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## **Irregular migrants and human right protection under international law: A critical analysis**

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### **Abstract**

Issues of movement of persons have always experienced abnormalities as it becomes the responsibility of States to protect only those who have decided to move to another country legally. The 1951 Refugee Convention in cognisance with other human right instruments ensures that only those who possess a legal should be accorded protection. The situation becomes a complex one when dealing with those under an irregular situation as rendering protection to this category of persons continues to be questionable. The fundamental question raised here is in determining whether irregular migrants can still benefit from the available human rights protection provided by international law irrespective of their irregular position? In providing a response to the above problematic, it will necessary to have a critical analysis of human dispositions when dealing with irregular migrants, and how violations will affect them. With all these complexities affecting this category of persons in international, providing protection continue to be a decayed and sour ground even though irregular migrant even in their irregular position needs minimum protection on their fundamental human right by those states they are taking residency.

**Keywords:** Irregular migrants, protection, human right, international law, analysis

### **Introduction**

The rule in International migration stands that it becomes difficult in possessing a universal definition of undocumented migrants as when we talk about migrant they are those who are residing in a given country legally. Other terms universally used to describe migrants in an irregular situation are considered to be incorporated as undocumented, unapproved, illegitimate and even unlawful. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families being the sole instrument duly recognised international in matters related to migrants' workers states that:

For the purposes of the present Convention, migrant workers and members of their families:  
(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;  
(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article <sup>[1]</sup>.

According to the Global Migration Group, an inter-agency body of the United Nations and other international entities working on migration defines an irregular migrant as "every person who, owing to undocumented entry or the expiry of his or her visa, lacks legal status in a transit or host country <sup>[2]</sup>. The term applies to migrants who overstep a country's admission rules and any other person not authorized to remain in the host country." <sup>[3]</sup> The rule here remains that irregular migrants will cover all categories of international migrants found in an irregular situation, including undocumented migrants, and even rejected asylum seekers are considered under such definition of a migrant in an irregular situation.

When it comes to issues related to irregular migrant it becomes complex as little or limited knowledge can be produced at this domain <sup>[4]</sup> as most official available fails to capture either the number or the surroundings of migrants, and many international data on migration do not accurately account for irregular migrants. The possibility of data available on those ON irregular migrants who are detained or otherwise subject to State action like those arrested at border control points, thus found in immigration detention and return figures, and with this in place, they still exist rare indication of the total irregular migrant population. Most of the time talking about Irregular migrants, they are rarely included in population censuses, which remain the main statistical source of information about migrant populations.

To establish whether they are meeting their treaty obligations, and to ensure that their conduct is not creating inequalities in the enjoyment of human rights, States are called upon to monitor the effects of their policies and actions, and even their social policies. To do so, these States have that duty in gathering disaggregated data relating to the situation and place occupied by the said category of migrants living in the society<sup>[5]</sup>. Undeniably, Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of the International Labour Organization (ILO) unambiguously points States to collect information on the existence of erratically employed male and female migrant workers<sup>[6]</sup>.

The Committee on the Rights of the Child has noted that lack of data on children in the context of migration deters the design, implementation and monitoring of public policies that safeguard migrant children's economic and social rights. For instance, there is no reliable figure or statistics existing as to the number of children in an irregular situation. The Committee recommended that addressing the absence of national figures and estimates on irregular migrants, particularly irregular migrant children, should be made a higher priority by all appropriate duty bringers, including the strengthening of disaggregated data collection. The tendency remains that in an effort in reducing the abuse of such data; ensuring that households affected by migration are identified in local statistical and data systems as well as nationally representative living standards, expenditure and labour force surveys; and ensuring that the responsibility for monitoring the situation of migrant children should be shared by all countries involved be it countries of transition, destination or even countries of origin<sup>[7]</sup>.

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has also expressed concern at the lack of data on the situation of irregular migrants, including on school enrolment, because this may prevent States from assessing and addressing the situation of migrant children effectively<sup>[8]</sup>.

