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**The right to health in context: Is the Irregular
migrant and the right to health an infeasible
equation?**

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Summary

There are an unknown number, estimated several millions of people, living in an irregular situation across the world. Moreover, the people live in the grey area of the legal provisions without access to human rights or other legal provisions. This situation illustrates a certain paradox, where human rights appear rather in contradiction with the national legal system. This contradiction leads to the evasion of the rights of irregular migrants, even though in theory they are entitled to protection of international human rights law.

This raises certain tensions, as it seems that States use human rights as tools to expose and expel irregular migrants rather than to offer safeguards as solution for their situation. Hence, irregular migrants appear invisible in societies in terms of their ability to claim human rights or legal safeguard against the States.

This research concentrates on the dilemma of irregular migrants. It shows how in theory they have access to human rights provisions, but because international human rights law and national laws, such as migration laws overlap, they create legal tensions which lead to a legal vacuum where irregular migrants remain without any protection whatsoever. Access to human rights has an essential significance to irregular migrants, especially in cases where they need health care after their journey as well as during their stay.

I am studying the subject of the right to health on three different levels to see how the tensions affect irregular migrants' position in reality, on the international, regional and national levels. ICESCR Article 12, which states in its scope that *everyone* is entitled to the right to health provisions, offers the grounds for the study. However, in practice the situation may not be as straightforward when a State interprets the provision and considers *everyone* only those with a legal right to stay.

Preface

“Without papers you can, eat, sleep and walk but in a society you are nobody and nothing”

-Aicha, an undocumented migrant in Paris.

Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter for Human and Peoples' Rights
CESR	Committee of Economic, Social and Cultural Rights
CERD	Committee on the Elimination of the Racial Discrimination
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EU	European Union
ICERD	International Convention for Eliminating All Forms of Racial Discrimination
ICESCR	International Covenant of Economic Social and Cultural Rights
IOM	International Organization for Migration
OECD	Organization for Economic Co-operation and Development
UN	United Nations
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization

1 Introduction

1.1. Research question, purpose and background

Irregular migration is a growing problem across the globe; this raises concerns on economic, social and legal levels in terms of irregular migrants' legal place on the "no man's land". Irregular migrants are a group of people who are staying within the grey area of legal provisions. This affects their possibilities to have access to any safeguards during their journey in a State's territory. Their presence without a legal right to stay determines their belonging. International, regional and national responses are rather silent in trying to find solutions for irregular migrants' sojourn.

The research question arises from the concept of an irregular migrant. There is no clear or internationally accepted definition of irregular migration.¹ However, an irregular migrant is generally understood to be a person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country.² The definition also covers persons who have entered a transit or host country lawfully but have overstayed their visas or permits to stay, or who have taken up unauthorized employment. They are also called clandestine/undocumented or migrants in an irregular situation.³

These migrants do not have a legal status or a right to stay within the territory of one of the State Parties. They are excluded from legal provisions by being "forced" to stay in a certain illegal position. There seem to be tensions between international human rights law, which applies to every human being, and national laws, which in turn only apply to citizens and other people legally residing in a State's territory, not to irregular migrants. Regional level legislation further complicates the picture. The legal distress is that irregular migrants suffer from these tensions and there is no easy solution to the problem.

I will examine the issue in the light of the right to health, which is a recognized human right. Article 12 of the ICESCR specifically states that the right to health applies to *everyone*. The right has certain universal meaning but it is not met on the regional level nor on the State level where

¹International Migration Law, Glossary to Migration, published by International Organization of Migration (IOM) 2004.

²IOM 2004, *ibid*.

³Kostakopoulou, D, 'Irregular migration and migration theory: Making State Authorization Less Relevant', in Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Barbara Bogusz et al.(eds.) ,Martinus Nijhoff Publishers ,2004, pg41-57

the right to health is rather limited to concern “majorities” instead of “everyone”. This limitation originates from States’ sovereign right to control entry, residence and deportation.

I will take few steps in my research beginning with an introduction to the concept of the irregular migration, briefly describing how the status, residence and expulsion affect their situation. I will concentrate on examining the research problem on three different levels, international, regional and national. I will start with a closer look at the international human rights law system. Article 12 of the ICESCR will serve as an example of the right that establishes universal protection. In the second part of my thesis, I will introduce the European Union level in relation to irregular migrants’ situation. In the third part I will discuss the situation on the national level using Finland as a study example. My discussion will illustrate that irregular migrants’ abilities to claim their rights are practically diminished.

1.2 Nature of irregular migration

Traditionally, the dynamics of migration are explained on the grounds of migration theories, which concentrate on rationalizing migration movements via push and pull factors in contrast with cost and benefit factors.⁴ The nature of migration movements have changed from the traditional model, which was perceived as unidirectional and permanent, based on geographic, cultural, linguistic or historical motivation to diverse and complex movement with multiple directions and a temporary nature.⁵

Irregular migration challenges the traditional understanding of the migration phenomenon, since it focuses solely on the so-called grey area of migration, where State officials regulate the movement by means of expulsion orders.⁶ In certain theories, this type of migration can be understood as a by-product of migration laws, which are made to control migration.⁷ Reasons for this type of migration vary. It can be voluntary or motivated by economic conditions, such as lack of work possibilities in the country of origin, family reunification, education and globalization among others.⁸ By contrast,

⁴Franck Düvell and Bill Jordan, *Irregular Migration, The Dilemmas of Transnational Mobility*, 2002, pg.15-18, published by Edward Elgar Publishing Limited, UK, see also Elizabeth Guild, *Who is an Irregular Migrant?* In *Irregular Migration and Human Rights: Theoretical, European and International Perspective*, Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak(Eds.)Martinus Nijhoff Publishers Leiden/Boston 2004 pgs.4-28

⁵ *Migration and Right to Health A review of European Community Law and Council of Europe Instruments*, Doc. No 12. ed. Paola Pace, International Organization of Migration, see also *Tackling the Policy Challenges of Migration*, OECD report 2011

⁶Kostakopoulou, D, ‘Irregular migration and migration theory: *Making State Authorization Less Relevant*’, in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz et al.(eds.) ,Martinus Nijhoff Publishers ,2004

⁷ *ibid.*

⁸See *Supra* note 4

conflicts, poverty and environmental issues force involuntary migration.⁹ Regardless of the reasons for migrating, the consequences may cause serious harm to a migrant's physical and mental health.

