

DO HUMAN RIGHTS KNOW BORDERS?

A Human rights critique of contemporary approaches to irregular migration



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Content

<u>1</u>	<u>INTRODUCTION – ‘ILLEGAL MIGRANTS’: THE ROSA PARKS OF OUR TIME</u>	<u>1</u>
1.1	Research topic and defining the problem	2
1.1.1	Research question	3
1.1.2	Thesis design	3
1.1.3	Demarcation	5
<u>2</u>	<u>WHO IS AN ‘ILLEGAL’ OR IRREGULAR MIGRANT OR WHAT IS ‘ILLEGAL’ OR IRREGULAR MIGRATION?</u>	<u>6</u>
2.1	National law and practice	6
2.2	European Union/European Community	9
2.3	Council of Europe	10
2.4	Forced migration	11
2.5	Irregular migration	13
2.6	The power of the word ‘illegal’	14
2.7	Conclusion	15
<u>3</u>	<u>INTERNATIONAL LAW</u>	<u>17</u>
3.1	Development of a universal personhood?	17
3.2	Balancing the sovereign rights of states and human rights obligations	19
3.3	Immigration status and rights	22
3.4	International human rights law and vulnerability	24

3.4.1	Non-discrimination and recognition before the law	26
3.4.2	Expulsion	31
3.5	The European Framework	32
3.5.1	The European Convention on Human Rights (ECHR)	33
3.5.2	One promising case from the (revised) European Social Charter	36
3.5.3	European Union	37
3.6	Conclusion	38
<u>4</u>	<u>THE ANATOMY OF ILLEGALITY, OR THE CREATION OF VULNERABILITY</u>	<u>41</u>
4.1	How borders create vulnerability	41
4.2	How communities create vulnerability	44
4.3	‘Illegality’ and the circumvention of international obligations	45
4.4	Control and Security	47
4.5	The case of expulsion – The myth of control	50
4.6	Inequalities and migration	52
4.6.1	Global responsibility: solidarity or law?	54
4.7	Conclusion	55
<u>5</u>	<u>FINAL CONCLUSION</u>	<u>57</u>
<u>6</u>	<u>REFERENCES</u>	<u>61</u>
	<u>ANNEX (OPTIONAL)</u>	<u>A</u>

1 Introduction – ‘Illegal Migrants’: The Rosa Parks of our time

My thesis starts with a story from American history. This story has nothing to do with migration, but is about something even more fundamental. It is about how we think of ‘others’ and what claim those ‘others’ hold to belong to humanity. On December 1, 1955, Rosa Parks took one of the first steps towards what would eventually become a sweeping campaign to end racial segregation in the United States. At that time, the Jim Crow laws segregated black and white people in almost every aspect of life. Instead of separate vehicles, each public bus had a section for the blacks who accounted for 75% of the daily passengers, located at the back of the bus. The size of the section was determined by a sign that could be moved according to the number of white passengers. One day Rosa Parks refused to give her seat to white passengers coming into the bus. In her biography Parks wrote, “I would have to know once and for all what rights I had as a human being and a citizen of Montgomery, Alabama.” In her book she writes that, contrary to common lore, she refused not because she was tired after work. Instead she writes: “No, the only tired I was, was tired of giving in”.¹

I retell this story because to me it brings many parallels to mind. Today’s world is also segregated by law and power, and in many ways between black and white². Despite the formal abolition of slavery in 1865, oppression found new life in racial segregation and discrimination: terms of which we still continue to struggle with today. At present, the majority of the world’s population is ordered to sit ‘in the back of the bus’ by reasons of underdevelopment, inequality and an unequal financial order³. That naturally compels poor people to move to countries with better possibilities for a brighter future. The ‘moveable sign’ in Rosa Parks’ bus still exists, but is now placed by a combination of public

¹ http://en.wikipedia.org/wiki/Rosa_Parks , accessed 1. may 2008

² Life expectancy is almost twice as high in Europe as in Africa

³ On causes of irregular migration see the UN Rapporteur on Migrants, 2003 A/58/275, §§ 10

xenophobia, narrow economic considerations and rising nationalism. Racial segregation has gone global and the ‘Global South’ is now segregated from the rich west. It is from this perspective that I see irregular migrants as the Rosa Parks of the new century. Irregular migrants struggle against segregation and oppression, and like Rosa Parks, they also claim to have a right to pursue life, freedom and happiness. During the days of racial segregation the signs read ‘no blacks’ or ‘white only’, today they read ‘no foreigners’, ‘visa required’ or ‘residents only’. The words are different, but the message is the same: there are some who belong, and some who don’t. The treatment of irregular migrants may today seem fair and ‘natural’, since these ‘strangers’ trespass our borders and infringe on our community without our explicit consent. We seem to silently overlook that the principle of ‘human rights for all’ should also apply to the ‘illegal’ migrant and the ‘bogus’ asylum-seeker.

1.1 Research topic and defining the problem

This thesis is about how some people are ‘inside’ the protection of the law, while others are ‘outside’. More specifically it is about how some people are left vulnerable because of certain migration policies, criminalisation, economic exploitation and the exclusionary logic of borders and nations.

I argue from the point of human rights, but try to balance this approach with a pragmatic recognition of the legitimate right of every nation to protect its borders. The goal is to expose how current practices render some individuals vulnerable and how human rights can reduce this vulnerability without necessarily jeopardizing the security and welfare of the state.

From the story of Rosa Parks we learn that some people have more rights than other, and that those with fewer rights are kept on the margins of society by law, social practice, ideology and history. My point of departure is the concept of vulnerability, as set out by the Special Rapporteur on Migrants, Jorge Bustamante⁴. Bustamante argues that irregular

⁴ Bustamante, 2002

migrants are structurally and culturally more vulnerable than residents, because of asymmetrical power relations created and justified by historical and ideological practices and social institutions. Vulnerability is not an inherent personal characteristic of the migrant, nor should it be confused with the causes of migration. It is rather a social construct that can be dismantled by empowering people with a basic bill of rights that bestows all individuals with dignity irrespective of migration status⁵. Vulnerability of irregular migrants is about power relationships and this thesis looks into how these relationships are constituted or challenged. An important question framing the issue is how the relationship between the sovereign nation-state, its legal residents and the ‘illegal’ migrants is or should be constituted and what fundamental principles that should guide these relationships of power or disempowerment.

Irregular migration stands as a huge contemporary challenge and our responses so far seem inadequate because they do not appear to stop irregular migration, and because they seem to bring us at odds with moral and human rights principles. *In this thesis I will argue that we need to dramatically rethink our responses to borders and irregular migration and that the promotion of a human rights sensitive agenda can show us new ways to approach this critical issue.*

1.1.1 Research question

How can universal human rights principles contribute to critical re-thinking of borders and migration control?

1.1.2 Thesis design

The IRAC-model is a legal tool for writing legal papers. When aiming for a legal analysis, one often separates the design of the research by framing the issue (issue), stating the law (rule), applying the law to facts in an analysis (analysis) and then concluding on the likely

⁵ Bustamente, 2002

outcomes (conclusion). I believe that model is good for case-briefs and legal overviews, where case-loads and legal instruments form the backdrop for the analysis. As this thesis is multidisciplinary in its approach and topic, I do not apply the IRAC-model rigidly but rather as a well-structured dialogue between empirical data (legal instruments and case-law), theory and my own analysis. The currently adopted method should therefore be one that does not necessarily aim at presenting a linear analysis cleansed of contradictions, but one that seeks to accommodate existing contradictions through a process of rational argumentation. The arguments in this thesis are intended to be universal in scope, but I have chosen to use Europe as a case because it is a region that has a sophisticated human rights system and at the same time attempts to deal with complex forms of migration. Europe is therefore a 'hard case', where the dilemmas and complexities are visible. I do not apply a strictly case-based reasoning as such, but use the case to highlight my points and to give an empirical basis for my conclusions.

The *second chapter* of the thesis clarifies the concept of irregular and 'illegal' migration, and outlines how being irregular or 'illegal' places some people 'inside' and other people 'outside' the protection of national law.

The *third chapter* brings human rights onboard as central principles that can qualify the relationship between states and individuals, between legal residents and 'illegal' residents and finally offer some substantial rights that can enable a minimum of dignity for irregular migrants.

The *fourth chapter* explores the inequalities between irregular migrants and other groups in society and how these inequalities are rooted in the exclusionary logic of boundaries and community, the myth of territorial control and the consequences of linking migration with security and crime.

The *fifth chapter* contains the conclusions, where I summarize the key points of previous chapters and give a final answer to the research question.

1.1.3 Demarcation

This thesis could apply a number of different methodologies to answer the research questions. Though one of the more common approaches to analyse irregular migration has been through refugee law and the right to seek asylum including access to fair determination procedures, I apply a broader understanding rooted in basic human rights law. Women and children are some of the most vulnerable groups in the migration process, but I do not explicitly engage with specific legal instruments (CEDAW and CRC) in particular or the gender/children perspective in general. I have also refrained from a more in-depth analysis of substantial rights and their content, but aim instead to show that substantive rights form a relevant baseline for countering some of the vulnerabilities created by migration control and borders. Migrants and migrant workers are in many ways facing the same challenges, but the term migrant worker is often related to the search for or relation to remunerated activity⁶. I intend to apply a broader notion of the migrant, and do therefore not pay any special attention to migrant workers or the relevant instruments relating to them, such as the ILO framework.

⁶ ILO, 2004

2 Who is an ‘illegal’ or irregular migrant or what is ‘illegal’ or irregular migration?

This chapter reviews what constitutes irregular migration in terms of national and regional frameworks (EU and Council of Europe) and how this relates to forced migration. During this chapter I also focus on the legal and non-legal reasons for why irregular migrants find themselves in a vulnerable situation (unequal) compared to other groups in society. Finally I highlight some of the conceptual challenges of the term ‘illegal’ or irregular migration. The goal is to show how immigration laws create nationals and foreigners and an ‘inside’ and an ‘outside.

2.1 National law and practice

Vulnerability of irregular migrants can be established directly in law (*de jure*) or as emanating from either the implementation or administration of law or other forms of social reality (*de facto*). In practice these distinctions becomes blurred, and I will therefore analyse *de jure* and *de facto* causes of inequality within the same section.

Most national laws only refer to legal migration, thereby leaving the question of defining ‘illegal’ migration as a grey area⁷. This makes the concept of illegal migration an abstract idea inferred negatively from laws on legal migration, but detached from any coherent legal framework and with wide discretion afforded to individual states and state actors⁸.

The very nature of ‘irregularity’ makes data-collection difficult. The estimates are that there are somewhere between 3 million and 8 million ‘irregulars’ out of a European population of 380 million people, while it is estimated than 500 000 people arrive every

⁷ Belgian Alien Law § 2 & 3; The British Asylum Act 2002 §§ 11; Annex 1 Guild in *Irregular Migration and Human Rights*, 2004

⁸ Guild in *Irregular Migration and Human Rights* 2004: 16

year⁹. The statistical uncertainty makes irregular migration an easy prey for different political agendas, whether it be those who deny the existence of ‘illegals’ or those who believe in an Europe ‘besieged by hordes of illegal immigrants’.

Immigration status is regulated by national domestic law and national authorities define illegal entry and stay (and often on an administrative basis)¹⁰. Instead of a larger review of European immigration law, I use the work of Guerrero who has summed up European immigration law and identified seven categories of undocumented migrants in European laws¹¹:

1. People who have entered the country with regular documents, but who stay longer than the documents permit
2. Immigrants who have lost their residence and/or work permit, either because they cannot renew it or they have lost it for some other reason
3. Refugees with short term residence permits who lost their permits, but still stay in the country
4. Migrants who have been released from deportation centres because they could not be deported
5. People who have entered the country in an irregular way - for example through smuggling or trafficking
6. Asylum seekers who have exhausted the asylum procedures and have eluded arrest or deportation
7. Stateless persons who have had great difficulties in obtaining official documents

Few laws in Europe explicitly (*de jure*) deny those with an irregular stay/entry their basic human rights, but irregular migrants have a significant lower level of civil and administrative protection/entitlements than legal residents¹². E.g. access to health care

⁹ Koser, 2005

¹⁰ Annex 1 Guild in *Irregular Migration and Human Rights*, 2004

¹¹ Guerrero, 2000:6

¹² Amnesty International, POL 33/007/2006; Doc. 10924, ‘*Human rights of irregular migrants*’, 2006; *Irregular Migration and Human Rights*, 2004

seems in theory to be guaranteed to irregular migrants around Europe, but primarily as a precaution and consideration related to the general public health¹³.

