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THE RIGHT TO EDUCATION OF UNDOCUMENTED MIGRANTS: FROM
INTERNATIONAL LAW TO PRACTICES IN THE EUROPEAN AND AMERICAN
REGIONAL SYSTEMS

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*To my parents, for their unconditional support
and for constantly raising the bar a little
higher so I could always beat my personal self,*

*To my brother, for accepting with serene
resignation the fact that I was the brightest
child, but most of all, for his unbreakable belief
in me,*

*To Sara, Francesca, Elena, Anna, Frai
and Arianna, for making me the
ultimate winner in the lottery of
friendship,*

*And to myself, for never downsizing my
ambitions*

ABSTRACT

This paper aims at analyzing the fundamental right to education of undocumented migrants as it is protected at the international level and in the light of practices in two regional human rights system: the European and the Inter-American system. The first part of this paper revolves around the human rights of undocumented migrants at the international level by retracing the historical lines and the reasons behind why economic, social, and cultural rights have always been perceived differently by international actors and in different regions of the world and by examining the international legal instruments that specifically safeguard irregular migrants' rights. The analysis will proceed by focusing on the history of the right to education as granted by international legal instruments and by discussing the principle of non-discrimination on grounds of residence status, since what most often impede irregular migrants children to access school is the requirement of documents at the moment of enrolling, and the question of resources. In the third and final part, I will move from the international to the regional level and I will compare the inept European human rights system's practices and jurisprudence on the issue against the more evolutionary and inclusive Inter-American system's ones.

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Introduction

Without a doubt, as I write this paper, the world witnesses one of the greatest migration crises of the last decades. This is not simply due to the advent of a globalized world, but also to the powder keg of Africa, the Syrian civil war, ISIS, Boko Haram, the rubble of the wars in Afghanistan and Iraq, the never-ending economic discrepancies between the Americas, and last but not least, the devastating effects of climate change on the living conditions of poor peoples. A part of the world is either running away seeking a wealthier life or is displaced, and another is building walls and opening only tiny doors. Growing up in Italy, I have known on my own skin the dangers of migration and irregular migration in general, not only in economic and cultural terms, but mostly witnessing the crumbling effect it has on the perception of the efficiency of a state's immigration laws. I grew up in this country with the impression that Italy was fighting an internal and futile battle between clutching onto its sovereignty and barricading its borders on one side, and advocating human rights and humanitarian assistance on the other. For many years I watched this "battle" without being able to take my own stand because there was too much I did not know. Now, I finally feel that I am able to take a position with regard to this challenge.

Now more than ever, considering the conditions we are facing, we are called to talk about the human rights of migrants, whether they are refugees, asylum seekers or economic migrants. And now more than ever we ought to be reminded that their status does not compromise their humanity nor erodes their dignity and the rights that it brings along. This discourse becomes especially impellent when it comes to irregular migrants. I did not chose to discuss their case simply because it's a reality I have grown very accustomed to in Italy, but because in spite of the physiological impossibility to count them, they are estimated to be tens of millions world wide and due to their status they are the most vulnerable to discrimination, abuse, exclusion and exploitation and other various breaches of human rights, during all phases of the migration process. Clandestine migrants not only are in greater risk to face ill-treatment, prolonged

detention or human trafficking, they also are the least likely to access justice and seek protection of the authorities for fear of being deported and expelled.

As the reader will understand from reading this paper, while everyone at the international level agrees to a certain degree of safeguard of fundamental human rights of undocumented migrants, such as the right to life or prohibition to torture, this same protection is often not extended to other human rights such as health, education, food, adequate housing and labor, also known as economic, social and cultural rights and which are still nonetheless attached to the wholeness of human dignity.

Writing this paper I intend to show how throughout time this distinction between civil and political rights and socio-economic rights came to be and what are the consequences of this on the safeguard of human rights of irregular migrants. My ultimate aim is to demonstrate that undocumented migrants are indeed protected as human beings and have an entitlement to their human rights, both civil and political as well as economic, social and cultural rights, under general principles of international law, customary law, and international and regional treaties, not only in respect to their freedoms but also in regards of positive obligations of states.

In order to explain this, I have chosen to focus my analysis on one specific economic, social and cultural right: the right to education. As I will further explain in chapter II of this paper, I have chosen the right to education because I firmly believe it is a multiplier of all the other rights that derive from simply being human, because nothing more than education, not even life, gives us a human dignity.

Through an explanation of the difference between economic, social and cultural rights and civil and political rights, with a focus on the right to education, I will study how the international human rights regime protects irregular migrants' access to this right, and I will compare the European and Inter-American human rights systems' practices on the matter to analyze regional approaches both in terms of legal instruments and of human rights courts' jurisprudence.

Chapter 1: Economic, Social and Cultural Rights of Irregular Migrants

1.1 Economic, social and cultural rights as human rights

For my generation, it is very difficult to imagine a world where a human rights regime is not in place, and where individuals are direct beneficiaries of rights in that they are humans rather than citizens of a particular state. Because of the dramatic change it sparked off, the Universal Declaration of Human Rights of 1948 may easily be considered the most important legal instrument of the last century. The revolutionary impact of this document began with the first statement of its preamble, which recognized as the foundation of freedom, justice and peace in the world, the inherent dignity of humans and established the equal and inalienable rights of all members of the human family.¹ As revolutionary as it was, the Universal Declaration of Human Rights was not completely innovative, since it was not the first historical mention of fundamental rights and liberties. Almost two hundreds years before, in 1789, the French Constituent Assembly passed the Declaration of the Rights of Men and of the Citizens,² a fundamental document not only in the history of the French revolution but in the history of civil rights. Nonetheless, the ideas of the Universal Declaration of Human Rights are still unprecedented. In fact, even though both discuss rights that are natural, sacred and unalienable, as the title itself mentions, the French declarations is proclaiming the rights of “citizens”, therefore recognizing the state as the subject of the law. On the other hand, the Universal Declaration of Human Rights set itself apart as it views human beings as the only subject of these fundamental rights, allowing the deconstruction of the state as a sovereign entity: rights and freedoms do not pass through the state, are not granted by a state’s constitution, but depends solely on the human nature and dignity. This is where the revolutionary impact of the Universal Declaration sounds the louder: for the first time in history state power is limited by the existence of a set of rights for everyone that is internationally guaranteed, protected by law, and that cannot be taken away.

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217

² Assemblée Nationale, *Déclaration des droits de l'homme et du citoyen du 26 août 1789*, 26 August 1789

Nonetheless, the Universal Declaration of Human Rights was only the first step towards the establishment of a human rights system. Human rights law's peak was reached with the adoption of two important treaties signed on December 16, 1966: the International Covenant on Economic, Social and Cultural Rights, setting forth the obligation on the members party to the treaty to respect, protect and fulfil socio-economic human rights such as the right to education, housing, adequate standard of living, health and the right to science and culture; and the International Covenant on Civil and Political rights, guarding the respect of civil and political life such as freedom of religion, freedom of speech or freedom of assembly.

In spite of the indivisibility brought forward by an idea of rights attached to the inherent dignity of the human being, economic, social and cultural rights have been seen for a long time as nothing but the cousins of civil and political rights,³ and the years that have elapsed between the Universal Declaration and the Covenants have contributed to fuel the controversy over the status of economic, social and cultural rights as human rights. To understand the reasons behind this controversy we ought to take a step back to the ideological foundations of the human rights system. In the State of the Union speech addressed to the United States Congress in 1944, president Franklin Delano Roosevelt had indeed recognized that "necessitous men are not free men," in this way paving the way to the idea that economic and social rights were indeed an essential tool to regain America and the world's strengths after the economic crisis. As a matter of fact, when it came to the drafting of the Declaration, Roosevelt's ideas were brought on the table by his wife, Eleanor and entered the declaration in articles 22 to 27.

The issue that set economic, social and cultural rights apart from civil and political rights was not tied to their necessity, because everyone agreed that they needed to be protected and respect. However, their implementation raised many questions. In fact, the main point of the discussions that took place within the Commission of Human Rights during the preparative works for the Declaration, revolved around the figure of the State in the fulfilment of economic, social and cultural rights. In its embryonic stage, it seemed clear that the state had to be under the obligation of putting in place public programs to ensure the preservation of these rights, but to what extent? The ideological war that was then being fought dictated the shaping

³ Saul, Kinley, Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases, and Materials*, Oxford University Press, 2014, introduction

of two different opinions on the matter: the socialist block wanted the role of the state to be recognized in the text, while the western democracies fought for the state to have complete freedom on the modalities and measures of corresponding public policies. Eventually, with article 22 of the Declaration of Human Rights,⁴ it was established that in order to fulfil socio-economic rights, States were able to choose either centralized policy measures or policies that left greater space to the market.

Nonetheless, it was recognized that States needed resources to actualize this category of rights. In fact, after having defined the role of the state, the two derivative issues concerned the situation of developing countries and the role of international cooperation. It was clear that developing countries lacked the necessary resources to immediately carry out the realization of economic, social and cultural rights and that richer countries had to sustain them in the progressive realization of these rights through international cooperation. These issues were officially clarified in the International Covenant of Economic, Social and Cultural rights, whose provision stated in Article 2, paragraph 1, spelled out the notion of progressive realization of economic social and cultural rights and the role of international cooperation, asserting that “each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁵

Yet, many concerns still surrounded the progressive realization of socio-economic rights and the role of international cooperation. In 1987, a group of distinguished experts on international law met in Maastricht to interpret the covenant giving birth to the The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, which marked a significant clarification in regards to the flexibility given to developing countries in fulfilling economic, social and cultural rights. The Limburg Principles stated that “the application

⁴ Art. 22 of the UDHR, speaking about the right to social security says that “everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, A/RES/2200, 16 December 1966, Art. 2(1)

of some rights can be made justiciable immediately while other rights can become justiciable over time,”⁶ and in this way they posed a clear limitation to the progressive realization of all economic, social and cultural rights. In addition to this, the UN experts expressed the urgency of realization, encouraging states parties to the covenant to move in the direction of fulfilment of the rights as quickly as possible, and highlighting that the progressive realization cannot be a pretext for not taking immediate action.⁷ Finally, a clue elucidation set forth by the Limburg Principles concerned the respect of a minimum core of rights regardless of the development status of a country.⁸

The Limburg Principles and the importance of respecting the minimum core of socio-economic rights in spite of a situation of underdevelopment were then resumed and further elaborated by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 3⁹ and again by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.¹⁰ Nonetheless, while defining a minimum core content for some of the rights in this category may be easy, when it comes to other rights the quest can become more challenging. Analyzing the work of the Committee for Economic, Social and Cultural rights, three basic requirements to assess the respect of the core of a socio-economic right can be drawn. First of all, the right in question must respect a non-discrimination clause and assure that disadvantage and marginalized population are in a position of priority to access the program set forth by the state. Secondly, basic needs of individuals must be safeguarded in respect to basic shelter, access to food and water, life-saving drugs as well as primary education. The final and key element is the procedural obligation that forces States to implement programs that specifically address the challenges it is facing to realize the right, in order to advance the

⁶ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135, par. 8

⁷ *Ibid*, par. 16

⁸ *Ibid*, par. 25

⁹ Un Committee on Economic, Social and Cultural Rights (CESCR) (1990) *General Comment No. 3: The Nature of States parties' obligations*, UN Doc. E/1991/23, Annex III, art. 2, par. 1

¹⁰ Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, 1997, UN doc. E/C. 12/2000/13 par. 9

country toward the complete fulfilment of the right in question, strengthening the emphasis on the positive obligations of the states party to the convention.¹¹

