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Sovereignty and the Human Rights of Irregular Migrants

This chapter presents a first set of arguments that explain why irregular migrants are often prevented from enjoying health-related rights on an equal basis with others with reference to international law-making and adjudication. Neither the form of international law nor the developing content and redress mechanisms of international human rights law facilitate the enjoyment of human rights by irregular migrants. This results in an expansion of domestic law and state discretion where the rights of irregular migrants are concerned. This analysis begins by providing an overview of two interacting normative pillars that are crucial in this regard, namely state sovereignty and human rights in international law. They are often presented as contrasting concepts, and the clash is particularly acute in relation to irregular migrants. Thus, over the last 130 years, a significant amount of domestic and international case law has referred to immigration control – understood as the executive power to exclude undesired aliens who are not refugees through the establishment of domestic laws regulating their legal entry, stay and return in a territory – as a corollary of state sovereignty.[1] By contrast, international human rights standards are aimed at limiting the arbitrary treatment of persons in the light of a common belonging to the human family.[2] The tensions between state self-determination and universal principles and between human rights and a subset of rights for irregular migrants lie at the heart of the philosophy and organisation of liberal democracy, which 'draws boundaries and creates

[1] James A. R. Nafziger, 'The General Admission of Aliens under International Law' (1983) *The American Journal of International Law* 77(4) 804, 822.

[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom justice and peace in the world.'

closures'.[3] Thus, the unequal treatment of irregular migrants in both law and practice puts to the test the coherence of international and European human rights law and personhood as a source of human rights.[4] This chapter conducts such a test by providing examples of the acute violations of human rights that irregular migrants have experienced in the context of border control. The intention is to give a flavour of the fragility – reflected in European and international case law – of the human rights of these migrants when they are subject to administrative detention, when they are deported and when they attempt to enjoy their right to family life. Furthermore, the unequal and somewhat inconsistent entitlement recognition in the European Social Charter (ESC) and the UN International Convention on Migrant Workers (ICMW) – partially remedied by the interpretative activities of their monitoring bodies – is revealed to demonstrate the dramatic extent to which sovereign state interests have shaped international human rights law-making with regard to these migrants. A brief reference to the jurisprudence of the inter-American system of human rights demonstrates that the 'sovereignty–human rights' relationship can also be shaped by a *pro homine* approach and that there is nothing natural in considering sovereignty as the starting point from which to grapple with immigrant-related cases.[5] However, the relatively recent intergovernmental negotiations on the Global Compact for Migration confirm the reliance on the 'guiding principles' of both national sovereignty and human rights in dealing with the challenges of international migration.

1.1 SOVEREIGNTY AND HUMAN RIGHTS OBLIGATIONS

1.1.1 *State Sovereignty in International Law*

Public international law,[6] here commonly referred to as international law, is the body of laws that, since the sixteenth century, has traditionally regulated

[3] Dembour and Kelly (n 3, Introduction) 8; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP 2004) 2.

[4] Sylvie Da Lomba, 'Immigration Status and Basic Social Human Rights – A Comparative Study of Irregular Migrants' Right to Health Care in France, the UK and Canada' (2010) *The Netherlands Quarterly of Human Rights* 28(1) 6, 7.

[5] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 6–7.

[6] Public international law differs from private international law, which is that body of domestic law that comes into play when a controversy contains a foreign element. In that case, the conflict of laws is resolved by this body of domestic law that identifies the law and jurisdiction applicable to the case. See Paul Torremans et al. (eds), *Cheshire, North and Fawcett: Private International Law* (OUP 2017).

the relationships between independent and sovereign nation-states.[7] Its first interpreters founded international law and its principles on the universal law of nature, to be discovered using reason and to be binding on all states.[8] By contrast, from the nineteenth century on, the dominant positivist doctrine has grounded international law in the 'theory of consent', according to which states could only be bound by those rules to which they had first agreed to be bound.[9] Until the twentieth century, the rules of this legal framework were concerned with interstate relations, and this is still largely the case today. However, regarding the role of people in international law, legal theories have reached different conclusions. For instance, in the nineteenth century, G. W. F. Hegel thought that individuals were subordinate to the state because the latter enshrined the wills of all citizens and, thus, evolved into a higher will.[10] From an international perspective, this state-centred approach meant that the state was sovereign and supreme, and people were merely objects of international law. Hersch Lauterpacht, an influential twentieth-century internationalist who witnessed the birth of the new post–World War II international community, considered the achievement of peoples' well-being as the primary function of all laws and advocated that international law based on human rights was the best way of achieving this purpose.[11] Contemporary international law recognises individuals as subjects of international law: states are primary subjects of international law, whereas individuals are – for the purposes of this discussion – rights holders in international and European human rights law.[12]

As for the principle of sovereignty, it is commonly understood as 'supremacy in respect of power, domination, or rank; supreme dominion, authority, or rule'.[13] Although sovereignty has existed since ancient times in different fashions within and between polities, the conceptual elaboration of modern sovereignty,[14] as an institutional attribute, is owed to the French philosopher

[7] Antonio Cassese, *International Law* (2nd edn, OUP 2003) 3; Patrick Daillier and Alain Pellet, *Droit International Public* (7th edn, LGDJ 2002) 35.

[8] Francisco de Vitoria and Hugo Grotius belonged to the school of natural law, see Malcolm N. Shaw, *International Law* (7th edn, OUP 2014) 16–18; Daillier and Pellet (n 7) 4–57.

[9] Daillier and Pellet (n 7) 59, 98–100.

[10] Shaw (n 8) 21.

[11] Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950).

[12] Cassese (n 7) 142–150; Shaw (n 8) 188–189.

[13] *Oxford English Dictionary*, 'Sovereignty' <www.oed.com/view/Entry/185343?redirectedFrom=sovereignty#eid> accessed 1 April 2021.

[14] For an overview on the nature, subject and source of sovereignty, see Samantha Besson, 'Sovereignty' (2011), in *Max Planck Encyclopaedia of Public International Law* <http://opil.ouplaw.com/home/MPIL> accessed 1 April 2021.

and jurist Jean Bodin, who defined it as the absolute and perpetual power of the *République*.[15] His views, together with those of Hugo Grotius,[16] contributed significantly to the appearance of state sovereignty as a key principle of the international legal order since the adoption of the seventeenth-century Treaties of Westphalia.[17] The essence of this double-sided concept is clearly captured in the influential *Palmas Island Case* award of the Permanent Court of Arbitration:

> Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[18]

Sovereignty means both independence from the interference of other states and supreme authority within a territory and over the population located therein.[19] In international law, the former (which is related to power and authority *between* states) is referred to as external sovereignty, and the latter (which concerns the power and authority *of* or *within* the state) is the internal component of sovereignty. This body of law concerns both aspects of the content of sovereignty, and since 1945, it has increasingly imposed obligations concerning how states behave in their jurisdictions and how they exercise their public power in relation to people and markets.[20]

As explained above, sovereignty is a structural principle of the international legal order, which locates the state at the centre of the stage of international relations, indeed as the primary subject.[21] Nevertheless, given that international law in the era of the UN has rapidly switched from being the law

[15] Jean Bodin, *Les Six Livres de la République* (first published 1579, Alden Press 1955) ch 7.
[16] Hugo Grotius, *De Jure Belli ac Pacis* (Buon 1625) book I.3.8.1.
[17] The peace process of Westphalia is associated with the birth of modern international law, as created by sovereign and equal states. For an overview, see Rainer Grote, 'The Westphalian System' (2006), in *Max Planck Encyclopaedia of Public International Law* <https://opil.ouplaw.com/home/MPIL> accessed 1 April 2021.
[18] *Island of Palmas Case* (*the Netherlands v USA*) (Merits) [1928] 2 UN Reports of International Arbitral Awards 829, para 8.
[19] *Customs Régime between Germany and Austria* (Advisory Opinion) [1931] PCIJ Series A/B No 41 [Individual Opinion of M. Anzilotti] 57, emphasis added.
[20] Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP 2012) 4, 64.
[21] Cassese (n 7) 71.

of coexistence to being the law of cooperation and has many inroads into matters traditionally considered to be of a domestic nature, some scholars have begun to question the view that state sovereignty is or should be the central feature of international society.[22] These debates focus on whether and, if so, to what extent the participation of new subjects in law-making marks a paradigm shift in the structural order of international law[23] and on whether it is desirable that sovereignty remains a guiding principle to address the contemporary legal and political problems of the international community.[24] While such debates constitute insightful critical approaches to the orthodoxy of international law, the dominant doctrine still considers (state) sovereignty to be a fundamental principle governing international relations and an organising principle of international law.[25] Nevertheless, there is substantial agreement on the point that the *exclusive* sovereignty of the *Palmas Islands* case is not a synonym for *unlimited* sovereignty.[26] The limit, as far as international law is concerned, is represented by state duties to comply with customary international law and treaty law,[27] including in the field of human rights.

1.1.2 *Human Rights Law*

International human rights law, as a comprehensive legal framework, was born in the aftermath of World War II. The horrors of the Holocaust and the war had shocked the world, and the international community mobilised around the idea that the treatment of people within states' borders could not be left to the exclusive discretion of states and domestic laws.[28] The dominant modern conception of human rights has its roots in several seventeenth- and eighteenth-century theories of natural law and rights, according to which (very

[22] See reference made by José E. Alvarez, 'State Sovereignty in Not Withering Away: A Few Lessons from the Future' in Antonio Cassese (ed) *Realizing Utopia* (OUP 2012) 26, 29.

[23] McCorquodale claims a 'participatory approach to sovereignty' and describes it as a relational concept shared by all subjects that engage in the international community. See chapters 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship' and 'An Inclusive International Legal System' in Robert McCorquodale, *International Law beyond the State: Essays on Sovereignty, Non-state Actors and Human Rights* (CMP 2011) 401, 427.

[24] Don Herzog, *Sovereignty: RIP* (Yale University Press 2020) ix.

[25] See, Cassese (n 7) 46.

[26] Besson (n 14) para 75; and Christopher Greenwood, 'Sovereignty: A View from the International Bench' in Richard Rawlings, Peter Leyland and Alison Young (eds) *Sovereignty and the Law* (OUP 2013) 251, 254.

[27] VCLT (n 47, Introduction) Article 27: 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[28] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 36–51.

briefly) there existed a reason-based moral framework with which positive man-made laws had to comply, and men were endowed with some innate tendencies and freedoms – natural rights – that were cognisable though the use of reason.[29] In the mid-twentieth century, these theories – often infused with moral, liberal and Western visions – led to a cosmopolitan conceptualisation of human rights according to which 'all human beings are born free and equal in dignity and rights'[30] and every state must exercise its powers in a way that is compatible with these universal freedoms and entitlements. The Charter of the United Nations, the document that set out a new international order based on the prohibition of the use of force and maintenance of peaceful international relations, declared the promotion of human rights to be one of the purposes of the organisation and a value to be reaffirmed.[31] This statement represented the first encroachment of the naturalist logic into the revisited post-war international law. Human rights gained their first recognition in an international legal document, and this 'value-based approach' to international law[32] has since been secured with the adoption of the morally authoritative Universal Declaration of Human Rights (UDHR) – containing civil, political, economic, social and cultural rights[33] – through binding human rights treaties[34] and with the recognition of some rights as customary norms, *jus cogens* and legal positions that can give rise to obligations *erga omnes* in international law.[35]

In the second half of the twentieth century, international law became progressively more engaged with the protection of human rights, and this has had an impact on the legitimate exercise of jurisdictional functions by

[29] For example, see John Finnis, *Natural Law and Natural Rights* (OUP 1980).

[30] UDHR (n 2) Article 1.

[31] Charter of the United Nations (UN Charter) (Adopted 26 June 1945, entry into force 24 October 1945) 892 UNTS 119, Preamble, Articles 1(3) and 55(c).

[32] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (3rd edn, CUP 2020) 52.

[33] UDHR (n 2) Preamble: 'the General Assembly proclaims this Universal Declaration of Human Right as a *common standard of achievement* for all people and all nations', emphasis added.

[34] Including those mentioned at nn. 42 and 43, Introduction.

