as a result of inaction or foot-dragging on the part of state parties whose consent to the establishment of such standards is always necessary. When added together, these limitations constrain the 'bite' of international human rights law as a tool for contesting state moves to create a 'hostile environment' for irregular migrants.

4.4.1 'External' Constraints

At times, these limits in human rights protection as it applies to irregular migrants are 'external' to human rights law, i.e., they involve problems relating to the impact and enforcement of human rights standards, as opposed to 'internal' flaws in their structure or content. Such external factors restrict the effectiveness of human rights law in many different contexts, which extend well beyond immigration control. However, their negative impact is often amplified when it comes to issues relating to the treatment of irregular migrants.

For example, states are often reluctant to give effect even to well-established international human rights standards, resenting what they see as external imposition (Goldsmith and Posner 2007). Attempts by NGOs and other campaigners to invoke human rights norms when challenging government policy will often generate backlash, with criticism frequently focusing on their 'undemocratic' or 'elitist' character (O'Cinneide 2019). Furthermore, the enforcement mechanisms for human rights treaties are very weak, meaning that states often face little international pressure to conform to their requirements.

International human rights law also often has an uncertain status within national legal systems. Its requirements may be subordinated to national legislation, or narrowly interpreted and applied by national courts, or otherwise marginalised. Legal remedies for rights violations may be difficult or even impossible to access. Coupled with political hostility, this can result in a situation where public authorities may face little or no substantive pressure to adhere to human rights requirements (Posner

2014), especially when they relate to vulnerable groups such as irregular migrants who are easy to demonise as undeserving of rights protection.

In other words, such external constraints on human rights law have a tendency to become a significant problem when the universalist orientation of human rights law runs up against political expectations at the national level that greater controls should be imposed on migrant influxes. In such situations, even well-established human rights legal frameworks can come under real pressure—as demonstrated, for example, by the political backlash in the UK, the Netherlands, and elsewhere against the constraints imposed on government deportation powers by the case-law of the European Court of Human Rights in respect of the right to family life protected under Article 8 ECHR (Bates 2014).

It can thus be difficult for the universalist orientation of human rights law to translate into positive improvements in the situation of irregular migrants. Rights universalism may promise more than it can deliver, especially when it runs up against political headwinds: external factors linked to the often-uncertain status of human rights law within national legal orders can substantively limit its impact.

That said, such external constraints come with the territory of human rights. They are perennial challenges that human rights campaigners strive to overcome in multiple different contexts. As such, these limitations pose a problem *for* the universalist ambitions of international standards rather than constituting a flaw *in* such standards: they are serious obstacles to be negotiated by campaigners fighting for a 'human rights approach' to be applied to the situation of irregular migrants, but do not undermine the 'internal' logic of human rights law itself.

4.4.2 'Internal' Constraints

However, the same is not true for certain aspects of human rights law as it applies to irregular migrants, where its universalist orientation has been diluted or otherwise compromised. In such situations, an 'internal' tension is generated between the lofty expectation that rights protection should apply equally to all persons and the qualified human rights law standards that are applied in practice—which undercuts human rights law's attachment to comprehensive universalism and substantially limits the rights protection afforded to irregular migrants.

To start with, the fact that irregular migrants are protected by human rights law does not necessarily mean that less favourable treatment of such migrants by states will constitute a breach of their legal obligations. Interference with individual rights will generally be 'objectively justifiable', if (i) the right in question is not a core or 'absolute' entitlement such as freedom from slavery or inhuman and degrading treatment and (ii) the interfering action in question can satisfy the 'proportionality' test used in human rights law to determine the legitimacy of state action. In this regard, courts have repeatedly accepted that state detention of irregular migrants, denial of access to social services, and certain other measures designed to create a 'hostile environment' constitute proportionate means of achieving the legitimate

aim of enhanced immigration control. Such judgments adhere formally to the universalist principle of equal rights protection, as irregular migrants are treated as having the same rights as others. However, the leeway usually given to national governments when it comes to defining what constitutes a breach of such rights often opens the way for irregular migrants to be subject to wide-ranging legal sanctions that would, in other circumstances, constitute a breach of basic norms (Costello 2015).

