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Special Issue Reprint

Migrants and Human Rights Protections

Edited by
Sylvie Da Lomba

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About the Editor

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Dr Sylvie Da Lomba, Senior Lecturer, University of Strathclyde, Law School. Her research focuses on human mobility, migration and the law, and she and she has published extensively in this field. Recent publications include: Sylvie Da Lomba and Saskia Vermeylen (2023) 'Rethinking vulnerability as a radically ethical device : ethical vulnerability analysis and the EU's "migration crisis"' 24 Human Rights Review 263; Sylvie Da Lomba and Saskia Vermeylen (2023) 19 International Journal of Law in Context 143.

Preface

This Special Issue on "Migrants and Human Rights Protections" was motivated by 'mixed feelings' towards human rights law and what this body of law can really do for migrants. In the literature on migrants' rights, human rights law has been cast as a 'hero' but also as a source of persistent disappointment. This Special Issue aims to further understandings of migrants' interactions with human rights protections by offering nuanced analyses of human rights regimes' (lack of) responsiveness to migrants' needs in a wide range of circumstances. The contributions by Carola Lingaas, Loi Thi Ngoc, Helen O'Nions and Marina Vannelli vividly show that, while migrants' immigration statuses vary greatly, being a migrant always acts as an actual or potential constraint on human rights protections. For example, Loi Thi Ngoc's article examines how the illegalisation of Karen refugees in Thai camps places them outside human rights protections, and Helen O'Nions' paper demonstrates that a 'secure' immigration status can also test the reach of human rights regimes. However, notwithstanding human rights law's enduring struggles to extend protections to migrants, Alejandro Fuentes and Marina Vannelli's contributions show that developments in the Americas offer hope of more inclusive interpretations and applications of human rights law.

Sylvie Da Lomba
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Editorial

Editorial Special Issue on "Migrants and Human Rights Protections"

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The idea for this Special Issue on 'Human Rights Protection for Migrants' was born out of a combination of frustration and scepticism in the face of International Human Rights Law's enduring struggles to extend protections to non-nationals, but also out of hope in the light of (some) human rights bodies' attempts to carve out 'protective spaces' for migrants against the backdrop of hostile migration laws and policies across the globe.

International migration is a universal and fundamentally human phenomenon. Yet, laws and policies worldwide increasingly construe migration and migrants as an 'anomaly' and a threat to the nation-state and the national community. Against this backdrop, International Human Rights Law, with its universal premise, is commonly perceived as the last rampart against the acute problematising of migration and the ensuing dehumanisation of migrants. However, it is well established that one's position vis à vis the nation state—one's legal status—continues to matter for human rights protection, and that immigration status constrains human rights protection, especially in the case of 'unwanted migrants'. For example, Lingaas points out how Norway's migration laws trump protection for male migrant victims of forced labour there (Lingaas 2022). Similarly, albeit in a very different context, Nguyen shows how Thailand's categorisation of refugees in Thai camps as *illegal* migrants prevents protections for this group (Nguyen 2023).

The contributions to this Special Issue show how diverse migrants and their life experiences are, as they examine human rights protection standards for non-nationals; herein, the authors discuss male migrant victims of forced labour in Norway (Lingaas 2022); permanent migrants who face expulsion from the UK, having engaged in criminal activity (O'Nions 2020); Karen refugees in Thailand's refugee camps (Nguyen 2023); unaccompanied migrant children in the European Union (Vannelli 2022); and children in the Americas (Fuentes and Vannelli 2019, 2021). Yet, as the contributions compellingly demonstrate, what migrants have in common is that the protection of their human rights is inextricably entwined with the exercise of the government immigration power, which in turn is shaped by the state's migration laws and policies. In this regard, O'Nions's contribution persuasively shows how we cannot discuss human rights protections for migrants without challenging the concepts of (national) citizenship and membership (O'Nions 2020). Indeed, as Hannah Arendt so forcefully argued in her critique of human rights, 'the right to have rights' demands belonging to a political community; it demands membership in the *national* community. In contrast with national citizens, migrants' membership remains contested—albeit to varying degrees—and contingent on their immigration status. 'Unwanted' migrants—those who were not 'invited' to enter and stay by the 'host' state—are denied access to national membership (Lingaas 2022; Nguyen 2023), while (regular) permanent residents are eligible for membership in the socio-economic sphere (but not in the political sphere, for the nation state is committed to maintaining a divide between nationals and migrants). O'Nions, however, reminds us that permanent residents' membership remains subject to the exercise of government immigration power, and is thus fragile (O'Nions 2020).

It follows that investigating human rights protection for migrants puts the universal premise of International Human Rights Law to the test, and it may be tempting to conclude that this body of law has altogether failed this test. Migrants remain confined to the margins

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of human rights protection regimes or, at the very least, at the risk of being pushed to their margins. Yet, as I note at the start of this editorial, there is hope. Yes, International Human Rights Law continues to fail migrants, but this assessment does not tell the whole story. There have been strides in human rights protection for migrants. For example, Fuentes and Vannelli show how the pioneering case law of the Inter-American Court of Human Rights in recent years has significantly improved human rights protections for children in the context of migration processes (Fuentes and Vannelli 2019), and has progressed the recognition of children's rights to a dignified life, including migrant children (Fuentes and Vannelli 2021). These contributions demonstrate how, through 'an *evolutive*, *dynamic* and *effective*' approach that puts human rights protection first, the Inter-American Court of Human Rights has furthered human rights protections for children in the Americas (Fuentes and Vannelli 2019, p. 2). The European Convention on Human Rights system is commonly described as the most advanced in the world. Yet, the European Convention on Human Rights system, and in particular the European Court of Human Rights, has much to learn from the Inter-American Court of Human Rights's *pro homine* approach to the adjudication of human rights, including those of migrants. In her contribution, Nguyen constructs an innovative legal framework for the protection of Karen refugees in Thailand's refugee camps that brings together International Human Rights Law, International Refugee Law, and International Law on Indigenous Peoples (Nguyen 2023).

Ultimately, it could be that we are asking too much of International Human Rights Law. Indeed, in my view, and as the contributions to this Special Issue suggest, the recognition of migrants—*all* migrants—as fully fledged human rights subjects does not start with human rights. International Human Rights Law alone cannot humanise what can be violently hostile laws and policies. Bringing migrants to the core of human rights protection regimes starts with a drastic reset of how the nation-state and the national community relate to migrants and migration. It calls for human and humane migration laws and policies that recognise the realities of international migration and the migrant experience. Until and unless such a humanising turn takes place, International Human Rights Law will not be able to live up to its universal premise. This assessment, however, does not leave International Human Rights Law 'off the hook', and it is apparent from this Special Issue's contributions that human rights protections for migrants can be strengthened, notwithstanding the violence exerted by migration laws and policies worldwide.

Conflicts of Interest: The author declares no conflict of interest.

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Article

Directing the Legal Radar at Forced Labour—Under Special Consideration of Male Victims in Norway

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Abstract: Human trafficking in the form of labour exploitation appears to have gone under the legal radar domestically, regionally, and internationally, with ensuing grave consequences for the victims concerned. This paper critically discusses the current legal developments and interpretations of global and regional legal sources on forced labour and the challenges they face. A legal analysis is supplemented by information obtained through interviews with 14 presumed male victims of forced labour, who recently escaped a coercive work situation and were living in a safe house in Oslo (Norway). The paper will demonstrate the shortcomings of the law and its application, using the case of Norway and the affected men as an example. It examines the case law of the European Court of Human Rights using a vulnerability approach and argues that the inaction in preventing and prosecuting crimes committed towards people who are exploited for forced labour is a violation of their human rights and may be interpreted as granting impunity to their perpetrators. The situation for male victims of forced labour is particularly severe.

Keywords: forced labour; human trafficking; human rights; modern slavery; ECHR; Norway

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1. Introduction

Human trafficking is prohibited by law on the domestic, regional, and international level. The United Nations (UN) Sustainable Development Goals stipulate in target 8.7. that immediate and effective measures must be taken 'to eradicate forced labour, end modern slavery and human trafficking' (United Nations Economic and Social Council 2016). The international community is determined to bring an end to these harmful practices. Yet, the legal definitions, delimitations, and applications of these different concepts causes confusion and, as a consequence, ineffective and insufficient protection for the victims[1] (McAdam 2019, p. 23).

Forced labour is one form of human trafficking that is on the rise and has become the predominant form of exploitation in many countries (GRETA 2018). Trafficking for labour exploitation has been identified as one of the major challenges in Europe. It remains a humanitarian and legal priority for all member States of the Council of Europe (Jagland 2019, p. 28). Additionally, in Norway, the majority of the victims of human trafficking are believed to be exploited for forced labour (Thorenfeldt and Stolt-Nielsen). Victims of forced labour are entitled to legal protection; however, there is a gap in their protection. This gap is caused by several problems that this paper will address, either on a general level or specifically for the case of Norway, depending on the challenges presented. First, there is no consensus on the definition of forced labour. Second, forced labour takes very different forms and occurs across various sectors in the formal and informal economy (Jagland 2019, p. 28). Moreover, the perpetrators constantly adapt their exploitive practices. Third, the detection of victims of trafficking for the purpose of labour exploitation is challenging, owing partially to the economies where it happens, and partially to a gender dimension

[1] This paper is aware of discussions and controversies surrounding victimhood, especially the presuppositions of passivity and lack of agency. The paper acknowledges but does not further discuss these matters.

(GRETA 2018; Jagland 2019, p. 29). Fourth, the victims are often migrant workers who are particularly vulnerable to exploitation due to their lack of integration in the society and to immigration policies of the respective state (Jagland 2019, p. 28). Finally, there is a lack of awareness of trafficking for labour exploitation, which is reflected in deficient identifications of victims and ensuing low numbers of investigations, prosecutions, and judgments. Research has concluded that the failure to investigate, prosecute and punish these crimes is a widespread problem which is not limited to certain continents, regions, or countries (Mapp 2021, p. 60; Duffy 2016, pp. 400–3; van der Anker and van Liempt 2012, p. 8).

Although cases of forced labour are on the rise and have become a real and pressing social and legal problem, this paper will show that there is slow and rather insignificant legal progress in the case law of the European Court of Human Rights (ECtHR) on this human rights violation that seemingly does not correlate with the developments in Europe. Importantly, on the European regional as well as the domestic level, only very few judgments deal with forced labour. In Norway, for instance, of 50 convictions on human trafficking since 2003, only 10 dealt with human trafficking for the purpose of exploitation by forced labour, while 40 dealt with exploitation of the prostitution of women and girls (Koordineringsenheten 2021, p. 6). The low conviction rate does not reflect the fact that there are more cases of forced labour, and the number of identified male victims seems to be higher than of women. Restrictive interpretations by courts further narrow the protective scope for the victims (Jagland 2019, p. 29). The persistent impunity surrounding forced labour, especially of men, is not specific to Norway. This paper discusses the legal frameworks on the international and regional level, foremost European human rights law, and their respective shortcomings. It shows how the legal definition of forced labour as a form of human trafficking remains vague.

The paper analyses the multilevel protection that the law offers against practices of forced labour. Using Norway as a case and the interviewed men as examples, the paper argues that the legal focus should be increasingly directed at victims of labour trafficking. This includes an increased awareness of labour exploitation and more research on the topic. Moreover, the research gap on male victims that earlier scholarship has exposed must be filled (Mapp 2021, p. 62; Paasche et al. 2018, pp. 43–44; Hebert 2016; Duffy 2016, p. 402; Warren 2012, pp. 107–8; van der Anker and van Liempt 2012, p. 7; Jones 2010; Andrees 2009, p. 90). This paper offers new insights into the situation of alleged male victims of forced labour, under special consideration of Norway.

2. Method

The paper combines a legal doctrinal method with a jurisprudential analysis and qualitative data from semi-structured interviews with purported male victims of forced labour in Norway. Altogether, 14 men living at secret addresses in Oslo were interviewed in June and October 2019.

The selection of the respondents was based on their availability at a safe house, which is run by a nongovernmental organisation (NGO) in Norway. Of the 14 men, two were long-term residents and readily available for interviews. Both spoke English fluently and no translator was required. The employees of the NGO also maintained contact with some former victims, who used to reside in the safe house. We were able to interview one of them who lives and works in Oslo. This interview was done in Norwegian, and no translator was necessary. One other man was interviewed in the National Police Immigration Detention Centre at Trandum. Because he was fluent in English, the interview was conducted in English. The remaining 10 men were interviewed with a translator in a temporary secret location because the safe house did not have the capacity to take them all in at the same time. The turnover of residents in the safe house is often fast, and most of its residents stay there between 1 and 29 days (Lingaas et al. 2020, p. 72). It was therefore important to conduct interviews upon short notice. Most interviews lasted for one hour, some up to three hours.

All men were individually informed about the project and asked by the NGO's employees whether they wanted to be interviewed. Upon oral consent, they were given a written information pamphlet with information, including direct contact information to the researchers. This information and the possibility to withdraw at any given time, without any reasons required, was repeated at the beginning of each interview. Each respondent signed a form of consent that the data can be used in anonymised form for research. The NGO's employees were present in two interviews where they functioned as interpreters. There was a standard battery of questions. All answers are recorded handwritten; thus, no sound or film recordings were done. The data was not coded. Based on the requirements by the Norwegian Centre for Research Data (NSD) that reviewed and approved the project, all data is stored in a safe and will be destroyed in 2023.[2] For the current paper, the qualitative data provides the backdrop for the discussion. Beyond references to statements of the respondents that exemplify their situation, the qualitative data is not used and is therefore merely illustrative of the men's experiences.

Services for victims of forced labour are typically designed to meet the needs of female victims (Mapp 2021, p. 62). The said NGO is the only one in Norway assisting purported male victims of forced labour, while several other NGOs across the country assist female victims. Since its launch in April 2016 until January 2020, the safe house assisted 41 men, of which 24 came from Romania, and 3 from each Poland, Bulgaria, Moldova, and Mongolia. All came from countries, mostly in Eastern Europe, with a significant lower employment and salary level than Norway and were tempted to make a decent living in Norway. Most men worked in a car wash (17), followed by construction work (4), masonry (2), restaurants (2), and agriculture (2), among others (Lingaas et al. 2020, pp. 55, 57).

The analysis focuses on legal instruments relevant to Norway, foremost those created under the auspices of the UN and the Council of Europe. This paper acknowledges the legal requirement to exhaust domestic remedies before bringing a complaint to the international level. Nevertheless, the examination is limited to international law and thereby excludes domestic (criminal) law.

3. Novelty and Results

The novelty of the paper lies in the legal analysis that focuses on forced labour in Norway. Norway is commonly hailed and has an image of itself as a champion of human rights (Hellum 2016, p. 78). Despite its strong record of protecting and promoting human rights, there remain areas where certain individuals and groups receive insufficient or inadequate protection. The area of human trafficking with the purpose of exploitation of forced labour is one. The victims, mostly men, disappear from the radar of legal protection.

Another novelty lies in the fact that while several research reports and articles (foremost in Norwegian) on the topic have been published (see for instance Brunovskis and Ødegård 2021), there exist hardly any *legal* academic publications in English to date. This paper contributes to filling this gap by providing an overview of the legal instruments dealing with forced labour and applying them to the situation of the men concerned. In doing so, the paper enables a comparative legal perspective and offers insights into the situation of male victims of forced labour. The paper is also one of the first to discuss the recent ECtHR judgment of 7 October 2021 in the case of *Zoletic and Others v. Azerbaijan* (Application No. 20116/12), which reveals parallels to the situation of the 14 men in Norway.

One result of this paper is the delimitation of the different forms of human trafficking. It thereby helps to provide legal clarity to obscure and unclear concepts. This clarification can assist in a more coherent application of the law and, as a consequence, to the increased and comprehensive protection of the victims. In its conclusion, the paper urges state authorities, civil society organizations and researchers to pay increased attention to victims of forced labour, especially migrant men. In order to achieve full protection and respect

[2] NSD notification form number 715904, approval 29 May 2019.

of fundamental human rights, state authorities, including police officers, case workers, prosecutors and judges should afford equitable attention to all individuals who are exploited for labour. This includes recognising their vulnerability, which is a precondition for their coercion. Only once men are recognised as equivalent victims whose vulnerability is exploited by means of forced labour and receive the same legal protection as women or children will states fully comply with their legal obligations. The paper thereby follows two tracks: the legal clarification of forced labour as one form of human trafficking that is commonly misunderstood as well as the examination of alleged cases of forced labour that the 14 men in Norway were exposed to.

4. Modern Slavery, Human Trafficking, Forced Labour

4.1. Definitional Confusion and Incomplete Protection

Forced and compulsory labour, slavery, modern slavery, servitude, chattel, debt bondage, slavery-like practices, forced marriage, human, child or sex trafficking, domestic servitude, forced prostitution and child soldiering are all terms that describe different grave practices of removing the personal freedom of a human being (Mende 2019, p. 230). These practices threaten the human dignity and fundamental freedoms of their victims and cannot be considered compatible with a democratic society.[3] Myriad terms, some of which partially overlap, cause definitional inconsistencies and challenges for anyone working in the field of human trafficking. In trying to deal with potential victims and perpetrators of trafficking, law enforcement agencies, lawyers, legal counsels, courts, caseworkers, social and humanitarian workers have to manoeuvre in a complex, multi-layered web of legal frameworks with distinct requirements and protection mechanisms. The lack of clear and coherent definitions and the ensuing lack of case law on all levels, especially regarding forced labour, create a legal gap in the protection of some of the most vulnerable individuals. Indeed, researchers confirm that conflicting legal rules and regulations as well as unclear practices are a great burden for the victims (Brunovskis 2016, p. 5; Hebert 2016, p. 283; van der Anker and van Liempt 2012, p. 4).

'I am a victim and deserve justice. But who gives you justice when you are a victim?', exclaimed one of the men, Nadim. He was being interviewed at the National Police Immigration Detention Centre at Trandum, Norway, from where he was deported to a country in Northern Africa shortly after. He was an alleged victim of forced labour at a farm where he had worked for several years without a working contract or a regular, agreed-upon salary. Initially, he worked without an income, but upon the intervention of neighbours, the farmer, Ole, eventually paid a salary into a bank account. However, the account was in the name of Ole, and Nadim was unable to access the money he had earned. Other men testified similar experiences of having to ask their exploiters for access to their own bank accounts. The financial and psychological control exerted was part of the power relation. 'Ole knew I depended on him. He used me, and he knew it and I knew it. But I was scared to go to the police because I did not want to be sent out of Norway'. Trapped in between two legal systems—immigration and criminal law—Nadim felt lost and without protection. 'Norway is always considered the best country [in the world], but it is not in reality,' he concluded.[4] 'I don't want anything from the system, just the opportunity to work and contribute'. Despite stating that he did not want anything from the system, Nadim hoped for and expected protection. However, under which definition did Nadim fall? Which legal category should provide him protection: was he an illegal migrant without a working permit, an employee exposed to social dumping, or a victim of forced labour? In his case, the immigration regime trumped the protection regime for victims of forced labour and the prosecution of its perpetrators: Nadim was expelled from Norway while Ole evaded criminal charges.

[3] European Court of Human Rights (ECtHR), *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (10 May 2010), para. 282; *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2017), para. 93.

[4] Another man confirmed: 'I did not expect to find such conditions in Norway'.

The following sections will present the different concepts of modern slavery and slavery, human trafficking, and forced labour in an effort to reduce the definitional confusions. This presentation will include general reflections on the case of Norway and the specific situation of the interviewed men.

4.2. Modern Slavery

Nadim's story reveals a legal gap in the protection of some of the most vulnerable individuals, but was Nadim a victim of forced labour? In colloquial language, his situation might be described as modern slavery. However, modern slavery is not a legal concept (McAdam 2019, p. 29). The use of nonlegal terminology in the description and denomination of illegal practices risks watering down the effectiveness of the legal protection of vulnerable persons. It is therefore advisable to revert to accepted legal concepts and terminology to describe situations such as Nadim's.

'Definitional problems plague discussions of (. . .) modern slavery', maintains Ronald Weitzer (2015, p. 225). Indeed, suggestions of definitions of modern slavery as the social isolation of individuals who suffer 'parasitical degradation' and are denied membership in the society of their masters create more confusion than clarification (Patterson 2012). Undisputedly, the prefix 'modern' indicates a contemporary version of the historical concept of slavery. The devastating stories and long-term consequences of the Atlantic slave trade reverberate and provide the concept of 'modern slavery' an inherent gravity.

The reference to slavery was also readily used by the interviewed men: 'We were slaves there [at the car wash]', two interviewed men exclaimed and stressed that 'gradually, we were treated like slaves'. However, another man who worked in the kitchen of an upper-class restaurant stated this: 'The owner is rich by having slaves in the restaurant'. These references to slavery convey an image of the seriousness and illegality of the working conditions. The slavery imaginary is certainly effective in distilling a complex phenomenon of trafficking into a simple narrative, but researchers urge caution: calling any form of human trafficking 'slavery' is not only legally inaccurate but also undermines the effective application of the appropriate legal regime and ignores the structural issues that enable trafficking (McAdam 2019, pp. 29–31; Chuang 2015, pp. 146–49; Vijeyaras and Villarino 2012, p. 36; Allain 2015, pp. 160–85). This caution applies to the men in Norway too: the excessive use of the slavery terminology might paradoxically lessen their protection. In calling all acts of trafficking 'slavery', one might not respond to cases of actual slavery.

Modern slavery carries parts of the name of one of the first international treaties against trafficking, namely the Convention against White Slavery of 1904 that sought to suppress the coerced movement of white women and girls from developed countries for purposes of prostitution (Gallagher 2010, pp. 13–25; Roth 2012, pp. 42–61; Obokata 2006, pp. 9–18). The campaign for the convention was situated in the wider framework of abolitionism, using language that resembled the human commodification of the transatlantic slave trade (McAdam 2019, p. 19). It had a deeply problematic racist connotation given that it protected only white females from prostitution. From a historical, legal and gender perspective, the White Slavery Convention was the first in a long line of treaties that focused exclusively on women and children who were exploited for prostitution. (Gallagher 2010, pp. 13–25; Roth 2012, pp. 42–61; van der Anker and van Liempt 2012, p. 7). On par with the term 'slavery', the one-sided focus on women and prostitution lingers on in modern times, a fact that permeates subsequent discussions and has a direct consequence for men as victims of forced labour (Obokata 2006, pp. 27–29). The knowledge, understanding, and respect for the fact that men can be victims is crucial for their protection and for the criminal prosecution of their traffickers. The assertion by an investigator in the section for human trafficking in the Oslo police to one of the interviewed men that 'you don't have the face of a victim' reveals a prejudice against presumed male victims that must be overcome in order to provide them protection under domestic law and thereby fulfill the state's obligations under international law.

International human rights law prohibits slavery in Art. 4 of the Universal Declaration of Human Rights and Art. 8 of the International Covenant on Civil and Political Rights. Unlike slavery, the term of modern slavery is short of legal force and contours (Mende 2019, pp. 233–34; Chuang 2015, pp. 146–49). The apparent increased use of the term in official contexts does little to mitigate its vagueness. Recently, for instance, the Norwegian government issued a foreign policy paper with the title 'Born to a Life of Freedom: Strengthened Development Policy Efforts to Fight Modern Slavery (2021–2025)' (MFA 2021), and the former Norwegian Prime Minister, Erna Solberg, stated the following in a speech at the centennial of the International Labour Organization (ILO) in 2019: 'Modern slavery is one of the biggest challenges to global human rights. Modern slavery exists in all countries and all layers of society'.[5] From a social, humanitarian, and political perspective, it is an undeniable achievement that attention is being brought to undignified and exploitative working and living conditions of some of the most vulnerable people in society that might reach the threshold of breaches of human rights. From a legal perspective, however, it is deplorable that human rights violations are not denominated correctly, thereby adding to the definitional confusion (Chuang 2015, pp. 146–49). It is therefore advisable to refrain from the continued use of the 'modern slavery' terminology, especially if issued by public authorities.

4.3. Human Trafficking

Although it might not be 'a clear-cut criminal offence' (McRedmond 2010, p. 186), human trafficking is a clearly defined legal concept that includes acts of sexual exploitation, forced labour, slavery, servitude or the removal of organs. Forced labour is thus one form of human trafficking. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) regulates human trafficking on the global level and contains important state obligations to protect victims and to criminalise trafficking offenses. It supplements the UN Convention against Transnational Organized Crime.

The UN Convention against Transnational Organized Crime of 2000 marks a paradigm shift to addressing slavery as the movement of people for the purpose of their exploitation (Mende 2019, p. 231). It is considered the main international instrument in the fight against transnational organized crime and has been ratified by 190 countries, thereby achieving near-universal recognition and revealing a broad consensus of the international community to combat collectively organized crimes. The UN Convention is supplemented by three additional protocols, which each target a specific area of organised crime and must be interpreted together with the convention (Art. 1(1) Palermo Protocol; McAdam 2019, p. 25; Gallagher 2010, p. 73). For the purpose of the present paper, the Palermo Protocol is the most relevant because it deals exclusively with trafficking in persons and exploitation by means of forced labour. As its full title indicates, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children offers special protection to women and children, who are mentioned seven times, while men are not specifically acknowledged. In Art. 3(a) the protocol provides a very detailed definition of trafficking as the

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other

[5] ILO (2019). Address by H.E. Ms Erna Solberg, former Prime Minister of the Kingdom of Norway (2019), timestamp 9:46–9:56, available at: https://ilo.cetc.stream/2019/06/10/address-by-h-e-ms-erna-solberg-prime-minister-of-the-kingdom-of-norway/ (accessed on 19 April 2022).

> forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[6]

In order to fall under the definition of human trafficking, three separate elements have to be present: first, an act that involves the movement or harbouring of people; second, the act is achieved by means of deception or coercion; and third, the act is committed with the purpose of exploitation (Mapp 2021, p. 38; McAdam 2019, p. 26; Allain 2015, p. 223; UNODC 2015; UNODC 2013, p. 16; Gallagher 2010, pp. 29, 78; McRedmond 2010, pp. 189, 194). For the purpose of the Palermo Protocol, 'exploitation' includes sexual exploitation, forced labour, slavery, servitude or the removal of organs. Forced labour is thus one of several forms of human trafficking (Gallagher 2010, p. 29; Hernandez and Rudolph 2015, p. 120).[7] Researchers have noted that the absence of a settled understanding of what constitutes 'exploitation' is one reason behind definitional fluidities (Jovanovic 2020, pp. 678–79; Gallagher 2010, p. 49), a problem that directly affects alleged victims, including the interviewed men in Oslo. Were they recruited for the purpose of exploitation? Were they transported or received by means of threat or use of force or other forms of coercion? Were they subsequently exploited and therefore exposed to forced labour—or were they just unlucky with their employment? These questions frame the further discussion.

The Palermo Protocol was adopted by UN General Assembly resolution 55/25 and entered into force on 25 December 2003. With 178 ratifications, among other by Norway, the Palermo Protocol has obtained a high degree of recognition. Significantly, the protocol is the first legally binding global instrument with an agreed definition on trafficking in human persons. It obliges the member states to prevent and combat human trafficking and to cooperate by means of information exchange, training, and border measures (Arts. 9–12). The aim of the treaty is to facilitate convergence in national approaches, especially regarding domestic criminal offences. Another objective of the protocol is the protection and assistance of victims of trafficking with full respect for their human rights. The treaty obligations thus extend beyond cooperation and convergence to reconfirming the member states' obligations under human rights law.

As an internationally binding treaty that aims at coalescing national penal approaches to human trafficking while at the same time respecting the victims' human rights, the protocol elegantly ties together different strands of international law: public international law and state responsibility, human rights law, and criminal law with corresponding individual liability. However, albeit including a strong victim-protection dimension, the protocol is not a human rights instrument because it does not create a claim for an individual victim against a state in cases of human trafficking (McAdam 2019, p. 24; Jovanovic 2020, p. 682). Nevertheless, the criminal justice response that the protocol stipulates must be facilitated in accordance with human rights law. In other words, although it is not a human rights treaty, the protocol must be implemented by considering relevant human rights obligations (McAdam 2019, p. 24; Obokata 2006, p. 151). For the sake of classification, the UN has categorized the Palermo Protocol as a penal matter, thus foregrounding the criminal law aspect of trafficking.[8] The placing of the protocol in the sphere of criminal justice is also seen as one of the key achievements: the implementation of domestic legislation in accordance with the protocol would not have happened if trafficking had remained in the sphere of human rights (McAdam 2019, p. 24).

The protocol's definition has been adopted by all relevant UN organs and agencies, and most state parties, including Norway, have enacted legal provisions prohibiting human

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[6] UNODC, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (accessed on 19 April 2022).