[35] Human rights as *customary international law* means that some of these norms are embraced via general state practice and are considered binding, regardless of their recognition in treaties; see American Law Institute, 'Restatement (3rd) of the Foreign Relations Law of the US' (1986) Section 701; *jus cogens* is a synonym of 'peremptory norms' [VCLT (n 47, Introduction) Article 53], which means that certain human rights norms, such as the prohibition of genocide and freedom from torture, are considered non-derogable under any circumstance, see *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (ICJ 2012) para 99; Obligations *erga omnes* highlight the fundamental nature of a human rights norm in relation to which all states have an interest and standing, see *Barcelona Traction case* (*Belgium v Spain*) (ICJ 1970) para 33.

states. However, it is worth noting that the UN Charter had not empowered the UN with any direct competence for the protection of human rights. Rather, states delegated to the organisation the *promotion* of the law and of cooperation in the area. In the first decades of the UN's existence, these loose textual state obligations allowed for an interpretation of Article 2(7) of the UN Charter to protect state sovereignty in the area of human rights as a matter 'essentially within the domestic jurisdiction of any State'. However, in the 1970s, the UNGA openly acknowledged that the protection of human rights was a predominantly international issue because human rights had an entrenched relation with the purposes of the organisation, including the maintenance of global peace and security.[36]

The negotiation of binding treaties in international and regional fora had, since the late 1940s, given legal recognition to the idea of the international protection of human rights. These human rights regimes have further developed through the creation of monitoring bodies, some of which allow individuals or groups of individuals to bring claims against states for human rights violations. This revolutionary development attributed elements of international legal personality to individuals by empowering them to claim their rights and hold states, as international duty bearers, to account.[37] Nevertheless, while international and regional human rights law, as a set of substantive rules, might be considered to be internationally led, the enforcement of such rules and the establishment of associated redress systems primarily take place at the domestic level. As such, the legal system is built around the principle of subsidiarity (states are, in the first instance, responsible for addressing human rights violations),[38] and this has significant implications for the actual enjoyment of migrant rights.

1.1.3 *The Mutual Impact of Sovereignty and Human Rights*

State sovereignty and human rights are often presented as opposing principles: the former is state-centred, and the latter is person-focused. They are synonyms of power and the limitation of power, respectively. To assess their relationship, it seems appropriate to distinguish between sovereignty as content and sovereignty as structure and, in relation to the former, between

[36] The UNGA Res 3219 (XXIX)/1974 on Chile was 'the real watershed in UN practice in this area'. See Israel de Jesús Butler, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law* (Intersentia 2007) 34–44.

[37] Irene Khan, *The Unheard Truth: Poverty and Human Rights* (W.W. Norton & Company 2009).

[38] See Section 1.3, *infra*.

authority and independence. Ultimately, I show that sovereignty is embedded in international human rights law and is, therefore, confirmed as a structural principle of international law to which human rights belong.

Based on Articles 2(1) and 2(4) of the UN Charter, sovereignty, as independence from external intervention, has been besieged by the doctrines of humanitarian intervention and responsibility to protect, two contested concepts that qualify sovereignty as responsibility, albeit to different extents. These doctrines hold that every state is internationally responsible for the treatment of people within its jurisdiction while also justifying the collective use of force in response to severe human rights violations within a state. However, such clashes of norms and goals in international law fall beyond the scope of this study.[39]

Sovereignty, as state authority to enact laws, adjudicate, draw up policies and enforce laws within a domestic jurisdiction, is a central feature of international law. The evolution of human rights as a branch of international law over the last seventy years has been aimed at preventing the arbitrary treatment of people through the establishment of a minimum content for state obligations in this regard. Accordingly, although logic may lead one to conclude that there is an inherent clash between this aspect of sovereignty and human rights, the *legal* understanding of these concepts points to a softer confrontation, at least with respect to the current state of the art. Indeed, on the one hand, regarding the broader picture of international law, it must be acknowledged that the international legal concept of sovereignty is not intended as unrestricted power and that international law works by imposing legal obligations regarding state behaviours by 'validating some claims of sovereign powers and refusing to validate others'.[40] On the other hand, most human rights, as legal rights, have not been conceptualised as absolute vis-à-vis other public interests. Human rights treaties allow reservations – although special rules apply[41] – and many rights contain limitation clauses that allow for the rights to be balanced against other private and public interests.[42] Furthermore, the formal

[39] For an overview of this debate, see Ramesh Thakur, 'The Use of International Force to Prevent or Halt Atrocities: From Humanitarian Intervention to the Responsibility to Protect' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013) 815 and Amitai Etzioni, 'Sovereignty as Responsibility' (2006) *Orbis* 50(1) 71–85.

[40] Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 29.

[41] See Ineke Boerefijn, 'Impact on the Law on Treaty Reservations' in Menno T. Kamminga and Martin Scheinin (eds) *The Impact of Human Rights Law on General International Law* (OUP 2009) 63; International Law Commission, 'Guide to Practice on Reservations to Treaties' (2011) *Yearbook of the International Law Commission* II(II) Ss. 4.5.1, 4.5.3.

[42] This broad wording means both 'derogations' in time of emergency, for example, Article 15 ECHR (n 43, Introduction), Article 4 ICCPR (n 42, Introduction), or common 'limitations'

incorporation of international human rights law into the domestic legal order, at least in dualist states, appears to be key for its applicability.[43] In addition, international treaties on human rights require the state to establish domestic means of redress for cases of violation[44] and to subject individual complaints made before international bodies to admissibility criteria, such as the exhaustion of domestic remedies, which are normally strictly scrutinised.[45] All of these structural, procedural and substantive features constitute an encroachment of state sovereignty into the legal sphere of human rights, which is based on the principle of subsidiarity. Subsidiarity – a central feature of human rights law – means that, in systems of multilevel governance, the most local level of governance is considered best equipped to exercise sovereign regulatory functions.[46] Notwithstanding some erosion of the domestic domain as a result of international and regional human rights law in relation to the internal aspect of sovereignty, human rights seem to 'qualify, rather than displace, the sovereignty of states' in international law.[47]

Finally, in relation to the impact of human rights on sovereignty as a 'structural' principle of international law, the conclusions cannot divert much from the above. Nevertheless, there are scholars who argue that the proliferation of international subjects or legal persons in the context of law-making and monitoring jeopardises the positioning of state sovereignty as a key organising principle of the international legal order.[48] The impact of civil society organisations, the delegation of power to international organisations, and the increasing role of individuals and corporations in the field of human

or 'restrictions' of rights, for example, Articles 9, 12, 13, 18, 19, 21, 22 ICCPR, Articles 5, 8–11 ECHR.

[43] The 'incorporation' or 'transposition' of international law into domestic legal order is necessary for the domestic applicability of treaties only when states are 'dualist'. Dualism, as opposed to monism, is a legal tradition according to which international law and domestic law are two separate spheres of law. Therefore, for the applicability of international treaties at the domestic level, national acts incorporating international norms need to be enacted. See, Davíd Thór Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar Publishing 2015).

[44] For example, ICCPR (n 42, Introduction) Article 2.3(a) and ECHR (n 43, Introduction) Article 13.

[45] For example, ECHR (ibid), Article 35 and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) ('OP-ICESCR') A/RES/63/117, Articles 2–5.

[46] For details Gerald L. Neuman, 'Subsidiarity' in Shelton (n 39) 360, and Isabel Feichtner 'Subsidiarity' (2007), in *Max Planck Encyclopaedia of Public International Law* <https://opil.ouplaw.com/home/MPIL> accessed 1 April 2021.

[47] James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (CUP 2012) 122.

[48] For instance, see De Jesús Butler (n 36), and McCorquodale (n 23).

rights law is undeniable. Nevertheless, due to the fact that the structure of international law is still state-oriented, states appear to retain key de jure and de facto powers in this field. For example, the implementation of human rights treaties and the 'enforcement' of the decisions of their monitoring bodies are mainly contingent on the willingness of states to comply. In relation to the latter, the findings of most international human rights bodies have only moral or recommendatory authority, and even when they are legally binding, as is the case of a handful of courts, the execution of their judgments is left to state compliance in good faith and mediated through political bodies.[49] The concept of sovereignty is, therefore, built into human rights instruments. Since subsidiarity may be regarded as a structural principle of human rights law,[50] state sovereignty remains a valid lynchpin of international law. Overall, the relationship between human rights and general international law is characterised by a 'tension between substance and form'.[51] While human rights are designed as universally valid propositions, human rights law presupposes the nation-state as the venue for human rights implementation.[52] Human rights, by becoming international legal rights, have had to surrender to the structural logic of public international law.

1.2 MIGRANTS: BETWEEN SOVEREIGNTY AND HUMAN RIGHTS

Building on the above debates, the core aim of this section is to assess whether and, if so, to what extent human rights have 'qualified' sovereignty in relation to the treatment of migrants or whether the opposite is the case.

1.2.1 *Migrants and Sovereignty*

The Westphalian system of states, although it is qualified and limited in the exercise of both internal and external sovereign powers, is still the reference

[49] For example, on the role of the intergovernmental body of the Council of Europe, the Committee of Ministers, on the execution of binding judgments and non-binding decisions on human rights. See ECHR (n 43, Introduction) Article 46, and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted 9 November 1996, entry into force 1 July 1998) ETS. No. 158.

[50] Paolo G. Carozza 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38.

[51] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP 2018) 86, 88.

[52] Benjamin Gregg, *The Human Rights State: Justice within and beyond Sovereign Nations* (Penn Press 2016) 44, as referred to in Lindsey N. Kingston, *Fully Human: Personhood, Citizenship, and Rights* (OUP 2019) 32.

model of the international community.[53] Intimately linked to this is state-led immigration management,[54] which has been regarded as a defining aspect of state sovereignty since the end of the nineteenth century.[55] Indeed, 'sovereignty's inherent powers within the nation-state system' are considered to include the state's power to control and manage the entry, residence and expulsion of aliens.[56] This is the result of a series of historical contingencies that occurred at the end of the nineteenth century, including political and economic tensions between states, which resulted in the spread of protectionism and nationalism[57] and the 'appearance of non-European foreigners on the migratory landscape' after four centuries of European explorations, colonisation, international business journeys and emigration.[58] For example, when these new migrants, mostly Asians, were drawn by the colonial interest in recruiting labour on a temporary basis, governing elites in both Australia and the USA proved reluctant to grant them entry.[59] One of the outcomes was the development of a common law jurisprudence that interpreted international legal theories as condoning the absolute state power to regulate immigration.[60] Therein, the texts of the authoritative international jurist Emer De Vattel were misinterpreted and bent to the political-judicial intent to regulate race and labour.[61] Indeed, in his *The Law of Nations*, Vattel set forth that:

> The lord of the territory may, whenever he thinks proper, forbid its being entered [. . .] he has, no doubt, a power to annex what conditions he pleases

[53] Alvarez (n 22) 26.

[54] In general, the last forty years of the European history have seen a gradual narrowing of the legal possibilities for aliens to immigrate and settle in European countries. See Boeles et al., European Migration Law (2nd edn, Intersentia 2014) 25. For example, in the post-World War II era and during the 1970s, French policy on immigration was not aimed at combating irregular immigration but rather was informally but deliberately focused on tolerating it. See Godfried Engbersen and Dennis Broeders, 'The State versus the Alien: Immigration Control and Strategies of Irregular Immigrants' (2009) *West European Politics* 32 867, 874.

[55] Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) *The Modern Law Review* 67(4) 588, 590; Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (CUP 2018) 81–111.

[56] Nafziger (n 1) 822.

[57] Ibid 816.

[58] Lester (n 55) 82, 84.

[59] Ibid.

[60] *Nishimura Ekiu v United States* [1892] 142 US 651 (US Supreme Court); *Fong Yue Ting v United States* [1893] 149 US 698 (US Supreme Court); *Musgrove v Chun Teong Toy* [1891] AC 272 (Privy Council of the United Kingdom). For details and other jurisprudential references see Lester (n 55) 94–107.

[61] Lester (n 55) 99–100; Nafziger (n 1) 813–814.

> to the permission to enter. This, as we have already said, it is a consequence of the right to domain.[62]

However, he identified several qualifiers to this power in his writings, including the stipulation that 'every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury'.[63] Vattel added that the sovereign's 'duty towards all mankind obliges him on other occasions to allow free passage through, and residence in, his state'.[64] These rights of passage and residence could not be refused without 'particular and important reasons' and were extended to the case of 'a foreigner who comes into the country with the hope of recovering his health, or for the sake of acquiring instruction in the schools and academies'.[65] As for the right of establishment of foreigners, sovereign discretion would take precedence and establishment could be refused if it represented 'too great an inconvenience or danger'.[66] Vattel even stated that in Europe, unlike in Japan and China, the general rule was 'open frontiers', except in relation to 'enemies of the state'. State power to exclude was not absolute in Vattel's writings but was framed and limited by the above situations.[67] However, since the late nineteenth century, Vattel has often been associated with a maxim of international law according to which states have absolute power to regulate the entry of non-nationals who are not asylum seekers or refugees.