It is a combination of practical (*de facto*) and administrative (*quasi de jure*) implications of being in an irregular position that result in the denial of effective access to basic rights or result in situations where basic rights become practically unobtainable¹⁴. Basic human rights are indeed basic rights and often fail to fully cater to those with special needs or challenges, such as those with mental illness, chronic sickness, children and women. The increased cooperation between police, municipalities, health and social services and immigration authorities makes it more difficult to access basic rights without being reported to the authorities, who in turn will initiate detention and expulsion procedures¹⁵. Another obstacle to effective access to rights are the sanctions applied to those assisting or hiring irregular migrants, with the effect that few irregular migrants can cater for their own survival through legal means¹⁶.

In conclusion, national laws on entry and stay are ways of determining the 'inside' and 'outside' of society, and some are more inside (citizens) and some are almost completely outside (irregular migrants). The legitimacy of the inequality between irregular migrants and others is regulated by national law (sometimes constitutional law) and I will argue also by international human rights obligations. The human rights framework stand as crucial since the treatment of foreigners is often subject to exceptionality or at least a large margin of executive discretion, and often lacks constitutional scrutiny in relation to entry,

¹³ Belgium: Unaccompanied minors (Irregular and regular) are entitled to receive health insurance (Loi du 13 Decembre 2006). Irregular migrants in general have the right to access "urgent medical assistance" free of charge (Loi 1976 M.B. du 31.12.1006); France: "State Medical Assistance" (Aide Médicale de l'Etat - AME), allows irregular to access subsidized health care under certain conditions, See also See Article 38-I(4) of Loi Pasqua of 1993; Germany: Asylbewerberleistungsgesetz of 5 August 1997, § 1 para. 1 No. 5 grants subsidized health care for different groups, which in principle include irregular migrants. Sweden is one of the few European countries that have explicitly denied emergency healthcare to irregular migrants, see <http://www.thelocal.se/11924/20080522/> accessed 23. may 2008.

¹⁴ A/HRC/7/12, 2008; E/CN.4/2000/82, 1999

¹⁵ Amnesty International, POL 33/007/2006; Doc. 10924, 'Human rights of irregular migrants', 2006; Guild in *Irregular Migration and Human Rights*, 2004

¹⁶ Scott, 2004

residence and expulsion¹⁷. Chapter three consequently explores how human rights can ensure a minimum of human dignity for irregular migrants.

2.2 European Union/European Community¹⁸

The whole approach towards irregular migration within the EU is guided by the objective of ‘the free movement of persons’ within the Union¹⁹. Simply put, the internal integration demands that external borders are vigorously protected. The European Union has the most well-developed regional migration regime, which has been shaped through working groups and bilateral agreements (Trevi Group, Schengen Agreement, Dublin Convention) and later as an integrated part of the European Community. The Treaty of Amsterdam (EC Treaty) established EC competences in the area of migration in its Title IV as an integrated part of the single area of freedom, security and justice²⁰. Article 62 TEC creates the legal base for measures relating to border controls and visa policy, and Article 63 (3) TEC creates the explicit legal foundation for measures on illegal immigration and illegal residence, including return of illegal residents. After the Treaty of Amsterdam in 1999 entered into force, a number of common measures have been adopted to combat illegal immigration under Article 63 (3)(b) of the EC Treaty²¹ and a number of support agencies has been set up²². Matters related to borders and irregular migration are therefore firmly rooted in the European Union.

The European Union continuously uses the term ‘illegal’ migration, which is used:

¹⁷ Guild in *Irregular Migration and Human Rights*, 2004: 12

¹⁸ For the purpose of this thesis the European Union and European Community (which is one part of the European Union) are used interchangeably.

¹⁹ Title IV, EC Treaty, 1997

²⁰ EC Treaty, 1997

²¹ Council Directive 2001/40/EC, 2001; Council Directive 2001/51/EC, 2001; Council Directive 2002/90/EC, 2002; Council Directive 2003/110/EC, 2003; Council Directive 2004/81/EC, 2004; Council Decision 2004/573/EC, 2004; Council Regulation (EC) No 377/2004, 2004; Council Directive 2004/82/EC, 2004; Council Decision 2005/267/EC, 2005; Draft Directive (COD/2005/0167).

²² Ad Hoc Group Migration, High Level Working Group on Migration, Strategic Committee on Migration, CIREA, CIRAFI. See also the directives and decisions above.

“[...] to describe a variety of phenomena. This includes third-country nationals who enter the territory of a Member State illegally by land, sea and air, including airport transit zones. [...] In addition, there are a considerable number of persons who enter legally with a valid visa or under a visa-free regime, but “overstay’ or change the purpose of stay without the approval of the authorities; lastly there are unsuccessful asylum seekers who do not leave after a final negative decision.²³”

There is not given a more substantial definition of an ‘illegal third country national’ than “entering a Member State ‘illegally’”, which means crossing a border in contravention of national laws on legal entry and stay. It is still the state that defines who belongs ‘inside’, though it has to some extent delegated power to supra-national entities and other states to help control the border between the ‘inside’ and ‘outside’. In Europe, the nation-state remains its brother’s keeper.

2.3 Council of Europe

The Parliamentary assembly of the Council of Europe adopted a resolution 1509 (2006) on the Rights of Irregular Migrants, where it was recognized that

“Irregular migration may take place in two circumstances. The first is when a foreigner enters a country in breach of regulations concerning entry, and the second is when a foreigner, having entered a country legally, overstays contrary to immigration regulations.²⁴”

This is generally the position taken by most countries and organisations, but it is important to note that in a European context where the EU uses the term ‘illegal migration’, the Human Rights Rapporteur of Council of Europe recognizes that: “‘Irregular migrant’ is the term preferred [since it] is more neutral and does not carry the stigmatisation of the term

²³ COM/2006/0402 final */

²⁴ Doc. 10924, ‘*Human rights of irregular migrants*’, 2006

‘illegal’. [...] It is wide enough to cover all those in an irregular situation, whether tolerated or not tolerated by the authorities, whether they entered the country legally or illegally, whether they work or do not work, whether they are independent or dependent (children, aged), whether they are failed asylum seekers or persons who have failed to apply for asylum, etc.”²⁵

2.4 Forced migration

Refugees can in some ways be seen as ‘outside’ society in the sense, that they have completely been ejected from their state of origin. They are however ‘inside’ in the sense that they have a special protection regime established in the 1951 Refugee Convention. In reality there is no clear boundary between forced migration as understood in terms of the 1951 Refugee Convention and ‘normal’ migration often referred to as ‘economic migration’²⁶. Rather this thesis recognises that:

“The complex and varied causes which lie behind migration suggest that it is perhaps best viewed as a continuum ranging from forced to voluntary movement. Between these two extremes, there are varying degrees of free choice or coercion involved in migrants’ decisions to move to another country²⁷.”

People fleeing poverty and general deprivation are more often than not classified as ‘economic migrants’²⁸. In 2003 the UNHCR²⁹ stated that:

“[...] migrants and other persons who seek protection, such as asylum seekers and refugees, are all part of the same migratory flows and all require protection. [...] safeguards should be established that allow different migratory categories to be identified and granted protection. Since there are limited legal options for the

²⁵ Doc. 10924, ‘*Human rights of irregular migrants*’, 2006.

²⁶ For a discussion of forced migration, see Guy Goodwin-Gill, 1996

²⁷ Amnesty International, POL 33/007/2006

²⁸ Goodwin-Gill, 1996

²⁹ United Nations High Commissioner for Refugees

entry into and residence in determined territories, asylum systems are increasingly being used to give certain migratory categories the possibility of remaining in a country.^{30,}

Irregular migration has often been discussed because of the way it affects the asylum-system, and most efforts have revolved around disentangling legitimate asylum-seekers from ‘normal’ migrants as if the latter is one coherent group³¹. This has contributed to an artificial dichotomy between ‘real’ refugees forced to flee and ‘economic’ migrants moving out of ‘free will’. The dichotomy between forced and voluntary migration is also evident in other aspects of migration related laws. The applied refugee system and the Palermo Protocols (on Trafficking and Smuggling) constitute a dichotomy between ‘voluntary’ or ‘forced’ actions, granting greater protection to those ‘forced’ to migrate (refugees and victims of trafficking) than those who move ‘voluntarily’ (economic migrants and those arriving by smuggling). *This approach seems to be insensitive to the finer details of migration and leaves great room for national interpretation as to where exactly the line is drawn between voluntary and coerced movement – between those who are ‘inside’ refugee law and those who are ‘outside’ refugee law*³².

Instead of positioning my argumentation in relation to forced or voluntary migration, I follow the argument of Taran when he points out that: “[...] violations of migrants’ human rights are so widespread and commonplace that they are a defining feature of international migration today”³³. The implications of this argument is to recognize that all migrants merit some form of protection, and that refugees often are in need of stronger international protection.

³⁰ Juridical Condition and Rights of the Undocumented Migrants, 2003

³¹ The UNHCR’s three-pronged approach (regional/country of origin, domestic and EU prongs) try to separate out ‘economic migrants’, but at the same time put in place safeguards against non-refoulement.

³² Tuitt, 1996; Jeremy Harding, 2000

³³ Taran, 2000; A/HRC/7/12, 2008

2.5 Irregular migration³⁴

The International Organization for Migration (IOM) defines irregular migration to “occur outside the rules and procedures guiding the orderly international movement of people”, which is an approach taken up by other international organisations when defining irregular migration³⁵. This definition seems pragmatic and contributes to set ‘irregular migration’ as something abnormal, unruly and outside the law and general management. The definition is rather abstract because it defines irregular migration in relation to other definitions of migration (namely that defined by ‘the orderly movement of people’) instead of a more substantive approach based on actions or characteristic of the individual³⁶. *This static approach maintains the ‘inside’ and ‘outside’ segregation between people, because it presumes that the ‘inside’ group of people moving in an orderly fashion is the group doing things the ‘right way’ and the rest is doing it the ‘wrong way’.*

The UN Special Rapporteur on Migrants argues that that any definition of ‘irregular’ migrants must be based on more than the reasons for migrating or means of immigration, since migration occurs across a wide spectrum of interests and degrees of coercion. The approach should be based on the vulnerable position of the individual such as to encapsulate *more* than the narrow definitions of resident aliens, refugees, asylum-seekers, nationals and citizens. In essence, the full system of human rights protection should give basic protection to all individuals before, under and after a border crossing, irrespective of the migrants’ motive and means³⁷.

The approach seeks to ensure that no one is left without rights, and that individuals with an uncertain legal standing in national law should as a minimum be protected by human rights. By this approach a clarification or regularisation of the irregular status would conceptually reduce the vulnerability arising from an irregular status. This will to some extent solve the

³⁴ For discussions on definitions and challenges see E/CN.4/2000/82, 2000 §§ 15-43;

³⁵ It is worth noting, that the primary objective of the IOM is not protection activity, but rather the orderly movement of people. IOM Constitution, Article 1

³⁶ See ILO definitions or the definition in the 1951 Refugee Convention

³⁷ For more precise definitions see E/CN.4/2000/82, 2000 §§ 36

problem of protection, but does not solve the problem of migration control. I do however appreciate the point that the construction or framing of the problem of irregular migration is part of the problem, and therefore also a barrier for achieving a solution.

2.6 The power of the word 'illegal'

The power to define or phrase an issue and the following re-affirmation of this definition is essential to understand why it is worth elaborating on the definition of irregular or 'illegal' migration. Bourdieu, in his *'Reproduction in Education, Society and Culture'* (1970), introduce the concept 'symbolic power' as the power to make a given understanding of reality to appear true and objective and at the same time exclude alternative understandings. The symbolic power of definition is exercised, albeit unknowingly, by educational institutions, experts, judges and media, and all contribute to reaffirm the symbolic power. Though not a concept that I explicitly use in the following analysis, I apply this understanding of power in much of my analysis of law, power and the symbolic power exercised through the 'objective' and 'true' interpretation of contemporary migration and international law.

