

# Human Rights of Irregular Immigrants: A Challenge for the Universality of Human Rights

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## Abstract

Irregular immigration is a phenomenon with a substantial impact for the majority of the countries. The paper analyses whether there is an adequate human rights framework for protection of irregular immigrants or whether the irregular status exempts the migrants from the protection of international human rights law. If this is the case, then the human rights universality has failed. The paper takes into consideration the developments in the International and EU Law, as well as in the jurisprudence of the international tribunals regarding protection of irregular immigrants. It is divided into three main sections. The first section informs briefly on the dynamics of irregular immigrants; the second section analyses the legislation on irregular immigration from the perspective of the state sovereignty, the third section analyses the human rights law and the protection it affords to irregular immigrants, pursuant to the interpretation of International tribunals.

**Keywords:** irregular immigrants; human rights; state sovereignty

## General Considerations on the Irregular Immigration

It is very difficult to have accurate statistics on the number of irregular immigrants due to the very nature of the irregular immigration, which takes place out of the control of states' authorities. However, different studies provide approximate figures based on flocks or stocks. In EU the data go up to 8 millions irregular immigrants.<sup>1</sup> In UK the estimates go up to 863.000 persons, according to a study of the London School of Economics (2007),<sup>2</sup> a figure with an increasing trend up to 1 million persons in 2012. In USA it is believed that there are 12 millions irregular immigrants<sup>3</sup>, Russia reports around 14 million 'irregular immigrant workers'.<sup>4</sup> In France, around 400.000 irregulars, in Italy and Canada are reported around 200.000, however the number is thought to be significantly higher.<sup>5</sup> Considerable figures are reported by other countries such as India, with around 16 million undocumented immigrants, South Africa with around 8 millions. Albania has been mostly a territory of transit of irregular immigrants, thus the number of foreigners that reside irregularly is insignificant, as compared to that

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<sup>1</sup> European Parliament Press: 2009; The Guardian: 2010.

<sup>2</sup> Report of the London School of Economics: 2009 p.58.

<sup>3</sup> Journal Washington Post: 2010; See also Catherine Dauvergne, p.12.

<sup>4</sup> Kiril Vasilengo 'The increasing illegal immigration', Russian Press Digest, 2006.

<sup>5</sup> Catherine Dauvergne, p13.

of emigrants.

Irregular immigration is a product of globalisation. It is the result of huge disparities in wealth and development between the countries. Lack of hope for survival, unemployment, extreme poverty up to starvation, lack of public order and problems of democracy have forced migrants to leave their countries, often travelling under bad conditions towards countries of destination. Desperate immigrants pay large amount of money to go to the 'promised lands', with the hope of a new life.

A push factor of irregular immigration is the labour market. Referring to a report of the International Labour Organisation (ILO), Stephen Castles<sup>6</sup> points that an element, which has contributed significantly to the increase of the number of irregular immigrants, is the use of informal employment in the working places called 3 D (dirty, dangerous, degrading). Illegal immigrants feed the market with cheap and instant labour force, whenever required; if not needed they just 'disappear'.<sup>7</sup> It is thought that a very important element for the functioning of the American economy is the cheap illegal labour,<sup>8</sup> or, if illegal immigrants would be returned, London would stop functioning overnight.<sup>9</sup> Illegal immigrants contribute in the economy, under the minimum wage, without demands for social protection. They become very attractive for employers, due to their vulnerable situation, resulting often in situations of modern slavery.<sup>10</sup> It is argued that the policy drafters of destination countries accept irregular immigration, as a necessity of the labour market. However the social costs are borne by irregular immigrants.<sup>11</sup>

### **States' Sovereignty and Irregular Immigration**

Regardless of their contribution in the economy, the official policies of the destination countries focus in the fight against irregular immigration. The main objective is effective deportation of irregular immigrants, as opposed to regularisation of their status.<sup>12</sup> Deportation is considered as a *conditio sine qua non* for the success of the policies for managing migration in general.

The majority of the destination countries consider irregular immigration as a crime. For example, UK, Germany, or Greece do envisage criminal penalty for irregular immigrants. Albania considers illegal border crossing as a criminal contravention,

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<sup>6</sup> Stephen Castles, Guest workers in Europe: A resurrection: International Migration Review, Volume 40, no.4, 2006, p.750

<sup>7</sup> Catherine Dauvergne, p. 19, *ibid*.