### **Assessing the Pathways leading to irregularity of migrants**

There are lots of controversies surrounding the irregular state of migrants on the international field, so many push factors ranging from economic, social, political, security, law and even cultural sometimes has always been considered by many as the provocative factors triggering the phenomenon of irregular migrants. Most of the instance that has presents itself; many of the people who migrate in an irregular manner do so because their own countries are affected by armed conflict, political instability and economic decline<sup>[9]</sup>. Around the world, those who take the legal and legitimate channels for migration are generally lacking and even those who claim of acquiring or going through the legal means of migration are often hard to access<sup>[10]</sup>. Individuals with fittingly few resources are suspiciously exaggerated by the absence of regular channels and barriers obstructing their use.

The rule in international Migration law stands that many reasons or factor can pushed someone to be transformed and assessed to be in the corridors of irregularity. Circumstances like those migrants who have been denied asylum may be powerless to return to their countries of origin for fear of human rights violations. Apart from the situation of asylum

denial, even the cumbersome and expensive administrative procedures can cause the unintended loss or withdrawal of regular status. The question one is force in asking is in determine what happen to those countries where work and residence permits of the migrants depends on its employment? The situation becomes a disturbing one as in most instances the migrant living in the said country will want to escape from the abusive character of its employer making such a migrant to become irregular in order to seepage its abusive employers. The situation even becomes more complex and worrisome where in some circumstances; a migrant may find itself in regular and an irregular situation. This will be the case where the migrant entered a country on a visa note so as to join family members but is subsequently compelled for financial reasons to find a job despite not having a work permit. Migrants may make the conscious decision to seek out irregular channels of entry in order to reunite with family or seek employment. In situation of children, most often they find themselves in an irregular situation because their status is linked to that of their parents, and children born to migrant parents in their countries of destination often inherit their irregular status. Research tells us that the majority of irregular migrants, who have entered a country of destination legally, subsequently fall into an irregular situation. Some will have overstayed their permits having been unable to maintain a regular presence, while there are some others who lapsed into irregularity due to bureaucratic obstacles or will have been driven into irregularity trying to escape exploitation and abuse by their employers. Some irregular migrants will have protection needs that they have been either unable or unwilling to articulate to State authorities, or that have been dismissed in flawed asylum procedures. The situations of human rights are not a matter of charity, nor are they reward for obeying immigration rules. Human rights are unchallengeable prerogatives of every human being, wherever they are and whatever their status<sup>[11]</sup>.

### **The tendency of experiencing Vulnerability in irregular migrants**

Irrespective of the fact that some migrants obtained or acquired irregular status, most of these irregular migrants are unreasonably exposed to human rights defilements. Most Migration Groups are expressing their deep concern about the human rights of international migrants in an irregular situation around the globe by concluding that they are more likely to face discrimination, exclusion, abuse and even exploitation going against one on the fundamental principle of human right law being that on non-discrimination<sup>[12]</sup>. Migration group like that of the Global group pointed out that the irregular situation in which international migrants may find themselves should not deprive them of either their humanity or their human rights, as they believe that these migrants irrespective of their status and position occupied in the society, they fundamental human rights attached to them should be respected by all<sup>[13]</sup>.

With all the legal dispositions and peculiarities exposed by the various human right instruments as to the protection and respect of the human right of all without discrimination and inequality, irregular migrants continues to face many violations of their fundamental human rights. They are often in most cases and settings imperilled to arbitrary and prolonged detention owing to obstructive migration

detention policies and sometimes subject to inadequate conditions in detention. By law or administrative regulation, many are deprived access to public health care, adequate housing and accommodation, education, and essential social security<sup>[14]</sup>. At the level of irregular migrant children, most of them are unable in law or practice to attend school. Irregular migrants are frequently ineligible to receive adequate health care or decent accommodation, and may not be allowed to exercise their right to freedom of association. Many feel unable to inform the police when they are victims of crime or do not send their children to school, because they are afraid of being deported.

Furthermore, forced to remain at the margins of society and often excluded from the formal economy, most irregular migrants work in low skilled and unregulated sectors of the labour market, in jobs that are often dirty, dangerous and difficult. They may join other family members who already work in these sectors. Their conditions of work are often dangerous and they have little or no protection of their labour rights.