There is a group of people labelled 'Illegals', 'Irregulars', 'Undocumented', 'Unwanted', 'Sans Papiers' and 'Clandistinos'. These words conjure up images of something out of place, subversive and dangerous. The fact is that there is no international working legal definition behind these words. *My postulate is that the abstract concept of 'illegal' migration blurs the social realities of migration, increase vulnerability and hamper pragmatic and effective policy-solutions.* My postulate is also that the common denominator is not the subversive character of the people covered by these words, but rather the effect that heterogeneous groups collectively labelled 'illegals' are kept in the legal, social and political no-man's land of Europe. The application of the concept 'illegal' migration or 'clandistinos' is entangled with symbolism and social meaning, with the result that:

“The term ‘illegal’ has escaped its legal, and even grammatical, moorings and now stands alone as a noun. It does not conjure British backpackers overstaying on Australia’s Gold Coast, or Kiwi’s working in London’s pubs. It conjures sweatshops and sex shops, poverty and race. The face of the imaginary illegal is poor and brown and destitute. This imagery works against careful attempts to define illegal migrants as those who transgress migration laws, it complicates attempts to respond appropriately to the phenomenon and to understand how and why it challenges sovereignty.”³⁸

This is not just a question of semantics and discourse, but has legal consequences since derogations and limitations in human rights law are justified if they can be said to be prescribed by law and necessary to protect national security, order, health, or morals or the fundamental rights and freedoms of others³⁹. The way we talk about the problem is relevant because public perception among communities and officials on irregular migrants is important for creating a human rights sensitive public culture. Policy-makers put themselves in a difficult position by using the concept ‘illegal migration’ and ‘migration control’, thereby implying that migration can be controlled, which by no means is an easy task. In other words, using ‘illegal migration’ as a word contributes to the very problem that politicians are trying to solve.

2.7 Conclusion

Laws on entry and stay are national laws on who belongs and who does not, which is reflected in irregular migrants de facto and de jure unequal access to rights. Irregularities can occur during the migrant’s entry, stay or by a specific activity and is described as an act in contravention of national immigration laws. Since there is no common agreement on a substantial definition of irregular migration, there exists a number of inconsistencies between heterogeneous national definitions and a collective international or regional

³⁸ Dauvergne, 2004

³⁹ See articles 4(1) of the ICCPR and Article 17 (ECHR); General Comment No. 31, 2004, §§ 6; as well as the jurisprudence of non-discrimination articles analysed in chapters to follow.

response⁴⁰. In terms of unequal access to human rights, irregular migrants face several immediate challenges⁴¹:

- Stronger and more complex push/pull effects in migration dynamics, but fewer legal ways of entering Europe
- *De facto* and *de jure* lower standing than legal residents, where the lack of a right to stay is most notable
- Lesser effective access to basic human rights due to fear of detention and expulsion
- Rising public demands for increased use of expulsions
- A definitional or discursive imbalance of power, where irregular migrants per definition is out of place and without legitimate demands to society

There are strong dichotomies in immigration law and refugee law, which separates those ‘inside’ and ‘outside’, the ‘real’ refugee from the ‘bogus’ refugee (the economic migrant). I will in the following chapters argue how human rights can soften these dichotomies and be a more delicate and precise tool for analysis and action.

An irregular status does necessarily arise as a consequence of a material or substantial (in)action such as not paying taxes, failure to pay for social services or crime. As such combating irregularity seems to be a question of control over territory and population, and therefore also a question of who is ‘inside’ and who is ‘outside’ the protection of the law. The laws in force in the days of Rosa Parks segregated people by colour, today migration law segregates people because of nationality or immigration status.

⁴⁰ Guild in *Irregular Migration and Human Rights*, 2004

⁴¹ A/HRC/7/12, 2008; E/CN.4/2000/82, 2000

3 International law

This chapter explores how international law guides the relationship between the nation-state and the individuals within its jurisdiction, and what treatment that may be legitimate in relation to irregular migrants. Drawing on the conclusions in the previous chapter, this chapter uses a human rights sensitive approach to argue that irregular migrants have a minimum claim to human dignity and that they can never be ‘outside’ human rights law. More specifically, this chapter first reflects on some theoretical observations about how developments in human rights law contribute to a framework of universal protection (the universal personhood). The chapter then reviews the legal basis for such a framework by balancing state sovereignty and human rights obligations, and to what extent immigration status may permit limitations on human rights. Finally I review some substantive articles (most notably non-discrimination) that can enable the universal personhood and give basic protection for irregular migrants.

There is no coherent and fully established international legal framework governing migration, but rather a patchwork of different principles drawing on such different branches of international law as refugee law, consular law, human rights law, air law and labour law⁴². These international regimes are supplemented by regional treaties such as those established by the European Union or Council of Europe, and bilateral agreements such as those governing readmission or guest worker agreements.

3.1 Development of a universal personhood?

Does there exist a basic bill of rights that applies to all individuals irrespective of citizenship status or relationship to particular nation? If this can be said to exist, this basic bill of rights may help to balance out the unequal relationship between irregular migrants and residents.

⁴² Chetail, 2005

Based on a traditional Westphalian⁴³ perception of states as closed systems, Brubaker argues that citizenship is ‘both the instrument and the object of social closure’⁴⁴. This means that citizenship is both the enabler of claiming rights and the way of excluding those not belonging to the community. Soysal argues for another position, where international law and dignity-discourses nourish a concept of ‘universal personhood’ based on the development of a post-national citizenship with increased rights for non-citizens⁴⁵. Joppke finds middle ground between these two positions when he emphasizes that despite the existence of universal rights, the state is still the central entity for claiming rights and also the venue for negotiating these rights⁴⁶. I accept that there is an expansion of rights for foreigners, but remains sceptical since this expansion of rights and right-holders seem to cater for a rather limited group of people. *There is a well established European citizenship and a growing recognition of the rights of guest workers and migrants*⁴⁷, *but as legal categories are set up to cater for a number of different groups, the noose is tightening around the neck of the ‘unwanted’ immigrants, the illegal and the destitute who are not part of the selected few.*

In sum, my point of departure is that there has been an expansion of rights, and these rights are not necessarily linked to a nation-state through citizenship or even regular migrant status. The nation-state is still the duty-holder and therefore also the implementing entity. An expansion of rights and right-holders has in turn spurred new forms of exclusion to delegitimize this development where it is convenient, whether it be ‘unlawful combatants’, ‘manifestly ill-founded asylum applications’ or ‘illegal’ aliens. The conflict remains between the proclamation of universal respect for human rights on the one hand, and national

⁴³ The treaty of Westphalia is said to be the event constituting the system of nation states and state sovereignty. Cassese, 2005: Chapter II

⁴⁴ Brubaker, 1992

⁴⁵ Soysal, 1994

⁴⁶ Joppke, 1994

⁴⁷ Article 17-22, TEC; Directive 2003/86/EC, 2003; Directive 2003/109/EC, 2003; Directive 2004/114; /* COM/2001/0386 final - CNS 2001/0154 */; Hammar, 1990; Dell’Olio, 2005; Brochmann, 2003; B.V. Costa in P. Alston, 1999:412.; Brubaker, 1992

self-determination on the other, and therefore Hannah Arendt's critique of the hollowness of human rights in a world of nation-states is still valid⁴⁸.

3.2 Balancing the sovereign rights of states and human rights obligations

The very essence of 'state-existence' lies with the control over territory and population, as judicially expressed in Article 1 of the Montevideo Convention on The Rights and Duties of States (1933), whereby a state is defined by having a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. The sovereign right of a state to grant entry and stay is expressed in a judgement from the USA. In *Nishimura Ekiu v. United States* from 1892, the Supreme Court held that in connection with immigration control and detention:

“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”⁴⁹

It is further established by the European Court of Human Rights (ECtHR) that:

“[...] as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory”⁵⁰.

An analysis of the jurisprudence of the European Court of Human Rights also shows that:

“In all of its decisions, the ECtHR reaffirms that it does not forbid states from regulating immigration and details a number of legitimate reasons for states to restrict immigration, including the economic well-being of a country and threats to public order. These

⁴⁸ Arendt, 2000: 601-625.

⁴⁹ *Nishimura Ekiu v. United States*, 1892.

⁵⁰ *Abdulaziz v United Kingdom* (1985)

restrictions are applicable if ‘necessary in a democratic society’.⁵¹

The question at hand is therefore not whether a state has a right to admit or expel foreigners as such, but under what circumstances this can be done and what status and rights this person has once she is present on the territory. This is an important point for the purpose of this thesis.

The concept of domestic jurisdiction as enshrined in Article 2(7) of the UN Charter can clarify the relationship between sovereignty and human rights obligations. This article was originally intended to insulate domestic affairs from international scrutiny, but have over the years been reformulated as international relations have developed⁵². In 1923, the Permanent Court of International Justice held that:

“The question whether a certain matter is or is not solely within the [domestic] jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. [...] The words ‘solely within the domestic jurisdiction’ seem rather to contemplate certain matters which [...] are not, in principle, regulated by international law.”⁵³

The enabling line here is that in order to be “solely with the domestic jurisdiction” the matter must not in principle be regulated by international law. Another authoritative, though not legally binding document, is the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live (1985)⁵⁴. The balance is struck between sovereignty and human rights obligations in the following way:

⁵¹ Guiraudon, V. and G. Lahav, 2000; Berg, 2007. For cases establishing these principles see *Agee v United Kingdom*, (1976); *Z v Netherlands*, (1984); *S, M and M T v Austria*, (1993); *Vilvarajah and others v United Kingdom*; *Abdulaziz v United Kingdom* (1985)

⁵² Cassese, 2005; Nigel, 1992

⁵³ PCIJ (1923) Ser. B, N° 4, §§ 37-38.

⁵⁴ General Assembly resolution 40/144, 1985

“Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. *However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.*” (My emphasis)

International human rights and migration have been firmly established as a concern for the international community, and therefore qualifies the extent of sovereignty as understood within the UN Charter⁵⁵.

Once persons are situated on the territory or within the jurisdiction of a signature state, the general obligations in human rights instruments are normally triggered. The obligations are generally such that:

“States Parties are required by article 2, paragraph 1, [of the ICCPR] to *respect* and to *ensure* the Covenant rights to *all persons* who may be *within their territory* and to all persons *subject to their jurisdiction.*⁵⁶” (My highlights)

In her report on the human rights of migrants, the Special Rapporteur of the Commission on Human Rights explains:

“In exercising their sovereign right to regulate the entry, stay and movement of migrants and their policy on immigration, asylum and refuge, States should bear in mind the international obligations they have assumed in the area of human rights. In other words, States party

⁵⁵ See amongst other the CMW, 1990; Vienna Programme of Action, 1993 (part II, paras. 33-35); Programme of Action, Cairo (chapter X); Programme of Action, Copenhagen (chapter III); Outcome document, Beijing (Platform for Action, chapter IV, section D); 2003 A/58/275; A/HRC/7/12, 2008; E/CN.4/2000/82, 2000

⁵⁶ General Comment No. 31, 2004, §§ 10 & 16

to the [ICCPR], [ICERD], [CEDAW] and [CRC] must guarantee to anyone who is in their territory and subject to their jurisdiction the rights recognised in those legal instruments.”⁵⁷

In the first chapter I highlighted that being an ‘irregular’ migrant is a question of national law on who is ‘inside’ and who is ‘outside’, and I have now further established that national law regulating migration matters must be in conformity with international obligations. *I argue that there is an increased human rights sensitive base-line in dealing with aliens, but this base-line is established in a hierarchy of rights depending on immigration status*⁵⁸. I reject the dichotomy between sovereignty and human rights, since “international legal obligations may, and frequently does, restrict a States' freedom of action and thereby the exercise of its sovereignty, but they do not diminish or deprive it of its sovereignty as a legal status.”⁵⁹ Most international obligations arise from the voluntary commitment made hereto by states. It is worth noting that the laws guiding entry and stay are in essence national law, which is subordinate to international law under the principles established in each instrument, in the Vienna Convention on the Law of Treaties (1966) or according to the general principle of ‘Pacta Sunt Servanda’. Sanctions and measures rooted in national law must therefore not be in contravention with international obligations, such as those under human rights law⁶⁰.

3.3 Immigration status and rights

Some rights may legitimately be restricted or derogated from as long as they adhere to some specific legal principles⁶¹. The Human Rights Committee, the authoritative body of

⁵⁷ E/CN.4/2003/85, 200: 11

⁵⁸ Political rights, for example, are reserved for citizens rather than aliens (Article 16 of the ECHR and Article 25 of the ICCPR); Castles, 2005

⁵⁹ Steinberger, 2000:512

⁶⁰ Cassese, 2005

⁶¹ Derogations are only permitted in exceptional circumstances, when the “life of the nation is at stake”, while limitations to rights may be made to serve certain legitimate aims. Reservations may be made at the time of ratification/accession to the treaty.

the ICCPR (one of the three instruments comprising the Bill of Rights), states on limitations:

“[that when] limitations are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”⁶²

The European doctrine on limitations is a balance of legitimate interests done with strict interpretation and it must be necessary in a democratic society and with proportionality between aim and means. The state has a certain margin of appreciation in determining how to best implement the provisions of the ECHR⁶³. When it is decided whether a limitation is necessary in a democratic society it is often considered whether the limitation is responding to a ‘pressing social need’⁶⁴.