On the other hand, the issue of international cooperation as a key role to the realization of this category of rights, came back with the adoption of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights. In fact, during its negotiations, even though it was clear that international cooperation was essential for the realization of the rights, it was discussed whether richer states had a legally binding duty to help developing states reaching international standards. It was the Committee on Economic, Social and Cultural Rights itself who abstained from delineating international cooperation as an obligation and as of today cooperation remains an act of compassion rather than the potential source of claims against a non-cooperative state.¹² This pushed the experts who drafted the 2011 Maastricht Principles to take on the issue to highlight the impellent need of further specification on international assistance, suggesting the urgency of putting cooperation into contracts between countries, rather than just allowing for it to be nothing but vague commitments.¹³

By the time the International Covenant on Economic, Social and Cultural Rights was ratified, all of these issues had contributed to fuel the divide between the nature of economic, social and cultural rights and that of civil and political rights, and the difference between these two generation of rights had almost become a cliché. The oversimplified idea behind this, was that civil and political rights were seen as negative freedoms, and therefore applicable and justiciable immediately, while on the other hand, economic, social and cultural rights entailed a series of obligations by the State and involved claims on public resources that were considered far out of the competence of a court.¹⁴

While a monitoring mechanism had been in place since the definition of political and civil rights, that is the Human Rights Committee, 20 years had to pass after the signature of the Covenant before finally an *ad hoc* Committee on Economic, Social and

¹¹ De Shutter, *Economic, Social and Cultural Rights as Human Rights*, Edward Elgar publishing 2013, introduction pp. 28-29

¹² Ibid, p. 52

¹³ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO, Heidelberg, 2013, principle No. 30

¹⁴ Vierdag E.W. "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", in *Netherlands Yearbook of International Law*, Volume 9, The Hague, The Netherlands: T.M.C. Asser Institute, 1978, pp.69-105

Cultural Rights was established.¹⁵ in charge of clarifying the normative and judiciable nature of socio-economic rights. The Limburg Principles first and the Maastricht Guidelines in a second moment, were a further successful steps in the direction of a clearer interpretation.¹⁶ Nonetheless, the issue of the justiciability of this category of rights, that is the enforcement by courts remained, and still remains, impellent and unresolved.

However, as domestic jurisprudence on socio-economic rights makes progress, the international monitoring mechanism develops and becomes therefore more capable of creating instruments that other national courts may use in the adjudication of claims based on economic, social and cultural rights. In this way domestic jurisprudence generates a positive vicious cycle that through time may prove indispensable to define these rights justiciability.¹⁷ Nevertheless, it is argued that the courts are not being as relevant as they could be as proponents of social change if they only intervene to defend the legitimacy of an existing entitlement or simply forbid the implementation of a policy that would bring the state backwards instead of forward in the realization of socio-economic rights.¹⁸ The idea behind this is that if courts are confined in only these two functions, they are missing out on the possibility of bringing about a true effective impact in the realization of social and economic rights.

Today, the discussion over how could domestic, regional and international courts enforce economic, social and cultural rights, still draws a lot of attention. Throughout the years, national human rights institutions have provided an answer, proving to be an excellent mediator between complaints and branches of government, without the classical limits of the judiciary.¹⁹ Nonetheless, it is precisely the aim of this

¹⁵ UN Economic and Social Council (ECOSOC), *Economic and Social Council Resolution 1985/17: Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 28 May 1985

¹⁶ Dankwa V. and others, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural rights", *Humans Rights Quarterly*, 20 (3), August ,1998, pp. 705-30

¹⁷ Langford M, "Donestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review", *Sur – International Journal on Human Rights*, 6 (11), December, 2009 pp.91-120

¹⁸ Landau D, "The Reality of Social Rights Enforcement", *Harvard International Law Journal*, 53 (1), Winter, 2012, pp. 189-247

¹⁹ Gomez M, "Social Economic Rights and Human Rights Commission" in *Humans Rights Quarterly*, 17 (1), February 1995, pp. 155-169

paper, focusing on a particular socio-economic right, the right to education, and its access by a particularly vulnerable group, undocumented migrants, to study and examine the practices of regional international bodies on the implementation, respect and protection of social, economic and cultural rights.

1.2 Irregular migrants under the international human rights system

As delineated by the first part of this chapter, economic, social and cultural rights have brought along with them a number of issues that puts them in a difficult position in regards to the ability of party states to fulfill, respect and protect them. This, of course, becomes more evident when it comes to the claiming of these rights by groups of people that are already in a vulnerable position in respect to all human rights, such as the group of undocumented migrants. In order to contextualize undocumented migrants within the framework of economic, social and cultural rights, it is necessary to define them and analyze their position under the international human rights system as a whole.

Who are irregular migrants? The notion of illegal migration covers many different situations, of which only three are straightforward: an alien entering the territory of a sovereign state clandestinely; an alien that overstays the time permitted by his visa and an alien who is working in the receiving country in a way, which is incompatible with the modalities entailed by his status. The rest of the situations are never defined clearly. As a matter of fact, undocumented migrants are mostly considered as a residual category of people, left out by the definitions of legal migration, becoming in this way an abstract concept that pertains more to a political sphere than a legal one.²⁰ Yet, what becomes important to underline, and is a philosophy that I have decided to adopt in this paper, is the idea that no human being should ever be defined as “illegal.” As Kees Groenendijk, professor of sociology of law and director of the center for migration law at the University of Nijmegen, in the Netherlands, says, “Most undocumented persons have some place in the world where they can live lawfully.

²⁰ Guild E, “Who is An Irregular Migrant?” in Bogusz and others, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden/Boston, 2004 pp. 3-28

Human beings are disqualified by being called illegal.”²¹ In fact, the residence of most undocumented migrants might have been legal when they entered the country or will be legal when they’ll be regularized or will return, coercively or voluntarily, to their country of origin. In this perspective, other terms such as irregular, or undocumented, help highlight a temporary situation, which eventually may be solved.

For what concerns irregular migrant’s human rights, the tenets of international law is nowadays permeated by a certain degree of integration between immigration law and human rights law, in spite of the principle of State sovereignty which leaves the state absolute freedom in the admission, rejection or regularization of an alien.²² Riccardo Pisillo Mazzeschi, Professor of International Law at the University of Siena, Italy, highlights how this phenomenon is creating a progressive preponderance of human rights norms over immigration law norms, up to the point of substituting them.²³ The idea behind this is that, throughout the last decades, international law has overcome the old concept of states as the only subject of the law. The individual has gained a more concrete role in international law, becoming the direct object of norms and entitled to rights and obligations that do not pass through states: in this way the single person is seen as protected by international law as a human being and not as a foreigner or an alien citizen.

This interpretation is widely accepted by the United Nations themselves, which, as we have already overviewed in the last chapter, has produced a lot of legal binding instruments on the matter. Aside from the Universal Declaration of Human Rights and the International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights, it is worth mentioning other important treaties which protects the rights of aliens, such as the International Convention on the Elimination of All Forms of

²¹ Groenendijk, in Bogusz and others, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, introduction

²² Nascimbene B., “Le migrazioni tra sovranità dello stato e tutela dei diritti della persona”, in Carta M., *Immigrazione, frontiere esterne e diritti umani, Profili internazionali, europei ed interni*, Roma, 2009 p. 29

²³ Pisillo Mazzeschi R., and others, *Diritti umani degli immigrati, Tutela della Famiglia e dei Minori*, Editoriale Scientifica 2011, Capitolo 2, pp.7-11

Racial Discrimination of 1965²⁴ and the Declaration of Human Rights of Individuals Who are not Nationals of the Country in which They Live²⁵ of 1985.

In addition to these treaties, we shall also notice the work in the direction of a more delineated framework of aliens' rights, the reports presented by the Special Rapporteur on Migrants Rights, Jorge Bustamante, nominated by the UN Human Rights Commission and the General Comment 15²⁶ of the Human Rights Commission itself, which covers the position of aliens under the covenant, apparently extending these rights to irregular migrants as well. The culmination of this approach arrived with the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁷ This treaty marked the first general framework of protection specific to migrants, regardless of their legal status. Nonetheless, many issues arose concerning the effectiveness of this last aforementioned treaty. The process of ratification, in fact, has highlighted the challenges that are present within the international community to reach a consensus over the protection of migrants: the first countries to ratify this treaty have been states that are senders of migrants, while none of the migrant-receiving states, such as the United State or the member states of the European union, has ratified the treaty.²⁸

Looking at all these international human rights treaties, it is undeniable that the international community managed to establish a core content of fundamental human rights that as *Jus Cogens* applies not only to aliens in general, but also to those unlawfully present in the state's territory. International and Regional jurisprudence and instruments have highlighted that this core includes the right to life²⁹, the

²⁴ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, , A/RES/2106, 21 December 1965

²⁵ UN General Assembly, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, , A/RES/40/144 13 December 1985

²⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986

²⁷ International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Assembly, 18 December 1990, A/RES/45/158

²⁸ Olmos Giupponi M.B., *Los Derechos de los Extranjeros en Situacion Irregular: Reflexiones a la Luz de la Practica de los Sistemas de Proteccion de Derechos Humanos en el Ambito Europeo y Americano*, EUI Working Paper, MWP 2009/03

²⁹ See for example art. 2 of European Convention on Human Rights and art. 4 of the American Convention on Human Rights

prohibition of slavery and any form of servitude³⁰, prohibition to torture and inhuman treatments³¹, the prohibition to remove the alien or the migrant to a country in which his human rights may not be granted³². Yet, being this only a limited nucleus of rights in comparison to the overall complex sphere of human rights, this fundamental core of rights is not able to sufficiently regulate the juridical life of aliens, especially when they are undocumented. In fact, the greatest problem in the protection of migrants' rights arises from the fact that even when human rights are theoretically applicable, there are often practical obstacles to their actual fulfillment.³³ This situation is exasperated in the case of the irregularity of an alien in a country, because in the case of irregular migrants, and of their vulnerable status, many rights are *the facto* restricted by their fear of risking expulsion when claiming one's rights, especially economic, social and cultural rights, which already bear justiciability problems *per se*.³⁴

Riding this wave of concern, on September 30th 2010, the Global Migration Group delivered a statement in which they declared their concern over the human rights of migrants in an irregular situation around the world, stating that "migrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment, and in some cases enslavement, rape or even murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities of countries of origin, transit or destination."³⁵

³⁰ See art. 4 of the European Convention on Human Rights, art. 6 of the American Convention on Human Rights and art. 8 of the International Covenant on Civil and Political Rights

³¹ See art. 3 of the European Convention on Human Rights, art. 5 of the American Convention on Human Rights and art.7 of the International Covenant on Civil and Political Rights

³² Case of *Soering v. United Kingdom*, ECHR, Strasbourg, 7 July 1989

³³ Bustamante Jorge, Report 2005 Un Doc. E/CN.4/2006/73 of December 30th 2005, par. 17

³⁴ Pisillo Mazzeschi R. *Diritti umani degli immigrati, Tutela della Famiglia e dei Minori* p. 27-28

³⁵ Global Migration Group, Statement on the Human Rights of Migrants in Irregular Situation, 30 September 2010

As we have highlighted in this chapter, this vulnerability is very much emphasized when it comes to social economic and cultural rights in general. Nonetheless, if it is undisputable that fundamental human rights, considered *jus cogens* and general principles of international law, can be claimed by irregular migrants, we should adopt the view that at least the core content of socio-economic rights must be granted and applied to undocumented aliens, since this category of rights is inscribed in general international law as well.³⁶ In the next chapters I will be focusing my study on a specific economic, social and cultural right to which irregular migrants should theoretically have access to, the right to education, and I will analyze the regional tendencies in the European and Inter-American Human rights system.