Similarly, courts have regularly adopted a narrow interpretation of the scope of state obligations to respect the human rights of irregular migrants on the basis that states can be assumed to have limited responsibility for migrants who have no legal entitlement to remain on the territory in question. For example, in the UK case of *R (Guveya) v NSS*,[3] the High Court concluded that there had been no breach of Articles 3 and 8 ECHR where no welfare support was given to a failed asylum seeker who refused to return home: the asylum seeker's failure to return was deemed to have relieved the UK government of any further obligation to meet their needs. Similarly, the European Court of Human Rights ruled in *N v UK*[4] that compelling irregular migrants to return to their countries of origin, even though they were receiving life-sustaining treatment in the UK that would not be accessible on their home states, would only constitute a breach the Article 3 ECHR right of freedom from inhuman and degrading treatment in certain very limited circumstances (Mantouvalou 2009). Again, there is formal adherence to the universalist approach in these cases, as irregular migrants are treated as benefitting from the scope of protection of rights provisions such as Article 3 ECHR just like anyone else. However, in practice, the restricted concept of state 'interference' with rights that is applied in such situations dilutes the impact of this formal universalism.

There are also 'internal' issues with the way in which human rights law has developed much more substantive standards in relation to some rights than to others. Across the human rights spectrum, certain rights are better protected than others, in the sense of being defined in more concrete terms, enjoying a more elevated status, and/or attracting higher levels of state compliance. In effect, this means that there are 'stronger' and 'weaker' types of rights claims, despite high-profile declarations made at international level recognizing the 'indivisibility of human rights'.[5] This distinction again sits uncomfortably with the universalist orientation of human rights law and has a particular impact on the situation of irregular migrants—as a comparison of the status of civil and political rights on the one hand and socio-economic rights on the other will show.

Civil and political rights such as the right to liberty or the right to fair trial fall into the 'strong' rights category. They are protected by a range of comparatively strong treaty instruments such as the ECHR, Inter-American Convention on Human

[3] [2004] EWHC 2371 (Admin).

[4] (2008) 47 EHRR 39.

[5] See e.g. the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5: "[a]ll human rights are universal, indivisible and interdependent and interrelated…".

Rights, and the ICCPR. Their scope and substance have also been mapped out in detail through the extensive case-law generated by bodies such as the European Court of Human Rights and the UN Human Rights Committee. Furthermore, civil and political rights standards benefit from a wide degree of political support: this ensures relatively high levels of compliance with this case-law. It is also common for civil and political rights standards to be incorporated into national law, meaning the provisions of an instrument such as the ECHR can be applied directly by national courts.

Thus, for example, if a European state detains irregular migrants pending deportation, their conditions of detention must satisfy the general requirements of the Article 3 ECHR right to freedom from inhuman and degrading treatment.[6] Article 5 ECHR, which protects the right to liberty, also requires that state authorities must have a clear legal basis for any such detention—as they should for any and all forms of deprivation of liberty.[7] Individuals without a lawful basis on which to remain on the territory of a host state cannot be deported back to their state of origin if they face a real risk of torture on their return or exposure to certain other forms of inhuman and degrading treatment—with this doctrine developing by extension from the absolute prohibition of torture applicable to all under the Convention.[8] Moves to deport irregular migrants may also in certain limited circumstances breach the Article 8 ECHR right to home, family, and private life, in particular where it would disrupt long-established family ties with the host state (Thym 2008): again, this particular doctrine is derived from the general protection conferred by Article 8 on all established family groups.

