



IRREGULAR MIGRANTS' RIGHT TO HEALTH: LEGAL AND  
PRACTICAL DYNAMICS IN INTERNATIONAL AND EUROPEAN  
HUMAN RIGHTS LAW - A CASE STUDY OF SPAIN

by Tatia Lomtadze

LLM Human Rights Final Thesis

SUPERVISOR: Professor Inga Winkler

Central European University

Private University Quellenstrasse 51-55, 1100

Vienna, Austria

# Abstract

There have always been ethical, practical and legal challenges towards irregular migrants and the ambiguity continue to exist when discussing their right to health. Particularly, the disparity regarding the interpretation of the right to health within the International and European Human Rights Law has real implications for the lived experiences of irregular migrants as they often find themselves targeted by State-imposed restrictive measures, especially during times of crisis. In 2012, Spain introduced austerity measures through the enactment of Royal Decree-Law 16/2012, which significantly restricted healthcare access for irregular migrants. As a result, thousands of irregular migrants lost access to medical services overnight. From 2012 until 2018, Spain saw an unprecedented social mobilisation at the domestic level and coordinated advocacy within the International and European Human Rights bodies, urging Spanish Government to change its healthcare policy from exclusion to inclusion.

Considering this context, this research aims to analyze how right to health is protected under International and European Human Rights Law and to what extent Human Rights bodies can address the practical and legal challenges surrounding irregular migrants' right to health.

Based on the analysis of the case study, this research finds that, the role of the Human Rights bodies in these legal frameworks are indeed important but not always decisive to uphold irregular migrants' right to health from arbitrary limitation. Thus, when coordination at the international level combines with the social mobilisation at the domestic level this really enhances the pressure on the States and positively affects the outcome of the process.

Keywords: irregular migrant, right to health, healthcare access, advocacy, social mobilization.

# Acknowledgement

To the invaluable people in my life,

There are no words sufficient to express my deepest gratitude to each of you who has played a significant role in my journey. First and foremost, I owe immense gratitude to Prof. Winkler, whose guidance and profound insights have been invaluable in the process. Your mentorship showed me the path when I was lost.

To my beloved family and friends, your endless support, encouragement, and belief in my abilities have made every achievement possible. This journey would have been incomplete without your love and presence by my side.

I am also thankful to all those, who knowingly or unknowingly, became a part of my story. Your contributions have enriched my experiences, and I learned a lot from you.

Lastly, I extend my heartfelt appreciation to CEU and Wien for providing an environment where I could thrive, learn, and grow. The experiences and memories collected during my time here will forever hold a special place in my heart.

Thank you, from the bottom of my heart!

# Table of Contents

List of Abbreviations.....	1
Introduction.....	2
Chapter 1: Irregular Migration - A Theoretical Overview .....	6
1.1 The Concept of Migration.....	6
1.1.1 Irregular Migration and Irregular Migrants.....	8
1.1.2 Irregular Migrants under Spanish Legislation.....	12
Chapter 2: Sovereignty in International Law vis-a-vis Irregular Migrants' Rights .....	14
2.1 The Concept of Sovereignty in Relation to Human Rights Obligations .....	15
2.2 Sovereignty's Grip on Irregular Migrants' Rights .....	16
Chapter 3: Irregular Migrants and the Human Right to Health .....	21
3.1 Irregular Migrants' Right to Health in the International Human Rights Law .....	22
3.2 Irregular Migrant's Right to Health in the European Human Rights Law .....	28
3.2.1 European Social Charter and Divergence between the ECSR, the ECtHR and the CESCR approaches.....	34
Chapter 4: Irregular Migrants' Right to Health on the National Level – Case Study of Spain.....	40
4.1 Spain's Healthcare Policy towards Irregular Migrants .....	40
4.2 Spanish RDL 16/2012 in the context of International and European Human Rights Law .....	44
4.3 Social Mobilisation in Spain – Measures Beyond the Legal Constraints .....	49
4.4 Determinants of the Right to Health of Irregular Migrants in Spain – Situation After 2018.....	56
Conclusions.....	60
References.....	62

## **List of Abbreviations**

CESCR - Committee on Economic Social and Cultural Rights

ECHR - European Convention on Human Rights

ECSR - European Committee of Social Rights

ECtHR - European Court of Human Rights

ESC - European Social Charter

ICESCR - International Covenant on Economic Social and Cultural Rights

UDHR - Universal Declaration of Human Rights

UN - United Nations

WHO - World Health Organization

# Introduction

“I am a Migrant” is a powerful social campaign facilitated by the International Organization of Migration (IOM)<sup>1</sup> which shares the courageous stories of migrants, whether regular or irregular. Each participant in the campaign narrates their journey, explaining how they left their home countries and became migrants. These stories highlight the immense courage it takes to undertake such journeys, with some traveling 3,500 kilometers, others 8,000, and some 500 kilometers. Therefore, this campaign reminds us that behind every migrant there is a unique and brave story and defining individuals solely by one aspect of their identity, such as their migrant status, oversimplifies their complexity, leading to stereotypes, discrimination, and injustice.<sup>2</sup>

The right to health for irregular migrants has significant importance for several reasons. First, when examining core concerns related to irregular migrants’ rights, it is evident that one of the most pivotal is their right to health in host countries. This stems from various factors, including the tendency for irregular migrants to engage in low-wage, high-risk jobs without proper safety measures and regulatory oversight.<sup>3</sup> Due to their legal status, irregular migrants often face unsafe working conditions and lack healthcare access, which puts their lives at constant risk as they fear deportation if they report issues.

---

<sup>1</sup> “I AM a MIGRANT,” n.d. <https://www.iamamigrant.org/>.

<sup>2</sup> Maurizio Ambrosini and Minke H.J. Hajer, *Irregular Migration* (Springer Nature; Springer International Publishing, 2023), 7.

<sup>3</sup> Paola Pace, ed., *Migration and the Right to Health: A Review of International Law* (n.d.), [https://publications.iom.int/system/files/pdf/iml\\_19.pdf](https://publications.iom.int/system/files/pdf/iml_19.pdf), 15.

Other crucial aspect is that achieving health equity, and reducing health inequality, is a primary objective of the 2030 UN Agenda for Sustainable Development Goals.<sup>4</sup> However, achieving universal health coverage remains practically impossible without integrating irregular migrants into the healthcare system. Thus, linkage between health equity and the inclusion of irregular migrants is not just a policy issue rather it is a matter of human rights and social justice.

Given the significant concerns outlined above, this thesis examines how do International and European Human Rights Law interpret and protect the right to health for irregular migrants and what is the role of the Human Right bodies within these legal frameworks to safeguard this right. This investigation is conducted through the analysis of the Spanish healthcare policy, where in 2012 the Spanish Government activated Royal Decree Law 16/2012 which practically limited irregular migrants' access to healthcare services in 2012 and after Spain saw an unprecedented social mobilisation and advocacy within the International and European Humann Rights bodies, irregular migrants regained access to healthcare coverage.<sup>5</sup>

To analyze the said topic, the research question of this paper is defined as follows: how do International and European Human Rights Law interpret and protect the right to health for irregular migrants, and what roles do Human Rights bodies play within these legal frameworks to address practical and legal challenges concerning irregular migrant's right to health at the domestic level? Drawing upon a case study of Spain's 2012 decision to limit irregular migrants' access to healthcare, followed by policy changes in 2018 which restored their access, what insights does this offer into the broader implications and challenges surrounding healthcare access for irregular migrants at the domestic level?

---

<sup>4</sup> Michael Marmot and Ruth Bell, "The Sustainable Development Goals and Health Equity," *Epidiology* 29, no. 1 (January 1, 2018): 5-7, <https://doi.org/10.1097/ede.0000000000000773>.

<sup>5</sup> Bruquetas-Callejo, María and Roberta Perna, "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field," *South European Society and Politics* 25, no. 1, <https://doi.org/10.1080/13608746.2020.1769342>.

In order to answer research question, this thesis is divided in four chapters:

1. The first chapter establishes the theoretical framework and the type of migration relevant to this thesis. Given the lack of a universally accepted definition of irregular migration, it also provides a working definition suitable for the thesis. Additionally, it discusses the appropriate terminology for addressing irregular migrants and outlines who is considered as irregular migrant under the Spanish legislation.
2. The second chapter investigates the complex interplay between sovereignty, migration control, and human rights. In this Chapter, I analyse the role of sovereignty in the face of irregular migrants' rights and examine how the interpretation of the sovereignty principle in the context of immigration, influences the implementation of human rights policies for irregular migrants.
3. Third chapter explores if there is an established understanding of the right to health for irregular migrants in the International and European Human Rights Law and how the interpretations of the human rights bodies within these legal frameworks either guarantee or limit the right to health for irregular migrants.
4. The fourth chapter is about the case study of Spain, where I analyze how the adopted interpretations about the irregular migrants' right to health within the International and European Human Rights Law impacted irregular migrants' healthcare access and what role Human Rights bodies played within International and European Human Rights law in realizing irregular migrants' right to health at the domestic level.

In the first three chapters of my research, I employ a doctrinal legal analysis as a research method to systematically analyze primary and secondary legal sources, review relevant case law, international treaties, domestic legislation and compare interpretations from different jurisdictions and in the fourth chapter, where I analyze the case study of Spain, I employ a socio-legal research method.



Analyzing a specific case study, such as the Spanish context regarding irregular migrants' access to healthcare, presents several limitations that must be acknowledged. First, it is challenging to identify the direct causal link between the policy changes and the grassroots movements, civil society actions and advocacy efforts. Thus, based on the scholarly analysis, reports and online sources, this thesis only explores the coordinated actions of the Human Rights bodies and social mobilisation in Spain. And secondly, this thesis does not delve into the legal analysis of the New Royal Decree of Spain.

This thesis contributes to critically analyze how in the absence of the established understanding of the right to health for irregular migrants between International and European Human Rights Law, can States implicitly use legal frameworks to restrict irregular migrants' healthcare rights and avoid providing them with more comprehensive protection guarantees under the International Human Rights Law. By examining the Spanish case study, this research offers a new insight how the right to health for irregular migrants can be protected when coordination of the Human Rights bodies at the International and European level combines with the social mobilisation at the domestic level.

# Chapter 1: Irregular Migration - A Theoretical Overview

In this thesis, the right to health for irregular migrants stands as a fundamental concept. Thus, the primary question that emerges when analyzing how do International and European Human Rights Law safeguards this right, centers on the very definition of migration itself.

In view of that, the initial section utilising migration theories, will explore the concept of migration. Additionally, since there is not universally accepted definition of the irregular migration or its fundamental concept,<sup>6</sup> given section establishes working definition of irregular migration as relevant to this thesis. Finally, it will address the suitable language to employ when referring to irregular immigrants.

## 1.1 The Concept of Migration

Characterizing migration is a controversial endeavour. Various definitions exist, and as Kok suggests, migration can be best understood as “the crossing of spatial boundaries” by one or more individuals as they “involved in a change of residence”.<sup>7</sup> Although, this definition may seem superficial at the first glance, the author asserts that there are actually numerous complexities and a long-standing theoretical debate surrounding the concept.<sup>8</sup>

Malmberg asserts that migration is inextricably linked to both time and space (“migration unfolds in time and space”)<sup>9</sup>, indicating that the concept is delineated by specific geographical

---

<sup>6</sup> Runde, Daniel F., Erol K. Yayboke, and Carmen Garcia Gallego. “Introduction: Why the Focus on Irregular Migration.” *Out of the Shadows: Shining a Light on Irregular Migration*. Center for Strategic and International Studies (CSIS), 2019. <http://www.jstor.org/stable/resrep22576.4>.

<sup>7</sup> Kok, Pieter. “The Definition of Migration and its application: Making Sense of Recent South African Census and Survey Data”. *Southern African Journal of Demography* 7, no. 1 (1997): 20. <http://www.jstor.org/stable/20853242>.

<sup>8</sup> Ibid.

<sup>9</sup> Malberg 1997, as cited in King, 2012, 7.

distances and spatial parameters.<sup>10</sup> Similarly, Shaw (1975) offers a traditional definition, describing migration as the enduring movement of individuals across significant distances (“migration is the relatively permanent movement of persons over a significant distance”).<sup>11</sup> This underscores the importance of considering spatial dimensions, such as distance, and temporal aspects, including the duration of residence, when understanding migration dynamics. King echoes this perspective and emphasize that understanding migration requires considering certain core elements<sup>12</sup> and migration is defined against “thresholds of distance” and “time in migration”.<sup>13</sup> Thus, migration theory, as elucidated by Malmberg, Shaw, and King, emphasizes the interconnectedness of time and space in defining migration, underscoring the significance of geographical distance and temporal duration as fundamental aspects shaping migration dynamics.

The scope of this thesis is limited to international migration, which is defined as the process of individuals “moving across borders”,<sup>14</sup> and the former inherently involves “a triangular relationship between a migrant, a State of origin, and a State of destination”<sup>15</sup>. The provided definition of international migration in this thesis, aims to explain the complex legal dynamics inherent in the trilateral relationship between migrants, their States of origin and receiving States. Furthermore, the latter serves to establish a precise scope and framework for analyzing the legal rights and obligations surrounding the health right of irregular migrants in the context of their movement across sovereign borders.

---

<sup>10</sup> Russell King, “Theories and Typologies of Migration: An Overview and a Primer Willy Brandt Series of Working Papers in International Migration and Ethnic Relations” (Malmö Institute for Studies of Migration, Diversity and Welfare (Mim, 2012), 7.

<sup>11</sup> Robert P. Shaw, *Migration Theory and Fact* (Philadelphia: Regional Science Research Institute, University of Pennsylvania, 1975).

<sup>12</sup> King, 7.

<sup>13</sup> Cwerner, 2001, as cited in King, 2012, 7.

<sup>14</sup> Chetail, Vincent. *International Migration Law*. Oxford Scholarly Authorities on International Law. Oxford: Oxford University Press, 2019, 4.

<sup>15</sup> Ibid.

Moreover, the multifaceted nature of migration, which encompasses various aspects such as definitions, causes, and consequences, is mirrored in the classification of migrants and their diverse attributes.<sup>16</sup> In particular, the nature of migratory movements leads to varying definitions of migrants,<sup>17</sup> although given the research topic of the thesis and considering all the points mentioned above, the primary focus of the thesis will be on the irregular migrant group as the central concern.

### 1.1.1 Irregular Migration and Irregular Migrants

This research places significant emphasis on individuals categorized as *irregular migrants* within its personal scope. Describing irregular immigration and identifying the specific individuals who fit this category is a complex task that lacks a precise definition.<sup>18</sup> Hence, defining precisely what constitutes irregular immigration and which immigrants fall under this definition is challenging<sup>19</sup> and despite its prevalence, there is a not universally accepted definition of the term or its fundamental concept.<sup>20</sup> However, the International Organization for Migration (IOM) characterizes irregular migration as movement occurring outside the established regulatory frameworks of the sending, transit, and receiving countries.<sup>21</sup>

In essence, as Ambrosini and Hajer suggests, the distinction between legal and illegal status can be blurred due to factors like changes in immigration laws, employment regulations, or

---

<sup>16</sup> Peter Scholten Editor, *Introduction to Migration Studies - An Interactive Guide to the Literatures on Migration and Diversity*, IMISCOE Research Series, n.d., 112, 2022. <https://link.springer.com/book/10.1007/978-3-030-92377-8>.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ambrosini, Maurizio and Hajer, Minke H.J., *Irregular Migration* (Springer Nature; Springer International Publishing, 2023., 2023), 15, <https://library.oapen.org/bitstream/handle/20.500.12657/63574/978-3-031-30838-3.pdf?sequence=1>.