³⁶ Pustorino P. "I Diritti Economici e Sociali" in Calamia, Di Filippo, Gestri, *Immigrazione, Diritto e Diritti: profili internazionalistici ed europei*, Cedam, 2012 pp.320-321

Chapter 2: The Right to Education

2.1 History and nature of the right to education

Among all of the different social, economic and cultural rights, it is not by a mere matter of chance that I chose to analyze the Right to Education of Irregular Migrants. I consider the right to education the most important among the social, economic and cultural Rights because it is the one that gives birth to a human conscience and allows the enjoyment of other human rights. As the Special Rapporteur on the Right to education Katerina Tomasevski said, we can define the right to education as a “multiplier,” increasing and magnifying the enjoyment of freedoms and rights.³⁷

The importance of the right to education derives from its nature as an empowerment right. In the first paragraph of the Committee on Economic, Social and Cultural Rights General Comment No. 13, the Committee recognizes that “education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”³⁸ As a matter of fact, education allows society to prevent children from exploitative labor and may save marginalized groups from sexual exploitation offering them a path to self-empowerment. In this way, education becomes essential to promote the building of a conscious human dignity that would enable individuals to participate effectively in society.

This discourse becomes even more important when we insert irregular migrants in the picture. Migrants as a broader category are often accused of not being able to fully integrate in the hosting society. Denying them and their children the possibility of education would mean to permanently obstruct their pathway to be integrated into the community. In fact we ought to keep in mind that when we are granting a right to education at the universal level, we are not simply assuring people can read, write or calculate; we are granting every child the chance to entirely develop and to acquire knowledge and moral values to adapt to the actual social life. Therefore, granting a right

³⁷ Katerina Tomasevski, *Removing Obstacles in the Way of the Right to Education (Right to Education Primers No. 1)* Novum Grafiska, Gothenburg, 2001, p.9

³⁸ UN Committee on Economic, Social and Cultural Rights General Comment No. 13, The Right to Education, 8 December 1999, E/C.12/1999/10, par. 1

to education means above all to take on the task of not destroying nor wasting the opportunities every individual has within oneself, talents which society should take advantage of in the first place, instead of losing them or suppressing them.³⁹ In this sense, especially in regards of immigrants' integration into society, education has a vital role in the ultimate success or failure of the individual's realization of his abilities and in his adjustment and integration to social life.

The significance of education was immediately recognized universally in the UN charter, which promoted "international, cultural and educational cooperation,"⁴⁰ establishing in 1945 the United Nations Educational, Scientific and Cultural Organization (UNESCO), which as of today has 195 members and 10 associate members.⁴¹ In its constitution's preamble, the UN organization for education, science and culture recognizes that "the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern."⁴² Nevertheless, in order to have the proper establishment of a general right to education we had to wait the Universal Declaration of Human Rights, which formalized it in Article 26. Article 26 of the Declaration recognized that everyone has a right to education, which shall be free and compulsory, at least at its fundamental stages. In its second paragraph the General Assembly included the scope of education and in the third and final paragraph it acknowledged parent's freedom of choice in selecting the education that shall be given to their children.⁴³

Almost a decade later, the International Covenant on Economic, Social and Cultural Rights offered a more detailed and legally binding elaboration of the right with the longest article in the treaty, Article 13.⁴⁴ To stress the fundamental character of this right, the covenant felt the need to provide an obligation of conduct, which is very

³⁹ Piaget J, Dove va l'Educazione in Ravaglioli F., *Educazione Occidentale*, Armando, Roma, 1988 vol. III, pp. 353- 359

⁴⁰ Charter of the United Nations, adopted June 26, 1945, 1 UNTS XVI, Art. 55 (b)

⁴¹ UNESCO website, Member states, available at
<<http://www.unesco.org/new/en/member-states/countries/>>

⁴² UN Educational, Scientific and Cultural Organisation (UNESCO), *Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, 16 November 1945, preamble

⁴³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art 26

⁴⁴ UNGA, ICESCR, Article 13

unusual for fundamental rights treaties, to ensure that states that could not afford compulsory free education in the moment of ratification would work out a detailed plan to achieve it in a reasonable number of years in Article 14⁴⁵. The provisions in the UDHR and in the ICESCR, were then resumed and reflected in Article 28 and 29 of the Convention on the Rights of the Child of 1989.⁴⁶ Obviously, the UNESCO, since its foundation, produced a large number of legal instruments, non-binding declarations and binding conventions to promote his ideal of education, the most important and relevant to us being the UNESCO convention against Discrimination in Education.⁴⁷

What does this international law jurisprudence tell us about the right to education and in what ways is this socio-economic right recognized as a fundamental right? In the Covenant, Article 13 contains 4 paragraphs which defines the subjects and objects of this right in the following way:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

⁴⁵ *ibid*, Art. 14

⁴⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Artt. 28 and 29

⁴⁷ UNESCO Convention against Discrimination in Education, 14 December 1960

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

This article is one of the most elaborated in the covenant.⁴⁸ As we can see, it provides for a very detailed provision in regards to all the issues that may arise from it. The first two paragraphs are of particular relevance as they establish the ends to which education should be directed and the requirements for achieving the right in regards of the different levels of education.

Paragraph 1 sets out to define the scope of the right, underlining its importance in promoting the participation of all in a free society. When drawing this right, it became clear to drafters that it was essential to emphasize this, as similar provisions on the aims of education are included in the Universal Declaration of Human Rights, the Convention on the Rights of the Child and in regional treaties. The Committee on Economic, Social and Cultural rights went the extra mile in stressing this, stating not only that these objectives should be addressed by all kind of education whether private, formal or non-formal, but that of these objectives the most fundamental is that “education shall be directed to the full development of the human personality”.⁴⁹ What is important to underline is that these aims are not considered as an end in themselves, they were not put there as a simple statement, but are highly considered by

⁴⁸ Saul and others, *International Covenant on Economic Social and Cultural Rights, Commentary and Cases*, Oxford University Press, 2014 Page 1085-10

⁴⁹ CESCR General Comment No. 13 par. 4

the Committee when they monitor states reports, assessing to what extent the school curricula and the school system address the objectives set out in paragraph 1 of Article 13.⁵⁰

In addition, Article 13, paragraph 2, sets out the requirements states recognize for achieving the right to education at different levels: primary, secondary, technical and vocational, and higher and fundamental. Despite the different requirements that relate to each level, the Special Rapporteur on the right to education from 1998 to 2004, Katerina Tomasevski conceptualized a scheme named the “4A” scheme.⁵¹ This scheme, which was then resumed and clarified by the Committee,⁵² helps delineate some key aspects that shall apply regardless to the level of education. The name “4A” scheme identify all the aspects that may be addressed with a word starting with A: availability, accessibility, acceptability and adaptability.

The General Comment No. 13 on the right to education made by the Committee on ESCR proved to be fundamental in the detailed explanation of these aspects. Availability was intended in such a way as the provision by states of educational institutions and programs available in sufficient quantity within the territory of a state.⁵³ Therefore, a state party to the convention needs to make sure there are enough primary, secondary and higher educational institution within its border.

While availability focuses on the presence of adequate infrastructure, accessibility demands those infrastructures to be accessible to everyone. As set out by the Committee, three necessarily coexisting dimensions compose accessibility: non-discrimination, physical accessibility and economic accessibility.⁵⁴ In fact, schools must provide everyone access regardless of their physical condition and their economic possibilities and without discriminating under any grounds. The non-discrimination

⁵⁰ The Committee has made many observation that take into consideration the school curriculum. Very good examples are its observations in relation to Georgia in 2000 (E/c.12/1/Add.42) and Japan in 2001 (E/C.12/1/Add.67). Also in its concluding observation on Israel, in 2003, the CESCR has pushed to the point of encouraging the state to develop a system of mixed schools for Jewish and Arab pupils (E/C.12/1/Add.90)

⁵¹ Commission on Human Rights, Preliminary Report of the Special Rapporteur on the right to education, E/CN.4/1999/49 (13 January 1999), Para. 42 - 47

⁵² CESCR, General Comment No. 13 para. 6

⁵³ Ibid, para. 6 (a)

⁵⁴ Ibid, para. 6 (b)

dimension of accessibility becomes particularly important when it comes to undocumented migrants and we will analyze it further in this chapter.

Acceptability of education means that the configuration and substance of education, and therefore curricula and teaching methods, have to be acceptable in regards to their relevance, their cultural appropriateness and their good quality.⁵⁵ Finally, the committee defines adaptability in reference to the need for education to be adaptable and flexible to the needs of dynamically changing society in order for education to always offer a response to different social and cultural environments.⁵⁶

In spite of these elements that apply regardless of the level of education, Article 13(2) provides specific guidance. This provision is indispensable because it establishes that primary education, i.e. the education necessary to obtain “basic learning needs”,⁵⁷ must be free of charge and compulsory⁵⁸, and that this constitutes the minimum standards obligation of states.⁵⁹ On the other hand, there is a much higher flexibility when it comes to secondary education, and technical and vocational education. Secondary education, for example, is thought as only “generally available and accessible to all [...] in particular by the progressive introduction of free education.” With this wording the covenant aims to underline that state should nonetheless prioritize the achievement of free primary education. The biggest difference among levels is set forth by the establishment of a higher education that should be accessible to all on the basis of capacity, signifying that higher education institution are free to assess expertise and relevant experiences and limit access by setting up specific academic prerequisites.⁶⁰

2.2 The principle of non-discrimination in education on grounds of residence status

The principle of non-discrimination is an evergreen of the core principles of human rights. It was affirmed by the Charter of the United Nations and it gained

⁵⁵ Ibid, para 6 (c)

⁵⁶ Ibid, para 6 (d)

⁵⁷ World Declaration on Education for All, Adopted by the World Conference on Education for All Meeting Basic Learning Needs, Jomtien, Thailand 5-9 March 1990, published by UNESCO, Article 1, par.1

⁵⁸ CESCR, General Comment No. 13 para. 11

⁵⁹ Ibid, para. 57

⁶⁰ Ibid, para. 19

importance and recognition through out time to the extent that it was recognized by the Inter-American court as forming part of general international law and as *jus cogens*.⁶¹ Under the Covenant on socio-economic rights, non-discrimination is a general principle dictated by article 2, which guarantees to *everyone* the rights it contains, prohibiting discrimination under all circumstance. ⁶² The committee on Economic, Social and Cultural Rights took a fierce position on this principle, recognizing that discrimination has a dynamic connotation that may render it different based on context. This particular connotation of discrimination allows it to evolve over time.

While immigration status is rarely treated directly as a ground of non-discrimination, the Committee, as stated in General comment No. 20 of 2009, explicitly considers migrants regardless of legal status.⁶³ In this same comment, the prohibition of discrimination towards access to economic, social and cultural rights covers both formal as well as substantive discrimination.⁶⁴ The Committee required states party to the covenant to not only behave as passive actors, that is without interfering as to discriminate certain categories, but it demands that they assume appropriate measures to stop, ease and remove conditions that may give birth to discrimination issues.

Nonetheless, an important limit was provided in this covenant to this general rule against discrimination and promoting active measures, a limit that acquires major importance to the access of these rights by undocumented migrants. In Article 2 of the covenant, its third paragraphs states that “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 Covenants to non-nationals.”⁶⁵ However the intention to provide a very narrow interpretation of this article is very clear as it may only be claimed by developing countries and in regards of economic rights. However, while we have a clear notion of which countries classify as developing, i.e. states that acquired independence from colonial rule,⁶⁶ it becomes harder to have a

⁶¹ Inter-American court Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003, Series A, No. 18 paras. 101 and 173 (4)

⁶² ICESCR, Art. 2

⁶³ CESCR, *General Comment no. 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, paras. 27 and 30

⁶⁴ *ibid*, para 8

⁶⁵ ICESCR Art. 2, para. 3

⁶⁶ Limburg Principles E/CN.4/1987/17, annex, paras 42-44

universal understanding of content of “economic right”. If it is obviously clear that labor rights fall under this category, the Committee on ESCR has said it itself that “the right to education...has been variously classified as an economic right, a social right and a cultural right.”⁶⁷

Nevertheless, in regards to the application of this limitative principle in education, in its General Comment No. 13, the committee has clearly stated that “the prohibition against discrimination enshrined in article 2 of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”⁶⁸

When it comes to discrimination on education, while the Convention on the Rights of the child explicitly asserts that preventing discrimination is an essential key to the full realization of the right to education,⁶⁹ the most authoritative instrument on the issue remains the UNESCO Convention against Discrimination in Education of 1960.⁷⁰ While the convention only seems to address discrimination “based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth,”⁷¹ during its work, the committee on socio-economic rights has dealt with more recent forms of discrimination, for example on the basis of sexual orientation.⁷² A very well known and recent ground of discrimination is in particular the one which concerns citizenship or residence status, which tackles exactly the access to education of undocumented migrants.