In contrast, the scope and substance of socio-economic rights such as the right to access health care or social welfare are much more contested. Socio-economic rights instruments such as ICESCR and the European Social Charter (ESC, the Council of Europe's social rights 'sister instrument' to the ECHR) have less status than their civil and political counterparts: states often regard their provisions as setting out vague aspirations rather than concrete rights guarantees, and it is rare for such rights to be enforceable in national legal systems. The standards developed by the expert committees that interpret these socio-economic rights instruments and assess whether state parties are complying with their requirements—the UN Committee on Economic, Social and Cultural Rights (CESCR) in the case of ICESCR, and the European Committee on Social Rights (ECSR) —are often disregarded or only attract lip service. Alston has even gone so far as to argue that socio-economic rights, in contrast to their civil and political counterparts, "remain largely invisible in the law and institutions of the great majority of states" (2017).

This differential approach to the protection of socio-economic rights has a real impact on irregular migrants. They often face substantial barriers in accessing social

[6] App. no. 53541/07, *S.D. v Greece*, Judgment of 11 June 2009; *M.S.S. v Belgium and Greece*, (2011) 53 EHRR 2.

[7] App. nos. 45355/99 and 45357/99, *Shamsa v Poland*, Judgment of 27 November 2003; App. no. 52722/15, *S.K. v Russia*, Judgment of 14 February 2017.

[8] *Chalal v U.K.* (1997) 23 EHRR 413.

services, education, health care, and other forms of socio-economic support. However, the obligations of states under human rights law to provide such services is not always clear—and little if any consensus exists as to when the exclusion of irregular migrants from accessing such services will actually breach the socio-economic provisions of human rights treaties (O'Cinneide 2014). Furthermore, there is usually very limited opportunity to invoke such rights before national courts, and they lack political status. As such, the segment of the human rights spectrum that is perhaps most directly relevant to the situation of many irregular migrants—on account of how they often lack access to basic forms of health care, housing, and social support—is lacking in real substance: a situation which is difficult to reconcile with the universalist aspirations of human rights law, and in particular with the notion that fundamental rights protection should be 'indivisible'.

4.4.3 The Lack of Express Human Rights Standards Relating to Irregular Migrants

There are also very few established standards relating to the rights of migrants as a distinct class of individuals. Human rights law has developed detailed requirements as to how women, ethnic minorities, persons with disabilities, children, and other vulnerable groups should be treated by states through instruments such as CEDAW, CRED, and CRC. But the one international treaty that sets out similar standards in relation to migrant workers—the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (the 'ICMW')—has not been ratified by any state which is a net importer of migrant labour.[9] This has substantially undermined its status as an authoritative source of human rights obligations: non-ratifying states are not legally bound by its provisions, and the refusal of migrant-receiving states to endorse its provisions means that it also lacks political impact. As Pécoud has argued, the ICMW is "clearly the most controversial and contested" of the core UN international human rights treaty instruments (2017). This means that little, if any, clarity exists as to the scope and substance of migrants' rights as a specific category of rights-holders, let alone those of irregular migrants.[10]

Certain specific provisions of international human rights law impose concrete obligations on states in relation to irregular migrants. For example, Article 4(3) of the Council of Europe's 2011 Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention') provides that state parties should give effect to its requirements "without any discrimination…on the ground of migrant or refugee status". This is an important provision, as it clarifies that female victims of violence are entitled to state protection and support

[9] No EU or North American state has signed or ratified the ICMW.

[10] Article 18 and 19 of the ESC contains provisions that set out certain migrant rights, but they are limited in scope and impact (as discussed further below).

irrespective of their migration status—a point emphasised in the official Council of Europe factsheets produced to accompany the Convention.[11]

However, such an express provision clarifying that irregular migrants are entitled to the full and equal protection of the rights set out in the human rights instrument in question is rare. The ICMV adopts a different approach. Its text makes it clear that irregular migrants are entitled to have their basic civil and political rights protected—and also to have access to certain socio-economic entitlements, such as emergency health care, education (in the case of children), and protection against employer exploitation.[12] Nevertheless, its provisions also differentiate between the rights of migrant workers and their families who are in a "documented or a regular situation" and those who are not, with the former benefiting from a much wider range of rights guarantees than the latter (Dupper 2010).[13] Furthermore, Article 35 of the Convention provides that nothing in its text "shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation". Thus, in giving with one hand, the ICMV takes with its other: it recognises irregular migrants as entitled to a range of fundamental rights protection, but also accepts that this protection should be considerably more limited than that on offer to other categories of migrant (*Ibid.*).