<sup>19</sup> Ibid., 15.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid., “Key Migration Terms,” International Organization for Migration (IOM), <https://www.iom.int/key-migration-terms>.

personal circumstances, therefore some immigrants may find themselves in a grey area of legality, neither fully authorized nor undocumented.<sup>22</sup> Hence, irregular migration remains a widely misinterpreted and inadequately documented occurrence,<sup>23</sup> although the reason for this ambiguity is quite straightforward: the term “illegal stay” encompasses a variety of scenarios.<sup>24</sup> These include migrant workers without required work permits, rejected asylum seekers, visa overstayers, and foreign students who failed to extend their residence permits. Each of these situations carries distinct legal and humanitarian implications.<sup>25</sup>

Before examining the Spanish case study, it is crucial to understand how international legal standards shape our perceptions and address the rights and responsibilities of irregular migrants globally.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), stands out as the most exhaustive global agreement addressing the rights of migrant workers.<sup>26</sup> It represents the newest addition to the group of core international human rights conventions, collectively constituting the United Nations human rights treaty framework.<sup>27</sup> According to Article 5 (1) (a) of the ICMW, migrant workers and members of their families “are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of

---

<sup>22</sup> Ambrosini, Maurizio and Hajer, Minke H.J., *Irregular Migration* (Springer Nature; Springer International Publishing, 2023., 2023), 15-17, <https://library.oapen.org/bitstream/handle/20.500.12657/63574/978-3-031-30838-3.pdf?sequence=1>.

<sup>23</sup> Runde, Daniel F., Erol K. Yayboke, and Carmen Garcia Gallego. “Introduction: Why the Focus on Irregular Migration.” *Out of the Shadows: Shining a Light on Irregular Migration*. Center for Strategic and International Studies (CSIS), 2019. <http://www.jstor.org/stable/resrep22576.4>.

<sup>24</sup> Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczyk, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, vol. 7, Immigration and Asylum Law and Policy in Europe, n.d., 18.

<sup>25</sup> Ibid.

<sup>26</sup> Edelenbos, Carla. “The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”. *Refugee Survey Quarterly* 24, no. 4 (2005): 93. <http://www.jstor.org/stable/45054041>.

<sup>27</sup> Ibid.

employment pursuant to the law of that State and to international agreements to which that State is a party”. Thus, given definition leads us to the assumption that legal migration is equal to “documented migration/migrants with necessary and valid travel documentation“ following the law requirements of the receiving State. Alternatively, Article 5 (1)(b) indicates that migrant workers and members of their families “are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article”.<sup>28</sup> Following this, it is clear that the crucial factor of the Convention lies in the authorization granted by the receiving State. Specifically, a regular migrant is one who has been duly authorized by the receiving State to enter and remain within its territory, thereby operating within the confines of domestic law, whereas an irregular migrant lacks such authorization and exists beyond the scope of the host State’s legal framework.

Although Spain, the case study for this research, has not ratified the convention, the ICMW’s definition remains a crucial legal parameter for distinguishing between regular and irregular migrants.

Furthermore, Spain as a Member State of the EU, should adopt appropriate laws to ensure consistency with the EU directives, including those pertaining to migration and border control. One significant directive is the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Given directive in its Article 3 paragraph 2 defines “illegal stay” as “the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfil the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member

---

<sup>28</sup> UN General Assembly, “International Convention on the Protection of the Rights of All Migrants and Members of their Families”, 18 December 1990, A/RES/45/158.

State”.<sup>29</sup> If we look to this definition from the legal perspective, the latter describes “illegal stay” only in negative terms.<sup>30</sup> Particularly, rather than attributing illegal stay to active misconduct, the definition emphasizes non-compliance with the specific legal standards.<sup>31</sup> Therefore, as Ambrosini and Hajer asserts given approach has profound implications for the legal treatment and perception of irregular migrants residing within the EU.<sup>32</sup>

Scholars and experts consider that using terms such as “illegal immigrant” or “clandestine” is contrary to human dignity.<sup>33</sup> This presumption is based on the idea that no individual can be labelled as illegal or clandestine.<sup>34</sup> Domestic laws of the receiving States influence the status of irregularity where immigrants enter, reside or work.<sup>35</sup> Thus, the status of the irregular migrant emerges from the systemic influences, such as law, border policy and visa regulations of the receiving State, rather than being an inherent or inevitable condition of the people concerned.<sup>36</sup> Defining individuals as “*illegal*” disregards their humanity, and migrants are human beings with inherent rights regardless of their status.<sup>37</sup> Moreover, in General Comment No. 2, CMW emphasizes that the term “*in an irregular situation*” or “*non-documented*” is the correct terminology and the Committee advises against using the term “*illegal*” because it can stigmatize these individuals by implying they are associated with criminal activity.<sup>38</sup>

---

<sup>29</sup> Council Directive 2008/115/EC of 16 December 2008 on common standards and procedure in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

<sup>30</sup> Ambrosini, Maurizio and Hajer, Minke H.J., *Irregular Migration* (Springer Nature; Springer International Publishing, 2023.), 16.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., 7.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Russell King, “Theories and Typologies of Migration,” Willy Brandt Series, 2012, 6.

<sup>37</sup> Khalid Koser, *International Migration: A Very Short Introduction* (Oxford University Press, 2016), 54.

<sup>38</sup> General comment No. 2, on the rights of migrant workers in an irregular situation and members of their families, August 28, 2013, UN Doc. CMW/C/GC/2 para 4.

In summary, this study suggests that there is no universally accepted definition of irregular migration, and the terminology commonly used to describe individuals in this situation is not comprehensive. Hence, throughout this study, we will refer to these individuals as being in an “irregular condition/situation” or as “irregular immigrants”.

### 1.1.2 Irregular Migrants under Spanish Legislation

This section examines Spanish laws regarding irregular migrants, clarifying the legal definition of an irregular migrant in Spain.

Irregular immigration is regulated in the Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration (original language title: Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social).<sup>39</sup> The former is amended by Organic Laws 8/2000 of 22 December, 11/2003 of 29 September, 14/2003 of 20 November and 2/2009.<sup>40</sup>

Article 49 of the Aliens Act determines what constitutes serious violations under the legislation. From the legal text of the given provision, being irregularly present on Spanish territory is defined as “not having obtained or having expired for more than three months the extension of stay, the authorization of residence or similar documents, when they are enforceable, and provided that the person concerned has not requested the renewal of the same in that period, is perceived as a serious violation of the law”.<sup>41</sup> Hence, from the essence of the provision three

---

<sup>39</sup> Jefatura del Estado, “Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.” (n.d.), <https://www.global-regulation.com/translation/spain/1453904/law-organic-4-2000%252c-of-11-january%252c-on-rights-and-freedoms-of-foreigners-in-spain-and-their-social-integration.html>.

<sup>40</sup> The European Migration Network (EMN), “Practical Measures to Reduce Irregular Immigration - Spain,” n.d., 14, [www.emnspain.gob.es/documents/392158/520788/EMN-EN-Irregular-Immigration.pdf/325601ac-2d9f-ef3a-012c-de09ffd89603?version=1.0&t=1645798159280&download=false](http://www.emnspain.gob.es/documents/392158/520788/EMN-EN-Irregular-Immigration.pdf/325601ac-2d9f-ef3a-012c-de09ffd89603?version=1.0&t=1645798159280&download=false).

<sup>41</sup> Jefatura del Estado, “Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.” (n.d.), Article 49, <https://www.global->



primary categories of irregular migrants emerge: a) Individuals who legally entered Spain but have not obtained permission to extend their stay; b) Individuals who entered Spain illegally; c) Individuals who have not been able to renew her residence permit.<sup>42</sup>

Therefore, in Spain irregular migrant group include three major categories and in line with the EU acquis on irregular migration, Spanish domestic legislation addresses the issue of irregular migration.

This chapter analysed the fundamental concepts and legal frameworks on migration. It explored the complexities of migration theories and established the working definition of the term irregular migration and irregular migrant under the International Human Rights Law. Furthermore, before zooming in on the case Study of Spain, represented chapter also investigated how Spanish legislation interpret irregular migrant. The next chapter explores the complex interplay between sovereignty, securitization of migration and irregular migrants' rights.

---

[regulation.com/translation/spain/1453904/law-organic-4-2000%252c-of-11-january%252c-on-rights-and-freedoms-of-foreigners-in-spain-and-their-social-integration.html](https://www.regulation.com/translation/spain/1453904/law-organic-4-2000%252c-of-11-january%252c-on-rights-and-freedoms-of-foreigners-in-spain-and-their-social-integration.html).

<sup>42</sup> Ibid.

## Chapter 2: Sovereignty in International Law vis-a-vis

### Irregular Migrants' Rights

This chapter investigates the legal implications of sovereignty and State authority concerning fundamental rights of irregular migrants. At the heart of this discussion lies the tension between the sovereign prerogatives of States to control their borders (often justified by the public safety to regulate migration flows) and the obligation stemming from the ratified treaties to uphold the universal dignity and rights of all individuals,<sup>43</sup> regardless of their legal status.<sup>44</sup> By exploring these dynamics, this chapter argues that the securitization of migration has significant implications for the rights of irregular migrants and national security-based responses to migration is prioritized over protecting their fundamental rights.

In discussing this issue, a key concern to be addressed in this chapter is the specific consideration of sovereignty in relation to human rights obligations concerning irregular migrants. Specifically, by drawing standards from the developments in international, European and EU law, this chapter will investigate to what extent are irregular immigrants afforded protection while residing in contravention with legal provisions within the territory of the destination country.

---

<sup>43</sup> Christopher Greenwood, "Sovereignty: A View from the International Bench," in *Sovereignty and the Law: Domestic, European and International Perspectives*, ed. Richard Rawlings, Peter Leyland, and Alison Young (Oxford University Press, 2013), 267 <https://doi.org/10.1093/acprof:oso/9780199684069.003.0014>.

<sup>44</sup> O'Cinneide, C. (2020). *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*. In: Spencer, S., Triandafyllidou, A. (eds) *Migrants with Irregular Status in Europe*. IMISCOE Research Series. 61, Springer, Cham. [https://doi.org/10.1007/978-3-030-34324-8\\_4](https://doi.org/10.1007/978-3-030-34324-8_4).

## 2.1 The Concept of Sovereignty in Relation to Human Rights Obligations

In scholarly discourse, sovereignty is understood as follows: “Each State has the right to regulate its own public order, and to that end it is entitled to legislate for everyone within its territory”.<sup>45</sup> This traditional view of sovereignty emphasizes the State’s autonomy and control over its internal affairs however, sovereignty entails more than just the exercise of power. It is perceived as an essential, defining trait and the inherent quality of a State.<sup>46</sup> As Fabri proposes, sovereignty should be construed not as power but as freedom: the liberty of a State to utilize its available powers according to its discretion.<sup>47</sup> This prompts us to reconsider sovereignty as a concept closely connected with the State’s ability to exercise autonomy and self-determination. Nonetheless, in the *Palmas Islands* case sovereignty over a territory is characterized as exclusive, but not unlimited.<sup>48</sup>

Moreover, in international law, the State holds the highest legal authority, and there exists no superior legal entity capable of compelling a State to enter into agreements with other States or groups of States.<sup>49</sup> The primary sources of international law, treaties, and customary international law, both stem from the independent will of sovereign States.<sup>50</sup> This is particularly evident with treaties, which are agreements voluntarily negotiated and ratified by States.<sup>51</sup> In the context of multilateral treaties, unless “expressly prohibited”<sup>52</sup>, States have the right to

---

<sup>45</sup> Vaughan, Lowe; Staker, Christopher. “Jurisdiction” In *International Law*, edited by Malcolm D. Evans, 329. Oxford, UK: Oxford University Press, 2003.

<sup>46</sup> Hélène Ruiz Fabri, “Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?,” in *Human Rights, Intervention, and the Use of Force*, ed. Philip Alston and Euan Macdonald (Oxford University Press, 2008), 34, <https://doi.org/10.1093/acprof:oso/9780199552719.003.0002>.

<sup>47</sup> Ibid.

<sup>48</sup> Greenwood, “Sovereignty: A View from the International Bench,” 250,

<sup>49</sup> Ibid., 258.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

attach reservations when ratifying or acceding to a treaty.<sup>53</sup> Thus, when a State chooses to join a pact or treaty, it does so voluntarily, exercising its sovereignty and acting with full awareness of their own interests and objectives<sup>54</sup> and by this ratification or accession, States willingly give up a portion of their sovereignty, allowing for the establishment of international frameworks and institutions to govern certain aspects of their conduct.<sup>55</sup>

Thus, while contemplating this dynamic, it is crucial to acknowledge the principle of sovereignty as a guiding force shaping national policies, even in the face of international human rights obligations. As Angeleri observes, sovereignty and human rights are often presented as “contrasting concepts”, particularly in the context of irregular migrants.<sup>56</sup> This prompts us to explore further the complex relationship between State sovereignty and the protection of human rights, raising critical questions about the extent to which States are willing to compromise their autonomy in pursuit of international norms and standards.

## 2.2 Sovereignty’s Grip on Irregular Migrants’ Rights

Irregular migrants often endure numerous challenges and rejections due to their undocumented status.<sup>57</sup> Their intense desire to avoid deportation to their home countries forces them to endure considerable hardships.<sup>58</sup> It is widely recognized that States are entitled to regulate and combat illegal migration, the former is also guaranteed by the international instruments, which provide States with the means to take measures against irregular migration. On an international level, two major documents are identified as means to combat illegal migration. Particularly, the “UN

---

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., 259.

<sup>55</sup> Ibid.

<sup>56</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 15.

<sup>57</sup> International Commission of Jurists, *Migration and International Human Rights Law, A Practitioners’ Guide*, 2014, 35.

<sup>58</sup> Ibid.

Protocol against smuggling of migrants, by land, sea or air” (UN Smuggling Protocol).<sup>59</sup> According to the Article 2 of the Protocol, the objective of the given document is “to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants”<sup>60</sup>. Thus, the Protocol reaffirms the sovereign right of every State and indicate that countries are required to enforce border control and impose criminal penalties for immigrant smuggling, while ensuring that the human rights of irregular immigrants are respected.<sup>61</sup> Nevertheless, the primary focus of the UN Smuggling Protocol is the prevention and combatting of illegal migration while protection of rights of the smuggled migrants (e.g., right to life) is secondary aim which is pursued through two main approaches: by implementing prohibitions, such as criminalizing human smuggling, and by conducting search and rescue operations when a risk to life has already arisen.<sup>62</sup> Hence, the primary focus on criminalization and border control, coupled with the secondary status of human rights protections, questions how effectively the UN Smuggling Protocol succeeds in protecting the rights of irregular migrants while reaching its objective. The issue is further complicated by State sovereignty, particularly States often invoke national security interests and prioritizes immigration control over international human rights obligations.<sup>63</sup> E.g, in *Saadi v. Italy*, the United Kingdom, as a third-party intervener, argued that “the climate of international terrorism” challenges the appropriateness of the ECtHR’s current jurisprudence

---

<sup>59</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, January 28, 2004, United Nations, UN Doc. A/55/383.