The right to education of non-nationals is recognized by the UNESCO Convention against Discrimination in Education, but only as an obligation of states to grant alien residents the same access of national citizens.⁷³ The Convention on the Rights of the

⁶⁷ CESCR, General Comment No. 11, Plans of Action for Primary Education E/1992/23, para. 2

⁶⁸ CESCR, General Comment No. 13 para. 31

⁶⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1, para. 10

⁷⁰ UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960

⁷¹ UNESCO Convention Against Discrimination, Art. 1

⁷² See CESCR, Concluding Observations: *Poland*, E/C.12/POL/CO/5 (2 December 2009), para. 32

⁷³ UNESCO Convention Against Discrimination Art. 3(e)

Child too only mentions nationality as a prohibited ground of discrimination.⁷⁴As previously said in this research paper, undocumented migrants are often a residual category.

Nonetheless, at the international level their situation in regards to their right to education has been explicitly catered by both the Committee on Economic, Social and Cultural rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This last treaty, albeit not binding many important countries that deal with clandestine migration, in its article 30, specifically addresses that “access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment”.⁷⁵ Among the most efficient international pieces of jurisprudence on the issue, we find the straightforward comment of the Committee on the Elimination of Racial Discrimination, which, in its recommendation over discrimination against non-citizens, advised states to “ensure that public education institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a state party.”⁷⁶ Unfortunately, being this only a recommendation it has no legal binding value on states. Nonetheless, its lack of legal force is filled by a strong political weight. This recommendation allows the understanding of the international norm, offering an evidentiary value of the obligations states hold on the issue of non-discrimination in education on grounds of residence status. In this sense, even the non-legally binding recommendation of the Committee on the Elimination of Racial Discrimination contributes to the creation of customary international law.⁷⁷ In addition to this, even the Committee on Economic, Social and cultural rights takes a stand with his unquestionable opinion which “confirms that the principle of non-discrimination extends to all persons of school age

⁷⁴ Convention on the Rights of the Child, Art. 2

⁷⁵ Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Art. 30

⁷⁶ UN Committee on the Elimination of Racial Discrimination (CERD) (65th session), *General Recommendation XXX: Discrimination against Non-Citizens*, 2004 para. 30

⁷⁷ Marko Divac Öberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” in the *The European Journal of International Law* Vol. 16 no.5 pp. 879-906

residing in the territory of a State party, including non-nationals and irrespective of their legal status".⁷⁸

It is therefore clear that international law and the ratification of the International Covenant on Economic, Social and Cultural Rights and other treaties, oblige states to make sure aliens as well as irregular migrants have equal access to at least primary education. Nonetheless it is evident that the implementation of this obligation is inconsistent and allows many discriminatory practices in many states.⁷⁹As already highlighted, it is obvious that school is a fundamental step to integrate migrants' children into society, and it may give them the chance to obtain residence permits and be regularized.⁸⁰However, fear of reporting obligations, permission of authority to obtain pupils data, school fees and costs and enforcement practices of migration authority become insurmountable barriers to access to education by undocumented children.⁸¹As a matter of fact, irregular children are often required in certain countries to show some form of identity in the process of enrolling to public school, whether it is a birth certificate or a residence permit,⁸²in this way deterring them from attending school. In the worst cases, irregular migrant children are straightforwardly declared not eligible to access public schools, as is the issue in certain Canadian provinces.⁸³

At the end of the day, even when national legislation seems to comply with international obligation, the lack of affirmative measures compromises undocumented migrants' possibility to take full advantage of the school system, and pupils face a higher risk with regards to accessing good-quality education.⁸⁴ Considering this, during the 2012 day of general discussion over the rights of all children in the context of

⁷⁸ CESCR, General Comment No.13 para. 34

⁷⁹ PICUM Platform for International Cooperation on Undocumented Migrants, *Undocumented Children in Europe: Invisible victims of immigration restrictions*, 2013, p.15

⁸⁰ In both France and Italy for example school attendance as well as residence may grant them a residence permit when they turn 18 years old. See PICUM, *Undocumented Children in Europe*, p.11

⁸¹ UN Human Rights Office of the High Commissioner, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, New York and Geneva 2014, p. 82

⁸² In Europe Bulgaria, Hungary, Lithuania, Latvia and Sweden all require some form of identity, see FRA, *Fundamental Rights of Migrants in an Irregular Situation*, 2011 pp. 87, 90-91

⁸³ CERD Concluding Observations on Canada, 25 May 2007 CERD/C/CAN/CO/18 para. 23

⁸⁴ Report of the Special Rapporteur on the right to education, Mr. Vernor Muñoz, A/HRC/14/25, para 34-35

international migration, the Committee on the rights of the Child demanded and encouraged states to ameliorate legislation in such a way that it would not create impediments to the fulfillment of the right to education, and urged them to promote policies that won't in any way discriminate against children affected by migration, stressing the point in regards to those in an irregular situation. In addition to this, the Committee asked to those who are in charge of providing public service and accessing children' information to share information with immigration authorities only in the best interest of the child, ensuring effective protection in law and in practices of undocumented migrants' rights.⁸⁵

As of 2013 there are counted some 232 million international migrants settled in the world,⁸⁶ of which around 15-20 per cent are estimated to be irregular migrants.⁸⁷ At the same time, 124 million of children are still out of school.⁸⁸ The paradox of these numbers is that, as the most recent Special Rapporteur on the right to education, Kishore Singh,⁸⁹ put in words, "the enjoyment of the right to education is often least accessible to those who need it the most."⁹⁰ In his 2013 report, he underlines the urgency of working towards ensuring that the right to education is adjudicated and that these judgments are enforced there where this right is not fully realized.⁹¹

As a matter of fact, unlike the other economic, social and cultural rights, the unprecedented characteristic of the right to education is that it is justiciable under the regional human rights system, which created fundamental jurisprudence in interpreting Article 13 of the covenant. In the following and final chapter I will in fact trespass the universal international dimension to focus on a regional one, analyzing and comparing the practices and approaches of the European human rights system and the Inter-

⁸⁵ Committee on the Rights of the Child, Report of the 2012 day of general discussion the rights of all children in the context of international migration, para 87

⁸⁶ United Nations Department of Economic and Social Affairs, Populations Division, *Trends in International Migrant Stock: The 2013 Revision*, UN database, POP/DB/MIG/Stock/Rev.2013

⁸⁷ International Organization for Migration, *world migration report 2010, the future of migration, building capacities for change*, Geneva, 2010, p.29

⁸⁸ UNESCO Institute for Statistics, *Number of Out-of School Children of Primary Age*, 2014

⁸⁹ Kishore Sing was appointed on August 1, 2010

⁹⁰ Human Rights Council, Report of the Special Rapporteur on the right to education on justiciability of the right to education, A/HRC/23/35 (10 May 2013) para 2-3

⁹¹ *ibid*

American one in protecting, fulfilling and respecting the right to education of undocumented migrants.

2.3 The question of resources

As already mentioned in the first paragraph of this chapter, the Covenant on Economic, Social and Cultural Rights provides a unique article, article 14, which establishes that “each State Party to the present covenant [...] undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”⁹² This clear obligation of conduct inserted in the covenant requires states to assemble a plan that would allow them to achieve the principles set out in article 13 to attain universal primary education.

This provision was fiercely contested during the *travaux préparatoires* of the Covenant, mainly on the ground that it conflicted with the principle of progressive implementation, but also on the basis that it was impractical to oblige states to adopt such a plan and that the UNESCO was already in charge of dealing with this issue.⁹³ Nonetheless, article 14 was adopted by a large majority of the drafters who, by doing this, underlined the utter importance of safeguarding the correct implementation of the right to education. In fact, at the time the UNESCO was still a very young organization and lacked the necessary efficiency in its methods of implementation and governance. For these reasons, the drafters believed it required further guidance in order to play a relevant role. In addition to this, the words of article 14 were not considered as going against or weakening the principle of progressive implementation. On the other hand the article presented itself as a completion of the ground rule and as a clarification of the steps deemed necessary in order to achieve the goal of universal primary education.⁹⁴ The adoption of this article goes to show the firm commitment to persevere in this direction.

⁹² ICESCR, Art. 14

⁹³ UN General Assembly, Third Committee, A/C.3/SR.790, 24 October 1957, 143-4 (UNESCO)

⁹⁴ Saul, Kinley, Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases, and Materials*, Oxford University Press, 2014, pp. 1163-64

Nevertheless, we are left wondering if the drafters, writing article 14, were taking into consideration the public costs of planning a free compulsory education, accessible to all. Unfortunately for the countries party to the Covenant, states are not able to elude their obligation under article 14 on the basis that they do not dispose of sufficient resources to attain such a plan. This is clearly stated in the Committee on Economic, Social and Cultural Rights' General Comment No. 11 on the plans of action for general education. In the comment, the Committee asserts that countries cannot evade their duty by declaring they lack the necessary resources because "if the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources."⁹⁵

The Committee confirmed their approach on this through various Concluding Observations. Some exemplar cases are the Concluding Observations in relation to the Solomon Islands and to Zimbabwe. In both cases the Committee declared that, in spite of the recognized financial and economic crises in both states, it was deeply concerned about the status of free compulsory primary education in the countries, and demanded a plan to be submitted as soon as possible.⁹⁶

Nevertheless, as already thoroughly discussed in the previous chapter, states are indeed expected to seek international assistance to manage to comply to their duties under article 14, and in order to conquer the objective of universal primary education, which is of primary relevance to the world globally. This is also specified in Comment 11, which sets out that "where a State party is clearly lacking in the financial resources and/or expertise required to work out and adopt a detailed plan, the international community has a clear obligation to assist."⁹⁷ We have already examined how this obligation on states is far from being clear, but it is nonetheless laid down in the Covenant and further specified by this Comment.

However, what mostly concerns this analysis, is not only the notion that states cannot escape their obligation to financially cover the cost of primary education even though they lack the resources, but also the principle that they should adopt, and pay for, a plan that allows education for all on grounds of equality and without

⁹⁵ CESCR, General Comment No. 11, para. 9

⁹⁶ See CESCR, Concluding Observations: *Solomon Islands*, E/C.12/1/Add.33, 14 May 1999 and CESCR, Concluding Observations: *Zimbabwe*, E/C.12/1/Add.12, 20 May 1997

⁹⁷ CESCR, General Comment No. 11 para. 9

discrimination against irregular aliens. We have already noted how discrimination in education on grounds of residence status is forbidden at the international level. The Concluding Observations of the Committee once again corroborated this position. Of particular importance is the one in relation to Kuwait of 2004, in which the Committee expresses its concern that the state does not provide free mandatory education to non-Kuwaiti children.⁹⁸ Similarly in respect to India and China, the Committee encouraged the countries to implement free education to target the most disadvantaged and marginalized groups.⁹⁹

In the recent context of the migration crisis, a lot of concern grew over whether the substantial number of migrants entering Europe irregularly would change the equation at least for countries carrying the greatest burdens, such as Greece or Italy itself. Especially in the case of Greece, considering the heavy financial crisis that hit the state last year, should the country be allowed not to provide education to thousands of irregular migrant children? It is comprehensible that taxpaying citizens, especially in a time of severe economic crises, would rather see their resources benefiting the pockets of Greece's workers rather than being directed to the education of migrants. As a matter of fact, being part of the Council of Europe, Greece could appeal to the provision of the European Social Charter, the main regional treaty on matters of socio-economic rights, that limits the right it contains, as well as the right to education, to lawfully residing immigrants.¹⁰⁰ Nevertheless, we have shown that under international law and especially before the Covenant on Economic, Social and Cultural rights, Greece must continue to direct its available resources to provide free education to irregular migrants, and in case this resources are not necessary Greece should seek international assistance.