They are often subject to exploitative conditions, including violence, torture and forced labour, with little recourse to remedies owing to their irregular situation.

Yet, national strategies or plans of action on public housing, health care or education rarely consider the situation and needs of vulnerable irregular migrants. Such policies rarely take into account the essential contributions that migrants make to society and the economy, or the many ways in which they may be denied their human rights. State authorities also often assume that the guarantee of economic, social and cultural rights requires them to provide free health care, water, education, food and other goods and services. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has pointed out, however, that the human rights framework does not always require the State to provide social assistance, noting that: "As the Universal Declaration of Human Rights states, everyone has the right to social security in the event of unemployment, sickness, old age or other lack of livelihood in circumstances beyond his or her control. However, this does not always mean an entitlement to a hand-out. Social security should prevent people from living in desperate situations and help them get back on their feet with a view to giving them opportunities to be free, contributing members of society."<sup>[15]</sup> This requires States to contemplate a range of measures, from providing benefits to dismantling the social barriers that obstruct the full participation of everyone in economic and social life.

Migrants are frequently condemned, often without basis, for taking jobs from local people, overburdening public health systems and jumping housing queues<sup>[16]</sup>. Human rights mechanisms have expressed their concern about the current resurgence of political parties with xenophobic ideologies and programmes that incite discrimination and violence against migrants, blaming them for insecurity and socioeconomic problems<sup>[17]</sup>. Widespread misperceptions about the scale and nature of migration can contribute to prejudice and xenophobia.

The fact that today South-South migration is almost as common as South-North migration, and that about one third of all migrants originate from and are living in the global South, seldom makes it to the front pages of newspapers<sup>[18]</sup>. On the other hand, surveys of public opinion have found a consistent overestimation of the absolute numbers of

migrants in destination societies<sup>[19]</sup>. Irregular migration has risen to the top of the political agenda in countries and regions across the world, and migrants are becoming unwittingly implicated in internal disputes about national identity<sup>[20]</sup>.

Fears over foreigners stealing benefits, jobs and security are rarely just fears about migrants and immigration. The reality is that there are usually fewer irregular migrants in communities than people fear, and they are typically less likely to claim benefits than the resident population. The debate on migration and irregular migration more specifically, is thus increasingly characterized by proxy fears about unemployment, the viability of welfare systems and other aspects of globalization.

The global economic and financial crisis has exacerbated the tendency of many States to limit avenues for regular migration (including family reunification), sometimes making irregular channels the only alternative for migration. Such policy decisions do not take into account evidence from around the world which suggests that, in general, migration does not have a negative economic impact on destination countries<sup>[21]</sup>.

### **Criminalization of irregular migration, a basic tenet in International Law**

In matters concerning International Law, the notion of irregular entry and stay are treated as matters of administrative misdemeanours rather than a criminal offence and should therefore be sanctioned accordingly; of themselves they involve no crimes against persons, property or national security. The Committee on Migrant Workers asserted in its general comment No. 2 (2013) that the aspect of crossing the borders of a country in an unlawful manner or without proper documentation or overstaying a permit of stay does not constitute or be can be considered as a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. Even though the aspect of irregular entry and stay of persons in a given country may constitute administrative offences, they are not crimes *per se* against persons, property or national security. The Special Rapporteur on the human rights of migrants agrees that irregular migration can never be seen as a crime. State authorities have increasingly had choice to the language of crime when they speak of irregular migration, with some States resorting to criminalization of irregular migration and/or of helping migrants in an irregular situation. Truly, the principle will always remain that crossing borders irregularly can be regarded as violation of the law, but it is an abstract violation of the law, since moving from one country to another does not *per se* endangers any person, nor affects any property."<sup>[22]</sup>

The criminalization of migrants who enter a country or remain in it irregularly aggravates their social exclusion and pushes them to live in even more dangerous conditions. While States enjoy a sovereign prerogative to manage their borders, it is important to note that human rights law limits its exercise.