<sup>60</sup> Ibid.

<sup>61</sup> Andreas Schloenhardt, Francesco Calderoni, Joseph Lelliott, and Bettina Weißer, eds., *UN Convention against Transnational Organized Crime: A Commentary* (Oxford: Oxford University Press, 2023), <https://doi.org/10.1093/law/9780192847522.001.0001>.

<sup>62</sup> Stoyanova, Vladislava. “The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling.” *German Law Journal* 21, no. 3 (2020): 438. <https://doi.org/10.1017/glj.2020.22>.

<sup>63</sup> Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak, eds., *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, 7:287, 2004

on States' non-refoulement obligations under Article 3 of the ECHR. This, undermines national interests in favor of human rights obligations.<sup>64</sup>

On the EU level, one of the vivid examples of the EU efforts to combat irregular migration is Directive 2008/115/EC. The aim of the legislation is to establish consistent rules and procedures across the EU for the return of irregular migrants, particularly it addresses detention periods, re-entry bans, and incorporates various legal protections.<sup>65</sup> The Directive requires Member States to prioritize ensuring facilitated return and enhanced cooperation in negotiating this legislation. The former emphasizes the importance of a unified Community approach to managing migration.<sup>66</sup> To effectively set the scene on the EU level concerning the rights of irregular migrants, several provisions from the Return Directive are particularly important. Primarily, the pre-removal detention provisions within the Return Directive demonstrate the EU's strict approach towards irregular migrants, who, despite not being convicted of any crime, can be deprived of their liberty for durations longer than the prison sentences of many convicted criminals.<sup>67</sup> Specifically Article 15(1) of the Return Directive stipulates that detention should be employed solely as a measure of last resort and for the shortest possible duration. It mandates that the detention period must be both necessary and proportionate to the individual circumstances of each case, ensuring that any extension is justified and subject to continuous reassessment. This aligns with the principles set forth by UN human rights mechanisms, including the Working Group on Arbitrary Detention (WGAD) and the Special Rapporteur on

---

<sup>64</sup> Saadi v. Italy, No. 37201/06, ECtHR.

<sup>65</sup> Anneliese Baldaccini, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive," *European Journal of Migration and Law* (2009) 1-17, n.d., 2, 2009.

<sup>66</sup> Ibid.

<sup>67</sup> Alan Desmond, "The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative", *Human Rights Law Review* 16, no. 2 (2016): 253.

the Human Rights of Migrants (SRHRM).<sup>68</sup> However, Article 15(5) of the Return Directive fails in demonstrating that pre-removal detention is of the shortest possible duration within the EU and instead, it permits detention for up to twelve months, which contradicts the principle of minimizing detention periods for irregular migrants.<sup>69</sup> Thus, the Directive has enabled MS to lower their standards regarding extending maximum periods for irregular migrants undergoing return decisions.<sup>70</sup> E.g Spain in 2011 has extended the period for detention from 40 to 60 days.<sup>71</sup> Furthermore, as Desmond notes, EU policy documents including Commission Communications have faced significant criticism from the European Economic and Social Committee (EESC) regarding their tendency to link irregular migration with crime and security.<sup>72</sup> The EESC has pointed out that the Commission's approach undermines the fundamental rights of irregular migrants particularly, the EESC noted "linking immigration with security, and separating it from the protection of fundamental rights, sends the wrong political message".<sup>73</sup>

This chapter investigated the complex interplay between sovereignty, migration control, and human rights. By scrutinizing various international instruments and EU Return Directive, it has become evident that efforts to combat irregular migration frequently prioritize border control and national security over human rights considerations. This discussion sets the stage for the

---

<sup>68</sup> Izabella Majcher, *The European Union Returns Directive and Its Compatibility with International Human Rights Law, Analysis of Return Decision, Entry Ban, Detention, and Removal*, vol. 45, Immigration and Asylum Law and Policy in Europe, n.d., 419, 2020.

<sup>69</sup> Ibid.

<sup>70</sup> Alan Desmond, "The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative", *Human Rights Law Review* 16, no. 2 (2016): 253.

<sup>71</sup> Jefatura del Estado, "Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social." (n.d.), <https://www.global-regulation.com/translation/spain/1453904/law-organic-4-2000%252c-of-11-january%252c-on-rights-and-freedoms-of-foreigners-in-spain-and-their-social-integration.html>.

<sup>72</sup> Alan Desmond, "The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative", *Human Rights Law Review* 16, no. 2 (2016): 254.

<sup>73</sup> Ibid.

next chapters, which will critically examine the conventional framing of irregular migrants as mere subjects of immigration enforcement policies. Such a perspective overlooks their inherent humanity and obligation to protect their socio-economic well-being. Therefore, the next step towards addressing the main research question is to analyze a catalogue of international treaties focused on recognizing and realizing the socio-economic rights of irregular migrants, with particular emphasis on their right to health.



## Chapter 3: Irregular Migrants and the Human Right to Health

Chapter 2 examined how the interpretation of the sovereignty principle in the context of immigration, influences the implementation of human rights policies for irregular migrants. This chapter explores if there is an established understanding of the right to health for irregular migrants in the International and European Human Rights Law and how the interpretations within these legal frameworks either guarantee or limit the right to health for irregular migrants. This examination is crucial because some legal sources and respective bodies that interpret human rights provisions, often create an ambiguous legal framework concerning the scope of fundamental rights available to irregular migrants.<sup>74</sup> This fragmentation may provide States with a justification to limit irregular migrants' right to health, as will be explored in the case study of Spain.

Moreover, CESCR in its 2017 statement on State duties towards refugees and migrants under the ICESCR indicates that “all people under the jurisdiction of the State concerned should enjoy Covenant rights”,<sup>75</sup> however, as discussed in this chapter, this ethos is not fully enshrined in the European Human Rights Law, which creates ambiguity concerning the exact scope and depth for the right to health for irregular migrants.

Considering all mentioned above, this chapter critically examines the complex interplay between legal frameworks and the lived experiences of irregular migrants in realising their

---

<sup>74</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 55.

<sup>75</sup> CESCR, “Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights”, E/C.12/2017/1, 13 March 2017. <https://www.refworld.org/policy/statements/cescr/2017/en/117624>.

right to health. By analysing these complexities, the chapter contributes to the understanding of the intersection between migration status and healthcare rights.

### 3.1 Irregular Migrants' Right to Health in the International Human Rights Law

This section analyzes how certain treaties on the international level uphold the right to health for “everyone” *inter alia* irregular migrants. Spain has signed and ratified all the documents reviewed here (except ICMW), obligating it to safeguard the right to health for irregular migrants through legislation and policy.

Under international law, the right to health is widely acknowledged as a fundamental human right.<sup>76</sup> In 1946, the World Health Organization (WHO) adopted its Constitution, which established that achieving the highest possible standard of health is a fundamental right for every individual, regardless of race, religion, political belief, or socioeconomic status.<sup>77</sup> In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR), which in Article 25(1) implicitly includes the right to health, although it is not explicitly stated as a specific right.<sup>78</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>79</sup> provides the clearest and most complete definition of the right to health among major international human rights instruments.<sup>80</sup> Specifically, Article 12 (1) of the ICESCR recognizes “the right of everyone to the enjoyment of the highest attainable standard

---

<sup>76</sup> John Tobin, “Charting the History of the Right to Health.” In *Oxford University Press eBooks*, 27, 2011. <https://doi.org/10.1093/acprof:oso/9780199603299.003.0002>.

<sup>77</sup> Constitution of the World Health Organization (WHO), 14 UNTS 185 (1946).

<sup>78</sup> John Tobin, “Charting the History of the Right to Health” in *Oxford University Press eBooks*, 17 (2011), <https://doi.org/10.1093/acprof:oso/9780199603299.003.0002>.

<sup>79</sup> UN General Assembly. International Covenant on Economic, Social and Cultural Rights. United Nations Treaty Series, vol. 993, p. 3, December 16, 1966.

<sup>80</sup> Audrey R. Chapman, “Conceptualizing the Right to Health: A Violations Approach,” *Tennessee Law Review* 65 (1998): 389, 397.

of physical and mental health” and paragraph 2 mandates that State parties must undertake measures to “achieve the full realization of this right”. Now focusing more closely on the right to health of irregular migrants, Article 12 (1) of the ICESCR enshrines the universal application of the right to health by explicitly using the term “everyone”.<sup>81</sup> This inclusive language, coupled with the Preamble’s assertion that “these rights derive from the inherent dignity of the human person,” emphasizes that human rights are not determined by factors such as *inter alia* citizenship.<sup>82</sup> Thus, this implies that socioeconomic rights are universal, inalienable, and integral to human dignity.

For achieving the “full realization of this right”, under Article 12 of the ICESCR, and according to the General Comment No. 14 (paras 30-33)<sup>83</sup> States do have three obligations: to respect, protect, and fulfill the right to health.<sup>84</sup> The obligation to respect requires States to avoid (direct or indirect) actions that undermine health rights, like denying or restricting equal access to healthcare on discriminatory grounds.<sup>85</sup> The obligation to protect mandates States to prevent third parties from harming individuals’ health.<sup>86</sup> The obligation to fulfill, as detailed in Article 2(2)(d) of the ICESCR, requires States to adopt measures ensuring everyone can access necessary health resources and opportunities.<sup>87</sup>

To thoroughly explore the right to health for irregular migrants, specific General Comments issued by international human rights bodies are essential for detailed examination. Firstly, the

---

<sup>81</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 79.

<sup>82</sup> Ibid.

<sup>83</sup> UN Economic and Social Council, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), E/C.12/2000/4, CESCR, 11 August 2000.

<sup>84</sup> Ibid paras 30-33; Angeleri Stefano, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 82.

<sup>85</sup> Angeleri Stefano, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 82.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid., 83.

CESCR in General Comment No. 14 (para 34) indicates that under the obligation to respect, States should not deny or restrict equal access to a range of health services, including preventive, curative, and palliative care *inter alia* for irregular migrants.<sup>88</sup> The former means that States are required to ensure that all individuals, regardless of their legal status have equitable access to comprehensive healthcare services without facing discrimination. This approach is also strengthened with the General Comment No. 5 (para 36) of the Committee on the Elimination of Racial Discrimination (CERD), which stipulates that States must uphold the right to health for non-citizens, by ensuring they have access to preventive, curative, and palliative health services.<sup>89</sup> Although, in this general comment there is not explicitly mentioned irregular migrants, under the Article 5 (e) (4) of the respective Convention, right to health is enshrined in relation to discrimination which obliges States to take specific measures to eradicate discrimination and ensure equal access to rights including, *inter alia*, access to public health, medical care, social security, and social services for all individuals regardless of race, color, or national or ethnic origin.<sup>90</sup>

Moreover, the CESCR, in General Comment No. 14, recognizes that the right to health is closely linked to and dependent upon the realization of other human rights, such as the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.<sup>91</sup> Thus, the CESCR considers that these rights and freedoms are

---

<sup>88</sup> CESCR, General Comment No. 14: E/C.12/2000/4.

<sup>89</sup> UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non-Citizens, 5 August 2004, para 36. <https://www.refworld.org/legal/general/cerd/2004/en/39027>

<sup>90</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), opened for signature 21 December 1965, 660 UNTS 195, Article 5.

<sup>91</sup> CESCR, General Comment No. 14: E/C.12/2000/4; Maite San Giorgi, “The Human Right to Equal Access to Health Care,” March 2012, 12.

integral to the right to health and if these statement would be analysed through the lens of the irregular migrants' vulnerability, it can be presumed that detaching irregular migrants from the health services not only undermines their right to health but also puts at risk their other fundamental human rights.

Furthermore, the special emphasis of the CESCR that “everyone” (including irregular migrants) should have access to “primary and emergency medical care” regardless “immigration status” is duly transposed in the General Comment No. 19 of the CESCR (para 37)<sup>92</sup> and General Comment No. 20 (para 30) also stipulates that Covenant rights (including Article 12) apply to “everyone” regardless individual’s “legal status and documentation”<sup>93</sup>.

Considering all mentioned above, the ICESCR establishes a broad and inclusive right to health, emphasizing universal application and the inherent dignity of all individuals. Therefore, States are tasked with progressively realizing this right through the creation of equitable health conditions and systems for everyone which ensures the right to health is accessible to everyone, including irregular migrants.

On an international level there are also other UN instruments that uphold the right to health, although these additional UN Conventions that include the right to health typically focus on protecting the rights of specific groups within society or address health issues within a particular context.<sup>94</sup>

---

<sup>92</sup> UN Economic and Social Council, General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, February 4, 2008.

<sup>93</sup> CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009.

<sup>94</sup> Ann Marie Gray, “The Right To Healthcare” in *International Human Rights, Social Policy and Global Development: Critical Perspectives*, ed. Gerard McCann and Félim Ó hAdhmaill (Bristol University Press, 2020), 196.

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) under the Articles 12 and 14 ensures women's right to health encompassing sexual and reproductive health.<sup>95</sup> In terms of the irregular migrants' right to health, General Recommendation No. 24 is particularly important. Specifically, in the GR No. 24 enshrine the Committee highlights that under Article 12 States are required to "eliminate discrimination against women in their access to health-care services"<sup>96</sup> and para 6 refers to the "vulnerable and disadvantaged groups such as migrant women".<sup>97</sup> Thus, even though the Committee does not explicitly enshrines irregular migrants, the term "vulnerable" as defined by CESCR, includes categories that irregular migrants could fall under. Particularly, Angeleri notes that under the practice of CESCR, vulnerable groups encompass "women, children, refugees, migrants, internally displaced persons, stateless individuals, ethnic minorities, persons with disabilities, the elderly, individuals with health issues such as HIV, and LGBTQI individuals"<sup>98</sup>, hence while irregular migrants' status often places them in vulnerable and disadvantaged circumstances akin to these groups, it might be reasonable to assume that they could reasonably be considered within the scope of protections outlined in the recommendation.

Convention on the Rights of the Child (CRC) under the Article 24, recognizes the right of every child to the highest achievable level of health and access to healthcare for treatment and rehabilitation.<sup>99</sup> In the General Comment No. 15, the Committee notes "every child to enjoy the highest attainable standard of health".<sup>100</sup> Thus, although the CRC does not explicitly

---

<sup>95</sup> *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, adopted December 18, 1979, entered into force September 3, 1981, 1249 UNTS 13, Articles 12 (1), (2), and 14 (2) (b).

<sup>96</sup> *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, chap. I (1999), para 2.

<sup>97</sup> *Ibid.*, para 6.

<sup>98</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 122.

<sup>99</sup> *Convention on the Rights of the Child (CRC)*, adopted New York, 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, Art. 24.

<sup>100</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15 (17 April 2013), para 24.

mention irregular migrant children, the principle of non-discrimination and the inclusive language of “every child” may reasonably include irregular migrant children.