<sup>8</sup> Douglas Guilfoyle, 'Transnational criminal law as governance strategy in the Global Labour Market', Refugees Survey Quarterly, volume 29, no.1, 2010, p.186 and LeVoy and Geddie 'Irregular Migration-Challenges, limits and remedies', Refugees Survey Quarterly vol.28, no.4, p.88.

<sup>9</sup> C. Auvergne, *ibid*, f.20

<sup>10</sup> Douglas Guilfoyle, *ibid*, f.188-195.

<sup>11</sup> Stephen Castles, *ibid*, f 777.

<sup>12</sup> COM:2006/402 final.

punished by fine or imprisonment up to two years.<sup>13</sup> In practice the majority do not punish irregular immigrants, but focus on effective removal.

In international level, the sovereign authority of the states to fight irregular immigration is acknowledged by the “UN Protocol against smuggling of migrants, by land, sea or air”.<sup>14</sup> The Protocol requires the states to take measures to enforce border control and penalise smuggling of immigrants through criminal penalties. However, the Protocol demands the states to have due consideration for respecting human rights of irregular immigrants. The Protocol reaffirms the sovereign right of every state on admission of foreigners in the territory and envisages the possibility of detention of irregular immigrants only for purpose of removal. If the immigrants are detained, the Protocol highlights the obligation of the country of destination to inform the consulates of the country of origin.

Another international instrument that provides measures against irregular immigration is ILO Convention no.143 ‘Migrant Workers’ Convention’. The Convention requires the countries to take measures against smuggling and illegal employment.<sup>15</sup> It envisages administrative, criminal and financial penalties against employers of irregular immigrants and smugglers (art. 6).

The sovereign right of the states to counter illegal immigration is expressed in a very consolidated form in the EU level. Fight against irregular immigration is considered as a key element of the EU policies and closely related with the primary objective of the EU for an area of freedom, security and justice.<sup>16</sup> EU Acquis has envisaged measures for border control and identification of irregular immigrants in territory. Member states are required to offer the public services to the foreigners only after their migration status has been ascertained, except when necessary for humanitarian reasons.<sup>17</sup> In practice implementation of such measures has been debatable, i.e. in Italy the doctors and nurses refused to check migration papers, declaring that “We are doctors and not police”.<sup>18</sup>

EU Acquis envisages penalties against facilitators of irregular immigration, pursuant to Directive 90/2002/EC ‘of 28 November 2002 ‘Defining the facilitation of unauthorized entry, transit and residence’. The sanctions are diverse. i.e., criminal, financial and administrative, both for the individual and the juridical persons.<sup>19</sup> Similarly EU Acquis

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<sup>13</sup> Article 297 of the Criminal Code of Albania.

<sup>14</sup> The Protocol entered into force in 28 January 2004. It has been ratified by the majority of the destination countries.

<sup>15</sup> Article 3 of C143.

<sup>16</sup> See the Preamble of the Directive on ‘Defining the facilitation of unauthorised entry, transit and residence’ 2002/90.

<sup>17</sup> See article 4, *Ibid*.

<sup>18</sup> Eve Gedie and Mishel LeVoi-‘Irregular immigration: challenges and Limits’ *Refugee Journal Quarterly*, 2010.

<sup>19</sup> See Directive 2002/90/EC.

envisages penalties for the transporters who enable illegal border crossing, by land, air or sea.<sup>20</sup>

To counter illegal employment of immigrants, EU has approved the Directive against illegal employment, no. 2009/52/EC in 18 June 2009. The Directive marks a significant step on the measures against irregular immigration as it puts the burden of proof to the employer in case of an illegal employment. The former must require the work/residence permit prior to employment of the immigrant. Failure to respect the obligations is subject to financial, administrative, permanent or temporary removal of the license and criminal sanctions.<sup>21</sup> The Directive does not provide measures against irregular immigrants. On the contrary, it envisages the right of irregular immigrants to claim and obtain all the dues from the work, including unpaid salaries, interests and accrued insurance.<sup>22</sup>