Other treaties go further in limiting their application to irregular migrants. The Appendix to the ESC, as discussed below, provides that Social Charter rights apply to non-nationals "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". This ambiguous provision has caused problems of interpretation, as discussed further below. However, it is a striking example of the universalist reach of a human rights instrument being expressly reined in to limit its scope of application to irregular migrants—a decision that dates back to when the text of the Social Charter was agreed in 1960 (O'Cinneide 2014).

4.5 Dynamics of Dilution

To summarise, a tension exists between the universalist orientation of human rights law and its diluted scope of application to the situation of irregular migrants.[14] Why has this tension emerged? Why has the universalism principle—the conceptual basis of human rights law—been so diluted when it comes to the situation of irregular migrants?

[11] See Council of Europe, Safe from Fear, Save from Violence: Preventing and Combating Violence against Women and Domestic Violence (2016), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046eabd

[12] See Articles 1–35 ICMV.

[13] See Articles 36–56 ICMV.

[14] For further discussion, see the excellent collection of essays in Dembour and Kelly 2011.

Several different factors seem to be in play. The under-development of socio-economic rights is a general problem within the field of human rights law: however, this particularly impacts on irregular migrants on account of their precarious status. Human rights law is increasingly exposed to political attack, on the basis that it allegedly interferes with national sovereignty: irregular migrants have to some extent been caught up in this cross-fire. Immigration control is a complex area, involving competing values and intricate questions of policy: human rights law can struggle to set out clear standards in such messy normative terrain.

However, there is one particular factor which impacts directly or indirectly on all these other considerations and which seems to exert a key influence on the dilution of rights protection as it applies to irregular migrants—namely, the wider tension discussed above between the universalist orientation of international human rights law and the hierarchical approach of national legal systems. The universalist orientation of human rights law may attract plenty of lip service, but the hierarchical approach of national law—and in particular the way it privileges accepted members of the civic community over 'outsiders' and gives national governments wide leeway to control migrant flows—is generally assumed to be a desirable, fixed, and necessary element of a state-centred system of global governance. As a result, the presumed need to preserve national immigration control is often assumed to trump the logic of rights universalism, in particular in situations where the rights claim at issue is not viewed as being sufficiently fundamental to justify a different approach, as tends to be the case with socio-economic rights, for example.

External pressure on human rights law thus often becomes very intense when it is invoked to challenge national immigration control policies.[15] Similarly, internal constraints on the application of 'full' rights universalism to irregular migrants are often based on the assumption that human rights law should not substantially interfere with the national prerogative of controlling migration flow, and that the responsibility of host-states towards irregular migrants is limited by virtue of their lack of legal entitlement to be on its territory.[16]

In other words, the limited reach of human rights law when it comes to the situation of irregular migrants seems ultimately to be motivated by the view that national authorities should generally be left alone to determine their own response to irregular migrants rather than being subject to overreaching international norms invoking an abstract notion of universalism. This view frames the problem of irregular migration as a social and economic issue to be determined by state regulation, rather than as a human rights matter: human rights law may be relevant at the margins to ensure compliance with fundamental civil and political entitlements, but beyond that, the interests embodied in state law and policy are assumed to have free rein (Vucetic 2007). This view has been subject to penetrating and compelling criticism on the basis that it gives insufficient weight to the human dignity and 'personhood' of

[15] As illustrated above by the example of political responses in the UK to the use of ECHR and EU legal standards to challenge migration policies.

[16] See e.g. the judgment of the European Court of Human Rights in Application no. 17931/16, *Hunde v Netherlands*, Judgment of 5 July 2016.

migrants present within the territory of states (Bosniak 2006; Carens 2013). However, it has cast a substantial shadow over human rights law as it relates to the situation of irregular migrants.