The Convention on the Rights of Persons with Disabilities (CRPD) affirm that individuals with disabilities have the right to equitable access to the highest standard of health, without discrimination based on disability.<sup>101</sup> Although, the Committee does not explicitly refer to irregular migrants in its General Comments.<sup>102</sup>

And lastly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) under Articles 28 and 43 protect the right to health.<sup>103</sup> Although, some scholars criticize ICMW for its approach towards irregular migrants’ right to health. Particularly, Chetail asserts that Article 28 of the ICMW provides a narrower scope than Article 12 of the ICESCR.<sup>104</sup> And Angeleri notes that there are some disparities in treatment of regular and irregular migrant groups, defined by the Articles 28 and 43.<sup>105</sup> Specifically, Article the right to health defined by Article 28 of the ICMW limits the right to health to “emergency medical care” for irregular migrants, conversely Article 43 (1)(e) prescribes that migrant workers should receive equal treatment compared to nationals of the host country concerning access to social and health services.<sup>106</sup>

Thus, at one hand scholars perceive that the ICMW shows considerable contrast between the treatment of regular and irregular migrants and is limited compared to Article 12 of the ICESCR. However, General Comment No. 2 of the CMW addresses the gap noted in the

---

<sup>101</sup> *Convention on the Rights of Persons with Disabilities* (CRPD), adopted by General Assembly Resolution A/RES/61/106 of 13 December 2006.

<sup>102</sup> Ibid.

<sup>103</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CRMWF), opened for signature 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003.

<sup>104</sup> Chetail, Vincent. “Migration and human rights. the United Nations Convention on Migrant Workers’ Rights” *International Journal of Refugee Law* 22, no. 4 (2010): 679.

<sup>105</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 53.

<sup>106</sup> Ibid.

specific provisions. Specifically, according to the Committee, Article 28 of the ICMW ensures that migrant workers and their families receive urgent medical care without discrimination compared to nationals, yet when combined with other human rights instruments like Article 12 of ICESCR, CMW asserts that States have broader obligations to provide all individuals, regardless of migration status, with equitable access to a basic level of healthcare *inter alia* primary, preventive, curative, and palliative services.<sup>107</sup>

To conclude, in the International Human Rights Law, Article 12 and GC Nos. 14, 19, and 20 provides the most comprehensive protection of the right to health for irregular migrants. Conversely, other UN treaties and bodies have narrower scopes and do not explicitly address irregular migrants in their provisions, General Comments or Recommendations. Furthermore, as seen in ICMW, although there are some disparities between the provisions, this is partially corrected by the respective Committee.

### **3.2 Irregular Migrant's Right to Health in the European Human Rights Law**

In the previous section, we examined the normative framework surrounding the right to health for irregular migrants within International Human Rights Law. This section investigates whether general human rights treaties and the corresponding case law of the Council of Europe (CoE) uphold the overarching guarantee of Article 12 of the ICESCR.

---

<sup>107</sup> CMW, *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, CMW/C/GC/2 (28 August 2013), para 72.



Focusing on the central document of the CoE, it is important to highlight that the ECHR, with the exception of the right to education (enshrined in the Article 2 of the Protocol 1), primarily addresses civil and political rights, leaving economic and social rights largely unaddressed.<sup>108</sup> Therefore, despite the fact that ECHR's primary emphasis is on civil and political rights, the adoption of the European Social Charter (ESC)<sup>109</sup> in 1961 partly addressed this focus.<sup>110</sup> However, since the right to health is not fully addressed or protected within the ECHR framework, some scholars argue that this results in a "reduced level of protection of (the right to) health" in comparison to International Human Rights law.<sup>111</sup>

The right to health is not explicitly included in the ECHR, however the Court continues to apply the Convention in relation to socio-economic conditions by broadly interpreting civil and political rights.<sup>112</sup>

Particularly, in *Airey v. Ireland*<sup>113</sup>, the ECtHR highlighted that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature".<sup>114</sup> This approach of the Court is evident by case law where health issues are assessed in view of the Articles 2, 3, 5, 8 and 14 of the ECHR.<sup>115</sup> These regulations are

---

<sup>108</sup> Colin Warbrick, "Economic and Social Interests and the European Convention on Human Rights" in *Economic, Social, and Cultural Rights in Action*, ed. Mashood Baderin and Robert McCorquodale (Oxford University Press, 2007), 241, <https://doi.org/10.1093/acprof:oso/9780199217908.003.0010>.

<sup>109</sup> European Social Charter, ETS No. 035, opened for signature October 18, 1961, entered into force February 26, 1965.

<sup>110</sup> Cristina Samboan, "The Role of the European Committee for Social Rights (ECSR) in the European System for the Protection of Human Rights: Interactions with ECHR Jurisprudence" *Perspectives of Business Law Journal* 2, no. 1 (November 2013): 228.

<sup>111</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 107.

<sup>112</sup> "Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?," *European Journal of Social Security* 16, no. 3 (September 2014): 253.

<sup>113</sup> *Airey v. Ireland*, No. 6289/73, ECtHR, para. 26.

<sup>114</sup> *Ibid.*

<sup>115</sup> Ippolito, Francesca, and Sara González. "Handle with Care' in Strasbourg the Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-Economic Rights." In *Journal Title*, 149.

frequently invoked to stop the deportation of irregular migrants when their health is endangered by the termination, unavailability, or high expense of medical treatment in their home countries.<sup>116</sup>

In this context, it should be noted that the case law of the ECtHR regarding healthcare is quite diverse. However, due to the scope of this research, only key cases concerning healthcare access for migrants not having legal residency will be examined. Particularly, the significant findings are made in the ECtHR's judgments *D. v. UK*,<sup>117</sup> *Amegnigan v the Netherlands*<sup>118</sup> and *Arcila Henao v the Netherlands*<sup>119</sup> where the Court asserted that removing a person in light of his/her medical condition violates Article 3 of the ECHR only under "very exceptional circumstances".<sup>120</sup> This concept is also applied in *N. v. United Kingdom*<sup>121</sup> where an HIV-positive citizen from Uganda faced deportation after her asylum claim was rejected and it was uncertain if she would have access to appropriate medical treatment in her country of origin.<sup>122</sup> In this case the Court made some additional clarifications/conclusions regarding said concept. First, ECtHR indicated that differences in medical advancements and socioeconomic conditions between receiving and sending countries can result in significant disparities in available healthcare<sup>123</sup> and that, Article 3 of the Convention does not require (receiving) States to address existing disparities by granting all irregular migrants "unlimited"<sup>124</sup> healthcare

---

<sup>116</sup> Ibid.

<sup>117</sup> *D. v. The United Kingdom*, No. 30240/96, ECtHR, para. 54.

<sup>118</sup> *Kossi Archil Amegnigan v. The Netherlands*, No. 25629/04, ECtHR.

<sup>119</sup> *Francisco J. Arcila Henao v. The Netherlands*, No. 13669/03, ECtHR.

<sup>120</sup> Ibid.

<sup>121</sup> *N. v. The United Kingdom*, Appl. No. 26565/05, ECtHR.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., para 44.

<sup>124</sup> Ibid.

access.<sup>125</sup> Alternatively, according to the Court's interpretation, States would face significant burdens.<sup>126</sup>

Therefore, this case demonstrates that the ECtHR has set a high threshold when it decided in favour of the United Kingdom and implicitly confirmed the possibility of removing terminally ill patients. Moreover, by emphasizing on the economic burden posed by irregular migrants to States Parties of the ECHR, the Court has (indirectly) granted European States the sovereignty to restrict healthcare access for irregular migrants. In this context as Ippolito and González note, such interpretation or application of Article 3 that compromises its absolute nature, particularly in favor of immigration control or resource considerations, is not align with the fundamental principles of human rights protection as outlined in the ECHR.<sup>127</sup>

It must be noted here that shortly after this landmark decision was adopted, the Spanish government in 2009 initiated a reduction in consolidated funds for healthcare, citing the global financial crisis as the reason.<sup>128</sup> Consequently, austerity measures affecting healthcare access were introduced in 2012 through the Royal Decree Law 16/2012 (RDL 16/2012), which imposed restrictions on healthcare available to irregular migrants.<sup>129</sup> This scenario will be further examined in Chapter 4, with a detailed analysis provided.

---

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ippolito, Francesca, and Sara González. "Handle with Care" in Strasbourg the Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-Economic Rights." In *Journal Title*, 149.

<sup>128</sup> Amnesty International, "Spain: Cruel Austerity Measures Leave Patients Suffering" April 24, 2018, <https://rb.gy/sscgy5>.

<sup>129</sup> Ibid.

Lastly, years after *N v. United Kingdom*, the Court in *Paposhvili v. Belgium*<sup>130</sup> expanded the scope of Article 3 in the medical cases and indicated that Article 3 can be invoked in cases involving serious medical conditions where the individual would face substantial harm or deterioration in health if deported, even if they are not *per se* at “imminent risk of dying”.<sup>131</sup> Thus, compared to previous ECtHR jurisprudence, this interpretation reflects a more inclusive and evolving approach concerning healthcare access for foreigners without the authorization to stay (rejected asylum applicants).<sup>132</sup>

The ECtHR’s approach towards the accessibility of social services, including healthcare, for irregular migrants is not consistent. This assumption is reinforced by the Court’s jurisprudence, where the determination of applicants as vulnerable individuals plays a crucial role in its decisions. Therefore, the standards for determining which applicants are considered vulnerable and the reasons behind this determination complicate the ECtHR’s overall approach to understand vulnerability.<sup>133</sup> Specifically, the Court makes difference between the vulnerability of irregular migrants, rejected asylum-seekers and asylum-seekers with pending cases. E.g in case *M.S.S v. Belgium and Greece*<sup>134</sup> the Court asserted that applicant’s situation was particularly severe, since he spent months in extreme poverty and was unable to meet basic needs such as food, hygiene, and shelter.<sup>135</sup> The Court’s assessment took into account that the applicant was an asylum-seeker, recognized them as part of “a particularly underprivileged and vulnerable population group in need of special protection”.<sup>136</sup> Thus, in the decision-making

---

<sup>130</sup> *Paposhvili v. Belgium*, No. 41738/10, ECtHR.

<sup>131</sup> *Ibid.*, para 183.

<sup>132</sup> Ippolito, Francesca, and Sara González. “Handle with Care’ in Strasbourg the Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-Economic Rights.” In *Journal Title*, 152.

<sup>133</sup> Sylvie Da Lomba, “Vulnerability, Irregular Migrants’ Health-Related Rights and the European Court of Human Rights”, *European Journal of Health Law* 21, no. 4 (2014): 354-363.

<sup>134</sup> *M.S.S. v Belgium and Greece*, No. 30696/09, ECtHR.

<sup>135</sup> *Ibid.*, para 254.

<sup>136</sup> *Ibid.*, para 251.

process, the ECtHR gave particular attention to the applicant's status and only then concluded that *M.S.S* was vulnerable which played crucial role in the Court's final reasoning. Unlike to this decision in *Khalifa and others v. Italy*,<sup>137</sup> where the applicants were detained irregular migrants, the Court indicated that the conditions of the detention centre were not sufficiently aggravating to cause vulnerability of the applicants.<sup>138</sup> Moreover, in *S.H.H. v. UK*,<sup>139</sup> an asylum applicant with disability claimed that in his origin country there was inadequate medical treatment, nevertheless the ECtHR did not find applicant to be vulnerable because the presented evidence was not sufficient to believe that adequate medical care and support was inaccessible in his home country.<sup>140</sup> Thus, it might be reasonable to conclude that as Da Lomba asserts ECtHR sometimes limits ECHR's positive obligations in the socio-economic rights in order not to impose "an impossible or disproportionate burden" on States.<sup>141</sup> Particularly, "resource and immigration control considerations"<sup>142</sup> heavily influence the ECtHR's approach to the identification and perception of the vulnerable groups.<sup>143</sup>

To conclude, the ECtHR interprets the right to health through the ECHR, setting a high threshold for violations. While earlier cases like *D v. United Kingdom* had a limited scope, *Paposhvili v. Belgium* marked a progressive step forward. However, the concept of vulnerability is essential for recognizing irregular migrants' right to health, yet it creates legal ambiguities, potentially leaving them without adequate protection.

---

<sup>137</sup> *Khlaifia and Others v. Italy*. No. 16483/12, ECtHR.

<sup>138</sup> *Ibid.*, paras 170-177.

<sup>139</sup> *S.H.H. v. The United Kingdom*, No. 60367/10, ECtHR.

<sup>140</sup> *Ibid.*, paras 249-264.

<sup>141</sup> Sylvie Da Lomba, "Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights", *European Journal of Health Law* 21, no. 4 (2014): 356.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

### 3.2.1 European Social Charter and Divergence between the ECSR, the ECtHR and the CESCR approaches

Alongside to the ECHR, the ESC and the Revised European Social Charter (RESC)<sup>144</sup> stand as significant platforms in European Human Rights law, *inter alia* regarding health-related rights.<sup>145</sup> The European Committee of Social Rights (ECSR) serves as the monitoring body (quasi-judicial body) of the European Social Charter and the primary responsibility of the ECSR is to monitor State's compliance with the Charter through the collective complaints and national reports.<sup>146</sup> Spain ratified the European Social Charter in 1980 and subsequently ratified the Revised European Social Charter in 2021, agreeing to all 98 of its provisions.<sup>147</sup>

The Preamble of the RESC sets the stage for understanding the significance and scope of health-related rights within the European human rights framework. Specifically, it asserts that, “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”.<sup>148</sup> Building upon this principle, Article 11 of the RESC, determines specifically the right to health and core main elements of this provision includes three positive obligations for the contracting States, prevention (of the diseases), removal (causes of ill-health) and provision (provide health education and encouragement).<sup>149</sup> Furthermore, Article 13 of the RESC represents the legal basis for the right to social and

<sup>144</sup> European Social Charter (revised), ETS No. 163, opened for signature May 3, 1996, entered into force July 1, 1999.

<sup>145</sup> “The European Social Charter - Social Rights - [www.coe.int](http://www.coe.int),” Social Rights, n.d., <https://www.coe.int/en/web/european-social-charter>.

<sup>146</sup> Social Rights. “European Committee of Social Rights - Social Rights - [www.coe.int](http://www.coe.int),” n.d. <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>.

<sup>147</sup> Social Rights. “Spain - Social Rights - [www.coe.int](http://www.coe.int),” n.d. <https://www.coe.int/en/web/european-social-charter/spain#:~:text=Spain%20ratified%20the%20European%20Social,on%2017%2F05%2F2021>.

<sup>148</sup> ESCR, Preamble paras. 3, 11.

<sup>149</sup> Ibid., Article 11.

medical assistance.<sup>150</sup> Thus, these obligations show the applied approach of the RESC to safeguard the right to health for all individuals within its jurisdiction.

Nevertheless, unlike the ECHR and the ICESCR which have a broad personal scope and includes “everyone” within the jurisdiction of the Contracting States, the RESC’s personal scope is limited. Particularly, the RESC’s Appendix determines that the Charter’s applicability, is limited to nationals of States Parties who are lawfully residing or regularly working in the State.<sup>151</sup> Initially, this suggests that individuals not covered by the Charter may be excluded from its protection, despite it being the sole document at the European level to protect socio-economic rights. This concern is particularly significant considering the ECtHR’s infrequent tendency to rule in favor of applicants in cases involving health-related rights. Therefore, a central question is whether the Committee has the authority to extend the personal scope of the Charter to include irregular migrants, and if it does, under what circumstances does it do so compared to ECtHR and CESCR?

Considering the jurisprudence of the ECSR, as Angeleri asserts the Committee extends the personal scope of the RESC in regard to minors in an irregular situation/unaccompanied minor.<sup>152</sup> Several key cases are important to examine the standard. The first is *FIDH v. France* where the Committee has extended the Charter’s personal scope to irregular migrant children and asserted that by denying immediate access to healthcare for the children of irregular migrants, France failed to meet its obligations under Article 17 of the RESC, which provides social, legal, and economic protection for children and young persons.<sup>153</sup> Another significant

---

<sup>150</sup> Ibid., Article 13.