EU *acquis* also envisages measures against marriages of conveniences, as one of the most frequent ways used by the irregular immigrants to regularize their status'.<sup>23</sup> MS must verify the marriage of third country nationals with EU citizen only if there are clear doubts on its genuineness and not systematically.<sup>24</sup> Another important document against irregular immigration in EU level is the Directive on Common Standards and Procedures for returning the Third Country Nationals Staying Illegally at EU MS. The Directive aims at effective return of irregular immigrants, through common procedures and standards.<sup>25</sup>

Thus, the fight against irregular immigration is framed as a holistic approach, in recognition of the sovereign right of the states to stop illegal immigration.

## **Human Rights and Protection of Irregular Immigrants**

The starting point when analysing the phenomena of irregular immigration is the right of the sovereign states to penalise irregular immigration. However, in the new era of the human rights and fundamental freedoms the question is: Are irregular immigrants subject of protection of international human rights law? Do they enjoy the rights when they are found in the territory of the destination country residing and/or working in contravention with the legal provisions? Is there a balance between the right of

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<sup>20</sup> See Schengen Directive- Article 26(1)(a) and Article 3 of the Council Directive supplementing the provisions of article 26 of the Schengen Convention', 2001/51/EC.

<sup>21</sup> Article 11 of the Directive against illegal employment of irregular immigrants.

<sup>22</sup> *Ibid*, Article 13.

<sup>23</sup> See Council Resolution of 4 December 1997 on the measures against marriages of conveniences, OJ N° C 328 of 16 December 1997.

<sup>24</sup> See the Preamble of the Resolution.

<sup>25</sup> See 'The status of foreigners in Albania: an analyses of the Law on Foreigners', published at the review *Jeta juridike*, 2008. See also Migration Law, published by Onufri, 2011.

the states to fight illegal immigration and the right of immigrants to be protected by Human Rights?

The Universal Declaration of Human Rights (1948), as the first document crystallising the basic list of the fundamental rights and freedoms mentions that: *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>26</sup> Thus, it does not make any distinction between citizens, immigrants and irregular immigrants.

Similarly the International Covenant on Civil and Political Rights (ICCPR) uses neutral terms, without specifying the status in most of the cases, i.e. *no one, every human being, everyone* etc. In few articles it uses lawful residence as a criteria for enjoying the right, i.e. article 12 '*On the free movement of persons*' it states that: *every one lawfully present in a territory has the right of free movement and to choose freely the residence.* Similarly, article 13 refers to the right of the lawfully staying alien to be deported only after a decision taken pursuant to the law and after being given the possibility to challenge the decision before competent authorities.<sup>27</sup>

For other rights, ICCPR does not specify the legality of residence. It may be concluded that other rights, such as the right to life, freedom from torture, freedom from slavery, right of personal security, family life etc. are to be enjoyed by the foreigners and citizens alike- regardless of their status. The General Comment no.18 of the Committee of Human Rights expresses that the Covenant does not allow discrimination in enjoyment between the rights of citizens and non- citizens, unless specified by the Covenant.

The General Comment of the Human Rights Committee '*On the status of aliens under the covenant*' refers that: *Reports from State Parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, Para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.*<sup>28</sup>

It also refers that: *The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide whom it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*<sup>29</sup>

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<sup>26</sup> Article 2 of Declaration.

<sup>27</sup> See article 13 of the ICCPR.

<sup>28</sup> See article 1 of the General Comment no.15 of the Committee for Human Rights '*Position of Aliens*'.

<sup>29</sup> Art.15 of the Convention.

I think that even though not expressly mentioned, this point of the general comment refers to the irregular immigrants, who, even though not admitted in the territory *de jure*, once present *de facto*, have some specific rights, which the states should respect. Such rights, as expressed by the comment are: the right not to be discriminated against, human treatment and the right of family life.

The approach of the destination countries such as USA, Australia, UK is that illegal immigrants are not admitted in the territory, hence they cannot be subject of its jurisdiction, which in turn, does not make the authorities liable for respecting the rights of irregulars.<sup>30</sup> However, point 5 of the Comment no.18 lists three mandatory principles: non-discrimination, prohibition of inhuman and degrading treatment and the right for family life.