Irregular migrants are often understood to be voluntary migrants, though some may be asylum seekers who have not applied for asylum or who have been denied asylum. Regardless of how one has settled upon an irregular situation, the access to the right to the highest attainable standard of health is often obstructed as a result of discrimination. An irregular migrant's status and social exclusion, discriminatory attitudes of local people and poverty have consequences on their mental and physical well-being.

Due to the problem that these people often live in hiding, there is no statistical data that could be used to comprehensively observe the movement but it is estimated that there are millions of people in irregular situations across the world.¹⁰

1.3. Importance of status to irregular migrants

It is said: "one of the most important distinctions in contemporary era is the one between those with legal migration status and those without it."¹¹ As was emphasized before, a legal presence establishes crucial value for a migrant. Therefore, it is relevant to examine the essential meaning of status as determining one's position in a society. Legal status grants access to the protection under human rights law as well as to fundamental provisions of States. Since it is under States' competence to designate the right to residence, irregular migrants are often excluded from legal protection on grounds of their illegal entry or stay. This leads them to the illegal position. They do not legally belong in the area where they are staying, but at the same time they cannot be protected by human rights. This highlights the contradiction where universal access to human rights, such as the right to health, is not recognized. Without legal status they are frequently excluded from the protection on State level and their access to human rights is limited. This limitation is seen as a distinction between foreigners and citizens, on whom the rights are ultimately conferred.

⁹*Ibid.*

¹⁰Clandestino Project; Undocumented Migration: Counting the Uncountable. Data and Trends Across the Europe, Project No. CIS8-044103, published by European Commission

¹¹Cathrine Dauvergne, Making People Illegal What Globalization Means for Migration Law 2008, quoting Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization, New York: Columbia University Press, 1996, pg.20

2 Irregular migrants and the right to health on the international level

On the international level the right to health is understood as fundamental to the way we perceive human rights that are based on the idea of a life in dignity.¹² By using the right to health as an example, my aim is to show how the essence of the right is to protect *everyone*. In practice, the accessibility to the right is actually limited by tensions at the different legal orders.

ICESER Article 12, defines the most comprehensive grounds to the right to health by “recognizing the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health.”¹³ The Committee of Economic Social and Cultural Rights (CESCR) has defined what is actually included under the scope of the right to health, as “underlying determinants of health”.¹⁴ The Committee’s statements are not legally binding but work as guidelines to the States.

These determinants include the right to safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health-related education and information, and gender-equality.¹⁵ The right to health is closely related to and dependent upon the realization of other human rights as stated in the International Declaration of Human Rights¹⁶, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, prohibition against torture, privacy, access to information, as well as freedoms of association, assembly and movement.¹⁷ These and other rights and freedoms address integral components of the right to health.¹⁸

According to the CESCR “States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying *or* limiting equal access for all persons, including prisoners or detainees, minorities, asylum-

¹²United Nations High Commissioner of human Rights (OHCHR) and World Health Organization (WHO), Factsheet No. 31, The Right To Health, 2008, printed at OHCHR Geneva

¹³See the Article 12 of the International Covenant of Economic Social and Cultural Rights, 16 December 1966, Entry into force 3 January 1976

¹⁴United Nation High Commissioner for Human Rights and WHO, The Right to Health, Factsheet No. 31, 2008, pg.4

¹⁵*Ibid.*

¹⁶Article 25 of the Universal Declaration of Human Rights (UDHR) states about the right to health as well that:”1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

¹⁷Committee of Economic, Social, and Cultural Rights, Substantive issues arising in the implementation of the International Covenant of Economic, Social and Cultural Rights, General Comment No. 14 (2000) Doc. E/C.12/2000/4, 11 August 2000

¹⁸CESR General Comment No.14, (2000) *ibid.*

seekers and illegal immigrants, to preventive, curative, and palliative health services; abstaining from enforcing discriminatory practices as a State policy...”¹⁹

The statements of the Committee underline four special elements that have to be ensured in State practice. As regards the right to health, it must be available; this means functioning public health and health care facilities, goods and services as well as programs, which have to be available in sufficient quantity within the State.²⁰ The committee thus takes into consideration the development level of the State party. The second requirement is accessibility. Health facilities, goods and services must be accessible to everyone without discrimination, within the jurisdiction of the State party.²¹ It is stated that especially the most vulnerable or marginalized sections of populations should have access to health care. The third element is acceptability: all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.²² The fourth and last element requires quality, which means that health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment.²³

The most critical components, according to ICESCR, in securing the right to health for all, are the principles of equal treatment and non-discrimination. CESCR states that “the principle of non-discrimination mentioned in Article 2(2) of the Covenant operates immediately and is neither subject to progressive implementation nor dependent on available resources.”²⁴ The Committee has also stated that “the ground of nationality should not bar access to the Covenant’s rights.”²⁵ Moreover it underlines that “covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, Stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”²⁶

Furthermore, even if Article 12 ICESCR grants a wide scope of provisions to *everyone*, it seems that only the people who have a legalized status in one of the State parties can attain them. However, as stated earlier, the scope of the right to health includes migrants regardless of their legal or immigration status. Thus the realization is impeded by the States’ legal limitations in health care, which cause certain barriers to irregular migrants because of their position as “illegals”.

¹⁹General Comment No.14(2000) para.34

²⁰*Ibid* para12(a)

²¹*ibid* para 12(b)

²² *ibid* para12.(c)

²³*ibid* para12(d)

²⁴CESCR General Comment No. 18 on the right to work UN Doc. E/C.12/GC/18 (2005),parag.33, see also General Comment No. 3 on the nature of State Parties’ obligations, UN Doc. E/1991/23 (1990), para.1,

²⁵CESCR General Comment No.20, Non-discrimination in Economic, Social and Cultural Rights,(art.2 para.2 of the ICESCR) UN Doc. E/C.12/GC/20, (2009) para.30

²⁶General Comment No. 20, (2009) Para. 30

2.1 States obligations and grounds for violations of the right to health

The right to health stipulates, as all human rights, three types of obligations on States parties.²⁷ These are the obligations to respect, protect and fulfil.²⁸ The obligation to respect requires States to restrain from interfering directly or indirectly with the enjoyment of the right to health for instance by discrimination.²⁹ The requirement to protect obligates States to take measures that prevent third parties from interfering with Article 12 guarantees.³⁰ Ultimately, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures for the full actualization of the right to health.³¹