<sup>151</sup> ESCR, Appendix, para 1.

<sup>152</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 192-196.

<sup>153</sup> International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, ECSR, 2004.

case is *DCI v. Belgium*<sup>154</sup>, where the Committee asserted that Belgium failed to comply with Article 11 of ESC since it did not ensure foreign minors with housing and foster homes.<sup>155</sup> Furthermore, ECSR in *DCI v. the Netherlands*<sup>156</sup> asserted that “the Charter cannot be interpreted in a vacuum”<sup>157</sup> and in *ECRE v. Greece*,<sup>158</sup> the Committee further noted that the Appendix should not be read in such a way as to deny unlawfully present individuals the fundamental rights guaranteed by the ESC.<sup>159</sup>

Even though the Committee’s interpretation seems quite progressive here, other case law of the ECSR demonstrate that the Committee includes (adult) irregular migrants in the personal scope of the health-related provisions only in situations when the person’s need is “sufficiently urgent and serious”.<sup>160</sup> More specifically, in *CEC v. the Netherlands* the Committee determined that State Parties are obliged to provide “short-term assistance to persons in a situation of immediate and urgent need”.<sup>161</sup> Furthermore, the Committee stated that irregular migrants in the Netherlands should be entitled to “necessary medical care”<sup>162</sup> which means that these individuals are entitled to medical treatment that is essential for their health (emergency assistance).

Thus, the ECSR’s approach in cases involving children of irregular migrants or unaccompanied minors shows a willingness to interpret the ESC in view of other international legal norms.<sup>163</sup>

---

<sup>154</sup> Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, ECSR, 2012.

<sup>155</sup> Ibid., paras 115-118.

<sup>156</sup> Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, ECSR, 2009.

<sup>157</sup> Ibid., para 35.

<sup>158</sup> International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Complaint No. 173/2018, ECSR, 2021.

<sup>159</sup> Ibid., para 76.

<sup>160</sup> European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, ECSR, 2014, para 105; Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 196.

<sup>161</sup> Ibid., para 105.

<sup>162</sup> Ibid., para 125.

<sup>163</sup> DCI v. the Netherlands, para 35.



This represents a significant step forward in expanding the ESC's coverage to include socio-economic rights for children in irregular migrant situations. Whereas the above discussed cases when the applicants were not minor irregular migrants, demonstrate that the Committee allows extension only in cases of "sufficiently urgent and serious" needs.<sup>164</sup>

Comparing the perspectives of the ECtHR and ECSR, we can assume that by extending protections to irregular migrants in urgent need, the ECSR emphasizes on human dignity, indivisibility of human rights and the fundamental nature of healthcare rights. Conversely, while the ECtHR interprets the right to health in line with of other ECHR rights and may have greater power to include irregular migrants due to its broad personal scope, the Strasbourg Court maintains a high threshold for irregular migrants' health-related rights, often limit its scope to avoid imposing burdens on States. Unlike to the ECtHR, the ECSR often expands ESC's personal scope to ensure that vulnerable groups receive adequate protection under the RESC, however, as examined by Angeleri<sup>165</sup> and demonstrated with practice, this expansion is typically refers to irregular migrant children. Thus, although both ECtHR's and ECSR's practice is progressing, their jurisprudence towards irregular migrants is quite strict and only "in exceptional circumstances" or "sufficiently urgent and serious" situations entitle irregular migrants to have access to the medical care, respectively.

This issue becomes more complicated if ECSR's and ECtHR's standards will be scrutinized through the lens of ICESCR. Particularly, as mentioned already the Committee through its General Comments (Nos. 14, 19, and 20) provides the most comprehensive protection of the right to health for irregular migrants. This approach is enshrined in the Committee's

---

<sup>164</sup> Stefano Angeleri, *Irregular Migrants and the Right to Health* (Cambridge University Press, 2022), 192-196.

<sup>165</sup> Ibid.

observations. Particularly, after austerity measures were introduced in various European countries, the Committee consistently expressed its concern over the limited access to healthcare for irregular migrants. For Italy, the CESCR highlighted the importance of the highest attainable standard of health and urged Italy to ensure this standard is met for all individuals.<sup>166</sup> Regarding Greece, the CESCR called for the guarantee of healthcare services for irregular migrants, including the provision of health examinations.<sup>167</sup> The CESCR also emphasized in its observations on Switzerland that irregular migrants should not face discrimination in the enjoyment of their socioeconomic rights under the CESCR.<sup>168</sup> For Germany, the CESCR stressed that irregular migrants should have access to healthcare services without fear of deportation or other repercussions<sup>169</sup> and regarding Spain the CESCR expressed its concerns about the regressive nature of the Spanish Royal Decree (RDL 16/2012) on the irregular migrants' right to health.<sup>170</sup>

To sum up, as it is shown within the International Human Rights Law, the most comprehensive protection is provided by the ICESCR whereas the protection mechanisms for irregular migrants' right to health guaranteed by the European Human Rights Law is limited and disparities arise in the interpretation of the right to health between the ECtHR, ECSR and CESCR.

The ICESCR and CESCR's General Comments and country-specific assessments consistently advocate for non-discriminatory access to healthcare for irregular migrants which demonstrates

---

<sup>166</sup> CESCR, "Concluding Observations on the Fifth Periodic Report of Italy", E/C.12/ITA/CO/5, 18 October 2015, paras 46, 47.

<sup>167</sup> CESCR, "Concluding Observations on the Second Periodic Report of Greece", E/C.12/GRC/CO/2, 27 October 2015, paras 35, 36.

<sup>168</sup> CESCR, "Concluding Observations on the Second and Third Periodic Reports of Switzerland", E/C.12/CHE/CO/2-3, 27 October 2015, paras 7, 29.

<sup>169</sup> CESCR, "Concluding Observations on the Sixth Periodic Report of Germany", E/C.12/DEU/CO/6, 27 November 2018, para 26.

<sup>170</sup> CESCR, "Concluding observations on the sixth periodic report of Spain", E/C.12/ESP/CO/6, 25 April 2018, paras 8, 41.

a comprehensive and inclusive approach. In contrast, the ECtHR's and ECSR's approaches not fully in line with the CESCR's broader standards and there is also a divergence at the European level. Overall, this disparity demonstrates that there is no established interpretation of irregular migrants' right to health between International and European Human Rights Law. This lack of clarity in practice may implicitly provide justification for states to limit irregular migrants' right to health. This discussion sets the stage for the next chapter, where the case study of Spain will be examined to explore the extent to which International and European Human Rights Law contribute to ensure (or limit) the right to health of irregular migrants amidst the absence of a unified approach.

## **Chapter 4: Irregular Migrants' Right to Health on the National Level – Case Study of Spain**

To address the main research question, this chapter analyses Spain's 2012 decision to limit healthcare access for irregular migrants followed by the policy changes in 2018 that restored their access. This case study is pivotal to illustrate the fragmented interpretations of the irregular migrants' right to health and demonstrates what is the role of the Human Rights bodies within International and European Human Rights law in realizing irregular migrants' right to health at the domestic level. Thus, through this focused analysis of Spain's healthcare policy, this chapter explores the authority of interpretive bodies and judicial (and quasi-judicial) organs within International and European Human Rights Law, as well as the influence of domestic social mobilization, in compelling States to fulfil their obligation for ensuring the right to health for irregular migrants.

Consequently, through this examination, the chapter seeks to contribute to the broader discussion on the complexities involved in implementing and enforcing equitable healthcare for irregular migrants at the national level.

### **4.1 Spain's Healthcare Policy towards Irregular Migrants**

The evolution of recognising irregular migrants access to the National Health System (NHS) in Spain, from the establishment of "health protection rights" under the Article 43 of the

Spanish Constitution in 1978<sup>171</sup> to the enactment of Royal Decree Law 7/2018,<sup>172</sup> demonstrates a path marked by both gradual progress and significant setbacks. The guarantee within the Spanish Constitution that the right to health is an inherent entitlement for all individuals, was progressively elaborated upon through subsequent legislation.<sup>173</sup> Notably, the enactment of the General Health Law 14/1984 strengthened the right to healthcare for both citizens and foreign residents in Spain.<sup>174</sup> However, in practice, the Spanish healthcare system initially served solely to the native population, as access for individuals from outside Spain was limited to those who contributed to the social security system.<sup>175</sup> Thus, at that point irregular migrants were only eligible for emergency medical services and treatment for communicable diseases.<sup>176</sup> In 1996, following the enactment of the Protection Law of the Minor (1996) and the Regulation Act of Immigration Law 7/1985 (1986), immigrant pregnant women and minors regardless of their administrative status, gained formal access to public healthcare services, reaching the same level as the native population.<sup>177</sup> Following this legislation, the Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (Law 4/2000), extended health coverage to anyone who demonstrated their habitual residency in Spain through municipal registration records.<sup>178</sup> Therefore, the Foreigners Law 4/2000 granted all residents of Spain the right to healthcare equally as Spanish citizens and healthcare access was ensured regardless of

---

<sup>171</sup> The Cortes Generales (Plenary Meetings of the Congress of Deputies and the Senate), “The Spanish Constitution,” § Article 43 (1978), Article 43, <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

<sup>172</sup> Jefatura del Estado, “Real Decreto-Ley 7/2018 de 27 de Julio, Sobre El Acceso Universal al Sistema Nacional de Salud,” Pub. L. No. BOE-A-2018-10752 (n.d.), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-10752](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10752).

<sup>173</sup> Àlex Boso and Mihaela Vance, “Should Irregular Migrants Have the Right to Healthcare? Lessons Learnt from the Spanish Case” *Critical Social Policy* 36, no. 2: 227, <https://doi.org/10.1177/0261018315624174>.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

an individual's legal status.<sup>179</sup> Despite this positive development, few years later, the Spanish government enacted Royal Decree Law 16/2012 (RDL 16/2012) in response to the severe economic crisis.<sup>180</sup> This law, driven by austerity measures, led to significant cuts in public healthcare expenditure.<sup>181</sup> After the adoption of the given law, irregular migrants in Spain were excluded from having access to a regular healthcare services, they maintained eligibility solely for emergency care.<sup>182</sup>

Insofar as, under the new amendments, the RDL 16/2012 ensured comprehensive health coverage exclusively for immigrant children and pregnant women, irrespective of their legal status.<sup>183</sup> When the healthcare reform under RDL 16/2012 came into effect, hundreds of thousands of people suddenly became invisible to the system.<sup>184</sup> Overnight, their health cards were deactivated, and their medical records were terminated, hindering the continuity of care and treatment for any diseases they might have.<sup>185</sup>

Importantly, the government's decision (led by the People's Party) to exclude irregular migrants from the national health coverage through RDL 16/2012 faced significant challenges and opposition across Spain.<sup>186</sup> As noted by Callejo and Perna the reform's "exclusionary"

---

<sup>179</sup> Bruquetas-Callejo, María and Roberta Perna, "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field," *South European Society and Politics* 25, no. 1, 80. <https://doi.org/10.1080/13608746.2020.1769342>.

<sup>180</sup> Ibid., 81.

<sup>181</sup> Ibid.

<sup>182</sup> Àlex Boso and Mihaela Vance, "Should Irregular Migrants Have the Right to Healthcare? Lessons Learnt from the Spanish Case" *Critical Social Policy* 36, no. 2: 228, <https://doi.org/10.1177/0261018315624174>.

<sup>183</sup> Ibid.

<sup>184</sup> La Red de Denuncia y Resistencia al RDL 16/2012 (REDER), "Civil Society Faced with Healthcare Exclusion, Defending Our Healthcare," October 2017, 3, <https://www.reder162012.org/wp-content/uploads/2022/02/REDERsep17ENG.pdf>.

<sup>185</sup> Ibid.

<sup>186</sup> Bruquetas-Callejo, María, and Roberta Perna. 2020. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25 no.1, 83. <https://doi.org/10.1080/13608746.2020.1769342>.

objectives were undermined due to the deeply-rooted universalist principles within the Spanish healthcare system.<sup>187</sup> As a result, the extensive social mobilization against RDL 16/2012, involved *inter alia* crucial stakeholders such as healthcare professionals who provided care to irregular migrants and local municipalities that initiated programs to improve healthcare access for this group.<sup>188</sup> This activism, ultimately led to the repeal of the decree by the newly elected Spanish Socialist Worker's Party in 2018 in contrast to the previous PP government, demonstrated a strong political commitment to restoring access to healthcare for irregular migrants.<sup>189</sup> Thus, with the enactment of RDL 7/2018, irregular migrants were reincluded as recipients of public healthcare benefits.<sup>190</sup>

Furthermore, it is crucial to acknowledge the role of the mobilization efforts at the international level to repeal of RDL 16/2012 and restore the healthcare benefits for irregular migrants. Advocacy groups, human rights organizations, and international bodies (both at UN and European level) united to emphasize that adopted measures violated Spain's International Human Rights obligations.<sup>191</sup>

In summary, the extensive mobilization against RDL 16/2012, both internationally and domestically, demonstrated the broad concern and solidarity for ensuring equitable access to healthcare for irregular migrants. This mobilization illustrated how healthcare policies are inextricably linked with broader social, political, and ethical contexts and therefore highlighted

---

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid., 87.

<sup>190</sup> Ibid., 88.

<sup>191</sup> La Red de Denuncia y Resistencia al RDL 16/2012 (REDER), "Anatomy of the Healthcare Reform. The Universality of Exclusion," September 2015, 12, <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-2015-sep-ENG.pdf>.

the crucial role played by both domestic and international actors in ensuring that States fulfil their obligations stemming from international treaties. Thus, the next section will investigate how the exclusion of irregular migrants from the healthcare system in Spain was addressed by European and United Nations Human Rights bodies and institutions.

## 4.2 Spanish RDL 16/2012 in the context of International and European Human Rights Law

This section examines how European and United Nations Human Rights bodies and institutions responded after the RDL 16/2012 was introduced in Spain and the measures they took to protect the right to health for irregular migrants. Particularly, since the official issuance of Royal Decree-Law 16/2012, there has been notable attention directed towards the actions of the Spanish Government on an international level.

In May 2012, following the global financial crisis that broke out in 2008, all ICESCR States parties, including Spain, were urged to implement “any proposed policy change or adjustment”<sup>192</sup> temporarily and proportionally, ensuring that they do not violate the principle of non-discrimination or the core content of rights, especially *inter alia* for migrants and refugees.<sup>193</sup> Additionally, shortly after the adoption of the Royal Decree, during the fifth period review of Spain, the CESCR issued a critical response to the legislative amendment through the Concluding Observations in June 2012.<sup>194</sup> In these observations, the Committee

---

<sup>192</sup> Letter addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights, 16 May 2012, CESCR/48th1/SP/MAB/SW

<sup>193</sup> Ibid.

<sup>194</sup> CESCR, “Concluding Observations on Spain of the Committee on Economic, Social and Cultural Rights,” E/C.12/ESP/CO/5 para 19 (2012).



emphasized that Spain must ensure the highest attainable standard of health and uphold the principle of universal health care regardless individuals' legal status.<sup>195</sup>

It is important to consider the counterarguments from the Spanish Government, as the former is a sovereign State criticized by international bodies for allegedly not following international conventions to which it is a State party. This analysis helps to examine how Spain justified the disputed legal actions and provides a broader understanding of the Spanish Government's approach and determination to balance its obligations under international law with domestic priorities and challenges.