[7] Confirmed by the ECtHR: 'exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights the intrinsic relationship between forced or compulsory labour and human trafficking (*Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2017), para. 93.

[8] United Nations Treaty Collection, Chapter XVIII, Penal Matters, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18 (accessed on 19 April 2022).

trafficking (Gallagher 2010, p. 42).[9] Researchers claim that the high state support was only achievable because the protocol is not a human rights instrument (McAdam 2019, p. 249). The compliance with and respect for the protocol seem to be very high and might even be an indicator of its customary law status because it attracts no principled dissent (Duffy 2016, pp. 375–76; Hathaway 2008–2009, pp. 7–8). However, the lack of full implementation suggests that the evidence of general practice as a required element of customary law (Art. 38(1)(b) of the Statute of the International Court of Justice) is absent. The scarcity in Norway and elsewhere of domestic criminal cases on trafficking, especially involving practices of forced labour of men, is a reminder that there is still room for improvement in the fulfilment of the treaty obligations. The admission of the Oslo police that cases of forced labour are not prioritised in terms of resources or investigations (Thorenfeldt and Stolt-Nielsen 2021), and the allegation by a certain interviewee that 'the police and the prosecution know [that people work like slaves] and close their eyes', add to the impression of incomplete legal protection.

The case of Norway is not an isolated occurrence (Jansson 2014, p. 3). The translation of the Palermo Protocol into domestic legislation and its effective implementation remain problematic: despite the fact that 97 percent of its states parties have enacted domestic criminal provisions prohibiting human trafficking, only few perpetrators are convicted, and most victims are never identified or given assistance (Mapp 2021, p. 60; UNODC 2020, p. 8; McRedmond 2010, pp. 181 and 195; Gallagher 2010, pp. 103–4; Arnegaard and Davis 2019, p. 9). Based on data from 41 countries, the United Nations Office on Drugs and Crime (UNODC) observes a global trend towards increasing criminal prosecution and conviction for trafficking crimes. This trend, however, does not apply to Europe, where conviction rates have been stagnating or decreasing over the last few years, despite increased official efforts to abolish human trafficking and the available technology to detect organised crime networks. Notwithstanding the decline in judgments, the absolute figure for the continent of Europe is still the highest in the world (UNODC 2020, pp. 16, 23). Rather than being an exception, the case of Norway thus seems to confirm the rule. It is unclear whether the lower number of judgments reflects a lower level of trafficking activities, or undetected crimes. Numerous studies point to a connection between increased knowledge about the victims, their identification, and the number of prosecutions of human trafficking, meaning that an awareness is needed to recognise and protect victims of human trafficking and criminally prosecute their perpetrators (Hulting 2012, pp. 145–60; van der Anker and van Liempt 2012, p. 3; Arnegaard and Davis 2019, p. 9; UNODC 2018, pp. 8, 13, 23, 45). This understanding must extend to the dynamics and social conditions that facilitate these human rights abuses.

4.4. Forced Labour

While the Palermo Protocol offers a detailed definition of human trafficking in Art. 3(a), it does not define forced labour.[10] However, a much older legal instrument, the ILO Forced Labour Convention of 1930, does provide a definition of forced labour. Its Art. 2(1) holds that the term 'forced or compulsory labour' shall mean 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Norway ratified the treaty, which remains in force, in 1932. It is also state party to the Protocol of 2014 to the Forced Labour Convention, which attempted to fill the gaps in the implementation of the convention. The ILO Protocol of 2014 notably contains an obligation to prevent and eliminate the use of forced labour as well as the protection of victims and the sanction of perpetrators of forced labour (McAdam 2019, p. 29).

'Before we came here, we knew our salary and the number of weekly hours', confirmed one of the purported victims of forced labour. The men all left their home country of their

[9] The Norwegian Penal Act prohibits human trafficking in § 275.

[10] For a discussion of forced labour under the European Convention of Human Rights, see Section 7.3.

own will, often triggered by information on social media about work opportunities in Norway.[11] The men offered their work voluntarily, and it was not exacted under the menace of a penalty. Following the general rules of interpretation, it would have to be concluded that the men do not fall under the protection of ILO Forced Labour Convention, which narrowly prohibits nonvoluntary work extortion.

However, the ILO supervisory bodies concluded that a labourer's right to free choice of employment is an inalienable right. Conversely, the inability to change or leave work at any time, under threat of a serious penalty, is a strong indication of forced labour (ILO 2009, p. 13). This insight is important for the case of the 14 men: while they voluntarily accepted their jobs and came to Norway, they found themselves unable to leave their employment. Thus, their situation changed and was characterised by an involuntariness to remain and an incapacity to leave.[12] The inability to leave a position of employment is often connected to practices of coercion related to threats, for instance threats of denunciation or deportation as in the case of Nadim, but also threats of wage deductions or retentions. Most of the interviewed men confirmed the use of threats, especially of wage deductions. Beate Andrees points out that 'threats can only be understood by taking the perspective of those who are subjected to them and by analysing the cultural background of the threatened persons' (Andrees 2009, p. 102). Threats can have a strong psychological effect on the workers: even if nobody physically stops them from leaving their workplace, they might nevertheless subjectively experience a lack of freedom of movement (Andrees 2009, p. 102). This holds true for the men who were physically able to leave their workplace, but nonetheless stated that they felt obliged to stay, for reasons of pride among others. Confronted with threats of wage deductions, most men considered it too embarrassing do anything else than accept them and work even longer hours to compensate for the loss. In their mind, it was impossible to return to their home countries in Eastern Europe with a massively reduced wage because it would make them look weak or unsuccessful. A cultural sensibility is therefore necessary for frontline workers who meet potential victims of forced labour, especially members of the police, but also of social welfare or health services.

Note that while the ILO supervisory bodies recognised that psychological coercion could amount to the menace of a penalty, they were hesitant to accept that a situation of economic constraint that keeps workers in a job was equivalent to any threat of penalty (ILO 2009, p. 12). Arguably, the ILO Convention contains an outdated definition of forced labour that does not correspond to contemporary insights into the exploitation of peoples' vulnerability. There appears to have been no evolutive interpretation of the convention's provisions to include the exploitation of economic vulnerability by means of forced labour. The next section examines the concept of vulnerability more closely and applies it to the exploited men in Oslo, followed by a discussion of the risk of competing legal regimes.

5. The Vulnerability of the Men

Central to the idea of human trafficking and to the Palermo Protocol is the concept of abuse of vulnerability (UNODC 2013, p. 5; Mapp 2021, p. 39; Jovanovic 2020, p. 694). The preparatory works of the protocol define this abuse to include 'any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved' (Gallagher 2010, p. 32). The Council of Europe Convention on Action against Trafficking in Human Beings is the European counterpart to the Palermo Protocol and was inspired by the latter (COE 2005, para. 6). It establishes a parallel system of protection

[11] This confirms research findings by Mapp (2021, p. 43); Andrees (2009, pp. 97, 100) and Rijken (2003, p. 6).

[12] In her study, Andrees uses the key question 'Were you free to leave your employment at any given point in time?' to differentiate between successful migrants and victims of trafficking (Andrees 2009, p. 91). This question alone is, however, not able to capture victims of trafficking who are at liberty to leave their employment but would only be able to do so under major economic, social, or personal losses. Andrees therefore adds the important element of 'free to leave without being faced by threats or the loss of any rights or privileges (e.g., nonpayment of wages or threat of violence against them or family members)' (Andrees 2009, p. 91.).

against trafficking on the European regional level. Norway, a member of the Council of Europe, ratified the convention in 2008. Although the convention reproduces verbatim the Palermo Protocol's definition of human trafficking, it goes further in its explanatory report and interprets vulnerability to include 'any kind, whether physical, psychological, emotional, family-related, social or economic'. In sum, 'any state of hardship in which a human being is impelled to accept being exploited' (COE 2005, para. 83). The ILO asserts that the categorisation of a person as a victim of forced labour must depend on an overall assessment of the specific situation. It includes factors such as the individual's age, education, gender, social, economic, and other elements. It must consider not only the working and salary conditions, but also living and sanitation environments, and degree of freedom of movement and isolation (ILO 2017, pp. 33, 51; see also Mapp 2021, p. 39). This overall assessment creates an image of the exploitation based on a vulnerability and thereby contributes to the legal determination of a person as a victim of forced labour.

As will be shown, all the interviewed men probably fall under this broad definition of vulnerability. Despite their distinct experiences of forced labour, they share common denominators, namely the escape of poverty and despair. Low gross domestic products and high unemployment rates were push factors that made them leave their home countries.[13] While some of the younger ones were fortune hunters and left their home country without a grand plan for their future, the more settled ones were driven by a motivation to help their family financially. They left voluntarily with an understanding that they would earn a decent salary in Norway. Counter to the stereotype of the uneducated and naïve victim of forced labour, some men were university graduates with significant work and living experience from other European countries. These findings cohere with recent research that suggests an increased diversification of the background of the victims (Hernandez and Rudolph 2015, pp. 118–39).

Section 4.4 above discussed that the men were in a state of hardship, which was typified by an economic, social, and family-related vulnerability. The need and wish to earn money for their own livelihood or to support their families led the men into employment relationships characterised by coercion or exploitation.[14] Their vulnerability was increased once they were threatened of or exposed to wage deductions, which put them under pressure due to familial or social expectations. Note that although some men witnessed physical violence, in their eyes, physical vulnerability did not characterise their situation. On the contrary, the men did not consider themselves victims at all.[15] They eventually realised the deception but would not be able to confide this to their families, who expected regular remittances. It would be too shameful to admit that they worked so hard yet received no payment. Even though the men without exception were—objectively—being exploited,[16] their pride prevented them from accepting a victim role: they simply wanted the money they had earned. Nonetheless, despite their refusal to be seen as victims, the men were nonetheless in a vulnerable position.

Their migrant status was an important factor that increased their vulnerability. One of the interviewees exclaimed: 'The police [in the section for human trafficking] don't care because I am a migrant', implying that they were aware of his situation, exploitation, and inability to escape his traffickers. Research has shown that migrants are a highly vulnerable group, one which is particularly vulnerable to human trafficking and forced labour as one of the forms of exploitation.[17] The migrants' vulnerability is caused by numerous, often interdependent, factors that vary from case to case: they commonly do not know the local

[13] For a detailed analysis of global drivers, see: Maria Ravik, *The Fight against Human Trafficking: Drivers and Spoilers* (Ravik 2020, pp. 49–76).

[14] Gallagher (2010, p. 124) confirms on a general level that 'most victims of trafficking (. . .) just want to go home or get a decent job'.

[15] Thereby confirming earlier research by Paasche et al. (2018, p. 39) and Hulting (2012, p. 148).

[16] Statement by the men's legal counsel.

[17] Migrant workers are considered the most vulnerable workers and thus at greater risk of human trafficking (Jovanovic 2020, p. 695; McRedmond 2010, p. 7; Arnegaard and Davis 2019, p. 6; Special Rapporteur 2019, p. 6; ILO 2017, pp. 30–31).

language; are not integrated into the local community and have no family or social network; and are unaware of their rights and duties, domestic laws and regulations, and the legal system as a whole. These facts are valid for the situation of all the interviewed men: they found themselves in Norway, a country where they had no connections or social contacts. They did not speak the local language, nor did they know the system or their rights, such as minimum hourly wages or maximum weekly working hours. Their exploiters were fully aware of these vulnerabilities and took advantage of them.

Some men, for instance, never received an employment contract and were threatened when they asked for one. Large-scale investigations into forced labour migrants in Europe confirms this common practice (Andrees 2009, p. 99; see also Mapp 2021, pp. 40, 43). Others signed contracts but did not understand them either because they were written in Norwegian or due to their complex terminology. Moreover, the contracts were standardised and seemingly adhered to the labour law regulations, while in reality the men had to work many more hours than stipulated. Several exploiters operated with fabricated working hour lists that could be presented to the authorities in the case of an unannounced inspection.

A recurring theme in the men's stories is that salaries started off on a decent level, but then gradually decreased. Adrian, for example, worked for more than a year in a car wash and initially received 10,000 NOK (approximately 1000 Euros) per month. Later, the payment was reduced to 4000 NOK, then 3000 NOK, while the working hours remained the same. Most men worked between 12 to 14 h a day, seven days a week. 'I felt like a toy', recalled Adrian, implying that the employers controlled much of his life. The men had very little free time because they were made to work around the clock in places with little public insight or control.

The men lived in basic and arguably undignified living conditions, in every case provided for by their traffickers, who often deducted an exorbitant rent directly from their salaries. Adrian mentioned a two-bedroom flat that he shared with five other workers; another man talked about a five-room apartment that housed 14 men. Each evening, when all were back from work, there was a queue to go to the bathroom and to make food. In addition to the rent, several men owed their traffickers for the transport to Norway, meaning they were already indebted before they started working. The low salary and high house rent made it impossible to ever work off their debt, a fact the exploiters were aware of. Large sample surveys confirm that migrants who are coerced into forced labour and accumulated debts they owed to their exploiter(s) are particularly vulnerable (Andrees 2009, p. 99). With a few exceptions,[18] the men did not have financial or other resources to return home or travel to another country.

In Norway, moreover, social research has concluded that 'neither the Norwegian labour unions nor the government seem to have seen the trafficking framework as ideal for addressing discrimination of migrant workers and exploitation in the labour market' (Jahnsen and Skilbrei 2015, p. 159; Skilbrei 2012, pp. 211–27). Instead, the anti-trafficking framework is designed to address victimisation through (female) sexual exploitation rather than through (male) exploitation of labour (Jahnsen and Skilbrei 2015, p. 159; McRedmond 2010, p. 184). Thus, their migrant status puts the men in a situation of vulnerability, which is exacerbated by the help apparatus' design to discover and assist female victims of sexual exploitation. The Norwegian framework does not sufficiently address the men's situation because it does not focus on the exploitation of men for labour. International research confirms that conceptions of vulnerability in anti-trafficking policies are heavily gendered and that there is a bias towards sexual exploitation of women and girls, leading to the association of victimhood and vulnerability with femininity (Mapp 2021, pp. 62–63; van der Anker and van Liempt 2012, pp. 7–8; Paasche and Skilbrei 2017, pp. 149–66). However, the discussions above and the overall assessment of their situation have shown that men

[18] One man fell ill and did not have health insurance. He decided to return home for treatment. Later, he came back to Norway and the same car wash. Arguably, he was at liberty to leave his employment and not return to Norway and/or the same employer. This might therefore not be a clear-cut case of forced labour, despite other elements of vulnerability and coercion.

can also be in a vulnerable situation. This vulnerability was caused by a state of hardship on psychological, emotional, family-related, social or economic grounds, their migratory status and gender. This multiple vulnerability impelled the men to accept their exploitation, leading to the conclusion that they probably were victims of forced labour.

Forced labour constitutes a breach of international state obligations, human rights law, and domestic criminal law. At the same time, the victims are often foreigners without work or residence permits. This situation entails the application of competing legal regimes to the disadvantage of the concerned individuals.

6. Disadvantageous Competing Legal Regimes

By ratifying the Council of Europe Convention on Action against Trafficking in Human Beings, Norway pledged to ensure that victims and their human rights are protected during the investigation of trafficking cases. The convention provides stronger rights than the Palermo Protocol and is therefore an important legal instrument for alleged victims.[19] According to Art. 1(1)(a), the convention aims at preventing and combating trafficking in human beings, 'while guaranteeing gender equality'. Women and children are mentioned in Arts. 6 and 10(1), while the convention is silent on the issue of male victims. Albeit explicitly guaranteeing gender equality, the convention exhibits the same focus as the Palermo Protocol, namely that women and children are victims of human trafficking, first and foremost.

The Council of Europe Convention and the Palermo Protocol share further commonalities in that they consider their human rights perspective and focus on victim protection as the main added value. The preamble of the Council of Europe Convention explicitly states that trafficking constitutes a violation of human rights and 'an offence to the dignity and integrity of the human being'. The convention has even been termed the most important human rights treaty of the last ten years (Gallagher 2010, p. 126), yet, due to competing legal regimes, the recognition and implementation of the human rights of the victims are not fully realised: the perpetrators of forced labour are often granted impunity while the human rights of the victims are violated (Mapp 2021, p. 60; Duffy 2016, p. 403; Obokata 2006, p. 4). The breaches of immigration and employment law regimes by the persons exploited seem to trump the violation of criminal provisions on forced labour by the traffickers, as the above case of Nadim exemplified.

Arguably, evidentiary considerations render investigations, prosecutions, and convictions for forced labour more demanding and are therefore not prioritised by law enforcement authorities.[20] The exploiters' practices are hidden from the public eye, shrouded in secrecy, and difficult to expose (Duffy 2016, p. 400; McRedmond 2010, p. 6). As a consequence, the perpetrators of forced labour are not investigated or prosecuted, while the victims either face criminal or administrative charges and/or are deported (Gallagher 2010, p. 118). The one-sidedness in dealing with cases of illegal employment that allegedly also reach the threshold of forced labour give the impression that domestic authorities expedite the immigration or labour law track, while not ensuring the effectiveness of the criminal law or human rights law track (Duffy 2016, p. 383; McRedmond 2010, p. 8; van der Anker and van Liempt 2012, pp. 1, 5). Research has concluded that although patterns of trafficking for forced labour vary across economic sectors and geographical regions, they share a common aspect: forced labour is 'generally the result of a deterioration of labour rights, such as lower salaries, longer working hours, reduced protections and informal employment' (UNODC 2020, p. 10). This documented and unambiguous link between the

[19] Gallagher (2010, pp. 114–16), clarifies that the Palermo Protocol focuses on prevention, whereas the Council of Europe Convention emphasises human rights and victim protection.

[20] The police will likely only initiate an investigation following a complaint from a victim. Yet, victims for reasons of intimidation or worry about repercussions are rarely willing to make complaints against traffickers. See: (Gallagher 2010, p. 124; Hulting 2012, pp. 147–48; Obokata 2006, p. 158). The lack of evidence was also an issue in a case before the European Court of Human Rights: *CN v. UK*, Application No. 4239/08, Judgment (13 November 2012).

weakening of labour rights and forced labour makes the one-sided focusing of domestic authorities on infringements of labour law by the exploited men objectionable.

The impression that the victims suffer double victimisation—first by being exploited, then by not being vindicated for the violation of their human rights—is not easily refuted. This supposition is confirmed for Oslo, where the Attorney General criticised the police for being more concerned with 'fulfilling specific target figures for expulsion and deportation cases' than identifying potential victims of human trafficking. The result of this prioritisation is the deportation of potential victims out of the country before their case is investigated, thereby making investigations even more difficult given that possible witnesses no longer reside in Norway (Thorenfeldt and Stolt-Nielsen 2021).

Despite their experience of abuse and exploitation, the men did not receive the required attention of the police. Several had secretly hoped that a police inspection would expose their dire situation. 'I don't know what is wrong with the law here [in Norway]', said one man. When he was back home, in an Eastern European country, he always thought of Norway as a nice and strong state. Norway had a good reputation as a safe country with many well-paid jobs. However, after his experiences, he changed his opinion: if he had experienced the same at home, his employer and exploiter would have been jailed. 'I am frustrated that the authorities do not do anything', he exclaimed. 'We want justice', he added, speaking also on behalf of his co-workers. More than two years after the first interviews and even longer since their employment begun, not one exploiter has been prosecuted or held criminally liable.[21]

7. Forced Labour in the Jurisprudence of the European Court of Human Rights

7.1. Introduction

The above analysis has shown that the concept of vulnerability is embedded in human trafficking, including forced labour as one of its forms. Vulnerability is also a concept that is gaining increased scholarly attention on the human rights level: several academics argue that it is gaining momentum in the case law of the ECtHR (Peroni and Timmer 2013, pp. 1056–85; Arnardóttir 2017, pp. 150–71; Adorno 2016, pp. 257–72; Morawa 2003, pp. 139–55; Jovanovic 2020, pp. 694–700). This section will provide an overview of the court's jurisprudence on forced labour, in part using a gender lens that considers the implications for men who, due to their vulnerability, were exploited for labour. It will also, where appropriate, apply the court's findings to the situation of the men in Norway.

7.2. Art. 4 ECHR: A Definitional Quagmire

Art. 4 of the European Convention on Human Rights (ECHR) prohibits slavery, servitude, and forced and compulsory labour. The ECtHR held that that vulnerability is 'the common feature of all forms of exploitation' of Art. 4 ECHR.[22] For the purpose of the present discussion, Art. 4(2) ECHR is the central provision that reads: 'No one shall be required to perform forced or compulsory labour'.

The definitional quagmire[23] on the international level that Section 3. discussed equally extends to the European regional level. Scholars have lamented the limited efforts of the ECtHR to clearly interpret and delimit the legal boundaries of human trafficking, slavery, and forced labour (Stoyanova 2017a, 2017b, 2020; Allain 2014, pp. 111–42). It is worth mentioning that the ECHR does not contain the term 'human trafficking'. In the *Rantsev v. Cyprus and Russia* judgment, however, the court added human trafficking to the conceptual apparatus of Art. 4 ECHR. In performing a teleological and dynamic interpretation of the ECHR as a living instrument, the court held that it was unnecessary to identify whether the treatment in question constituted 'slavery', 'servitude' or 'forced or compulsory labour', the three available legal categories provided by Art. 4 ECHR. Instead, it concluded that

[21] Confirmed by several independent sources.

[22] *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2017), para. 82.

[23] Inspired by Hathaway (2008–2009, p. 1).

human trafficking is part and parcel of Art. 4 on the basis of the Palermo Protocol and the corresponding provision in the Council of Europe Convention.[24] The recent Grand Chamber judgment in *S.M. v. Croatia* followed suit, stressing that 'it is not possible to characterise a conduct or a situation as an issue of human trafficking unless it fulfils the criteria for the phenomenon in international law'.[25] Note that the judgment also confirmed that 'force' in forced labour encompassed subtle forms of coercive conduct. (para. 301).

In reverting to global and other regional treaties, the ECtHR promotes a cross-fertilisation and coherent legal interpretation of human trafficking (Duffy 2016, pp. 387, 402). Such an approach streamlines the international community's efforts to combat human trafficking, hence a positive aim. The Guidelines on Art. 4 ECHR even explicitly state that the court does not apply the rights and freedoms in a vacuum and that the provisions of the convention are not the sole framework of reference for their interpretation (ECtHR 2021, pp. 5–6). Furthermore, Vladislava Stoyanova correctly points out that the reference to the Council of Europe Convention enables the ECtHR to draw on an already established regional human trafficking framework, which imposes important obligations on its state parties (Stoyanova 2020). Nonetheless, she and other scholars critique the inclusion of a legal term by reference to other international treaties, notably without clarification of how 'human trafficking' as defined there relates to the other concepts under the ECHR, thereby creating a 'definitional quagmire'.

The disentanglement of these legal terms, both within the same and from distinct legal instruments, is important. The different prohibited practices and their thresholds must be clearly determined and distinguished in order to prevent, identify, and punish breaches. Only once the different concepts receive a precise delimitation can the identification of the victims and perpetrators, the possibility to provide redress to victims, and the change or adaptation of conflicting domestic practices and laws occur (Chuang 2015, pp. 146–49; Allain 2015, pp. 217–29).

Because human trafficking in general and forced labour in particular are on the rise (UNODC 2020, p. 15; Obokata 2006, p. 3), more cases and litigation before domestic and regional courts ought to be expected. In the context of forced labour, over the last 15 years, the number of detected male victims has statistically increased more than women. This has led to a change in the victim profile: the share of adult women fell from 70 percent to less than 50 percent in 2018 (UNODC 2020, p. 15). Not only has the victim profile changed but the motive for trafficking has too. While trafficking for sexual exploitation is still the most common form in the world, the percentage of those trafficked for forced labour has more than doubled—from 18 to 38 percent among the detected cases. Thus, trafficking for forced labour is more often detected and represents a larger number of cases (UNODC 2020, p. 16).[26] Given these statistical changes of crimes and victim profiles, an increase in cases of forced labour before the courts should be expected. Interconnected, there might also be an increase in cases concerning male victims of forced labour. Therefore, the ECtHR must be prepared to provide unambiguous legal interpretations so as to deliver accurate judgments and offer guidance to the domestic judiciary.

7.3. Case Law on Forced Labour until 2017

The ECtHR has rendered just under 64,500 judgments, yet surprisingly few deal with human trafficking and forced labour (Duffy 2016, p. 400; Stoyanova 2017a). In *Rantsev v. Cyprus and Russia*, the court even admitted that it 'is not regularly called upon to consider

[24] *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (10 May 2010), para. 282. Discussed in: (Jovanovic 2020, pp. 676, 682; Duffy 2016, pp. 385–89). For a critique: (Stoyanova 2012, pp. 163–94; Vijeyaras and Villarino 2012, pp. 36–61; Allain 2015, pp. 217–29).

[25] *S.M. v. Croatia*, Application No. 60561/14, Grand Chamber Judgment (25 June 2020), para. 290.

[26] These figures do not cohere with the ones provided for by the (European Commission 2016, p. 14), which mentions that the majority (75%) of all victims of trafficking registered with recognized authorities are female, while 26% of the registered victims of labour exploitation are female. This discrepancy can be owed to different geographical focus (global vs. Europe) or that sexual exploitation, where women represent 96% of all registered victims is more readily discovered, recorded, and investigated.

the application of Article 4'.[27] To date, only 19 cases have been litigated under Art. 4(2) ECHR, which prohibits forced and compulsory labour.[28] Because forced labour is a major and growing societal problem, it is striking that the court has found a violation of Art. 4(2) ECHR in only four cases: *Zoletic and Others v. Azerbaijan* (2021), *Chowdury v. Greece* (2017), *Chitos v. Greece* (2015), and *C.N. and V. v. France* (2012). This section will examine some of the court's judgments on human trafficking and forced labour beyond the previously mentioned *Rantsev v. Cyprus and Russia* and *S.M. v. Croatia*, with a focus on their relevance for the cases of the 14 men in Norway.

Siliadin v. France was the first human rights case to address practices of human trafficking. It dealt with a Togolese national who came to France to study. She alleged that for several years, she was forced to work as a domestic servant in a private household, without pay or holiday. While the court found that the applicant's treatment did not amount to slavery, it concluded that Siliadin was a victim of servitude and forced labour and that France had violated Art. 4 ECHR. In order to find the degree of control and constraint, the ECtHR applied the ILO standard, wherein forced labour involves 'the menace of a penalty'.[29] Arguably, the court went beyond the standards of the ILO in holding that the seriousness of threats and fear of deportation were a situation equivalent to 'penalty'.[30] The situation of Siliadin is undoubtably graver and more invasive to the freedom of movement and liberty than any man interviewed in Oslo experienced. Siliadin was a female minor from Africa who never received a work contract or salary while working in France for several years 15 h a day, seven days a week. However, *Siliadin* probably does not set the threshold for forced labour as stipulated by Art. 4(2) ECHR. Rather, it clarified that a

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[27] *Rantsev v. Cyprus and Russia* Application No. 25965/04, Judgment (7 January 2010), para. 279.

[28] The court found that the totality of the applicants' arguments and submissions made both before the domestic courts in their civil claim and before the court (concerning excessively long work shifts, lack of proper nutrition and medical care, physical and other forms of punishments, retention of documents and restriction of movement) constituted an "arguable claim" that the applicants had been subjected to human trafficking and forced labour. The court stated that even though the applicants' claims concerning the alleged forced labour and human trafficking had been sufficiently and repeatedly drawn to the attention of the relevant domestic authorities in various ways, no effective investigation had taken place and, therefore, Azerbaijan had failed to comply with its procedural obligation under Article 4, paragraph 2, of the Convention. Each applicant was awarded compensation for nonpecuniary damage in the amount of 5000 euros.In its decision, the court referred to the findings of GRETA's 2014 report on Azerbaijan, in particular to the fact that law-enforcement officials in Azerbaijan had a tendency to see potential cases of human trafficking for labour exploitation as mere labour disputes between the worker and the employer, and that there seemed to be a confusion between cases of human trafficking for labour exploitation and disputes concerning salaries and other aspects of working conditions.