One of the core principles is to ensure the right to access health facilities, goods and services on a non-discriminatory basis especially for vulnerable or marginalized groups.³² In particular the States are under obligation to respect the right to health. This means that States cannot deny, restrict or limit equal access to health care from anyone, including *illegal immigrants*. The health care provisions in question include preventive, curative and palliative health service. These provisions should not be withheld by any discriminatory State policy practices.³³

Violations of the right to health may occur in situations where the right to access health facilities, goods and services is denied to particular individuals or groups, as a result of *de jure* or *de facto* discrimination.³⁴ Violations also occur as if the access is intentionally detained or information, which is vital to health protection or if treatment, is misrepresented.³⁵

2.2. The core principles to protect equal access

As was established earlier, States have an obligation to respect, protect and fulfil the right to health. However, abovementioned legal tensions affect the accessibility of this right. On the one hand, the right to health is stated to belong to *everyone* including illegal migrants and it is stated that status does not matter in the international context. On the other hand, when the right to health is dealt with on the regional or national level, the matter of the sovereign rights of States arises. The contradicting effect is that States can refuse to comply with the right by justifying restrictions with State security. In general, human rights instruments contain two types of rights, such as

²⁷See *supra* note 22 para 33

²⁸*ibid.*

²⁹See *supra* note 22 para 33

³⁰*Ibid.*

³¹See *Supra* note 22 para 33.

³²See *supra* note 22 para 43 (a)

³³See *supra* note 22 para. 48

³⁴See *supra* note 22 *ibid.*

³⁵*ibid*

equal treatment and prohibition of non-discrimination. As was emphasized before, the prohibition of discrimination in the enjoyment of the right to health is stated in Article 2(2) of the ICESCR among other international provisions.³⁶

According to the ICESCR the general equality requirement stresses that *everyone* must be treated equally before the law, implying that all laws are applied equally to all people under the jurisdiction of the State without discrimination. This has significant effect on the irregular migrant's ability to take action in a State's territory. They may invoke actualization of the right to health even without a legal status. On the regional level the EU has also recognized the principle of equal treatment between persons under its jurisdiction.³⁷ In general, under international law, a violation of the principle of non-discrimination arises if equal cases are treated in a different manner. However, if discrimination has an objective or reasonable justification, such as national security or public health, or if the discriminative actions are proportional to the legitimate aim achieved, it may be allowed. These justifications are decided by the international supervision bodies and the European Court of Human Rights.

Equal treatment and prohibition of discrimination are core grounds on the international level for equal access to the enjoyment of the legal safeguards such as the right to health including also irregular migrants. Besides the international framework, the principles are recognized extensively on the national level.

As it has been established earlier in this study, the legal status of a migrant defines the position of a migrant in a legal environment even today. If a person lacks a legal status, legal provisions on the national level are rarely supportive of addressing equal rights to them but rather offer justifications for their discrimination. This is an important observation because the principle of non-discrimination is highlighted virtually in all legal practices, especially when enforcing the rights or duties of individuals.

³⁶ Article 1(1) of American Convention on Human Rights (ACHR), 22 November 1969, Article 2 of African Charter on Human and People's Rights (ACHPR), 27 June 1981, and Article 14 in the European Convention of Human Rights and Fundamental Freedoms, 4 November 1950. Thus the equal treatment provided in these instruments covers only rights set out in these instruments.

³⁷ European Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Adopted 29 June 2000.

2.2.1. Prohibition of discrimination of irregular migrants in relation to the right to health

On the grounds of Articles 2(2) and 3 of ICESCR, “any discrimination in access to health-care and underlying determinants of health is prohibited to means and entitlements for their acquisition. On the basis of; race, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, if these have the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.”³⁸ The list of discrimination elements here is broad, which in theory strengthens the level of protection for irregular migrants. In particular CESR stresses that even in times of severe resource constraints the vulnerable members of society must be protected.³⁹

The State parties have a special obligation to provide protection for those who do not have sufficient health insurance or access to health-care facilities. State parties are also obliged to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with the core obligations of the right to health. In addition inappropriate health resource allocation can lead to obvious discrimination.

As emphasized before, the prohibition of discrimination is one of the main principles in ensuring an equal right to health and equal health treatment of all the people on a State’s territory. In the context of irregular migrants, the equal treatment is not absolute since the issue concerns people who are not legally visible; therefore it is argued that they are not entitled to the same rights as the citizens or legal residents of the country. Discrimination occurs in different sectors and levels in societies: it can be either positive indirect discrimination, or negative direct discrimination based on character of the person on one or more of the prohibited grounds. However, in the context of this study, States seem to approve of discrimination when it is based on the legal right to stay in the country.

This contradiction makes the principle really twofold, meaning that the prohibition of discrimination has a certain double nature because it is linked to legal status. On the one hand, the principle guarantees equality to everyone by the very nature of the principle, which is especially important when a vulnerable group of people such as irregular migrants is concerned. On the other hand, discrimination may be justified, if the reasons comply with the tests of legality, necessity and proportionality in line with State practice, and also if the individual is expressly excluded from the scope of

³⁸See the Articles 2(2) and 3 of the ICESCR

³⁹The CESCR committee recalled Provision Stated in the General Comment No.3, The nature of States Parties obligations (art.2 par.1) 14.12.1990 parag.12

the application.⁴⁰ Therefore the principle makes a distinction between citizens and other people in that even if the States are obliged to provide access to the fundamental rights to everyone under their jurisdiction, they are also able to exercise positive discrimination on the grounds of national law. In addition, national law often requires its application to cover only people who are legally residing in the country. States are able to justify discrimination, based on the doubt that a person is threatening State security, public order or public safety.⁴¹ Nowadays this type of justification is unfortunately common. Discrimination against irregular migrants' is frequently based on illegality -residing without a "legal right"- and this seems to promote discrimination and denial of access to the right to health. However, from another perspective, granting irregular migrants the full range of socio-economic rights would place them in an equal position with regular migrants, if not with citizens.⁴² Denying a host State's right to discriminate against irregular migrants may again diminish the State's sovereign right to conceive and regulate its migration policies and actions at its borders.⁴³ This is thus a certain paradox, since the actual accessibility and enjoyment of the rights is dependent on the State's actions.⁴⁴

Concerning the treatment of foreigners, it is stated in the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) that States Parties are required to guarantee economic, social and cultural right, in particular the right to *public health, medical care*, social security and social services to everyone, without distinction as to race, colour, or national or ethnic origin.⁴⁵ The committee of CERD emphasizes the obligation of States to "respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services."⁴⁶ The committee also requires States to "Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health."⁴⁷

⁴⁰States are able to limit the scope of certain rights subject to certain restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others. See, for instance legal practice of European Court of human Rights.