The increased criminalisation of irregular migrants and securitisation of matters related to irregular migration may contribute to legitimize certain limitations and restrictions. It is therefore worth noting that irregular migrants must at least not be treated as criminals and that: ‘Immigrants [...] even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals’⁶⁵. I briefly note Article 31 of the UN Refugee Convention, which prohibits punishing people for illegal entry as long as they do so in order to apply for asylum in good faith. Current practice of criminalising illegal entry when an asylum application is rejected, seem to ignore the initial good faith in arrival and seeking asylum.

⁶² General Comment No. 31, 2004, §§ 6

⁶³ Arnardóttir, 2003

⁶⁴ *Brannigan och McBride 1993; Belilos, 1988; Slivenko v. Latvia, 2003; Silver, 1983; Handyside v. the UK, 1976*

⁶⁵ E/CN. 4/Sub. 2/2003/23 §§ 29; General Comment No. 31, 2004

So as established by authoritative sources, the ‘irregular’ or ‘illegal’ status does not deprive the migrant of her basic rights nor does it relieve the state of its obligations. The enjoyment of basic human rights does not necessarily presuppose a right to stay or a prohibition on expulsion. They are rather rights that apply as long as the individual is within the jurisdiction of the state.

In conclusion I claim that irregular migrants are firmly placed inside international law and ipso facto inside national law, which restricts the potential harmful consequences of being placed on the ‘outside’ of the national legal order and community. Rosa Parks was first and foremost a human before she was coloured, just as irregular migrants are humans before being irregular migrants. The development of international law has made citizenship less relevant, and to that extent we can talk of a ‘universal personhood’ enabled by a state’s international obligations, which ensure irregular migrants a standing in the national legal order.

3.4 International human rights law and vulnerability

There are a number of substantive articles that can enable the universal personhood and give basic protection and dignity to irregular migrants. *Firstly*, I set out a general ‘bill of rights’ applicable to irregular migrants. *Secondly*, I explore the principles of non-discrimination and equality and how these principles can reduce the vulnerability arising out of *de jure* and *de facto* inequality between irregular migrants and other groups in society. *Thirdly*, I highlight a number of European substantive human rights articles and their relevance for irregular migrants. These three lines of arguments will give substance to the idea of an ‘universal personhood’ that can be implemented to ensure human dignity and reduce vulnerability.

I believe that the following basic ‘bill of rights’ can be applied almost universally, since it draws upon regional and international legal instruments and apply to citizens and non-citizens⁶⁶:

- The right to life: unreasonable force should not be used to prevent the entry of non nationals, and authorities have a duty to try to save those whose lives may be in danger in seeking to enter a country.⁶⁷
- Protection from torture and inhuman or degrading treatment or punishment. The return process should respect the right to dignity, and coercive measures should be ‘kept to a minimum’.⁶⁸
- The right to equality: there should be no discrimination in the enjoyment of rights; or discrimination on grounds of race or ethnicity in admission, stay or expulsion.⁶⁹
- Protection from slavery and forced labour.⁷⁰
- Detention should be used only as a last resort, judicially authorised, and not for an excessive period of time⁷¹.
- The right to seek asylum and the non-refoulement principle should be respected.⁷²
- The right to an effective remedy before removal, which should be before a competent, independent and impartial authority, with interpretation and legal aid.⁷³
- Respect for private and family life; removal should not take place where there are ‘particularly strong ties’.⁷⁴
- The right to marry; ‘total barriers’ should not prevent right-holders from doing so.⁷⁵
- Adequate housing and shelter guaranteeing human dignity.⁷⁶

⁶⁶ This ‘bill of rights’ is inspired by Council of Europe, Resolution 1509, 2006, which also list a number of instruments such as the UDHR and ICCPR.

⁶⁷ UDHR Article 3; ICCPR Article 6; ECHR Article 2; *Baumgarten v. Germany* (960/2000), ICCPR; *Streletz, Kessler and Krenz v Germany* (34044/96, 35532/97, 44801/98), 22 March 2001 ECHR

⁶⁸ ECHR Article 3; Article 7 ICCPR; *A v. Australia* No. 560/1993, ICCPR; *C. v. Australia* (900/1999), ICCPR; *The East African Asians and Abdulaziz v United Kingdom* established that a State is not allowed to implement an immigration policy of a racist nature, since ‘discrimination based on race could amount to degrading treatment’, ECHR

⁶⁹ ECHR Article 14, ICESCR Article 2, ICCPR Article 2, Article 24 and Article 26; General Comment No. 15: The position of aliens under the Covenant, 1986; General Comment No. 18 the UN Human Rights Committee (“HRC”); See analysis of non-discrimination below in section 4.3.1

⁷⁰ ICCPR Article 8; ECHR Article 4

⁷¹ ICCPR Article 9; ECHR 5; ECHR Article 3; *A v. Australia* No. 560/1993, ICCPR; *Madafferi v. Australia* (1011/2001), ICCPR; On use of force to ensure detention, see ECHR case law: *Ribitsch v Austria*, 1995; *Rehbock v Slovenia*, 2000; *Egmez v Cyprus*, 2000; and *Altay v Turkey*, 2001; *Aslan v Malta* 2000; *Torres v. Finland* (291/1988), ICCPR; *Canepa v. Canada* (558/1993) ICCPR

⁷² UDHR Article 14, Article 3 ECHR, Article 7 ICCPR, UN 1951 Refugee Convention

⁷³ ICCPR Article 9; ECHR 5; *Bozano v France*, 1986 ECHR; *Al-Nashif v Bulgaria*, 2002 ECHR; *Garcia Alva v. Germany*, 2001 ECHR

⁷⁴ *Mauritian Women v. Mauritius*, ICCPR; *Ngambi v. France* (1179/2003), ICCPR; *Byahuranga v. Denmark* (1222/2003), ICCPR; *Abdulaziz, Cabales and Balkandali v United Kingdom*, 1985 ECHR; *Gul v Switzerland*, 1996 ECHR; *Ahmut v Netherlands*, 1996 ECHR; and *P R v Netherlands* (39391/98), 2000 ECHR; *Nsona and Nsona v Netherlands*, 1996 ECHR

⁷⁵ ICCPR Article 17, ECHR Article 8; *Mauritian Women v. Mauritius* (R.9/35)

- Emergency health care should be available to irregular migrants.⁷⁷
- Social protection where it is necessary to alleviate poverty and preserve human dignity. Migrant children should enjoy social protection on the same footing as national children.⁷⁸
- Rights in employment: fair wages, reasonable working conditions, access to court to defend rights, trade activity. The state should ‘rigorously’ pursue employers breaching these terms.⁷⁹
- Right to primary and secondary education for all children⁸⁰.

3.4.1 Non-discrimination and recognition before the law

Two lines of reasoning are pursued in this section. First I argue that non-discrimination principles can reduce the vulnerable position of irregular migrants by eliminating arbitrary and discriminatory treatment between legal residents and irregular migrants. Secondly, a more general comment can be made as to show that non-discrimination is a fundamental pillar in the creation of a strong universal personhood and how non-discrimination can challenge the legitimacy of an inequality based on borders, immigration rules and citizenship.

The first challenge of reducing the vulnerable position of irregular migrants is how to place them ‘inside’ the law, when most rules of immigration either *de jure* or *de facto* place them ‘outside’ the rules that can grant them protection. Article 6 of the UDHR and Article 16 of the ICCPR both establish the principle that “Everyone shall have the right to recognition everywhere as a person before the law”. This is the first step towards a ‘legal existence’ and the very basis of the universal personhood.

⁷⁶ UDHR Article 25; ICESCR Article 2, 11(1) (As part of adequate standard of living); See ESC Committee General Comment 4; It can be argued that Article 8 and Article 3 of the ECHR together can be invoked in cases of ‘intolerable’ living conditions, see: *Guzzardi v. Italy* (7367/76); Cholewinski, 2006

⁷⁷ ICESCR Article 2, 12(1); ESC Committee 14; Article 28 ICMW; European Social Charter (Revised) (See analysis below); Article 3 ECHR (see *Pretty v. United Kingdom*)

⁷⁸ UDHR Article 23(3); ICESCR Article 2, 9, 10, 11; European Social Charter (Revised) Article 12, 13; ICMW Article 27

⁷⁹ Cholewinski, 2006

⁸⁰ UDHR Article 26; ICESCR Article 13; CRC Article 2 and 28(1); CMW Article 30; Article 2 of the First Protocol ECHR read together with Article 14 ECHR; *Foreign Students v United Kingdom* (7671/76, 15), 1977 ECHR

The principle of non-discrimination features in several major human rights documents, and it has been established by an international tribunal that non-discrimination may in some cases be *jus cogens*⁸¹. The Inter-American Court has understood that:

“[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.⁸²”

“[The Court considers] that the principle of equality before the law, equal protection before the law and non-discrimination *belongs to jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.⁸³” (My emphasis)

Discrimination can occur when: a) laws formally treat one group differently from other similarly situated groups (unless the different treatment is seeking to remedy existing inequalities, b) laws or policies that appear to be facially neutral but use categories that are proxies for illegitimate discrimination, c) when any law, policy, or action has the practical effect of disadvantaging a group regardless of whether the policy is facially neutral, and d) when states fail to take effective affirmative measures to achieve equality among disparate groups⁸⁴. The differential treatment is discrimination when:

“...it has no objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”⁸⁵

Jurisprudence also holds that “...that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations”⁸⁶. Border

⁸¹ For *Jus Cogens* see Article 53 of the VCLT; Cassese, 2005, Part III.

⁸² Juridical Condition and Rights of the Undocumented Migrants, 2003, §§ 83

⁸³ Juridical Condition and Rights of the Undocumented Migrants, 2003, §§ 111

⁸⁴ Arnardóttir, Oddný Mjöll, 2003; Dijk, P. Van and Hoff, G.J.H. van, 1998

⁸⁵ *Case of Moldovan and Others v. Romania* (2005), §§ 137

⁸⁶ *D.H. And Others v. Czech Republic*, (2007), §§ 175

control and differentiation between citizens and aliens may therefore be legal and acceptable as long as it complies with these principles.

The ICCPR contains two non-discrimination provisions. Article 26 is a ‘free standing’ guarantee of non-discrimination in that it prohibits discrimination with regard to all rights and benefits established by the law. Article 2 in the Covenant, is on the other hand, a ‘dependent’ provision as it guarantees non-discrimination with respect only to the rights guaranteed by the ICCPR. According to the HRC:

“[...] the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”⁸⁷

Article 26 provides for a more general non-discrimination principle by stating that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. [...] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] race, colour, national or social origin, or other status.”

This entails an obligation not to make discriminatory laws, and that no law shall be enforced or implemented in a discriminatory fashion⁸⁸. Since Article 26 is a general non-discrimination provision it also applies to immigration laws and the application thereof, as well as putting obligations on the state to ensure that no third party violate the rights of irregulars⁸⁹. This means that illegitimate discriminatory treatment at the workplace, in the housing sector, educational system or in access to justice all fall within this provision.

⁸⁷ General Comment No. 15, 1986

⁸⁸ General Comment No. 18

⁸⁹ General Comment No. 15, 1986; *B.d.b. v the Netherlands* (273/1988, ICCPR)

The CERD is the most progressive of the global instruments on race, and its essential principle of non-discrimination on account of race has a strong claim to the status of peremptory norm of international law⁹⁰. Due to the intersection of racism, discrimination and migration, this Convention is of particular relevance for irregular migrants⁹¹. The scope of the Convention is wider than many other conventions, and quite progressive of its time⁹². It is further noted that the Convention does not define the guarantees of civil, political, social and economic rights protected in Article 5, which therefore enables the Committee to apply new developments in jurisprudence in favour of reducing vulnerability of irregular migrants. Article 1(2) allows states to draw distinctions between citizens and non-citizens, but still holds that these distinctions must not be discriminatory (Article 1(3)) and should be judged in the light and purpose of the Convention.