(1) *Zoletic and Others v. Azerbaijan*, Application No. 20116/12, Judgment (7 October 2021).
(2) *Tibet Menteş and Others v. Turkey*, Application Nos. 57818/10; 57822/10; 57825/10; 57827/10; 57829/10, Judgment (24 October 2017).
(3) *Chowdury and Others v. Greece*; Application No. 21884/15, Judgment (30 March 2017).
(4) *Meier v. Switzerland*; Application No. 10109/14, Judgment (February 2016).
(5) *Chitos v. Greece*; Application No. 51637/12, Judgment (4 June 2015).
(6) *C.N. and V. v. France*, Application No. 67724/09, Judgment (11 October 2012).
(7) *Graziani-Weiss v. Austria*, Application No. 31950/06, Judgment (18 October 2011).
(8) *Stummer v. Austria*, Application No. 37452/02, Grand Chamber Judgment (7 July 2011).
(9) *Rantsev v. Cyprus and Russia* Application No. 25965/04, Judgment (7 January 2010).
(10) *V.T. v. France*, Application No. 37194/02, Judgment (11 September 2007).
(11) *Solovyev v. Ukraine*, Application No. 4878/04, Judgment (14 December 2006).
(12) *Ananyev v. Ukraine*, Application No. 32374/02, Judgment (30 November 2006).
(13) *Roda and Bonafatti v. Italy*, Application No. 10427/02, Judgment (21 November 2006).
(14) *Verkeyenko v. Ukraine*, Application No. 22766/02, Judgment (13 December 2005).
(15) *Siliadin v. France*, Application No. 73316/01, Judgment (26 July 2005).
(16) *Karlheinz Schmidt v. Germany*, Application No. 13580/88, Judgment (18 July 1994).
(17) *van der Mussele v. Belgium*, Application No. 8919/80, Judgment (23 November 1983).
(18) *van den Droogenbroeck v. Belgium*, Application No. 7906/77, Judgment (24 June 1982).
(19) *de Wilde, Ooms and Versyp v. Belgium*, Application No. 2832/66;2835/66;2899/66, Judgment (18 June 1971).

A total of 32 cases have been litigated under Art. 4 ECHR.

[29] *Siliadin v. France*, Application No. 73316/01, Judgment (26 October 2005), para. 117. On the ILO standards, see above in Section 4.4.

[30] *Siliadin v. France*, Application No. 73316/01, Judgment (26 October 2005), para. 118.

regime of isolation, fear and threat combined with the misuse of positions of power are clear indicators of forced labour (Duffy 2016, p. 380). These indicators and the exploitation of vulnerability are apparent in the Norwegian cases too.

A further clarification of the contours of forced labour came with the judgment in *C.N. and V. v. France*. The case dealt with two orphaned sisters, both minors from an Eastern African country, who were forced to engage in unpaid domestic chores in the household of their uncle and aunt in France. Again, the court relied on the ILO Convention of 1930, but broadened its approach to 'penalty' as developed in *Siliadin v. France*.[31] It held that the meaning of penalty 'may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities' (para. 77). This interpretation conforms with the one for the Council of Europe Convention and is important in its recognition of psychological threats. The presumed victims of forced labour in Oslo, with the exception of Nadim, were all men from Eastern Europe and not illegal immigrants. They did not face expulsion but risked penalties for working without valid work permits. As such, the risk of being denounced to the police was genuine. Even if they had work permits and contracts that appeared to be valid and legal, they still were exposed to threats, mostly of an economic nature.

The case of *Chowdury and Others v. Greece* was the first where the court found that the exploitation of adult irregular migrants' labour amounted to forced labour.[32] In the judgment, the court refers back to its earlier elaborations in *Siliadin* and *Rantsev* for the relevant international law, primarily the ILO Convention, the Palermo Protocol, and the Council of Europe Convention, thereby confirming its cross-fertilisation approach (para. 38). In dealing with forced labour of migrant men, *Chowdury* is highly relevant for the situation of men in Norway. The case deals with Bangladeshi migrants who were employed as strawberry pickers in Greece without work permits. Under the supervision of armed guards, they worked every day from 7 a.m. to 7 p.m. The men lived in makeshift shacks made of cardboard and without toilets or running water. Their employers had warned them that they would only receive their wages if they continued to work for them. While the working conditions and the accompanied threats and humiliation in *Chowdury* resemble the stories of the men in Norway, the safety regime was decisively stricter and the living conditions far worse. Moreover, in *Chowdury*, the workers experienced armed violence and several suffered acute gunshot wounds. Their freedom of movement was significantly curtailed and their right to life threatened, while in the Norwegian cases, the workers faced no threat from guns or other arms. Their freedom of movement was reduced foremost due to economic restraints. The security regimes are therefore not comparable, and *Chowdury* reveals severe, and even irreversible, breaches of human rights of the workers. However, as discussed above in the case of *Siliadin*, the threshold for breaches of Art. 4(2) ECHR and the prohibition of forced labour is probably lower than those of *Chowdury*. It is therefore not excluded that the men in Norway were victims of forced labour, and their treatment was a violation of Art. 4(2) ECHR.

In the judgment, the court reminded the member states of their obligation to adopt a 'comprehensive approach'—without elaborating on what constitutes the comprehensiveness—to combat the phenomenon of forced labour (para. 87). Furthermore, the states had to 'assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking' (para. 87). The implementation of an effective protection is thus part of the positive obligations of the states. For the cases of the men in Oslo, one might question the effectiveness of the protection, especially considering that the Attorney General criticised the police for focusing on expelling rather than identifying—and protecting—potential victims of human trafficking. The Attorney General explicitly mentioned the lack of law enforcement regarding victims of forced labour, especially men, which confirms a lack of their effective protection. All 14 cases were dropped

[31] *C.N. and V. v. France*, Application No. 67724/09, Judgment (11 October 2012), para. 71.
[32] *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2016).

before they reached the trial stage, indicating an inadequate protection regime. The limitation of resources that law enforcement has at its disposal does not exempt the state from its obligation to protect (male) victims of forced labour.

The ECtHR emphasised that 'forced labour' went beyond just any form of legal compulsion or obligation and had to include the idea of physical or mental coercion. The court exemplifies that carrying out work based on a 'freely negotiated contract cannot be regarded as falling within the scope' of Art. 4 ECHR. By implicit reference to the ILO Convention and explicit reference to its earlier case law, the court held that work must be exacted under the menace of a penalty and also performed against the will of the person concerned, hence 'work for which he has not offered himself voluntarily' (para. 90). In a narrow reading of the law, the work of most interviewed men would not be considered forced labour. With a few exceptions, such as Nadim, they worked to agreed contracts and offered their work voluntarily. Arguably, this arrangement was not based on freely negotiated contracts because the men were made to work for much longer hours and lower pay than anticipated. This alone would, however, not suffice to reach the threshold of forced labour, yet, taking into consideration the totality of the physical and psychological circumstances, including their vulnerability and the coercion, the required threshold is probably reached. Later in the judgment, the court clarified that 'where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily' (para. 96). Based on this clarification, one might reasonably conclude that the men in Norway were victims of forced labour in the sense of Art. 4(2) ECHR.

7.4. Zoletic and Others v. Azerbaijan (2021)

The judgment in *Zoletic and Others v. Azerbaijan* was rendered in October 2021. It deals foremost with the procedural limb of Art. 4(2) ECHR. This section presents the case and examines it in light of the material conditions of the forced labour and compares it with the situation of the interviewed men in Norway. The case concerns 32 male applicants from Bosnia and Herzegovina who were recruited as temporary construction workers to Azerbaijan. They arrived on tourist visas, without work or residence permits or individual contracts. Upon arrival, their passports and travel documents were seized. They were accommodated in houses with overcrowded shared rooms for twelve to twenty-four people and unsanitary conditions, without enough toilets. Under threats of physical violence, they were not allowed to leave their accommodation. Because they were not given adequate food, they lost a lot of weight. The men had to work 12-h shifts, sometimes even up to 36-h shifts in construction (paras. 62 and 106–8). For several months, the applicants did not receive any wages, deprived of approximately 10,000 US dollars. Later, upon intervention of humanitarian organizations, parts of the accrued wages were paid. 'An atmosphere of fear and dependency was created (. . .) with the intention of fraudulently depriving the victims of their wages through deductions, fines and denial of adequate accommodation, food and healthcare in order to misappropriate the money transferred to the account' of the construction company (para. 62).

The facts of the case show a remarkable resemblance to the situation of the men in Norway: although no one had his passport taken away, they lived in similar accommodation with overcrowded dormitories and inadequate sanitary and cooking facilities. The men worked long shifts, did not receive their wages on time, the money was in inaccessible accounts, and they experienced fraudulent deprivation of their wages through deductions. The atmosphere of fear and dependency that the court describes reverberates in the cases of the 14 men in Oslo.

By reference to the international treaty obligations of Azerbaijan and following the principle of harmonious interpretation of the convention and other instruments of international law, the ECtHR confirmed the cross-fertilisation and streamlining of the different legal regimes, in particular with ILO Convention No. 29 and the Palermo Protocol. It

thereby followed the path laid out in *Siliadin*, *Rantsev*, *Chowdury*, and *S.M.*, thus settling the jurisprudence on the matter (paras. 96–98 and 155).

The judgment also refers to a report by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA), according to which Azerbaijan has been fighting trafficking in human beings 'for the purpose of sexual exploitation of Azerbaijani women abroad and not enough attention has been paid to [trafficking] for labour exploitation, particularly occurring in Azerbaijan' (para. 118). This reference confirms the focus of states on combating trafficking for the purpose of sexual exploitation of women, thereby placing (male) victims of labour exploitation in a subordinate position. The unfortunate signal sent by such government policies is that sexual exploitation of women is not accepted and will be met by sanctions, while labour exploitation of men is granted impunity. As discussed above, the policies of the Norwegian authorities have a similar focus, which has had disadvantageous consequences for the male victims concerned.

Confirming its earlier case law, the ECtHR elaborated on the notion of 'forced or compulsory labour' under Art. 4 and held that it aims to protect against serious exploitation, irrespective of whether it is related to a specific human trafficking context (para. 148). The court also confirmed the reasoning of *Chowdury* whereas the concept of 'consent' is nullified if an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them (para. 149). It reiterated the requirement of 'disproportionate burden' to distinguish forced labour from work which can reasonably be expected based on family assistance or cohabitation (para. 150). The 'penalty' notion is to be interpreted in a broad manner to include physical violence or restraints as well as threats and other psychological pressure exerted upon the victim (para. 151).

'The court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere' (para. 152). By using the terminology of the right to ownership, the ECtHR makes a connection to the historical definition of slavery from the 1926 Convention. McAdam (2019, p. 30), however, points out that nowadays, the legal right of ownership cannot be exercised by one person over another, thereby rendering this notion inadequate to address a contemporary problem. Another issue is that, by reverting to the analogy of the trade of human beings, the ECtHR reinforces the understanding of trafficking as a notion of modern slavery, despite the above-discussed definitional vagueness and lack of legal validity of the term. This parallel, although certainly effectful, is unfortunate from a legal perspective. In connecting the discussion of forced labour to the selling of humans under the right of ownership, the court does not contribute to disentangling the legal concepts of slavery, human trafficking, and forced labour from the nonlegal concept of modern slavery.

Notwithstanding, there is no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and is incompatible with a democratic society and the values expounded in the ECHR. The court interpreted the convention dynamically and held that trafficking in human beings, although not explicitly mentioned, falls within the scope of Art. 4 (paras. 153–54). It thereby confirms the reasoning of *S.M. v. Croatia*.

The judgment in *Zoletic* was clear in its conclusion that the allegations of punishments, retention of documents and restrictions of movement were indicative of coercion. In the view of the court, the absence of work and residence permits as well as the non-payment of wages and deductions disclosed a vulnerability of the migrant men (para. 166). These considerations hold equally valid for the men in Norway. The court is also clear that even if the workers offered themselves for work voluntarily, the situation might have changed because of the employer's conduct (para. 167). The same holds true for the interviewed men: they applied for the jobs voluntarily and believed in good faith that they would receive their wages, but their situation changed shortly after their arrival to Norway. If an employer takes advantage of the vulnerability of the workers to exploit them, they do, in the view of the ECtHR, no longer offer themselves voluntarily (para. 167). The situation of the

men in Oslo and Azerbaijan was very similar with forced, excessively long work shifts, lack of proper housing and sanitary conditions, and a coercive and intimidating atmosphere, based on an abuse of the alien status of the workers and their lack of knowledge of the local language. The ECtHR concluded that, taken together, their situation amounted to an arguable claim of forced within the meaning of Art. 4(2) ECHR. The same conclusion should be reached for the interviewed men.

7.5. Summing Up

The most recent judgment in *Zoletic* confirms much of the ECtHR's earlier jurisprudence. Despite the scarcity of judgments on Art. 4(2) ECHR, the court has gradually managed to create a jurisprudence on forced labour, which starts to take consistent and coherent form. However, there remain a few legal issues, which have not been fully resolved yet. At the same time, the scarcity also leaves the European domestic courts with few guidelines for their interpretation of forced labour.

The limited number of judgments on forced labour points to an overarching challenge: few cases are reported, investigated, prosecuted, judged, appealed, and finally reach the ECtHR. The cases that reach Strasbourg are only the tip of the iceberg—or, in the words of Helen Duffy, a snapshot of a phenomenon (Duffy 2016, p. 400). She makes the compelling argument that the limited jurisprudence on the regional level reveals that law exists on paper but is not understood or given effect in practice, thereby confirming the claim this paper made above. The lack of effectiveness of the provisions is, in the view of Duffy, owing to a variety of reasons such as lack of capacity and knowledge of prosecutors and judges, or insensitive and ineffective handling of investigations (Duffy 2016, p. 401). The latter was an issue in Norway too: police officers neither prioritised nor understood the seriousness of the respective case and allegation of forced labour, in part because the alleged victims were men. This fact is confirmed by research, according to which authorities and agencies operate under a conception of a trafficked person as a women or girl exploited for prostitution (Mapp 2021, p. 62; Berket 2015, p. 359). Instead, the image of a trafficked person must include men such as the 14 interviewed, all of whom suffered an abuse of their labour and human rights by exploitation of their vulnerability through poor working conditions, inadequate remuneration, and threats, among other factors. While, in Norway, both labour exploitation in general and the exploitation of men in particular are commonly written about as important targets of anti-trafficking policies of the authorities, research has demonstrated that very few concrete steps have been taken to assist these victims in practice (Paasche et al. 2018, p. 39).

8. Conclusions

Globalisation and communication have contributed to an increase in trafficking of vulnerable people who come from low-income countries in search for work in wealthier countries like Norway. All 14 interviewed men confirmed their traveling to Norway voluntarily, where an employment opportunity awaited them. Despite this voluntariness, their situation changed once they started working: salaries were withheld, payments reduced, living conditions were poor, and psychological coercion was significant. With a few exceptions, they found themselves in increasingly restrictive and unforgiving employment and living conditions. 'I was trapped in the car wash', one man admitted.

Unclear practices and definitions of human trafficking and forced labour have resulted in a low number of judgments on the domestic and regional level. By delimitating and clarifying the different forms of human trafficking, this paper contributed to closing the legal gap in the protection of vulnerable individuals. Legal scholarship and jurisprudence have conclusively determined that vulnerability is a precondition for coercion. The emergence of a judicial and scholarly understanding of vulnerability as a core element of forced labour is an important development in the untangling of different forms of human trafficking.

The situation of the men—presumed victims of forced labour—is complex. Despite experiences of coercion and threats that clearly reach the legal threshold of forced labour,

they did not receive the necessary and required protection. The men were not on the legal radar as victims of a criminal act. Instead, they were met with stereotypical understandings by the authorities. Due to competing legal regimes, as foreigners without work or residence permits, their human rights were played down while their status under immigration or labour law was foregrounded. '[The police] talked away the problem of human trafficking', one man concluded. Moreover, the men neither considered themselves as victims nor appreciated their victimisation: in their view, they were simply deceived. Pride and shame held back any admission of exploitation.

This reluctance has serious consequences: as long as their stories remain unknown, there will be no investigation, prosecution, and conviction for grave crimes that also breach the human rights of the men. Research and activism have largely focused on human trafficking for prostitution, leading to a knowledge gap about forced labour and its legal and factual characteristics, especially regarding migrant men. This gap is reinforced by the fact that alleged cases are dealt with under immigration or labour law, thus foregrounding the illegality of the victims' residence or employment rather than the perpetrators' criminal acts. In the battle of competing legal regimes, human rights and state responsibility seemingly lose out. This loss entails that there is little advancement of the interpretation of the law on forced labour, and the respective provisions, especially of Art. 4(2) ECHR, remain elusive.

By providing a legal analysis of international legal instruments, foremost the Palermo Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings as well as the case law on forced labour of the ECHR—this paper has examined how the legal definitions are understood and how they apply to the situation of the interviewed men. In doing so, the paper directed the legal focus onto male victims of forced labour whose vulnerability might not be discernible at first sight. It showed that although the law does not require victims to be migrant workers to experience forced labour, their status as migrants adds to their vulnerability, which is exploited once they are abroad.

A real and effective protection of the rights of victims of forced labour, including men, demands clearly determined legal thresholds and correspondingly stringent legislative and administrative practice.

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Article

Protecting the Human Rights of Refugees in Camps in Thailand: The Complementary Role of International Law on Indigenous Peoples

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Abstract: This paper investigates whether and how International Law on Indigenous Peoples (ILIP) can complement protections granted under International Refugee Law (IRL) and International Human Rights Law (IHRL) to refugees in camps in Thailand. Presently, there are over 90,000 refugees from Myanmar in Thailand, confined to nine camps along the Thailand–Myanmar border. These refugees belong to different ethnic minority groups, but the vast majority are Karen—Indigenous Peoples from the Thailand–Myanmar border regions. They have fled to Thailand due to persecution by Myanmar authorities and segments of the Myanmar population. To date, Thailand has refused to become a party to the 1951 Refugee Convention or its 1967 Protocol. The country has failed to develop an asylum system and its laws continue to regard refugees as 'illegal migrants'. These refugees have been surviving in conditions of profound rightlessness. I posit that ILIP has a critical role to play in addressing the protection gaps and limitations in IRL and IHRL. In particular, the ILIP system of collective rights is vital in recognising the specific needs of refugees who are indigenous peoples. ILIP therefore provides a potent tool to make IRL and IHRL more responsive to the protection needs of indigenous refugees.

Keywords: refugees from Myanmar; refugee camps along Thailand–Myanmar border; Karen refugees; Thailand; refugee protection; human rights; International Law on Indigenous Peoples; collective rights; indigenous refugees; complementary role

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1. Introduction

The provisions on international protection for refugees can be found in a range of legal sources and different fields of law with a diversity of rules. This diversity, which is a manifestation of the fragmentation of international law (Young 2015, p. 2), does not mean that norms from various areas of international law necessarily conflict. Rather, these norms overlap and can share a common goal and interact (ibid). In this regard, I argue that the interaction between International Law on Indigenous Peoples (ILIP), International Refugee Law (IRL) and International Human Rights Law (IHRL) forms a network of complementary protections for refugees.

IRL, which has two core instruments, the 1951 Refugee Convention and its 1967 Protocol,[1] constitutes the core of the international refugee protection regime. IRL, however, has proved of limited value to the many refugees who find themselves in camps in Thailand. Indeed, the country hosts 90,759 Myanmar[2] refugees in nine camps located in four provinces along the Thai–Myanmar border as of November 2022 (UNHCR Thailand

[1] International Refugee Law (IRL) as used throughout my paper refers to: Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[2] Prior to 1989 the country was officially named Burma, after which the country's name officially changed to Myanmar. However, in the English-speaking world the country is often referred to as either Burma or Myanmar. This paper uses the terms Burma and Myanmar interchangeably throughout.

Multi-Country Office 2022), but still refuses to accede to the 1951 Refugee Convention or its 1967 Protocol.[3] Thus, when I use the term refugee(s) in relation to persons in camps in Thailand, I understand it in a wider sense than that arising from the 1951 Refugee Convention and its 1967 Protocol.[4] The term refugee brings to the fore these persons' need for international protection. When referring to those who have been granted refugee status within the meaning of the 1951 Refugee Convention and its 1967 Protocol, I employ the term recognised refugee(s). Because refugees in Thai camps have not been granted refugee status, they are denied the rights enshrined in the 1951 Refugee Convention (UN Human Rights Council 2021). Critically, in the absence of a national asylum system, Thai law views these refugees as 'illegal migrants'.

Although Thailand is not a state party to the 1951 Refugee Convention or its 1967 Protocol, the country is bound by IHRL instruments, which contain rights applicable to all human beings, including refugees in Thai camps. For this reason, I contend that the system of human rights conventions that Thailand is party to is instrumental in addressing IRL's limitations and gaps in protection. Refugees in Thai camps are therefore better protected under IHRL. However, below I show that IHRL is not best equipped to uphold the rights of Karen refugees in Thai camps as indigenous peoples. The vast majority of refugees presently in Thai camps are from the Karen peoples and are widely known as indigenous to the Thailand–Myanmar border region, although they are not legally recognised as indigenous peoples by Thailand and Myanmar (Lehman 1979; EthnoMed 2008). Yet, Karen refugees and the Karen people in general need their collective dignity and the value of their collective way of life to be recognised and protected (Howard 1995, pp. 83–84). It follows that ILIP has a critical role to play in protecting Karen refugees' collective rights as an indigenous people—something that IRL and IHRL cannot achieve on their own. ILIP promotes and preserves their unique collective cultures, values and traditions while seeking refuge in camps in Thailand.

In this article, I make the case for the complementary role of ILIP in the protection of indigenous refugees, and more specifically Karen refugees in Thai camps. I accept that there are still gaps—at times considerable—between internationally recognised rights and their enjoyment in practice. It is well established that the implementation and enforcement of international obligations continue to rest primarily with states, which makes implementation contingent on their 'goodwill' (Hannum et al. 2023; Bantekas and Oette 2020, pp. 25–26). However, failures in the implementation and enforcement of ILIP, IRL and IHRL do not negate the value inherent in investigating the role that the interaction between these three international legal regimes can play in buttressing protection for indigenous refugees. With this in mind, I analyse how this interaction can inform Thailand's legal and policy approach on refugee camps and thus advance protection for Karen refugees in camps along the Thai–Myanmar border.

I start by providing an overview of the historical background of the indigenous Karen and of their protracted refugee situation in Thai camps. I then discuss the respective role of each area of international law to apply, in particular how IHRL can fill the protection gaps arising from the failure of Thailand to sign up to the provisions of IRL, leaving refugees in Thai camps beyond its scope. As IHRL cannot fully protect the rights of Karen refugees as indigenous peoples, I then make the case for the key complementary role of ILIP in conferring protection on these refugees. This addresses a gap in the current literature in the

[3] For Thailand's ratification status to the 1951 Refugee Convention, see: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (accessed on 5 December 2022). For Thailand's ratification status to the 1967 Protocol Relating to the Status of Refugees, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (accessed on 5 December 2022).

[4] For the definition of refugee, see Article 1A (2) of the 1951 Refugee Convention. Firstly, the person must be outside his or her country of origin or habitual residence and have crossed an international border. Secondly, the person must have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Thirdly, the person should be unable or unwilling to seek or take advantage of the protection of that country, or to return there.

field, where few studies consider how ILIP could bolster the rights of indigenous peoples in refugee situations. Indeed, while there is much literature on the protection of refugees, there is little that addresses indigenous peoples who are refugees.

2. Karen Refugees in Camps along the Thai–Myanmar Border: An Overview

2.1. The Karen as Indigenous Peoples: A Historical Background

While there are few written documents of the origins of the Karen peoples, Karen oral histories describe the arrival of their people as far back as 2500 years ago, after migrating through Tibet and China to present-day Myanmar (Minority Rights Group International 2017; McConnachie 2014, p. 24). By the eighteenth century, they were well established in the remote highland eastern region of Myanmar bordering Thailand and maintained autonomous village management systems (Minority Rights Group International 2017; Scott 2009; Renard 2003, p. 5).

The Karen form a population with various linguistic, sociocultural and religious backgrounds, with twelve sub-groups: Sgaw, Pwo, Pa-os, Paku, Maw Nay Pwa, Bwe, White Karens, Padaung (Kayan), Red Karen (Karenni), Keko/Keba, Black Karen and Striped Karen (Harriden 2002, p. 84; McConnachie 2014, p. 23). The vast majority of Karen are Buddhists (probably over two thirds), although large numbers converted to Christianity during British rule in Myanmar (Minority Rights Group International 2017). They have their own language, with the two most widely spoken Karen languages being Sgaw (predominantly spoken by Christian Karen) and Pwo (predominantly spoken by Buddhist Karen) (McConnachie 2014, p. 23).

It is well established that the Karen are indigenous to the Thailand-Myanmar border region. The Karen peoples, since their earliest history, have lived in autonomous villages in the eastern region of Myanmar bordering Thailand and have always considered themselves indigenous and different from the Burman group living in the lowlands of Myanmar—the dominant and largest ethnic group in Myanmar (Renard 2003, pp. 4–5; Mason 1862). The Karen, among other ethnic minority groups in Myanmar, are struggling to maintain and practice their own cultures including language and religion, as the central Burmese government aims to Burmanise them (Pedersen 2008, p. 56). The indigenous Karen peoples have been largely marginalised by the central Burmese state and many have engaged in a long, armed struggle for autonomy (ibid., pp. 47–48).

During the British colonial period in Myanmar, the Karen fought on the British side against the central Burmese state in order to secure their independence and autonomy (McConnachie 2014, p. 27; Taylor 2007, pp. 74–75; Ng 2022, pp. 189–90). With the British withdrawal in 1948, there were massive uprisings of the Karen against the central Burmese state (Lintner 1999, pp. 9–10; McConnachie 2014, p. 23). The Karen were the first ethnic group to take up arms against the central Burmese via the Karen National Union (KNU). The KNU is viewed as one of the oldest active insurgent groups in the world today, having fought the government for autonomy continuously since 1949 (Pedersen 2008, p. 48). Indeed, the self-determination movement of the Karen peoples is sometimes described as the world's longest running self-determination movement throughout history and is still in existence today (McConnachie 2014, p. 28).

2.2. The Protracted Refugee Situation in Camps in Thailand

Importantly, the current position of the Karen in protracted refugee situations in Thai camps has its origin in the long history of ethnic conflicts inside Myanmar and the fighting for self-determination as mentioned the section above (Clarke 2001, pp. 422–23). In particular, throughout the 1970s and early 1980s, the Burmese military followed a pattern of dry-season offensives and wet-season retreats, and ethnic minority villagers under attack echoed this movement, crossing into Thailand to escape a military offensive and returning when the troops departed (McConnachie 2014, p. 33). For the first time in 1984, Myanmar Army troops did not retreat when the rainy season came and large numbers of the Karen were trapped in Thailand, causing the creation of the first temporary refugee camps (ibid.). Since

then, as the Burmese government has not granted either political autonomy or substantial rights to ethnic minorities, the indigenous Karen have continued to flee to refugee camps in Thailand. The situation has been made worse in recent times when Myanmar's military, under the command of coup leader Gen. Min Aung Hlaing, seized power on the 1 February 2021 and launched a series of airstrikes in the areas of ethnic Karen people in Myanmar's southeastern region (Kapur 2022, p. 204; UN Office of the High Commissioner for Human Rights 2023; Gravers 2023; Refugees International 2021).

While the situation of political uncertainty in Myanmar remains dangerous, the country is not yet safe for refugees to return. Despite this, Thailand has, for decades now, continued to apply a hostile immigration policy to these refugees. Refugees are left in limbo, are not granted refugee status and are not allowed access to sufficient protection of basic human rights (UN Human Rights Council 2021). Refugees are confined in remote camps, are not able to leave the camps for work and are excluded from the Thai educational system (Human Rights Watch 2012, pp. 1–4; UN Human Rights Council 2021). Should refugees leave camps without official permission, they will be subjected to deportation (Human Rights Watch 2012, pp. 1–4). Refugees in camps cannot access the Thai healthcare system, and especially faced serious problems during the 2019 Coronavirus pandemic (COVID-19) including in relation to vaccines, tests, masks and disinfectants (UN Committee on the Elimination of Racial Discrimination 2022; Kobayashi et al. 2021).

The Karen, under Thai policy and law, have very limited control of their life choices in refugee camps. The Thai government restricts the teaching of history containing sensitive content, such as Karen revolutionary history or histories of Karen hardship, histories which are considered part of the indigenous Karen identity (Oh 2010, p. 7). Teaching materials containing critical historical and political education that might promote revolution or war in the refugee community in Thailand against their historic enemy, the Burmese government, are banned from use in camps (Oh 2012, p. 88). Karen refugee students in camps are not able to fully explore and understand their own history and their community. Young Karen refugees cannot gain knowledge and meaning from their indigenous collective heritage. The Karen refugees in camps are, in general, in a deeply vulnerable situation and are facing cultural erosion; their distinct collective culture and values are at risk of being diminished (Carpeño and Feldman 2015, pp. 417–18). I will now turn to explore the interaction of areas of international law in protecting refugees in Thai camps, and indeed will start from an analysis of the role of IHRL in filling the gaps and limitations of IRL in order to protect these refugees.