⁹⁸ CESCR, Concluding Observations: *Kuwait*, E/C.12/1/Add.98, 7 June 2004

⁹⁹ See CESCR, Concluding Observations: *India*, E/C.12/IND/CO/5, 8 August 2008 and CESCR, Concluding Observations: *China*, E/c.12/1/Add.107, 13 May 2005

¹⁰⁰ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Appendix 1

Chapter 3: Practices in the European and Inter-American Human Rights Regional Systems

3.1 The European System

As predictable, it is extremely hard if not impossible to obtain objective and realistic rough calculation of the number of irregular migrants, let alone the number of children out of primary school. Nonetheless, Eurostat in 2010 estimates that approximately 41,500 undocumented migrant children are present under the jurisdiction of the European member states, and 16,000 of these are under the age of 14.¹⁰¹ It becomes therefore extremely important in this context to analyze the condition of their right to education as granted by the European human rights system.

The European Convention for the protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), is the major instrument of human rights doctrine in Europe and was drafted in 1950 by the newborn Council of Europe.¹⁰² All of the states members of the Council of Europe have ratified the Convention and are under the obligation to respect it. Most importantly it imposes upon the states party to the convention the duty to partially give up their sovereignty to the rulings of the European Court of Human Rights, the supranational court established by the Convention.¹⁰³

During the years, the European system of human rights developed and gave birth to two other important instruments stemming from different entities: the European Social Charter, child of a now experienced Council of Europe and the Charter of Fundamental Rights of the European Union. While the latter was born as a necessity of the European Union to formalize a doctrine of fundamental rights that was being

¹⁰¹ Eurostat, enforcement immigration statistic

¹⁰² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

¹⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 19 of ECHR

shaped by the jurisprudence of the European Court of Justice,¹⁰⁴ the former was the counterpart for economic, social and cultural rights of the Convention.

All of these three treaties contribute to protecting the right to education in the European regional system. Article 2 of Protocol 1 of the ECHR explicitly affirms that “no person shall be denied the right to education” and recognizes the right of parents to freely choose the education they favor for their children. In spite of its formulation as a negative freedom, it was established by the European Court of Human Rights that this provision does indeed entail a positive right not only because it straightforwardly mentions a *right* to education, but especially in light of the preamble of the convention which asserts that the aim of the ECHR is eventually that of the enforcement of rights and freedoms.¹⁰⁵

The European Social Charter, revised in 1996, defends the right to education in its article 17. However it does so only recognizing it as part of the entitlements children have of a proper legal, social and economic protection, and not by writing an ad hoc provision.¹⁰⁶ Finally, also the Charter of Fundamental Rights of the European Union has a specific provision on the rights to education, that is Article 14, which spells out the right to education as pertaining to everyone, with the “possibility to receive free compulsory education” and stating the sacrosanct right of parents to choose the kind of education they prefer for their children.¹⁰⁷

Nonetheless, for the purpose of this paper we ought to stress the fact that, while the EU Charter of Fundamental Rights does not specify in any provision who its beneficiaries are,¹⁰⁸ the European Social Charter is not applicable to irregular migrants. As a matter of fact, in its appendix on the scope of the treaty it specifically indicates that “the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as

¹⁰⁴ Case C- 228/69, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; [1972] CMLR 255.

¹⁰⁵ European Court of Human Rights, case “*relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium* (merits), Judgement of 23 July 1968

¹⁰⁶ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Art. 17. This article does not explicitly protect the right to education but simply states that “Children and young persons have the right to appropriate social, legal and economic protection.”

¹⁰⁷ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 14

¹⁰⁸ Dominick Mcgoldrick, “The charter and UN Human Rights Treaties” in Peers, Ward, *European Union Charter of Fundamental Rights*, Hart Publishing, 2004 p.108

they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.”¹⁰⁹

Therefore, if the European Social Charter appeared as a victory of the recognition of economic, social and cultural rights and human rights, it left out a portion of its potential, and mostly in need, beneficiaries. In spite of this, there have been documented cases in which the European Committee on Social Rights, deciding on matters of collective complaints, made exceptions in relation to undocumented children, who are the first beneficiary of a right to education, and aliens in need of medical care. In *Defence for Children International v. the Netherlands*, where the Dutch Government was accused of not granting children the right to housing, the Committee “highlights that States' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants.”¹¹⁰ On the same lines, if not more explicitly, when France was accused of not respecting the right to medical assistance of the charter, by *the facto* restricting access of illegal immigrants, in *FIDH v. France*, the Committee expressed its belief that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter”, stressing the fact that the charter should be interpreted in light of the principles of individual human dignity.¹¹¹ Considering these interpretations, it would therefore be possible to infer that, in those cases where the Committee delivers a decision on the basis of and referring to international human rights treaties, it should be prone to be well disposed also towards granting access to free primary education to undocumented migrants.

Nonetheless, even if the European Social Charter has not proven to be determinant in granting any rights to illegal migrants as its provisions do not apply to them. The European Court of Human Rights has ruled in favor of their fundamental right to access education without impediments, setting an important judicial precedent that states members of the Council of Europe are legally bound to observe. In the case

¹⁰⁹ European Social Charter (Revised), Appendix 1

¹¹⁰ *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009

¹¹¹ *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No.14/2003, Council of Europe: European Committee of Social Rights, 20 October 2009, 3 November 2004

Timishev v. Russia,¹¹² The European Court of Human Rights found Russia guilty of breaching Article 2, Protocol I of the European Convention on Human Rights when it was called to decide over a case of a Chechen migrant's children who were denied access to school on the ground that their father did not have a resident paper. This decision ultimately confirmed the impermissibility under European law to discriminate migrants on the basis that they lack relevant documents. As a matter of fact, one of the largest grounds of *the facto* discrimination is exactly the one that stems from requiring documents at the moment of admission to school, prohibiting the request of documents during the enrollment process is an effective step toward the fulfillment of the right to education of irregular migrants.¹¹³

To conclude, we have shown that despite the instruments that compose the European human rights system do entails provisions that protect the right to education, no specific legal framework was designated to address undocumented migrants as beneficiaries of these rights. Despite this consideration, the tendencies of the European Committee on Social Rights to refer to international human rights treaties and most importantly the jurisprudence of the European Court of Human Rights have shown a substantial opening towards the delineation of the right to education of undocumented migrants residing in Europe.

3.2 The Inter-American system

The Inter-American human rights system has, in comparison to the European one, gone the extra mile not only in establishing a legal framework for undocumented migrants, but also in affirming the interdependence between economic, social and cultural rights and civil and political rights.

There is a very widespread misconception about the condition of illegal immigration throughout the American region. It is often believed that the American states, especially those of central and south America are states that only "produce" irregular immigrants, and only the United States of America are seen as the relevant

¹¹² European Court of Human Rights, *Case of Timishev v Russia*, Apps. 55762/00 and 55974/74/00, 13 December 2005, 44 EHRR 37

¹¹³ The FRA in its 2011 report on fundamental rights of migrants in an irregular situation has found that Bulgaria, Hungary and Lithuania requires a residence permit to access free primary education, See FRA p. 87-88

recipient of undocumented migrants. In spite of this belief, the major economic powers in the southern region, such as Brazil, Argentina, Chile and Mexico itself attract a very great deal of undocumented migrants from the poorer regions.¹¹⁴ Even though this information may not seem relevant to our analysis, I deemed important to show that the sensitivity of the Inter-American system the situation of undocumented migrants ' rights has historical and contextual roots.

The Inter-American System is founded upon the Organization of American States, an Inter-governmental, inter-continental organization established in 1948 to ensure the solidarity and cooperation of the states in both North and South America.¹¹⁵ Twenty years after, in 1969 the OAS drafted its international human rights instrument, the American Convention on Human Rights,¹¹⁶ also known as the Pact of San José, giving birth to an Inter-American human rights system, protected by the establishment of an ad hoc Commission¹¹⁷ and the Inter-American Court of Human Rights.¹¹⁸ Unfortunately, in spite of the fact that in that same moment in history states were ratifying the International Covenant on Economic, Social and Cultural rights, this category of rights was hardly taken into consideration in the text of the American Convention, which was more focused on civil and political rights. As a matter of fact, despite dedicating an entire section to them, chapter III doesn't contain an autonomous catalogue of rights but only one single provision, Article 26, which obliges states to progressively develop the economic, social and cultural rights incorporated in the OAS Charter, both internally and through international cooperation.¹¹⁹ Conscious of this lack, in 1988, with the aim of taking the Inter-American human rights system to the next level, the states parties to the convention adopted Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, which also takes the name from the city it was signed in, Protocol of San Salvador.¹²⁰ This time, the catalogue of the

¹¹⁴ James A. Baer, Senior Research Fellow, *Documenting the Undocumented within Latin America*, Council on Hemispheric Affairs, November 18 2014

¹¹⁵ Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948

¹¹⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969

¹¹⁷ American Convention on Human Rights, Chapter VII

¹¹⁸ Ibid, Chapter VIII

¹¹⁹ Ibid, Chapter III, Art. 26

¹²⁰ Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*

rights granted is extremely wide and detailed, but nonetheless the protocol carried with itself the problem intrinsic to the nature of economic, social and cultural rights: justiciability. In fact, only two of the protected rights, trade union rights and the right to education, can be object of individual complaint to the Commission and eventually be subject of the contentious jurisdiction of the Inter-American Court of Human Rights.¹²¹ As a matter of fact, during the drafting of the protocol, it was the Court itself, which recognized that only some rights act as subjective rights jurisdictionally enforceable, while on the other hand, because of their nature or the economic situation of each country, many rights which required putting up complex institutional and economic systems were not deemed fully enforceable.¹²²

Nonetheless, it is exactly the jurisprudence of the Inter-American Court that has had the greatest and most active role in protecting economic, social and cultural rights, developing an “integrated approach” to this category of rights, that is safeguarding them in that they are a constituent part of civil and political rights. The choice of adopting this philosophy in the Inter-American area was made very clear in the Preamble of the Protocol of San Salvador which recognizes “the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person.”¹²³ In fact, this approach consists in widening the interpretation of civil and political rights to the point of including socio-economic rights in them. The jurisprudence of the court has widely embraced this approach. It was the court itself during one of its proceedings to explain how the merging of these apparently different categories of rights stems from the necessity of interpreting international human rights norms in an evolutionary way in order to adapt these norms to the dynamic changings of the normative, economic and social context they are applied to.¹²⁴ In this optic, the right to life is interpreted as the right to a dignified life and for this reason the

(“Protocol of San Salvador”), 16 November 1999, A-52

¹²¹ Ibid, Art. 19 (6)

¹²² Oswaldo R. Ruiz-Chiriboga, “The American Convention and the Protocol of San Salvador: Two Intertwined Treaties, Non-enforceability of economic, social and cultural rights in the Inter-American system”, in *Netherlands Quarterly of Human Rights*, Vol. 31/2 (2013), pp. 159-186

¹²³ Ibid, Preamble

¹²⁴ Corte Interamericana de Derechos Humanos, *Caso “Cinco Pensionistas” vs Perú*, Sentencia de 28 de febrero de 2003 (Fondo, Reparaciones y Costas) par. 108

right to life comprehends within itself the right to healthcare, education, food and others economic, social and cultural elements. This was again made clear by the Court in a very important judgment which speaks of the right to a *vida degna*, dignified life, seen as the demand for conditions that confer feasibility and fullness to one's existence.¹²⁵

It therefore does not come as a surprise that the Inter-American Court of Human Rights has been the first supranational human rights entity to specifically address the legal status and rights of undocumented migrants. In 2003 the court deliver an advisory opinion requested by Mexico on the issue and finally gave undocumented migrants a specific legal framework of reference¹²⁶. In it's opinion it clearly states that the principle of equality and non discrimination has gone beyond general international law and has entered the domain of *jus cogens*, therefore defending the opinion that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights."¹²⁷ Further explaining this position, the judge Sergio Garcia Ramirez stress the rejection by the court of the opinion that violating the immigration laws of a country, residing there illegally, does not erode a migrant's human condition and does not take away his human dignity and the freedom that brings along.¹²⁸ Of even greater importance is the explicit reference he makes to the focus of the opinion, i.e. labor rights of undocumented migrants workers, stressing that, although some scholars have defined labor rights and economic, social and cultural rights in general as "second generation" rights, "they have the same status as the so-called "civil and political" rights. Mutually dependent or conditioned, they are all part of the contemporary statute of the individual; they form a single extensive group, part of the same universe, which would disintegrate if any of them were excluded."¹²⁹ Therefore, even though education is never explicitly mentioned, the approach of the court on the issue and the obligations set by

¹²⁵ Corte Interamericana de Derechos Humanos, *Caso Comunidad Indigena Sawhoyamaxa vs. Paraguay*, Fondo, Reparaciones y Costas, Sentencias de 29 de marzo 2006. Serie C. n. 149 (Voto razonado del juez Sergio Garcia Ramirez) par. 18

¹²⁶ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, *Juridical Condition and Rights of Undocumented Migrants*.