In 2014 under the Universal Period Review (UPR) mechanism, Spain has submitted national report and explained that they took the decentralized approach in providing healthcare assistance to irregular migrants.<sup>196</sup> Particularly, according to Spain, even though irregular migrants were not entitled to have health coverage, social services in autonomous community determined the type of assistance for them.<sup>197</sup> Hence, the Spanish government explained that there were other (legally ambiguous) "alternatives" for irregular migrants to maintain access to medical services.<sup>198</sup> Moreover, in its concluding remarks following the review session on Spain in July 2015, the CEDAW highlighted that irregular migrant's exclusion from the universal health coverage, disproportionately affected migrant women since they were denied free access to sexual and reproductive health services.<sup>199</sup> Likewise CEDAW, the Working

---

<sup>195</sup> Ibid.

<sup>196</sup> Human Rights Council and Working Group on the Universal Periodic Review, "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Spain", A/HRC/WG.6/21/ESP/1, 10 November 2014, para 71.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> CEDAW, "Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Spain," CEDAW/C/ESP/CO/7-8, July 29, 2015, para 30, 9.

Group on the issue of discrimination against women in law and in practice after its mission in Spain (2015), stressed out that despite Spanish government's position that irregular migrants still receive healthcare, "exclusion of migrants in an irregular situation represents a retrogressive measure incompatible with the State's international and regional human rights obligation".<sup>200</sup>

In 2016, the CERD also emphasized on Spain's failure to comply with international human rights law obligations. Specifically, in its Concluding Observations, the CERD highlighted that excluding irregular migrants from healthcare access constituted a "retrogressive measure".<sup>201</sup>

Furthermore, in the State's report for CESCR presented in 2017, Spain asserted that RDL 16/12 was designed to safeguard the sustainability and quality of the healthcare system and that irregular migrants had access to healthcare services, albeit limited to emergency care.<sup>202</sup>

Thus, despite the UN's efforts to urge Spain to fulfil its obligations, the Spanish Government during these years had not shown any commitment to address raised concerns. They consistently avoided admitting that they had restricted irregular migrants' right to health and often cited the provision of emergency care as a sufficient justification.

Nevertheless, UN bodies continued to pressure Spain over its regressive actions on irregular migrants' right to health. Specifically, the next Concluding Observations of the CESCR on Spain were adopted in April 2018 where the Committee again expressed its concerns on the

---

<sup>200</sup> The Working Group on the issue of discrimination against women in law and in and practice, "Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice - Mission to Spain", A/HRC/29/40/Add.3, 17 June 2015, para 104, 19.

<sup>201</sup> CERD, "Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of Spain", CERD/C/ESP/CO/21-23, June 21, 2016, para 11, 3.

<sup>202</sup> CESCR, "Sixth Periodic Report of Spain, Due in 2017, under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights," E/C.12/ESP/6, 31 Oct. 2017, para 111, 14.

“regressive effect on the right to health of RDL 16/2012” and urged Spain to guarantee unrestricted access to vital healthcare services for irregular migrants, in compliance with the

Covenant’s provisions on non-discrimination and the right to health.<sup>203</sup>

Although these UN institutions and activist groups at the domestic level operated independently, undoubtedly, they focused on the same issues.<sup>204</sup> Thus, the coordinated efforts of UN bodies, which consistently issued recommendations to Spain, were effectively used by the local activist groups. These groups used the international pressure to raise awareness about the Spanish Government’s violations and to mobilize opposition against RDL 16/2012 at the domestic level.<sup>205</sup> E.g one of the grassroots movements, Red de Denuncia y Resistencia al RDL 16/2012 (REDER) recognized and echoed these recommendations in their reports and communications.<sup>206</sup> Furthermore, according to REDER, their advocacy work involved addressing official institutions like Ombudsman Office and their coordinated efforts played a role in the criticisms of the RDL by several European and International Human Rights organizations, including the ECSR, CEDAW, the UN Special Rapporteur on extreme poverty, and other special UN rapporteurs.<sup>207</sup>

In the European human rights law, the first body to be analysed is the European Commission against Racism and Intolerance (ECRI), which in its report on Spain (2017) emphasized that emergency medical treatment and other essential healthcare services should be explicitly

---

<sup>203</sup> CESCR, “Concluding observations on the sixth periodic report of Spain”, E/C.12/ESP/CO/6, 25 April 2018, paras 41-42, 8.

<sup>204</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. “Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study” *International Journal for Equity in Health* 18, no. 1 (2019): 82, 9. <https://doi.org/10.1186/s12939-019-0971-9>.

<sup>205</sup> REDER, “Anatomy of the Healthcare Reform. The Universality of Exclusion,” September 2015, 12, <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-2015-sep-ENG.pdf>.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.,5.

guaranteed by national law for everyone and urged Spain to ensure right to health for everyone.<sup>208</sup> Furthermore, one of the most interesting approaches towards Spanish exclusion policy was revealed by the ECSR. Particularly, in 2014 the ECSR issued Conclusions XX-2 on Spain, which *inter alia* referred to Article 11 of the ESC (The right to protection of health).<sup>209</sup> More broadly, in the Conclusions the ECSR openly criticised Spain for the adoption of the given law and declared that irregular migrants' exclusion from the health care coverage, constituted a violation under the 11 of the Charter.<sup>210</sup> Furthermore, the Committee asserted in the given case that States parties of the ESC had positive obligations in terms of providing access to health care for migrants regardless of their administrative statuses.<sup>211</sup> As discussed in Chapter 3, although the Committee typically indicates that accommodation, food, emergency medical care and clothing should be available for irregular migrants when their needs are "sufficiently urgent and serious",<sup>212</sup> this approach is not explicitly stated in the Conclusions. Instead, the ECSR warned Spain that failure to amend the law would result in non-compliance with Article 11 of the RESC.<sup>213</sup>

In essence, this inconsistent approach by the ECSR raises questions about the clarity of its oversight mechanisms and the enforcement of human rights obligations at the European level. While the Committee's position on Spain's exclusion of irregular migrants from the healthcare system is appreciated from the perspective of advancing human rights, the case law of the Committee does not align with the narrative outlined in Conclusions XX-2. Particularly, the

---

<sup>208</sup> ECRI Secretariat, Directorate General II - Democracy, and Council of Europe, "ECRI Report on Spain (Fifth Monitoring Cycle)," n.d., para 79, 30.

<sup>209</sup> November 2014, "European Committee of Social Rights, Conclusions XX-2 (ESPAGNE); Articles 3, 11, 12, 13 and 14 of the 1961 Charter.," n.d.

<sup>210</sup> Ibid., 13.

<sup>211</sup> Ibid.

<sup>212</sup> (FEANTSA) v. the Netherlands, No. Complaint No. 86/2012 (n.d.), para 171.

<sup>213</sup> November 2014, "European Committee of Social Rights, Conclusions XX-2 (ESPAGNE); Articles 3, 11, 12, 13 and 14 of the 1961 Charter.," 13-14.

cases *CEC v. Netherlands*<sup>214</sup> and *FEANTSA v. Netherlands*<sup>215</sup> where the Committee incorporates the concept “sufficiently urgent and serious” were adopted in July 2014, after the RDL 16/2012 was introduced and the Conclusions was adopted in November 2014. Hence, this divergent approach might indicate on the potential gap between the Committee’s general principles and its specific actions. Specifically, while the Committee generally advocates for the protection of “universal” right to health for irregular migrants, their specific actions (case law) are not fully aligned with their stated principles. However, the progressive approach of the ECSR in supporting the inclusion of irregular migrants in the healthcare system is crucial for safeguarding the right to health for this marginalized group.

To sum up, the responses of key European and United Nations Human Rights bodies and institutions to Spain’s exclusionary healthcare policy towards irregular migrants highlight that despite warnings and criticisms from UN and European bodies, RLD 16/2012 remained in force until the electoral changes occurred and in 2018, RLD 16/2012 was replaced by the RLD 7/2018. Therefore, despite international pressure, Spain “*successfully*” maintained its policy and restricted access to healthcare for irregular migrants until 2018.

### **4.3 Social Mobilisation in Spain – Measures Beyond the Legal Constraints**

In this section, the social mobilisation in Spain directed against the RDL 16/2012 will be analysed. More broadly, this section explores how broader social pressure and mobilization

---

<sup>214</sup> *CEC v. Netherlands*, para 105.

<sup>215</sup> (*FEANTSA*) *v. the Netherlands*, para 171.

within Spain contributed to demonstrating that the Spanish Government's decision to exclude irregular migrants from the healthcare system was not in line with broader public sentiment.

Callejo and Perna highlight that the advocacy campaign groups included a wide range of entities such as professional bodies, patient groups, labor unions, NGOs, migrant associations, and grassroots movements that emerged in response to RDL 16/2012.<sup>216</sup> Notably, among these grassroots movements were Yo SÍ Sanidad Universal and REDER – Red de Denuncia y Resistencia al RDL 16/2012.<sup>217</sup>

Different actors launched various initiatives at multiple levels, including shaping public opinion, mobilizing healthcare services and professionals, and engaging in legal challenges.<sup>218</sup> Moreover, a strong opposition emerged among medical staff in Spain, who acted in accordance with their moral principles.<sup>219</sup> For example, the president of the Spanish Association of Family and Community Medicine (SEMFYC) declared that he cares about individuals, but not their insurance status<sup>220</sup> and as Garcia Ruiz notes many doctors in Spain continued to serve immigrants regardless of their administrative statuses and showed civil disobedience against the RDL 16/2012.<sup>221</sup> Furthermore, multiple public campaigns were launched to inform the public about the negative effects of the RDL 16/2012 and established observatories to document healthcare exclusion and inequality at both national and regional levels.<sup>222</sup> E.g under the campaign YES to Universal Health Care (facilitated by the Yo SÍ Sanidad Universal) over

---

<sup>216</sup> Bruquetas-Callejo, María, and Roberta Perna. 2020. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25 (1): 85. <https://doi.org/10.1080/13608746.2020.1769342>.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid., 86.

<sup>220</sup> Ibid.

<sup>221</sup> Yolanda Garcia Ruiz, "The Withdrawal of Health Care from Irregular Immigrants and Medical Conscientious Objection," *Oñati Socio-Legal Series*, series 6, no. 5, 2016, 3, <https://ssrn.com/abstract=2888868>.

<sup>222</sup> Bruquetas-Callejo, María, and Roberta Perna. 2020. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25 (1): 86. <https://doi.org/10.1080/13608746.2020.1769342>.

2,000 medical professionals, including doctors and other healthcare staff, publicly voiced their resistance to the Royal Decree, with a significant number opting to openly resist its mandates.<sup>223</sup>

Moreover, following the enactment of RDL 16/2012, grassroots movements like REDER and Yo SÍ Sanidad Universal emerged. These initiatives were formed in response to the legal changes introduced by the decree and the influence by these organizations played a pivotal role in initiating amendments to the said decree which will be further discussed below.

REDER is “a network of groups, movements, organizations and people involved in defending universal access to health and denouncing non-compliance”.<sup>224</sup> REDER’s operational framework involved documenting cases, raising public awareness, and advocating for legislative reforms that ensured universal access to healthcare within the National Health System.<sup>225</sup> It is crucial to note that between 2014 and 2018, REDER identified nearly 4,755 cases where the human right to healthcare for irregular migrants was violated.<sup>226</sup> Nevertheless, documenting cases was not the only aim of REDER and their work included four different pillars: Resisting, Condemnation, Awareness and Changing.<sup>227</sup> A crucial element for this thesis is the fourth pillar: Changing. More broadly, REDER worked with regional authorities and political groups and provided detailed information on the significant human rights violations caused by RDL 16/2012.<sup>228</sup> They reminded autonomous governments of their obligations under

<sup>223</sup> Pressenza International Press Agency, “In Spain, Doctors Resist by Healing,” n.d., <https://www.pressenza.com/2012/11/in-spain-doctors-resist-by-healing/>.

<sup>224</sup> REDER, “Sanidad Universal Para Todas Y todos”, n.d., <https://www.reder162012.org/>.

<sup>225</sup> REDER, “Qué Hacemos,” n.d., <https://www.reder162012.org/manifiesto/>.

<sup>226</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. “Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study” *International Journal for Equity in Health* 18, no. 1 (2019): 82, 6. <https://doi.org/10.1186/s12939-019-0971-9>.

<sup>227</sup> REDER, “Anatomy of the Healthcare Reform. The Universality of Exclusion,” September 2015, <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-2015-sep-ENG.pdf>.

<sup>228</sup> Ibid., 7.

human rights law and offered recommendations on how to universal access to healthcare.<sup>229</sup> As per REDER's report, these efforts resulted in some regions adopting measures to ensure healthcare access for those excluded by the 2012 reform.<sup>230</sup> Hence, the core insight of REDER's work is its ability to bridge grassroots activism with legislative reform, effectively addressed systemic healthcare injustices through advocacy and social mobilization efforts.<sup>231</sup> Another grassroots movement is Yo Sí Sanidad Universal, which was established under the slogan "Yes, Universal Health." It included users and workers of the National Health System and represented a civil disobedience movement to oppose RDL 16/2012.<sup>232</sup> Their goal was to unite professionals and users to ensure universal healthcare and push for the repeal of RDL 16/2012.<sup>233</sup> Yo Sí Sanidad Universal employed civil disobedience as a means of achieving this goal.<sup>234</sup> Thus, this movement, based on conscientious objection, showed a conflict between personal beliefs and legal duties, emphasizing the call for reform and the right to follow one's principles.<sup>235</sup>

Considering the work of these grassroots movements, some scholars assert that although it is difficult to find "a direct causal link" between<sup>236</sup> grassroots and the actual outcome, it can be

---

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. "Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study" *International Journal for Equity in Health* 18, no. 1 (2019):82, 8-10, <https://doi.org/10.1186/s12939-019-0971-9>.

<sup>232</sup> Yo Sí, Sanidad Universal, "Quiénes Somos, Por Una Sanidad Universal," n.d., <https://yosisanidaduniversal.net/quienes-somos>.

<sup>233</sup> Ibid.

<sup>234</sup> Yo Sí, Sanidad Universal, "Preguntas Frecuentes Acerca de La Desobediencia Civil Sanitaria," n.d. <https://yosisanidaduniversal.net/materiales/documentos-legales/preguntas-frecuentes-al-equipo-legal-de-yo-si>.

<sup>235</sup> Ibid.

<sup>236</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. "Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study" *International Journal for Equity in Health* 18, no. 1 (2019): 82, 12, <https://doi.org/10.1186/s12939-019-0971-9>.



argued that they played a crucial role in reforming RDL 16/2012 and regaining access to healthcare for irregular migrants.<sup>237</sup>

Callejo and Perna indicate that after RDL 16/2012 legislative initiators (People's Party) was confronted with huge opposition *inter alia* from the grassroots movements, they shifted their position in 2015 and decided to grant access to primary care for undocumented migrants.<sup>238</sup> However, despite significant social mobilization and public opposition to RDL 16/2012, the Spanish Government did not implement any efficient measures until the new ruling party took office in 2018.<sup>239</sup> The newly elected Spanish Socialist Workers' Party showed a strong political commitment to restoring access to healthcare for irregular migrants.<sup>240</sup> For instance, in the 2015 elections, the PSOE's political program reflected the issue of irregular migrant's inclusion in the healthcare coverage and furthermore, one of their notable slogans was "treat healthcare as a right and not as a commodity".<sup>241</sup> Hence, the PSOE made commitments to reintegrate in the public funding, those who were excluded by the RDL 16/2012 reform.<sup>242</sup> In 2018, PSO won elections, thus irregular migrants regained access to healthcare.