This exclusionary approach has survived until the present time, and the case law of the ECtHR, since the landmark case of *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*,[68] has made wide use of the 'long-established maxim of international law' according to which immigration control and the right to exclude are prerogatives of sovereign states. The constant repetition of this maxim encapsulates the idea of 'fixed and exclusive territoriality that is associated with the rise of the modern nation-state' and with sovereignty.[69] This suggests a natural state of the world divided into territories,

[62] Emer de Vattel, *The Law of Nations* (first published 1787, Liberty Fund 2009) Book II, ch VIII, para 100.
[63] Ibid, Book I, para 230.
[64] Ibid, Book II, ch VIII, para 100.
[65] Ibid, Book II, ch X, para 135.
[66] Ibid, Book II, ch X, para 136, emphasis added.
[67] Ibid, Book II, ch IX, paras 119–125; Nafziger (n 1) 810–815.
[68] *Abdulaziz, Cabales and Balkandali v the United Kigndom* App nos 9214/81, 9474/81 (ECHR 1985) para 67; New York Declaration for Refugees and Migrants (16 September 2016) UNGA Res 71.1, A/RES/71/1, para 24.
[69] Dora Kostakopoulou, 'Irregular Migration and Migration Theory: Making State Authorisation Less Relevant' in Bogusz et al. (n 13, Introduction) 45.

whereby people are associated inextricably with their state of origin or nationality. However, this idea of foreigners as outsiders with no right to enter countries that are not their own was the result of historical contingencies and was deeply linked to political-economic interests, the rise of non-European immigration and nativism.[70]

The doctrine of the 'integrity of national borders' and the exercise of sovereign power to determine who is entitled to enter and stay in a given state territory gave rise to different categories of people: nationals and non-nationals, with the latter being subdivided into authorised immigrants and irregular or undocumented migrants. The very presence of irregular migrants within a state jurisdiction is perceived as a de facto erosion of the state's territorial sovereignty and a violation of the state's power to determine the composition of its *demos* or national community.[71] The sovereign state's right 'to exclude' through refusal of admission or deportation is characterised by extensive executive discretion, but it is not unrestricted: slim but significant limitations are stipulated in refugee law and in certain provisions of human rights law. For this reason, Section 1.2.2 examines whether migrants in general and irregular migrants in particular enjoy the protection of human rights law and the extent to which this tool manages to counterbalance the sovereignty-related right to exclude.

1.2.2 *Migrant Rights or Human Rights?*

1.2.2.1 International Law and the Standards of Civilisation

The treatment of foreigners was a topic of international law long before human rights (law) was officially recognised within that legal framework. This trend originated at the beginning of the sixteenth century with a series of intellectual and legal arguments that were designed to protect Western nationals while they were conducting business and expanding their interests in the non-European world during the colonial era. Fathers of international law, such as Francisco de Vitoria and Hugo Grotius, dealt with 'civilised' Christian European foreigners by resorting to theories of natural law to

[70] Lester (n 55) 77–86; Nafziger (n 1) 816.

[71] Linda S. Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' in Bogusz et al. (n 13, Introduction) 311, 329; Dembour and Kelly (n 3, Introduction) 6–10.

articulate the 'rights of aliens to trade and preach' in the New World.[72] Francisco de Vitoria, in justifying the Spanish expansion in the Indies, defended the 'humane and dutiful' obligation to welcome strangers:[73] the stranger's (that is, the European coloniser's) right to receive hospitality, to trade, to travel and to reside within a territory were central to his thinking.[74]

A century after Vitoria's speculations, Hugo Grotius also defended the mobility of European traders in Europe and outside the continent as the natural order of things by asserting the rights to trade and hospitality.[75] Although the starting point was the right to free movement, the rights of foreigners could be restricted when their intentions were not 'benign'.[76] It is interesting to note that Grotius went as far as recognising the (limitable) right of foreigners to enjoy 'basic necessities'.[77] Although he is commonly regarded as one of the theorists who excluded foreigners' rights from international law, his arguments are similar to those put forward by Vattel.[78]

By the end of the nineteenth century, international law had also developed the doctrine of state responsibility for injuries to aliens. This meant that the treatment of a non-national below certain minimum 'standards of civilisation' (which were not clearly defined)[79] constituted a wrongful act towards the state of nationality of that person, which gave rise to interstate responsibility. The state of nationality, at its own discretion,[80] could exercise diplomatic protection in favour of its national. These relations constituted an exercise of state

[72] Anthony Anghie and Wayne McCormack, 'The Rights of Aliens: Legal Regimes and Historical Perspectives' in Thomas N. Maloney and Kim Korinek (eds) *Migration in the 21st Century: Rights, Outcomes and Policy* (Routledge 2010) 23, 30.

[73] Francisco de Vitoria, 'On the American Indians' in Anthony Pagden and Jeremy Lawrance (eds) *Vitoria: Political Writings* (CUP 1991) 250, 278–282.

[74] Ibid; Lester (n 55) 54–60.

[75] Hugo Grotius, *De Jure Praedae Commentarius* (first published 1604, Clarendon Press 1950) 218–220.

[76] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (first published 1646, Clarendon Press 1925) Book II, ch II 192, 198, 201–202.

[77] Ibid, 192–195, 201.

[78] See *supra* at Section 1.2.1.

[79] Debates about 'civilisation' are controversial, interdisciplinary and beyond the scope of this study. As per Westlake, the 'test of civilisation' could consist in the capacity of the government to guarantee both the life and security of aliens and the security and well-being of locals. According to many colonial doctrines, when a 'country' was not considered civilised, it lacked sovereignty and therefore was suitable for conquest as *terra nullius*. See Anthony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2007) *Third World Quarterly* 27(5) 739, 745.

[80] *Barcelona Traction case* (n 35) para 79, ICJ stated that 'the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease'.

sovereignty and were the result of a traditional paradigm of international law whereby individuals were mere objects of interstate relationships and not active subjects.[81] Therefore, during the pre–human rights era, an individual classed as an alien often enjoyed greater protection under international law than as a national in his home country, since the latter was the exclusive domain of national law. For these reasons, the law of diplomatic protection has been defined as the forerunner of human rights in international law.[82] This conclusion may be an oversimplification, however, as the standard of civilisation doctrine and the related practice of 'capitulation agreements'[83] were legal constructs of the abusive colonial period aimed at protecting citizens of European countries as they went about their expansionist business in the 'uncivilised' colonies. When human mobility started to flow significantly in the opposite direction, with migrants tending to belong to lower social classes, contemporary international law shifted to play a marginal normative role with regard to migration.[84]

1.2.2.2 Human Rights for Migrants

In the contemporary legal world, the standard of civilisation law has been replaced by international human rights law.[85] However, during the first three decades after the adoption of the UDHR, international human rights were purely formal in relation to migrants and were mainly designed to empower citizens vis-à-vis abuses committed by their state of nationality. This international project 'made assumptions about [national] identity and membership' of rights holders, which 'placed limitations on its inclusiveness'.[86] Furthermore, the rights of aliens were associated with colonialism as a result of which core pieces of human rights law allowed developing states to restrict

[81] On diplomatic protection and minimum standards of treatment for aliens, see Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2014) *Georgetown Immigration Law Journal* 28 225, 231 and Annemarieke Vermeer-Kunzli, 'Diplomatic Protection as a Source of Human Rights' in Shelton (n 39) 250, 251.

[82] Ibid (Vermeer-Kunzli) 262.

[83] Capitulations were bilateral agreements whose purpose was essentially to insulate European expatriates or colonisers from the domestic jurisdiction of the forum state. For further details, see Christine Bell, 'Capitulations' (2009) in *Max Planck Encyclopaedia of Public International Law* <https://opil.ouplaw.com/home/MPIL> accessed 1 April 2021; Cassese (n 7) 26–28.

[84] E. Achiume Tendayi, 'Reimagining International Law for Global Migration: Migration as Decolonization?' (2017) *American Journal of International Law* 111 142–146.

[85] See the ICJ acknowledgement in *Ahmadou Sadio Diallo* (*Guinea v Dem. Rep. Congo*), (Preliminary Objections) [2007] 599 para 39.

[86] Kingston (n 52) 30.

the economic rights of non-nationals in their jurisdictions.[87] The change began in the 1970s, when the mass expulsion of Asians from Uganda operated as a catalyst for greater involvement of the UN in the protection of the rights of non-nationals.[88] Since then, debates within the UNGA and its ancillary bodies brought about, *inter alia*, the adoption of the declaration on the human rights of non-citizens,[89] the Convention on the Rights of Migrant Workers,[90] the Durban Declaration[91] and, more recently, the New York Declaration for Refugees and Migrants and the Global Compacts.[92]

Apart from these migrant-specific initiatives, the general human rights treaties were worded to embrace every human being as a human rights holder by virtue of their common humanity or personhood,[93] irrespective of their migration status. As such, human rights conventions apply *ratione personae* to 'everyone' or 'all individuals'[94] in a state territory or jurisdiction,[95] and this includes non-citizens and, among them, irregular migrants. While this is the general rule, some treaty provisions and their interpretations allow for differential treatment on the grounds of nationality and immigration status. The Human Rights Committee (HRCtee), which is the monitoring body of the

[87] Article 2(3) ICESCR (n 23, Introduction) allows developing countries to restrict the enjoyment of economic rights for non-nationals. Regarding colonialism-related reasons for this rule, see Chetail (n 81) 235, 248–249; for the restricted applicability of this article, see Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2016) 147–150.

[88] Stefanie Grant, 'The Recognition of Migrants' Rights within the UN Human Rights System: The First 60 Years' in Dembour and Kelly (n 3, Introduction) 33.

[89] Declaration on the Human Rights of Individuals who are not nationals of the country in which they live (13 December 1985) UNGA Res 40/144.

[90] ICMW (n 42, Introduction).

[91] This declaration reiterated that state sovereignty should be consistent with the human rights of all migrants, regardless of their legal status. See World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban Declaration and Programme of Action) (8 September 2001) A/CONF.189/12, paras 26 and 39.

[92] New York Declaration (n 68); Global Compact for Safe, Orderly and Regular Migration (19 December 2018) UNGA Res 73/195; Global Compact on Refugees (17 December 2018) UNGA Res 73/151.

[93] UDHR (n 2) Article 2 stipulates that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'. See also ICCPR (n 42, Introduction) Article 2(1); CRC (n 42, Introduction) Article 2(1); CMW (n 42, Introduction) Article 7; American Convention on Human Rights (adopted 22 November 1969, entry into force 18 July 1978) (ACHR) Article 1(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) (ACHPR) OAU Doc. CAB/LEG/67/3 rev. 5, Article 2.

[94] ECHR (n 43, Introduction), Article 1; ICCPR (n 42, Introduction).

[95] For example, the ECtHR acknowledges the existence of the application of the ECHR *ratione loci* when a violation of human rights takes place in a state party's territory and exceptionally when, extraterritorially, the state exercises control and authority over an individual. See *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR 2012) paras 70–82.

International Covenant on Civil and Political Rights (ICCPR), made clear, in its General Comment No. 15, that non-citizens must enjoy, without discrimination, all human rights set forth in the Covenant, with the exclusion of the right to vote.[96] In addition to the above, the right to freedom of movement and freedom to choose a residence within the territory (Article 12 ICCPR) and the guarantees of due process in relation to expulsion from the territory (Article 13 ICCPR) were intended to apply only to 'lawfully residing aliens'.[97]

In all other areas, the interpretation of the principle of non-discrimination is central for framing the actual enjoyment of human rights law by non-nationals. The contemporary concepts of equality and non-discrimination are deeply influenced by the Aristotelian maxim that 'things that are alike should be treated alike'.[98] Applying this to people, modern scholars have criticised this concept as being entirely 'circular', because it does not clarify what is meant by 'like people', which generates confusion regarding what defines comparable situations.[99] Accordingly, differential treatment has been justified because the comparators – irregular/regular migrants or migrants/citizens – are not always deemed sufficiently similar to warrant similar treatment in various legal frameworks. While the prohibited grounds for discrimination in international human rights law do not explicitly include nationality or the legal status of people, the normative interpretation by most international bodies has partly covered this gap.[100] Therefore, prima facie, all migrants enjoy a broad catalogue of human rights on a non-discriminatory basis. In legal practice, 'distinction, exclusion, restriction or preference based on [legal status and nationality] which has the purpose or effect of [...] impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms [that admit limitations]'[101] may be legally

[96] Human Rights Committee (HRCtee) 'General Comment No. 15: The Position of Aliens under the Covenant' (11 April 1986) para 2.

[97] Ibid, paras 8, 9, 10. Similarly, the ECtHR, in *Maaouia v France* App no 39652/98 (ECHR 2000), held that the right to fair trial in Article 6 ECHR does not apply to immigration proceedings.