The principle of non-refoulement, for example, bars States from removing from their territory any person, regardless of nationality or status, to a place where he or she would be at risk of persecution, torture or other serious human rights violations<sup>[23]</sup>. It continues to be debated, for example,

whether returning people to countries in which they may not have access to adequate health care constitutes inhuman or degrading treatment. In this context, the view of the Committee on Migrant Workers, as stated in its general comment No. 2 (2013), is that this principle covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life. The law here also applies to situations where individuals would not be protected from onward refoulement. The Committee is of the view that migrants and members of their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life. The European Court of Human Rights, in its most recent jurisprudence, appears to suggest that the expulsion of persons with a life threatening medical condition or a terminal illness who could not continue treatment in their country of origin would amount to inhuman and degrading treatment contrary to article 3 of the European Convention on Human Rights only under exceptional circumstances.

The Committee on the Elimination of Discrimination against Women highlighted, in its general recommendation No. 26 (2008) on women migrant workers, that “undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are vulnerable to sexual abuse, and then deported.

Women migrant domestic workers face additional risks related to their gender, including gender-based violence. The Committee on Migrant Workers noted in its general comment No. 1 (2011) on migrant domestic workers that these risks and vulnerabilities are further aggravated for irregular migrant domestic workers, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer. The Committee further recommended that States should incorporate a gender perspective and develop remedies for the gender-based discrimination faced by women migrant domestic workers.

Constraints on the rights of adult migrants negatively affect the rights of their children. According to the United Nations Children’s Fund (UNICEF), “the labour conditions of migrant workers, restrictions on their right to work, as well as the absence of regularization policies contribute to the marginalization of migrants. This marginalization in turn deprives their children of the right to an adequate standard of living.”

### **Irregular Migrants and the Principle of Equality and non-discrimination**

The principles of equality and non-discrimination is always considered in occupying a prominent place in international human rights law and are directly related to that of universality affirming that every human being possesses fundamental rights. According to the Universal Declaration of Human Rights, “all human beings are born free and equal

in dignity and rights”<sup>[24]</sup> and “everyone is eligible to all the rights and freedoms provided in the Declaration without distinction of any kind”<sup>[25]</sup>. The International Covenant on Economic, Social and Cultural Rights also on its part guarantees that everyone irrespective of status and race should exercise the right to work, to just and favourable conditions of work, to trade union freedoms, to social security, to an adequate standard of living, to health, and even to education. The notion of discrimination in its entire ramification is not only prohibited by the International Covenant on Economic, Social and Cultural Rights, but also in all circumstances of the human right phase. Under the Covenant, it becomes the responsibility of every States part to the said covenant in ensuring that everyone should be protected without discrimination matters relating to human right protection and recognition. However, even though this principle is firmly established in international human rights law, there is always the misinterpretation about its application to non-nationals impeding full implementation of economic, social and cultural rights. Irregular migrants in particular often face discrimination, even when this is specifically prohibited under the relevant legislation or regulations.

Human rights law provides that every person, without discrimination, must have access to the fundamental human rights set out in the two Covenants on human rights. States are obliged to ensure that any differences of treatment between citizens and non-citizens or between different groups of non-citizens serve a legitimate unbiased and any course of action they take to achieve such an objective must itself be proportional and judicious. States should thus ensure that their laws, regulations and administrative practices do not discriminate against migrants.

In sustenance of this position, the presence of the Committee on Economic, Social and Cultural Rights remains the main philosophical parameter as to whether the Covenant in question should continue to be based on the principle of non-discrimination. According to the said law and other human right treaties in practice, the difference of treatment of those regarded as irregular migrants must pursue an authentic ambition companionable with the nature of the rights hallowed in the Covenant and must meet the purpose of promoting the general welfare in a democratic society. In amassing with the above principle, there must be a clear and realistic relationship of proportionality between the objective that a State seeks to realize and the measures it takes or avoids taking to achieve that objective<sup>[26]</sup>.

With all these in place, the question we are bound in asking is as to the situation of children and other vulnerable groups that can be discriminated against on multiple grounds such as persons with disabilities, women at risk, and even those considered as older migrants. It will appropriate for us in determining whether such categories of persons even though irregular in nature should receive particular scrutiny? A more of such concept is that illustrated is that by the Committee on Economic, Social and Cultural Rights in its comment No. 20 (2009) providing and establishing that the right of all children to education, adequate food and affordable health care should be fully protected.