To conclude, social mobilisation in Spain and grassroots movements such as REDER and Yo Sí Sanidad Universal played important role in challenging the restrictive policies of RDL 16/2012, advocating for universal healthcare access, and influencing legislative reforms to

---

<sup>237</sup> Ibid.

<sup>238</sup> Bruquetas-Callejo, María, and Roberta Perna. 2020. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25 (1), 86, <https://doi.org/10.1080/13608746.2020.1769342>.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> PSOE, "Tratar La Salud Como Un Derecho y No Una Mercancía Es #GobernarParaLaMayoría," n.d. <https://www.psoe.es/municipales-autonomicas/gobernar-para-la-mayoria/tratar-la-salud-como-un-derecho-y-no-una-mercancia-es-gobernarparalamayoria/>.

<sup>242</sup> Bruquetas-Callejo, María, and Roberta Perna. 2020. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25 (1): 87. <https://doi.org/10.1080/13608746.2020.1769342>.

restore healthcare rights for irregular migrants in Spain. Moreover, the adoption of RDL 16/2012 by the Spanish Socialist Workers' Party in 2018 represents a significant shift which restored access to healthcare for irregular migrants. Therefore, this legal transformation sets the stage for examining the coordinated interaction between the civil society movements and human rights bodies at the International and European levels. More broadly, the Spanish case study is compelling as it demonstrates the role of human rights advocacy within UN and European human rights bodies. It showcases the strategies used to address major challenges and illustrates the natural cooperation that developed between these entities.

Specifically, local civil society organizations seized the opportunity to address UN bodies, and presented detailed information based on REDER's statistics about the marginalized populations in Spain. E.g in 2014, under the UPR mechanism, 27 stakeholders submitted a report.<sup>243</sup> In the given report, stakeholders emphasized on the negative consequences of the RDL 16/2012 and asserted that after the reform approximately 873,000 individuals deprived of health cards and excluded from healthcare services.<sup>244</sup> Reports from the civil society organisations were also sent to CEDAW, where in terms of the health care, Amnesty International asserted that this policy had adverse impact on the reproductive rights of women.<sup>245</sup> Moreover, the mutual cooperation between international bodies and civil society is evident in the joint report submitted by 36 civil society organizations for Spain's review at the CESCR during the 63rd session in March 2018.<sup>246</sup> This report covers health-related concerns by presenting REDER's

---

<sup>243</sup> UN Human Rights Council, Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Spain, A/HRC/WG.6/21/ESP/3, 27 October 2014.

<sup>244</sup> Ibid., para 33.

<sup>245</sup> Amnesty International (submission for the PSWG), "Spain Report to the CEDAW," July 2015, 4.

<sup>246</sup> NGOs (Spain), "Joint Submission to the CESCR on the Occasion of the Review of Spain's 6th Periodic Report at the 63rd Session," n.d. [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FCS%2FESP%2F30354&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FCS%2FESP%2F30354&Lang=en).

data on marginalized groups affected, indicating that 3,784 individuals were denied access to healthcare services under RDL 16/2012.<sup>247</sup> Thus, documentation of health-related issues by REDER served dual purposes, it provided essential assistance to the affected population while simultaneously raised international awareness and advocacy on these critical issues.

The coordinated efforts of civil society resulted in CESCER'S concluding observations. More broadly, in 2018, information enshrined in the joint submission was duly transposed in the CESCER's concluding observations, where the former once again urged Spain to take appropriate measures to guarantee that irregular migrants receive equitable access to essential healthcare services, without discrimination.<sup>248</sup> Moreover, “a sustained and coordinated fight”<sup>249</sup> of the civil society was strongly encouraged by the international, non-governmental organisation Centre of Economic and Social Rights (CESR), whose name is frequently cited next to the grassroots movements in Spain.<sup>250</sup> Particularly, CESR was not only joined statements on an international level, but according to some commentators, through their coordination with local Spanish civil society organisations and international actors (joint statements with local Spanish civil society organisations<sup>251</sup> and submission of shadow reports at the various organs on International and European level<sup>252</sup>), civil society organisations made a progress and got a promise from the new government in 2018, to repeal the RDL 16/2012.<sup>253</sup>

---

<sup>247</sup> Ibid., para 14.

<sup>248</sup> CESCER, “Concluding observations on the sixth periodic report of Spain”, E/C.12/ESP/CO/6, 25 April 2018, para 41, 8.

<sup>249</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. “Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study” *International Journal for Equity in Health* 18, no. 1 (2019): 82, 9. <https://doi.org/10.1186/s12939-019-0971-9>.

<sup>250</sup> Center for Economic and Social Rights (CESR), “Full Submission to UN CESCER for Spain Review, March 2018,” March 25, 2018. <https://www.cesr.org/full-submission-un-cescr-spain-review-march-2018/>.

<sup>251</sup> Ibid.

<sup>252</sup> CESR, “United Nations Urges Spain to End Detrimental Austerity Measures,” n.d. <https://www.cesr.org/united-nations-urges-spain-end-detrimental-austerity-measures-0/>.

<sup>253</sup> Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. “Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study” *International Journal for Equity in Health* 18, no. 1 (2019): 82, 9. <https://doi.org/10.1186/s12939-019-0971-9>.

Cooperation and significance of the information provided by NGO is vividly seen in the CoE's Human Rights Commissioner's 2013 report. After visiting Spain, the Commissioner indicated that according to the information provided by the Spanish NGOs, irregular migrant's children were denied access to medical services and thus Commissioner pushed Spain to comply with Article 24 of the CRC for ensuring the highest attainable standard of health for all children, thereby contributed to the repeal of RDL 16/2012.<sup>254</sup>

Considering all mentioned above, this section showed examples of a coordinated approach where civil society organizations, grassroots movements, and human rights bodies worked collaboratively at both domestic and international levels. Their efforts included documentation of violations, advocacy through international mechanisms, joint submissions of reports, and sustained pressure on governments. Ultimately, these interactions significantly contributed to raising awareness of the issue and influenced policy changes, which will be explored in the next section.

#### **4.4 Determinants of the Right to Health of Irregular Migrants in Spain – Situation After 2018**

Following an examination of the healthcare rights for irregular migrants in Spain from 2012 to 2018, this next section analyzes the post-2018 landscape. With heightened social pressure on the government during this period, significant shifts have occurred in healthcare policies and practices. Therefore, the information represented in this section aims to scrutinize these changes and their impact on the access to healthcare for irregular migrants in Spain.

---

<sup>254</sup> CoE, "REPORT by Nils Muižnieks Commissioner for Human Rights of the Council of Europe. Following his visit to Spain from 3 to 7 June 2013" n.d. CommDH (2013)18, 9 October 2013, para 21. <https://rm.coe.int/16806db80a>.

The preamble of RDL 7/2018 illustrates significant shifts in Spanish healthcare policy, by acknowledging that the effective protection of citizens' health is crucial, particularly for vulnerable groups facing social exclusion, such as undocumented immigrants in Spain.<sup>255</sup> The Preamble also criticizes RDL 16/2012 and specifically highlights that the implementation of RDL 16/2012 in Spain restricted access to public healthcare for undocumented migrants, infringing upon their fundamental right to health.<sup>256</sup> Thus, according to the new RDL 7/2018 previous law contradicted international norms, which perceive healthcare as an inherent entitlement for all individuals regardless of their immigration status and represents a clear violation of human rights principles.<sup>257</sup>

Thus, by acknowledging the infringement upon fundamental rights posed by the implementation of RDL 16/2012, the new decree reflects a commitment to upholding human rights principles and addressing the inherent vulnerabilities faced by marginalized populations, rationally might be perceived as a significant step towards promoting equity and inclusivity within the healthcare system in Spain. Although, some commentators and grassroots movements such as REDER notes that RDL 7/18 (Article 3) introduces administrative and bureaucratic requirements for this group to access healthcare.<sup>258</sup>

To sum up, the focus of this thesis is limited to analyzing the ambiguity within the provisions of the new Royal Decree, and the limitations identified in the decree are not extensively

---

<sup>255</sup> Jefatura del Estado, Real Decreto-ley 7/2018 de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud (Royal Decree-Law 7/2018, of July 27, on universal access to the National Health System). [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-10752](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10752).

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> REDER, "The Urgency of Ensuring Universal Health Care, Leave No One Out," n.d., 5. 2018. <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-oct18-eng-v1.pdf>.

documented in academic or published literature.<sup>259</sup> Nevertheless, the examination of RDL 7/2018 is motivated by its clarity of demonstrating a decisive move towards encompassing irregular migrants under its protective framework and despite the bureaucratic criteria outlined, RDL 7/2018 ultimately resolves the issue and ensures irregular migrants' access to healthcare. In summary, the RDL 7/2018, as highlighted by the REDER movement, signifies a substantial advancement in healthcare access for irregular migrants in Spain.<sup>260</sup> However, the historical context of healthcare rights for irregular migrants from 1978 to 2012, combined with ongoing legal ambiguities, reveals that neither past nor present governments have fully committed to the complete inclusion of irregular migrants in healthcare coverage and the repeal of the RDL might be perceived as an outcome of the coordinated efforts both at the International and domestic level.

This chapter has explored how international and European human rights law mechanisms safeguard the right to health for irregular migrants, with Spain's healthcare policy changes serving as a focal case study. The analysis highlights that while RDL 7/2018 is perceived as a substantial improvement in healthcare access for irregular migrants, the persisting legal ambiguities reflect an incomplete commitment by both the former and current governments. Case study of Spain illustrates that States often show resistance in safeguarding the rights of irregular migrants, even when they are bound by international and European human rights obligations. Nevertheless, the protection guarantees of the International and European human rights law in protecting the right to health for irregular migrants is strengthened by the influence

---

<sup>259</sup> Renee Y Hsia and Diana Gil-González, "Perspectives on Spain's Legislative Experience Providing Access to Healthcare to Irregular Migrants: A Qualitative Interview Study," *BMJ Open* 11, no. 8 (n.d.): 5. <https://bmjopen.bmj.com/content/11/8/e050204.info>.

<sup>260</sup> REDER, "REDER Presenta Sus Enmiendas a La Nueva Ley Para Alcanzar La Verdadera Universalidad Sanitaria," 2022, <https://www.reder162012.org/presentamos-nuestras-propuestas-de-enmiendas-sobre-universalidad/>.

of social mobilization and pressure from international human rights bodies. This combined effort has been essential in Spain for making progress, as solely depending on pressure from European and International human rights bodies would not have been adequate to bring change. The outcomes of the 2018 elections and the integration of healthcare policy for irregular migrants into the Spanish Socialist Workers' Party's electoral campaign, highlights that social mobilization has indeed influenced the government to make changes in the legislation.

## Conclusions

There have always been ethical, practical and legal challenges toward irregular migrants and even today, the lack of consensus on how to properly address them without dehumanizing, further demonstrates how marginalized is this community.

The inherent ambiguity and complexity toward irregular migrants continue to exist when discussing their right to health. Particularly, the disparity regarding the interpretation of the right to health within the International and European Human Rights Law demonstrates that there is not an established understanding of irregular migrants' right to health. This fragmentation has real implications for the lived experiences of irregular migrants who frequently find themselves targeted by State-imposed restrictive measures, particularly during times of crisis.

Spanish Government's decision to limit irregular migrants' healthcare access is a broader reflection of the aforementioned critical issue where thousands lost access to medical services overnight.

The Spanish case study illustrated that States could evade their obligations under International Human Rights Law, which provides the most comprehensive protection of the right to health. Instead, they may opt to afford the right to health for irregular migrants in line with the more limited guarantees provided by European Human Rights Law. Thus, in the absence of a robust framework on the right to health for irregular migrants within these legal frameworks, States are equipped with the justification to limit irregular migrants' access to healthcare, thereby they are left vulnerable to the State-imposed restrictions.



Considering all points mentioned, the role of the Human Rights bodies within the International and European Human Rights Law is particularly important to address the practical and legal challenges at the domestic level and to safeguard irregular migrants' fundamental rights. Although, the protection mechanisms provided by these bodies may not always be adequate to compel states to fulfil their obligations when irregular migrants' rights are at stake. This weakness is mitigated by the pressure exerted through domestic social mobilization and advocacy.

To sum up, at one hand the sovereignty of the State and on the other hand the fact that there is not an established interpretation of the right to health for irregular migrants leads us to the conclusion that the role of the Human Rights bodies in these legal frameworks are indeed important but not always decisive to uphold irregular migrants' right to health from arbitrary limitation. Thus, when coordination at the international level combines with the social mobilisation at the domestic level this really enhances the pressure on the States and positively affects the outcome of the process. However, further research is needed to analyze the specific actions and impact of Human Rights bodies in advocating for the right to health of irregular migrants. This research is important to understand what the advocacy strategies and legal interventions of the Human Rights bodies to protect that healthcare access for irregular migrants without relying on domestic social mobilization. The former is critical because public sentiments about irregular migrants' fundamental rights may not always be strong enough in receiving States to compel them to meet their human rights obligations.

## References

- Airey v. Ireland, No. 6289/73, Judgment of the European Court of Human Rights, 9 October 1979.
- Ambrosini, Maurizio, and Minke H.J. Hajer. *Irregular Migration*. Springer Nature; Springer International Publishing, 2023. <https://library.oapen.org/bitstream/handle/20.500.12657/63574/978-3-031-30838-3.pdf?sequence=1>.
- Amnesty International. "Spain: Cruel Austerity Measures Leave Patients Suffering." April 24, 2018. <https://rb.gy/sscg5>.
- Amnesty International (submission for the PSWG). "Spain Report to the CEDAW," July 2015.
- Angeleri, Stefano. *Irregular Migrants and the Right to Health*. Cambridge University Press, 2022.
- Ann Marie Gray, "The Right To Healthcare" in *International Human Rights, Social Policy and Global Development: Critical Perspectives*, ed. Gerard McCann and Félim Ó hAdhmaill (Bristol University Press, 2020), 196.
- Anneliese Baldaccini, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive," *European Journal of Migration and Law* (2009) 1-17, n.d., 2, 2009.
- Alan Desmond, "The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative", *Human Rights Law Review* 16, no. 2 (2016): 253.
- Àlex Boso and Mihaela Vance. "Should Irregular Migrants Have the Right to Healthcare? Lessons Learnt from the Spanish Case." *Critical Social Policy* 36, no. 2016. <https://doi.org/10.1177/0261018315624174>.
- Audrey R. Chapman, "Conceptualizing the Right to Health: A Violations Approach," *Tennessee Law Review* 65 (1998): 389, 397.
- Bruquetas-Callejo, María, and Roberta Perna. "Migration and Healthcare Reforms in Spain: Symbolic Politics, Converging Outputs, Oppositions from the Field." *South European Society and Politics* 25, no. 1 (June 18, 2020): 81-87. <https://doi.org/10.1080/13608746.2020.1769342>.
- Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak. *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. Vol. 7. Immigration and Asylum Law and Policy in Europe, n.d. 2004.
- Cristina Samboan. "The Role of the European Committee for Social Rights (ECSR) in the European System for the Protection of Human Rights: Interactions with ECHR Jurisprudence." *Perspectives of Business Law Journal* 2, no. 1 (November 2013): 228.
- Center for Economic and Social Rights (CESR). "Full Submission to UN CESCR for Spain Review, March 2018." March 25, 2018. <https://www.cesr.org/full-submission-un-cescr-spain-review-march-2018/>.
- Center for Economic and Social Rights (CESR) "United Nations Urges Spain to End Detrimental Austerity Measures." April 2018. <https://www.cesr.org/united-nations-urges-spain-end-detrimental-austerity-measures-0/>.
- CESCR. "Concluding Observations on Spain of the Committee on Economic, Social and Cultural Rights." E/C.12/ESP/CO/5 (2012).
- CESCR. "Concluding Observations on the Fifth Periodic Report of Italy." E/C.12/ITA/CO/5, 18 October 2015.
- CESCR. "Concluding Observations on the Second Periodic Report of Greece." E/C.12/GRC/CO/2, 27 October 2015.
- CESCR. "Concluding Observations on the Second and Third Periodic Reports of Switzerland." E/C.12/CHE/CO/2-3, 27 October 2015.