The Convention on Migrant Workers (CMW) is the most migrant-specific human rights instruments, setting out a broad range of human rights for irregular migrants. Few of these rights are ‘new’ rights, but rather a compilation of several other instruments such as the ICESCR. The rights enshrined in Part III of the CMW apply to all migrant workers, irregular as well as regular, and covers in particular rights relating to economic activity, social rights and extensive provisions relating to fair trials/procedures and expulsion. Most importantly, the extensive non-discrimination provisions provide that migrant workers must not be deprived of any of these rights by reason of any irregularity in their stay or employment. Article 18 provides that migrant workers ‘shall have the right to equality with nationals of the state concerned before the courts and tribunals.’ Article 24 affirms that ‘[e]very migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.’ The Convention is however weakened by extremely low ratification, especially among migrant-receiving countries. The Convention and the related declaration should however not be underestimated since it provides a valuable framework for cooperation to prevent irregular migration, and also becomes an important instrument of protection as more and more states ratify it and

⁹⁰ CERD Report 2002, A/57/18 at Chapter XI C.

⁹¹ CERD Report 2002, A/57/18 at Chapter XI C.

⁹² Article 1, CERD

migrant sending countries simultaneously become transit or receiving countries⁹³. Most importantly, this Convention has a higher level of specificity and therefore leaves less room for acceptable differential treatment of irregular migrants.

I conclude that several documents provide protection against discrimination of irregular migrants, and that states are allowed to differentiate between ‘irregulars’ and legal residents under certain circumstances. There is a fine balance between whether an act constitutes differential treatment or discrimination, and the former can only be justified based on the reasonability and proportionality of the measure and legitimacy of the aim. The evaluation of reasonability and legitimacy becomes increasingly difficult as the issue of irregular migration is linked to crime, questions of social cohesion, scarce welfare resources and security.

A more in-depth discussion of the application of non-discrimination and equality principles is outside the scope of this thesis, but non-discrimination law is in theory and practice not without challenges. Critical issues are what form of equality that should be sought after (equality of treatment or equality of result), what comparators that should be used in non-discrimination cases, what positive obligations arise from non-discrimination articles and what standards that should be used in evaluating legitimate aims and what standards and burdens of proof should be applied⁹⁴. The greatest challenge in implementing non-discrimination principles in relation to irregular migrants are the fact that it is commonly accepted that differential treatment between irregular and legal residents is proportional to legitimate aims of border protection, security and welfare.

What if the act of violating immigration rules as such did not justify differential treatment? What would that mean for how we approach belonging within the nation state, entitlements to rights and the individual contribution to society? In the times of Rosa Parks racial segregation was, by the white majority, seen as a completely natural thing that ensured a

⁹³ Resolution E/CN.4/RES/2005/47.

⁹⁴ Fredman, 2001; Monaghan 2001; McColgan, 2006; Livingstone, 1997; Arnardóttir, 2003; Dijk, P. Van and Hoff, G.J.H. van, 1998; Kokott, 1998; Loenen, 1999

stable, secure and homogenous society. Challenging the status quo thinking of society (and law) is never an easy thing.

3.4.2 Expulsion

Expulsion is a key event in understanding the dynamics of irregular migration. Situations of irregularity are created or exacerbated when people are granted an 'exceptional leave to remain' because of non-refoulement concerns or when expulsion is temporarily impossible due to technicalities. Neither of these two scenarios would normally lead to a certain legal position or an indefinite right to stay. Fear of expulsion is also what drives many irregular migrants underground and it is the single largest cause of the vulnerable position of irregular migrants⁹⁵.

It is important to note, that the promotion of human rights of irregular migrants does not prohibit expulsions, as long as the measures taken are in conformity with international standards and obligations. Human rights law provides substantial and procedural rights in relation to expulsion, as well as a general prohibition against mass expulsion. Any act of expulsion should have procedural safeguards including the ability to challenge the decision to deport, access to interpretation services and legal counsel, access to a review in case of a negative decision, as well as proper consideration of the practical and legal realities surrounding the case⁹⁶.

The two most relevant concepts are the prohibition against refoulement and the rights related to privacy and family rights⁹⁷. For the purpose of this thesis I deal mostly with the concept of non-refoulement, which can be summed up as a prohibition against expulsion to a country where there is a real risk of being subjected to torture or ill-treatment⁹⁸.

⁹⁵ E/CN.4/2003/85; *Irregular Migration and Human Rights*, 2004

⁹⁶ Goodwin-Gill, 1996; Amnesty International, POL 33/007/2006: 24

⁹⁷ For a review of jurisprudence related to family life and irregular migrants, see Blake in *Irregular Migration and Human Rights*, 2004

⁹⁸ See *Soering v United Kingdom* (1989) §§ 88

The Convention Against Torture (CAT) provides strong safeguards against refoulement, but only defines torture to mean ‘any act [...] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ This means that persecution and harm inflicted by non-state actors would fall outside the scope of the CAT⁹⁹.

The non-refoulement right under the ICCPR is derived mostly from article 7¹⁰⁰. In its General Comment (1992), the HRC stated, inter alia: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement’. An important distinction is present in Article 13 of the ICCPR which limits procedural safeguards to lawfully present aliens only. This safeguard is extended to undocumented migrants in Article 22 of the CMW. The principle of non-refoulement is the most often used principle in relation to expulsion and extradition, and exists in a number of instruments and is said to be part of international customary law¹⁰¹.

The rules relating to expulsion constitute a more or less explicit recognition of a universal personhood with specific substantial and procedural rights.

3.5 The European Framework

The European Union (EU/EC) and the Council of Europe are the two main regional institutions in Europe dealing with migration. The EU has applied a strong non-discrimination regime for a privileged group of regular migrants, but this has been coupled with an emphasis on the prevention of clandestine migration which has “undercut, or even eclipsed, the concern to protect the rights of irregular migrants”¹⁰². The Council of Europe has to a larger extent applied a rights-based approach to irregular migration, and several

⁹⁹ CAT Articles 1(1) and 3(1)

¹⁰⁰ See also Article 9, 14, 16 and 26

¹⁰¹ Goodwin-Gill, 1996

¹⁰² Grant, 2005

cases at the European Court have dealt with the rights of irregulars, mostly in relation to non-refoulement (Article 3) and family life (Article 8). The following sections deal with the European Convention on Human Rights (ECHR) and the basic human rights provisions in the EU/EC.

3.5.1 The European Convention on Human Rights (ECHR)

The Convention is an extremely valuable instrument in ensuring dignity and freedom for all in Europe, since it is the binding regional instrument on human rights. The general framework enabling entitlements for irregular migrants is based on Article 1, that states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [...] of this Convention.” The European Convention is often coined as a document of civil and political rights, but it is important to note that the Court has recognised that “[...] while the convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature”¹⁰³. Furthermore, the Court established a strong interpretational principle in *Soering v UK* by stating:

“(...) the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (...).”

In the *Tyrer-case* the court further held that “the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions.”¹⁰⁴ There is therefore plenty of case-load to support a progressive promotion of the rights of irregular migration.

Due to the accessory character of the non-discrimination provision in the ECHR there has been only few cases invoking Article 14, and a heavier reliance on the substantive articles in question. Article 14 gives a non-free standing right to non-discrimination (accessory),

¹⁰³ *Airey v Ireland*, §§ 26

¹⁰⁴ Application No. 00005856/72

but it does not presume a violation of a substantive right and is therefore to some extent autonomous. A key requirement is that the facts of the case fall within the orbit of a right guaranteed in the Convention¹⁰⁵. It is hoped that Protocol No.12 of the Convention will reaffirm the principle of non-discrimination, because it gives a free-standing right to non-discrimination in “The enjoyment of any right set forth by law [...]”. The present legal framework with its limited non-discrimination provisions and especially the doctrines established by the Court’s jurisprudence make it difficult to apply a strong non-discrimination framework in favour of irregular migrants¹⁰⁶.

Litigation in the Court is an important way of framing and bringing onboard the rights of irregulars, since there are few specific references to the rights of irregular migrants in the wording of the ECHR¹⁰⁷. Like the ICCPR, the ECHR also contains provisions that ensure the legal standing of irregular migrants and a venue for claiming rights¹⁰⁸. Article 13 requires that everyone “whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority”. This has often been invoked to secure adequate safeguards in conjunction with Article 3 of the ECHR, since it may be argued that the absence of effective judicial scrutiny of executive/administrative decisions may not constitute an ‘effective remedy’ for the purposes of Article 13¹⁰⁹. More importantly it can form the basis for a stricter separation between enforcement of immigration laws and access to rights, since irregular migrants are often denied an effective remedy either because of lack of legal standing or because of fear from being deported or detected prevents them from going to court. Increased focus on ensuring remedies could

¹⁰⁵ Dijk, P. Van and Hoff, G.J.H. van, 1998

¹⁰⁶ Arnardóttir, 2003; Dijk, P. Van and Hoff, G.J.H. van, 1998; Greer, 2006.

¹⁰⁷ Save for the reference in Article 5(1)(f) concerning deprivation of liberty “to prevent an unauthorised entry into the country or [...] with a view to deportation[...]”. This right is reaffirmed in the restriction in Protocol 4, Article 2. The explicit mentioning of aliens are found in the prohibition on collective expulsion in Protocol 4, Article 4 and the guarantee of certain procedural safeguards relating to expulsion in Protocol 7, Article 1.

¹⁰⁸ The former Commission of Human Rights and the Court has established that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 of the ECHR. See *Maaouia v. France* (2002); *Slepčik v Netherlands and the Czech Republic*, (1996)

¹⁰⁹ *Chahal v the United Kingdom*, 1996 §§ 145-155, §78

assist in cementing the legal standing of irregular migrants and reduce their vulnerable position.

Some states use denial of social and economic rights as a mean of forcing irregular migrants to leave the country. Exclusion from social provisions is sometimes the direct result of a rejected asylum application¹¹⁰. Though not established as a firm principle, the court may draw social and welfare obligations from the positive obligations in Article 3, when denial of such services will meet the threshold of inhuman or degrading treatment contrary to the provisions of the Article. This could be the case where the migrant is highly vulnerable due to age, illness or external conditions severely affecting their ability to take care of themselves¹¹¹. This could also apply in cases of emergency medical treatment, where the denial of such treatment to irregular migrants may violate the right to life under Article 2. Violations of social and economic rights often fall outside the scope of the ECHR even though poverty, labour rights and access to social services are some of the issues linked most closely to the vulnerability of irregular migrants¹¹².

There is a rather well-elaborated case-load dealing with judicial guarantees, detention and rights under detention¹¹³. The general principles are that the detention decision must not be arbitrary in the light of the facts of the case¹¹⁴ and must comply with the principle of legal certainty¹¹⁵.

The ECHR does ensure some basic *de jure* protection of irregular migrants, but is challenged by:

¹¹⁰ UK Parliamentary Joint Committee, 2006-7, §§ 125-152

¹¹¹ *D. v. the United Kingdom* where the threshold was met

¹¹² Article 4, affirming the general prohibition of slavery, may apply to irregular migrants who are held against their will and forced to work by private persons, such as cases of domestic workers being forced under threats to work. See *Siliadin v France* (73316/01), 2005

¹¹³ See Article 5 (Liberty and Security of Person) and Article 5(1)(f); McBride, 2005; Recommendation Rec(2003)5; UNHCR Revised Guidelines; Council of Europe's Committee of Ministers' Guidelines on Forced Return; For a general overview of judicial guarantees see Dijk, P. Van and Hoff, G.J.H. van, 1998

¹¹⁴ *Bozano v France* (9990/82), 1986

¹¹⁵ *Shamsa v Poland* (45355/99 and 45357/99), 2003

- Lack of practical access to the Court, since most national laws does not grant a leave to stay while the case is pending in national courts or the case falls due to non-exhaustion of domestic remedies, which in practice often result in the prevalence of immigration law over human rights law¹¹⁶
- The fact that the Convention does not deal with socio-economic rights
- A rigid and conservative reading of the non-discrimination provision
- The lack of a specific and binding framework for dealing with migrants rights, and in particular irregular migrants

3.5.2 One promising case from the (revised) European Social Charter

The European Social Charter guarantees social and economic human rights in areas of housing, health care and education¹¹⁷. The 1961 version was revised in 1996, and the Committee overseeing the Charter can under a 1995 Protocol receive collective complaints. Even though most of the charter, according to the attached appendix, only applies to nationals or other persons residing or working lawfully within the territory of the state parties, the Committee has ruled on a case concerning the rights of irregular migrants. In *FIDH v. France*, the Committee concluded that: “the Committee holds that legislation or a 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 Charter¹¹⁸.” The even more relevant point related to my argumentation is that the Committee referred to the VCLT and stated the restrictions in the Charter (as mentioned above) should be read narrowly so as not to deprive the Charter life and meaning. *I argue that the reasoning in this case strengthen the argument for a clear ‘base-line’ for fundamental rights, which should be respected irrespective of immigration status. Furthermore this case highlight that it is the non-discriminatory and effective enjoyment of rights that should be the guiding standards in evaluating the performance of states.*

¹¹⁶ Article 29 ECHR (Interim measures) can be invoked to prevent an expulsion until the Court has investigated the case, but this is not always granted by the Court

¹¹⁷ Cholewinski, 2006

¹¹⁸ Complaint No. 14/2003

3.5.3 European Union

All 27 member states of the EU have to different degrees transferred power to the EU, and are therefore subjects to its primary laws (the treaties), its legislation and the case law of the Court of Justice of the European Communities (“ECJ”) – all together making out the *Acquis Communautaire*. EU law takes precedence over domestic law within its field of competence. This ‘supremacy’ of EU law entails that national courts must give primacy to EU law over inconsistent domestic measures. The EU legal system can thus be described as ‘supranational’ in character.