¹²⁷ Ibid, p. 113

¹²⁸ Reasoned concurring opinion of judge Sergio García Ramírez in relation to advisory opinion oc-18/03 on "legal status and rights of undocumented migrants" of september 17, 2003 issued by the inter-american court of human rights, para. 23

¹²⁹ Ibid, Para 27

this advisory opinion upon states of respecting, protecting and implementing labor rights of undocumented migrants, allows us to assert that under the Inter-American system irregular migrants have a fundamental right to access education as education is a condition of a decent life, in the same way judge Ramirez sees work as a “subsistence factor” of the right to life.¹³⁰

In the context of the Inter-American human rights system, the right to education is defined by Article 13 of the Additional Protocol on economic, social and cultural rights, and is worded and structured very similarly to Article 13 of the International Covenant. The provision ensures that “everyone has a right to education” and after describing the scope of education, it proceeds by regulating its different levels and by granting parents the ultimate right of selecting the type of education for their children.¹³¹ The assumption I just made that the principle of non-discrimination would strongly apply also to undocumented individuals trying to access free primary education was confirmed by an Inter-American Human Rights Court Judgment of 2005. In the case *The Yean and Bosico Children v Dominican Republic*,¹³² the court was called to judge an eventual breach of the American Convention occurred when the civil registry denied two girls, born in the Dominican Republic to Haitian immigrant mothers, their Dominican birth certificate that they needed to enroll in school. The court found an evident breach by the state of the obligations entailed by Article 13 of the Convention, stressing the vulnerability to which children may be exposed if denied their nationality and juridical personality, that is being prevented from fulfilling her right to free primary education which must be provided by states to all children.¹³³

We have seen how throughout its jurisprudence the Inter-American Court, has been absolutely determinant in establishing the equal ranking between economic, social and cultural rights and civil and political rights. Through its integration approach and the establishment of not only a right to life but a right to a decent life, it managed to fill in the historical gap between these two categories and to explicitly define undocumented migrants as direct beneficiaries of social rights and in particular the

¹³⁰ Ibid, Para. 28

¹³¹ San Salvador Protocol, Art. 13

¹³² Inter-American Court of Human Rights *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs)

¹³³ Ibid, par. 185

right to access free primary education. Hence, in spite of the poorer and harder socio-economic context of the states that recognize and submit to the Inter-American Court supranational powers - context that would have justified a slower implementation of economic, social and cultural rights - the American region has managed to set it self apart for its interpretation of human rights, outclassing the richer European region.

Conclusion

To conclude, I believe this analysis has shown that undocumented migrants, in spite of their irregular status, enjoy the protection of their human rights both at the international and regional level. I sincerely hope I have managed to demonstrate that crossing a border illegally and violating a country's immigration laws does not affect one's entitlement to his human rights. This level of protection is particularly important when it comes to defending immigrants' right to education, as it is exactly through education that a society can hope to fully integrate them and maximize their value.

Nonetheless, the remark that needs to be made is that there is an objective lack of a specific instrument of protection that clarifies obligations states have to respect and especially realize human rights of migrants. In fact, unless undocumented immigrants are found and either expelled or regularized, as it is a sacrosanct right of states to do so, states often neglect to recognize them their fundamental human rights, especially those that belong to the second generation of rights, the economic, social and cultural rights. In addition to these reasons, it is obvious that the economic cost to sustain in order to allow access of irregular migrants to education, and to other socio-economic rights, is the primary factor that deters states from recognizing this obligation. As a matter of fact, citizens are very unwilling to see their tax money directed to the benefit of people that, not only are perceived as "foreigner", but are perceived as harmful to society, insofar as they may not contribute to the welfare of the state. It is hard to say if the lack of a specific legal framework comes from the fact that irregular immigrants are a group that is almost impossible to single out as they often hide from society, or if states are reluctant to safeguard their rights because it would mean an open undermining of their sovereignty and primarily of their democracy, according to which they are obliged to respect its citizens needs and wants. Nevertheless, without a distinct legal framework, even considering the protection they enjoy under international human rights instruments, state will continue to *de facto* impede their full enjoyment, in the case of education, by restricting access to only those who have documents or who do not fear to be reported to immigration authorities.

At the regional level this situation has been addressed especially by the Inter-American court of human rights, which has established the first binding opinion on the juridical condition of undocumented migrants. This, combined with their evolutionary

approach to economic, social and cultural rights has taken the region to the next level in respect to this issue and has allowed the country to distinguish it self from a more reluctant Europe. In this sense, I am of the opinion that, especially considering the delicate situation of the current migration emergency Europe is facing right now, the region should absolutely and quickly fill in this wide juridical gap, addressing the situation and implementing policies that ensure the protection of economic, social and cultural rights of migrants regardless of their legal status, as well as their civil and political rights. Let's not forget that none of the European countries as well as the North American ones have not ratified the International Convention on the Protection of Migrant Workers and Members of their Families, the most specific treaty on the matter at the international level, and the regional work of the Inter-American court of human rights itself becomes impressively resized if we take into consideration the fact that the United States, which alone are estimated to have more than eleven millions of immigrants, do not recognize the power of the court.

In the end, we are left asking ourselves whether the protection undocumented migrants enjoy of their right to education and of their other socio-economic rights is only on paper or is an actual protection. In the reasoned concurring opinion of judge Sergio Garcia Ramirez on the Inter-American court advisory opinion on the juridical condition and rights of undocumented migrants, the judge underlined that "announcing rights without providing guarantees to enforce them is useless. It becomes a sterile formulation that sows expectations and produces frustrations. Therefore, guarantees must be established that permit: demanding that rights should be recognized, claiming them when they have been disregarded, re- establishing them when they have been violated, and implementing them when their exercise has encountered unjustified obstacles." This paper was not meant to be answering this question, but it remains an important food for thought.

In spite of these final considerations, I believe that there won't be any further, more liberal and inclusive approach to the human rights of irregular migrants. The real issue is not that of recognizing them as humans and therefore entitled to human rights, but to oblige states to implement public policies, such as school reforms, that guarantee the full realization of these rights. I am under the impression that state's sensitivity of their sovereignty will be an insurmountable obstacle to this, and if in the last half century human rights law has supplanted immigration law, considering the new threats

our society is facing, especially that of terrorism, I believe we are more likely to be taking steps backwards rather than forwards, privileging visa documents and resident permits over humanity. In the hope that this prediction never realizes I would like to remind us what John Fitzgerald Kennedy said, in his civil rights address speech delivered the 11th June of 1963: “The rights of every man are diminished when the rights of one man are threatened.”

Bibliography

- Monographies
 - Bestagno Francesco, *I diritti economici, sociali e culturali, promozione e tutela nella comunità internazionale*, Vita e Pensiero, 2009
 - Bogusz and others eds., *Irregular migration and human rights: theoretical, European and international perspective*, Martinus Nijhoff Publishers, 2004
 - De Shutter Oliver, *Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing Limited, 2013
 - Saul, Kinley, Mowbray, eds. *The International Covenant on Economic, Social and Cultural Rights: Commentary Cases and Materials*, Oxford University Press, 2014
 - Dembour, Kelly, *Are human rights for migrants? Critical reflection on the status of irregular migrants in Europe and in the United States*, A Glass House Book, 2011
- Chapters, Articles and Working Papers
 - Bosniak Linda S., "Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers' Convention", in Bogusz and other eds., *Irregular migration and human rights: theoretical, European and international perspective*, Martinus Nijhoff Publishers, 2004, pp. 311- 345
 - Carens Joseph H, "The Rights of Irregular Migrants", *Ethics & International Affairs*, Volume 22, Issue 2, pages 163–186, Summer 2008
 - Carrera Sergio and Merlino Massimo, *Assesing EU Policy on Irregular Immigration under the Stockholm Programme*, Center for European Policy Studies, 2010
 - Chetail Vincent, "The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights", *Georgetown Immigration Law Journal* Vol 28:225:2013, 225- 255
 - Costamagna Francesco, "Corte Interamericana e tutela dei diritti economici, sociali e culturali: il diritto ad una "vida degna", in Bestagno, *I diritti economici Sociali e culturali, promozione e tutela nella comunità internazionale*, Vita e Pensiero, 2009pp. 137- 166
 - Dankwa V. and others, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural rights", *Humans Rights Quarterly*, 20 (3), August,1998, pp. 705-30
 - Dennis Micheal J. and Stewart David P. "Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?", *American Journal of International Law*, 98 (3), July, 462 – 515
 - Estrada-Tanck Dorothy, "Human Security and The Human Rights of Undocumented Migrants: Systemic Vulnerabilities and Obligations of Protection," *European Journal of Social Security*, Volume 15 (2013) No.2
 - Gomez Mario, "Social Economic Rights and Human Rights Commissions", *Human Rights Quarterly*, 17 (1), February, 155-69
 - Guild Elspeth, "Who is an Irregular Migrant", in Bogusz and other eds., *Irregular migration and human rights: theoretical, European and international perspective*, Martinus Nijhoff Publishers, 2004, pp. 3-29
 - James A. Baer, Senior Research Fellow, *Documenting the Undocumented within Latin America*, Council on Hemispheric Affairs, November 18, 2014
 - Katerina Tomasevski, *Removing Obstacles in the Way of the Right to Education (Right to Education Primers No. 1)* Novum Grafiska, Gothenburg, 2001