The principle of non-discrimination in all its ramifications is acknowledged by all the core international human rights instruments and even by the Charter of the United Nations as the fundamental in human right recognition and protection. The degree to which it is recognized to be a key



element of human right makes us to really question whether truly such right forms part of general international law and even occupied a place within the realm of *ius cogens*. It therefore applies to all States whether or not they are a party to a specific international treaty? <sup>[27]</sup> The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both prohibit discrimination in every circumstance without any frustration and disappointment <sup>[28]</sup>. In its general recommendation No. 30 (2004), the Committee on the Elimination of Racial Discrimination asked all State parties to ensure that laws barring racial discrimination cover non-citizens, regardless of their immigration status, and that their implementation has no discriminatory effects on them.

International human rights law therefore narrowly restricts the circumstances in which States may legitimately permit differences of treatment between citizens and non-citizens or between different groups of non-citizens including regular and irregular migrants with regard to economic, social and cultural rights, and affirms that any differences of treatment should be objective and reasonable <sup>[29]</sup>. While States enjoy a certain margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment, they must justify how such different treatment, based exclusively on nationality or legal status is compatible with the principle of non-discrimination.

National origin is expressly included among the prohibited grounds of discrimination in all universal human rights instruments that contain a non-discrimination provision, except the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also considers nationality to be a prohibited ground of discrimination <sup>[30]</sup>.

The Committee on Economic, Social and Cultural Rights has recognized that discrimination varies according to context and evolves over time. It has stated that a flexible approach is needed to capture forms of differential treatment that cannot be justified reasonably or objectively and are comparable in nature to prohibited grounds of discrimination. Legal and immigration status are less often listed explicitly as a prohibited ground of discrimination in the core instruments. However, the Committee has affirmed that Covenant rights 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 <sup>[31]</sup>.

### **The Practicalities of Non-discrimination in aspect of Migration**

Dealing with aspect of discrimination, the tendency remains that the concept of prohibiting discrimination in human right law covers both formal as well as substantive discrimination <sup>[32]</sup>. It therefore becomes the responsibility of States in ensuring that their constitutions as well as their domestic laws and policies do not discriminate on prohibited grounds against a particular individual or group. Every State must be able in adopting concrete measures in preventing, alleviating or even eliminating the occurrence of conditions or attitudes that can cause or perpetuate discrimination with respect to the Covenant's rights. The situation is not different when it comes to those classified as Migrant

Workers which professed that the mere addressing of de jure discrimination will not in any way or circumstance ensure de facto equality. The Convention on Migrants Workers <sup>[33]</sup> asked State parties to protect the rights of all migrant workers under the Convention <sup>[34]</sup> by adopting positive measures in preventing, diminishing and even eliminating the conditions and attitudes which can provoke or perpetuate de facto discrimination against the migrants. In tallying, the Committee on Economic, Social and Cultural Rights has illustrated that in practice eliminating discrimination requires States to give appropriate attention to groups of individuals who have suffered historical or persistent prejudice. It is not sufficient merely to formally compare the treatment of individuals regardless of context, it is rather important in highlighting that, in view of their particular vulnerability, exclusion and disadvantage, such individuals and groups could include irregular migrants and irregular migrant communities. The High Commissioner for Human Right believe and noted that the treatment of all persons equally in formal terms can literally be a demising sentence to those labouring silently, daily, under the yoke of structural discrimination" <sup>[35]</sup>.

States in like manner have been called upon to address both direct and indirect discrimination. A law, policy or practice may appear neutral, but have a disproportionate impact on the rights of migrants. Imposing a rule that children enrolling for school must show a birth certificate, for example, discriminates against irregular migrant children who do not possess such documents or cannot easily obtain them. Fee-based medical systems that have the effect of excluding irregular migrants from health care might also be discriminatory.