- CESCR. “Concluding Observations on the Sixth Periodic Report of Germany.” E/C.12/DEU/CO/6, 27 November 2018.
- CESCR. “Concluding Observations on the Sixth Periodic Report of Spain.” E/C.12/ESP/CO/6, 25 April 2018.
- CESCR. “Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights.” E/C.12/2017/1, 13 March 2017. <https://www.refworld.org/policy/statements/cescr/2017/en/117624>.
- CESCR. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant). E/C.12/2000/4, CESCR, 11 August 2000.
- CESCR. General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant). E/C.12/GC/19, February 4, 2008.
- CESCR. General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/20, 2 July 2009.
- Chetail, Vincent. “Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights.” *International Journal of Refugee Law* 22, no. 4 (2010): 679–699.
- Chetail, Vincent. *International Migration Law*. Oxford Scholarly Authorities on International Law. Oxford: Oxford University Press, 2019.
- Constitution of the World Health Organization (WHO), 14 UNTS 185 (1946).
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, entered into force September 3, 1981, 1249 UNTS 13.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), “Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Spain,” July 29, 2015.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, chap. I (1999), 2015.
- Convention on the Rights of Persons with Disabilities (CRPD), adopted by General Assembly Resolution A/RES/61/106 of 13 December 2006.
- Convention on the Rights of the Child (CRC), adopted New York, 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.
- Council Directive 2008/115/EC of 16 December 2008 on common standards and procedure in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.
- “European Committee of Social Rights, Conclusions XX-2 (ESPAGNE); Articles 3, 11, 12, 13 and 14 of the 1961 Charter,” n.d. November 2014.
- Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, European Committee of Social Rights, 2012.
- Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, European Committee of Social Rights, 2009.
- D. v. The United Kingdom, No. 30240/96, Judgment of the European Court of Human Rights, 2 May, 1997.
- Edelenbos, Carla. “The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.” *Refugee Survey Quarterly* 24, no. 4 (2005): 93–99. <http://www.jstor.org/stable/45054041>.
- European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, European Committee of Social Rights, 2014.
- European Committee of Social Rights. “European Committee of Social Rights - Social Rights - www.coe.int.” n.d. <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>.

European Committee of Social Rights. "Spain - Social Rights - www.coe.int." n.d. <https://www.coe.int/en/web/european-social-charter/spain#:~:text=Spain%20ratified%20the%20European%20Social,on%2017%2F05%2F2021>.

European Migration Network (EMN). "Practical Measures to Reduce Irregular Immigration - Spain." n.d. <https://www.emnspain.gob.es/documents/392158/520788/EMN-EN-Irregular-Immigration.pdf/325601ac-2d9f-ef3a-012c-de09ffd89603?version=1.0&t=1645798159280&download=false>.

European Social Charter, ETS No. 035, opened for signature October 18, 1961, entered into force February 26, 1965.

European Social Charter (revised), ETS No. 163, opened for signature May 3, 1996, entered into force July 1, 1999.

"The European Social Charter - Social Rights - www.coe.int." Social Rights. n.d. <https://www.coe.int/en/web/european-social-charter>.

"European Committee of Social Rights, Conclusions XX-2 (ESPAGNE); Articles 3, 11, 12, 13 and 14 of the 1961 Charter," n.d. November 2014.

European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, ECSR, 2014.

European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012, European Committee of Social Rights

Francisco J. Arcila Henao v. The Netherlands, No. 13669/03, ECtHR.

Garcia Ruiz, Yolanda. "The Withdrawal of Health Care from Irregular Immigrants and Medical Conscientious Objection." *Oñati Socio-Legal Series* 6, no. 5 (2016): 1163–1185. <https://ssrn.com/abstract=2888868>.

General Comment No. 2, on the rights of migrant workers in an irregular situation and members of their families, August 28, 2013, UN Doc. CMW/C/GC/2.

Greenwood, Christopher. "Sovereignty: A View from the International Bench." In *Sovereignty and the Law: Domestic, European and International Perspectives*, edited by Richard Rawlings, Peter Leyland, and Alison Young, 0. Oxford University Press, 2013. <https://doi.org/10.1093/acprof:oso/9780199684069.003.0014>.

Hélène Ruiz Fabri. "Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?" In *Human Rights, Intervention, and the Use of Force*, edited by Philip Alston and Euan Macdonald, 34–57. Oxford University Press, 2008. <https://doi.org/10.1093/acprof:oso/9780199552719.003.0002>.

Human Rights Council and Working Group on the Universal Periodic Review. "National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Spain." A/HRC/WG.6/21/ESP/1, 10 November 2014.

International Organization of Migration (IOM). "Key Migration Terms." International Organization for Migration (IOM). <https://www.iom.int/key-migration-terms>.

International Commission of Jurists. *Migration and International Human Rights Law, A Practitioners' Guide*, 2014.

International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Complaint No. 173/2018, ECSR, 2021.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), opened for signature 21 December 1965, 660 UNTS 195, Article 5.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMWF), opened for signature 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003.

International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, European Committee of Social Rights, 2004.

"I AM a MIGRANT," n.d. <https://www.iamamigrant.org/>.

Ippolito, Francesca, and Sara González. "Handle with Care" in Strasbourg the Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-Economic Rights." In *Journal Title*, 149–168.

Izabella Majcher, *The European Union Returns Directive and Its Compatibility with International Human Rights Law, Analysis of Return Decision, Entry Ban, Detention, and Removal*, vol. 45, Immigration and Asylum Law and Policy in Europe, n.d., 419, 2020.

Jefatura del Estado. "Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social." (n.d.). <https://www.global-regulation.com/translation/spain/1453904/law-organic-4-2000%252c-of-11-january%252c-on-rights-and-freedoms-of-foreigners-in-spain-and-their-social-integration.html>.

Jefatura del Estado. "Real Decreto-Ley 7/2018 de 27 de Julio, Sobre El Acceso Universal al Sistema Nacional de Salud." Pub. L. No. BOE-A-2018-10752 (n.d.). [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-10752](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10752).

King, Russell. "Theories and Typologies of Migration: An Overview and a Primer." *Willy Brandt Series of Working Papers in International Migration and Ethnic Relations*. Malmö Institute for Studies of Migration, Diversity and Welfare (Mim), 2012.

Khlaifia and Others v. Italy. No. 16483/12, Judgment of the European Court of Human Rights, 15 December, 2016.

Khalid Koser. *International Migration: A Very Short Introduction*. Oxford University Press, 2016.

Kok, Pieter. "The Definition of Migration and its Application: Making Sense of Recent South African Census and Survey Data." *Southern African Journal of Demography* 7, no. 1 (1997): 20–30. <http://www.jstor.org/stable/20853242>.

Kossi Archil Amegnigan v. The Netherlands, No. 25629/04, Judgment of European Court of Human Rights, 25 November, 2004.

La Red de Denuncia y Resistencia al RDL 16/2012 (REDER). "Anatomy of the Healthcare Reform. The Universality of Exclusion." September 2015. <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-2015-sep-ENG.pdf>.

La Red de Denuncia y Resistencia al RDL 16/2012 (REDER). "Civil Society Faced with Healthcare Exclusion, Defending Our Healthcare." October 2017. <https://www.reder162012.org/wp-content/uploads/2022/02/REDERsep17ENG.pdf>.

La Red de Denuncia y Resistencia al RDL 16/2012 (REDER). "Qué Hacemos." n.d. <https://www.reder162012.org/manifiesto/>.

La Red de Denuncia y Resistencia al RDL 16/2012 (REDER). "Sanidad Universal Para Todas Y Todos." n.d. <https://www.reder162012.org/>.

La Red de Denuncia y Resistencia al RDL 16/2012 (REDER). "The Urgency of Ensuring Universal Health Care, Leave No One Out." n.d., 2018. <https://www.reder162012.org/wp-content/uploads/2022/02/REDER-oct18-eng-v1.pdf>.

Letter addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights, 16 May 2012, CESCR/48th1/SP/MAB/SW.

Malberg, 1997, as cited in King, 2012.

Marmot, Michael, and Ruth Bell. "The Sustainable Development Goals and Health Equity." *Epidemiology* 29, no. 1 (January 1, 2018): 5–7. <https://doi.org/10.1097/ede.0000000000000773>.

M.S.S. v Belgium and Greece, No. 30696/09, Judgment of the European Court of Human Rights, 21 January 2011.

N. v. The United Kingdom, Appl. No. 26565/05, Judgment of the European Court of Human Rights,

O'Cinneide, C. "The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism." In *Migrants with Irregular Status in Europe*, edited by Spencer, S., and Triandafyllidou, A. IMISCOE Research Series. 61, Springer, Cham, 2020. [https://doi.org/10.1007/978-3-030-34324-8\\_4](https://doi.org/10.1007/978-3-030-34324-8_4).

Pace, Paola, ed. *Migration and the Right to Health: A Review of International Law*. n.d. [https://publications.iom.int/system/files/pdf/iml\\_19.pdf](https://publications.iom.int/system/files/pdf/iml_19.pdf).

Paposhvili v. Belgium, No. 41738/10, European Court of Human Rights.

Pressenza International Press Agency. "In Spain, Doctors Resist by Healing." n.d. <https://www.pressenza.com/2012/11/in-spain-doctors-resist-by-healing/>.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, January 28, 2004, United Nations, UN Doc. A/55/383.

PSOE. "Tratar La Salud Como Un Derecho y No Una Mercancía Es #GobernarParaLaMayoría." n.d. <https://www.psoe.es/municipales-autonomicas/gobernar-para-la-mayoria/tratar-la-salud-como-un-derecho-y-no-una-mercancia-es-gobernarparalamayoria/>.

Rawlings, Richard, Peter Leyland, and Alison Young. *Sovereignty and the Law: Domestic, European and International Perspectives*. Oxford University Press, 2013. <https://doi.org/10.1093/acprof:oso/9780199684069.003.0014>.

Runde, Daniel F., Erol K. Yayboke, and Carmen Garcia Gallego. "Introduction: Why the Focus on Irregular Migration." *Out of the Shadows: Shining a Light on Irregular Migration*. Center for Strategic and International Studies (CSIS), 2019. <http://www.jstor.org/stable/resrep22576.4>.

Saadi v. Italy, No. 37201/06, Judgment of the European Court of Human Rights,

Samboan, Cristina. "The Role of the European Committee for Social Rights (ECSR) in the European System for the Protection of Human Rights: Interactions with ECHR Jurisprudence." *Perspectives of Business Law Journal* 2, no. 1 (November 2013): 228–243.

Scholten, Peter, ed. *Introduction to Migration Studies - An Interactive Guide to the Literatures on Migration and Diversity*. IMISCOE Research Series, n.d. <https://link.springer.com/book/10.1007/978-3-030-92377-8>.

Schloenhardt, Andreas, Francesco Calderoni, Joseph Lelliott, and Bettina Weißer, eds. *UN Convention against Transnational Organized Crime: A Commentary*. Oxford: Oxford University Press, 2023. <https://doi.org/10.1093/law/9780192847522.001.0001>.

Shaw, Robert P. *Migration Theory and Fact*. Philadelphia: Regional Science Research Institute, University of Pennsylvania, 1975.

Social Rights. "European Committee of Social Rights - Social Rights - www.coe.int." n.d. <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>.

Social Rights. "Spain - Social Rights - www.coe.int." n.d. <https://www.coe.int/en/web/european-social-charter/spain#:~:text=Spain%20ratified%20the%20European%20Social,on%2017%2F05%2F2021>.

"The European Social Charter - Social Rights - www.coe.int." Social Rights. n.d. <https://www.coe.int/en/web/european-social-charter>.

Stoyanova, Vladislava. "The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling." *German Law Journal* 21, no. 3 (2020): 438–460. <https://doi.org/10.1017/glj.2020.22>.

Sylvie Da Lomba. "Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights." *European Journal of Health Law* 21, no. 4 (2014): 354–363.

S.H.H. v. The United Kingdom, No. 60367/10, Judgment of the European Court of Human Rights, 29 January, 2013.

Tobin, John. "Charting the History of the Right to Health." In *Oxford University Press eBooks*, 17-27. 2011. <https://doi.org/10.1093/acprof:oso/9780199603299.003.0002>.

The Cortes Generales (Plenary Meetings of the Congress of Deputies and the Senate). "The Spanish Constitution." § Article 43 (1978). <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

The Working Group on the issue of discrimination against women in law and in and practice. “Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice - Mission to Spain.” A/HRC/29/40/Add.3, 17 June 2015, para 104.

UN Committee on the Elimination of Racial Discrimination (CERD). CERD General Recommendation XXX on Discrimination Against Non-Citizens, 5 August 2004. <https://www.refworld.org/legal/general/cerd/2004/en/39027>.

UN Committee on the Rights of the Child (CRC). General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15 (17 April 2013).

UN Economic and Social Council. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant). E/C.12/2000/4, CESCR, 11 August 2000.

UN General Assembly. General Comment No. 2, on the rights of migrant workers in an irregular situation and members of their families, August 28, 2013, UN Doc. CMW/C/GC/2.

UN General Assembly. “International Convention on the Protection of the Rights of All Migrants and Members of their Families.” 18 December 1990, A/RES/45/158.

UN General Assembly. *International Covenant on Economic, Social and Cultural Rights*. United Nations Treaty Series, vol. 993, p. 3, December 16, 1966.

UN Human Rights Council. “Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Spain.” A/HRC/WG.6/21/ESP/3, 27 October 2014.

Urtaran-Laresgoiti, M., Fonseca Peso, J., and Nuño-Solinís, R. “Solidarity against Healthcare Access Restrictions on Undocumented Immigrants in Spain: The REDER Case Study.” *International Journal for Equity in Health* 18, no. 1 (2019): 82. <https://doi.org/10.1186/s12939-019-0971-9>.

Vaughan, Lowe; Staker, Christopher. “Jurisdiction” In *International Law*, edited by Malcolm D. Evans, 329. Oxford, UK: Oxford University Press, 2003

Warbrick, Colin “Economic and Social Interests and the European Convention on Human Rights.” In *Economic, Social, and Cultural Rights in Action*, edited by Mashood Baderin and Robert McCorquodale, 241–258. Oxford University Press, 2007. <https://doi.org/10.1093/acprof:oso/9780199217908.003.0010>.