⁴¹*Ibid.*

⁴²Dauvergne, 2008

⁴³*Ibid.*

⁴⁴See *supra* note 22 *ibid.*

⁴⁵See Article 5(e)(iv) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Adopted and opened for signature and ratification by General Assembly resolution 2106(xx) of 21 December 1965, entry into force 4 January 1969

⁴⁶Committee of the Elimination of All Forms of Racial Discrimination (CERD), General Recommendation No.30: Discrimination Against Non Citizens, 1.10. 2004, para.36

⁴⁷*ibid.*

2.3. Public health as a limitation on the scope of the right to health

Irregular migrants' health issues often raise concerns in terms of public health. Moreover, concerns are frequently expressed as to whether untreatable infectious diseases carried by irregular migrants, such as tuberculosis or HIV/AIDS, may pose a major risk for the health of the host population.⁴⁸ Therefore, it seems that the questions of the health issues revolve around "public health" concerns rather than the health of an irregular migrant.

Public health also appears to be one of the justification clauses of discrimination by which access to the right to health can be limited. CESCR has emphasized that the ICESCR's limitation clause is first and foremost intended to protect the rights of individuals rather than to permit the injunction of limitations by States.⁴⁹ The clause states that, "the State Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State. In conformity with the present Covenant,"the State may subject such rights only to such limitations as are determined by law, only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."⁵⁰

Accordingly, a State, which justifies an action or undertakes action in relation to health provisions covered by the right, on grounds of national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in the limitations clause.⁵¹ Such restrictions must be in accordance with the law, including human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued and strictly necessary for the promotion of general welfare in a democratic society.⁵²

2.4 Implications

To emphasize the tensions and contractions more clearly I am taking a closer look at the right to health in its international scope. According to the scope of the right to health on the international level, it obligates States

⁴⁸The Council of Europe has expressed that "given the inevitable interdependence between the health of migrants and their host countries' populations, this issue is of general concern and should be given high importance". See Council of Europe, Committee on Migration, Refugees and Demography. Retrieved August 19, 2003 from <http://assembly.coe.int/Document/WorkingDocs/doc00/EDOC8650.HTM>

⁴⁹See General Comment No 14 (2000) parag.28

⁵⁰See Article 4 of the ICESCR

⁵¹*Ibid.*

⁵²See *supra* note 20 parag. 28.

since it has components which are legally enforceable.⁵³ It also shows that there are certain restrictions that States have to obey to avoid violations of the right. The only allowance has been made in relation to the developing States by recognizing their limited resources in that they may determine to what extent they can guarantee the economic and social rights to non-nationals.⁵⁴

One essential element of the Covenant is that it does not obligate States explicitly under the scope of the rights. It lists justifications by which States have the possibility to limit the scope of the rights. It is stated that "...the State may subject such rights only to such limitations as are determined by law only in so far as at this may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society."⁵⁵ By using this indication and the requirement of "the right to the highest attainable standard of health", which is to be understood to take into account both the individual's biological and socio-economic preconditions and the State's available resources, may have serious consequences for irregular migrants in practice, as it may prevent them from accessing health care services.⁵⁶

States are able to invoke their own legislation, where the basic principles for the access to health care are laid.

The actual access may be based on the legal right to stay in a State's territory under its jurisdiction, and this distinction obviously separate the irregular migrants from the citizens. This tension is also visible between human rights law and national law, where the applicability of human rights law is limited by national law, which regulates the treatment based on the sovereign rights. This again shows how the legal structure creates a gap in the legal protection, which leaves one group of people out of the protection of the legal safeguards.

However, the Covenant is significant in that it recognises the right to health for *everyone* meaning explicitly all the people who are present in a State's territory and not only within a State's jurisdiction. This reflects the universal understanding of human rights without making distinctions between different people. In contrast, the Covenant may appear as a tool for the States when they only use it for highlighting their sovereign powers. By placing irregular migrants under the migration law provisions, the States are able to justify their discrimination on grounds of illegal stay. This affects those in an irregular situation as they are a vulnerable group.

In particular, the complex relationship between international human rights law and national law is shown in the practice of the CESCR. It is pushing

⁵³For instance CESCR has established that the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions. See the General Comment 14 fn.1

⁵⁴Article 2(3) of the ICESCR

⁵⁵See the Article 4 of the ICESCR, (1966)

⁵⁶See General Comment No. 14(2000) para.9

for universal applicability of the right to health, but only to an extent to which States are willing to accommodate human rights law. This does not bar them from making a distinction between their own citizens or legal residents and others on the basis of sovereign right to control migration. Mirroring the issue on the national level, a State's practice should fall in line with its human rights obligations. However, there are justifications by which it can limit the access to actual rights, by using them as tools for enhancing national legislative powers against human rights law. The following chapter tries to emphasize this paradox of protection gap by illustrating practices on the regional level.

3 Irregular migration and right to health on the regional level

At the moment it is estimated that several million people are staying in irregular situations in the territory of the European Union.⁵⁷ This has certainly raised tremendous concerns on political, social and economical levels since there is no common comprehensive legislative instrument which could determinate the actions, limitations, and measurements needed to administrate and control the phenomenon of irregular migration.⁵⁸ As was explained in chapters one and two, one may understand the irregulars' place in a State's territory as a rather complex issue: irregular migrants are seen at the intersections of different jurisdictions. This leaves them in a protection gap, meaning that they may have no access to any safeguard on the regional nor on the national level. One may see a parallel here; as the traditional legal concept of territorial ownership has created the right to control one's land and population, the EU has transformed the idea of territoriality. The EU is founded on the same territorial idea but it owns a right as one entity to control the populations in its territory and at its frontiers, beyond the borders of a single State. The territory in question has externalized, from one State territory to cover several States. This brings one more complex factor into our discussion of tensions.

As a legal system, EU law orders, in line with international human rights framework, legal obligations to the member States. The principles that describe the particular relationship between EU and its member States are direct effect and primacy, and by these the EU has a certain prevailing position over national legislations.⁵⁹

Irregular migrants are often seen as illegal immigrants in the territory of the EU. This is shown by aspirations, which are concentrating merely on, removing the migrants rather than on recognizing them as right-holders. Irregular migrants' situation places them in an unwanted "illegal" position which results from the Stockholm Programme 2009⁶⁰. This policy sets the principles for taking effective actions to "fight" illegal migration, by placing

⁵⁷Clandestino project, see *supra* note 20.