[98] David Ross, *The Nicomachean Ethics/Aristotle* in John Loyd Ackrill and James Opie Urmson (eds) (OUP 1980) 112–117.

[99] Peter Westen, 'The Empty Idea of Equality' (1980) *Harvard Law Review* 95(3) 537; Christopher J. Peters, 'Equality Revisited' (1997) *Harvard Law Review* 110 1211.

[100] HRCtee, GC15 (n 96); CESCR, 'General Comment No. 20: Non-discrimination on Economic, Social and Cultural Rights' (2 July 2009) E/C.12/GC/20, para 30. Nationality and legal status, as prohibited grounds of discrimination, are covered by the phrase 'other status' in Articles 2(1) ICCPR and 2(2) ICESCR. See *Ibrahima Gueye et al. v France* Com no 196/1985 (HRCtee 1989); *Gaygusuz v Austria* App no 17371/90 (ECHR 1996).

[101] HRCtee, 'General Comment No. 18: Non-discrimination' (1989) para 6; CESCR, GC20 (ibid) para 7.

acceptable only when restrictive state measures have a domestic legal basis, pursue a legitimate aim (such as immigration control or protecting the economic well-being of the country) and remain reasonable and proportionate.[102] In the concrete assessment of this issue, the proportionality test between means and aim usually plays a crucial role.[103] The prohibition of discrimination is also of pivotal relevance for socioeconomic rights, since, in relation to societal inequalities and concrete situations of vulnerability, it was interpreted in international law as requiring states to take appropriate measures to address structural and substantive forms of discrimination.[104] The CESCR clearly states that socioeconomic rights, although to be realised progressively, apply 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',[105] and that very limited circumstances allow restrictions of the personal scope of these rights.[106] Against this background, at a domestic level, socioeconomic rights are often restricted for irregular migrants, which underscores the state belief that the limitation of these subsistence rights reduces the 'pull factor' of immigration and deters people from infringing immigration law.[107] As explained in the following chapters, socioeconomic rights have always been regarded as resource demanding, so states have tended to limit their enjoyment by community outsiders such as certain categories of undesired immigrants. Even if international human rights law regards universality and personhood as principles governing its scope of application, in practice, other statuses, such as

[102] *Gaygusuz* (n 100) para 42; *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECHR 1968) para 10. See also HRCtee, GC18 (ibid) para 13; CESCR, GC20 (n 100) para 13; Manfred Nowak, *UN Covenant on Civil and Political Rights – Commentary* (2nd edn, NP Engel Publishing 2005) 31–51; Ciara Smyth, 'Why Is It So Difficult to Promote Human Rights-Based Approach to Immigration?' in Donncha O'Connell (ed) *The Irish Human Rights Law Review 2010* (Clarus Press 2010) 83, 89.

[103] See examples provided in Section 1.3, *infra*.

[104] The former means equality of everyone before the law, without consideration of individual or group-related disadvantaged situations. The latter means that the state – to avoid de facto discrimination – should abandon the neutrality of a non-discrimination approach to law and actively adopt all necessary measures to equalise people's starting points and opportunities to attain real equality. For further details, see Section 2.7.

[105] CESCR, GC20 (n 100) para 30; CERD Committee, 'General Recommendation No. 30 on Discrimination against Non-citizens' (2005).

[106] ICESCR (n 23, Introduction) Article 4. See also Section 3.3.1. See also Office of the High Commissioner for Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (UN Publications 2014) 31–32.

[107] Bosniak (n 71) 324.

nationality, citizenship or residence, continue to play key roles in empowering human beings vis-à-vis the state where they live.[108]

Furthermore, even where irregular migrants are entitled to their human rights, the actual enjoyment of those rights can prove problematic because of their irregular migratory status. For them – perceived as people that have infringed a state's territorial sovereignty – universal human rights may be just illusionary rhetoric, since rights exercise at local and national level and access to domestic and international redress mechanisms normally 'presuppose that migrants entertain contacts with the hosting state organs', which may report them to immigration authorities.[109] Irregular migratory status acts as a structural barrier to the enjoyment of rights, which makes this group particularly vulnerable because of 'their inability to call upon the basic protective functions of the state in which they reside for fear of deportation'.[110] Therefore, as exemplified in the sections that follow, irregular or undocumented migrants are *sui generis* subjects of human rights law: while some international treaties plainly limit their human rights, the interpretation of universal treaty obligations, which also permits rights limitation, is unsettled with respect to irregular migration.

To conclude, human rights law is framed in a way that oscillates between statements of universalism on the one hand and 'the attraction of particularism or closure', whereby 'only those who are recognised as belonging to the polity' have full access to jurisdictional human rights guarantees.[111] As far as the rights of vulnerable migrants such as undocumented people are concerned, exclusionary justifications based on the concepts of dependency, national identity and costs,[112] which are supported by a liberal and negative idea of human rights, seem to have negatively affected the character of migrant rights. People who do not hold legally recognised membership to a Westphalian polity may see the enjoyment of their human rights reduced to the maintenance of 'bare life',[113] thus bringing into question the consistency of a model of international

[108] Constantin Sokoloff and Richard Lewis, 'Denial of Citizenship: A Challenge to Human Security' (2005) 28 *European Policy Centre – Issue Paper* 3–4, <www.epc.eu/en/Publications/Denial-of-Citizenship–A-Chal~22ed68> accessed 2 April 2021.

[109] Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants' (2010) *European Journal of Migration and Law* 12 241, 243.

[110] Jaya Ramji-Nogales, '"The Right to Have Rights": Undocumented Migrants and State Protection' (2015) *Kansas Law Review* 63 1045.

[111] Dembour (n 5) 251; See also Dembour and Kelly (n 3, Introduction) 6–11.

[112] Baumgärtel (n 12, Introduction) 138–139.

[113] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

constitutionalism based on universal rights which are grounded on equal worth and dignity of every human being.

1.3 TRENDS IN THE EUROPEAN AND INTERNATIONAL JURISPRUDENCE ON THE HUMAN RIGHTS OF MIGRANTS WITH IRREGULAR OR PRECARIOUS STATUS

Having clarified the undertones of the human rights–sovereignty tension in the context of (irregular) migration, I now demonstrate how the clash plays out in pieces of international and European human rights law. This section aims to give a flavour of both exclusionary and protective jurisprudential tendencies in the contemporary human rights practice of the ECtHR and the UN treaty bodies. This helps to set the stage for later chapters, which extensively detail state obligations regarding the complex relations between health and irregular migration in human rights law, as complemented by public health arguments.

1.3.1 *Instances of Immigration Cases before the Strasbourg Court*

The ECHR is a multilateral human rights treaty between forty-seven countries across Europe and Western Asia, signed in the context of the Council of Europe in 1950. It is probably the most visible and celebrated of all human rights instruments, partly because its monitoring body, the ECtHR, is empowered to receive individual applications claiming violations of the ECHR and to deliver international judgments that are binding for the member states of the Council of Europe.[114] Like many other general human rights instruments of the same period, the original purpose of the ECHR was to protect citizens against arbitrary state treatment. This is clear from the drafting history: the Convention's personal scope was universally extended as a result of the Italian delegation's dissatisfaction with a proposal to link the rights in the Convention to people's residence in a member state, because that protection gap would have threatened the position of Italian nationals living in other European countries, at a time when Italy was a migrant-sending rather than a migrant-receiving country.[115]

Although the ECHR has been a treaty of universal personal application since its adoption, the case law of the Strasbourg Court concerning migrant rights has mainly developed over the last forty years and more intensively in

[114] ECHR (n 43, Introduction) Articles 32, 46.
[115] As explained by Dembour (n 5) 35–45.

the last two decades.[116] However, some provisions of the ECHR and some authoritative precedents of the ECtHR provide for a blunt asymmetric implementation of rights where migrants are concerned. For example, Articles 5(1)(f) and 16 ECHR (dealing with the right to liberty and restrictions on the political activities of aliens, respectively) explicitly authorise limitations of the rights of migrants.[117] Furthermore, Article 6(1) ECHR is consistently interpreted as excluding conventional fair trial guarantees from asylum, deportation and related procedures. In the landmark case of *Maaouia* v. *France*, Article 6(1) was not considered applicable to cases concerning migrant removal from state territories or exclusion orders because these circumstances would 'not involve a determination of [a person's] civil rights and obligations or of any criminal charge against [them]' and 'major repercussions on the applicant's private and family life or on [their] prospects of employment cannot suffice to bring those proceedings within the scope of civil rights'.[118] Not all the ECtHR judges considered these justifications to be convincing; some believed that because the 'rescission of an exclusion order' was an available legal remedy, 'the applicant's claim concerned the determination of a "civil" right'.[119] While it is beyond the scope of this chapter to provide a detailed analysis of the Court's jurisprudence in the field of immigration,[120] I examine here a sample of the applicable case law to present how, either directly or indirectly, state sovereignty impacts on the immigration case law of the ECtHR and to foreground some instances of *pro homine* findings.

Prior to examining the Court's findings on the merits of cases, it is worth mentioning the exceptional interim measures jurisdiction of the ECtHR (*per* rule 39 of the Rules of the Courts) in cases of deportation. This jurisdiction arises when an applicant would face a real risk of serious and irreversible harm involving violations of Articles 2 (life), 3 (torture or inhuman or degrading treatment or punishment) or 8 (right to private and family life) ECHR if the deportation was not suspended while the Court was considering the merits of

[116] The case of *Abdulaziz* (n 68) in 1985 was the first case decided on the merits which concerned the rights of immigrants.

[117] Furthermore, in *Saadi v the United Kingdom* App no 13229/03 (ECHR 2008), analysed in the main body, the Court made clear that immigration detention is justified even when it is not the measure of last resort.

[118] *Maaouia* (n 97), paras 36, 38.

[119] Ibid, Dissenting opinion of Junge Loucaides, joined by Judge Traja.

[120] European Court of Human Rights (Jurisconsult), 'Guide on the Case-Law of the European Convention on Human Right – Immigration – Updated on 31 August 2020', <https://echr.coe.int/Documents/Guide_Immigration_ENG.pdf> accessed 2 April 2021.

the case.[121] This practice, which concerns only a small number of migrant-related cases, demonstrates a certain prima facie commitment by the Court to the human rights of migrants with precarious status. Indeed, virtually all well-known health-related cases – which are analysed in detail in Chapter 3 – have been accompanied by the application of interim measures to protect migrants from irreparable harm to their freedom from inhuman or degrading treatment.[122] The recently initiated case of the search-and-rescue vessel *Sea-Watch 3* is instructive in this regard. In January 2019, this boat was prevented from harbouring in Sirausa (Italy) because forty-seven non-authorised migrants were on board, and the Italian government did not want them to go ashore, pursuant to a newly launched and particularly restrictive immigration policy. In light of the 'poor health' of the migrants on board, some of whom were children, the Court requested Italy 'to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary' to avoid any irreparable harm to their human rights.[123] Although this was an undeniably protective-oriented measure, it is interesting to note that the Court did not order Italy to allow the migrants to disembark to obtain assistance, thus demonstrating a lack of willingness to directly challenge sovereign immigration policies.

1.3.1.1 The Prohibition of Refoulement and Collective Expulsions

The principle of non-refoulement is ostensibly the strongest weapon against the sovereign right to control immigration and to deport non-nationals in all human rights frameworks. This principle, which is now an essential component of human rights law, originated in international refugee law.[124] It prevents states from transferring people, either nationals or non-nationals, to a country where they face a real risk of irreparable harm or a serious violation of human rights.[125]

[121] European Court of Human Rights – Press Unit, 'Interim Measures – Factsheet' (January 2019) <www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> accessed 2 April 2021.

[122] See *D. v UK* App no 30240/96 (ECHR 1997); *N. v UK* App no 26565/05 (ECHR 2008), and *Paposhvili v Belgium* App no 41738/10 (ECHR 2016).

[123] Registrar of the European Court of Human Rights, 'ECHR Grants an Interim Measure in Case Concerning the SeaWatch 3 Vessel' *Newsletter* (February 2019) <www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-february-2019 > accessed 2 April 2019.

[124] Convention Relating to the Status of Refugees (adopted 28 July 1951, entry into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Article 33.