4.6 Changing the Dynamic: The Potential of Human Rights Law

Arendt had identified this tendency for individuals lacking a 'civic identity' to be denied rights protection in her classic *The Origins of Totalitarianism*, building on her 'bare life' analysis discussed above and particularly referring to how the Jewish population of Germany had been rendered effectively stateless before the Nazi regime began its extermination campaign. She argued that "[t]he Rights of Man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon minimum rights, no authority was left to protect them and no institution was willing to guarantee them" (Arendt 1968: 171–2). In her view, rights could only be meaningfully articulated within a civic community—and refugees and other stateless persons, lacking membership of such a community, were therefore reduced to a state of intrinsic 'rightlessness'. "The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems within given communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them" (Arendt 1968: 175–6). Agamben has made similar arguments, going so far as to argue that human rights are ultimately incapable of being delinked from membership of a particular political order (Agamben 1998; Lechte 2007).[17]

However, both Arendt and Agamben overstate their case: Arendt because she was writing before the evolution of modern international human rights law from the 1960s on, Agamben because he understates the inherent fluidity of law (Fitzpatrick 2005; Lechte 2007). Out of deference towards the hierarchical claims of national law, human rights law pulls its punches when it comes to the situation of irregular migrants. However, this deference is not all-encompassing. As outlined above, international human rights law imposes certain substantive limits on national immigration law and policy: these limits may, in general, only apply to civil and political rights, but they still establish a protective framework that ensures irregular migrants enjoy a qualified legal status as rights-bearing individuals. Furthermore, while the external and internal constraints discussed above limit the applicability of human rights norms to the situation of irregular migrants, they do not impose rigid cut-off

[17] These arguments were first developed in relation to refugees. However, their applicability to irregular migrants is clear.

points: such constraints act as drag factors on the development of rights protection, but some space is left for incremental development of existing standards.

This means that existing human rights law has the potential to expand its scope of protection. Its underlying universalist orientation is often watered down or even repressed when it comes to the situation of irregular migrants, in particular as regards the development of 'hard' law standards. However, it can nevertheless be used as a lever to open up new legal and political avenues of rights protection: the dynamic of dilution need not be the only process in play.

For example, as discussed above, states are given considerable leeway when it comes to justifying immigration control measures under the proportionality test used to decide whether human rights standards have been breached. However, this leeway is not unlimited: clear justification must still be shown for measures affecting fundamental rights, even when it comes to the rights of a marginalised and discounted group like irregular migrants. National governments regularly manage to satisfy courts that far-reaching immigration control measures are proportionate, but success is not guaranteed as evidenced by the number of successful legal challenges in multiple jurisdictions that result in such measures being struck down on the basis that they failed to comply with human rights requirements.[18] This pressure to show justification can deter governments from introducing certain anti-migrant measures – especially when particularly vulnerable groups of irregular migrants are affected, such as elderly persons, the sick, children and families.[19] It also gives human rights campaigners a point of leverage when it comes to challenging the necessity for such measures and opening them up to political and media contestation (Kawar 2015).

Similarly, even when courts adopt restrictive interpretations of the scope of human rights guarantees, this is not the end of the story. Such interpretations can be difficult to reconcile with the universalist orientation of human rights law and makes them ripe for both legal and political contestation. This tension can encourage courts to revise earlier approaches and adopt a more expansive approach, often in response to criticism from human rights campaigners. A classic example of this tendency can be found in the recent case-law of the European Court of Human Rights. As discussed above, the Court's 2008 judgment in *N v UK* adopted a very narrow approach to the interpretation of the right to inhuman and degrading treatment: it established that states deporting irregular migrants receiving life-sustaining treatment back to countries where they would not receive an equivalent level of treatment would only breach this right in "very exceptional" circumstances. This decision was subsequently subject to sustained academic and NGO criticism on the basis that it represented an abdication by the Court of its responsibility to protect all persons against degrading treatment generated by state action (Brems 2014). In response, in the

[18] See e.g. the South African case of *Khosa v Minister of Social Development* [2004] ZACC 11; the UK case of *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; the Irish case of *Luximon and Blachand v Minister for Justice* [2018] IESC 24.