⁵⁸Recommendation 1577/(2002) Creation of a charter of intent on clandestine migration, Parliamentary Assembly, adopted 23 September 2002, available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1577.htm>

⁵⁹The general principles are decided in the EC Court Case law see The Flaminio Costa V. E.N.E.L, ECR 585 (6/64) 15 July 1964, One of the landmark cases decide about supremacy of the EC law. See also NV Algemeine Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen,(Van Gend En Loos) Case 26/62, 1963. In this Case, the ECJ identified three situations necessary to establish direct effect of primary EU Law. The situations are: the provision must be sufficiently clear and precisely stated; it must be unconditional and not dependent on any other legal provision and it must confer a specific rights to the citizens upon which a citizen can base a claim.

⁶⁰Council of the European Union, The Stockholm Programme- An Open and Secure Europe serving and protecting the citizens, Doc.No.17024/09, Brussels, 2 December 2009, 6.1.6..p.66

the issue on the “Area of Freedom, Security and Justice”.⁶¹ The terminology used clearly reflects the attitudes towards irregular migrants in present EU politics. This can be seen in the recent legislative measures, which increased restrictions on borders and whose aim is to control and enhance deportation actions in the territory. The regional level shows in practice how the International human rights law is not able to secure the rights of these migrants. Or at least so it seems, when the legal measures concentrate on expulsion rather than on regularization procedures.

The harmonization of migration policies has a deep impact on the irregular migrants’ situation. In particular the aforementioned “fight” against illegal migration affects the situation of the irregular migrants, in terms of their health conditions. By legislative measures these migrants are forced to live underground and threatened with expulsion, which is an obvious obstacle in the accessibility to human rights. This may have serious implications for their health.⁶² It seems that actual restriction lies on the legal level, where irregular migrants are invisible in the sense that they do not have access to rights because of restrictive immigration policies.

Irregular migrants’ position differs notably from that of EU citizens’ because of the legal structure, which gives primacy to protect the legally residing people. As was discussed before in section 2.2.1. above, the discrimination clause is not always able to prohibit the action. To be able to participate in the life of a member State one needs to be able to enjoy the right to live in such a State having legal residency. In particular the right appears to apply only to the citizens of the Union.⁶³ The Citizenship of the Union is defined as conferring “on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.”⁶⁴ This freedom of movement is granted only to an EU citizen who is defined as “a national of a member State.”⁶⁵ The differentiation highlights the situation of irregular migrants,

⁶¹The Treaty of Amsterdam amending the Treaty of European Union, the Treaties establishing the European Communities and certain related acts, 1997, O.J.C. 340/1 (Treaty of Amsterdam was signed on October 2, 1997, and brought into force on May 1, 1999. It provides the legal basis for gradual implementation of an Area of Freedom, Security and Justice.

⁶²Sylvie Da Lomba, *Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England*, in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz et al. eds., Martinus Nijhoff Publishers, 2004 pg 363-386

⁶³See section 1 of the Directive 2004/38/EC Of The European Parliament and of The Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

⁶⁴*Ibid.*

⁶⁵See The Maastricht Treaty, 1992, which first defined the EU citizenship. See also The Lisbon Treaty Article 8 which states that; “In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and

who are held as non right-holders in the EU territory, lacking full access to certain rights such as the right to health.⁶⁶

The EU as an entity is required to respect human rights obligations that are stated also in The Treaty of the Union, which underlines the basic values that the Union is founded on.⁶⁷ The Union has also recognized and adopted the right to health as a part of its own Human Rights Charter, with Article 35 specifically covering the right to healthcare. The next section will establish the right to health of irregular migrants, more specifically under the EU jurisdiction.

3.1. Irregular migrants and the right to health under EU Law framework

The right to healthcare is specifically stated in Article 35 of the Charter of the fundamental rights of the European Union, which states that “*everyone* has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.”⁶⁸ According to international human rights obligations, all EU member States have recognized that right of *everyone* has the right to the “Highest attainable standard of physical and mental health” and to receive medical care in the event of sickness or pregnancy. These including the provisions of Article 12 of the ICESCR among other international obligations.⁶⁹

However, through lack of implementation of these standards and unwillingness in ratifying or acceding to new instruments, the member States exhibit resistance to recognizing the application of human rights standards to migrants, especially to irregular ones. This leads to the virtual exclusion of irregular migrants from the scope of human rights standards. Moreover, certain international obligations highlight the importance of nationality as a necessary condition for being entitled to medical assistance on equal terms with nationals and on that account the States are obstructing

shall not replace it. Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Brussels 30 April 2008, 6655/1/08, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>

⁶⁶*Ibid.*

⁶⁷See the Article 6 of the European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing the European Community, published in the Official Journal of the European Union, 29.12.2006 Doc. C321 E/7, and The Charter of Fundamental Rights of the European Union, Article 35, Doc. 2000/C 364/01, published in the Official Journal of the European Communities, 18.12.2000, C 364/03

⁶⁸See the Article 35 of Charter of Fundamental Rights of European Union (2007/C 303/01)

⁶⁹Román Romano-Ortuno, Access To Health Care for Illegal Immigrants in the EU, should we be concerned? Published in European Journal of Health Law, 2004, pg 245-272, 2004, published by Martinus Nijhoff publishers 2004

irregular migrants' access health care provisions.⁷⁰ However, the actualization of the right to health is left under the Member State's national legislation.⁷¹

The only coherent system in the field of health in the EU is the European health insurance policy system. This system gives EU citizens the right to access the health care services in other EU countries with the same costs as nationals.⁷² The actualization of the right to health is determined on the grounds of legal "belonging" in the EU through being a citizen of the EU, which in practice defines the people who are qualified to have rights in the territory of the EU. Irregular migrants may have access to health care on two occasions: (i) in life threatening emergencies; or (ii) in case of an infectious disease which poses a threat to public health. However, the emergency health care is expensive since irregular migrants do not have insurance security.⁷³ This emphasizes the problem of the tensions; since the irregular migrants do not legally belong on the territory of the EU they are excluded from the scope of the safeguards, which seem to be granted only to citizens.

⁷⁰See Article 1 of the European Convention on Social and Medical Assistance, Council of Europe 1953, and Article 13 of the European Social Charter, Council of Europe 1961, which explicitly require nationals of Contracting Party be *lawfully* present in the territory of another Contracting Party if they are to be entitled to medical assistance in equal terms with nationals. In addition also the Article 8 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, United Nations' Declaration 1985, States that only aliens *lawfully* residing in the territory of a State may enjoy the right to health protection and medical care.