[125] Maarten Den Heijer 'Whose Rights and Which Rights? The Continuing Story of Non-refoulement under the European Convention on Human Rights' (2008) *European Journal of*

The ECtHR began to apply and develop this preventive and complementary protection in its case law on the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR).[126] In *Soering* v. *the UK*, the Court held, for the first time, that an extradition that resulted in exposure to a real risk of treatment prohibited by Article 3, 'while not explicitly referred to in [its] brief and general wording', would 'plainly be contrary to the spirit and intendment of the Article'.[127] The right to life, fundamental aspects of the right to liberty and the right to fair trial were successively considered relevant human rights in this regard.[128] More recently, in *Hirsi* v. *Italy*, a case relating to the 'push-back' of migrants to Libya by the Italian Revenue Police and Coastguard, the ECtHR recalled the absolute character of non-refoulement and its applicability even in the maritime context when extraterritorial interceptions of migrants take place and when the return operations are grounded in a bilateral agreement between two countries as a part of a state migration policy to combat irregular migration.[129] The Court gave weighty evidentiary value to the reports of civil society organisations and international agencies working in the field to rule out the acceptability of immigration policies which are systematically designed to return migrants to a country where there are substantive grounds to believe that returnees are subjected to severe inhuman or degrading treatment and are likely to be refouled back further to their origin country, where they are also likely to be subject to abusive treatment.[130]

A few months previously, the Court had adopted the celebrated *M.S.S.* v. *Belgium and Greece* judgment, a seminal decision that has impacted states' interpretation and implementation of EU law in the area of immigration and asylum. Belgium had sent an asylum seeker back to Greece under the EU Dublin Regulation, which generally allocates responsibility for processing asylum claims to the first EU member state into which the asylum seeker enters.[131] Greece was held liable for violating the ECHR because reception

Migration and Law 10(3) 277; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) chapters 5 and 6.

[126] *Soering v UK* App no 14038/88 (ECHR 1989) paras 85–91; *Chahal v UK* App no 22414/93 (ECHR 1996) paras 74, 83–107; *D. v UK* (n 121) para 49.

[127] *Soering* (ibid) para 88.

[128] For example, *Bader and Kanbor v Sweden* App no 13284/04 (ECHR 2005); *Othman (Abu Qatada) v the UK* App no 8139/09 (ECHR 2012).

[129] *Hirsi* (n 94) paras 70–82. For a detailed analysis, see Maarten Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) *International Journal of Refugee Law* 25(2) 265.

[130] *Hirsi* (n 95) paras 123–136.

[131] European Parliament and of the Council Regulation (EU) No. 604/2013 of the of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for

conditions and procedures for processing asylum claims were largely dysfunctional and asylum seekers were either detained or left to fend for themselves on the street in dire socioeconomic conditions. Furthermore, the applicant had no access to a serious examination of his asylum claim and risked being denied international protection and potentially expelled to Afghanistan.[132] Against a background of violations of Articles 3, 5 and 13 (the right to an effective remedy) ECHR by Greece, Belgium was also held accountable because its decision to return the applicant to Greece had exposed him to inhuman or degrading treatment in Greece, about which Belgium should have known. Under such circumstances, instead of transferring the asylum seeker to the EU country of first entry, Belgium could have drawn on the 'sovereignty clause' in the Dublin Regulation to take responsibility for the case.[133] This judgment is an important example of how the Court, in cases of exceptionally severe circumstances, can reach findings favouring migrants in precarious situations. Linked to this jurisprudential trend, in *Tarakhel* v. *Switzerland*, a case involving a family of asylum seekers who were due to be transferred from Switzerland to Italy under the EU Dublin Regulation, the Court held that – in the light of the vulnerability of asylum seekers (particularly children) and the deficient reception conditions for families in Italy – Article 3 ECHR required the returning country to obtain sufficient assurances that the actual accommodation facilities for the returnee family in Italy were human rights compliant.[134]

It is also worth noting that neither of these cases, which were assessed for compliance with a provision that cannot be limited or derogated under any circumstances (Article 3), mentions the well-established maxim of the sovereign right to control immigration. Push-backs at sea or removals from a state territory of non-nationals may also raise concerns regarding violation of Article 4 of Protocol 4 to the ECHR, which prohibits collective expulsions. This procedural guarantee has been subject to oscillating interpretation. In the above-mentioned *Hirsi* case, the state obligation to conduct a reasonable and objective examination meant an assessment of 'the particular case of each individual alien of the group', whereby everyone was 'given the opportunity to put arguments against his expulsion to the competent authorities', resulting in

examining an application for international protection lodged in one of the member states by a third-country national or a stateless person, OJ L 180.

[132] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 2011) paras 207–234, 254, 300.

[133] Dublin Reg (n 130); Violeta Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v Belgium and Greece' (2012) *European Journal of Migration and Law* 14 1, 29.

[134] *Tarakhel v Switzerland* App no 29217/12 (GC ECHR 2014), para 120.

a suspensive effect on deportation enforcement.[135] In the more recent and controversial *Khlaifia* v. *Italy* judgment,[136] which concerned the lawfulness of the removal of three migrants from the First Aid and Reception Centre of Lampedusa to Tunisia via Palermo, the Grand Chamber of the ECtHR reversed the arguments of the Chamber (and of *Hirsi*) on the requirements of collective expulsion in the following terms:

> [The collective expulsion of aliens] does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion.[137]

This opinion was considered a retrograde step in human rights protection by the dissenting judge Serghides, who, *inter alia*, held that the findings of the majority of the Grand Chamber might lead to:

> Giving the authorities the choice of deciding to abstain from upholding the rule of law, i.e., from the fulfilment of their said procedural obligation, at the expense of satisfying the principles of effectiveness and legal certainty; [...] making the Convention safeguards dependent merely on the discretion of the police or the immigration authorities, [...] thereby not only making the supervisory role of the Court difficult, but even undermining it and rendering it unnecessary.[138]

This restrictive trend continued with *N.D. and N.T.* v. *Spain* that concerned the infamous 'systematic practice of collective summary expulsions at the border fence' of the Spanish enclave of Melilla.[139] The Court held that the expulsion of migrants was not technically 'collective' because, while Spain had provided evidence of 'genuine and effective means' to claim asylum or obtain a visa, the lack of individualised assessment was attributable to the situation 'in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety'.[140] The weight of this precedent – which seems to condone indiscriminate push-backs and solidify previous *obiter dicta* on the relevance of the conduct of migrants at border crossing – on the case

[135] *Hirsi* (n 95) paras 184–185, 205–206.
[136] *Khlaifia and Others v Italy* App no 16483/12 (ECHR 2015) and (GC ECHR 2016).
[137] Ibid (*Khlaifia* 2016) para 248, emphasis added.
[138] Ibid, Partly Dissenting Opinion of Judge Serghides, para 12(a).
[139] *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (GC ECHR 2020) para 81.
[140] Ibid, paras 198–201, 231.

law of the Court is yet to be appreciated. Early comments suggest that its scope of application should be narrowly circumscribed, as 'an overly broad interpretation of the judgment would damage the "broad consensus within the international community" concerning compliance with [...] the obligation of non-refoulement'.[141] Finally, on the migrant-protective side, the circumstances of the case of *M.K.* v. *Poland* convinced the ECtHR judges that even when individual interviews designed to put forward protection grounds are conducted, they may be a mere formality to hide a systematic policy of removal. In these circumstances, expulsion from the territory may well be considered 'collective' and in violation of Article 4 Protocol 4.[142]

1.3.1.2 The Right to Personal Liberty and to Fair and Decent Conditions of Detention and Living

In the above-mentioned *Khlaifia* case, the Court declared other breaches of the ECHR, including the right to liberty and security of person set out in Article 5(1), because the detention of the applicants in a migrant reception centre had no legal basis.[143] Generally, when a limitation of liberty is justified by a legal basis and a legitimate aim, the legality of detention is further scrutinised under the umbrella of the proportionality test, which means adopting the least restrictive alternative and ensuring that the detriment to the person is not excessive in relation to the benefits for the state. However, in immigration detention cases – which are explicitly foreseen in Article 5(1)(f) – the case law of the ECtHR has been overall consistent with *Saadi* v. *the UK* precedent and does not require a 'full' test of necessity and proportionality,[144] as far as 'adults with no particular vulnerabilities' are concerned.[145] Accordingly, unlike all other types of detention listed in Articles 5(1)(a)–5(1)(e) and regardless of a substantially similar wording, the detention of unauthorised migrants, which is deemed a 'necessary adjunct' of the power to control entry and stay of aliens on a state's territory, is permissible without

[141] *Asady and Others v Slovakia* App no 24917/15 (ECHR 2020), Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland, para 25.
[142] *M.K. and Others v Poland* App nos 40503/17, 42902/17, 43643/17 (ECHR 2020) paras 204–211.
[143] *Khlaifia* (n 136) paras 66–72.
[144] ECHR (n 15, Introduction) Article 5(1): 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...] f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'; *Saadi* (n 117) paras 72, 73.
[145] ECHR, Case law guide on immigration (n 119) para 18.

checking the 'necessity' of the measure, provided that it is 'closely connected' to the purpose of preventing unauthorised entry or processing viable deportation procedures and, thus, not arbitrary.[146] This is a clear example of how the principle of Westphalian sovereignty and its immigration-related corollary frame the interpretation of human rights provisions in a way that undermines their universal personal scope and dilute human rights.[147] However, in cases concerning children, the Strasbourg Court has adopted a full test of proportionality to scrutinise the legality of immigration-related detention. For instance, in *Rahimi* v. *Greece*, the Court held that the placement of a minor in a detention centre with dire conditions had been arbitrary – and thus illegal – because the 'best interest of the child' and the extreme vulnerability of unaccompanied minors would have required a less restrictive measure.[148]

In *Rahimi*, the Court also held a violation of Article 3 ECHR on the accounts provided by a series of NGOs and the European Committee for the Prevention of Torture, which described the material conditions of the Pagani camp as 'abominable'.[149] Indeed, a post-entry or pre-deportation detention in unsuitable locations may lead to violations of Article 3 ECHR, a human rights provision that admits no derogation under any circumstance. In this respect, the ECHR case law shows that violations of the freedom from inhuman or degrading treatment require a minimum level of severity to be met and are more likely to be ascertained as a result of the cumulative effect of certain risk factors in the concrete circumstances.[150] Poor conditions of detention might amount to violations of minimum subsistence rights and serious violations of human dignity,[151] which may increase the vulnerability of individuals and groups that the Court already recognises as socially and legally vulnerable, such as asylum seekers, children and elderly people.[152]

Finally, outside cases of migration detention, the Court found, in *Kahn* v. *France*, that the neglect of an unaccompanied migrant child, who was not

[146] *Saadi* (n 117) paras 72–74.
[147] For further details Galina Cornelisse, 'A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think beyond Westphalian Sovereignty' in Dembour and Kelly (n 3, Introduction) 99.
[148] *Rahimi v Greece* App no 8687/2008 (ECHR 2011) paras 108–111.
[149] Ibid, paras 85, 95–96.
[150] These include the excessive length of detention, lack of privacy, overcrowding, lack of basic hygiene requirements, restricted access to the open air and the external world, lack of ventilation, scarce means of subsistence, lack of access to social and legal assistance, and inadequate medicine or medical care. For example, *S.D. v Greece* App no 53541/07 (ECHR 2007) paras 52–53; *M.S.S.* (n 132) paras 223–234; *Khlaifia* (2016) (n 136) paras 163–174.
[151] *M.S.S.* (n 132) para 233.
[152] *Khlaifia* (2016) (n 136) para 194.

provided state protection and social care and who was left in a shanty town near Calais in France, constituted inhuman or degrading treatment contrary to Article 3 ECHR.[153] This judgment relied heavily on the findings of Rahimi to establish that France had failed to consider the extreme situation of vulnerability of the child, which would give rise to positive obligations, displace any considerations pertaining to irregularity of status and lower the threshold of severity that triggers Article 3 ECHR.[154]

1.3.1.3 The Protection of Family Life

Another highly controversial area where European human rights law has encroached upon the sovereign state power to regulate the entry and stay of non-nationals, although only partially, is the protection of family life in Article 8 ECHR. This is a limitable or qualified right insofar as it is susceptible to any interference that is lawful and necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedom of others.[155]

The case law of the Court has elaborated extensively on what 'family life' means, which includes married couples who are presumed to be a family[156] and those situations that demonstrate de facto family ties, such as people living together who are in a long-term relationship with each other or who have children.[157] The 'mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.[158] By contrast, the relatively recent case of *Narjis* v. *Italy* illustrated that, in the context of deportation, an unmarried and childless adult who had 'not demonstrated additional elements of dependence other than normal emotional ties towards his mother, sisters and brother', all of whom were adults, did not fall within the ambit of migrant family life.[159]

[153] *Khan v France* App no 12267/16 (ECHR 2019) paras 74, 81, 92.
[154] On 'child's extreme vulnerability [as a] decisive factor [that] takes precedence over considerations relating to the status of illegal immigrant' see also *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECHR 2007) para 55 and *Popov v France* App nos 39472/07 and 39474/07 (ECHR 2012) para 91.
[155] ECHR (n 43, Introduction) Article 8(2).
[156] *Marcks v Belgium* App no 6833/74 (ECHR 1979).
[157] *Johnston and Others v Ireland* App 9697/82 (ECHR 1986) para 56; X, Y *and* Z *v the UK* App no 21830/93 (ECHR 1997) para 36.
[158] *B. v the UK* App 9840/82 (ECHR 1987). For further details, see Council of Europe, *Guide on Article 8 of the European Convention on Human Rights* (COE–ECHR 2018) 46.
[159] *Narjis v Italy* App 57433/15 (ECHR 2019) para 37.