3. IHRL's Role in Addressing IRL's Limitations in the Protecting Refugees in Thai Camps

3.1. IRL and Its Limitations in the Protection of Refugees in Camps in Thailand

IRL developed in the post-Second World War period in order to support the displaced populations of Europe, and rests upon humanitarian premises (Barnett 2002, p. 246; Hathaway 2005, p. 91). Today, some three-quarters of the world's governments have bound themselves to respect the standards set by the 1951 Refugee Convention and its 1967 Protocol (Hathaway 2021, p. 171; Edwards 2018, pp. 539–40; UNHCR 2002).[5] Yet, whilst Southeast Asia is currently hosting a large population of refugees, the region has a very low level of ratification, with only two states of the Association of Southeast Asian Nations (ASEAN) having ratified the 1951 Refugee Convention and its 1967 Protocol, namely Cambodia and the Philippines (Moretti 2021, p. 214). As noted above, Thailand is not party to these IRL instruments.

[5] For State Parties including Reservations and Declarations to the 1951 Refugee Convention, see further: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (accessed on 5 December 2022).
For State Parties Including Reservations and Declarations to the 1967 Protocol Relating to the Status of Refugees https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (accessed on 5 December 2022).

Critically, the concept of a refugee does not exist in Thai law and the country has continually looked at issues pertaining to refugees as immigration law matters (Jetschke 2019, p. 712). For decades now, the primary objective of the Thai immigration system has been to deter migrants, including those who need international protection from entering and residing in Thailand (Gruß 2017, p. 25). Refugees in Thailand fall within the scope of the Thai Immigration Act B.E. 2522 (Immigration Act 1979) (Jetschke 2019, p. 712; Coddington 2018, p. 329).

It is important to note that in 2019, Thailand enacted the Regulation of the Office of the Prime Minister on the Screening of Aliens who enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562 (the Regulation).[6] Clause 3 of this Regulation introduced a National Screening Mechanism (NSM), which would assess aliens who cannot return to their country of origin for 'Protected Person' classification. It is notable, however, that the Regulation does not grant refugee status within the meaning of the 1951 Refugee Convention and its 1967 Protocol (Chotinukul 2020, p. 27). Throughout the text of the Regulation, Thailand deliberately avoids using terms such as 'refugee' or 'asylum', and the legal status of the protected persons remains unclear (ibid.). In addition, although the Regulation came into effect in 2020, the onset of the COVID-19 pandemic slowed the implementation of the NSM (Stover 2021). The Regulation is therefore untested, and there are no reports of anyone having been granted protected person status (ibid.).

Refugees in Thailand still fall within the scope of the Immigration Act 1979 and are considered to be illegal migrants. Section 12(1) of Immigration Act 1979 accordingly provides that 'aliens' will be excluded from entering Thailand if they have no valid passport, travel document or visa stamped by a Thai authority. Those who enter Thailand without the requisite documentation are classified as illegal migrants. As those who seek refuge in Thailand often enter without papers and are unlikely to meet entry requirements, they are, under Section 12(1) of the Immigration Act 1979, categorised as illegal migrants (Jetschke 2019, p. 712). Indeed, refugees and asylum seekers in Thailand are considered to be the same as all other illegal migrants (Lego 2018, p. 184; Al Imran 2022, p. 985). As illegal migrants, refugees are, in accordance with Section 29 of Immigration Act 1979, sent out of Thai territories.

However, Section 17 of the Immigration Act 1979 also provides the Thai government with discretionary powers to allow people without the necessary documents to enter and stay in Thailand under some special circumstances. Interestingly, Section 17 of the Immigration Act 1979 does not specify which special circumstances may justify the exercise of the Thai government's discretionary power. On this legal basis, the Thai government exceptionally allows refugees from Myanmar, mostly indigenous groups fleeing from political persecution or fighting with the Burmese government, to enter the country as long as they stay within nine camps (officially designated 'temporary shelter') along the Thailand–Myanmar border (Vungsiriphisal et al. 2014, pp. 38–42; Petcharamesree 2016, p. 178).

To be clear, admission to Thai camps does not amount to being granted refugee status within the meaning of the 1951 Refugee Convention and its 1967 Protocol. This admission to Thai camps is not granted with a view to resettlement in Thailand (Human Rights Watch 2012, p. 18; UNHCR 2006). Instead, the Thai government views the stay of refugees in Thai camps as only a temporary matter and assumes that they should prepare for resettlement in third countries or repatriation to Myanmar (Brees 2008, p. 384). These people in camps under Thai Immigration law retain the status of illegal migrant (Human Rights Watch 2012, pp. 18–19; UNHCR 2006).

Critically, as refugees in Thai camps have not been granted refugee status and are, under Thai law, considered illegal migrants, they are not able to access the range of refugee rights articulated in the 1951 Refugee Convention (UN Human Rights Council 2021). In particular, the 1951 Refugee Convention and its 1967 Protocol define the term refugee and set out a range of basic rights attached to the status of refugees, such as the right to

[6] Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin (entered into force 24 December 2019) B.E. 256225.

work, the right to education, the right to free movement within the state that has bestowed refugee status, and other rights (Goodwin-Gill 2016, pp. 36–37).

The range of rights enshrined in the 1951 Refugee Convention consequently only apply to persons who have been granted refugee status (Chetail 2021, p. 208). Indeed, these rights are not applicable either to asylum seekers or to peoples who are at risk in their own countries but are not recognised as refugees within the definition of the Refugee Convention (ibid.). It is clear here that because people from Myanmar in camps under Thai Immigration law are, as analysed above, considered to be illegal migrants, they cannot enjoy the range of rights in the 1951 Refugee Convention and its 1967 Protocol, which are conferred only upon recognised refugees (Human Rights Watch 2012, pp. 18–19; UNHCR 2006).

The only provision of the 1951 Refugee Convention that applies to both recognised refugees and all asylum seekers, including refused asylum seekers, is the principle of *non-refoulement* articulated in Article 33(1) (UNHCR Executive Committee 1977). Accordingly, state parties are not allowed to return a refugee to a country where their life or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion.

It is important to note that the prohibition against the *refoulement* of refugees stipulated in Article 33(1) of the 1951 Refugee Convention has acquired the status of a norm of customary international law (UNHCR 1997, 2002). The fundamentally norm-creating character of the principle *non-refoulement* (*opinio juris*) is supported by the fact that the principle receives extensive citation in many Conclusions of the Executive Committee of UNHCR and in a number of important binding and nonbinding international texts (Lambert 2021, p. 245; Lauterpacht and Bethlehem 2003, pp. 143–44).[7] This cornerstone of IRL is therefore legally binding upon Thailand and all other States which have not ratified the 1951 Refugee Convention and/or its 1967 Protocol (UNHCR 2001, p. 14; Lambert 2021, p. 240).

However, the principle of *non-refoulement* articulated in Article 33(1) of the 1951 Refugee Convention is not absolute and has exceptions (Duffy 2008, p. 374). In accordance with Article 33(2) of the 1951 Refugee Convention, the benefit of the present provision may not be claimed by asylum seekers or refugees whom there are reasonable grounds to regard as a danger to the security of the asylum country, or who constitute a danger to the community of that country. Overriding reasons of national security or public safety will allow states to derogate from this principle and permit lawful refoulements (Lauterpacht and Bethlehem 2003, p. 155).

It is important to emphasise that although Thailand is bound by the principle of *non-refoulement*, the absence of formal asylum procedures and, more generally, the lack of refugee law and policy, produce an environment that does not account for the obligation to comply with the principle of *non-refoulement*. Since they are illegal migrants, should refugees leave the camps without official permission, they can be subjected to deportation (Human Rights Watch 2012, pp. 1–4). This clearly violates the principle of *non-refoulement*—the cornerstone of IRL.

[7] For example, the principle of *non-refoulement* is cited in the following documents: UNHCR Executive Committee. 1996. General Conclusion on International Protection No. 79 (XLVII). A/51/12/Add.1. Available online: https://www.refworld.org/docid/3ae68c430.html (accessed on 15 November 2022); UNHCR Executive Committee. 1997. General Conclusion on International Protection No. 81 (XLVIII). A/52/12/Add.1. Available online: https://www.refworld.org/docid/3ae68c690.html (accessed on 15 November 2022).
Declaration on Territorial Asylum, UNGA res 2312 (XXII) (adopted 14 December 1967), Article 3; Organisation of African Unity Convention Governing the Specific Aspects of Refugees Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Article 2; Final Text of the Asian-African Legal Consultative Organization (AALCO)'s 1966 Bangkok Principles on Status and Treatment of Refugees (adopted on 24 June 2001), Article 3(1).
Also including the various expressions by the Council of Europe such as:
Council of Europe. 1967. Committee of Ministers, Resolution (67) 14: Asylum to Persons in Danger of Persecution. Available online: https://www.refworld.org/docid/3ae6b38168.html (accessed on 10 September 2022); Council of Europe. 1984. Committee of Ministers, Recommendation No R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees. Available online: https://www.refworld.org/docid/3ae6b3816c.html (accessed on 11 November 2022).

It is undeniable that IRL is the central international legal regime in protecting refugees, but this remains limited in the context of refugees in camps in Thailand given that the Thai government has refused to ratify the 1951 Refugee Convention and its 1967 Protocol. In addition, although Thailand is not party to the 1951 Refugee Convention and its 1967 Protocol, the country as a member State of the United Nations is obligated to cooperate with the UNHCR in the fulfilment of its responsibilities to protect refugees in camps.[8] However, the Thai government has not been willing to cooperate with the UNHCR and has continually reduced the role of UNHCR, particularly in the Thai–Burma border refugee camps (McConnachie 2012, p. 40). The UNHCR plays a minimal role in supporting and protecting of refugees in Thai camps (ibid.).[9] The next section will now turn to analyse how IHRL is instrumental in addressing the limitations of the applicability of IRL in Thailand in the protection of their rights as refugees.

3.2. IHRL's Role in Complementing Protection under IRL for Refugees in Camps in Thailand

While Thailand remains a non-signatory of the 1951 Refugee Convention and its 1967 Protocol, the country importantly is party to core human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).[10] With this in mind, I examine and evaluate IHRL's contributions to protecting refugees in Thai camps.

Firstly, while most of the rights contained in the 1951 Refugee Convention and its 1967 Protocol are, as mentioned in Section 3.1, only granted to recognised refugees, the rights enshrined in IHRL are plainly applicable to all persons, regardless of their immigration or other status (Edwards 2018, pp. 539–40; Harvey 2015, pp. 43–44). In particular, Article 2 of the Universal Declaration of Human Rights (UDHR)[11] emphasises the principle of non-discrimination, specifying that every human being has inherent dignity and is entitled to all the rights and freedoms set forth in the Declaration. Human rights should be given to everyone without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[12] The principle of non-discrimination has become a core principle and is frequently cited in the range of subsequent human rights treaties, including Article 2(2) of the ICESCR and Article 2(1) of the ICCPR or Article 2(1) of the CRC.

Although they have not been bestowed refugee status, refugees in Thai camps are bestowed rights under IHRL as human beings, irrespective of their immigration status. For instance, the right to employment is, in accordance with Article 17(1) of the 1951 Refugee Convention, limited only to recognised refugees. In contrast, Article 6 of the ICESCR that Thailand is party to provides that everyone is entitled to freely choose their work and obliges state parties to take appropriate steps to safeguard this right. The UN Committee on Economic, Social and Cultural Rights (CESCR) has further emphasised that the right

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8 For more information on the obligation of states of the United Nations to cooperate with the UNHCR, see: Statute of the Office of the United Nations High Commissioner for Refugees, UNGA res 428 (V) (adopted 14 December 1950).

9 Within the limited scope of this research, the paper will not discuss the governance architecture of the Thai–Burma border refugee camps, including the role of UNHCR, in depth.

10 International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
For more information on the ratification status for Thailand, see further at UN Treaty Body Database. Available online: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN (accessed on 28 November 2022).

11 Universal Declaration of Human Rights, UNGA res 217A (III) (adopted 10 December 1948).

12 Article 2 of the UDHR.

to work articulated in Article 6 of the ICESCR applies to everyone including refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation (UN Committee on Economic, Social and Cultural Rights 2009, p. 9, para. 30).

The CESCR also explicitly acknowledges the vulnerability of refugees due to their often-precarious legal status and accordingly asserts that Contracting States should enact legislation enabling refugees to work and under conditions no less favourable than nationals (UN Committee on Economic, Social and Cultural Rights 2016, p. 13, para. 47(i)). Here, it is clear that although refugees in Thai camps have not been granted refugee status and are, under the 1951 Refugee Convention, not allowed to work, they as human beings are, in accordance with Article 6 of the ICESCR, entitled to this fundamental right. Thailand is therefore obliged, under IHRL, to grant them the right to work and crucially, take appropriate measures to ensure that refugees in camps are able to exercise or engage in employment in practice.

Moreover, Thailand in accordance with Article 13(2) of ICESCR, has an obligation to make primary education compulsory and available free to all persons including refugees in camps, without reference to nationality or immigration status. Thailand must make secondary education in its different forms including technical, vocational training available and equally accessible to all by every appropriate means.[13] Higher education also should be made equally accessible to all. Indeed, refugees in camps are under IHRL, entitled to equal treatment with Thai nationals with respect to free and compulsory primary education and to access different forms of secondary and higher education. Thailand is not allowed to exclude refugees in camps from the Thai school system. Furthermore, Thailand is under Article 12(2) of ICESCR, required to adopt and implement measures ensuring the right of access to health facilities, goods and services to all on a non-discriminatory basis. Refugees in camps should accordingly be eligible to access all Thai medical services including prevention and treatment, including for diseases such as COVID-19.

Another way in which IHRL is instrumental in complementing IRL in the protection of refugees in camps in Thailand can be seen through the application of the principle of *non-refoulement*. In addition to the 1951 Refugee Convention and its 1967 Protocol, the principle of *non-refoulement* is also expressed in international human rights treaties. Although the human rights principle of *non-refoulement* largely coincides in substance with the refugee law principle of *non-refoulement*, the former offers broader protection than the latter, and has no exemptions (Chetail 2021, p. 209). Indeed, Article 33(1) of the 1951 Refugee Convention states that refugees are protected against return to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. As analysed in Section 3.1, this principle articulated in Article 33(1) of the 1951 Refugee Convention is not absolute. Article 33(2) of the 1951 Refugee Convention also permits lawful refoulement in specific circumstances such as the existence of a danger to the security of the country or a danger to the community of the country.

This is obviously in contrast with the human rights principle of *non-refoulement*. In particular, Article 3 of the CAT states that countries shall not expel or return a person to another state where there are substantial grounds for believing that doing so would expose them to a danger of being subjected to torture. Article 7 of the ICCPR also mentions that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Although Article 7 of the ICCPR does not explicitly forbid refoulement to such ill treatment, the Committee on Civil and Political Rights (CCPR) has interpreted this provision as concluding a prohibition on removal of peoples to places of torture, cruel, inhuman, humiliating or degrading treatment or punishment (UN Human Rights Committee 1992, p. 2, para. 9; UN Human Rights Committee 2004, p. 5, para. 12).

[13] Article 13(2) of ICESCR.

Indeed, the principle of *non-refoulement* articulated in the human rights treaties is present to protect all peoples irrespective of their immigration status from suffering severe forms of ill-treatment that cause serious harms to all human life. Importantly, the prohibition on refoulement under IHRL is absolute and has no derogation (UN Human Rights Committee 1992, p. 1, para. 3; UN Committee Against Torture 2008, p. 2, para. 5–6). This means that even if a refugee or asylum seeker could be returned in accordance with Article 33(2) of the 1951 Refugee Convention, IHRL may still not permit refoulement on the humanitarian grounds of the prohibition of torture, cruel, inhuman, humiliating or degrading treatment or punishment and other irreparable harm (Edwards 2018, p. 549; Goodwin-Gill and McAdam 2007, p. 306; Mathew 2021, p. 903; International Committee of the Red Cross 2017, p. 348).

Therefore, IHRL offers refugees from Myanmar in Thai camps stronger protection against *refoulement* than IRL. Thailand, as a state party to both the ICCPR and CAT, is under no circumstances allowed to view refugees in camps as subjects for deportation and is not permitted to forcibly return refugees to Myanmar where they may face the danger of being subjected to torture or ill treatment. Any deportation of refugees to Myanmar due to leaving camps without official permission given by the Thai authorities is illegal under IHRL.

Although Thailand is a signatory to international human rights instruments and is bound by their provisions, the country's implementation of the human rights obligations in practice as mentioned at the start of this paper continues to pose a challenge. In particular in accordance with the 2017 Constitution of Thailand,[14] the country applies a dualist approach to the incorporation of treaties into its domestic legal system. Under a dualist system, international law and national law are considered separate legal systems wherein the rules and obligations of international law binding upon the state do not automatically become a part of national law (Verdier and Versteeg 2015, p. 516).

Section 178 of the 2017 Constitution of Thailand specifies that there is no treaty that has direct applicability in Thailand. For treaties to become law in the municipal sphere, it requires the enactment of an Act for implementation approved by the National Assembly. Consequently, the international human rights treaties that Thailand is party to are only implemented if the Thai government has transformed or incorporated them into domestic law. The implementation of international human rights obligations remains therefore entirely at the goodwill of the Thai government. This has led to concern that refugees in Thai camps might not actually benefit from provisions under IHRL, even including ones to which Thailand has signed up.

However, it is important to understand that, in the decades since the end of World War II, a normatively robust human rights regime has been developed and shaped by an ideal that human beings are born free and equal in dignity and rights (Morsink 2019). IHRL has been widely endorsed because its normative force is inescapable in the contemporary world (Donnelly and Whelan 2020). All states have accepted that human rights are a legitimate subject of international politics (ibid). I argue that even though the likelihood of the Thai government implementing its obligations arising from human rights instruments may be low, the provisions of IHRL remain fundamental to the protection of refugees in Thai camps and constitute one of the core approaches to inform the critique and development of law and policy towards these refugees. The reality also remains that, even in Thailand's dualist system, once the international human rights treaties are signed, Thailand is subject to obligations that bind them on the international plane. Signing up to human rights instruments, being bound by their provisions, is the first important step in their later implementation in domestic law.

It is clear that human rights treaties provide a unique and vital source of refugee protection in the 43 United Nations Member States, including Thailand, that have not ratified the 1951 Refugee Convention and its 1967 Protocol (Chetail 2021, p. 203). IRL and IHRL work hand in hand, and complement and reinforce each other within one single

[14] The Constitution of the Kingdom of Thailand (entered into force on 6 April 2017) B.E. 2560.

continuum of protection. Provisions of both of these legal regimes working together will offer strong standards of treatment that the refugee policies of many states today should comply with and in particular, provide effective protections for rights for refugees in camps in Thailand. However, I argue that, as Karen refugees in Thai camps are indigenous peoples, provisions of IRL and IHRL do not provide adequate protection of their indigenous rights and needs. In the next section below, I will now turn to analyse the role of ILIP and how ILIP complements provisions of IRL and IHRL in the protection of indigenous refugees in camps in Thailand.

4. ILIP's Role in Complementing Protections under IRL and IHRL for Refugees in Thai Camps

While fleeing from their homeland and living in the refugee camps in Thailand, the indigenous Karen peoples continue to seek to protect their own community and enhance their autonomy as well as the integrity of their own distinct indigenous identity (McConnachie 2014, pp. 46–51).[15] They often claim collective rights which are indispensable for their existence, well-being and integral development as indigenous groups.

Critically, the provisions of IRL and IHRL as analysed in previous sections mainly focus on individual rights rather than group rights and necessarily protect the Karen refugees as individuals rather than groups. Although the UNHCR accepts refugees on a prima facie basis, for example in large-scale refugee situations, members of that group are considered individually as refugees and the system of rights that attach to them under the 1951 Refugee Convention and its 1967 Protocol remain individual rights, held individually by the members of that group (UNHCR 2015). That said, IHRL offers some level of protection for group rights; for example, Article 27 of the ICCPR recognises the right of groups to enjoy their communal culture, profess their religion and use their language.

It cannot be denied that IRL and IHRL alone cannot, however, fully protect the specific needs of the Karen refugees. This is clearly the case, especially when these indigenous refugees are, as mentioned in Section 2, left in a deeply vulnerable situation in a protection vacuum and exposed to the risk of cultural erosion and identity loss. Even when refugee status is granted to these Karen refugees, the international standards on the subject, particularly IRL and IHRL do not provide the necessary specific protection that guarantees the preservation of the cultural identities of the indigenous refugees (Figueira 2020, p. 443). In the face of profound vulnerability, Karen refugees are in need of the indigenous collective rights framework articulated in ILIP in addition to and beyond the system of rights of IRL and IHRL.

To date, the 1989 Convention on Indigenous and Tribal Peoples (ILO Convention 169)[16] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[17] are the main international instruments on the protection of indigenous peoples (Lennox and Short 2016, p. 5).[18] ILO Convention 169 is the only legally binding international treaty on indigenous peoples (ibid.). It has been ratified by 24 countries, which do not include Thailand.[19] It is important to emphasise that, although reluctance by States including Thailand to ratify is indicative of the existing challenge of ILO Convention 169, it is a fact that ILO Convention 169 has led to profound changes in the domestic legal systems of ratifying countries (Ormaza and Oelz 2020, p. 73). It remains the only treaty open

[15] It is noted that despite the limited opportunities available in refugee camps, and the restrictions of the Thai government, the indigenous Karen still attempt to build dynamic Karen communities and structure their daily life in camps in the way of their traditional village and community life (McConnachie 2014, p. 45).

[16] C169 Indigenous and Tribal Peoples Convention (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

[17] Declaration on the Rights of Indigenous Peoples UNGA res 61/295A (adopted 13 September 2007).

[18] I acknowledge that there are also other related Conventions such as The Convention on Biological Diversity (CBD) or The United Nations Framework Convention on Climate Change (UNFCCC). However, within the limited scope of this research, I cannot discuss all, instead focusing on the core documents directly relevant to the situation of Karen indigenous refugees. To be clear, International Law on Indigenous Peoples (ILIP) as used throughout my paper refers to the ILO Convention 169 and UNDRIP.

[19] For more information on ratifications of the ILO Convention 169, see at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (accessed by 15 November 2022).

for ratification specifically and exclusively dedicated to the promotion and protection of indigenous peoples' rights and culture (Ormaza and Oelz 2020, p. 72; Swepston 2018, p. 3). The importance and contribution of ILO Convention 169 have become prominent.

ILO Convention 169 was the result of the revision of the preceding ILO Convention on Indigenous and Tribal Populations (ILO Convention 107)[20] (Thornberry 2002, p. 27; Wolfrum 1999, pp. 371–72). ILO Convention 169 importantly lays down comprehensive protection standards for indigenous peoples; it explicitly aims at removing the assimilationist orientation of the earlier standards in ILO Convention 107.[21] ILO Convention 169 instead emphasises the aspirations of indigenous peoples to exercise control over their own institutions, education, ways of life and economic development and to maintain and develop their own identities, languages and religions.[22] ILO Convention 169 calls on states to value the distinctive contributions of indigenous peoples to the cultural diversity of humankind.[23]

Within this framework, ILO Convention 169 recognises indigenous peoples as 'peoples' and takes a decisive stand on the collective nature of indigenous rights by emphasising a series of provisions on collective rights (Rodriguez-Pinero 2005, p. 321). Accordingly, indigenous peoples have rights to maintain and develop their own societies. States are urged to respect, recognise and protect the social, economic and cultural identities, and the customs and traditions and institutions of indigenous peoples[24] as well as to respect the integrity of these values, practices and institutions.[25] More specifically, ILO Convention 169 recognises rural and community-based industries, as well as subsistence economies and traditional activities of indigenous peoples such as hunting, fishing, trapping and gathering as important factors in the maintenance of their cultures and in their economic self-reliance and development.[26]

The cornerstone of ILO Convention 169 rests in the participatory rights of indigenous peoples (Yupsanis 2010, p. 438). Article 6(1)A of ILO Convention 169 provides that states shall consult indigenous peoples through appropriate procedures, whenever consideration is being given to legislative or administrative measures which may affect them directly. The consultation must be undertaken in good faith.[27] Article 7(1) of ILO Convention 169 further strengthens the possibility of indigenous peoples' participation in decisions that concern them, such as their right to decide their own priorities for the process of development affecting their own lives, beliefs and institutions or their right to exercise control over their own economic, social and cultural development.

While ILO Convention 169 is a legally binding international treaty, UNDRIP is a non-binding instrument (usually known as a soft law) (Lennox and Short 2016, p. 5). Although UNDRIP is a non-binding instrument, it represents a global consensus on the standards relating to indigenous peoples and is considered as a key international legal document on the rights of indigenous peoples (Odello 2016, p. 64). Interestingly, UNDRIP is the product of indigenous peoples and their insistence on the inclusion of articles that responded to their needs (Burger 2016, p. 322). It is one of the very few UN legal documents that have been elaborated in consultation with the victims of human rights abuses and with peoples who are to be the beneficiaries (ibid.). Despite its non-binding nature, provisions of UNDRIP therefore play a key role in shaping policy and law towards indigenous peoples around the world, including the case of indigenous Karen refugees in Thai camps.

It is also important to note here that soft law and binding instruments such as treaties or customary law can interact and build upon each other as complementary tools for solving

[20] C107 Indigenous and Tribal Populations Convention (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247.

[21] The preamble of the ILO Convention 169, paragraph 4.

[22] The preamble of the ILO Convention 169, paragraph 5. See further: Article 5(A) and (C) of the ILO Convention 169.

[23] The preamble of the ILO Convention 169, paragraph 7.

[24] Article 2(2)(B) and Article 5(A) of the ILO Convention 169.

[25] Article 5(B) of the ILO Convention 169.

[26] Article 23(1) of the ILO Convention 169.

[27] Article 6(2) of the ILO Convention 169.

international problems (Shaffer and Pollack 2010, p. 721). Soft law instruments are not law per se and thus have less legal effect than legally binding instruments (Focarelli 2019, p. 223). However, soft law instruments may acquire binding legal character as elements of a treaty-based regulatory regime or constitute part of a subsequent agreement between parties regarding the interpretation of a treaty or the application of its provision (Boyle 2014, p. 119).[28] Some soft-law instruments are also important as they can become a first step in a process eventually leading to the conclusion of a multilateral or regional treaty (Shaw 2021, p. 100; Boyle 2014, p. 123). Non-binding instruments can, with evidence of opinio juris (the belief that action is legally necessary), and widespread practice amongst states, facilitate the progressive evolution of customary international law (Boyle 2014, pp. 130–33).

The importance of UNDRIP has especially become clear as some provisions of UNDRIP may acquire the status of customary international law binding all states including Thailand (Wiessner 2012, pp. 54–56; Odello 2016, p. 64). In particular, although UNDRIP is a non-binding instrument, it was supported by an overwhelming majority of states, with 143 states including Thailand in favour[29] and since adoption in 2007, there is significant emerging practice relating to UNDRIP (Isa 2019, p. 15). Moreover, UNDRIP has been referred to by the Inter-American Court of Human Rights[30] and the African Commission on Human and Peoples' Rights and its Court.[31] They both repeatedly cite the provisions of UNDRIP and use UNDRIP as the legal basis for their findings and decisions (Isa 2019, p. 14; MacKay 2018). Domestic courts have also made use of UNDRIP (ibid., p. 15). For example, the Constitutional Court of Peru[32] and the Supreme Court of Belize[33] have used UNDRIP in some of their decisions. The Supreme Court of Belize indeed emphasised that Belize voted in favour of the Declaration and is not expected to disregard it. The Declaration has also been used to develop specific national laws and amend existing legislation in some countries (Odello 2016, p. 64; Isa 2019, p. 15). Most significantly, Bolivia explicitly incorporated UNDRIP into Bolivia's National Law 3897 of 26 June 2008 and recognised indigenous peoples' rights (Odello 2016, p. 64). Ecuador is another leading example that used the indigenous language of UNDRIP in the Constitution of 2008.[34] These examples have indeed shown an evolution of international consensus towards acknowledging the rights of indigenous peoples as set out in UNDRIP (Odello 2016, p. 64).

Although most rights embodied in UNDRIP are in general not new and are already part of the existing set of fundamental human rights included in other legally binding instruments such as ILO Convention 169 (Odello 2016, p. 64), there are also major innovations in UNDRIP (Isa 2019, p. 10). One of the major innovations put forward by UNDRIP is the recognition of the right to self-determination—one of the key demands by the global indigenous movement (ibid.). Article 3 of UNDRIP accordingly states that indigenous peoples have the right to self-determination. By virtue of that right, indigenous peoples freely determine their political status and freely pursue their economic, social and cultural development. Article 4 of UNDRIP continues to explain further that the exercise of the right to self-determination of indigenous peoples only takes place through autonomy and self-government in matters relating to their internal and local affairs.