⁷¹The Member States are required to adopt of The European Social Charter, which is a Council of Europe treaty. It guarantees social and economic human rights. It was adopted in 1961 and revised in 1996. The European Committee of Social Rights rules on the conformity of the situation in States with the European Social Charter, the 1988 Additional Protocol and the Revised European Social Charter. The right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights, as interpreted by the case-law of the European Court of Human Rights, by imposing a range of positive obligations designed to secure the effective exercise of that right.

⁷²The 1991 Maastricht Treaty gave the Union new competences in public health and more scope for international cooperation. Joint action with the Member States was identified for health promotion and health protection, the subsidizing of medical and health policy research, and the establishment of international information systems. See European Parliament, Directorate General for Research Working Paper Health care Systems In the EU a Comparative Study, Public Health and Consumer Protection, SACO 101, 11-1998 available at: http://www.europarl.europa.eu/workingpapers/saco/pdf/101_en.pdf However, the rules on social security coordination do not replace national systems with a single European one. All countries are free to decide who is to be insured under their legislation, which benefits are granted and under what conditions. The EU provides common rules to protect your social security rights when moving within Europe. See the internet page of European Commission: <http://ec.europa.eu/social/main.jsp?langId=en&catId=859>

⁷³Da Lomba et al. see *supra* note 62

The general opinion of the Council and the Parliament of the EU emphasizes that irregular migrants shall be treated on the national level respecting human rights standards and that States should realize the rights based approach in this respect.⁷⁴ However, even public concerns have risen regarding the situation of irregular migrants. It is acknowledged that these migrants, who fall out of the scope of existing health and social services, exemplify a major problem in the area of health-care provision on the national level. The member States are not willing to extend full health care coverage to irregular migrants. This is explained by “humanitarian hostility” which means that the States are concerned that if they would fully actualize the right to health to irregular migrants, it would increase the migration flow.⁷⁵ However, this assumption lacks evidence. When irregular migrants choice to leave to the destination country, the decision does not depend on the benefits of different welfare systems.⁷⁶

3.2. Equal treatment and Non-discrimination in the EU

The principle of non-discrimination is one of the main principles of the EU legislation. The existing Article 12 of the treaty of the European Community prohibits discrimination on the grounds of nationality. The legal basis is seen as being present in order “...to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁷⁷ The Union is ostensibly enhancing the protection of equal treatment, though in practice it is shown that the particular protection is rather conferred on the citizens of the European Union.

⁷⁴See *Ibid.* as well as Resolution 1509 (2006) Human Rights of Irregular Migrants, Recommendation 1755 (2006), Human Rights of Irregular Migrants, Recommendation 1211 (1993), on Clandestine Migration, traffickers and employers of clandestine migrants, Recommendation 1325 (1997) Trafficking in women and forced prostitution in Council of Europe member States, Recommendation 1449 (2000) On Clandestine migration from the South of Mediterranean into Europe, Recommendation 1467 (2000) on Clandestine migration and the fight against traffickers, Recommendation 1545 (2002) on a Campaign against trafficking in women and Recommendation 1618 (2003) Migrants in irregular employment in the agricultural sector of southern European countries.

⁷⁵Romano- Ortuno, 2004, pg 249

⁷⁶ *ibid.*

16. Robinson, V. and Segrott, J. (2002) Understanding the decision-making of asylum seekers (Home Office Research Study 243). London: Home Office Research, Development and Statistics Directorate, p. 50. Available online: <http://www.homeoffice.gov.uk/rds/pdfs2/hors243.pdf>

⁷⁷Treaty establishing the European Community (Nice consolidated version)Part One: Principles, Article 13, The Lisbon Treaty broadens the scope of these prohibitions on discrimination by adding positive obligations to observe equality and equal treatment in all Union action.

3.3. Expulsion as a States' measure to remove "illegal" immigrants

Deportation deteriorates irregulars' basic rights.⁷⁸ Threat of expulsion widens the rights gap creating a stronger distinction between EU citizens and irregular migrants. On the regional level, the "fight" against illegal migrants shows their situation as invisible "others" without a right to have rights. As regards the right to health, the matter raises various concerns relating to their physical and mental health. Living in continuous fear of being exposed and returned to the country of origin or transit leaves irregular migrants more likely to stay underground and avoid any health services, even if they are in serious need of treatment.

The European Court of Human Rights certainly addresses the importance of the actualization of the rights but at the same time it is very careful not to cross the line in State's rights to order deportation. However, risk of expulsion may also lead to a violation of Article 3 of the ECHR. In certain cases, the denial of health care may amount to an infringement of Article 3 on grounds that it prohibits torture and degrading and inhumane treatment, although the threshold of the requirements is set high. ECtHR has stated that "the types of treatment which fall within the scope of Article 3 of the Convention is ill-treatment that attains minimum level of severity and involves actual bodily injury or intense physical or mental suffering."⁷⁹

Again according to the Court, if treatment humiliates or debases an individual, shows a lack of respect for or diminishes, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and thus falls within the protection of Article 3.⁸⁰ States may place irregular migrants under the threat of violation of Article 3, while they wait to be deported. Moreover "the suffering which flows from naturally occurring illness, physical or mental may be covered by Article 3, where it is, or risks being exacerbated by treatment, whether flowing from conditions of detention, expulsion, or other measures, for which the authorities can be held responsible."⁸¹

The positive obligations of the States to ensure the enjoyment of human rights arise in three situations: (i) where the State is under the duty to protect the health of a person deprived of liberty; (ii) where the State is required to

⁷⁸Linda Bosniak, The basic rights of short-term immigrants also need protection, Boston Review, May/June 2009,pg.19

⁷⁹See ECtHR Ireland V. the United Kingdom, para 66, ECtHR V. v. The United Kingdom no.24888/94, ECtHR Pretty v. The United Kingdom no.2346/02, Judgment 29 April 2002,para.50-52

⁸⁰See ECtHR Price V. The United Kingdom no.33394/96, para 24-30, and Valasinas v. Lithuania 44558/98, para 117