The International Covenant on Civil and Political Rights <sup>[36]</sup> prohibits discrimination in all circumstances with respect to the rights it covers. In addition, it requires States to ensure equal protection under the law, a provision that may be invoked independently of other substantive guarantees <sup>[37]</sup>. The Human Rights Committee has made clear that the principle of equal protection, without discrimination, applies to all State legislation (not only matters covered by the Covenant), and has consistently reaffirmed that it applies to legislation that touches on economic, social and cultural rights <sup>[38]</sup>. In its general comment No. 15 (1986) on the position of aliens under the Covenant, the Committee explains that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and non-nationals.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contains a general provision on the prohibition of discrimination with respect to the rights it covers <sup>[39]</sup>. The rights to equal conditions of work, to social security, to urgent medical care and to education, among others, are applicable to all migrant workers and members of their families, whether they are documented or in an irregular situation. Part IV of the Convention guarantees certain additional rights to documented migrants and migrants in a regular situation.

The International Convention on the Elimination of All Forms of Racial Discrimination states that special measures are not to be considered discriminatory when they are taken for the sole purpose of securing adequate advancement of certain groups of individuals and the achievement of full equality <sup>[40]</sup>.

### **Limitations to the principle of universal access to human rights**

Talking about the exception to this universal principle of non-discrimination, the International Covenant on Civil and Political Rights has established two exceptions to the principle of universality that on the one hand irregular migrants do not enjoy political rights or, with certain important caveats, freedom of movement<sup>[41]</sup>. Any other differences of treatment between nationals and non-nationals, including irregular migrants, must be based on reasonable and objective criteria<sup>[42]</sup>.

The International Covenant on Economic, Social and Cultural Rights also identifies an exception to the general rule of equal and universal access<sup>[43]</sup>. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

However, it is important to note that the provision of article 2(3) of the International Covenant on Economic, Social, and Cultural Right is narrowly construed, as it relied upon only by developing countries and refers only to economic rights<sup>[44]</sup>. Therefore, States may not treat citizens and noncitizens differently with respect to social and cultural rights. The Covenant's article 4 is also relevant in this respect by providing that States Parties to the present Covenant should recognize the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

### **What Rights Does an Irregular Migrant Have?**

The notion of 'legal protection' has a very narrow focus<sup>[45]</sup>. The 1951 Convention relating to the Status of Refugees<sup>[46]</sup> only applies once a State can identify the status of the party. This means that states are only bound by the Convention once an asylum seeker has been identified as a 'refugee' under the Convention. This may be problematic as it can insert a measure of discretion for the States, which may lead to States using procedure and technical rules to circumvent their international law obligations. In the 1951 Convention, States agreed to provide refugees with a wide range of basic rights, such as administrative assistance<sup>[47]</sup>, the grant of permission to transfer assets<sup>[48]</sup>, and the facilitation of naturalization<sup>[49]</sup>. The 1951 Convention proposes as a minimum standard that refugees should receive 'at least the treatment which is accorded to non-citizens generally'<sup>[50]</sup>. The 2004 Qualification Directive<sup>[51]</sup>, which defines how the EU States define the notion of 'refugee', further calls for 'subsidiary protection' in the case of those who would face a real risk of serious harm if returned to their country of origin<sup>[52]</sup>, and this clearly applies to a large majority of those coming from Syria and the surrounding regions.

The cornerstone of the 1951 Convention is arguably the principle of non-refoulement, as provided for in Article 33. It states that all persons should enjoy the right not to be deported to a country where they may be subjected to persecution. As this is almost certainly a principle of customary international law<sup>[53]</sup>, it should apply to all countries regardless of whether they are a party to the 1951 Convention. As such, it is quite clear that the 1951 Convention has codified some parts of customary

international law, especially those relating to the basic rights of such refugees under articles 14 to 30.

Since they are considered a part of custom<sup>[54]</sup>, a breach of customary international law attributable to the State in question will invoke State responsibility for the internationally wrongful act under Article 1 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts ('ARS')<sup>[55]</sup>. The State will be required to make full reparation<sup>15</sup> for the breach under Article 31, and if the obligation is owed to the internationally community as a whole (i.e. an *erga omnes* obligation) under Article 48(1)(b), any State will be able to invoke the responsibility.<sup>16</sup> Given that refugee law overlaps with human rights law, and that the basic principles of non-refoulement and of temporary refuge are customary in nature, it is highly likely that such obligations will be *erga omnes*.