The immigration case law of the ECtHR actually began with the aforementioned family life case of *Abdulaziz, Cabales and Balkandali*, which concerned three women of foreign origin resident in the UK whose applications to be reunited with their husbands were rejected by the UK authorities. This case has become 'infamous' for setting the precedent – and premise of most of the immigration cases pending in Strasbourg – whereby, as a 'matter of well-established international law', immigration control is a sovereign state power that may counterbalance the enjoyment of human rights by migrants. Accordingly, while the Court recognised that Article 8 ECHR may give rise to 'positive obligations inherent in an effective "respect" for family life' and is *in abstracto* applicable to migrants, '[t]he duty imposed by Article 8 cannot be considered as extending to a *general* obligation on the [. . .] state to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouse for settlement in that country'.[160] The ECtHR ultimately rejected the applicants' claims on the grounds that they had not, *inter alia*, shown that 'there were obstacles to establishing family life in their own or their husbands' home countries'.[161]

Therefore, although there is no general state duty to guarantee the right to enter or stay in a country to enjoy family life, under certain circumstances, 'the removal of a person from a country where close members of his family are living may amount to an infringement' of Article 8 ECHR.[162] In cases of alleged violation of Article 8 ECHR, the Court seeks to ascertain whether a 'fair balance' has been struck between the competing interests of protection of family life in paragraph 1 and any relevant state interest in paragraph 2, while affording states 'a certain margin of appreciation' in that regard. This means that the ECtHR must undertake, on a case-by-case basis, a 'legitimacy' and 'proportionality test' concerning the acceptability and necessity of the deportation or refusal of entry of a family member in relation to the applicant's right to family life. For example, the Court has found that immigration measures 'may be justified by the preservation of the country's economic well-being, by the need of regulating the labour market and by considerations of public order weighing in favour of exclusion'.[163] However, the case law of the ECtHR has indicated several factors that must be considered by the state in such cases. These include the best interest of family children, the existence of

[160] *Abdulaziz* (n 68) 68, emphasis added.
[161] Ibid.
[162] *Al-Nashif v Bulgaria* App 50963/99 (ECHR 2002) para 114.
[163] *Berrehab v the Netherlands* App 10730/84 (ECHR 1988) para 26; *Rodrigues da Silva and Hoogkamer v the Netherlands* App 50435/99 (ECHR 2006) para 38.

insurmountable obstacles to the relocation outside of the country, the potential rupture of the family, immigration control and public order considerations, and '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.'[164]

Although 'very weighty reasons' are necessary to justify the deportation of a settled migrant who, for example, has regularly spent most of her childhood or youth in the deporting state or who is disabled or where serious impediments prevent the establishment of family life in the country of deportation,[165] the assessment of proportionality in the area of immigration adds a wide degree of unpredictability to the findings of the Court. This unpredictability of outcomes in cases of migrant family life is evident in the comparison between findings of the Chamber and those of the Grand Chamber in the case of *Biao* v. *Denmark*. The responding state refused to grant a residence permit for family reunion to one of the applicants because her husband – a naturalised Danish citizen and co-applicant in the proceedings – had not demonstrated sufficient 'attachment' to Denmark insofar as he did not meet the twenty-eight-year citizenship requirement to bring his spouse into the country without undertaking an 'attachment' test. The Court's Chamber judgment assessed the permissible interference with Article 8 ECHR by recalling the maxim of state sovereignty in immigration management and without attaching importance to the several years of Mr Biao's regular residence in Denmark. Furthermore, considering the alleged ties of the applicants to countries other than Denmark and the couple's awareness of the precarious status of one of them when the relationship started, the Court concluded that there were no insurmountable obstacles that prevented the family from moving to another country and thus considered the balance struck by the state as fair and compliant with Article 8 ECHR.[166] The Court also rejected the argument that the twenty-eight-year citizenship prerequisite for family reunification constituted indirect discrimination on the grounds of ethnic origin. The Grand Chamber of the Court reversed the above findings and considered that Article 14 on non-discrimination and Article 8 ECHR were jointly violated. It held that Denmark had failed to show that there were:

[164] *Jeunesse v the Netherlands* App no 12738/10 (ECHR 2014) paras 107–109.
[165] *Maslov v Austria* App no 1638/03 (ECHR 2008) para 75; *Nasri v France* App 19465/92 (ECHR 95).
[166] *Biao v Denmark* App 38590/10 (ECHR 2014) paras 52–60.

> Compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.[167]

1.3.2 *A Glimpse at the UN Treaty Bodies' Jurisprudence Concerning Migrant Human Rights*

The nine UN human rights treaties are monitored by ten independent treaty bodies, which were 'established specifically to supervise the application of [each] treaty' and provide interpretation of treaty obligations to which states should 'ascribe great weight'.[168] While the International Court of Justice is referring to the HRCtee in the above quotes, the general comments, recommendations and case-based views of all treaty bodies have an authoritative legal significance in international human rights law, although they are not a source of binding rules.[169] However, the normative legitimacy of their mandated activities arguably depends on a number of factors, including the determinacy of their reasonings, the coherence of the activities with the treaty system and the adherence of their findings to the sources and rules of interpretation of international (human rights) law.[170] Several of these bodies have made clear their commitment to the rights of migrants with precarious or irregular status, with arguments that are worth comparing with those of the Strasburg Court. Some examples of this general commitment are provided in this section, whereas a systematic analysis of the health-related jurisprudence of these treaty bodies is provided in Chapters 2–5.

1.3.2.1 Authoritative Interpretative Statements on the Rights of Migrants

One of the first migrant-related interpretative statements was the 1986 General Comment No. 15 of the HRCtee, according to which aliens and citizens should, in principle, enjoy equal human rights and that prima facie embeds a less deferential approach to the idea of state sovereignty than that of the ECtHR:

[167] *Biao v Denmark* App 38590/10 (ECHR 2016) para 138.
[168] *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*), Merits 2010 ICJ Reports 639 (Judgment of 30 November 2010) para 66, emphasis added.
[169] See Section I.2.
[170] Brigit Schlutter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Keller and Ulfstein (n 9, Introduction) 269, referring to Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990) 17.

> The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is *in principle* a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant *even in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[171]

Furthermore, General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination (CERD Committee), for reasons of system consistency with other UN human rights instruments and in consideration of the concerns raised in the state reporting mechanisms, reinterpreted the personal scope of application of the Convention on the Elimination of Racial Discrimination (CERD) as extending to racial discrimination against non-citizens, regardless of their immigration status.[172] This conclusion reversed the previous approach, according to which the Convention did not apply to state differentiations between citizens and aliens, which were in principle permissible under the Convention.[173]

More recently, in 2017, the CESCR issued a statement on the rights of migrants and refugees, which specified that all people in a situation of human mobility, particularly undocumented migrants, should be considered especially vulnerable people with regard to the enjoyment of socioeconomic rights.[174] This statement relies heavily on the concept of 'core obligations' to recommend that states guarantee to everyone the enjoyment of minimum essential levels of rights, an approach that is drawn upon in subsequent chapters and contributes to justifying a convincing road ahead for extending the depth and quality of migrant social rights as human rights.

Finally, in the same year, the Committee on the Rights of the Child (CRC Committee) and the CMW Committee issued two groundbreaking joint general comments on general principles and state obligations in relation to migrant children.[175] These collaborative statements of interpretation reiterated

[171] HRCtee, GC15 (n 96) paras 1, 2, 4, 5, emphasis added.

[172] CERD Committee, GR30 (n 105) paras 2, 4, 7.

[173] CERD (n 42, Introduction) Article 1.2 and CERD Committee, General Recommendation No. 11: 'Non-citizens' (1993) para 1.

[174] CESCR, 'Statement: The Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights' (13 March 2017) E/C.12/2017/1.

[175] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, 'Joint General Comment No. 3/22 on the general principles regarding the human rights of children in the context of international migration' (16 November 2017) CMW/C/GC/3-CRC/C/GC/22; 'Joint General Comment No. 4/23 on the state obligations regarding the human rights of children in the context of

that international children's rights apply to all children, regardless of their or their parents' nationality or migration status. It is worth highlighting that these committees, among their various advances, plainly prohibited the detention of migrant children by establishing that the *ultima ratio* principle – which is currently employed by the ECtHR – should not apply to migrant children.[176]

1.3.2.2 Jurisprudential Trends from Treaty Bodies' Communication Procedures

Research on the databases of the UN Office of the High Commissioner of Human Rights demonstrates that, in their communication procedures concerning failed asylum seekers and non-authorised migrants, the UN treaty bodies have been particularly concerned by alleged violations of the right to freedom from torture or inhuman or degrading treatment and of the prohibition of refoulement.[177] As explained above, the latter requires states to refrain from deporting an individual when there are substantial grounds for believing that the person concerned would be at 'foreseeable, personal, present and real' risk of torture in that country[178] or at real and personal risk of irreparable harm.[179]

While for both the ECtHR and the HRCtee, the identification of a real and personal risk of degrading or undignified treatment in the country of removal should, in principle, inhibit the enforcement of a return, the Committee of the Convention against Torture (CAT Committee) interprets the principle of non-refoulement as protecting the complainant against a risk of being subjected to 'torture' in the event of removal. Torture is defined in the Convention as the intentional infliction of severe pain or suffering, whether physical or mental, by the state. This fact raises considerably the threshold of potential human rights abuse that may prevent a removal within that legal framework. In such an assessment, 'the existence of a consistent pattern of gross, flagrant or mass violations of human rights' in the country of deportation

international migration in countries of origin, transit, destination and return' (16 November 2017) CMW/C/GC/4-CRC/C/GC/23.

[176] Ibid (JGC 4/23) para 5. For further details, see Ciara M. Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) *Human Rights Law Review* 19 (1) 1.

[177] Research performed on <http://juris.ohchr.org/> accessed 2 April 2021.

[178] CAT Committee, 'General Comment No. 4 (2017): The Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) CAT/C/GC/4, para 11.

[179] HRCtee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004) CCPR/C/21/Rev.1/Add. 13.

is considered together with the complainant's personal risk of being tortured[180] and in the light of their vulnerabilities and medical records.[181]

The HRCtee, in the context of deportation, has demonstrated particular sensitivity with regard to family- and child-related situations. In *O.A. v. Denmark*, which concerned the removal of an unaccompanied minor from Denmark to Greece under the EU Dublin System, this Committee held that the child would be exposed to a high risk of irreparable harm because of the still ongoing substandard state of the Greek reception system.[182] In particular, the Committee held that the state party failed to undertake an individualised assessment of the risk of subjection to inhuman and degrading treatment that a vulnerable person, in this case a child, would face if deported.[183] In *Y.A.A. & F.H.M. v. Denmark*, the Committee reached similar conclusions in relation to the deportation of a family with four children to Italy, where they had previously encountered extreme hardship in securing basic social assistance, including shelter, work and health care. In this case, the state had failed to give enough weight to the situation of vulnerability of the complainants and their family and 'to seek proper assurances from the Italian authorities that the authors and their four children would be assured of living conditions that are compatible with Article 7 (prohibition of torture and inhuman or degrading treatment) ICCPR'.[184] In another case against Denmark, *Warda*, although similar circumstances of material deprivation in the 'first country of asylum' led the HRCtee to hold a violation of Article 7 ICCPR, the concurring opinion of two judges clarified the exceptional and particular factors that grounded that decision.[185] Similarly, in *I.A.M.*, the principles of precaution and the best interest of the child were employed by the CRC Committee to oppose the Danish decision to repatriate a Somali mother and her daughter to (an area of) their country of origin where female genital mutilation was widely practised.[186]

The protection of the family was also one of the main arguments in the *Mansour* case, which concerned the refusal to grant a visa to an Iranian father

[180] For example, see *M.A.M.A. et al. v Sweden* Com 391/2009 (CAT Committee 2012); *Rouba Alhaj Ali v Morocco* Com no 682/2015 (CAT Committee 2016).