⁸¹See ECtHR D v. The United Kingdom (1997), ECtHR Keenan v. The United Kingdom no. 27229/95, 3 April 2001, para 110-111, and ECtHR Bensaid v. The United Kingdom no.44599/98,paras. 32-40

take steps to ensure that persons within its jurisdiction are not subjected to torture or other prohibited treatment at the hands of private individuals; and (iii) where the State proposes actions in relation to an individual which would result in the infliction of inhuman or degrading treatment on him.⁸² However the problem concerns the fact that human rights norms are immensely important to migrants and the difficulties of meaningfully extending these standards to those without migration status. “Illegal” migration reveals a vital problem with being merely a human being if the rights are based on the legal status.⁸³

3.4. Implications

As regards territoriality and sovereign rights, the European Union is actually no different from other nation-States. The distinction between EU citizens and third country nationals can be seen as a continuum of inequality, which prevents irregular migrants from accessing the right to health by placing them in the position of non right-holders. It may seem that the process of enhancing human rights protection is not at the centre of legislative discussion in the EU. The States' interests become rather evident from the documents, as the so called Returns Directive 2008/115/EC proves.⁸⁴ The Directive illustrates the States' agenda of eliminating the presence of illegal migrants rather the barriers in human rights protection. The system forces irregular migrants to live underground and it seems that no measures are taken to improve their ability to access healthcare benefits.

⁸²See *supra* note 79, *Pretty v. the United Kingdom*,

⁸³Dauvergne 2008, ch 3 pg. 35

⁸⁴See European Council and Parliament Directive 2008/115/EC, on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union, 24.12.2008

4 The right to health and irregular migrants in the national context

This section will examine the irregular migrants' situation and treatment in Finland within the national legal framework and international human rights obligations. The complexities in the different legal systems create a problematic situation for irregular migrants in terms of their situation in these different orders. As stated earlier in the sections 2. and 3.1., these migrants are often in an utmost need of health care and protection, but since they do not have a legal right to stay, they do not have concrete rights in the States' practice. As it is discussed before, the reason why this particular group of migrants are suffering is the rights gap caused by the tensions at the different legal orders. Even if the right to health is provided under the international human rights law as an equal right to everyone, in the regional practice the accessibility to the right appears only in that extent in which the Member States define the scope of the human rights. In EU practice, the right holders are EU citizens and legal residents. At the State level, in practice, the system is similar as will be seen from the following country study.

4.1. Irregular migration on the national level

The measures used to control migration in Finland are among others the visa requirements, carrier sanctions and effective control at borders.⁸⁵ In terms of the strict residence permit policy of the State has ensured that the number of "unwanted" people will remain low. In many cases, migrants need to apply for a residence permit even before entering the State, so that the State can ensure that the person is eligible for residency in its territory. The economic situation and political environment define what kind of migrants the State is ready to receive. The official course of conduct in Finland is "to prefer educated workers, researches or students and quota refugees by definition, who are able to integrate but who are in need of international protection."⁸⁶

However, even if the State is trying to de facto control the movement of people, the possibilities to fully exercise the power of decision are limited. There are always "unwanted" people who enter the State's territory who may have to be granted a permit of residence on grounds of international protection.⁸⁷ It is estimated that there are a few thousand people living in an irregular situation in Finland.⁸⁸

⁸⁵ Alien Act 2004, 30.4. 2004/301, 30 April 2004

⁸⁶ Eva Nykänen, *LAWFUL, UNLAWFUL AND SOMETHING BETWEEN*-The Aliens and membership in the case of foreigners who have entered the country as asylum-seekers, (abstract in English), Oikeus 2008 (37) ; 3 pg 345-364

⁸⁷ See *Supra* note 83

⁸⁸ According to National bureau of investigation there was approximately 6888 persons illegally staying in 2009, *Laittoman maahanmuuton torjunta-ohjelma 2010-2011, Poliisin ylijohdon julkaisusarja*, 3.11.2009 pg. 9

The access to the right to health, as well as to the other rights, depends on sojourn. Different grounds for residence entitle immigrants to different rights and freedoms.⁸⁹ Therefore, the legal status given also entitles a person to public services.⁹⁰ The minimum standards for the international protection are defined by the international human rights obligations as well as international and regional standards.⁹¹ Residence permit has a significant impact not only on the individual but also on the society they are about to be members of. In a national context the legal right to stay is essential to a migrant in order to be able to build a meaningful life in the new country.

The basic principle of the migration law in Finland is that all residents who are staying in the country shall have a residence permit.⁹² Without a residence permit, one is seen as a right-holder under migration law only when faced with the threat of expulsion. In practice, when issuing the cases of aliens the State has to take into consideration the norms under the Alien Act in addition to international obligations.⁹³

4.2. Equal treatment, access to rights and prohibition of discrimination in the national context

The principles of equal treatment and prohibition of discrimination play a remarkable role as the ground principles for human rights and fundamental right actualization in the Finnish legal practice. The principle of equality is stated under Article 6 of the Constitution of Finland.⁹⁴ Article 6 States that: “Everyone is equal before the law. No one shall be, without an acceptable reason, be treated differently from other persons on the grounds of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided more detailed by an act.”⁹⁵ According to the Equal treatment provisions the Non-Discrimination Act applies to discrimination based on ethnic origin concerning among others, “social welfare and health care services; social security benefits or other forms of support, rebate or advantage granted on social grounds...”⁹⁶

⁸⁹Nykänen, 2008 supra note 121

⁹⁰ ibid

⁹¹ Finland has ratified a wide range of human rights treaties, including, Bill of Rights, ECHR

⁹²Nykänen, 2008

⁹³Ibid.

⁹⁴See section 6 of the Constitution of Finland,

⁹⁵See the section 6§ of the Constitution of Finland 11 June 1999, Unofficial translation available at: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>

⁹⁶See the Non- Discrimination Act 21/2004, section 2§

However even if it seems that the treatment of aliens is founded firmly on equity, the limitations to these equal treatment provisions state that the Act does not apply to the “*application of provisions governing entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law.*”⁹⁷ This means in general that the prohibition of discrimination is not preventing the State from placing its nationals in a privileged position in comparison to aliens.

4.3. The right to health and irregular migrants in the national context

In state practice irregular migrants should have access to the rights provided in the ICESCR as right to health. However, in Finland the right is associated with permanent residence, which means that a person has to have a registered hometown in Finland to be able to access health care services.⁹⁸ The right of access is decided on the municipal level.⁹⁹ To be able to have a hometown requires intent for the permanent residence and a residence permit for at least a year.¹⁰⁰ It is common that the residence permits are admitted for shorter periods than for a year, for instance temporary residence permits.¹⁰¹ In these cases, access to economic, social and cultural rights may become more difficult. It follows that in practice the actualization of the basic rights requires a legal right to stay in Finland, which again leaves irregular migrants out of the scope of the protection on the national level.