[19] See e.g. the European Court of Human Rights judgment in application no. 16483/12, *Khlaifia and others v Italy*, Judgment of 15 December 2016 [GC], para. 194.

2016 case of *Paposhvili v Belgium*,[20] the Court ruled that it would constitute inhuman and degrading treatment for a person receiving such treatment to be deported when it would cause a "serious, rapid and irreversible decline in his or her state of health".[21] This has extended the protection afforded to irregular migrants by human rights law, and has been described as moving the Court's case-law "closer to its [underlying] principles" (Peroni 2016).

Even weak, inchoate, and underdeveloped areas of human rights law have the potential to generate new avenues of rights protection for irregular migrants. Socio-economic rights instruments such as ICESCR and the ESC may lack impact. However, their provisions—and the standards developed by the abovementioned expert committees which interpret these instruments, such as the UN Committee on Economic, Social and Cultural Rights and the European Committee on Social Rights—can nevertheless over time influence legal and political debate. They give greater definition to the content of socio-economic rights and consequently tend to be invoked as authoritative norms by NGOs, human rights commissions, and other groups campaigning for greater respect for such rights (Bódig 2016; McCall-Smith 2016). In turn, this helps shape policy discussions about what respect on a universalist basis for such standards entails—including in areas such as immigration control.[22] The same is true for the standards developed by bodies such as the UN Committee on the Rights of the Child (interpreting the CRC) and even potentially the UN Committee on Migrant Workers (interpreting the ICMW). Such standards only constitute 'soft law' norms, as they are not formally binding on state parties: however, they can still affect policy debates about the status and treatment of irregular migrants.[23] Indeed, Betts has argued that the development of such norms has the potential to close the "fundamental normative and institutional gap" that currently exists in international law relating to the treatment of such migrants (2010).

4.7 The Changing Dynamic: Municipalities as a Case Study

Thus, to recapitulate, human rights law offers limited protection to irregular migrants. But, Arendt and Agamben notwithstanding, such migrants are not 'rightless'. The 'hard' legal standards that protect them may be circumscribed, however, the universalist orientation of human rights law can still be mobilised so as to pose a challenge to national laws that threaten their human dignity: the impact of international rights standards can go beyond what is formally required by the strict letter of

[20] Application no. 41738/10, Judgment of 13 December 2016, Grand Chamber.

[21] Ibid, [183].

[22] See e.g. the evidence relating to the treatment of 'refused' asylum seekers presented to the Joint Committee on Human Rights of the UK Parliament in 2007, and the Committee's conclusions in its subsequent report: JCHR 2007. See also Council of Europe 2011; Grove-White 2014.

[23] See e.g. the case study relating to the Netherlands in the following section. See also the discussion of civil society activity in this regard in LeVoy and Geddie 2009.

the law. Benvenisti and Harel have argued that international human rights norms and national law exist in a conjoined relationship of 'discordant parity', meaning that the former can operate so as to expose flaws, blind spots, and inconsistencies in the latter (2017). This is particularly true in the context of immigration control, where the tension between the universalist orientation of international human rights law and the hierarchical, often exclusionary, approach of national law can open the latter up to political and legal contestation (Kawar 2015).

In the past, such contestation has often been driven by NGOs, migrant advocacy groups, and activist lawyers representing migrants being subjected to exclusionary measures. But it is increasingly involving more than just these 'usual suspects' from civil society.

International human rights law, in both its 'hard' and 'soft' iterations, has become a significant point of reference in national law and policy. Its provisions are increasingly invoked as guides to be followed by politicians, civil servants, and others working within state structures, with Goodman and Jinks identifying 'acculturation' in the form of cognitive and social pressure to adhere to rights standards as being a significant factor in encouraging compliance with human rights law at the level of domestic political governance (2013). Such domestic take-up of rights standards also increasingly covers both hard and soft law commitments, extending beyond civil and political rights to cover a wider range of human rights norms (McCall-Smith 2016). It thus opens up more room for rights standards to be invoked in domestic political struggles by various political actors pushing for change (Goodman and Jinks 2013: 187–88). As a consequence, not all political and legal contestation in the context of migration control stems from civil society: state actors in the form of different public authorities are increasingly also becoming involved, especially in situations where the policies of one arm of the state may run counter to the interests and/or values of another arm.