- Landau David, "The Reality of Social rights Enforcement", *Harvard International Law Journal* 53 (1), Winter 189-247
- Langford M, "Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review", *Sur – International Journal on Human Rights*, 6 (11), December, 2009 pp.91-120
- Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" in the *The European Journal of International Law* Vol. 16 no.5 pp. 879-906
- Mcgoldrick D, "The charter and UN Human Rights Treaties" in Peers, Ward, *European Union Charter of Fundamental Rights*, Hart Publishing, 2004
- Mikkola Matti, *Social Human Rights of Migrants under the European Social Charter*, available at <http://www.helsinki.fi/oikeustiede/omasivu/mikkola_matti/pdf/migrants.pdf>
- Nascimbene B., "Le migrazioni tra sovranità dello stato e tutela dei diritti della persona", in Carta M., *Immigrazione, frontiere esterne e diritti umani, Profili internazionali, europei ed interni*, Roma, 2009
- Oberoi, Pia. "Defending the Weakest: The Role of International Human Rights Mechanisms in Protecting the Economic, Social and Cultural Rights of Migrants," *IJMS: International Journal on Multicultural Societies*, 2009, vol.11, no.1, pp. 19-35. UNESCO
- Olmos Giupponi M.B., *Los Derechos de los Extranjeros en Situacion Irregular: Reflexiones a la Luz de la Practica de los Sistemas de Proteccion de Derechos Humanos en el Ambito Europeo y Americano*, European University Institute, 2009
- Oswaldo R. Ruiz-Chiriboga, "The American Convention and the Protocol of San Salvador: Two Intertwined Treaties, Non-enforceability of economic, social and cultural rights in the Inter-American system", in *Netherlands Quarterly of Human Rights*, Vol. 31/2 (2013), pp. 159-186
- Pasqualucci J.M. "The rights to a dignified life (vita digna): The integration of economic and social rights with civil and political rights in the Inter-American human rights system," *Hastings International & Comparative Law Review*, 31 (1), 2008
- Piaget J, "Dove va l'Educazione" in Ravaglioli F., *Educazione Occidentale*, Armando, Roma, 1988 vol. III, pp. 353- 359
- Piotrowicz Ryszard, "European Union Policy on Irregular Migration: Human Rights Lost?" in Bogusz and other eds., *Irregular migration and human rights: theoretical, European and international perspective*, Martinus Nijhoff Publishers, 2004, pp. 159- 193
- Pisillo Mazzeschi Riccardo, "Sui rapporti fra i diritti umani ed i diritti degli stranieri e dei migranti nell'ordimento internazionale", *Diritti Umani degli Immigrati, tutela della famiglia e dei minori*, Editoria Scientifica, 2011, pp. 7-36
- Pustorino P. "I Diritti Economici e Sociali" in Calamia, Di Filippo, Gestri, *Immigrazione, Diritto e Diritti: profili internazionalistici ed europei*, Cedam, 2012 pp. 319- 346
- Santos and others, "International Migrants Bill of Rights", *Georgetown Immigration Law Journal* Vol 28:9
- Taran, P. A. (2001), "Human Rights of Migrants: Challenges of the New Decade". *International Migration*, Volume 38, Issue 6, pages 7–51, Special Issue 2 2001
- Tonelli Simon, "Irregular Migration and Human Rights: a Council of Europe Perspective", in Bogusz and other eds., *Irregular migration and human rights: theoretical, European and international perspective*, Martinus Nijhoff Publishers, 2004, pp. 301-311

- Vierdag E.W., "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" in *Netherlands Yearbook of International Law*, Vol 9, The Hague, The Netherlands: T.M.C. Asser Institute, 69-105
- Young Katherine G., "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *Yale Journal of International Law*, 33 (1), 113-175
- Internatinal Organizations Documents
 - Treaties
 - Assemble Nationale, *Déclaration des droits de l'homme et du citoyen du 26 août 1789*, 26 August 1789
 - *Charter of the United Nations*, adopted June 26, 1945, 1 UNTS XVI
 - Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
 - Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163
 - European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02
 - Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 16 November 1999, A-52
 - Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969
 - Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948
 - UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960
 - UN General Assembly *International Covenant on Economic, Social and Cultural Rights*, A/RES/2200, 16 December 1966
 - UN General Assembly, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, A/RES/40/144 13 December 1985
 - UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577
 - UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, A/RES/2106, 21 December 1965
 - UN General Assembly, *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families*, 18 December 1990, A/RES/45/158
 - UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), 10 December 1942
 - Civil Society Organizations
 - Global Migration Group, *Exploitation and abuse of international migrants, particularly those in an irregular situation: a human rights approach*, 2013
 - 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
 - Global Migration Group, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation*, 30 September 2010

- Human Rights First, *Immigration Detention and the Human Rights of Migrants and Asylum seekers: key challenges*, submission to UN Special Rapporteur on the Human Rights of Migrants, January 2012
- IOM, *world migration report 2010, the future of migration, building capacities for change*, Geneva, 2010
- IOM, *World Migration Report 2011: Communicating Effectively about Migration*, Geneva 2011
- *Maastricht Guidelines on Violation of Economic, Social and Cultural Rights*, 1997, UN doc. E/C.12/2000/13
- *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO, Heidelberg, 2013
- PICUM Platform for International Cooperation on Undocumented Migrants, *Undocumented Children in Europe: Invisible victims of immigration restrictions*
- *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN doc. E/CN.4/1987/17
- United Nations
 - Committee
 - Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States parties' obligations*, UN Doc. E/1991/23
 - Committee on Economic, Social and Cultural Rights, *General Comment No. 11, Plans of Action for Primary Education* E/1992/23
 - Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education*, 8 December 1999, E/C.12/1999/10
 - Committee on Economic, Social and Cultural Rights, *General Comment no. 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Georgia*, E/C.12/1/Add.42, 17 May 2000
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Japan*, E/C.12/1/Add.67, 24 September 2001
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Israel*, E/C.12/1/Add.90, 26 June 2003
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Solomon Islands*, E/C.12/1/Add.33, 14 May 1999
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Zimbabwe*, E/C.12/1/Add.12, 20 May 1997
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on Kuwait*, E/C.12/1/Add.98, 7 June 2004
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on India*, E/C.12/IND/CO/5, 8 August 2008
 - Committee on Economic, Social and Cultural Rights, *Considerations of Report Submitted by State Parties Under Article 16 and 17 of the Covenant, Concluding Observations on*

- China*, E/c.12/1/Add.107, 13 May 2005
- Committee on the Elimination of Racial Discrimination (65th session), *General Recommendation XXX: Discrimination against Non-Citizens*, 2004
 - Committee on the Elimination of Racial Discriminations, *Concluding Observations on Canada*, 25 May 2007 CERD/C/CAN/CO/18
 - Committee on the Rights of the Child, *General comment No. 1, The aims of education*, 17 April 2001, CRC/GC/2001/1
 - Committee on the Rights of the Child, *Report of the 2012 day of general discussion the rights of all children in the context of international migration*
 - Human Rights Committee, *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986
 - UN General Assembly, Third Committee, A/C.3/SR.790, 24 October 1957, (UNESCO)
- Publications
 - Commission on Human Rights, *Preliminary Report of the Special Rapporteur on the right to education*, E/CN.4/1999/49 (13 January 1999)
 - Human Rights Council, *Report of the Special Rapporteur on the right to education on justiciability of the right to education*, A/HRC/23/35 (10 May 2013)
 - Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante Overview of activities of the mandate, Un Doc. E/CN.4/2006/73 of December 30th 2005
 - Report of the Special Rapporteur on the right to education, Mr. Vernor Muñoz, A/HRC/14/25,
 - United Nations Children's Funds (UNICEF) and National University of Lanus, *Economic, Social and Cultural rights of migrant children and children born to migrant parents: challenges, good practices and recommendations*, draft paper, March 2010
 - United Nations Department of Economic and Social Affairs (UNDESA), Populations Division, *Trends in International Migrant Stock: The 2013 Revision*, UN database, POP/DB/MIG/Stock/Rev.2013
 - United Nations Economic and Social Council (ECOSOC), *Economic and Social Council Resolution 1985/17: Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 28 May 1985
 - United Nations Educational, Scientific and Cultural Organization (UNESCO) Institute for Statistics, *Number of Out-of School Children of Primary Age*, 2014
 - United Nations Educational, Scientific and Cultural Organization (UNESCO), *Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, 16 November 1945
 - United Nations Educational, Scientific and Cultural Organization (UNESCO), *World Declaration on Education for All*, Adopted by the World Conference on Education for All "Meeting Basic Learning Needs", Jomtien, Thailand, 5-9 March 1990
 - United Nations Human Rights Office of the High Commissioner, *The economic, social and cultural rights of migrants in an irregular situation*, New York and Geneva, 2014
 - Europe
 - Center for European Policy Studies, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, European Union 2011

- European Committee of Social Rights, Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013
 - European Committee of Social Rights, Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008
 - European Committee of Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012
 - European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003
 - European Union Agency for Fundamental Rights, *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, 2011
 - Eurostat, enforcement immigration statistic
 - Ktistakis Yannis, *Protecting Migrants under the European convention on human rights and the European social charter*, Council of Europe, February 2013
 - Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, *Undocumented Migrants Children in an irregular situation: a real cause for concern*, Doc 12718, 16 September 2011
- Case Law
 - European Court of Human Rights
 - European Court of Human Rights, case "*relating to certain aspects of the laws on the use of languages in education in Belgium*" v. Belgium (merits), judgment of 23 July 1968
 - European Court of Human Rights, Case of *Soering v. United Kingdom*, Strasbourg, 7 July 1989
 - European Court of Human Rights, Case of *Timishev v Russia*, Apps. 55762/00 and 55974/74/00, 13 December 2005, 44 EHRR 37
 - Inter-American Court of Human Rights
 - Corte Interamericana de Derechos Humanos, Caso "*Cinco Pensionistas*" vs Perú, Sentencia de 28 de febrero de 2003 (Fondo, Reparaciones y Costas)
 - Corte Interamericana de Derechos Humanos, Caso *Comunidad Indígena Sawhoyamaya vs. Paraguay*, (Fondo, Reparaciones y Costas) Sentencias de 29 de marzo 2006. Serie C. n. 149 (Voto razonado del juez Sergio García Ramírez)
 - Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs)
 - Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, *Juridical Condition and Rights of Undocumented Migrants*
 - Reasoned concurring opinion of judge Sergio García Ramírez in relation to advisory opinion oc-18/03 on "legal status and rights of undocumented migrants" of september 17, 2003 issued by the inter-american court of human rights
 - European Court of Justice
 - Case C- 228/69, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; [1972] CMLR 255

IL DIRITTO ALL'ISTRUZIONE DEI MIGRANTI CLANDESTINI: DAL DIRITTO INTERNAZIONALE ALLA PRATICA NEI SISTEMI REGIONALI EUROPEO ED AMERICANO

Introduzione

Ho deciso di affrontare con questa tesi il tema dei diritti umani dei migranti proprio alla luce della più grande emergenza migratoria e umanitaria degli ultimi decenni di cui siamo testimoni. Ora più che mai siamo chiamati a ricordare che lo status di migrante, politico o economico, non deve intaccare la dignità umana e non deve ostacolare l'accesso ai diritti umani fondamentali. Questo discorso diventa particolarmente importante nel caso dei migranti clandestini. Nonostante l'oggettiva impossibilità di contarli, è stimato che ce ne siano decine di migliaia in tutto il mondo e la loro posizione irregolare nei confronti degli stati li rende estremamente vulnerabili a discriminazioni, abusi, sfruttamenti e altre violazioni dei loro diritti umani, durante tutte le fasi del processo migratorio. Non solo sono più esposti al rischio di maltrattamenti, detenzioni prolungate e traffico di esseri umani, ma sono soprattutto i meno propensi ad accedere alle forme di tutela giurisdizionale per paura di essere denunciati, deportati o espulsi. Mentre a livello internazionale esiste un tacito consenso intorno alla protezione dei diritti fondamentali dei migranti irregolari, quali il diritto alla vita o il divieto alla tortura, questo consenso non viene esteso alla tutela dei diritti economici, sociali e culturali, quali il diritto alla salute, all'istruzione, al lavoro o ad un'abitazione adeguata.

L'obiettivo di questa tesi è esattamente quello di dimostrare che anche gli immigrati clandestini hanno diritto alla tutela dei loro diritti economici e sociali, non solo secondo i principi generali del diritto internazionale, e secondo il diritto consuetudinario, ma anche secondo trattati internazionali e regionali che regolano le loro libertà e gli obblighi positivi degli stati nei loro confronti.

Per dimostrare ciò ho deciso di concentrare la mia ricerca sull'analisi della tutela del diritto all'istruzione dei migranti irregolari, alla luce del fatto che l'istruzione mira allo sviluppo della personalità umana e del senso della sua dignità, moltiplicando così il rispetto per tutti gli altri diritti dell'uomo e le libertà fondamentali.