The socioeconomic rights are enshrined in the constitution. The requirements for fulfilment of the rights highlight the life of human dignity by taking into account health, housing, nourishment, work a livelihood, education, rest and leisure.¹⁰² In addition, the conditions include the requirements of the international obligations.

⁹⁷See the Non-Discrimination Act 21/2004, (as amended by several acts including 84/2009) section 3§ (2, unofficial translation available at: <http://www.finlex.fi/en/laki/kaannokset/2004/en20040021.pdf>)

⁹⁸ See Kotikuntalaki , 11.3.1994/201, enforced 1.6. 1994, section 2§, no translation available

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹Alien Act 2004, section 11§ states about requirements of entry into Finland, see also section 33§ which states about types of residence permits

¹⁰²Riitta-Leena Paunio, former Parliamentary Ombudsman of Finland, Social Rights as Human Rights, JFT 5, 2010, pg 477-481

4.3.1. Legal Practice in Finland in relation to the right to health

Finland has ratified the ICESCR¹⁰³ and it is obligated under the Covenant's provisions to respect the right to health as it is stated in the Covenant.

4.3.1.1. "The Health Care Act"

The objective of the Health Care Act is to:

- 1) promote and maintain the population's health and welfare, work ability and functional capacity, and social security;
- 2) reduce health inequalities between different population groups;
- 3) ensure universal access to the services required by the population and improve quality and patient safety;
- 4) promote client-orientation in the provision of health care services; and
- 5) improve the operating conditions of primary health care and strengthen cooperation between health care providers, between local authority departments, and with other parties in health and welfare promotion and the provision of social services and health care.¹⁰⁴

The object of the Act is to *reduce health inequalities between different population groups*, as well as ensure *universal access to the services*. This has direct implications for irregular migrants in terms of their right to health care in Finland. However, in practice in Finland many of the requirements remain unfulfilled due to limitations under national laws. Furthermore, the Non-Discrimination Act does not prevent Finland from placing its nationals in a privileged position in comparison to irregular migrants, which may legally close them out of the scope of the health care provisions. A vulnerable group of irregular migrants, a small number in Finland but the most in need of health care provisions, is left without safeguards, as the health care provisions are rather privileged to citizens.

The public health care system is fragmented and the access to health care is linked to the decision of municipal authorities about residence in the particular municipality.¹⁰⁵ The terms for medical care are stated in the Health Care Act section 24§, which states that "Local authorities shall provide *their residents* with access to medical care services..."¹⁰⁶ Furthermore, the residency is connected to the legal right to reside, the

¹⁰³Finland ratified ICESCR in 19 August 1967

¹⁰⁴See Laki Terveystieteidenhuollosta "The Health Care Act", No.1326/2010, Issued in Helsinki 30 December 2012, section 2§, English translation available at : <http://www.finlex.fi/en/laki/kaannokset/2010/en20101326.pdf> , note legally binding only in Finnish and Swedish

¹⁰⁵Kotikuntalaki §4 "Municipality act" available in Finnish and Swedish at: [http://www.finlex.fi/fi/laki/ajantasa/1994/19940201?search\[type\]=pika&search\[pika\]=kotikuntalaki](http://www.finlex.fi/fi/laki/ajantasa/1994/19940201?search[type]=pika&search[pika]=kotikuntalaki)

¹⁰⁶See the Health Care Act, section 24§ about Medical Care

requirements of which are stated in the Alien Act provisions.¹⁰⁷ Irregular migrants' access to the services is therefore difficult. Emergency health care is the only health care service that is available to *everyone*.¹⁰⁸ However, in case of emergency, the patient is asked for personal identification for billing.¹⁰⁹ They never have easy access to the rights, which, in theory, should be available to them.

4.4. Implications

The question of irregular migration remains open and has not inspired as much public discussion in Finland as in the other European countries where the issue illustrates a growing problem of illegal stay. It is emphasized that binding the economic, social and cultural rights to the legal right to stay may result in concrete violations of the human rights on the national level in terms of equal access. People in need of health care must be treated with human dignity. In practice, the States are able to decide the right-holders in their territory and to legally exclude irregular migrants from the protection of human rights, based on State's sovereign rights to order entry, residence and expulsion in their territories. This creates certain tensions at the different legal orders, where no one is winning but the irregular migrants are losing by being left out of the scope of the legal safeguards.

¹⁰⁷See the Alien act 2004, requirements for residence, states in the Section 11§

¹⁰⁸See The Health Care Act, section 50§, which defines the grounds for emergency health care and states that the emergency health care "including urgent oral health care, mental health care, substance abuse care, and psychosocial support shall be provided for patients regardless of their place of residence."

¹⁰⁹ *ibid*

Conclusion

The tension between universally applicable rights where *everyone* is entitled and rights only for the legally entitled citizens or legal residents can be found at each level in the study, on the international, regional and national level. There is no straightforward solution to the problem. Human rights law as a solution for the protection problem and irregular migrants' possibility to voice out their vulnerability seem to remain a political discussion without an alternative. Irregular migrants have gained increasing attention on the international and national levels as a vulnerable group who are living in the grey area of legal protection.

Their situation can seem to be caused by these tensions at different legal orders which overlap with each other and thus push the irregular migrants out of the scope of the legal protection. As has been seen with the right to health the right is recognized as a universal human right when it comes to its applicability to everyone without discrimination. However, the States understand the right as concerning only their citizens and since irregular migrants do not own a legal right to reside, they cannot be legally bound to protection. This is shown also by the States' ability to expel unwanted people under their migration laws. It seems that irregular migrants are entitled to the human rights protection only via national legislations which often restrict access to the human rights such as the right to health for irregular migrants based on their "illegal" conduct.

Hannah Arendt wrote about the refugees' right to have rights already in the aftermath of the Second World War and her view seems relevant in the current situation; "no one seems to be able to define what these general human rights, as distinguished from the rights of citizen really are". She insists: "Equality in contrast to all that is involved in mere existence, is not given to us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equals as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."¹¹⁰ Irregular migrants may be perceived as a group with the most right to freedom of movement although they are without an actual right to enjoy the realization of this or any other right because they are not seen as equals.

¹¹⁰Hannah Arendt, *The Origins of Totalitarianism*, pg. 278. New York: Harcourt Brace Jovanovich(1968)

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