[181] *J.B. v Switzerland* Com no 721/2015 (CAT Committee 2017); *A.N. v Switzerland* Com no 742/2016 (CAT Committee 2018). Further details on these and other mental health-related cases are provided in Chapter 5.

[182] *O.A. v Denmark* Com no 2770/2016 (HRCtee 2017) para 8.9.

[183] Ibid, para 8.11.

[184] *Y.A.A. and F.H.M. v Denmark* Com no 2681/2015 (HRCtee 2017) para 7.9.

[185] *Warda v Denmark* Com no 2360/2014 (HRCtee 2015) Appendix II.

[186] *I.A.M. v Denmark* Com no 3/2016 (CRC Committee 2018); Similarly, *Kaba v Canada and Guinea* Com no 1465/2006 (HRCtee 2010).

who had lived regularly for more than sixteen years in Australia because of insufficiently clarified 'compelling reasons of national security'. The HRCtee held that the state's procedure lacked due process of law and violated Articles 17 (private and family life) and 23 (protection of the family and rights associated with marriage) ICCPR because it did not provide 'adequate and objective justification for the interference with [the applicant's] long-settled family life'.[187] In another case of expulsion from Australia, the same Committee clarified that the state interest in expelling a long-term settled person to his country of nationality, where he had no family bonds, might be considered – as it was in the case in question – a disproportionate interference with the right to family life as per Article 17 ICCPR.[188]

In relation to detention, unlike the ECtHR, the HRCtee considers that the prolonged detention of 'unauthorised arrivals', while not prohibited in principle, 'could be considered arbitrary if it is *not necessary* given all the circumstances of the case'.[189]

The tension between sovereign immigration enforcement and human rights clearly underlies the recent *Toussaint* case, in which the HRCtee grappled, for the first time, with an alleged violation of the ICCPR on the grounds of a lack of access to urgent health care of an irregular migrant. The applicant was denied health care because the state authorities claimed that the 'operative cause' of the risk to her life and health was her own decision to irregularly remain in the country. The domestic court had stated that: 'The exclusion of immigrants without legal status from access to health care is justifiable as a reasonable limit under section 1 of the Canadian Charter because appropriate weight should be given to the interests of the state in defending its immigration laws.'[190] However, the Committee held the opinion that a differentiation based on the applicant's 'immigration status' that 'could result in the author's loss of life or in irreversible negative consequences for the author's health' was not based on reasonable and objective criteria and was therefore a discriminatory interference with the right to life (in dignity) of Article 6 ICCPR: 'Aliens have an "inherent right to life". States therefore cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.'[191]

[187] *Mansour Leghaei et al. v Australia* Com no 1937/2010 (HRCtee 2015) para 10.5.
[188] *Stefan Lars Nystrom v Australia* Com no 1557/2007 (HRCtee 2011).
[189] *Madafferi v Australia* Com no 1011/2001 (HRCtee 2004) para 9, emphasis added. See Section 5.4.1 for further details on this case.
[190] *Toussaint v Canada* Com no 2348/2014 (HRCtee 2018) para 2.12.
[191] Ibid, paras 11.7, 11.8.

The advocacy of UN treaty bodies for migrant rights has exceeded the articulation of substantive arguments, and the 2021 decisions in *A.S. et al.* v. *Italy* and its twin case against *Malta* are important examples of how expansive rules on jurisdiction may contribute to developing a favourable case law for non-nationals with precarious legal status and at risk of dying.[192] These cases concerned the joint failure of Malta and Italy, in 2013, to rescue more than 200 migrants whose vessel sank six hours after the initial call to the Italian authorities. The case against Italy is particularly significant, as it shows how state obligations vis-à-vis the right to life of migrants at sea may be expanded as a result of a 'functional' approach to state jurisdiction. The HRCtee endorsed this approach in its General Comment No. 36 by favouring the idea that extraterritorial state responsibility for the protection of human rights not only exists where states have effective control *over the victims* but also where they (may) have *control over the enjoyment of the victim's human rights*, which may be foreseeably hindered by certain state actions or inactions, including in situations of distress and rescue at sea.[193] In this case, the HRCtee considered that although the vessel was located outside Italy's territorial sea and its search-and-rescue area, 'in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy'.[194] These circumstances included the fact that the people on the sinking boat had several contacts with the Italian search-and-rescue coordination centre and that an Italian navy ship was relatively close (an hour's sailing) to the place where the incident occurred but was required to move away from the sinking boat, as well as the 'relevant legal obligations incurred by Italy under the international law of the sea'.[195] In consideration of this, the rights of people onboard the vessel in distress 'were directly affected by the [delayed] decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant'.[196]

On the merits, the Committee found that Italy failed to act with due diligence to protect the right to life of the applicants.[197] The tension between sovereign migration policies and expansive human rights obligations lies at the

[192] A.S., *D.I., O.I. and G.D. v Italy* Com no 3042/2017 (HRCtee 2021).
[193] HRCtee, 'General Comment No. 36: Article 6 of the International Covenant on Civil and Political Rights on the right to life' (30 October 2018) para 63.
[194] A.S. *et al.* (n 192) para 7.8.
[195] Ibid.
[196] Ibid.
[197] Ibid, para 8.5.

heart of this case, as cooperating in the search and rescue of migrants at sea may have implications in terms of admissions and reception of those migrants, recognition of their rights (including their right to asylum) and redistribution of public resources. With this decision – which was criticised by scholars and dissenting judges because of the alleged inconsistent legal grounding of some of its arguments[198] – the HRCtee in its majority chose to embrace a marked *pro homine* approach on the spectrum of possible decisions by increasing state duties of due diligence at sea borders vis-à-vis migrant rights.

1.3.3 *The Different Approaches of European and International Case Law*

Instances of deportation from a country and irregular stay are particularly delicate circumstances in which human rights abuses are likely to take place and executive powers of immigration control are strong vis-à-vis a situation of concrete and legal vulnerability. Against this backdrop, the ECtHR has established certain procedural and substantial minimum standards, which, to different extents, limit the sovereign power to exclude. However, state sovereignty considerations, reminders of our Westphalian system of international law, are subsumed in the ECHR and in the Court's case law. On the one hand, the Court has relied on Article 3 ECHR concerning the prohibition of degrading treatment to rule out situations of appalling migration detention, extreme poverty outside of the detention context and cases of refoulement but only where a high threshold of severity of abuse is met. On the other hand, the Court has been hesitant to challenge restrictive state practices that impinge on migrants' right to family life. Furthermore, settled case law excludes the requirement to assess the migration-related detention of adults by reference to its 'necessity', as is the case for other types of detention. Finally, procedural guarantees against collective expulsions have evolved as particularly qualified standards, and fair trial guarantees do not generally apply to immigration proceedings. The migration-focused jurisprudence of the most widely known human rights Court is extremely complex and case-specific, making it difficult to establish long-lasting trends and general standards. This enables states to limit the impact of the Court's findings, which is why its case law has been described as 'dilemmatic'.[199] As for the UN treaty bodies, they

[198] Ibid, Annexes I and II; Marko Milanovic, Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations (*EJIL:Talk! Blog of the European Journal of International Law*, 16 March 2021) <www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/> accessed 8 April 2021.

[199] Baumgärtel (n 12, Introduction) 101–120.

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place less emphasis on the state power to regulate immigration than the ECtHR does in its case law. Indeed, none of the individual communications mentioned in Section 1.3.2, which are not formally binding for responding states, contains any *obiter dicta* regarding the 'long-established maxim' of state sovereignty in the area of immigration, and failed communications tend to be based on the applicants' lack of evidence or the failure to meet a prima facie standard of proof in relation to a human rights violation.[200] The HRCtee, in the case of *Toussaint*, even relies on the jurisprudence of the Inter-American Court of Human Rights, which, as explained in Section 1.5.1, is particularly progressive and *pro homine*–oriented in relation to migrants' rights.[201]

1.4 EXPLICIT LIMITATIONS ON THE RIGHTS OF IRREGULAR MIGRANTS IN HUMAN RIGHTS TREATY PROVISIONS

Not only has the uneasy balancing of sovereign interests and powers in the field of immigration with human rights law led to qualified judicial or quasi-judicial decisions on migrant rights, but it is directly enshrined in the texts of some human rights treaties, such as the ICMW and the ESC.

1.4.1 *The Convention on Migrant Workers*

Unlike the ICCPR, the ICESCR and the ECHR, the ICMW explicitly regulates differential treatment for regular as opposed to irregular migrants as human rights holders. On the one hand, this instrument represents an overall improvement in the protection of the rights of migrant workers and makes them visible within international human rights law,[202] emphasising 'the situation of vulnerability in which migrant workers and members of their families frequently find themselves'.[203] On the other hand, it 'constitutionalises' a double divide (citizens v. non-citizens and regular v. irregular migrants) in international human rights law. Hence, the ICMW has been described as a 'hybrid instrument',[204] aimed at achieving greater protection of migrants'

[200] For example, *M.P. v Denmark* Com no 2643/2015 (HRCtee 2017); *E.A. v Sweden* Com no 690/2015 (CAT Committee 2017).

[201] *Toussaint* (n 190) para 11.7. See *infra* at Section 1.5.

[202] Isabelle Slinckx, 'Migrants' Rights in UN Human Rights Conventions' in Paul De Guchteneire, Antonie Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights* (CUP 2009) 122, 146.

[203] ICMW (n 42, Introduction) Preamble.

[204] Bosniak (n 71) 316. See in particular Articles 34 and 79 of the ICMW, which recall the exclusive state right to regulate immigration.

rights while also reaffirming state territorial sovereignty as a well-founded principle of international and immigration law. For example, the unequal treatment of irregular migrants and documented migrant workers emerges in relation to social and health care entitlements. Whereas the Convention is generally silent regarding irregular migrants' social rights, Article 28 ICMW stipulates the following:

> Workers and members of their families shall have the right to receive any medical care that is *urgently required for the preservation of their life or the avoidance of irreparable harm to their health* on the basis of equality of treatment with nationals of the State concerned. Such *emergency* medical care shall not be refused [to anyone] by reason of any irregularity with regard to stay or employment.[205]

By contrast, Article 43 ICMW establishes that documented or regular migrant workers 'shall enjoy *equality of treatment* with nationals of the State of employment in relation to [...] access to housing, including social housing schemes [and] access to social and health services'.[206]

Although the ICMW is not widely ratified outside Latin America and western Africa[207] and its treaty body has encouraged a contextual interpretation of its text (in the light, e.g. of the ICESCR-related obligations) that aligns with the recommendation of the ILC's Fragmentation Report' to extend access to essential social services using the more favourable treaty norms among those applicable,[208] the differential treatment it textually condones has been openly written into a binding and a specialised human rights document.

1.4.2 *The European Social Charter*

The second example of a treaty text that clearly restricts the human rights of irregular migrants in the context of social and medical assistance and beyond

[205] ICMW (n 42, Introduction) Article 28, emphasis added.

[206] Ibid, Article 43, emphasis added.

[207] As of April 2021, only fifty-six states are parties to this Convention, neither of them from the EU, Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives* (UNESCO Publishing 2007) 51.

[208] CMW Committee, 'General Comment No. 1 on Migrant Domestic Workers' (23 February 2011) CMW/C/GC/1, para 44; CMW Committee, GC2 (n 16, Introduction) paras 7, 8, 10, 72; Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UNGA Report, finalised by Martti Koskenniemi (13 April 2006) A/CN.4/L.682, para 108.

is the ESC.[209] This is the sister treaty, in the area of socioeconomic rights, of the ECHR. In contrast to the European Convention, which applies to 'everyone' within state jurisdictions,[210] the Appendix of the Charter places irregular migrants outside the personal scope of the treaty: 'the persons covered [...] include foreigners only in so far as they are nationals of other contracting parties lawfully resident or working regularly within the territory of the contracting party concerned'.[211] This ideological fault line (in the context of a human rights treaty) stems from the fact that the drafters of the Charter, in the mid-1950s, were principally concerned with eliminating barriers to the equal enjoyment of labour and social rights for the nationals of European countries.[212] However, this limited personal scope has been kept in the protocols to the ESC and the Revised Charter, which resulted from the reform of the ESC system in the late 1980s and early 1990s.[213] This confirmed the assumption that socioeconomic rights are prevalently considered a matter solely for nationals and 'legal communities' as identifiable taxpayers.[214] Justifications based on 'identity' and 'costs'[215] that are embedded in this status quo prima facie undermine the conceptualisation of equal migrant social rights in this legal framework.