Capitolo 1: Diritti Economici, Sociali e Culturali dei Migranti Irregolari

La prima domanda che mi sono posta approcciando questo tema è stata: per quale motivo esiste una maggiore difficoltà ad estendere agli immigrati la tutela dei loro diritti economici e sociali, mentre non sembrano esserci contestazioni riguardo la tutela dei loro diritti civili e politici?

In questo primo capitolo ho ripercorso la storia dei diritti umani e l'impatto rivoluzionario che questa dottrina ha avuto nella giurisprudenza internazionale, causando la decostruzione dello stato come entità sovrana, e limitando il suo potere. A partire dalla Dichiarazione Universale dei Diritti Umani del 1948, gli essere umani diventano destinatari diretti di diritti che derivano solo ed unicamente dalla dignità umana e che scavalcano i diritti legati alla cittadinanza e concessi dalle costituzioni degli stati. L'apice della dottrina dei diritti umani si raggiunge nel 1966 con la stesura del Patto Internazionale sui Diritti Civili e Politici e del Patto Internazionale sui Diritti Economici, Sociali e Culturali.

Tuttavia, per molti anni si è discusso sullo status di quest'ultima generazione di diritti. Nonostante la necessità di proteggere i diritti socio-economici non sia mai stata messa in dubbio, la difficoltà della loro implementazione ha causato molte divergenze fin da subito circa la loro natura giuridica. Infatti, al contrario dei diritti politici e civili che impongono solamente obblighi negativi agli stati nel rispetto delle libertà dell'individuo, e che per questo sono immediatamente giustiziabili, i diritti economici e sociali richiedono agli stati degli obblighi positivi per il rispetto, la tutela e soprattutto la realizzazione di alcuni diritti, fra i quali il diritto all'istruzione, che richiedono tempo e risorse da parte degli stati. Esempio è il fatto che mentre all'interno del Patto sui Diritti Civili e Politici era stato previsto un meccanismo per il monitoraggio, ci sono voluti 20 anni per l'istituzione di un corpo ad hoc che monitorasse ed interpretasse i diritti socio-economici, il Comitato per i Diritti Economici, Sociali e Culturali.

Inoltre, gli esperti in materia, riunitisi prima a Limburg e poi a Maastricht, hanno fornito interpretazioni e linee guida che stabiliscono che, nonostante venga garantita una certa elasticità nella realizzazione dei diritti socio-economici per gli stati membri del patto considerati paesi in via di sviluppo, questa non può essere una giustificazione per la mancata attuazione e viene sottolineato che vi deve comunque essere un nocciolo duro di diritti che deve essere garantito al di là delle risorse del paese. In nome di questo, viene ribadito il ruolo fondamentale della cooperazione internazionale.

Dopo aver analizzato la natura dei diritti economici e sociali, ho analizzato come i migranti clandestini sono tutelati a livello internazionale, denotando l'importante mancanza di un quadro normativo ad hoc. Dopo aver specificato cosa si intende per migrante irregolare, ovvero colui che entra clandestinamente in uno stato o che rimane superando il tempo del soggiorno previsto dal permesso d'entrata, ho analizzato come ormai la giurisprudenza attorno al tema dell'immigrazione prediliga l'approccio dei diritti umani degli stranieri, in linea con l'idea che il diritto internazionale abbia superato il concetto di uno stato come unico destinatario e beneficiario del diritto internazionale. L'approccio dei diritti umani è quello prediletto dalle Nazioni Unite che negli ultimi anni ha prodotto innumerevoli trattati, report e raccomandazioni che trattano i diritti umani degli stranieri. La più recente ed attinente è la Convenzione Internazionale sui Diritti dei Lavoratori Migranti e dei Membri delle loro Famiglie, la cui efficacia è però compromessa dal fatto che nessuno dei maggiori stati ricettori di immigrazione clandestina lo ha ratificato. Anche se manca una normativa specifica per gli stranieri clandestini, dal lavoro delle Nazioni Unite si evince un nucleo di diritti umani che li riguarda in quanto *jus cogens*, quali il diritto alla vita, il divieto di schiavitù, di tortura e trattamenti inumani, e il divieto di rimandare un migrante in un paese in cui non vengono tutelati i diritti umani. Tuttavia questo nucleo non è sufficiente a regolare la vita giuridica degli stranieri, specialmente clandestini. Infatti, se accettiamo una visione in cui i diritti umani inalienabili sono considerati come *jus cogens* e come principi generali del diritto internazionali e in quanto tali possono essere reclamati da tutti, anche dai migranti clandestini, dobbiamo vedere allo stesso modo il nocciolo duro dei diritti economici e sociali poiché anche questi sono iscritti nei principi generali.

Capitolo 2: Il diritto all'istruzione

Il motivo per cui ho deciso di focalizzare la mia ricerca sulla tutela internazionale del diritto all'istruzione e sull'accesso a quest'ultimo da parte degli immigrati irregolari è legato all'importanza insita nell'educazione. Il diritto all'istruzione viene infatti considerato un moltiplicatore di tutti gli altri diritti umani, in quanto permette lo sviluppo della persona e della dignità umana. Questa caratteristica dell'istruzione diventa ancora più importante nel contesto dell'immigrazione. Infatti, per permettere l'integrazione degli immigrati e per sfruttare il loro potenziale in modo che possa essere

di vantaggio all'intera comunità, è fondamentale non negare agli immigrati residenti, sia legalmente che non, il loro diritto all'istruzione.

Fin dalla sua nascita le Nazioni Unite hanno riconosciuto l'importanza del diritto all'istruzione, fondando l'Organizzazione delle Nazioni Unite per l'Educazione, la Scienza e la Cultura, l'UNESCO e inserendolo all'interno della Dichiarazione Universale dei Diritti Umani. Tuttavia, la disposizione più dettagliata e che sancisce un reale vincolo legislativo per gli Stati firmatari, è l'articolo 13 del Patto Internazionale sui Diritti Economici, Sociali e Culturali, che stabilisce un diritto all'istruzione per tutti e gratuita a livello primario. Dopo aver analizzato nei dettagli il contenuto della disposizione mi sono soffermata sulle caratteristiche che l'istruzione deve avere a prescindere dal livello: disponibilità sul territorio, accessibilità senza discriminazioni sociali, fisiche o economiche, accettabilità dei curricula e flessibilità ai diversi contesti.

Particolarmente rilevante ai fini di questa tesi era analizzare il principio di non discriminazione in base allo status di residenza per l'accesso all'istruzione. Infatti, il vero limite posto al godimento del diritto all'istruzione da parte degli immigrati clandestini consiste principalmente nella richiesta di documenti al momento dell'iscrizione, quali certificati di nascita e permessi di residenza. In effetti, lo status di migrante non viene mai direttamente considerato una possibile causa di discriminazione, anche perché il Commento Generale numero 20 della Commissione per i Diritti Economici, Sociali e Culturali, sancisce senza ombra di dubbio che il diritto all'istruzione deve essere garantito a tutti i migranti, a prescindere dal loro status giuridico. Neanche la realizzazione progressiva del diritto all'istruzione o la mancanza di risorse possono essere usate come giustificazioni per negare l'accesso all'educazione ai migranti clandestini, come disposto dalla Commissione nel Commento Generale No. 13.

Rimane tuttavia impellente risolvere la questione delle risorse con la quale uno stato dovrebbe garantire l'istruzione agli stranieri, per giunta illegalmente presenti sul territorio, considerando che questa è una delle ragioni principali dell'astio che i cittadini contribuenti nutrono verso questo obbligo. Sorge spontaneo chiedersi se sarebbe possibile permettere a stati che affrontano particolari crisi sia finanziarie che migratorie, come la Grecia in questo momento, di precludere ai migranti l'accesso all'istruzione. Tuttavia la Commissione per i Diritti Economici e Sociali nelle sue numerose osservazioni ha ribadito in casi simili che la mancanza di risorse non

permette agli stati di esimersi dal garantire a tutti i migranti l'accesso all'educazione, e che in questi casi limite bisogna rivolgersi alla cooperazione internazionale.

Capitolo 3: Pratiche a confronto nel sistema regionale Europeo e Inter-Americano

Ciò che differenzia il diritto all'istruzione dagli altri diritti socioeconomici, e che lo rende particolarmente interessante ai fini di questa ricerca, è il fatto che questo sia processabile sia nel sistema regionale europeo che nel sistema inter-americano dei diritti umani. Di conseguenza, in quest'ultimo capitolo mi occupo di mettere a confronto i due sistemi e di analizzare come e in quale misura essi tutelino il diritto all'istruzione dei migranti clandestini.

Il sistema europeo dei diritti umani, tutela il diritto all'educazione sia nella Convenzione Europea dei Diritti Umani, rendendolo processabile dalla Corte Europea dei Diritti Umani, istituita dalla Convenzione stessa, sia nella Carta Sociale Europea. Tuttavia, le disposizioni della Carta Sociale Europea possono essere applicate agli stranieri solo se sono regolarmente residenti in uno degli stati membri, e quindi taglia esplicitamente fuori gli immigrati clandestini come beneficiari dei diritti tutelati dalla Carta. Nonostante ciò, la Commissione Europea dei Diritti Sociali, esprimendosi in risposta a reclami collettivi, ha fatto eccezioni a ciò, in particolare in relazione a minori clandestini. Più chiara è la presa di posizione della Corte Europea dei Diritti Umani, che nel caso *Timishev c. Russia*, ha giudicato la Russia colpevole di aver negato l'iscrizione a dei bambini ceceni sulla base della mancanza del permesso di residenza del genitore, in questo modo confermando l'illiceità nel sistema europeo dei diritti umani di negare l'accesso all'educazione ai migranti che non abbiano i documenti che provino la loro regolarità.

Tuttavia, nonostante le tendenze del sistema europeo che vertono ad un'apertura nella tutela dei diritti socioeconomici dei migranti clandestini, il sistema inter-americano ha raggiunto un sostanziale consolidamento per la tutela giuridica di tali diritti, che dimostra i passi avanti che l'Europa ancora deve fare. Infatti il sistema inter-americano dei diritti umani ha adottato un approccio ai diritti economici e sociali che può essere letto come la definizione di un diritto ad una *vida degna*: i diritti economici e sociali vengono integrati nel fondamentale diritto alla vita, rendendolo il diritto ad una vita degna di essere vissuta. Spinta da quest'ottica così inclusiva, la Corte Inter-americana dei Diritti Umani ha rilasciato nel 2003 un parere consultivo sulla

condizione giuridica dei migranti clandestini, nel quale esplicita che la situazione irregolare non preclude l'accesso ai diritti umani di qualsiasi generazione, sottolineando che i diritti economici e sociali sono da essere messi sullo stesso piano rispetto a quelli civili e politici. Questa posizione è stata poi corroborata nella specificità del diritto all'educazione nella decisione della corte sul caso *Yean e Bosico c. Repubblica Dominicana*.

Conclusione

In conclusione, dopo aver dimostrato che nonostante l'assenza di un quadro normativo ad hoc che a livello internazionale tuteli i diritti socioeconomici, e in particolare il diritto all'istruzione, dei migranti irregolari, l'intera giurisprudenza sia a livello internazionale che regionale ne ha confermato l'obbligatorietà. Tuttavia, rimane irrisolta la questione che questa tutela esista solo sulla carta e non nella pratica. Nonostante questa tesi abbia dimostrato la presenza di un sempre più predominante approccio ai diritti umani in materia di immigrazione, sono della convinzione che alla luce delle attuali minacce del terrorismo, gli stati saranno sempre più portati a fare dei passi indietro per reinstaurare la loro sovranità in tale materia, prediligendo nel futuro visti e permessi di residenza alla semplice dignità umana.

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