Oomen and Baumgärtel have highlighted the growing importance of local authorities' in this process of rights 'acculturation' and political contestation, especially as it plays out in the context of migration control (2018). They give numerous examples of situations where municipal authorities have committed themselves to providing greater levels of human rights protection than is necessarily on offer from central government and 'decoupled' from various state policies which they regard as violating international standards—with several of these examples relating to the treatment of irregular migrants.

Oomen and Baumgärtel suggest that this developing phenomenon of "human rights cities" involving the "legalisation from below" of otherwise contested international human rights standards represents a "new frontier" in the development of a multi-layered system of rights protection. It is certainly an increasingly important dynamic in the context of migration control. Measures by the central government directed against irregular migrants are increasingly being contested by elected

municipal authorities—in particular those in charge of liberal, multicultural cities.[24] In so doing, these municipal authorities often invoke universal human rights norms to justify their refusal to comply with edicts from the central government. Like many campaigning organisations in this context, they push beyond the formal limits of 'hard' human rights law to use its softer elements as a lever for change. In so doing, they demonstrate the potential of rights standards in this context—and the danger of assuming that their impact is confined to their 'hard' legal requirements.

One particular example cited by Oomen and Baumgärtel stands out as an example of this dynamic in action. In 2012, the Dutch central government prohibited municipalities from offering emergency shelter to irregular migrants as part of a wider migration control policy strategy. This was controversial, with city authorities in Amsterdam, Utrecht, and elsewhere objecting on the basis both of human rights concerns and also because of how they would be left to handle the social fallout from this policy. 'Hard' human rights law—such as the ECHR—offered no clear avenue of challenging the central government's decision. However, civil society groups brought a collective complaint before the ECSR, the expert body that interprets the ESC, alleging that this prohibition breached the rights to social assistance and housing set out in Articles 13 and 31 of the revised Social Charter (Oomen and Baumgärtel 2018; O'Cinneide 2014).

As discussed above, the socio-economic rights set out in the ESC are generally not viewed by states as having the same weight as the civil and political rights set out in instruments such as the ECHR. Furthermore, as also discussed above, the Appendix of the ESC limits its scope of application to migrants "lawfully resident or working regularly" in the state concerned. The Committee nevertheless concluded that these restrictive provisions of the Appendix had to be read subject to the universalist orientation of the ESC taken as a whole, with its overriding emphasis on securing human dignity.[25] It therefore went on to hold that the Dutch government had breached the requirements of the ESC in imposing a comprehensive ban on irregular migrants receiving emergency shelter, irrespective of need.[26]

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[24] For example, in New York City successive mayors have taken measures to protect irregular migrants against both exploitation by private employers and the application of what they see as abusive immigration controls by the federal government. See *The New York Times*, "De Blasio Defends New York Policies on Immigration", 28 June 2017, available at https://www.nytimes.com/2017/06/28/nyregion/bill-de-blasio-defends-new-york-policies-on-immigration.html

[25] Complaint No. 90/2013, *Conference of European Churches (CEC) v. the Netherlands*, Decision on the merits of 1 July 2017. See also Collective Complaint 86/2012, *FEANTSA v. The Netherlands*, Decision on the merits of 9 July 2014. Both decisions are accessible at https://hudoc.esc.coe.int/

[26] In this regard, the Committee followed its previous decision in Collective Complaint 47/2008, *Defence of Children International v The Netherlands*, Decision on the merits of 20 October 2009, which had focused specifically on the issue of whether undocumented migrant children should have an explicit legal entitlement to access social services. See also Collective Complaint No. 14/2003, *International Federation of Human Rights Leagues v. France*, Decision on the merits 8 September 2004; Collective Complaint No. 69/2011, *DCI v. Belgium*, Decision on the merits of 23 October 2012.