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[28] See also: Vienna Convention on the Law of Treaties, (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(3)(A).

[29] See further the voting record for UNDRIP including the view of Thailand at: https://press.un.org/en/2007/ga10612.doc.htm (accessed on 20 December 2022).

[30] For example: In *the Saramaka People vs. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2007, Series C No.172 or in another recent case *Kaliña and Lokono Peoples vs. Suriname*, IACTHR, 2015, Series C, No. 309.

[31] For example: In *African Commission on Human and Peoples' Rights vs Republic of Kenya,* Application No.006/2012 Judgment of 26 May 2017, paragraph 209.

[32] For example: In *Tres Islas indigenous community Case*, Sentencia del Tribunal Constitucional, Exp. No. 01126-2011-HC/TC, Judgement of 11 September 2012.

[33] For example: In *Aurelio Cal et al vs. Attorney General of Belize*, (Claim No. 17 and 172 of 2007), Judgement of 18 October 2007 (Mayan land rights).

[34] See further at: Ecuador, Constitution, *Registro Oficial* 449, 20 October 2008, Articles 16, 29, 347, 379.

I acknowledge that whether or not provisions of UNDRIP have achieved customary law status remains an open question. However, the provisions of UNDRIP in particular may come to have a large role in the shaping of an international consensus and the future development of customary law. In addition, although Thailand is not a signatory to ILO Convention 169, its provisions remain important as a key benchmark for the treatment of indigenous peoples including the Karen refugees in Thai camps. I argue that Karen refugees as indigenous peoples should be eligible for the specific system of indigenous collective rights under ILO Convention 169 and UNDRIP. In accordance with this, Karen peoples in refugee camps should be allowed to practice, develop and teach their indigenous religious traditions, customs, ceremonies and history. They should have the right to establish and control their own educational systems, institutions and facilities and to ensure teaching in their Karen languages, in respect of their own collective cultures. They should also have the right to maintain and develop their own political, economic and social systems and be free to express their political status. Young Karen refugees should be allowed to learn knowledge and meaning from their indigenous collective heritage and to continue to preserve their own distinct values and tradition while staying in camps.

By bringing ILIP into the mix, I also understand that there is much debate that the ILIP system of indigenous collective rights are in opposition to the individual rights contained within IRL and IHRL (Patton 2016). The entitlement to indigenous collective rights may undermine their enjoyment of the system of individual rights articulated in IRL and IHRL (Ivison et al. 2000, pp. 1–5). However, I contend that these two systems of rights should not be seen as conflicting. I argue that the indigenous collective rights articulated in ILIP are of such a nature that indigenous peoples can choose the extent of their participation in them.

The indigenous collective rights articulated in ILIP only seek to enhance their group life and experience, but still preserve the right of indigenous peoples to deviate or exit from that group life should they so choose. This is indeed explicitly stated in the preamble of UNDRIP, emphasising that indigenous individuals are entitled without discrimination to all the human rights recognised in international law, and that these indigenous peoples at the same time possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

Indigenous collective rights under ILIP are given to the Karen refugees on the basis of preserving their own cultures, values and traditions while seeking refuge in camps in Thailand. These indigenous group rights however should not be understood as being in opposition to the individual rights contained within IRL or IHRL. Granting these indigenous group rights would not prevent the Karen refugees from the enjoyment of protection under IRL and IHRL. Karen refugees have the right to access to the Thai education and healthcare systems or have the right to engage in Thai labour market. ILIP constitutes another layer of protection that complements IRL and IHRL and would create a protection regime more responsive to the rights and needs of refugees in camps in Thailand, especially for the special needs of Karen indigenous refugees.

5. Conclusions

In this paper, I have demonstrated that ILIP has a critical role to play in complementing protections IRL and IHRL for refugees in camps in Thailand. I have stressed that the primary consequence of Thailand's failure to ratify the 1951 Refugee Convention and its 1967 Protocol is that IRL remains of limited value in protecting refugees in Thai camps. Indeed, these refugees have not been granted refugee status and therefore are not bestowed the rights attached to this status under IRL. I then argued that although Thailand is not party to the 1951 Refugee Convention and its 1967 Protocol, it is bound by obligations enshrined in the international human rights instruments it has ratified. Importantly, the range of rights granted by IHRL are conferred on all human beings regardless of immigration status, which includes refugees in Thai camps. It follows that IHRL contributes to the protection of refugees in Thai camps as it addresses some of the limitations of IRL. However, I have also shown that IHRL is not best placed to uphold the rights of Karen refugees as an

indigenous people. The shortcomings of IRL in this respect are even greater. On this basis, I have argued that ILIP has a vital role to play in filling this protection gap as it recognises Karen refugees' group rights as members of an indigenous people. I have shown that the range of collective indigenous rights enshrined in ILIP do not conflict with the system of individual rights under IRL and IHRL. Rather, ILIP interacts and complements IRL and IHRL in protecting and promoting the distinct values and identities of Karen indigenous groups while staying in refugee camps in Thailand. By bringing ILIP into dialogue with IRL and IHRL, this paper brings to the fore the specific protection needs of Karen refugees as members of an indigenous people and how these can be best addressed. Importantly, while the paper has focused on Karen refugees, the proposed approach with its emphasis on the complementary role of ILIP is of relevance to other indigenous peoples who find themselves in a similar predicament to Karen refugees.

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The Unaccompanied Child's Right to Legal Assistance and Representation in Asylum Procedures under EU Law

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Abstract: The independent migration of children today is a global phenomenon present in many regions worldwide, where unaccompanied minors seeking asylum do not enjoy full protection of their rights. Among their procedural safeguards, the right to legal assistance and representation is a fundamental right strictly related to the realization of other rights contained in the UN Convention on the Rights of the Child. Nevertheless, despite the fundamental role that guardians and legal advisors play in the wellbeing of unaccompanied children seeking asylum, many issues are currently affecting the exercise and implementation of this fundamental right in several European Union Member States. Therefore, the purpose of this article is to examine the content and scope of protection of this right under EU law, while highlighting the existence of possible ambiguities or gaps in current legal standards. Which EU law rules currently protect unaccompanied minors' access to legal assistance? What changes are necessary in order to strengthen that protection for unaccompanied minors seeking asylum? These are some of the questions that this paper addresses in order to critically analyze the level of protection that Europe has provided to unaccompanied children's right to legal assistance.

Keywords: human rights; child rights; asylum; unaccompanied children; international law; legal representation; guardianship; legal assistance

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1. Introduction

Europe has received almost 1,850,000 asylum applications from children during the last decade (EUROSTAT 2021). Among children seeking asylum, the special needs for protection of unaccompanied children due to their particular situation of vulnerability have not yet been effectively assessed (European Union Agency for Fundamental Rights (FRA) 2018; UN High Commissioner for Refugees (UNHCR) 2019).

However, it is well recognized at the normative level that unaccompanied children require special assistance and protection during asylum procedures (UNHCR 1997). Among their guaranteed procedural safeguards, the right to legal representation and assistance is a fundamental right strictly related to the realization of other rights contained in the UN Convention on the Rights of the Child (CRC). In fact, guaranteed legal representation directly contributes to the legal empowerment of children and is often highlighted as a central aspect of the broader right to access to justice.[1]

However, despite the clear link between the right to legal representation and access to justice, a number of problems currently negatively affect legal representation of unaccompanied children within the 27 EU Member States. The kinds of legal assistance provided by States to unaccompanied children varies greatly around Europe. For instance, while some countries provide unaccompanied minors with two representatives (a legal guardian and a lawyer) throughout the asylum process, others appoint legal advisors only after the preliminary processing has taken place (Crock 2015). Recent reports have shown that in several EU Member States, legal assistance is not provided to unaccompanied children in

[1] "[C]hildren are strongly in need of legal and other appropriate assistance in order to enjoy their right to access to justice and such assistance should be free of charge (or subsidized) and effective". (Liefaard 2019, p. 209).

every stage of the asylum procedure, and, further, representation is not usually offered by legal advisors qualified and experienced in representing children (European Council on Refugees and Exiles (ECRE) 2014). Oftentimes, no specific skills and knowledge on asylum, migration law, children's rights, or psychology are required for guardians and legal counsellors (Di Stefano 2016). In addition, the excessive workload on guardians and legal representatives is a common protective issue in several States, thereby affecting the quality of unaccompanied children's representation (ECRE 2014). Accordingly, these gaps in providing adequate legal representation to unaccompanied minors naturally begs the question: What do EU rules require from States in connection to this right? This paper seeks to directly answer this question.

In order to meet this aim, I will examine the following: (i) The asylum seeker's right to legal representation under the EU Charter of Fundamental Rights; (ii) Sources of the right to free legal representation in the Common European Asylum System (CEAS); (iii) The right to legal representation and assistance in the Commission proposals to reform CEAS and the New Pact on Migration; (iv) The European Court of Human Rights and asylum seekers' legal representation; and (vi) The right to legal representation and assistance as interpreted by the Court of Justice of the European Union.

Nonetheless, before engaging in this epistemological endeavor, an analysis of the scope of "legal representation and assistance", particularly in connection to unaccompanied minors, is necessary to more fully understand current EU rules and the issues surrounding this right. After this initial step, this paper will seek to identify the extent of this right under current standards and determine the existence of possible ambiguities, gaps, or contradictions in EU law, as well as define the potential barriers to the effective protection of unaccompanied children in terms of legal representation at the European level.

2. Legal Assistance and Representation: Two Sides of the Same Coin

Several issues affecting the right to representation and assistance of unaccompanied children are connected to the lack of definitions surrounding this right. For instance, scholars have often questioned the scope of the right, asking: What should legal assistance and representation include? What are the differences between guardianship and representation? When should representation be appointed, and which type of representation is needed during the asylum procedure in connection to children? With these questions in mind, in order to have a comprehensive understanding of what is meant by legal representation and assistance, and in order to identify the corresponding States' obligations, it would be necessary to define and limit the scope of this right as included in European law.

However, while the right to legal representation and assistance is recognized under EU law, there are no common definitions agreed in connection to this right (FRA 2014). In addition, as the rules concerning representation and the terminology applied at the national level vary significantly, difficulties appear when one attempts to apply common terminology such as guardians, advisors, or representatives in different EU Member States.

Within EU legislation, the different roles and tasks of the personnel involved in the asylum-seeking child's representation and assistance (such as guardians, legal representatives, advisers, or counsellors) are not determined. In fact, the term "guardian" is not defined under CEAS[2], and the directives only refer to "representative" or "legal representative", broadly describing a "person or an organization appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal

[2] Only used in the EU: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (*Antitrafficking Directive*) and the EU: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (*Recast Qualification Directive).*

capacity for the minor where necessary"[3]. This extensive definition of representatives in the asylum acquis could refer both to guardians and legal advisors.

Nevertheless, it might be possible to find some clarification under UN rules, such as through the "UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", which clearly differentiates the roles of guardians and legal assistants. The term "guardian" is here defined as an independent person who is in charge of the child's best interest and general wellbeing, differing from legal advisors, who specifically provide legal assistance in connection only to the legal matters during legal procedures (UNHCR 2009, p. 26).

These definitions are also shared by the Fundamental Rights Agency's "Handbook on Guardianship", where explanations concerning the roles of guardians are provided. According to FRA, "guardians" exercise three distinctive functions: ensuring the child's overall wellbeing, safeguarding the child's best interests, and exercising legal representation to complement the child's limited legal capacity (FRA 2014). The roles of "legal assistants" or "advisors", on the other hand, are strictly connected to legal assistance and the legal representation of the child before legal proceedings, such as the asylum procedure (FRA 2014).

In this sense, while the child's lawyer, legal assistant, or legal advisor should be a person qualified to provide legal assistance, aid, or counselling during the asylum proceedings and to assist the child in all legal matters, the guardian or legal representative will focus on the general wellbeing of the child, including, for instance, on all matters connected to the child's health, education, and accommodation. The adequacy of representation relies precisely on the effectiveness of the interplay between guardians and legal advisors. Effective protection by a guardian and also by a lawyer is an indispensable component for the wellbeing of unaccompanied children, particularly because without legal representation, the probabilities of them presenting their claims successfully are relatively low, if not nonexistent (King 2013).

Following this line of thought, it would be possible to say that the right to legal assistance and representation comprises both the child's rights to legal aid and, separately, to guardianship during the asylum procedure. This means that every unaccompanied minor applying for asylum should be entitled to the right to protection by a guardian and a lawyer or legal assistant. Regardless of the terminology applied at the national level, the right to legal representation and assistance of the unaccompanied child in the asylum procedure requires the appointment of one or several persons who will ensure the minor's general wellbeing, protect the best interest of the child, complement the legal capacity of the child when necessary, and provide legal assistance on all legal matters connected to court or administrative procedures in which the child is involved.

Nowadays, asylum procedures in EU Member States are complex proceedings which require research, evidence, the child encountering several actors (social workers, translators, psychologists, migratory authorities, etc.), and the child participating in at least one personal interview. In this context, legal assistance and representation is a necessary component of the right to due process. Moreover, guardianship and counsel are absolutely necessary to ensure that other procedural safeguards and fundamental rights of the unaccompanied child are adequately guaranteed. Unveiling the content of this right under primary and secondary sources of EU law will be the subsequent focus of this paper.

3. The Asylum Seeker's Right to Legal Representation under the EU Charter of Fundamental Rights

In December 2009, the Treaty of Lisbon came into force and the Charter became legally binding on EU Member States.[4] Through the amendment of Article 6 of the Treaty on

[3] EU: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Art 2 (j).

[4] For an overview of the application of the Charter before 2004, see e.g., Di Federico (2011) and Defeis (2017).

European Union (TEU), it is now recognized that the Charter "shall have the same legal value as the Treaties".[5]

The Charter, which now constitutes a source of primary EU law, includes six different chapters providing a set of civil, political, social, economic, cultural, and citizenship rights. Due to the wide array of rights enshrined in this instrument, it has been claimed that "the Charter presents in sharpest relief the indivisibility of human rights" (Douglas-Scott 2011, p. 651). However, the Charter is only applicable within the field of EU law,[6] and all rights can be subject to a general limitation clause under Article 52.[7]

Asylum seekers' right to free legal representation stems from Article 18 of the Charter, which broadly establishes the right to asylum "with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".[8] The recognition of the right to asylum under the Charter requires, in consequence, procedural guarantees for the effective and adequate protection of this right. As clearly stated by Guild, "in EU law (and ECHR law) where a right exists procedural obligations regarding the protection of that right are inherent". (Guild 2015, p. 265).

Among the procedural rights included in the Charter, Article 47 establishes the right to an effective remedy and to a fair trial, expressly including legal representation. This provision states:

> "Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

Accordingly, as provided in Article 47, the asylum seekers' right to legal representation will depend on the need to ensure an effective access to justice and an effective remedy. The Charter also sets forth numerous additional rights related to the adequate representation of a child. For example, the Charter establishes the principle of *non-refoulement* (Article 19), equality before the law (Article 20), non-discrimination principle (Article 21), and the rights of the child (Article 24). Moreover, with regards to the rights of children, the Charter enshrines the best interest principle, the right of the child to express his or her views and to have those views taken into consideration, and the rights of the child to protection and care necessary for their wellbeing. Finally, Article 21 further establishes that discrimination based on age is prohibited.

In short, under the Charter, asylum seekers' right to free legal assistance and representation will rest on the need to ensure an effective remedy and effective access to justice. In the following section, the main provisions of the asylum acquis attaining to this right would be scrutinized.

4. Sources of the Right to Free Legal Representation in the Common European Asylum System

The Common European Asylum System (CEAS) is a legislative framework which covers all aspects of asylum procedures, such as the rules establishing the responsible

[5] Treaty of Lisbon, Article 6 (1).

[6] Article 51 of the Charter reads as follows. "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". For an overview of the theoretical and practical problems arising from the application and interpretation of Article 51(1) of the Charter see—among others—(Hancox 2013), (Fontanelli 2014) and (Andreevska 2015).

[7] Article 52 of the Charter addressing the Scope of guaranteed rights states: "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[8] The explanations to this provision provide that: "The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees".

Member State for examining asylum applications, and the common standards for asylum procedures, reception conditions, and the recognition of beneficiaries. All Member States are bound by these measures and shall consequently ensure that their national law is compatible with this legal framework. The interpretation of this body of law relies on both national judges and the Court of Justice of the European Union (CJEU), in that national courts must interpret EU law in many cases and, in some cases (where they are the court of last instance in a matter, for example), refer their questions on the proper interpretation of an EU legal provision to the CJEU.[9]

For the purpose of this paper, I will rely on those rules which contain the most relevant sources in connection to the right to legal assistance of asylum seekers and, specifically, unaccompanied children. These are the Recast Asylum Procedures Directive (2013/32/EU),[10] the Qualification Directive Recast (2011/95/EU),[11] the Recast Reception Conditions Directive (2013/33/EU),[12] the Antitrafficking Directive (2011/36/EU),[13] and the Recast Dublin Regulation (604/2013) or "Dublin III"[14].

As will be explained below, a common element shared by the numerous directives and regulations when it comes to unaccompanied children's representation is the fact that the different roles and tasks between guardians, legal representatives, advisers, or counsellors are not explicitly defined. Instead, this legal framework mainly refers to "representative" or "legal representative" in a broad manner, combining the roles of both guardians and advisors and only referring in a general way to their fundamental function of assisting and representing the unaccompanied child in the legal procedure without specific requisites.[15]

To begin with, the *Recast Asylum Procedures* Directive (2013/32/EU) sets the main rules concerning asylum seekers' right to legal assistance in addition to the right of the unaccompanied child to legal representation. Accordingly, the directive includes both the asylum seekers' right to legal and procedural information free of charge and the right to legal representation. However, there are significant distinctions when it comes to the extent of such rights. On the one hand, Article 19 requires States to provide applicants *on request* with legal information free of charge concerning the procedure in connection to the applicant's particular circumstances. In addition, States are also required to provide appeal information *on request*, including the reason the applicant received a negative decision at first instance and the subsequent means to challenge the decision.

Similarly, free legal representation shall be provided *on request* in the appeals procedure, in line with Article 20. As other scholars have suggested, it is regrettable that the directive does not strengthen standards by *guaranteeing* free legal aid and representation at all stages of the asylum procedure, such as during the attendance at the personal interview. See e.g., (Borland 2015, p. 38). Under current law, Member States are not restrained from applying the "merits test" to the exercise of this right in cases where the court, tribunal, or competent authority considers there to be no tangible prospect of success with the application for asylum.[16] However, if the decision not to provide legal assistance is not taken by a court

[9] The CJEU has jurisdiction over preliminary references from national courts. See Article 267 TFEU.

[10] Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[11] Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

[12] Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

[13] Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

[14] Council of the European Union, Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[15] See e.g., *Recast Reception Conditions* Directive (2013/33/EU), article 2 (j).

[16] *Recast Asylum Procedures* Directive (2013/32/EU), article 20 (3).

or tribunal, Member States are required to ensure that the applicant has the right to an effective remedy before a court or tribunal against such decision so that the applicant's effective access to justice is not, at least in theory, hindered.[17]

Further limitations are also prescribed. Article 21 allows Member States not to provide legal representation to appellants who are no longer present in their territory and impose monetary or time limits on the provisions of free legal and procedural information and free representation. In addition, States may require reimbursement for costs granted if the applicant's financial situation improves or the decision to provide such costs was taken based on false information provided by the applicant.[18] Lastly, applicants are entitled to consult, at their own cost, a legal adviser or other counsellor at all stages of the procedure, and providers of legal representation may include nongovernmental organizations.[19]

Regarding the scope of legal representation, Article 22 requires Member States to ensure that legal advisers and counsellors have access to the information in the applicant's file upon which the decision is, or will be, made. The provision contains restrictions to this right based on security reasons such as national security or the security of organizations or persons who provide the information, among others. In addition, Member States shall ensure that the legal representative is able to access closed areas in order to visit the applicant and allow the applicant to be accompanied by their legal adviser or counsellor to the personal interview.[20]

With regards to unaccompanied children, the guarantees of this vulnerable group are expressly included within Article 25. The Article mandates that States are required to appoint "as soon as possible" a representative that represents and assists the unaccompanied child and inform the minor immediately of the appointment of his or her representative. Notably, the requirement "as soon as possible" may lead to the denial of this right by State actors, as States may suggest different interpretations considering various excuses or circumstances to retard the appointment of representatives.

In addition, the latter provision includes some general requirements concerning both the representatives' role and the quality of representation. In this regard, the unaccompanied child's representative "shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end".[21] Once again, this legal framework refers, in a broad manner, to the requirements attaining this right, which could lead to different interpretations among States affecting the quality of unaccompanied minors' assistance and representation.

Representatives or advisers shall only be changed if necessary, and States shall ensure that the representative has the opportunity to inform the child about the personal interview.[22] Further, States are required to allow the representative or legal adviser of the child to be present during the interview and ask questions or make comments.[23] State authorities shall also provide both unaccompanied children and their representatives with the legal and procedural information in accordance with Article 19.[24]

Lastly, Member States may apply one limitation in connection to the appointment of the representative for the unaccompanied minor in accordance with Article 25 (2). Following this provision, Member States may refrain from providing a representative when the unaccompanied child will reach the age of 18 before a decision at first instance is taken.

The *Qualification Directive* Recast (2011/95/EU) establishes common criteria for determining eligibility for international protection, including both refugee status and subsidiary

17 (Ibid.), article 20 (3). Whether children will be able to appeal an unfavorable decision in practice is a separate question.
18 (Ibid.), article 20 (5).
19 (Ibid.), article 22.
20 (Ibid.), article 23 (2) and (3).
21 (Ibid.), article 25 (1) (a).
22 (Ibid.), article 25 (1) (b).
23 (Ibid.).
24 (Ibid.), article 25 (4).

protection. Unaccompanied children's rights are explicitly mentioned in Article 31(1), which establishes the right of every unaccompanied child to representation "by a legal guardian or, where necessary, by an organization responsible for the care and wellbeing of minors, or by any other appropriate representation including that based on legislation or court order" as soon as possible after granting international protection. State authorities should ensure that the appointed guardian or representative fulfils the needs of the child and are equally responsible for regularly monitoring the quality and exercise of these guardianships.[25] As the latter provision shows, this directive enlarges the level of protection by including monitoring duties for States and including the term guardian to in its wording. However, the specificities concerning monitoring are left to States and the criteria "as soon as possible" is still the main requisite referring to the adequate time of appointment of the guardian or representative, which, as previously mentioned above, could lead to manipulations or delays in such appointments at the national level.

The *Recast Reception Conditions* Directive (2013/33/EU) includes minimum standards for a full set of benefits granted to individuals who apply for asylum, while specially including a chapter concerning vulnerable persons.[26] In particular, State authorities have the obligation to assure the fulfilment of the principle of the best interest of the child during the implementation of the provisions of the Directive connected to minors.[27] The assessment of the best interest of the child shall consider, among others, the views of the minor in accordance with his or her age and maturity.[28]

Article 24 refers specifically to the rights of the unaccompanied child. With regards to legal representation, this right is contemplated with the same wording as Article 25(a) of the Recast Asylum Procedures Directive.[29] The only significant change is the inclusion of regular assessments concerning the availability of the necessary means for representing the unaccompanied child.[30] In addition, the latter provision further requires appropriate and constant training for all those individuals working with the child in connection to the special needs of the child.[31] They are also bound by confidentiality rules in connection to any information they receive during their work.[32]

Further, the *Antitrafficking* Directive (2011/36/EU) demands particular attention from State authorities to unaccompanied children victims of trafficking, and it recognizes that these children "need specific assistance and support due to their situation of particular vulnerability".[33] The rights of the unaccompanied child victim of trafficking are expressly contained in Article 16, where States are required to "take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings . . . ".[34] Moreover, when the legal representative and/or guardian are appointed, "those roles may be performed by the same person or by a legal person, an institution or an authority".[35]

Finally, the *Recast Dublin Regulation,* or "*Dublin III*", regulates the determination of the Member State responsibilities when examining an asylum application. Article 6 establishes the right of every unaccompanied child to a representative who assists the minor with all matters concerning the Dublin procedure. In addition, it is mentioned that the representative "shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration" during Dublin procedures and have access "to

25 Qualification *Directive* Recast (2011/95/EU), article 30 (2).
26 See *Recast Reception Conditions* Directive (2013/33/EU), chapter IV.
27 (Ibid.), article 23.1.
28 (Ibid.), article 23.2.
29 (Ibid.), article 24 (1).
30 (Ibid.).
31 Recast *Reception Conditions* Directive (2013/33/EU), article 24 (4).
32 (Ibid.).
33 Antitrafficking Directive (2011/36/EU), recital 23.
34 (Ibid.), article 16 (3).
35 (Ibid.), recital 24.

the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minor".

Overall, it is possible to say that a number of rules concerning legal representation are established under the Common European Asylum System, but most of the standards are written in a general way, lacking clear requisites for representatives or specific obligations for State authorities. The lack of clear definitions regarding, for instance, the necessary qualifications of representatives, the differentiation between the roles of advisors and guardians and States' monitoring duties, and so on, leave a great amount of discretion for Member States at the national level. Time limits and States' obligations are also often vague, with expressions such as "where appropriate" or "as soon as possible".[36]

The ambiguity of legal standards at the regional level, which resultantly fails to clearly establish the content and extent of this right, is directly transposed to the national level where States offer different types of representation affecting the enjoyment of unaccompanied minors' rights and guarantees during the asylum procedure. In fact, as mentioned above, the kind of legal assistance provided by States to unaccompanied children varies around Europe. While some States offer adequate representation in terms of legal aid and guardianship from the moment the minor is identified, others include the appointment of legal advisors only once the preliminary processing takes place (Crock 2015).[37] These differences and deficiencies in several protection systems at the national level appear to be tolerated under the lack of specific legal standards at the regional level.

These limitations in the framework of CEAS concerning representation, in addition to other structural issues, were exposed during the refugee crisis in 2015.[38] As a consequence, the Commission proposed a structural reform of CEAS in April 2016[39] and a New Pact of Migration in September 2020.[40] In this regard, special attention will be given in the following section to the Commission proposals to reform CEAS in connection to the right to legal representation and assistance.

5. The Way Forward: The Right to Legal Representation and Assistance in the Commission Proposals to Reform CEAS and the New Pact on Migration

The Commission has enacted a wide array of proposals. The first series of proposals included reforms of the Dublin system,[41] reinforcement of the Eurodac system,[42] and the

[36] See e.g., *Antitrafficking* Directive (2011/36/EU) and *Recast Asylum Procedures* Directive (2013/32/EU).

[37] For example, in Italy and Spain, guardianship is usually entrusted to an independent body or governmental authority while in Belgium each child is appointed an individual guardian. Regarding legal counselling, in Austria, every asylum seeker has a right to free legal assistance during all the entire asylum procedure, including the admissibility stage. In Italy, on the other hand, free legal assistance of a lawyer is provided during the judicial phase of the asylum procedure as well as in administrative, civil and criminal court proceedings. For an in deep study on the differences within legal assistance systems in EU States see—among others—(ECRE 2014, 2017).

[38] In the words of the Commission: "The large-scale uncontrolled arrival of migrants and asylum seekers in 2015 has put a strain not only on many Member States' asylum systems, but also on the Common European Asylum System as a whole . . . The crisis has exposed weaknesses in the design and implementation of the system, and of the 'Dublin' arrangements in particular". European Commission, Towards A Reform of The Common European Asylum System And Enhancing Legal Avenues To Europe, COM (2016) 197 final, 6 April 2016, p. 3.

[39] (Ibid.) See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, Brussels, 13.5.2015, COM (2015) 240 final.

[40] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23.09.20, COM (2020) 609 final.

[41] See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third- country national or a stateless person (recast), Brussels, 4 May 2016, COM (2016) 270 final.

[42] See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Members States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities to

transformation of the European Asylum Support Office into a European Union Agency for Asylum with a stronger mandate, which will facilitate the functioning of the entire system.[43] Further proposals included the replacement of the Qualification Directive and Asylum Procedures Directive with new regulations,[44] changes to the Reception Conditions Directive,[45] and the proposal establishing a Union Framework on Resettlement.[46] This second set of proposals will be the subsequent focus of this section, as they include reforms to the provisions of legal representation for asylum seekers.

An important inclusion of these proposals is the replacement of the term "legal representative" for the term "guardian",[47] and the incorporation of specific provisions addressing guardians' main tasks and qualifications. Even if some aspects of guardianship continue to be established in a general manner, the standards enshrined in the proposals—as will be shown below—are certainly more extensive than the rules in the current asylum acquis.