The application of such obligations varies, since it depends on the political will of States to take positive steps to enforce measures. Although it is particularly effective in isolated situations, it has yet to apply in a meaningful manner if a large number of States are potentially in breach, as is the case in the current context. This differs from specific regional enforcement, such as an obligation to respect the rights of refugees articulated in the ECHR or 1969 Convention on the Organization of African Unity (hereafter 'the OAU Convention')<sup>[56]</sup>. Therefore, it seems clear that once recognized as a refugee, a person has a significant array of rights that are protected under customary international law. This begs the question of why the rights of Syrian asylum seekers are not protected, as seems to be evident from the numerous media sources mentioned in the introduction. Some suggest that the answer lies in the way refugees are defined under the current legal framework.

### **Differentiation between regular and irregular**

Can 'regular' and 'irregular' migrants be easily distinguished? In reality, distinctions between migrants in regular and irregular situations are rarely clear. The overwhelming majority of the world's migrants arrive to their host country in a regular manner and only later become 'irregular' due to administrative overstay. This may be due to no fault of the migrant herself, but instead to unclear or overly bureaucratic migration procedures, discrimination, or practical barriers such as high visa renewal costs, language barriers and lack of access to legal aid. Such overstay affects migrants from all countries and at all socio-economic and educational levels. Members of the same family may even hold a different status to each other, and such status can regularly change throughout the course of one's migration and/or stay. For the minority of migrants who do arrive irregularly, it is important to note that such irregular arrival can be justified, for example in the case of irregularly arriving migrants seeking protection from *refoulement*.

### **Do 'regular' and 'irregular' migrants enjoy different human rights?**

Human rights are rights inherent to all human beings, whatever our nationality, migration status, sex, race, religion, language, or any other status. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights (UDHR) in 1948, has been reiterated in numerous

international human rights conventions, declarations, and resolutions. Additionally, the core principles of equality and non-discrimination, which are enshrined in the International Bill of Human Rights, require non-discriminatory access to all civil, political, economic, social and cultural rights with only two limited exceptions as to the right to vote and take part in public affairs, and the right to freedom of movement within a country. All other human rights should be enjoyed equally and without discrimination by all people under the jurisdiction or effective control of the State, including migrants in irregular situations. Any differential treatment between nationals and non-nationals, or between non-nationals with different migration statuses, must be lawful, proportionate and pursue a legitimate aim. An attempt to define different classes of mi-grants with different classes of rights other than those explicitly allowed within the International Bill of Human Rights would be contrary to these core values of universality, equality and non-discrimination.

In addition, it is important to recall that the human rights framework places a focus on the most excluded, discriminated and marginalized groups in society, and in this way recognizes and seeks to address the particular vulnerability of irregular migrants. While the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that Covenant rights such as the right to health, education, housing or social security can be achieved progressively to the maximum available resources of each State party (art. 2.1), States may not simply postpone action indefinitely or deny access to these fundamental rights indiscriminately or selectively. States have an immediate obligation to take appropriate steps towards the full realization of these rights and, at a minimum, fulfil the “core obligations” of the Covenant. They are obliged to avoid measures that would restrict or deny access to these rights, and to respect the principle of non-discrimination. Civil and political rights such as the right to liberty or the right to equality before the law similarly require the State to take immediate action, including through appropriate investment, to ensure non-discrimination and fulfilment of the right.

### Conclusion

With all the ramifications surrounding the concept of irregular migration in International law, the principle and policy still remain that ossr of human right is without discrimination when dealing with application and recognition. Even with the fact that the necessary human right instruments dealing with irregular migration frowns at this category of persons because of the irregular situation and status they occupied in International where offering them protection has always been problematic, there is always that need in redressing. Human right is inherent and it's application and recognition is wide in scope irrespective of persons concerned. The rule will always remain that States possess that power in ensuring the security of their respective territory, but it will be a frustrating curriculum if some certain categories of persons due to their irregular situation occupied are denied from the enjoyment of their basic and minimum human right.