Having said this, a contextual and purposive interpretation of the ESC and its Appendix, in conjunction with a series of substantive rights within the Charter, has led the European Committee of Social Rights (ECSR) – the quasi-judicial body that oversees the implementation of the ESC – to gradually grant basic social rights to irregular migrants. The turning point occurred in 2004 with the *FIDH* v. *France* case,[216] which concerned access to medical

[209] European Social Charter and European Social Charter (Revised) (n 43, Introduction).
[210] ECHR (n 43, Introduction) Article 1.
[211] ESC (n 43, Introduction) Appendix, para 1.
[212] PACE, 'Common Policy of Member States in Social Affairs – Debate on the Report of the Committee on Social Questions' (23 September 1953) 20–21: PACE, 'Debate on the Report of the Committee on Social Questions Expressing an Opinion on ... the Social Programme of the Council of Europe' (28 May 1954) 31, in *Collected Edition of the 'Travaux préparatoires' Volume 1 (1953–1954)* <www.coe.int/en/web/european-social-charter/preparatory-work> accessed 15 March 2021.
[213] Charte-Rel Committee, 'Final Activity Report (adopted by the Committee on the European Social Charter', Charte-Rel (94) 23, 19 October 1994, Appendix IV, 58: 'The majority of delegates had difficulty with the proposed change to the scope, *ratione personae*, of the Charter as a whole.'
[214] Francesca Biondi Dal Monte, 'Lo Stato Sociale di Fronte alle Migrazioni: Diritti Sociali, Appartenenza e Dignità della Persona' (2012) *Rivista del Gruppo di Pisa* 3(12).
[215] Baumgratel (n 12, Introduction) 138–139.
[216] *International Federation of Human Rights League (FIDH) v France* Com no 14/2003 (ECSR 2004).

care by irregular migrant children. On that occasion, the ECSR, arguing for the complementary nature of the ESC and the ECHR, the interdependence and indivisibility of all human rights, and the protection of human dignity, concluded that a 'legislation or practice which denies entitlements to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter'.[217] In subsequent cases concerning housing and social and medical assistance, the ECSR extended its legal reasoning beyond the ordinary meaning of the words of the Appendix, stating that the Charter must be interpreted 'in the light of other applicable rules of international law'[218] that are truly universal, such as the Convention of the Rights of the Child (CRC) and the ICESCR.

This teleological and evolutionary interpretative extension of the personal scope of the Charter is considered the exception rather than the rule and is linked to certain circumstances. For example, most of the cases of the 'irregular migrant saga' have concerned 'unlawful children' who were deemed particularly vulnerable because of their limited autonomy.[219] Nevertheless, the ECSR reached the conclusion that at least the right to 'emergency assistance' (either social or medical) of Article 13(4) ESC – which is linked to the 'preservation of most fundamental rights of these persons, as well as their human dignity'[220] – should apply to all irregular migrants, including adults.[221] This creative interpretation constitutes a progressive step towards the universal personal application of the ESC, even though social rights for irregular migrants in the European human rights system are clearly not ultimately framed in equal terms for everyone, regardless of migration status.[222]

The variety of legal sources and bodies that interpret human rights provisions generates some confusion regarding the character, shape and content of the human rights of irregular or undocumented migrants. The legal uncertainty concerns, first and foremost, whether irregular migrants hold human rights or simply some rights, and, as in the case of social rights, what the 'levels'

[217] Ibid, paras 26–32.

[218] *Defence for Children International (DCI) v the Netherlands* Com no 47/2008 (ECSR 2009) para 35; *Defence for Children International (DCI) v Belgium* Com no 69/2011 (ECSR 2012) paras 29, 33; *Conference of European Churches (CEC) v the Netherlands* Com no 30/2013 (ECSR 2014) para 68.

[219] *DCI v Belgium* (ibid) para 35; *CEC* (ibid) para 71.

[220] *CEC* (ibid) para 74. See also *DCI v Belgium* (ibid) para 36.

[221] *CEC* (ibid) paras 73, 75; *European Federation of National Organisations Working with the Homeless (FEANTSA) v the Netherlands* Com no 86/2012 (ECSR 2014) paras 171, 173, 182–183, 186.

[222] Stefano Angeleri, 'Article 13: The Right to Social and Medical Assistance' in RACSE/ANESC (eds) *A Commentary on the European Social Charter*, Vol 3 (2023, Brill-Nijhoff 2023).

and 'qualities' of these guarantees are. Although not without contradictions, international and European human rights law has served to open international legal avenues to protect the human rights of irregular migrants in terms of providing fora for discussion, standard setting and interpretation. The partial achievements reported in this chapter bear witness to the fact that debates on the depth of irregular migrants' rights are yet to be resolved.

1.5 BROADENING CONTEXTUAL REFLECTIONS ON MIGRANT RIGHTS

1.5.1 *The Pro-migrant Approach of the Inter-American System of Human Rights*

The previous sections in this chapter demonstrate certain oscillations within international and European law between the need for immigration law enforcement and the necessity of human rights implementation. At this juncture, it is useful to briefly reference the jurisprudence of the inter-American bodies to show that limiting migrant rights is not inevitable in human rights law. While European human rights law has recognised violations of the human rights of irregular migrants in exceptional and severely abusive cases,[223] the inter-American human rights system has been particularly responsive to the call of equality vis-à-vis sovereign powers with respect to immigration management. This approach is especially evident in the Inter-American Court's advisory opinion on the rights of undocumented migrants.[224] This was the result of a request filed by Mexico regarding the treatment and rights of Mexican undocumented migrant workers in the USA. In particular, the question posed to the Inter-American Court was whether excluding undocumented migrants from labour rights was human rights compliant. It is interesting to note that the Court essentially acknowledged the vulnerability of undocumented migrants, referring to an 'individual situation of absence or difference of *power* with regard to non-migrants', and recognised them as people who are particularly exposed to various forms of discrimination.[225] In the advisory opinion, the principles of non-discrimination and equality are deemed so essential to the entire human rights legal framework to be considered part of *jus cogens* and, thus, as norms

[223] See *supra* at Sections 1.3.1 and 1.3.2; and *infra* at Chapters 3 and 4.
[224] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, IACtHR Series A no 18 (17 September 2003).
[225] Ibid, para 112, emphasis added.

that should prevail over any other in international law norms. According to this decision, human rights, including labour rights, which are essential to 'develop fully as a human being', must be enjoyed by everyone without discrimination, including discrimination on the grounds of legal status.[226] The maxims of this opinion are consistently restated in several judgments of the Inter-American Court,[227] and even recalled in a concurring opinion to an ECtHR ruling.[228]

Ten years after the above opinion was issued, the Court reiterated these highly protective conclusions in another advisory opinion on the rights of migrant children, which unequivocally stated that the 'State must ... respect the said rights, because they are based, precisely, on the attributes of the human personality [...] regardless of [...] whether the person is there temporarily, in transit, legally, or in an irregular migratory situation.'[229] This brief account of the approach of the inter-American system shows that the restrictive approach to the rights of undocumented people justified by the principle of state sovereignty is not the only option but instead is a deliberate choice of certain legal systems, including certain branches of international human rights law.

1.5.2 *The Global Compact for Migration*

This analysis would be incomplete without briefly mentioning that, since 2016, the adoption of the New York Declaration and the outcomes of the two Global Compacts, under the auspices of the UN, have shaped a non-binding cooperative framework to address large movements of migrants and refugees.[230] Although these instruments are not legally binding, they can play an important role in consolidating human rights–based norms and

[226] Ibid, paras 158, 169, 170. For further analysis, see Dembour (n 5) 296–304; Beth Lyon, 'Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18' (2003) *NYU Review of Law & Social Change* 28 547.

[227] *Vélez Loor v Panama* (IACtHR 2010) Series C No. 218, paras 98–100; *Pacheco Tineo Family v Bolivia* (IACtHR 2013) Series C No. 272 para 128; *Expelled Dominicans and Haitians v Dominican Republic* (IACtHR 2014) Series C No. 282, para 197.

[228] *De Souza Ribeiro v France* App no. 22689/07 (ECHR 2012) Concurring Opinion of Judge Pinto de Albuquerque.

[229] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21, IACtHR (19 August 2014) para 62.

[230] New York Declaration (n 68); Global Compact for Safe, Orderly and Regular Migration and Global Compact on Refugees (n 92).

collaborative approaches, including with regard to irregular migrants.[231] Indeed, they restate existing international obligations and set out relatively detailed priorities, good practice, action plans and follow-up mechanisms to deal with the challenges of international migration.

The Compact for Migration, like the documents analysed in this chapter, constantly wavers between the principle of state sovereignty, with all its negative implications for irregular migrants, and a genuine commitment to the holistic protection of the rights of all migrants. This tension was palpable in the negotiations that led to the text adopted at the Conference of Marrakech and endorsed by the UNGA in December 2018.

The zero draft of the Compact did not contain any explicit distinction between the treatment of regular and irregular migrants.[232] However, the paragraph on 'national sovereignty' as a *guiding principle* in the final draft, which was insisted upon by the EU bloc during the negotiations, reads as follows:

> The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact.[233]

It is also significant that, in relation to the actual enjoyment of rights by irregular migrants, the zero draft contained several references to the establishment of 'firewalls', which refers to the structuring of public service provision or labour inspection so as not to expose irregular migrants to immigration enforcement authorities, whereas the final draft makes this separation less clear.[234] The final text requires states to 'ensure that cooperation between service providers and immigration authorities does not exacerbate the vulnerabilities of irregular migrants by compromising' their human rights.[235]

[231] Alexander Betts, 'Towards a "Soft Law" Framework for the Protection of Vulnerable Irregular Migrants' (2010) *International Journal of Refugee Law* 22(2) 209–236.

[232] Zero Draft of the Global Compact for Safe, Orderly and Regular Migration (5 February 2018) para 13, <https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf> accessed 1 March 2021.

[233] GCM (n 92) para 15; Elspeth Guild and Katharine T. Weatherhead, 'Tensions as the EU Negotiates the Global Compact for Safe, Orderly and Regular Migration' (*EU Migration Law Blog*, 6 July 2018) <http://eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/> accessed 1 March 2021.

[234] Zero Draft (n 232) paras 20.j; 21.g; 29.c.

[235] GCM (n 92) para 31.b.

However, it does not incontrovertibly dictate that public service providers should refrain from reporting situations of irregularity to the immigration authorities.

Finally, as far as immigration detention is concerned, Objective 13 of the Global Compact reads as promising on paper, since it requires states to ensure that detention is a measure of last resort and that it 'follow[s] due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments'.[236] This emphasis on the procedural guarantees and on the necessity of detention is at odds with the limited applicability of the proportionality test of the ECtHR judgment in the case of *Saadi*.[237]

1.6 CONCLUSIONS

This chapter attempted to clarify, in relation to the topic at hand, the concepts of sovereignty and human rights and how their interrelations shape human rights treaty provisions, their interpretation and, ultimately, the enjoyment of human rights by irregular migrants. In doing so, it shows that the Westphalian system of international society, based on the inviolability of state borders and territories, has been a central argument in the establishment of immigration control as an exclusively domestic and sovereign power. However, the doctrine of absolute sovereignty in relation to immigration is not a 'natural' feature of the Westphalian system but instead is the result of a practice that has grown since the late nineteenth century and that is still upheld today. Even certain norms of international and European human rights law, which are naturally aimed at limiting the exercise of exclusive state authority in a territory and over a population, have recognised state control over migration flows as a legitimate state power and a well-established principle of international (human rights) law. The case law of the human rights bodies has navigated between a universally oriented human rights approach and a respect for sovereign domestic policies while also demonstrating an awareness that the vulnerability of irregular migrants to human rights abuses is high in the context of immigration control. These clashes have contributed to the development of asymmetric conceptualisations that human rights law will need to resolve to avoid excessive expansion of domestic law and state discretion where the rights of irregular migrants are concerned. The brief look at the inter-American jurisprudence reveals a different way of grappling with the rights of migrants in international law, whereby sovereign powers to regulate immigration are not

[236] Ibid.
[237] *Saadi* (n 117).

the starting point for human rights monitoring and adjudication. The case of the right to health provides a significant example of the structural difficulty of applying human rights regimes universally, regardless of immigration status. The legal and structural difficulties that irregular migrants encounter with regard to their right to health are not only a consequence of the harsh impact of sovereign powers in the areas of immigration. The non-neutrality of international and European human rights law in relation to socioeconomic rights and the sovereign dimensions of health governance – which are fleshed out in Chapter 2 – are important factors that constrain the full realisation of the right to health of irregular migrants.