Within the proposals, a higher level of procedural safeguards is established in connection to children and particularly to unaccompanied minors.[48] With regards to legal representation, the proposal to transform the Asylum Procedures Directive into a new regulation aims to standardize guardianship practices in the Union in order to ensure that guardianship becomes prompt and effective in all EU Member States. As discussed above, standardizing guardianship practices seeks to avoid disparities within the several guardianship systems in Member States that may lead to the lack of enjoyment of unaccompanied minor's procedural guarantees, thereafter exacerbating their inadequate care or their exposure to situations that could possibly lead them to escape.[49]

Accordingly, the former proposal establishes that unaccompanied children should be appointed a guardian as soon as possible and no later than five working days from the moment they present an application.[50] The five days limit introduces a positive modification to the Asylum Procedures Directive, as the current standard is "as soon as possible", which—as described earlier—could lead to misleading and inconsistent results among Member States.[51]

Europol for law enforcement purposes (recast), Brussels, 4.5.2016 COM (2016) 272. Eurodac is a large-scale IT system used by 32 States: 28 EU Member States and 4 Associated Countries (Iceland, Norway, Switzerland and Liechtenstein) to store new fingerprints and compare existing records on asylum seekers. Eurodac contributes to the management of European asylum applications by storing and processing the digitalised fingerprints of asylum seekers and irregular migrants who have entered a European country.

43 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Agency for Asylum and repealing Regulation (EU) No 439/2010, Brussels, 4.5.2016 COM (2016) 271 final.

44 European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels, 13.7.2016 COM (2016) 466 final and European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 13.7.2016 COM (2016) 467 final.

45 European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) Brussels, 13.7.2016 COM (2016) 465 final.

46 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014, Brussels, 13.7.2016 COM (2016) 468 final.

47 The guardian is defined as "a person or organization appointed by the competent bodies in order to assist and represent an unaccompanied minors in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary". See COM (2016) 466 final, *supra* note 44, Article 2 (19). See also COM (2016) 465 final, *supra* note 45, article 2 (12) and COM (2016) 467 final, *supra* note 44, article 4(2)(f).

48 See COM (2016) 467 final, *supra* note 44, Articles 19 (applicants in need of special procedural guarantees), 21 (guarantees for minors) and 22 (special guarantees for unaccompanied minors).

49 COM (2016) 467 final, *supra* note 44, p. 15.

50 (Ibid.), article 22 (1). Also, COM (2016) 465 final, *supra* note 45, article 23 (1).

51 However, in 2018, the Council and the Parliament reached a provisional agreement on the proposal where the time limit for designation of the guardian extends to 15 days, and exceptionally to 25 working days. See Council

The functions of the guardian are also described in Article 22 (3), which states that:

> "The guardian shall, with a view to safeguarding the best interests of the child and the general well-being of the unaccompanied minor: (a) represent and assist the unaccompanied minor during the procedures provided for in this Regulation and (b) enable the unaccompanied minor to benefit from the rights and comply with the obligations under this Regulation".

In addition, Article 22 (4) reads as follows:

> "The guardian shall perform his or her duties in accordance with the principle of the best interests of the child, shall have the necessary expertise, and shall not have a verified record of child-related crimes or offences".

Within the guardians' tasks, the proposal also includes that guardians are in charge of informing the unaccompanied child about the personal interview, its meaning, possible consequences, and, where appropriate, how to prepare himself or herself for such an interview.[52] Guardians shall be present in the personal interview, as well as legal advisors or counsellors admitted under national law, and shall be able to ask questions and make comments.[53]

Moreover, State authorities are equally responsible for monitoring the quality and exercise of these guardianships, and they are required to appoint entities or persons accountable for the performance of guardians' tasks.[54] Unaccompanied minors shall be entitled to lodge complaints against their guardians,[55] and guardians shall be changed when responsible authorities consider that she or he does not adequately perform their main tasks.[56] State authorities are also responsible for not appointing a guardian with a disproportionate number of unaccompanied children at the same time.[57]

Overall, the proposals provide a relevant improvement in the current legal framework concerning unaccompanied children's representation in asylum in EU Member States. The inclusion of time restrictions, monitoring systems, and clearer definitions for guardians' roles will lead to a lesser level of discretion in the implementation of this right and a better understanding of legal representation within EU States. In addition, the proposal to transform the Qualification Directive and Asylum Procedures Directive into new regulations will lead to the harmonization of standards, as regulations are directly applicable in the Member States.

Nevertheless, a few words should be said regarding the state of the proposals in the legislative process. The proposal to reform CEAS have not been formally adopted under the 2014–2019 parliamentary term, due mainly to disagreements between the Council and Parliament.[58] However, the stagnation of the past years seemed to have been overcome in September 2020 when the Commission presented a new pact on migration and asylum where it supported the provisional political agreement achieved in connection to the previous proposals and urged for adoption "as soon as possible".[59] However, this seems unlikely

of the European Union, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)—Conditional confirmation of the final compromise text with a view to agreement, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018 (OR. en) 10009/18.

52 COM (2016) 467 final, *supra* note 44, Article 22 (6).

53 (Ibid.).

54 (Ibid.), Article 22 (5). Also, COM (2016) 465 final, *supra* note 45, article 23 (1).

55 COM (2016) 467 final, *supra* note 44, Article 22 (5).

56 (Ibid.), article 22 (4).

57 (Ibid.), Article 22 (5). Also, COM (2016) 465 final, *supra* note 45, article 23 (1). In the compromise text of the Council of the EU and the European Parliament a maximum number of 30 (exceptionally 50) is set. See *supra* note 51.

58 See https://www.consilium.europa.eu/en/policies/ceas-reform/ceas-reform-timeline/ (accessed on 1 November 2021).

59 COM (2020) 609 final, *supra* note 40.

to happen at present as the pact holds an integrated and comprehensive approach, covering all aspects of asylum and migration governance, which complicates the negotiations.

The new pact builds from and maintains the proposals while introducing additional elements to them as well. It aims to conclude the negotiations on the 2016 proposals while including several positive novelties. For instance, the pact includes the creation of integrated procedures at the borders through pre-entry screening and specific monitoring safeguards. It also calls for improvements in cooperation in the area of migration management and establishes a more effective solidarity mechanism, such as strengthening return solidarity measures.

The needs of the migrant child are identified in the pact as a priority while seeking to strengthen the safeguards of children under EU law in the context of migration. In this sense, the new proposed rules seek to ensure that all decisions concerning asylum-seeking children are taken with primary consideration of the best interest of the child and with due respect to the right of the child to be heard. Moreover, when it comes to the rights of unaccompanied children, special attention is given to this vulnerable group through, for instance, reinforcements in the right to family reunification and prioritization for relocation of unaccompanied minors.[60]

With regards to legal representation, the pact establishes that unaccompanied minors should be appointed a representative no later than fifteen days after an asylum application is presented.[61] In addition, the role of the European Network on Guardianship[62] should be strengthened while promoting stronger coordination, cooperation, and capacity- building of guardians throughout the European Union.[63] The particular needs of unaccompanied children and child-specific procedural guarantees, such as ensuring the right of the child to be heard, swift family reunification, and legal assistance, throughout the entire asylum procedure should be effectively provided.[64]

Despite the positive aspects introduced in the pact, the legislative proposals are still being negotiated between the European Parliament and the Council of the EU. In addition, the existing tensions between Mediterranean States and Northern States based on the differences in their interests concerning secondary movements, reception conditions, accommodation, and solidarity and responsibility sharing, sets important challenges to discussions and makes it difficult to reach consensus.

Bearing these considerations in mind, in the following sections it will be critically analyzed the manner in which the European Court of Human Rights and the European Court of Justice have referred to this right in concrete cases.

6. The European Court of Human Rights and Asylum Seekers' Legal Representation

The European Court of Human Rights (ECtHR) ensures the correct application of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). Procedural guarantees in the European Convention are enshrined in Articles 6 (right to a fair trial) and Article 13 (right to an effective remedy). While these provisions are closely related, the content and extent of the rights enshrined therein are not the same. See e.g., (Borland 2015, p. 52). Article 13 ECHR can only be engaged if the applicant holds an arguable claim in connection to other provisions of the ECHR, such as, for instance, Articles

60 (Ibid.).

61 Commission staff working document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD/2020/207 final, p. 66.

62 The European Network on Guardianship seeks to improve services for unaccompanied minors within EU Members States through guardianship development and assistance to practitioners and organizations.

63 COM (2020) 609 final, *supra* note 40, para. 2.4.

64 (Ibid.).

2 (right to life), 3 (prohibition of torture), or 8 (right to respect for private life) ECHR.[65] On the other hand, Article 6 ECHR provides for the right to a fair hearing and access to justice in civil and criminal procedures. Further, under paragraph 3c, the provision recognizes the right to free legal aid in criminal proceedings under certain circumstances.[66]

The Court has developed an extensive jurisprudence in connection to the content and extent of States' obligations under Article 6 ECHR with regards to the granting of legal aid.[67] However, in the context of migration, the regional tribunal has so far refused to accept that the procedural rights enshrined under Article 6 ECHR are applicable to asylum procedures.[68] Since its first judgment regarding the applicability of Article 6(1) to expulsion proceedings of aliens in the case of *Maaouia v. France*,[69] the regional tribunal has claimed that:

> "[D]ecisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention".[70]

Notwithstanding the negative position of the regional tribunal regarding the applicability of Article 6 ECHR in immigration and asylum procedures, the ECtHR has recognized specific procedural guarantees to asylum seekers and migrants by the joint application of other interconnected and interrelated provisions—such as Articles 8 and 13 ECHR—to asylum procedures.[71]

To state it differently, while the Court has held that the procedural safeguards enshrined in Article 6 ECHR are not applicable in asylum procedures, Article 13 ECHR, which ensures the right to an effective remedy, is fully applicable in connection to asylum in cases when the applicant builds an "arguable claim" under any other provision of the Convention.[72] In this sense, the Court has acknowledged on several occasions, while analyzing violations in connection to Articles 2, 3, and 8 ECHR in the context of migration, that procedural obstacles such as the lack of legal representation could result in a violation of Article 13 ECHR.[73]

For instance, in the case of *Abdolkhani and Kariminia v. Turkey*,[74] the Court found that the applicants in an asylum case were not guaranteed an effective and accessible remedy in connection with their complaints based on Article 3 of the Convention.[75] Thus, the Court identified a violation of Article 13 ECHR based partly on the lack of legal assistance of the applicants during detention.[76] In fact, according to the regional tribunal:

> "A remedy must be effective in practice as well as in law in order to fulfil the requirements of Article 13 of the Convention. In the present case, by failing to

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65 See—among others—*M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, ECtHR, Application No. 30696/09, para. 288 and *Abdolkhani and Kariminia v. Turkey*, Judgment of 22 September 2009, ECtHR, Application no. 30471/09, para. 107.

66 Article 6(3) ECHR reads as follows: "Everyone charged with a criminal offence has the following minimum rights: . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

67 See e.g., *Airey v. Ireland*, Judgment of 9 October 1979, ECtHR, Application no. 6289/73; *Gnahoré v. France*, Judgment of 19 September 2000, ECtHR, Application no. 40031/98; *McVicar v. The United Kingdom*, Judgment of 7 May 2002, ECtHR, Application no. 46311/99; *Steel and Morris v. the United Kingdom*, Judgment of 15 February 2005, ECtHR, Application no. 68416/01.

68 See for further readings on this matter: (Guild 2015, pp. 279–80).

69 Maaouia *v. France*, Judgment of 5 October 2000, ECtHR, Application No. 39652/98.

70 (Ibid.), para. 40.

71 As claimed by Kilkelly: "[A]n implicit part of certain substantive provisions permits the development of safeguards which are specific to the rights guaranteed and go beyond the scope of protection of the fair trial provision (Kilkelly 1999).

72 *MSS v. Belgium and Greece*, *supra* note 65, para. 288.

73 (Ibid.) See also *Čonka v. Belgium*, Judgment of 5 February 2002, ECtHR, Application No. 51564/99, para. 79.

74 Abdolkhani *and Karimnia v. Turkey*, Judgment of 22 September 2009, ECtHR, Application No. 30471/08.

75 (Ibid.), para. 117.

76 As mentioned by the Court: "the applicants were not given access to legal assistance when they were arrested and charged, despite the fact that they explicitly requested a lawyer". *Abdolkhani and Karimnia v. Turkey, supra* note 74, para. 114.

> consider the applicants' requests for temporary asylum, to notify them of the reasons for not taking their asylum requests into consideration and to authorise them to have *access to legal assistance* while in Hasköy police headquarters, the national authorities prevented the applicants from raising their allegations under Article 3 within the framework of the temporary asylum procedure".[77]

As an additional development of this jurisprudential approach, in the case of *MSS v. Belgium and Greece*,[78] the Court assessed Article 13 ECHR in connection to Articles 2 and 3 ECHR. Accordingly, the regional tribunal highlighted in this decision that the access to asylum proceedings and the examination of applications for asylum in Greece presented several deficiencies. Among these, the Court specifically highlighted "the lack of legal aid effectively depriving the asylum seeker of legal counsel"[79] in addition to serious lack of information and communication issues affecting asylum seekers,[80] and the lack of practical means of the applicant to pay a lawyer.[81]

The importance to guarantee an effective remedy in the context of migration processes where the applicant's complaint is connected to Article 3 of the Convention were further developed by the Court in the latter case of *Hirsi Jamaa and Others v. Italy*.[82] In particular, the Court was able to recognize that the applicants had no access to a procedure that identified and assessed their personal circumstances before they returned to Libya.[83] Moreover, the Court specially highlighted that "[t]here were neither interpreters nor *legal advisers* among the personnel on board".[84]

Further, when examining States' obligations towards children involved within migration procedures, the European Court has highlighted on numerous occasions how important is to pay attention to their special situation of vulnerability as both minors and migrants. In fact, the Court has reinforced the protection of children's rights by reaffirming that:

> "This requirement of 'special protection' of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability".[85]

This jurisprudence has been further consolidated with the acknowledgment of the need to introduce a differential treatment able to provide an enhanced level of protection to migrant children. In fact, the Court has repeatedly referred to several provisions of CRC that should be taken into consideration as reference points for States authorities when ensuring the effective realization of children's rights. Among these provisions, the Court has highlighted the special relevance of Article 3 (best interest of the child), 22 (appropriate protection and humanitarian assistance for refugee children), and 37 (detention and punishment).[86]

Accordingly, by means of reading the ECHR in the light of the CRC, the Court has acknowledged the relevance of the best interest of the child in all decisions concerning children,[87] and the need to adapt the reception conditions for asylum-seeking children

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77 (Ibid.), para. 115. (emphasis added).

78 *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, ECtHR, Application No. 30696/09.

79 (Ibid.), para. 301.

80 (Ibid.), para. 311.

81 As mentioned by the Court: "although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system, which renders the system ineffective in practice". (Ibid.), para. 319.

82 *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, ECtHR, Application No. 27765/09.

83 (Ibid.), para. 202.

84 (Ibid.) (emphasis added).

85 Tarakhel *v. Switzerland*, Judgment of 4 November 2014, ECtHR, Application no. 29217/12, para. 119.

86 See *Muskhadzhiyeva and Others v. Belgium*, Judgment of 19 January 2010, ECtHR, Application no. 41442/07, para. 62 and *Popov v. France*, Judgment of 19 January 2012, ECtHR, Applications nos. 39472/07 and 39474/07, para. 91. See also: (Ippolito and Iglesias 2015, p. 252).

87 Popov *v. France*, *supra* note 86, para. 140.

in accordance with the child's age.[88] In addition, the regional tribunal highlighted that the Convention on the Rights of the Child requires States to adopt appropriate measures that ensure that asylum-seeking children enjoy protection and humanitarian assistance regardless of the condition of the child as accompanied, separated, or unaccompanied.[89] In particular, the Court has found in this context that children who apply for asylum alone can face increased levels of vulnerability.[90]

The jurisprudential developments of the ECtHR clearly show that the specific vulnerability connected to the condition of being a child seeking asylum justifies an increased level of protection, together with the identification of tightness obligations over State authorities.[91] This rule is fully applicable to the case of unaccompanied children where their intrinsic vulnerability requires higher levels of protection from States, such as adequate legal representation and guardianship.

In fact, the court placed special focus on the extreme situation of vulnerability that affects the child who is unaccompanied in the case of *Mubilanzila*.[92] In its reasoning, the regional tribunal condemned the two-month detention of an unaccompanied child in a center designed for adults without any person being assigned to look after her, and highlighted that the State authorities had not taken appropriate measures for her protection, as, for instance, "[N]o measures were taken to ensure that she received *proper counselling* and educational assistance from qualified personnel specially mandated for that purpose".[93]

Lastly, it would be important to note that even if the Court has expressly denied the application of Article 6 ECHR and the recognition of the entitlement of the right to legal representation under this provision in asylum procedures, it has, however, also identified on several occasions the lack of representation as a predominant factor while examining asylum seekers' right to a fair remedy. In fact, by taking into consideration Article 13 ECHR in connection with other provisions of the European Convention, such as, for instance, Article 3 ECHR, the regional tribunal has required States to establish asylum procedures which contain a set of minimum safeguards, including the right to be heard.[94] As evidenced under the decisions examined above, there is clear concern from the European Court regarding the need for free legal assistance during asylum procedures, especially as asylum seekers are in a special situation of vulnerability. See e.g., (Guild 2015, p. 280). This interpretative rule is clearly applicable to the case of unaccompanied children, whose specific condition of vulnerability require, from State authorities, higher levels of protection through additional safeguards. Bearing these considerations, the Court has developed an important case law aimed at strengthening the conventional protection of the rights of the migrant child.

7. The Court of Justice of the European Union and the Right to Legal Representation and Assistance

The judicial authority of the EU has, as its main function, to ensure the uniform interpretation and application of European Union law.[95] When it comes to asylum law, the Court of Justice has examined cases concerning different aspects of migration, see (Costello

88 Tarakhel *v. Switzerland, supra* note 85, para. 119.

89 (Ibid.), para. 99. See also *Popov v. France, supra* note 86, para. 91.

90 Rahimi *v. Greece*, Judgment of 5 July 2011, ECtHR, Application No. 8687/08, para. 86.

91 Muskhadzhiyeva *and Others v. Belgium*, *supra* note 86, para. 53.

92 In the words of the Court: "The second applicant's position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor (. . .). She therefore indisputably came within the class of highly vulnerable members of society". (Ibid.), para. 55.

93 (Ibid.), para. 50. Emphasis added.

94 See for an in deep study on this matter: (Smyth 2018, p. 141).

95 TEU Article 19 (1): "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

2012) and (Garlick 2015). such as the minimum standards for determining who qualifies as a refugee under EU law,[96] states' obligations under Dublin Regulation,[97] minimum standards for the reception of asylum seekers in EU Member States,[98] and asylum seekers' procedural rights.[99] As indicated by the constant jurisprudence of the CJEU, it is important to highlight that States Members are under the general obligation to ensure judicial protection of an individual's rights under EU law.[100]

The Court of Justice has addressed the relevance of the right to legal assistance in connection to Article 47 of the Charter in the case of *D.E.B.*,[101] specifically in the context of the *Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*. The latter directive applies to Union citizens and third-country nationals domiciled or who are habitual residents in a Member State in connection to cross-border disputes and to civil and commercial matters, whatever the nature of the court or tribunal.[102] Hence, it leaves outside the scope of its application legal aid in asylum procedures. However, it is worth focusing on this decision, as the reasoning of the Court in the case of *D.E.B* could be translated to cases concerning asylum seekers and their right to effective remedy.[103]

In this case, the Court of Justice examined the scope of Article 47 of the Charter with regards to legal aid by interpreting the provision in its context, i.e., in connection to "other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights".[104] As a result of this integrative approach, the court recognized that the grant of legal aid in connection to the right to an effective remedy shall be made "on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated".[105]

Moreover, the regional tribunal specifically recognized that the principle of effective judicial protection should be interpreted as including legal aid related to the payment of the costs of the procedures and/or the assistance of a lawyer.[106] Lastly, national courts should assess whether the conditions for granting legal aid constitute a limitation to the right to access to courts which undermines the core of the right, pursuing a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which is sought to achieve.[107] When making the latter assessment, national court shall take into consideration:

> "The subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts".[108]

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96 E.g., Joined *cases C-57/09 and C-101/09, Bundesrepublik Deutschland v. B and D*, CJEU, 9 November 2010; *joined cases C-7/11 and C-99/11, Bundesrepublik Deutschland v. Y and Z*, CJEU, 5 September 2012 and *joined cases C-199/12, C-200/12 and C-201/12, X, Y and Z*, CJEU, 7 November 2013.

97 E.g., Joined *cases C-411/10 and C-439/10, N.S v. United Kingdom* and *M.E. v. Ireland*, CJEU, 21 December 2011.

98 *Case C-179/11, Cimade Gisti v. Ministre de l'Intérieur de l' Outremer, des Collectivités territoriales et de* l'Immigration, CJEU, 27 September 2012.

99 *Case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, CJEU, 28 July 2011.

100 See Case *C-63/08, Virginie Pontin v. T- Camalux SA*, CJEU, 29 October 2009, para. 44.

101 *Case C-279/09 DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik* Deutschland (2010) ECR *I-13849*, CJEU, 22 December 2010.

102 See Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, articles 1–3.

103 See e.g., (Guild 2015, pp. 281–84).

104 *Case of D.E.B*, *supra* note 101, para. 37

105 (Ibid.), para. 42.

106 (Ibid.), para. 59.

107 (Ibid.), para. 60.

108 (Ibid.), para. 61.

Accordingly, the application of this decision in the context of asylum could lead us to conclude that States need to follow the criteria established above in each particular asylum case in connection to the provision of legal assistance. In addition, the asylum seekers' right to legal aid, established in CEAS, should not be interpreted in isolation, but taking into consideration the context of the legal system of reference, including other instruments and agreements directly related to EU asylum law. Under this integrative approach, the interpretation of asylum seekers' right to legal assistance should also consider—as elaborated by the European Court in the *D.E.B.* case—the jurisprudence of the ECtHR in connection to the right to legal aid and Article 47 of the Charter.

Further clarifications connected to the right to legal aid were developed by the regional tribunal in connection to vulnerable persons. For instance, in *Pontin*, the Court held that time limits in the procedure could make it too difficult for the applicant to obtain legal advice, due to the applicant's special condition of vulnerability, such as in the situation of a dismissed pregnant women.[109] Accordingly, a 15-day period as time limit for bringing an action for nullity and reinstatement could be reasonable in other cases, but, combined with the vulnerability position of certain applicants, could result in a violation of the applicant's procedural rights. This rule is fully applicable in connection to asylum seekers.

Lastly, the regional tribunal has recently ruled a remarkable judgment in the case of *TQ v. Staatssecretariis van Justitie en Veiligheid*[110] regarding the interpretation of several provisions of the *Return* Directive (2008/115/EC)[111] in cases involving unaccompanied minors whose application for international protection has been rejected. In this case, the court identified States' obligation "to apply the best interests principle *at all stages of the procedure*"[112] before taking any return decision. In addition, the regional tribunal emphasized how important is to hear the unaccompanied child before adopting a return decision with regards to the conditions in which she or he might be received in the State of return.[113] This rule is clearly connected to the right to legal assistance and representation of the unaccompanied child, as the adequate exercise of this right is absolutely necessary to hearing the child properly and examining their best interest in each particular case.

8. Conclusions

This paper has thoroughly examined the main legal developments at the EU level concerning legal representation and assistance for unaccompanied children seeking asylum in the EU. In addition, several deficiencies in current EU rules concerning this right, which lead to significant challenges and disparities in its implementation at the national level, have been highlighted. Among these, one can mention the overbroad and vague definition of the term "representatives" in the asylum acquis—which could refer both to guardians and legal advisors—and the lack of specific standards for legal representation and assistance in the case of unaccompanied minors. In fact, the lack of clarification in the asylum acquis reflects a lack of consistency and harmonization among Member States in the application of EU law when it comes to unaccompanied children's representation.

The continuous sufferings of this vulnerable group confirm that the current general standards of protection have not been enough, and that legal certainty needs to be achieved if the present ambiguities and gaps in the protection of unaccompanied children are to be solved. As both CJEU and ECtHR have recognized, the right to legal representation is strictly connected to the right to justice, a fundamental human right interrelated with other rights enshrined in the CRC and the EU Charter. The right of the unaccompanied minor to legal representation and assistance is necessary to ensure the effectiveness of other

109 *Case C-63/08, Virginie Pontin v. T-Camalux SA*, CJEU, 29 October 2009, para. 65.

110 *Case C-441/19, TQ v Staatssecretariis van Justitie en Veiligheid*, CJEU, 14 January 2021.

111 Council of the European Union, Directive 2008/115/EC of the European Parliament and Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

112 Case *C-441/19, TQ v Staatssecretariis van Justitie en Veiligheid*, *supra* note 110, para. 44.

113 (Ibid.), para. 59.

procedural guarantees. In fact, proper representation constitutes an effective mechanism to avoid unfounded deportations that could result in violations of other rights, such as the best interest principle and the right to family reunification. As such, ensuring unaccompanied minors protections both procedurally and substantively is of resolute importance.

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Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	UN Convention on the Rights of the Child
ECRE	European Council on Refugees and Exiles
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUROSTAT	European Statistics
FRA	European Union Agency for Fundamental Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	UN High Commissioner for Refugees

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Article

No Place Called Home. The Banishment of 'Foreign Criminals' in the Public Interest: A Wrong without Redress

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Abstract: This article examines the legal and ethical rationale for the deportation of 'foreign criminals' who have established their homes in the United Kingdom. It argues that provisions relating to automatic deportation constitute a second punishment that can be more accurately described as banishment. The human rights of those defined as 'foreign criminals' have been reduced to privileges that are easily withdrawn with reference to the ill-defined public interest. The ability to challenge deportation is then compromised by a non-suspensive appeal process that deliberately undermines the right to an effective remedy whilst further damaging private and family life. With reference to social membership and domicile theories of belonging, it is suggested that those who have made their lives in the UK and established their place and domicile here should be regarded as unconditional members of civil society. As such, they are entitled to equality of treatment in the criminal justice system and should be immune from punitive 'crimmigration' measures.

Keywords: deportation; citizenship; foreign criminals; family life; human rights; appeals; 'hostile environment'

1. Introduction

In 2012 the then Home Secretary Theresa May announced the introduction of a 'really hostile environment' for 'illegal immigrants'. Absent of any robust impact assessment, a series of legislative and policy measures followed, the consequences of which continue to be felt by all who have migrated to the UK and many who regard it as their home (Williams 2020). This article focusses on the position of established residents who have engaged in criminal activity and face deportation. It is argued that removal is akin to banishment and that it is ethically wrong with reference to normative understandings of belonging and membership. Furthermore, it is legally wrong with reference to fundamental human rights norms that are decoupled from formal citizenship status.

There are strong ethical arguments presented in theories of social membership that support a right of residence for those considered to be 'citizens in the making' (Miller 2008, p. 195). Yet those defined legally as 'foreign criminals' present a challenge to membership theories as the foundations of this right are typically predicated on good behaviour, measured for example through the strength of social and cultural ties or positive contributions made to the host society. Indeed, the offender's criminal history can be presented as evidence that no such ties exist, undermining an ethical argument against expulsion. The argument in this paper is that there is no meaningful qualitative difference between citizenship and permanent residence for the purpose of ascribing membership. Membership is a question of fact, existing irrespective of criminal behaviour in much the same way as it exists for citizens. To refuse membership rights results in civic marginalization (Owen 2013). This argument is grounded in both social membership and domicile theories of non-deportability advanced by Carens, Moore and Birnie, that support an unconditional right of residence irrespective of formal citizenship status.

Whilst it may be possible to have membership of more than one national community this is far from typical. Recent deportations suggest that those with indefinite leave consider themselves to be British and rarely have significant ties to their country of nationality, in some cases the deportee has spent their entire life in the UK. British citizenship is not necessarily acquired by place of birth so it is conceivable that some permanent residents would not even be aware they lacked citizenship. Post sentence detention and deportation in these situations constitutes a second punishment, amounting to enforced exile or banishment.

The percentage of foreign nationals serving prison sentences is comparable to the percentage of foreign nationals living in the UK generally (Sturge 2019) yet the 'foreign criminal' has become 'doubly damned' as an ungrateful, 'bad' migrant, whose very existence threatens the community of value (Griffiths 2017). The label is enduring, reducing the individual to a moment in time that will henceforth define every aspect of their identity. The introduction of automatic deportation in the UK Borders Act 2007 essentially confirms this position. The offender's rights, and those of their families, become privileges that have been abused. This can be seen clearly in the proportionality assessments of decision-makers which, it is argued, often appears cursory.