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3. Global Migration Group, International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, 2008, 7p.
4. Ibid, Health and Human Right Consultation Review on Protection of the Rights of Migrants Workers, 5p.
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6. The Convention states: Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations (art. 2.1).
7. See Committee on the Rights of the Child, Report of the Day of general discussion on the rights of all children in the context of international migration, paras, 2012, 63-67.
8. CMW/C/DZA/CO/1, para. 20.
9. Global Commission on International Migration, Migration in an interconnected world: new directions for action, 2005, October, 33p. Available from [www.queensu.ca/samp/migrationresources/reports/gcim-complete-report-2005.pdf](http://www.queensu.ca/samp/migrationresources/reports/gcim-complete-report-2005.pdf)
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11. Navi Pillay, United Nations High Commissioner for Human Rights, Equal rights for all migrants: a call for ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, address to the Graduate Institute of International and Development Studies, Geneva, 2011, 14 December,.
12. Article 2 of the Universal Declaration of Human Right 1948 which provide that everyone is entitled to all the rights and freedoms set forth in the declaration without distinction, of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This UDHR is read alongside with article 26 of the International Covenant on Civil and Political Right 1966, article 1(1) of the United Nation International Convention on all form of Racial Discrimination and even article 44 of the Additional Protocol relating to the Geneva Convention of, 1977.

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15. OHCHR, Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights, 21p.
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17. Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere (A/HRC/20/33), para, 28.
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24. Article 1 of the Universal Declaration of Human Right, 1948
25. Ibid, article 2
26. See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 para. 13, 2009.
27. Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, Series A, No. 18, paras. 101 and 173 (4), 2003, 17 September.
28. The International Covenant on Economic, Social and Cultural Rights states: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 2.2). The International Covenant on Civil and Political Rights states: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 2.1).
29. Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13; and European Court of Human Rights, Gaygusuz v. Austria, Application No. 17371/90, Judgement of 16 September 1996. See also Pia Oberoi, Defending the weakest: the role of international human rights mechanisms in protecting the economic, social and cultural rights of migrants, International Journal on Multicultural Societies, 2009, 11(1).
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31. Prohibited grounds include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See International Covenant on Economic, Social and Cultural Rights, art. 2.2; and Committee on Economic, Social and Cultural Rights, general comment No. 20 paras. 27 and 30, 2009.
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36. Article 2(1) of this Covenant is imperative
37. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 26). See also Human



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38. See, for example, *J. Vos v. Netherlands*, communication No. 786/1997, Views adopted on 29 July 1999; *Pauger v. Austria*, communication No. 415/1990, Views adopted on 26 March 1992; *Carlos Orihuela Valenzuela v. Peru*, communication No. 309/1988, Views adopted on 14 July 1993; *Hendrika S. Vos v. Netherlands*, communication No. 218/1986, Views adopted on 29 March 1989; *Blom v. Sweden*, communication No. 191/1985, Views adopted on 4 April 1988; and *Oulajin and Kaiss v. Netherlands*, communication Nos. 406/1990 and 426/1990, Views adopted on 23 October, 1992.
  39. States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status (art. 7).
  40. Committee on the Elimination of Racial Discrimination, general recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, para. 21, 2009.
  41. The Covenant reserves to citizens the right to vote and take part in public affairs (art. 25), and grants the right of freedom of movement to foreigners provided they are lawfully in a country (art. 12). The Human Rights Committee nevertheless made clear in its general comment No. 15 (1986) that all foreigners may enjoy the protection of the Covenant, including in relation to entry and residence, when issues of discrimination, inhuman treatment or respect for family life arise (para. 5). It is also important to note that the Covenant guarantees to everyone without discrimination the right to leave any country, including his or her own, and to enter his or her own country (art. 12.2 and 4).
  42. Human Rights Committee, *F. H. Zwaan-de Vries v. The Netherlands*, communication No. 182/1984, Views adopted on 9 April, 1987, para. 13.
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