Another human rights instrument with impact for irregular immigrants is the International Covenant on the Economic, Social and Cultural Rights (ICESCR), which includes *inter alia* the right to work in dignified and favourable conditions; the right for social protection, the right for adequate living standards, adequate health and physical conditions, adequate education, cultural rights and the right to benefit from the scientific progress. These rights are very important in the context of migration. ICESCR includes the non-discrimination clause in its article 2.2. In a General Comment no.20, the Committee for Economic, Social and Cultural Rights has declared that: *The ground of nationality should not bar access to Covenant rights,*<sup>31</sup> *e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*<sup>32</sup> Thus, the Committee has expressed openly towards full protection of undocumented immigrants.

In another Comment no.14, the Committee has declared that: *States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health service.*<sup>33</sup>

With the two Comments, the Committee has clarified the general obligation of the states to respect the rights envisaged in ICESCR also for irregular immigrants.

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<sup>30</sup> See Hoffman Case, below.

<sup>31</sup> This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

<sup>32</sup> See also General Comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

<sup>33</sup> See Comment no.14/2000 'The right for the highest attainable health care', UN Doc. E/C.12/2000/4.

For the purpose of this article, I will mention two other International Human Rights Instruments that have impact in protection of vulnerable categories of migrants: Women and Children. The Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW) has been interpreted as requiring states to respect all the human rights of undocumented migrant women. Similarly, the Convention for the Rights of the Child (CRC) has been interpreted as protecting the rights of children of undocumented parents or irregular unaccompanied children. This approach has been clarified in the General Comment no.6 of the Committee for the Rights of Child on 'The treatment of the unaccompanied and separated children outside their country of origin'.<sup>34</sup> The Comment expresses that '*...State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness*'.<sup>35</sup>

In Europe, the European Convention of Human Rights (ECHR) uses for the majority of the rights the term 'everyone' *that is in the jurisdiction* of States. It refers to legal residence only for few specific rights. More specifically, Protocol 4 and Protocol 7 of the ECHR refer to lawfully resident aliens.<sup>36</sup> Art. 2, Protocol 4 says that: *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*.<sup>37</sup> While Art.1, Protocol 7 envisages that *'An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law...'*<sup>38</sup>

Irregular immigrants do not benefit from the above-mentioned rights. But, this does not lead us to conclude that the ECHR does not offer protection for irregular immigrants. An '*a contrario*' analyses leads us to conclude that all the other rights envisaged by the ECHR, which do not specify the status of the subject- citizen, lawful alien or undocumented alien- are to be enjoyed by all the human beings regardless of their nationality.

The ECHR though, mentions that *'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'*, which has been interpreted that if a person is not accepted in the territory, thus is not under the jurisdiction, cannot enjoy the protection of the ECHR.

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<sup>34</sup> See article 2 of the CRC.

<sup>35</sup> UN Committee for the Rights of the Child, Comment no.6, 2005, UN doc CRC/GC/2005/6, para 12.

<sup>36</sup> Article 1, Protocol 7 of ECHR.

<sup>37</sup> Article 2, Protocol 4 of ECHR.

<sup>38</sup> Art. 1 of Protocol 7 of ECHR.



However, the realities of the migration have clearly impacted the jurisprudence of the European Court of Human Rights in declaring that all the rights, (where the nationality or migration status is not mentioned by the ECHR as a condition) are to be enjoyed by all the persons, regardless of the status.<sup>39</sup> A landmark decision of the European Court of Human Rights on this matter is *Siliadin v. France*.<sup>40</sup> *Siliadin*, a citizen from Congo entered France legally, sponsored by a French woman, being promised that her status would be regularised and she would continue the school. However for several years, *Siliadin* worked as domestic worker at her home and at the home of another French family, with no prospects for regularisation of her stay. She took care of three children, cleaned and cooked every day, without a holiday, without being paid. For entire years she endured exploitation due to the fear of becoming subject of deportation in her country of origin.

French Courts decided that the couple that exploited her was liable for paying all the dues, interests, holidays, over-time and all the relevant insurance, but did not consider the case as of servitude or slavery, thus did not punish them under the criminal law. *Siliadin* lodged a complain in the ECHR, which decided after considering all the facts and law that *Siliadin* had been subject of forced labour and of servitude, pursuant to Article 4 of the ECHR. *Siliadin case* indicated the particular vulnerable position of women and children irregular immigrants working as domestic workers.