According to Article 6 (F) of the ‘Treaty on European Union’, the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” It refers explicitly to the ECHR in, stating that “the Union shall respect fundamental rights, as guaranteed by the [ECHR] and [...] as they result from the constitutional traditions common to the Member States, as general principles of Community law”. In the European Union the ‘Charter of Fundamental Rights of the European Union’ might hold some promise for the rights of irregular migrants, since it does not distinguish between civil and political rights and social and economic rights, but collect all the rights in one charter¹¹⁹. Unless specified otherwise it applies to all irrespective of nationality, but some rights are limited to nationals or legal aliens (e.g. social security).

There is no specific legislative instrument concerning the rights of irregular migrants (or illegal third country nationals as it is called within the EU), since most attention to this topic has been devoted to control, expulsion and prevention of entry. The Racial Equality Directive does reaffirm a strong non-discrimination principle, but its effect for irregular migrants is uncertain¹²⁰. Article 3(2) provides that the Directive “is without prejudice to

¹¹⁹ Cholewinski in *Irregular Migration and Human Rights*, 2004

¹²⁰ Directive 2000/43/EC, 2000

provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”¹²¹ The Preamble provides a prohibition against discrimination based on race or ethnic origin, since it on principle ‘should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.’¹²² Cholewinski notes that the Directive’s

“[...] direct impact on the treatment of third-country nationals in the field of immigration control is likely to be nominal, largely as a result of the measure’s limited material scope. [...and that] Member States recognize that they are making explicit distinctions on the basis of nationality and arguably also that they are acutely aware that immigration control activities are particularly susceptible to discrimination on the grounds of race, ethnic or national origin or religion.”¹²³

EU legislation still seems most preoccupied with ensuring the rights of those legally inside the community.

3.6 Conclusion

Irregular migrants are in a vulnerable position because of the unequal power relations between them and legal residents, and the fact that they often live on the margins of society and law. I have argued that there exist a set of rights that can ‘level’ the playing field and decrease vulnerability of irregular migrants.

¹²¹ Directive 2000/43/EC, 2000

¹²² Preamble, §§ 13

¹²³ See Cholewinski, 2002; Cholewinski, 2005

Firstly, human rights obligations qualify the relationship between the sovereignty of the nation-state and the individual¹²⁴. This means that migration control must be in conformity with international obligations (in this case human rights) and that an irregular status cannot justify infringements on basic rights.

Secondly, non-discrimination provisions ensure a balanced and fair power relationship between those legally present and the irregular migrant and at the same time allow for differential treatment under the principles of ‘legitimate aim’, ‘proportionality’ and whether it is ‘necessary in a democratic society’ and responds to ‘pressing social needs’¹²⁵.

Thirdly, a number of specific substantial rights protects and empowers irregular migrants vis-à-vis state authorities and the settled community¹²⁶. There is not any absolute guarantee or protection against expulsion or a right to stay, but human rights law does ensure procedural safeguards to protect irregular migrants from arbitrary treatment and legitimize their claims on human dignity.

Most of the rights and principles reviewed in this chapter can be invoked by all individuals irrespective of their affiliation with a state or their immigration status. State responsibilities are triggered as soon the individual falls within the effective jurisdiction of the state. I argue that this doctrine can be seen as a form of ‘universal personhood’¹²⁷, where legitimate claims on rights can be made independently of migration status or citizenship.

Irregular migrants can be placed ‘outside’ by national immigration law, but they will always be ‘inside’ international human rights law and therefore also back ‘inside’ national law.

Generally speaking, human rights vulnerabilities cannot be detached from their ideological and historical context. For the purpose of this thesis the context is rooted in historical and

¹²⁴ See section 3.1

¹²⁵ See section 3.3.1

¹²⁶ See section 3.3 and 3.4

¹²⁷ See section 3.1

ideological conceptions of borders and communities coupled with xenophobia and a construction of 'the other' that takes on various functional tasks related to maintaining the community and power relations between the settled natives and the arriving strangers. It is this context that the following chapter reflects upon.

4 The anatomy of illegality, or the creation of vulnerability

‘There are friends and enemies. And then there are *Strangers*.’¹²⁸

The first two substantial chapters have dealt with how the relationship between the newcomers and the settled are established in law, and how applied human rights law can help us see beyond the ‘inside-outside’ perspective of current migration approaches, and instead recognise the value and dignity of the individual irrespective of her status as an irregular migrant. Rosa Parks not only confronted the Jim Crow laws on racial segregation, but also the implicit and submerged public perceptions on humanity, communities, race, poverty and social relations. To fully appreciate the scope of our contemporary problems and research area, this thesis now takes a more sociological approach and explores how the vulnerability of irregular migrants is multiplied or even created by some of the submerged logics of migration control, community formation and the anxieties related to the ‘other’.

4.1 How borders create vulnerability

The main argument here is that the configuration of borders may reduce or increase the vulnerability of people¹²⁹. The systems of human rights protection must be responsive to the globalisation of segregation, inequality and oppression. *The global push and pull effects of migration take much more fluid, mobile and transnational forms than the mechanisms for implementing human rights, which are often closely connected with the nation-state.* Social relations and informal cross-border trade are examples of ‘borderless’ interaction where a border-focussed approach fails to fully tackle or appreciate problems and possibilities.

¹²⁸ Bauman, 1991

¹²⁹ See Bigo in *Irregular Migration and Human Rights*, 2004

Geographical space is transformed into territory when it becomes demarcated and divided as a political strategy to affect and control people, phenomena and relationships¹³⁰. Territory therefore exists as a construction of space, which can be transformed and altered depending on the configurations of power. The complex linkages between space, power and communities are obscured by the political and legal devotion to the territorial nation-state that makes it difficult to apply or consider alternative strategies detached from traditional notions of space and territory¹³¹. What we see is an ongoing struggle between those who continue to insist on a state-nation-citizen constellation and those who recognize that this construction is slowly changing¹³².

Immigration law is more than the application of rules and laws, but an active part of 'nation-building', where decisions on admittance become constituting actions in constructing the national identity¹³³. The general turn towards restrictive policies in Europe is closely related to the contemporary discussions of national and European identity and the discretionary character of much immigration legislation easily bend to these trends of closing the nation. The argument for 'open borders' or 'a right to immigrate' may be unfeasible¹³⁴, but following the argument of Kostakopoulou we shall critically reconsider our basic assumptions of borders, community and their link to nationalistic narratives¹³⁵. These critical reflections shall not only be intellectual exercises but shall also creatively assess current forms of community formations detached from borders and nations and increase the focus on how social relations are in fact constituted across borders and space.

European integration has shown that the reconfiguration of borders and space is possible¹³⁶. This reconfiguration is done to promote economic prosperity and social development. The

¹³⁰ Bigo in *Irregular Migration and Human Rights*, 2004

¹³¹ Kostakopoulou in *Irregular Migration and Human Rights*, 2004

¹³² See section 3.1

¹³³ Fitzpatrick and Tuitt, 2004

¹³⁴ Hayter, T, 2000

¹³⁵ Kostakopoulou in *Irregular Migration and Human Rights*, 2004

¹³⁶ The development of a European citizenship established by in the Treaty of Maastricht of 1992 is sometimes used by those arguing for a 'post-national' order, but they fail to take into account that European citizenship only apply to citizens of European states. The onus is still on the state.

dark side of these skills of reconfiguration are seen when diplomatic agreements, aid conditionality and security arrangements are mended together to provide for the projection or externalisation of 'borders' into third countries, who are normally in a significant subordinate negotiation position vis-à-vis a united EU¹³⁷. Council Regulation, 2004 provides for the stationing of immigration officers overseas to ensure that the combat against illegal migration is fought in the country of first departure. Borders and border officials are no longer met at the physical border post, but it is projected into trade agreements with third countries, administrative procedures and at the airports in Africa. It is noteworthy that the attempts to address root-causes for migration seem to lack the same financial and political commitment as that which is given to control and deterrence measures¹³⁸.

Fundamentally, I argue that the legal or ideological conceptions of borders, state and community are somewhat dislocated from the development of demography and migration. In 2000, the UN forecasted that by 2050 the (then) 15 member states of the European Union would need more than 40 million migrants to maintain the overall size of their populations¹³⁹. When Spain regularised 570,000 migrant workers in 2005, it was on the recommendation of employers, a clear sign that the economic development of labour markets and production had circumvented *de jure* immigration restrictions¹⁴⁰. The 'black economy' in particular and the economic globalisation in general increasingly show a lack of respect for the political borders of the nation state, which is evident in the discordance between the demand of flexible labour, the desire of people to move and the legal channels to do so¹⁴¹. Restrictive laws on immigration have not lead to a reduction in the number of

¹³⁷ The Cotonou agreement (aid/trade) with Caribbean and African countries highlight that failure to cooperate on illegal migration may have effect on the Agreement and agencies such as FRONTEX (Joint border security agency) and the European Agency for the Management of Operational Co-operation at the External Borders set up different form of cooperation with third countries.

¹³⁸ Koser, 2005

¹³⁹ Council of Europe, CommDH/IssuePaper(2007)1

¹⁴⁰ Council of Europe, CommDH/IssuePaper(2007)1

¹⁴¹ Grant, 2005

migrants, but rather an increase of irregular (or illegal) channels of migration, and a growth in trafficking and smuggling¹⁴².

The present situation leaves irregular migrants caught in the dislocations between their physical presence, the socio-economic reality surrounding them and their weak legal standing 'outside' the national legal order. Irregular migrants should be brought 'inside' the protection of the law. Specific steps forward could be ratifications of the Convention on Migrant Workers and regional projects that go beyond control and deterrence, and aim at strengthening cross-border networks to deal with the vulnerable position of irregular migrants.

4.2 How communities create vulnerability

This thesis assumes that we construct and define our social and legal categories not only from the positive of 'what it is', but also from 'what it is not'. In the words of Derrida, "Identity becomes this process of continual separation and relation to 'The Other'"¹⁴³. It becomes evident, that the process of separation and relation is not only one of rhetoric or nationalism, but becomes an 'objective truth' when it is inscribed in law and daily practice. Immigration laws and legal entitlements are therefore part of the complex of symbolic violence (Bourdieu), which reconfirms the nexus between nation, population and the state. The rise of xenophobia and racism in Europe towards migrants "is therefore not about objective characteristics, but about relationships of domination and subordination, about hatred of the 'other' in defence of 'self', perpetrated and apparently legitimated through images of the 'other' as inferior, abhorrent, even subhuman"¹⁴⁴. Those individuals who are without a territorial and political fix-point (for example through citizenship) become stateless, or as explained by Arendt: a refugee and an outsider¹⁴⁵. The concept of 'the other' is a submerged logic in international cooperation and law. By establishing the EU as an `Area of

¹⁴² Council of Europe, CommDH/IssuePaper(2007)1

¹⁴³ Derrida, 1982

¹⁴⁴ Fredman, 2001

¹⁴⁵ Arendt, 2003

Freedom, Security and Justice’, the outside of Europe became an area of un-freedom, insecurity and injustice¹⁴⁶. The reference to ‘area’ is deeply linked to the concept of a common border, thereby establishing an ‘inside’ that is much needed in creating the European identity and European integration.