Deportation of offenders is justified in the legislation by reference to the public interest. The implication being that it is necessary for public protection and the prevention of crime. Foreign criminals certainly elicit little public sympathy, although this may in part be attributable to the way that deportations are framed in public discourse. It is hard to argue against the view that very serious offenders, such as murderers and drug traffickers, present a threat to public safety. The inability of previous Home Secretaries to remove foreign nationals following completion of their sentence has attracted a great deal of public condemnation and led to the resignation of Home Secretary Charles Clarke in 2006. Such a failure appears to undermine the first duty of the government to keep citizens safe and the country secure.

Recent amendments to the UK's immigration rules and the introduction of s117C of the Nationality, Immigration and Asylum Act 2002 (hereafter 'NIAA') pre-load the decision-makers assessment of proportionality in favour of expulsion where the individual was sentenced to twelve months in prison, but make some allowances for arguments based on both private and family life (reflecting the UK's obligations under Article 8 of the European Convention on Human rights). Article 8 is given effect through the Human Rights Act 1998 but it is a qualified right and the state has been afforded a margin of appreciation in its assessment of the public interest. Yet the public interest is presented as a given in deportation legislation and therefore receives little scrutiny, as evidenced by the snapshot of cases presented below. Zedner notes how criminals are typically characterised in public discourse as enemies in a way that ignores research on the normality of offending (Zedner 2010, p. 390). All offending is treated as equally dangerous and there is no willingness to look behind the crime. 'Foreign criminals' (and their families) cease to be members of the public when their enemy status is consolidated by the absence of formal citizenship.

The steady devaluation of Article 8 rights observed by (Griffiths 2017, p. 533) has been accompanied by a corresponding devaluation in procedural rights including the right to challenge a deportation order. One of May's flagship 'hostile environment' policies was the 'deport now, appeal later' provision enacted by the Immigration Act 2014. May had previously expressed frustration at the judiciary for ignoring the will of Parliament when "putting the law on the side of foreign criminals instead of the public" (House of Commons 2013, col. 156; O'Nions 2020). Legal representatives were also accused of 'cashing in' and the appeals system was characterized as an 'abuse of Article 8' (House of Commons 2013, col. 158; O'Nions 2020). However, the Supreme Court in *Kiarie and Byndloss* ruled that the provisions undermined the right to an effective appeal, both in terms of its substance (creating further damage to the applicant's private and family ties) and in terms of the process which needs to

be effective.[1] It is now accepted that for an effective appeal, deportees may need to be returned to the UK after several months to present their evidence and face cross-examination.[2] Yet statistics suggest that very few deportees will attempt to challenge their removals once overseas, the reasons for this are unclear but it is likely that cost and accessibility are significant factors.

Given the argument that deportation of those permanent residents perceived to present a danger to an ill-defined public interest is both ethically and legally problematic, there is a further need to reflect on the underlying rationale of conditional membership. The post-Brexit landscape reveals a country deeply divided economically, socially and culturally. To a large extent deportation shores up the foundations of the community of value by overtly signalling that certain behaviour is unwanted whilst confirming that the immigration system is not a 'soft touch' (Walters 2002, p. 286). However, it paradoxically contributes to the fragility of membership by emphasising the enduring 'foreignness 'of some members of that community and reducing their fundamental human rights to precarious privileges. 'Hostile environment' policies such as the right to rent scheme which requires private landlords to check the immigration status of their tenants, have arguably legitimized discrimination against those perceived to be foreign and further contributed to this fragility (Independent Chief Inspector of Borders and Immigration 2018).[3]

It is important to begin by contextualizing the ethical and legal arguments against deportation with reference to the most recent deportations and the legislative framework. This also provides an insight into the way that the 'hostile environment' has constructed certain types of foreigner in public discourse. A consideration of the ethical arguments against deportation will follow in an attempt to ground a theory of unconditional membership for permanent residents. Finally, the paper addresses the human rights principles that are relevant in this context. It will be argued that the rights of 'foreign criminals' and their families are too easily reduced to privileges when balanced against the ill-defined public interest.

2. Setting the Context

Section 32 of the UK Borders Act 2007 provides for automatic deportation of those termed 'foreign criminals' which becomes effective when the individual receives a prison sentence of at least 12 months. Further, it allows the Home Secretary to specify offences that are deemed to be 'particularly serious' where any sentence can constitute grounds for deportation. Regulations introduced pursuant to this section were deemed ultra vires on the grounds of irrationality in *EN(Serbia)* [2009] as they specified offences, such as theft and criminal damage, which were not necessarily 'serious'.[4] This has resulted in a rebuttable presumption of dangerousness.

Legislation introduced in 2014 pursuant to the 'hostile environment' established that in the case of 'foreign criminals' deportation was in the public interest, removing any need for the deporting authority to pay specific attention to the nature of the offence, the history of offending and current assessment of risk (s117C Nationality Immigration and Asylum Act 2002). A 'foreign criminal' may be detained immediately following the end of their sentence or many months later and there is no automatic bail hearing. A very recent Court of Appeal decision found that there was a real risk of detainees being removed by the Home Office before they had an opportunity to challenge an adverse decision before a court. The notice period required for deportation did not provide sufficient opportunities for the deportee to access legal advice before the removal window became operational.[5]

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1 Kiarie and Byndloss v Secretary of State for the Home Dept. [2017] UKSC 42.
2 AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC).
3 R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Dept. [2019] EWHC 452 (Admin).
4 EN (Serbia) v Secretary of State for the Home Dept.; Secretary of State for the Home Dept. v KC (South Africa) [2009] EWCA Civ 630.
5 R (On application of FB) v Secretary of State for Home Dept. [2020] EWCA Civ 1338.

'Foreign criminals' are typically detained for longer periods than other immigration detainees, on average over four months (Shaw 2018, para. 4.98). The absence of a time-limit, the challenges of securing legal representation (legal aid is not routinely available in immigration cases) and anxiety over the ever-present possibility of expulsion leads many to report a deterioration in their mental health (Chief Inspector of Prisons 2017; Borril and Taylor 2009). The Home Office do not ordinarily provide specific deportation dates so they can reduce the possibility of late legal challenges. This undoubtedly adds to the anxiety of detainees. One of the foreign criminals interviewed during Lord Shaw's investigation of immigration detention had been in the UK since birth. He had committed a gang-related offence as a teenager and was awaiting deportation to Nigeria, a country that had so far refused to accept him. He had been detained at Campsfield House for more than fourteen months at the time of the report, notwithstanding a review recommending his release. His Home Office file stated that he was not socially or culturally integrated in the UK due to his involvement in crime (Shaw 2018, para. 4.98).

Lawyers report difficulties in accessing clients in detention whereas detainee advocacy groups argue that the quality of legal advice given to detainees is poor (Bail for Immigration Detainees 2020a). There has been a proliferation of providers under the current duty detention scheme but this has meant that many are inexperienced and do not have the time to build up expertise. A survey undertaken by BID in 2018 had found that only half of detainees had a legal representative and whilst this had improved somewhat in 2019, 40% of immigration detainees still lacked representation. For those detained in prison following the end of their sentence, only 15% had received legal advice from an immigration solicitor (Bail for Immigration Detainees 2019).

The recent deportation flights from the UK to Jamaica illustrate the inherent contradictions in deportation policy. The testimonies of those detained pending deportation can be contrasted to the official narrative and serve as a reminder of both the normality of offending and the personal impact of expulsion, described by Griffiths as 'life-altering violence' (Griffiths 2017, p. 538).

On the 6 February 2019, twenty-nine 'foreign criminals' were deported to Jamaica whilst more than 50 others were returned to detention following last minute appeals (Gentleman et al. 2019). A second flight carrying seventeen 'foreign criminals' departed in February 2020. At least twenty-five others were prevented from leaving due to a court order which found that faulty phone masts had prevented them accessing their lawyers whilst detained (BBC News 2020a). Home Office minister Kevin Foster insisted that there were no 'British nationals' onboard the flight and emphasised the dangerousness of all those on board (Honeycombe-Foster 2020). It was repeatedly asserted that all were violent offenders (BBC News 2020a; Daily Mail 2020). The Home Office press release stated:

> "Today 17 serious foreign criminals were deported from the UK. They were convicted of rape, violent crimes and drug offences and had a combined sentence length of 75 years, as well as a life sentence. We make no apology whatsoever for seeking to remove dangerous foreign criminals". (BBC News 2020a)

In the face of such obvious dangerousness it is understandable that removal received broad public support but the individual stories behind the headlines were more complicated. Several of the deportees, their representatives and partners were subsequently interviewed by journalists from the BBC, *The Guardian* and *The Independent* newspapers. These testimonies challenge official accounts and provide a valuable insight into the experience of post-sentence detention and deportation (Merrick 2020).

One notable feature in several testimonies is the period of delay between release from prison and the decision to re-detain, calling into question the public interest justification. David Lammy MP highlighted the case of Tayjay who was twenty-four years old when detained, four years after his release from prison. Tayjay had been in the UK since the age of five and all his family live here. Having been groomed to participate in domestic drug trafficking (known as 'county lines') as a minor he was sentenced to fifteen months in prison at the age of nineteen. There was no suggestion of any further criminality following his release from prison (Lammy 2020). BBC Newsnight featured the story of Rayan Crawford who came to the UK aged 12, twenty years ago (Clayton 2020). He has a history

of minor offending and served a twelve-month sentence for burglary in 2017. He was detained two years after his release from prison pending deportation. Rayan has a partner of fourteen years and two children who are British citizens. He also suffers from a degenerative bone disease and inflammatory arthritis which require regular medication. A tribunal hearing found that although the deportation would be very difficult for the family it would not meet the legal threshold of being 'unduly harsh'. His family were unable to afford the £2000 needed for a judicial review and he was reportedly deported in February without his medication.

The public interest justification is also arguably weak where the level of offending is below the statutory threshold of twelve months imprisonment. The charity Bail for Immigration Detainees highlighted the case of EB who was on the February flight. Having come to the UK aged eight he now has a British partner and four children all of whom are British citizens. While EB has committed low-level offences in the UK he has never received a custodial sentence amounting to 12 months which would make him automatically liable to deportation. He was assessed to be at low risk of reoffending by the probation service (Bail for Immigration Detainees 2020b). Reshawn Davis was removed from the deportation flight in February. Although he had been convicted of robbery ten years ago this was under a test for joint enterprise that the Supreme Court subsequently found to be incorrect. Despite being subject to automatic deportation powers, Reshawn served only two months in prison and has not committed any further crimes. He has lived in the UK since the age of 11 and has a British partner and five-month old baby (Bulman 2020). His solicitor informed *The Independent* that despite living with his partner and daughter the Home Office rejected his argument that he had a genuine and subsisting relationship with them. Further, they found that it would not be unduly harsh on the family for Reshawn to be deported. Davis was interviewed two weeks later whilst still in detention. At this point he had received no information about his case and did not know whether he would be released or deported.

The BBC sympathetically highlighted the case of Rupert Smith dubbed a violent 'thug' by the tabloid media. Rupert came to the UK age 11 with his parents and all his family live here (Murphy-Bates and Law 2020). After finishing school, he spent four years at college when he committed his only offence of Actual Bodily Harm in retaliation for a sexual offence committed against a member of his family. Rupert described detention as 'like being on death row' (Taylor 2019. He arrived in Jamaica with only the clothes he was wearing and was taken to an army barracks where a volunteer offered him temporary accommodation.

MP Shabana Mahmood revealed that one of her constituents was removed from the most recent flight. Having fought in the army on two tours of Afghanistan he now suffers from post-traumatic stress disorder and has been diagnosed with bi-polar affective disorder. The injustice of seeking to deport a man who has risked his life defending the security of the country is not lost on Mahmood: "he's served this country; he hasn't had help for the PTSD he picked up as a serving soldier for our country . . . it really goes to the heart of our notions of what it is to be a citizen" (BBC News 2020a).

It is evident from this snapshot of cases that the Government's repeated assertion that all those on the deportation flight were 'rapists and violent criminals', simply cannot be supported. Many had committed their offences when teenagers, were not repeat offenders and were arguably unlikely to reoffend (BBC News 2020b). In these cases, arguments concerning the public interest ring hollow (Shaw 2018, para. 4.99).

Griffiths argues that "offenders in the UK today . . . are punished harder and denied redemption when they are non-citizens, casting them as more seriously and indelibly criminal than their British counterparts" (Griffiths 2017, p. 531). Policing practices which target young black men and the prevalence of gang culture in some of the UK's biggest cities feed into the statistics on deportation. De Noronha contends that racialized policing and discrimination inevitably mean that a disproportionate number of young black men are incarcerated, and this is played out in the decisions to expel (De Noronha 2019, p. 2425).

This is most apparent when considering the partnership between police and immigration officials known as Operation Nexus. Nexus was piloted in London in 2012, the same year as Theresa May announced that Britain would become a 'really hostile environment' for illegal immigrants. The data sharing at the heart of Nexus has now been rolled out in many areas of the UK. It is framed as targeting 'High Harm' foreign national offenders but it has become apparent that those with spent and petty convictions, as well as 'non-convictions', such as police encounters, acquittals and withdrawn charges are being targeted (Home Office 2017; De Noronha 2019). Between 2012 and 2015, 3000 FNOs were removed under Nexus, with the figure expected to increase after Brexit as European Union citizens become subject to British immigration rules. Nexus is grounded in an unsubstantiated assumption that migrant communities are more likely to engage in crime (Zedner 2010, p. 386), with the result that at a case for deportation can rest on:

> "a medley of allegations, associations, unproven assertions, hearsay, anonymous evidence, the behaviour of the appellant's friends and circumstantial evidence, none of which would usually be admissible in a criminal court". (Griffiths 2017, p. 533)

The numerous procedural and evidential requirements safeguarding the rights of criminal defendants are not required by the administrative process of removal. Griffiths details several cases marked for deportation following a Nexus investigation including a 20-year-old man who had been in the UK since the age of 5. His longest sentence was eight weeks for carrying a knife which he attributed to the need to protect himself after being stabbed three times (Griffiths 2017, p. 537). Another man interviewed by Griffiths had overstayed and had experienced prolonged periods of alcoholism and destitution. He had been detained for 5 months pending deportation after stealing a piece of steak at new year. These examples illustrate how the political construction of the 'foreign criminal' is inextricably linked to the creation of the 'hostile environment'. The use of speculation and assertion to justify forced exile of non-citizens can hardly be said to be in the public interest. The legality of Operation Nexus will soon be assessed by the Supreme Court after the Court of Appeal granted leave to appeal their ruling confirming its lawfulness.[6]

Prisons and removal centres are similarly focussed on the end game of exile. In her study of immigration removal centres, Bosworth observes how very little support is offered to 'foreign criminals' in terms of assisting reintegration and rehabilitation because it is understood that their imprisonment is "geared to one aim: deportation" (Bosworth 2011, p. 586; Stumpf 2006, p. 408). Prison overcrowding now affects 62% of prisons and remand facilities are particularly affected, leaving many confined to cells following their release date (Sturge 2019).

Hasselberg interviewed deportees and their families who were on bail pending deportation following a period of immigration detention (Hasselberg 2014, p. 471). All participants regarded themselves as settled in the UK despite the heterogeneity of their backgrounds. Their impression of surveillance strategies such as reporting are conceptualised as a form of coercive action which compels them to depart by constraining their lives into an ever-decreasing space of confinement. In 2016 the Government's plan to tag all released foreign criminals and subject them to a curfew was deemed unlawful.[7] Many of Hasselberg's participants regarded the condition of deportability and bail as a trap to make them more likely to fall into further criminal behaviour. The characterisation of powers such as detention and expulsion as administrative procedures is directly contradicted by the experiences of 'foreign criminals' who regard them as additional, arbitrary punishments (Dow 2007; Aas and Bosworth 2013).

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[6] Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Dept. and Commissioner of Police for the Metropolis [2018] EWCA Civ 2837.

[7] R (On the application of Abdiweli Gedi) v Secretary of State for Home Dept. [2016] EWCA Civ 409.

3. From British Subject to 'Foreign Criminal'

Walzer observes how that the study of distributive relationships within the political community always begs the prior question of how that community was constituted and maintained in the first instance (Walzer 1983, p. 30). Any discussion on the subject of removals and membership must be viewed in the context of the UK's colonial history, recently played out in the Windrush affair (Williams 2020).

Prior to the Commonwealth Immigrants Acts in 1962 and 1968 citizens of the UK and colonies could freely enter and reside in the UK without restrictions, based on their implied allegiance to the Queen. There were certainly voices arguing that deportation should be applied to certain groups of foreign criminals, typically those from the 'new' commonwealth (as distinguished from the old, largely white, commonwealth). Yet calls to extend deportation powers were initially resisted as subjects of the empire were considered to be full members of the British 'community of value' (Gibney 2013, p. 225). By 1971 this position had changed with the introduction of the Immigration Act, but the power to deport was rarely used until the enactment of the UK Borders Act and its particular construction of the 'foreign criminal' (s32(1) UK Borders Act 2007).

As De Noronha argues, colonial histories and global inequalities are often obscured in immigration discourses, enabling important questions about racism to be pushed aside (De Noronha 2019, p. 2416). This can be very clearly seen with the Windrush generation who left their homes in British colonies at the invitation of the British Government from 1948 onwards. Having grown up in the UK, paid taxes and built their lives here, the Windrush generation and their children regarded themselves as British. The Immigration Act 1971 provided that those ordinarily resident for five years at the date of commencement were entitled to citizenship. Yet in 2012, shortly after the introduction of the 'hostile environment' it became apparent that the Home Office were disputing their membership. As a result, 83 people were unlawfully deported, others lost their jobs, and some were refused urgent medical treatment (Williams 2020). The Home Office had destroyed the landing cards that could have proved entitlement to citizenship and without such proof had treated everyone as a foreign national, notwithstanding national insurance and other official records.

Some of the recent expulsions concern relatives of the Windrush generation. Most identify exclusively as British and struggle to comprehend the sudden realisation of the precarity of their membership (Hasselberg 2014; Grell 2020). Whilst ministers are keen to distinguish their deportations from the Windrush cases, there are notable comparisons. It is no accident that the publication of the review into Windrush was delayed for over a year until the departure of the most recent flight to Jamaica. The 'Lessons Learned' review rebuts claims that Windrush was both unforeseen and unavoidable, placing the blame on a Home Office culture which is ignorant of history and defends, deflects and dismisses criticism (Williams 2020). The 'hostile environment' along with the Home Office's well-documented culture of disbelief, lies at the root of the Windrush affair. The Home Office, driven by removal targets, ignored the sensitivities of individual cases including lifetimes of lawful residence, extensive family ties and contributions to British society. The public outrage over the Windrush affair centred on the denial of membership and the hardship that resulted from expulsion. Whilst the 'foreign criminal' inevitably elicits less public sympathy the same central arguments apply. Indeed, the Government initially defended many of the 83 Windrush deportations on the grounds of criminality (Gentleman 2018) and subsequently excluded these cases from the 'Lessons Learned' review.

'Lessons Learned' criticises the inflammatory rhetoric used by ministers, particularly when it comes to the subject of 'foreign criminals'. Similar concerns were raised five years ago by senior civil servant David Faulkner:

> "Government regularly uses images and terminology of confrontation and warfare, with 'criminals' as an implied enemy who is of less value than the 'law-abiding' and 'hard-working' citizen .... Such language can also be heard as an encouragement or justification of abuses of power and due process. Its effect can be to deepen social divisions and increase the anxiety which the government itself wishes to prevent." (Faulkner 2014)

It is evident from recent ministerial comments that few lessons have been learned. If anything, the preference for inflammatory, exclusionary rhetoric has increased. Baroness Neville-Rolfe recently suggested that the Government should purchase its own planes to make deportation easier and cheaper and the Home Secretary has publicly blamed 'activist lawyers' for obstructing the deportation process (Hyde 2020). It seems probable that officials will continue to make the same mistakes when blinded by removal targets and a Government mantra that problematises all immigration (O'Nions 2020). As the UN Rapporteur on Poverty and Human Rights, Philip Alston, recognised in 2018, the 'hostile environment' goes to the heart of what it means to be British:

> "I wish to underscore that a hostile environment ostensibly created for, and formally restricted to, irregular immigrants is, in effect, a hostile environment for all racial and ethnic communities and individuals in the UK. This is because ethnicity continues to be deployed in the public and private sector as a proxy for legal immigration status. Even where private individuals and civil servants may wish to distinguish among different immigration statuses, many likely are confused among the various categories and thus err on the side of excluding all but those who can easily and immediately prove their Britishness or whose white identity confer upon them presumed Britishness" (UN Human Rights Commission 2018)

4. The Case against Deportation

Liability to deportation is one of a small number of provisions distinguishing citizens from non-citizens. As such it constructs citizenship, asserting its value as the highest level of belonging (Walters 2002, p. 288). Gibney describes citizenship as Janus-faced, as both a unifier that stresses a common identity and a divider that excludes non-members (Gibney 2011, p. 41). Every deportation affirms the significance of the unconditional rights of residence that citizenship provides whilst also affirming its normative qualities (Anderson et al. 2011). It can therefore be argued that deportation is constitutive of citizenship (Walters 2002, p. 288). This may go some way to explaining the increased use of citizenship deprivation powers and deportation since the UK voted to leave the European Union in 2016.

4.1. Constituting Britishness

Brexit has been inextricably tied to notions of identity to the extent that the enormous challenges of ensuring an orderly exit and the economic impact of leaving without a trade deal have been sidelined in the public discourse. Those that oppose Brexit are frequently depicted as destroyers of the democratic process, moderate 'remainer' conservatives were ousted from long-standing cabinet positions, leaving the country with an inexperienced government at a crucial time. The previous speaker of the House of Commons, conservative member of parliament John Bercow, was strongly criticized by the media and leave-supporting parliamentarians for asserting the power of parliament after Prime Minister Boris Johnson prorogued parliament in an attempt to reduce its scrutiny of Brexit legislation. Businesswoman Gina Miller who attempted to challenge the legality of the Brexit process in the courts found herself repeatedly depicted as an enemy of the people. Her dual nationality attracted particular condemnation; she was routinely described by tabloid newspapers as a 'foreign born multi-millionaire'.

Boris Johnson learned the lessons from his predecessor and rewarded loyalty above experience and proven competence. However, as the promise of an easy trade seems to be slipping away, Brexit-supporting MPs repeatedly downplay the economic arguments and stress that leaving the EU is about restoring independence from Brussels and securing British values. The nature of these values and their distinction from European values is impossible to pinpoint. However, the same values are commonly emphasised in public discourse over national security and public safety, particularly when the perceived threat comes from supposedly 'foreign' sources. The increasing danger posed by far-right extremists who have been galvanized by the Brexit process receives comparatively little media and political attention. Counter demonstrations to the 'black lives matter' campaign in several UK cities revealed an uncomfortable unity of perspectives, all of which mask deep-seated hostility

towards democratic values of equality, tolerance and human rights. The Government's attempt to unite the newly independent nation appears facile in the face of such polarized opinion. Reported hate crimes increased significantly after the referendum, even when compared to the number recorded following terrorist attacks in Manchester and London (Devine 2018). Devine concludes that media coverage of immigration has played a fundamental role in connecting 'meaningful democratic events' with 'prejudicial violence'. The most recent report of the UN Committee on the Elimination of Racial Discrimination described the referendum campaign as "marked by divisive, anti-immigrant and xenophobic rhetoric" which politicians failed to condemn, resulting in the creation and entrenchment of prejudices "thereby emboldening individuals to carry out acts of intimidation and hate towards ethnic or ethno-religious minority communities and people who are visibly different" (UN Committee on the Elimination of All Forms of Racial Discrimination 2016, para. 15). This context is very relevant to the public construction of the 'foreign criminal' as it allows a seemingly uncontroversial alignment of public safety and immigration control whilst affirming the normative value of citizenship.

4.2. Acquisition of Citizenship

British citizenship can be acquired through naturalisation which broadly depends on continued residence, evidence of integration and good character (required for almost all applicants over the age of ten). The UK's liberal nationalist model requires English language competence and completion of the 'Life in the UK' test. Naturalisation is then confirmed by an official ceremony and allegiance pledge. However, both the Life in the UK test and language competence are also required for indefinite leave to remain (ILR) applications, making the distinction far less significant.

Naturalisation requires a period of five years lawful residence (reduced to three in the case of spouses) with an additional one year spent with ILR. The rules for acquiring ILR as a child are easier to satisfy but the cost of then obtaining citizenship as an adult (currently £1032), along with the requirement of good character and the Life in the UK test, may be prohibitive for those from more disadvantaged backgrounds. It is quite possible that a person who arrived as a child with their family, like many of those recently deported, believes themselves to be a British citizen. The distinction is further blurred as commonwealth citizens who are ordinarily resident are able to vote in UK elections.

Although the number of people applying for citizenship has been broadly stable for the last four years it is less than half the figure for 2013 (Home Office 2018). Thus, many people remain in the UK and never acquire formal citizenship. Kanstroom (2007) describes them as 'eternal guests'. This absence of formal status has little significance unless the individual resides overseas for more than two years (in which case they will be subject to the returning resident rule) or if they engage in criminal behaviour. For those present without permission there is a requirement of twenty years residence to obtain leave to remain which may subsequently result in an application for ILR after an additional ten years. Naturalisation is therefore a distant dream for those with periods of unauthorised residence in their immigration history.

Those with a criminal record or previous immigration problems may find that citizenship is unattainable. Here we are reminded of the intersection between criminal and immigration law, what Stumpf describes as 'crimmigration law' (Stumpf 2006). Essentially this constitutes an additional range of sanctions only applied to the non-citizen, described by Bosworth as a kind of 'double jeopardy for non-nationals' (Bosworth 2011, p. 592). Stumpf likens the government's position to that of a bouncer whereby, upon discovering Kanstroom's 'eternal guest' is not a full member, there is enormous discretion to use persuasion or force to remove them from the premises (Stumpf 2006, p. 402).

4.3. Grounding the Rights of 'Eternal Guests'

There is a great deal of academic debate exploring the foundational principles of citizenship, in particular exploring the rights of 'eternal guests' when compared with formal members. Shachar is critical of the birth-right citizenship model, noting how heredity is rejected in almost every other sphere as a legitimate basis of discrimination yet in this context it is accepted as a just basis for the

distribution of additional rights and privileges. There is, she argues, a 'democratic legitimacy gap' when rights of equivalence are denied to long term residents (Shachar 2003, p. 347; Shachar 2009). Certainly, the coupling of fundamental rights with citizenship finds no place in international human rights norms, yet, as the Brexit process illustrates very well, there is a temptation for governments to exploit the line between citizens and foreign nationals in times of crisis. It is essential that fundamental rights and basic protections are grounded in human rights stemming from our common humanity. They should not be reframed as privileges dependent on citizenship (Cole 2006, p. 2543). Nevertheless, there is an evident tension between our conceptions of universal, inalienable human rights and the bounded nature of the modern democratic state. The resident foreigner is the incarnation of this tension (Gibney 2011, p. 45).

To the extent that there is consensus within the inter-disciplinary arena of citizenship studies it occurs when scholars address the rights of permanent residents who have built their lives in the country of residence (rather than nationality) (Young 2000). Whether their membership stems from vulnerability to state coercion, their contributions in the form of duties and taxes, or established societal ties, there are few scholars arguing that permanent residents should be treated less favourably than full members.

Miller argues that it is anomalous for someone whose interests are deeply impacted by the policies and laws of a state to have no say in determining these policies (Miller 2016; Walzer 1983). Baubock's stakeholder principle calls for an alignment between the reality of people's daily existence and their level of integration into society with their legal status (Baubock 2005, p. 667). But as Gibney notes, there are unanswered questions over how such integration can be measured (Gibney 2011, p. 66). This is particularly obvious when the individual engages in criminality. Whilst they may have a certificate confirming integration, their criminal conduct suggests otherwise and bars their movement to formal membership. Scholars are notably more cautious when advocating full membership in these cases. For example, Miller appears to accept the public interest argument that offending can legitimately lead to expulsion if the national community so determine providing basic procedural rights are protected (Miller 2016, p. 108).

Whilst Miller has been criticised for his defence of the status quo (Sager 2016), there are few who defend the membership of serious or persistent offenders. In this respect, many of the arguments applying rights to long-term residents based on their assumed membership centre on the figure of the sympathetic 'good migrant' whose presence is uncontroversial. These are relatively comfortable academic positions that avoid engaging with the most contentious issues of belonging and in so doing, it is suggested, they add weight to the position that the absence of a passport makes the offender inherently more dangerous.