In the EU level, the EU Charter of Fundamental Rights and Freedoms uses the term 'every one' when protecting rights related with the dignity and freedoms, with the exemption of the right to choose profession and to be employed.<sup>41</sup> The right to search for a job is considered as pertaining only to the citizens, while the third country nationals, when authorised to work in any MS have the right to work in the same conditions as EU citizens.<sup>42</sup> *A contrario*, the irregular immigrants do not have any right for the same working conditions as citizens, given that they are not authorised at all to work. However, in case of a *de facto* employment, reference is made to other articles such as the dignity of the individual, the right not to be held in slavery and servitude, to the ECHR and the Directive Against Illegal Employment, which oblige the employer of an irregular immigrant to provide all the benefits that result from the un-authorized employment.<sup>43</sup>

In practice the enjoyment of the human rights is subject of belonging to a particular group. The citizens have the highest level of protection; afterwards the regular

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<sup>39</sup> See below the case *Siliadin v. France*. See also *Ranstev v. Russia and Cyprios*.

<sup>40</sup> No.733316/01, datè 27.07.2005

<sup>41</sup> See European Charter of Human Rights and Fundamental Freedoms.

<sup>42</sup> *Ibid.* Article 15.

<sup>43</sup> *Ibid.* See als Commentary of the Charter from the Document 49/2000 at [http://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf).



immigrants and the last category is that of the irregular immigrants. The third category resembles often to that of slavery, due to the extreme exploitation.<sup>44</sup> A report from the Committee Against the Racial Discrimination states that:

*' Reports on the status of the undocumented migrants in many parts of the world, in particular Africa, Eastern Europe and Asia reveal the level of violation of the human rights of irregular immigrants, in particular of economic, social and cultural rights; there is information that they are ill treated, take very low wages with extreme delays, work unpaid over time, part of their wages are taken from the employers as payment for the accommodation in the overcrowded places, without electricity or running water.'*<sup>45</sup>

Similarly, the report of the Special Commissioner for the Rights of Non- Citizens reiterates the position of irregular immigrants as below: They are continuously subject of smuggling and trafficking; live beyond the accepted living standards; are subject of frequent illegal investigations at home, work, subject of degrading treatment and violation of human rights; quite often it is not clear whether they have been detained by the police because there are not family members to ask for them; they can not appeal in the court against violation of human rights due to the fear of deportation or lack of access in the court; they work in the most dangerous places, without the minimal public services, i.e. health or educational.

The state authorities often acknowledge the ill treatment from the employers or smugglers. Thus, in the case Hoffman Holding Plastic Compounds Inc. Against National Labour Relations Board-NLRB,<sup>46</sup> the USA Supreme Court decided that: *an illegal immigrant does not have the right to accrue the benefits that arise from the employment relationship that has been unjustly breached by the employer, because this relationship should have not been established, given the irregular status of the immigrant.*

In this case, Castro, a Mexican worker was employed by the Hoffman INC in 1988, using the work permit of a friend. He tried to establish a trade union in the company, for which he was dismissed from the job. He was not given unemployment benefits for unjust dismissal, thus, he lodged a complain at the National Labour Relations Board, which decided that Castro had the right to take benefits from unjust dismissal, regardless of his legal status as a migrant. However, this decision was overturned by the Supreme Court which expressed that: *providing the right for the illegal immigrants to lodge a complain in the court against employers, means to acknowledge them as workers in this state, which, means to encourage the illegal immigration'*.<sup>47</sup>

<sup>44</sup> Michele Levoy and Eve Geddie, *Ibid.*, Vol.28, nr. 4, 2010.