Integration and citizenship is a social process of empowering an individual to become a politically and social participatory citizen interacting on equal terms with the rest of society¹⁴⁷. The process of exclusion is inversely a process of separation and disempowerment. Thus while cast in the language of inclusion, belonging and universalism, the process of creating a modern citizenship has systematically established strangers and outsiders¹⁴⁸. *This process of exclusion can be countered by strengthening and applying the ‘universal personhood’ described in the previous chapter, which will also ensure that irregular migrants have a ‘voice’, rights and claims in their host communities, so as to avoid stereotypes, exclusion and a vulnerable position¹⁴⁹.*

4.3 ‘Illegality’ and the circumvention of international obligations

The universality of human rights poses new challenges in delineating rights and obligations, which traditionally have been delineated according to citizenship or diplomatic relations. Dauvergne notes on the concept of ‘illegality, that:

“[...] a rhetorical focus on ‘illegals’ shifts the boundaries of exclusion. When a part of the population is acknowledged to be ‘illegal’, it is excluded and erased from within. Even when sovereignty at the border is breached, labelling people within one’s territory ‘illegal’ imprints sovereignty. It adjectively shifts the argument about membership and entitlement. [...] their contribution to the economy or their long term residence [are] counted as evidence of their

¹⁴⁶ Derrida, 1992

¹⁴⁷ Brochmann, 2003

¹⁴⁸ Engin Fahri Isin, Bryan S. Turner, eds., 2002

¹⁴⁹ See section 3.4; Joppke, C, 1999

transgression. [...] the label ‘illegal’ allows us to shift the US-THEM line from the border of the nation to within the nation, wherever it is required.”¹⁵⁰

Inspired by Dauvergne, I argue that ‘illegality’ is a way of projecting issues of borders and control into all aspects of rights and life. Practical circumstances have made it difficult to physically control flows over borders, so different internal mechanisms of control and separation have been set up¹⁵¹. Dauvergne puts it well, when she notes that the mark of being ‘illegal’ places the person “[...] not only as an outsider to a particular nation, but as an outsider to any nation. As such, the other is outside the law itself, and, in a word, illegal”¹⁵².

The Draft Directive on Common Standards for Return¹⁵³ is an example of how an irregular status will affect one’s *de jure* rights. Current debates on the Directive focus on whether irregular entry should justify the application of lesser standards compared to those who are illegally staying due to a rejected asylum-request or expiration of visas¹⁵⁴. *The construction of ‘irregularity’ and ‘illegality’ again stands as an attempt to circumvent the legal obligations arising from an already existing physical presence within state territory.*

I argue that there exists a plurality of legal frameworks applicable to irregular migrants. Laws governing entry, labour rights, criminal law and human rights law are just a few examples of several legal paradigms intersecting each other. The construction of illegality denies and supports the fact that ‘irregulars’ are woven into the economic fabric of the nation, albeit as labour that is cheap and disposable. They remain “[...] a caste outside the boundaries of formal membership and social legitimacy”¹⁵⁵. When law is seen as a scene of contention, different interests and power relations seek to promote the dominance of some paradigms over others. The construction and application of illegality means that irregular

¹⁵⁰ Dauvergne, 2003: 9

¹⁵¹ See section 4.4

¹⁵² Dauvergne, 2003

¹⁵³ Draft Directive, (COD/2005/0167)

¹⁵⁴ Letter to the EU Presidency, 14. April 2008, Amnesty International EU Office

¹⁵⁵ Ngai, 2004

migrants find themselves subject to what is in effect penal or criminal sanctions, but without the adequate safeguards because the sanctions are deemed to be only ‘administrative’¹⁵⁶. Any legal advocacy has to take into account multiple sources of law that can protect the individual, and excavate the multiple identities that can enable these sources of law. The concept of ‘intersectionality’ used in discrimination-litigation is a helpful source of inspiration in combining these different legal sources to the maximum of human rights protection¹⁵⁷. By using an ‘intersectional’ approach one can better grasp the fullness of the human rights protection by recognising that an irregular migrant may be protected from abuse in her capacity as a girl-child, asylum-seeker, worker and coloured. This approach enables several legal instruments, as well as provide framework for a much richer analysis of vulnerability.

4.4 Control and Security

National debates on irregular migration are often concerned with control and the credibility of government capacity to protect nation and borders¹⁵⁸. UK Home Secretary John Reid vowed that “enforcement action against those who overstay their welcome would be essential to ‘restore public confidence.’”¹⁵⁹ And in France, the Prime Minister Sarkozy has also expressed a desire to show that “France is in control of migration, and not a passive recipient”, which has been followed up with new legislation and an increase in deportation orders¹⁶⁰.

The human rights of irregular migrants have fallen prey to a general ‘securitisation’ of migration¹⁶¹ and the Special Rapporteur has pointed to the fact, that the legal regime of ‘illegality’ is supported and enabled by a general public climate of hostility and

¹⁵⁶ Amnesty International, POL 33/007/2006

¹⁵⁷ Berg, 2007

¹⁵⁸ PICUM, 2007

¹⁵⁹ Guardian, 26 July 2006

¹⁶⁰ BBC, 17 June 2006

¹⁶¹ 2003 A/58/275; On ‘securitisation’ see Buzan, Barry, Ole Wæver and Jaap de Wilde, 1998

xenophobia¹⁶². The increased conceptual and discursive link between irregular migration and criminality is still pervasive in EU documents, though it is realized that:

“Public perception which tends to establish a link between some societal problems and illegal immigration should also be taken into account [and the Member States] must promote a rational debate [...] to eradicate racism and xenophobia including by adopting and implementing effective EU legislation in this area.”¹⁶³

In July 2006, the Commission adopted a ‘Communication on Policy priorities in the fight against illegal immigration of third-country nationals’¹⁶⁴. This programme has been severely criticised for over-emphasising control and ‘criminalisation’, linking migration with terror, criminality and security. Human rights figures as a gloss in the introduction, but plans for implementation are largely absent. All the operative clauses focus on control, criminalisation and deterrence and fail to apply a practical human rights sensitive approach¹⁶⁵. The same can be said in the detailed work on sanctions for those who employ irregular workers, where there is no rights-based approach seeking to create effective remedies, voice and decrease vulnerability for the migrant workers¹⁶⁶. It can be argued that sanctions on those hiring irregular migrants will only drive irregular migrants further into the black economy, unless these measures are coupled with ways to effectively defend and access rights for irregular migrants.

¹⁶² 2003 A/58/275

¹⁶³ COM(2006) 402 final §§ 12

¹⁶⁴ (COM (2006) 402)

¹⁶⁵ See PICUM’s Comments on the Communication from the Commission on “Policy priorities in the fight against illegal immigration of third-country nationals, COM (2006) 402 final, accessed at 29 February 2008 at <http://www.picum.org/>

¹⁶⁶ The focus on sanctions and criminalisation should be contrasted to a former draft directive which recognised that by increasing workers rights for irregular migrants the incentives for employers to use irregular labour would be removed, Proposal for a Council Directive Concerning the Approximation of the Legislation of the Member States, in Order to Combat Illegal Migration and Illegal Employment. COM (78) 86 final, 3 April 1978. For a more progressive stand than the one set out by the Commission, see European Parliament MEMO/07/196, Sanctions against employers of illegally staying third-country nationals

The 1990 Convention implementing the Schengen Agreement (Article 3(2)) calls for states “to introduce penalties for the unauthorised crossing of external borders”. Member states have now introduced penalties for unauthorised entry ranging from a few days imprisonment to two years¹⁶⁷. ‘Infringements of national immigration rules’ allow states to report a person to the Schengen Information System (SIS), the European database of undesirables, on the grounds that his or her presence constitutes a threat to public policy or national security¹⁶⁸. So through one irregular border crossing and subsequent reporting to the SIS, all participating EU Member States are obliged to refuse future entry to the person concerned¹⁶⁹. Since there is no common definition on what constitutes an ‘infringement of national immigration rules’, the reporting is based on national policy despite its geographical wider implications. This potentially violates the non-refoulement principle, the effective right to seek asylum and the non-discrimination principle since persons in similar situations may be treated differently in terms of SIS reporting¹⁷⁰. The totality of closure is also seen in the ‘Directive on the mutual recognition of decision on expulsion of third country nationals’, where EU Member States must recognise and enforce expulsion decisions made by another Member State, when there is “serious and present threat to public order or to national security and safety” or/and “failure to comply with national rules on the entry or residence of aliens”¹⁷¹. This means that the total ejection from the EU can be based on a conception of ‘illegal entry or residence’ on which there is no European consensus¹⁷².

Bigo reflects on how migration and globalisation have changed surveillance, punishment and control in relation to the criminalisation of migrants. Control has relocated from the physical border-crossing and to more fluid forms of control in the interior or at a

¹⁶⁷ Belgium (8 days–1 year and a fine); Denmark (6 months); France (1 year and a fine); Germany (1 year; 3 years proposed); Italy (up to 2 years or a fine); Netherlands (6 months). See B. Ghosh, 1998:99

¹⁶⁸ Article 96(3) Schengen Implementation Agreement

¹⁶⁹ Acceptance into territory is only in exceptional circumstances.

¹⁷⁰ See Cholewinsky in *Irregular Migration and Human Rights*, 2004

¹⁷¹ Article 3(1), Council Directive 2001/40/EC, 2001

¹⁷² In Article 3 (2) EU Member States are under an obligation to apply the Directive with due respect for human rights and fundamental freedoms.

distance¹⁷³. Visa-control, carrier-sanctions, internal checks and external cooperation are all initiatives to address this, but all of them more or less fail to make adequate safeguards on human dignity and individual rights. In *A Letter Concerning Toleration* (1689) and in the *Two Treatises of Government* (1690), John Locke conceptualised the idea that the right to life, liberty and property are natural laws, which simultaneously restrict the power of a state and also oblige it to protect these rights. It is this reasoning that resonates in international human rights law, and the relationship between state and citizens. But I would perhaps argue that this argument turned upside down becomes harmful for irregular migrants, when the state defines its outsiders, the ‘illegals’, as those whom society needs to be protected against.

It can be said that the objective complexities of migration in economic, human, political and legal terms escape a rational public debate and fall prey to increased xenophobia and public anxiety that put demands on politicians ‘to do something’ to increase the sense of control. Politicians are therefore forced to do something ‘visible’ to enhance the sense of security and at the same time attempt to pursue more pragmatic and effective policy options dealing with rational cause and effect.

The bastard linkages between irregular migration and security have serious practical consequences on basic human rights, since the relationship changes from being between a right-holder (the irregular migrant) and the duty-bearer (the state) to a relationship between the enemy (the irregular migrant) and the state as the defender of the nation. *When irregular migration is transformed to a security threat and the ‘illegal’ migrant personifies that threat, even the most draconian measures might seem legitimate.*

4.5 The case of expulsion – The myth of control

I do not argue against expulsions as part of immigration management as such, and I accept that it remains a central and a necessary feature in the maintenance of the liberal democratic state. But what I argue against is the development where expulsion-procedures

¹⁷³ Bigo in *Irregular Migration and Human Rights*, 2004:66; Dauvergne, 2003

have “[...] now become ‘normalised’, ‘essential’ instruments in the ongoing attempt to control or manage immigration in European states.”¹⁷⁴

The actual number of deportations has remained more or less unchanged except for a few countries¹⁷⁵. Deportation is made difficult by a series of rights-based constraints regarding deportation and the unstable nature of public opinion¹⁷⁶. Interestingly, Gibney and Hansen argue that the restrictive or exclusionary application of non-arrival measures “[...] is the perverse fruit of increasingly inclusive practices towards foreigners who are resident in these states.” Non-arrival measures become central, because arrival automatically triggers international human rights responsibilities. By referring to the Platonic concept of the noble lie, Gibney and Hansen suggest that deportation is simultaneously *ineffective* in terms of *de facto* control and *essential* in terms of the symbolic value of control. It is the most visible form, the extreme manifestation, of control over territory and people.

“By maintaining policies on deportation, the state furthers the myth – and it is nothing more than a myth – that it can actually remove from its territory all criminal non-citizens and/or illegal migrants. No state is willing to collapse the distinction between legal and illegal migrants.”¹⁷⁷

More generally, the continued emphasis on the myth of control is a crucial element in maintaining the ‘imagined community’ as one of borders in terms of belonging and entitlements.