The Dutch government attempted to challenge the ECSR's decision before the Committee of Ministers of the Council of Europe, alleging that the decision failed to conform to the text of the Charter. It also pointed out that Dutch authorities were not formally required as a matter of national law to give effect to decisions of the ECSR (Oomen and Baumgärtel 2018).[27] However, the Committee of Ministers chose not to intervene to overturn the ECSR decision.[28] As a result, various Dutch local authorities announced that they would treat the ECSR's decision as setting out the requirements of international human rights law and proceeded to open up their emergency shelters to irregular migrants. This issue proved to be politically divisive, with sharp splits emerging in the Dutch ruling coalition. The government eventually proposed what it saw as a compromise position, whereby access to emergency housing shelters will be permitted but only for irregular migrants who co-operated with expulsion procedures. However, several municipalities—including Utrecht and Amsterdam—have continued to use the ESC standards as interpreted by the ECSR as the basis for their local policies as regards the provision of emergency shelter to irregular migrants (Oomen and Baumgärtel 2018).

This case study shows how even apparently 'soft' human rights standards like the ESC framework can be invoked to contest exclusionary policies directed against irregular migrants—and how different actors can be involved in different ways in this dynamic. (In the Dutch case, civil society organisations, municipalities, and the Council of Europe institutional framework were all involved, along with the centre-left political parties making up the Dutch governing coalition.) Human rights law may have limited 'hard' applicability when it comes to the situation of irregular migrants, but it remains a source of universalist-inflected 'soft' standards that can be used to challenge hierarchical national law and policy.

4.8 Conclusion

When it comes to the migration control context, human rights law is capable of generating both (i) binding 'hard' legal requirements (such as those arising under the ECHR) and (ii) fuel for political and legal contestation in the form of 'soft' principles (such as those set out in instruments like the ESC). The universalist orientation of human rights law may be highly diluted when it comes to the situation of irregular migrants, but it still has sufficient normative appeal so as to give some concrete definition to the notion of a 'human rights approach' to irregular migration.

[27] In addition, it should be noted that the European Court of Human Rights ruled that no violation of the civil and political rights set out in the ECHR had taken place: see *Hunde v Netherlands*, at ftn 17 above.

[28] Resolution CM/ResChS(2015)5, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, adopted by the Committee of Ministers on 15 April 2015, at the 1225th meeting of the Ministers' Deputies. See also Resolution CM/ResChS(2015)4, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies.

Academic research is increasingly trying to give more substantive content to this concept, as reflected for example in the recent call by Crépeau and Hastie (echoing NGO campaigns and municipal policies in New York and elsewhere) for a 'firewall' to be erected between immigration enforcement activities and public service provision (2015). This approach is also influencing the ongoing development of international standards in this context, as reflected for example in the recently-agreed text of the UN Global Compact for Safe, Orderly and Regular Migration which aims to set common international standards in relation to the treatment of all migrants. In particular, Objective 15 of the Compact commits states to ensuring that "all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services", which entails that "cooperation between service providers and immigration authorities [should not] exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery" (UN 2018). The influence of rights standards may also partially explain why greater restrictions on migration at the national level have not always translated into more restrictive access to essential social services for irregular migrants (Spencer and Hughes 2015): measures which appear to seriously undermine human dignity are difficult to reconcile with the universalist orientation of human rights norms, even if they may not be 'unlawful' *per se*.

As states tighten their immigration policies, it remains to be seen how much of an impact human rights law can have in this context, in either its 'hard' or 'soft' incarnations. However, the Dutch municipalities/ESC case study shows how human rights law is increasingly being invoked to defend the rights of irregular migrants in ways that go beyond the formal limitations of the ECHR and other instruments. Irregular migrants may have less rights than others, but they are not 'rightless'—and it is possible to speak meaningfully (albeit with some qualifications) about a developing substantive and contestatory 'human rights approach' in this context.

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