<sup>45</sup> Weissbrodt and Meili " Human Rights and protection of non-citizens:with universality and indivisibility of rights', *Refugee Survey Quarterly*, Vol 28, n4.2, 2010

<sup>46</sup> Lexis Nexis- Case no. 535 US 137, 2002

<sup>47</sup> *Ibid.*

This decision indicated that the discrimination and ill treatment by the privates is accepted and legitimised by the state structures, including the judiciary. There was the fear that such decision would increase the discrimination and abuse of the employers, as it did not provide any possibility for redress or judicial access to illegal immigrants regardless of the nature of the abuse and exploitation.<sup>48</sup> For this reason, given the considerable number of irregular Mexican workers in USA, Mexico lodged a request at the Inter American Court of Human Rights, asking the Court to provide, *inter alia*, an Opinion on the level of protection afforded to irregular immigrants by international Human Rights law; whether the principle of equal treatment and equality before the law is valid for the category of illegal immigrants.

The Inter American Court expressed that the principle of equality and non discrimination has the character of *jus cogens*, thus, being obligatory for all the states- an obligation *erga omnes*- it is not subject of migratory status of the immigrant. After a lengthy analysis of the International Human Rights Law and practice, the Court concluded that states should take measures to eliminate discrimination on the basis of migratory status. The Inter- American Court expressed that *'whoever enters into a territory and starts an employment relationship is subject of labour human rights protection, because such protection derives from the employment relationship. The states are not obliged to provide work to an undocumented migrant, in the contrary they have the right to refuse and stop the employment of irregular immigrants. But if the employment relationship has started, the individuals become automatically subject of the labour human rights protection. States can not tolerate the employment of irregular immigrants for the interests of specific sectors of economy and production on one side, and to deprive immigrants from protection of fundamental rights on the other hand...'*<sup>49</sup>

A similar case was judged in Greece in 2007 from the Greek Supreme Court. Two Albanian Workers who had worked for more than five years in Greece irregularly and had not been paid justly by the employer lodged the complaint. Their salary was lower than the minimal wage for the work done; they had not received overtime payment and any other benefit during their work. The Supreme Court decided that they would take all the unpaid remuneration and all the interests accrued during the 5 years period. Also in Italy, the Italian Constitutional Court decided that the right to marry is not conditioned by the residence permit, because this is a basic human right which is not subject of the legal status of the person in a state.<sup>50</sup>

The difficulties for application of Human Rights Instruments in practice to protect the rights of irregular immigrants, led the international community in enactment of

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<sup>48</sup> See Delago Law Firm arguments at Inter American Court of Human Rights.

<sup>49</sup> Advisory Opinion no OC-18/03 of the Inter American Court of Human Rights.

<sup>50</sup> Decision no. 245/2011 of the Italian Constitutional Court.

a specific document for protecting the rights of migrants: the *UN Convention on the Rights of All Migrant Workers and Their Family Members*. The Convention does not envisage any new human right as compared to the Human Rights Instruments,<sup>51</sup> but it is important because expresses clearly the obligation of the States to respect all the human rights for *irregular immigrants*. The drafting and approval of this Convention was, at least partially, result of the failure of the human rights instruments to protect irregular immigrants. The implementation of the Convention would bring the level of protection of irregular immigrants in a totally new level, but it has been ratified by a small number of countries, mostly countries of origin.

## Conclusions

Human Rights Instruments, by and large, do not clearly express the obligation of the states to respect the human rights for the irregular immigrants; neither do they provide a specific list of the rights that are to be enjoyed by this category. The presumption in favour of the full enjoyment of the human rights derives by the non-discrimination clause that is contained in such instruments. However the destination countries have interpreted the human rights Conventions as only referring to the citizens. This interpretation is used also by the practice- irregular immigrants are often subject of abusive treatment by the employers, backed by state structures and judiciary. The instruments that clearly envisage the rights of irregular immigrants, i.e. International Convention on Migrant Rights and of their Family Members have not been ratified by destination countries, as such their impact in practice is irrelevant.

However, the trend of the international foras and of higher courts in some countries towards interpretation of the Human Rights documents as universally applicable to all the human beings, regardless of the migratory status is very positive. Their jurisprudence of has a significant impact in gradual awareness and acceptance by the states that migratory status does not denaturalise the human being, thus, does not affect protection by human rights. This approach balances the sovereign right of states to decide whom to admit in the territory, and the universal right of every person to enjoy human rights, regardless of the status and the place of residence.

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<sup>51</sup> Catherine Dauvergne, *Ibid*, f.25.

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