The ‘irregular’ migrant serves as a ‘*Homo Sacer*’, a term borrowed from the Italian philosopher Agamben¹⁷⁸. A *Homo Sacer* is a person that exists ‘inside’ the community, but yet ‘outside’. She is therefore expendable or can be killed with impunity. To me, it seems that the precarious legal standing of the irregular migrant makes her within some law, but

¹⁷⁴ Schuster, 2004

¹⁷⁵ Gibney, M and Hansen, R, 2003

¹⁷⁶ See the section on legal standards restricting expulsion in chapter 3

¹⁷⁷ Gibney, M and Hansen, R, 2003:15

¹⁷⁸ Agamben, 1998

at the same time outside some law. This not only applies to law, but to society in general. She could very well interact on a daily basis with the community and the economy. The fact, that she can be somewhat part of the community, but still outside make her a perfect sacrifice in times of crisis. Crack-downs on irregular migrants could just as well be phrased as ‘purifying’, whereby scape-goating is taken to the extreme with the total deportation of the migrant along with all the symbols that have been attached to her. The symbolic link of ‘irregular’ migrants with crime, disease and social disintegration enables a purification process, where a crackdown on this group will causally result in less crime and increased social cohesion for society as a whole. Sacrifice in times of danger and change has always been part of human culture, and it seems reasonable to argue that during times where the nation fears for its existence it needs to perform rituals of sacrifice – In our case, the deportation. The tendency to use deportation orders as a tool for crime control and ‘the stick’ in integration policies jeopardizes the legitimacy of the migration system in particular and the state in general, since many deportation orders cannot be carried out and certainly do not address the more structural problems of crime and lacking social cohesion in society. The implementation of the principles outlined in section 3.3.2. and 3.4.1 all ensure fair, transparent and individual procedures and safeguards that protect individuals against scapegoating and public demonising.

4.6 Inequalities and migration

There is a submerged argument in the public debates on migration, which holds that less restrictive border control will lead to an exodus from the poor South to the rich North. This argument makes border control a matter of survival and self-defence, where those who are deemed to contribute to the community are separated from those who are perceived a strain on resources. Moving from this argument to a macro-perspective, borders can be seen as an allocation and geographical fixing of populations to specific territories, where the global poor become prisoners of the local, and cannot enjoy the same benefits of the compression of time and space as the global elites¹⁷⁹. *From this perspective, irregular migration can be*

¹⁷⁹ Bauman, 1998

seen as a form of civil disobedience against an unjust allocation of space and belonging.

Describing a global Apartheid upheld by law and raw power, Cheng writes that those not favoured by global capitalism and valued as expert labour are expected “to remain forever in their global über-ghettoes, the garbage-heap of a superfluous humanity”¹⁸⁰.

The reasons for migrating cannot be de-contextualised from poverty, environmental changes and economic development, and the global chain of cause-effect in terms of vulnerability should not be underestimated. European states actively recruit skilled workers from the health sector and well-educated people from developing countries, which create a short term negative impact caused by the brain-drain in the developing countries. Over fishing by European supertrawlers in the waters of West-Africa leaves small fishing communities impoverished, and forces sons and husbands to leave for Europe in search of work. The dumping of subsidized American and European products in small farm communities in Africa, forces the workforce to migrate to cities in Europe to find employment and a future. Local communities benefit from remittances from migrant workers, and the employment opportunities resulting from demographic deficits in some European countries act as powerful pull-effects¹⁸¹. My argument is that global and local developments create a number of vulnerabilities and possibilities and that migration is both a cause and effect to this. It is widely recognised that migration management should balance deterrence and prevention, but this acknowledgement stands in sharp contrast to the realities of global inequality and the continued resilience to bring about solid change in migrant sending countries through free trade and development aid¹⁸².

As argued in the previous section, the symbolic reaffirmation of borders as something that can be controlled or even closed is a costly fiction in many ways, and the continued insistence on this fiction may divert our attention from doing something about the root causes of migration. By looking at migration as a social burden and as something that can be controlled we may obscure solutions that can transform migration into social and

¹⁸⁰ Cheng, 2004: 2-3

¹⁸¹ TIME, 2000

¹⁸² Schuster, 2003

economic value and at the same time deal with causes of migration. Just as refugees refuse or are unable to avail themselves of the protection of their country of origin based on fear of persecution, millions of people leave their countries because their country fails to address economic, social or environmental issues. It seems like the majority of nation-states have failed to live up to their part of the social-contract and the system of nation-states find it increasingly difficult to justify border control.

4.6.1 Global responsibility: solidarity or law?

I wish to make a number of abstractions on the emerging doctrine of non-territorial rights or ‘solidarity-rights’. Not because I believe that this is an accepted source of hard law or established legal paradigm, but because I believe it to be informative for engaging the global responsibilities of nation states. In particular, I would like to mention Article 28 of the UDHR, which refers to an international order that enables the rights in the declaration. Human rights violations are both cause and effect of irregular migration and a progressive reading of this article could give rise to non-territorial obligations to ensure a fair world order and an implicit condemnation of those measures keeping out those people who migrate to enjoy basic human rights. The ICESCR also supports such an argument, by not making any reference to either jurisdiction or territory in Article 2 concerning state obligations¹⁸³. It could be reasoned that if there exists an extra-territorial obligation to combat poverty, then the migration prompted by the failure to do this cannot be manifestly wrong or illegal. Any sustainable form of migration management must empower human agency and dignity in all parts of the migratory process and move beyond territorial responsibility. No man is an island, and neither are states.

¹⁸³ Notwithstanding the permitted limitation in Article 2(3)

4.7 Conclusion

The racial segregation during the time of Rosa Parks was rooted in a number of historical, social and ideological events and enforced through different legal, political and social practices. The same can be said in relation to the vulnerability of irregular migrants. Where previous chapters have established that national laws on immigration are pronouncements on who is ‘inside’ and ‘outside’, this chapter has explored the social and symbolic underpinnings of the ‘inside’ and ‘outside’.

Firstly, I have argued that borders and boundaries are manifestations of power, which are shaped to maintain the unequal relationship between the settled and the newcomers. These manifestations are made ‘logical’ and acceptable through law and social practice, but should be challenged if we wish to find new and effective means to deal with migration¹⁸⁴. The failure of contemporary approaches to borders and human rights are revealed by the fact that the global push and pull effects of migration does not respect political borders, and that human rights violations take on much more fluid and transnational forms than the mechanisms of human rights protection, which are often rooted in the nation-state¹⁸⁵. The present situation leaves irregular migrants caught in the dislocations between socio-economic reality and their weak legal standing ‘outside’ the national legal order. Irregular migrants should be brought ‘inside’ the protection of the law through the application of the ‘universal personhood’ outlined in chapter 3.

Secondly, irregular migrants are placed on the ‘outside’ of any law through the ‘securitisation’ and ‘illegalisation’ of irregular migration. The universality of human rights pose new challenges in delineating rights and obligations, which traditionally have been delineated according to citizenship or diplomatic relations. Instead of a positive and constructive response to this challenge, western societies have responded by a criminalisation and securitisation of irregular migration¹⁸⁶. The questionable linkages

¹⁸⁴ Section 4.1

¹⁸⁵ Section 4.2

¹⁸⁶ Section 4.3

between irregular migration and security have serious practical consequences on human rights, since even the most draconian measures might seem legitimate to protect the security of the nation¹⁸⁷. The construction of ‘irregularity’ and ‘illegality’ here stands as an attempt to circumvent the legal obligations arising from an already existing physical presence within state territory¹⁸⁸.

Thirdly, the continued emphasis on the myth that borders can be controlled or closed is a crucial element in understanding how the community can define itself by borders and with an identifiable ‘inside’ and ‘outside’. This myth of control is persistently repeated in acts of deportation, which seem to have more of a symbolic effect than an actual effect in terms of border management¹⁸⁹. Deportation becomes more than an act of migration control, but a ritual sacrifice aimed at regaining an abstract control over territory and population.

Finally, it seems that migration cannot be de-contextualised from poverty, environmental changes and economic development. If we do not engage with root-causes of migration, we will not succeed in managing migration. We cannot insist on the inviolability of borders, while the effects of our trade, aid and foreign policies compels people to move and we cannot expect people “to remain forever in their global über-ghettoes”. If we insist on this, we actively contribute to the ‘racial segregation’ of the century, where the irregular migrant through her actions becomes the Rosa Parks of this century.

¹⁸⁷ Section 4.4

¹⁸⁸ Chapter 3

¹⁸⁹ Section 4.5

5 Final conclusion

I started this thesis by asking, how we can apply human rights principles to promote a critical thinking about borders and migration management. Current thinking is characterised by:

- Sharp distinctions between wanted and unwanted migrants
- Strong belief in the inviolability of nation-state borders
- Increased criminalisation and securitisation of matters related to migration
- Regional cooperation that focus more on protecting and safeguarding narrow understandings of the ‘inside’ than protecting rights of those effectively within national jurisdiction
- Narrow interpretation of who is ‘inside’ or ‘outside’ and who should constitute right-holders within the territory

I concluded that an irregular status comes from a violation of national immigration law, which can roughly be described as a pronouncement of who belongs and who do not, and following from that, what kind of entitlements one can claim according to national law. The ‘inside’ and ‘outside’ thinking permeates the field of migration, and some similar dichotomies can be found in traditional thinking of refugee law or definitions of irregular migration¹⁹⁰. Immigration law is therefore about establishing an ‘inside’ and an ‘outside’ of the nation.

In the chapter on international law I have established that even though every state has the right to control its territory and population, every act must conform to the international obligations of the state. It is in these international obligations that we find basic notions of a ‘universal personhood’, which grants rights and dignity to individuals irrespective of

¹⁹⁰ Section 2.4 & 2.5

whether they belong or not according to national law. The only enabling factor is their presence within the jurisdiction of the state, which is enough to constitute them as rights-holders and ‘inside’ the protection of human rights law. Any differential treatment between irregular migrants and those legally in the country must correspond to a number of principles related to the proportionality of the means and the legitimacy of the aims. Since these principles are subject to dynamic interpretations it becomes relevant to analyse how we see borders, migration control and irregular migration. This analysis has been done in chapter 4, where I have applied some critical perspectives on how borders not only affect the implementation of human rights, but also our very ideas of who is ‘inside’ or ‘outside’ human rights law.

Since the causes and effects of irregular migration do not respect political or administrative borders, any human rights sensitive response must accommodate this fact. In chapter 4, I concluded that there are several dislocations between actual presence inside socio-economic realities and irregular migrants’ weak legal standing outside national law. I have argued that an effective implementation of the ‘universal personhood’ as outlined in chapter 3 will be one way of remedying the vulnerabilities arising from these dislocations. The ‘universal personhood’ as a universal bill of rights are however challenged or even threatened by current approaches to irregular migration, which emphasize control and criminalisation. I see these developments as attempts to circumvent already existing human rights obligations. Human rights as universal principles will therefore be eroded if we do not change the way we think of migration, borders and rights.

Several perspectives that can inspire a way forward have been excavated in this thesis:

- If we apply the same approach to borders and migration that we have always done, we will get the same results¹⁹¹
- The problem is not just irregular migration as such, but how we think or conceptualize migration

¹⁹¹ One could argue of there has been enough consistency within migration management to empirically support this argument, but the point remains that if we do not rethink our approach we will not get any new answers

- Borders as spaces or geography that can be managed or controlled are to a large extent legal or political fictions which are exposed daily by unrestricted global movement of capital, people, culture and ideas
- Borders and communities are dynamic constructions that can be altered towards a human rights sensitive framework
- Human rights for irregular migrants must be based on protection needs, but does not necessarily mean a prohibition on deportation or a right to immigrate
- Responses to irregular migration should be guided by the actual contribution or effect and not on default perceptions on irregular migration
- The effective access to human rights should not be impeded by the effective implementation of immigration law
- Empowerment of irregular migrants does not mean an ineffective immigration regime, but rather that irregular migrants can speak up against oppression. This would strengthen the struggle against black economies, human trafficking and exploitation at work

Rosa Parks claimed her humanity and exposed racism embedded within the institutions, laws and social practices of the American society. She did not want special treatment, just equal treatment and a life with dignity. Parks' story tells us, that one of the hallmarks of democracy is that people on the 'outside' can successfully claim a rightful place on the 'inside'. Coloured people, homosexuals, women and the uneducated were once 'outside' society. While their entry as active participants in society was expected to bring about chaos, they successfully brought prosperity and development. Today the 'unwanted' migrant is our Rosa Parks, and we should carefully consider the moral, socio-economic and legal consequences of keeping her 'outside' society.

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Annex (optional)