Jospeh Carens rejects the conditionality of membership. In *The Ethics of Immigration* Carens persuasively argues that deportation of permanent residents is morally wrong for three interrelated reasons: membership, fairness to other societies and the rights of family members (Carens 2013, p. 102). It is the first reason that is perhaps the most contentious as it is unclear at exactly what point a person becomes a member. If, for example, a person has been in prison for most of their adult life will this prevent their membership? In the case of *Akinyemi No 2*, Judge Kecik took this approach in ruling that a thirty-three-year-old man was not socially and culturally integrated because he had a string of criminal convictions. The man in question had been born in the UK and had never left. The appellant *Kiarie* found that seventeen years living in the UK (since the age of three) was insufficient evidence for the Home Office to consider him culturally and socially integrated. Thus societal ties may be relatively easily denied when the individual concerned has a history of offending.

The question remains as to how membership should be measured, with the arguments appearing circular or arbitrary. There is clearly a distinction between the membership of non-citizens born in a particular country and those who arrive as adults or come for a specific purpose such as study or work. However, the social and cultural ties argument is not particularly helpful as this depends on the sociability and resources of the individual. The worker or student may actually accumulate more

social ties than the unemployed long-term resident, yet most would argue they have a weaker case for full membership.

Birnie builds on Carens' approach but seeks to avoid the limitations arising from a membership theory based on demonstrable social ties or contributions. His domicile approach stresses the importance of place which forms the backgrounds to our relationships and attachments to the natural and built environment and the social, economic and cultural activities that take place within it (Birnie 2020, p. 378). Birnie's theory is grounded in spatial rather than societal ties and it can therefore be applied to societal outliers, such as the hermit and the offender. It is also an individual rather than membership-based right that reflects the metaphysical nature of belonging and the importance this has for human flourishing.

Moore also advances a 'moral right of residency' that comes from the occupation of a space where we develop projects and relationships and pursue our way of life to which we are typically attached (Moore 2015, p. 38). Our space is fundamental to both the preservation of our life plans and continuing projects, but it also provides a deep emotional attachment to the place and the people therein. Whilst it is possible to have this connection to more than one place, Birnie argues this is relatively unlikely:

> "After a long period of absence from the country of origin of previous domicile, someone's geographically located projects and attachments there are by definition strongly diminished" (Birnie 2020, p. 380)

Importantly Birnie and Moore's positions avoid the limitations of a more subjective social ties approach which can be used to exclude those who engage in criminality or are perceived to live an isolated life (Stiltz 2013, p. 341). The place of domicile exists prior to and independent of the political community, what Walzer describes as a 'locational right' (Walzer 1983, p. 43). Birnie is clear that non-citizens who are effectively domiciled should have the same protection against deportation as citizens in order to "protect the integrity of their geographically grounded life project, regardless of whether they choose to naturalise" (Birnie 2020, p. 383).

This position reflects the lived reality of those deemed liable for deportation. They have typically spent their formative years in the UK and established relationships with families and friends to varying degrees. They may have worked or studied here but ultimately what connects them to the UK is a less tangible sense of place and home. In such circumstances, banishment appears particularly cruel and disproportionate.

It may be countered that the extension of unconditional rights of residence to those without formal citizenship would blur an already muddied distinction and would diminish the desirability of citizenship. Carens argues that naturalisation should not be required for the protection of rights of permanent residents. The option to freely consent to naturalisation is not always available but even if it were, inaction should not be used to justify the forfeiture of such vital interests:

> "If people are to give up a fundamental right, like the right to a live in a society in which they are most deep-rooted, it must be done as a deliberate and conscious choice" (Carens 2013, p. 103)

Whilst this may suggest that there is no substantive difference between social membership and full citizenship, Carens preserves some crucial distinctions. He argues that membership rights can be lost if the non-citizen voluntarily leaves the territory to reside elsewhere. He also draws an important distinction between the civil community and the political community of citizens that would exclude permanent residents who have not taken the final step of naturalising (Carens 2013, p. 102). The latter may enjoy additional privileges such as the right to vote and stand for office and this would preserve the ultimate membership status of citizenship. Birnie also preserves a distinction between citizenship and non-deportability, arguing that naturalization would protect a person who seeks to reside outside the citizenship state, giving them a right to return, whereas a domicile predicated right would be lost if the individual chose to relocate.

5. The Legal Power of 'Banishment'

British citizens cannot be deported unless their citizenship is first revoked, a power that has been increasingly used since the introduction of the hostile environment, but which is still largely confined to cases of suspected terrorism. There is a deep hostility towards non-citizens who commit crime as they are perceived to have abused the state's hospitality (Gibney 2013, p. 218). But the hospitality argument does not adequately explain why deportation is appropriate in the case of permanent residents who have acquired indefinite leave to remain. They have no immigration restrictions on their stay and regard the UK as their home. A deportation order typically begins with a period of detention which is subject to very limited safeguards and no maximum time limit (Bosworth 2011; Shaw 2018). The order remains in force for at least ten years until it is formally revoked; during this time the deportee cannot legally return. Banishment is therefore a better description of the deportation process.

The current law relating to the deportation of foreign criminals was introduced in 2007 following a scandal concerning the unsupervised release of an estimated 1000 foreign offenders. The scandal, described by Griffiths as a 'moral panic', led to the resignation of the Labour Home Secretary and the birth of the label 'foreign criminal' (Griffiths 2017, p. 530). Bosworth observes how "New Labour championed a rhetorical convergence between crime and immigration" focussed on public protection, the impact of which can be clearly seen today as migration and crime has become conflated in public discourse (Bosworth 2011, p. 587; Gibney 2013, p. 233). The expression of moral outrage over foreign criminals is clearly attractive from a political perspective, regardless of its efficacy in controlling immigration or reducing crime (Stumpf 2006, p. 413).

5.1. The Importance of a Label

The 'foreign criminal' label results in the complex intimate histories of a life being reduced to one defining moment. A study in Jamaica found that returnees struggled with the term 'deportee' due to its connotations ("no good, dutty (dirty) criminal") which hampered their efforts to meaningfully participate in society (Headley and Milovanovic 2016).

Having been punished for their lapse of judgement, the 'foreign criminal' continues to be labelled as a threat, entering a liminal state of deportability with the ultimate sanction being expulsion, a reminder that membership for the non-citizen is always contingent on good behaviour. Sigona's interviews with undocumented migrants, demonstrate how illegality permeates every aspect of life (Sigona 2012). Yet those who become 'foreign criminals' are not undocumented and have thus far not experienced this precarity. The offence changes everything. All other aspects of that person's life are trivialised as insignificant as Lady Stern highlighted with reference to Sakchai Makao who had been in the UK since the age of ten and faced deportation following an arson conviction:

> "he was not just a foreign national offender but a sportsman, a member of a family, a worker, a taxpayer, a member of a community and a constituent whose MP was very active on his behalf" (Gibney 2013, p. 232)

The 'foreign criminal' label obscures the richness and complexities of life with Mr Makao defined solely by this lapse of judgement.

5.2. The Introduction of 'Automatic' Deportation

Section 32 of the UK Borders Act 2007 provides for automatic deportation of 'foreign criminals' which becomes effective when the individual receives a prison sentence of at least 12 months. Further, it allows the Home Secretary to specify offences that are deemed to be 'particularly serious' where any sentence can constitute grounds for deportation. Regulations that set out offences, including

criminal damage, were declared unlawful by the Court of Appeal, resulting in a rebuttable presumption of dangerousness.[8]

Prior to the automatic deportation provisions, the Home Secretary could use discretion to deport and the courts could recommend deportation when sentencing, considering factors such as the nature of the offence, history of offending and assessment of risk. This therefore demanded specific consideration of the public interest. s117C of the Nationality Immigration and Asylum Act (hereafter NIAA) establishes that deportation is in the public interest. A foreign criminal may be detained immediately following the end of their sentence and there is no automatic bail hearing. They are typically detained for longer periods than other detainees, on average over four months (Shaw 2018, para. 4.98). The absence of a time-limit, the challenges of securing legal representation (legal aid is not routinely available in immigration cases) and anxiety over the ever-present possibility of expulsion leads many to report a deterioration in their mental health (Chief Inspector of Prisons 2017; Borril and Taylor 2009). One of the foreign criminals interviewed during Lord Shaw's investigation of immigration detention had been in the UK since birth. He had committed a gang-related offence as a teenager and was awaiting deportation to Nigeria, a country that refused to accept him. He had been detained at Campsfield House for more than fourteen months at the time of the report, notwithstanding a review recommending his release. His Home Office file again stated that he was not socially or culturally integrated in the UK due to his involvement in crime (Shaw 2018, para. 4.98).

Most legal systems allow opportunities for permanent residents to acquire citizenship and state practices preventing formal inclusion, such as the German Gastarbeiter system, typically attract criticism from those keen to ensure equal protection of the law (Castles 1985). The UK along with Denmark and Ireland have not opted into the European Directive on long-term residents 2003/109 which provides enhanced protection against arbitrary expulsion for third country nationals who are resident in a member state for five years. Article 12(1) states that an expulsion decision can only be taken where there is a sufficiently serious threat to public policy or public security and Article 12(3) requires that member states shall have regard to the duration of residence, the age of the person concerned, the consequences for the person and their family and links with the country of residence or absence of ties to country of nationality. The Court of Justice has confirmed that expulsions without consideration of these factors are unlawful even in cases where a person has received a custodial sentence.[9] (European Commission 2019).

Similarly, the UK government has not opted into Directive 2008/115 on Return of illegally present third country nationals, because it does not deliver a 'sufficiently strong returns regime' and is considered to be 'overly bureaucratic' (Nokes 2019). A more obvious problem conspicuously absent from Nokes's rationale is posed by Article 15 of the directive which sets out a six-month maximum period for immigration detention. Despite extensive domestic and European criticism, successive governments have refused to place a maximum time limit on immigration detention with the result that 12% are detained for longer than the European maximum. In 2018, 54 people were detained for longer than a year (House of Commons 2019). The UK is however bound by the Citizenship Directive 2004/38 which has been implemented through the Immigration (EEA) Regulations 2016. This requires that the removal of persons on public policy grounds who are exercising their Treaty rights of free movement requires an individual and present danger to one of the fundamental interests of society.[10] The current Home Secretary, Priti Patel, has recently announced that the UK Borders Act will be applied to EU nationals and their family members once the withdrawal period ends, whilst those who have received a one year custodial sentence will be banned from entering the UK.

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[8] EN (Serbia) v Secretary of State for the Home Dept.; Secretary of State for the Home Dept. v KC (South Africa) [2009] EWCA Civ 630.

[9] Wilber López Pastuzano v Delegación del Gobierno en Navarra CJEU [2017] C-636/16.

[10] See for example R v Bouchereau CJEU [1977] C-30/77.

6. Appealing against Banishment

Specific rights of appeal against deportation are contained within Part 13 of the immigration rules on the grounds of family and private life. Since the 2014 Immigration Act, these rules have been placed on a statutory footing by virtue of by s117C NIAA 2002. S117C states clearly that the public interest requires deportation and in the case of a sentence of at least four years the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

The exceptions, which are only applied to those sentenced below four years, centre on three scenarios.

(i) A private life in the UK. This requires the appellant to demonstrate lawful residence in the UK for most of his life; social and cultural integration in the UK; **and** very significant obstacles to his integration into the country where they will be deported.
(ii) A genuine and subsisting relationship with a qualifying partner, or
(iii) A genuine and subsisting parental relationship with a qualifying child, **and** the effect of the deportation on the partner or child would be unduly harsh. The qualifying partner needs to be British or have indefinite leave to remain and the qualifying child needs to be a British citizen or have spent seven years continuously in the UK.

The effect of the statutory underpinning is to ensure that both decision-makers and the judiciary have regard to the same criteria when assessing family and private life arguments. It can be viewed as an attempt to curtail judicial interference with executive decision-making. McCloskey J, President of the Upper Tribunal's Immigration and Asylum Chamber, referred to the statutory regime as 'novel and challenging', but which should be 'construed and applied in a manner which makes it sensible, intelligible and workable'.[11]

Questions have inevitably arisen over the significance of European Court of Human Rights (hereafter 'ECtHR') jurisprudence relating to Article 8 (family and private life) when considering deportation challenges. Regrettably, there has been little consistency in the judicial approach on Article 8. In *Hesham Ali* the Supreme Court had to consider the 'very compelling circumstances' test and applied a 'balance sheet' approach, reflecting Strasbourg jurisprudence and requiring a consideration of factors that are highly relevant to the social membership theory, whilst recognising that the public interest in deportation will almost always outweigh countervailing considerations of private or family life.[12]

Of particular relevance is the ECtHR jurisprudence requiring that special consideration be given to private lives formed when the deportee was a child, even in cases of persistent criminality.[13] In *Boultif v Switzerland* the ECtHR also had regard to the time elapsed since the commission of the offence and the appellants conduct following release.[14] Where a foreign criminal has not reoffended since their release this should refute a suggestion that they remain a threat to the public. This marks a recognition that the foreign criminal is not reducible to one moment in time. The absence of these considerations in s117 is deliberate. If the goal is automatic deportation of 'foreign criminals' there is no room for nuanced assessments of public risk.

In 2017 the Court of Appeal ruled that where there are no obvious compelling circumstances, they would not have regard to ECtHR jurisprudence and there was no judicial discretion to allow an appeal on human rights grounds.[15] This may appear to be a semantic exercise as where the 'very

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[11] Treebhawon and Others (NIAA 2002 Part 5A—compelling circumstances test) [2017] UKUT 13.
[12] Hesham Ali v Secretary of State for the Home Dept. [2016] UKSC 60.
[13] Maslov v Austria App. App 1638/03 23 June 2008.
[14] Boultif v Switzerland App 54273/00 [2001] ECHR 497.
[15] NE-A Nigeria [2017] EWCA Civ 239.

compelling circumstances' test is not met it is unlikely, given the public interest, that another human rights argument would prevail. However, it does provide an indication of the conflicted role of tribunals and courts who are being directed in how to undertake their judicial function on human rights assessments.

The case of *Akinyemi v SSHD (No 2)* is comparable to many of the more contentious deportation cases.[16] It concerned an appellant with a string of serious criminal convictions. He was 33 years old and had always lived in the UK. The Court of Appeal, applying *Hesham Ali*, noted that the public interest cannot be fixed in time. If deportation is to be compatible with Article 8 it must take into account:

> "such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation"[17]

From this analysis one can perhaps be persuaded that the rights of offenders (and their families) are being fairly balanced against a carefully measured public interest, at least by the senior courts. However, few cases reach this level of judicial scrutiny and for those deported notwithstanding an arguable human rights appeal, the damage to family life is already being done.

6.1. 'Deport Now, Appeal Later'

The challenge of fighting a deportation decision is complicated by the non-suspensive appeal provisions introduced in 2014 as s.94B of the Nationality Immigration and Asylum Act 2002. The provision applies to human rights appeals and allows the Secretary of State to certify that removal would not violate s.6 of the Human Rights Act, for example because the individual would face 'serious irreversible harm'. The certification can be done after an appeal has been lodged and will then prevent the appeal from being continued while the appellant remains in the UK. It can be challenged by judicial review if notice is lodged within 5 days.

There are several issues with this approach. Underpinning all of them is a question over the appellant's safety on return. Jamaica is controversially included in the statutory list of safe countries where there is in general no serious risk of persecution (s94(4 NIAA 2002). It remains on the list notwithstanding a Supreme Court judgement in 2015 which ruled that where 10% of the population risked persecution on the grounds of their sexuality, there could not rationally be deemed to be 'no general risk of persecution'.[18] Until recently Jamaica had the highest homicide rate in the world, and it is still one of the most violent countries with a murder rate over forty times that of the UK and, according to Home Office figures, a 7% conviction rate (Home Office 2019a).

There are particular challenges faced by British deportees who lack resources and contacts to easily integrate. As Lord Shaw reported, most of those deported have no connection to Jamaica and have strong British accents making them clearly visible (Shaw 2018, para. 4.93). At least five British deportees are known to have been murdered in Jamaica since 2018 (Taylor 2019). Some of these cases relate to gang reprisals whilst others appear more random. Absent family, social and cultural ties mean it is difficult to imagine how a deportee can rebuild their lives without returning to criminal behaviour. Headley and Milovanovic (2016) suggest that deportees to the Caribbean are commonly blamed for the region's public safety troubles. This may be attributed to the US policy of deporting violent gang members to central and south America. However, it should be noted that an increase in deportations from the UK in the last twenty years often following conviction for drugs offences have contributed to

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16 Akinyemi No 2 v Secretary of State for the Home Dept. [2019] EWCA Civ 2098.
17 Akinyemi No 2 v Secretary of State for the Home Dept. [2019] EWCA Civ 2098 per Lord Kerr, para. 49.
18 R (Brown) v SSHD [2015] UKSC 8.

this association. Jamaican police have warned British expats that they face significant risks of financial crime and an 'extreme risk' of murder with at least 85 Britons, Americans and Canadians murdered between 2012 and 2018 (Halliday 2018).

Some have argued that safety considerations should be irrelevant when an offender is being deported. This is linked to the coupling of human rights with citizenship and the sense that the foreign criminal has abused their conditional membership. During the passage of the UK Borders Act David Davies MP argued that 'no country in the world be considered so dangerous that we should not deport people to it if they are persistent criminals or have committed serious crimes such as rape' (Davies 2007).

Davies also advanced a proposal that the age of liability for automatic deportation should be reduced from eighteen to sixteen (thus potentially including vulnerable children coerced into gang membership and drug dealing). Davies's arguments find favour with much of Britain's conservative media which repeatedly stress that 'foreign criminals' have forfeited their rights and are dangerous to the British way of life, whilst conveniently forgetting that they are British in almost every sense (see Drury 2020; Baker 2019).

Whilst the Home Office 2019 guidance recognises the severe pressures facing the criminal justice system in Jamaica, this receives little consideration prior to the deportation of those characterised as violent offenders who learned their craft in the UK. It will be recalled that 'fairness to other societies' was one of three reasons presented by Carens to support a moral right of membership (Carens 2013, p. 102). In his extensive review of immigration detention, Lord Shaw contests the presentation of all those deported as violent offenders, but he also goes further by questioning whether it is morally right to return any criminal whose offending follows an upbringing in the UK (Shaw 2018, para. 4.99).

6.2. The Effectiveness of an Appeal from Overseas

A second issue relates to the ability of the deportee to mount an effective appeal from overseas. This became the focus of the Supreme Court decision in *Kiarie and Byndloss* [2017] which appeared to sound the death knell for non-suspensive appeals.[19]

The appellants were from Kenya and Jamaica, respectively. Both had indefinite leave to remain and had established family lives in the UK. Mr Byndloss had a wife and four children and at least three children from other relationships in the UK. He was told that he did not have a subsisting relationship with any of his children. The Home Office rejected evidence from the prison records that his children had visited him during his incarceration. Mr. Kiarie was told that although he had been in the UK since the age of three, he was not socially and culturally integrated here and there would not be significant obstacles to his reintegration in Kenya. Their appeals against deportation following convictions for drugs offences were certified as clearly unfounded meaning that any right of substantive challenge would need to be made from overseas.

Giving the leading judgment, Lord Wilson confirmed that 'serious irreversible harm' may be caused to the individual and their family by separation, but he stressed that it could also result from an ineffective appeals process that undermines the right to appeal.[20] One of the central questions for their lordships was the extent to which an appeal from overseas could be a sufficient substitute for a UK tribunal hearing. The right to a fair trial in Article 6 of the European Convention on Human Rights does not apply to immigration proceedings as they are deemed to be administrative in nature.[21] However, it is now well-established that where the right to family and private life in Article 8 is engaged by a decision, that decision must carry with it the possibility of making an effective challenge.[22] In *Al-Nashif*

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19 Kiarie and Byndloss v Secretary of State for the Home Dept. [2017] UKSC 42.
20 Ibid., para. 39.
21 Maaouia v France App 39652/98 5th Oct 2000.
22 R Gudadaviciene v Director of Legal aid Casework [2014EWCA Civ 1622 [2015] I WLR 2247.

v Bulgaria the ECtHR ruled that the refusal of a right to appeal where deportation interfered with the applicant's family life would mean that any such interference was not 'in accordance with the law'.[23]

In considering the effectiveness of remote appeals, Lord Wilson referred to Home Office statistics which suggested that an appeal would take a minimum of five months from overseas. In his opinion, this could significantly weaken the substance of the appeal and therefore it would necessitate considerable justification.[24] Appellants with limited means may also need to make an application for exceptional case funding under s10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This requires the appellant to show that the absence of legal aid *would* breach human rights, or it *might breach them and provision of it is appropriate in all circumstances.* Even if legal representation is secured the lawyer could face 'formidable difficulties' in giving and receiving instructions both prior to and during the hearing.[25] One of the biggest issues impacting on effectiveness is the ability of an appellant to give oral evidence. Given the appellant's character is so crucial to the success of an appeal, the provision of oral evidence and response to cross-examination is likely to have considerable impact.

Given the significant issues raised over the effectiveness of overseas appeals, it is perhaps worth considering why the Home Secretary introduced the certification process. It will be recalled that the focus of the 2014 Immigration Act was to reduce the number of appeals, thereby saving costs to the taxpayer, preventing abuse, and shoring up the integrity of the returns process. The specific focus of s. 94B was to reduce the delay in the determination of the appeal but also to prevent abuse by strengthening the ties of the deportee during the appeal process (May 2013a). The public association of appeal rights with procedural abuse has been a familiar theme in the rhetoric of the 'hostile environment' (see Hyde 2020; O'Nions 2020). The vital constitutional safeguard of judicial review has been presented as an abuse of the system at a time when the number of judicial reviews has fallen by 44% (Kate and Quinn 2020). In introducing the Immigration Bill before the House of Commons May stated:

> "Secondly, we will extend the number of non-suspensive appeals so that, where there is no risk of serious and irreversible harm, **we can deport first and hear appeals later**. We will also end **the abuse of article** 8. There are some who seem to think that the right to family life should always take precedence over public interest in immigration control and when deporting foreign criminals. The Bill will make the view of Parliament on the issue very clear." (May 2013b)

s.94B represents a pyric victory where costs to the deportee, their family and the taxpayer are likely to significantly exceed the cost of the system that it replaces. The cost to the taxpayer is difficult to determine as much depends on the specific facts and deportation may follow months of detention. Recent statistics show that 24,773 people were detained in 2018 and of these around 20% were actually deported, the majority of which were EU nationals (Home Office 2019b). Thus, the number of foreign criminals deported to non-EU countries is actually comparatively small and a significant number of those detained will be released back into the community (although their deportable status will remain). We do know that for the 46 people removed on six charter flights from July to September 2019, 203 guards were used and Mitie, who provide 'escorting' services, have a 10-year contract with the Home Office worth £525 million (Mitie 2017).

If the individual decides to purse their right to challenge their deportation, there will be more appeals and judicial reviews following the judgement in *Kiarie*. If the Tribunal concludes that the appellant needs to be in the UK to make an effective challenge, proceedings should be adjourned so that the appellant can return.

Given the complexity of the legal position and the costs associated with a protracted legal process, it is difficult to understand why the Government has maintained its position on non-suspensive

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[23] Al Nashif v Bulgaria [2003] 36 EHRR 123.
[24] Kiarie and Byndloss v Secretary of State for the Home Dept. [2017] UKSC 42. para. 58.
[25] Ibid., para. 60.

appeals. The answer may perhaps be explained by its dramatic impact on the number of appeals. In the eighteen months following its introduction the Home Secretary issued 1175 certificates pursuant to s. 94B in relation to foreign criminals, all, therefore, with arguable appeals. Of those the vast majority were deported in advance of their appeals but only 72 had filed notice of appeal with the tribunal from abroad. Not one of the 72 appeals had succeeded.[26] Given the badging of appeals as an 'abuse' of the system, one is led to conclude that this was more than an unforeseen consequence.

6.3. The Substance of Appeals

Whilst there are serious doubts concerning an appellant's ability to present a challenge from overseas, it must also be reiterated that certification implies that all those deported have arguable human rights cases.

The approach of Judge Kecik in *Akinyemi No2* illustrates the challenges faced by a deportee in demonstrating a private life in the UK when they have a history of offending. Yet if they are not deemed 'socially and culturally integrated' in the UK, it has to be concluded that they are not integrated anywhere. The relevance of offending to the degree of integration is problematic as the crime effectively becomes double-weighted. Whilst is clearly relevant to the strength of the public interest it now becomes relevant to the strength of the individuals' rights to a private life. Further, to conclude that criminality prevents social and cultural integration implies that British citizens, whose integration is a given, do not commit crimes; evidently a nonsensical conclusion.

There can be no doubt that the continued separation of families (including time spent in detention) will impact on a subsisting family life. But s55 Borders, Citizenship and Immigration Act 2009 gives effect to Article 3(1) UN Convention on the Rights of the Child by establishing that the child's best interests are a primary consideration in immigration cases. Applying this principle, cases such as *ZH Tanzania* [2011] have found that a mother's 'appalling immigration history' can be trumped by the best interests of her British citizen children. In the leading judgement, Baroness Hale emphasised that a child should not be blamed for the actions of her parents. In *Zambran*o the Court of Justice ruled that children who are citizens of member states have complementary Union citizenship which can prevent removal of an illegally present parent.[27] If removal of the parent would result in the child being compelled to leave the member state, the action will be unlawful.[28]

But the impact of the child's best interests in deportation cases is not so straightforward. The Supreme Court have reiterated that 'a' primary consideration does not elevate the child's best interests above all other considerations.[29] *ZH* is a removal rather than deportation case, so the public interest in expelling the parent is weaker as it centres on maintaining immigration control rather than public protection. The commission of a criminal offence strengthens the public interest considerably and the child's best interests may more easily be outweighed. The UK court have also reduced the impact of the child's interests when they are not British citizens (notwithstanding the absence of a citizenship requirement in the Article 3 of the Convention on the Rights of the Child). In *Zoumbas* the facts were comparable to *ZH* save for the absence of British citizenship.[30] The Supreme Court ruled that the parents with their three children could be removed to the Republic of Congo in the interest of maintaining effective immigration control.

For those with an established family life, the immigration status of their partner and children will therefore be relevant as is the need to demonstrate a subsisting relationship. This can be difficult if the appellant has spent time in prison and immigration detention. The impact on the family member

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[26] Kiarie, para. 77.
[27] Zambrano (Gerardo Ruiz) v Office national de l'emploi CJEU [2011] C-34/09.
[28] Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others CJEU [2017] C-133/15; Patel, Shah & Bourouisa v Secretary of State for Home Dept. EWCA Civ 2028 [2017].
[29] ZH Tanzania v Secretary of State for the Home Dept. [2011] UKSC 4.
[30] Zoumbas v Secretary of State for the Home Dept. [2013] UKSC 74.

is assessed using the 'unduly harsh' test in the immigration rules. The Home Office defines unduly, according to the Oxford dictionary definition as 'excessively' and 'harsh' as 'severe or cruel' (Home Office 2019c). The guidance cites with approval the Supreme Court ruling in *KO Nigeria* that the 'unduly harsh' test is a high one, 'going beyond what would necessarily be involved for any child faced with the deportation of a parent'.[31] Authoritative guidance from the Upper Tribunal states that 'harsh' "denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."[32] If the child is not compelled to leave with the deported parent and has a good relationship with their other parent in the UK it will be particularly difficult to make this argument.

Cases, such as that of Mr Byndloss suggest that the Home Office may be routinely dismissing evidence of family life by placing an impossibly high threshold to determine that the relationship is 'subsisting.' This will become increasingly problematic when the family is separated by the non-suspensive appeal. When balanced against the public interest as defined in s117C NIAA there would seem to be very little opportunity for a foreign criminal to assert their fundamental rights before they are irrevocably damaged.

7. Conclusions

Detention and expulsion are not simply administrative acts to exclude undesirable immigrants. In the case of established residents, the 'domicile principle' should be applied such that removal is a disproportionate act constituting an additional punishment which is typically harsher than any imposed by the criminal justice system. This sentiment was captured by Justice Douglas in the US case of *Harisiades v Shaughnessy* in 1952:

> "If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair" (1952 cited by Schuck 2000, p. 67)

In his leading judgement in *Kiarie*, Lord Wilson acknowledged that the impact of removal on established family ties would 'probably be significantly more damaging than that of his prior incarceration here'.[33]

Liability to deportation leaves the 'foreign criminal' trapped in a state of perpetual quasi membership that can be withdrawn at any time. This should be conceptualized as a form of state tyranny (Walzer 1983, p. 62; Bosniak 2006; Carens 2013). The process of surveillance, further incarceration and deportation constitutes a substantial and enduring interference with the right to the private and family life of the deportee and their family members. The opportunity to rehabilitate and reintegrate following release from prison is not available to the 'foreign criminal' whose precarious status is confirmed from the point of first encounter with the police.

Prevailing human rights norms are decoupled from nationality and they should be sufficiently robust to defend the interests of all those subject to the state's jurisdiction. Yet, the margin of appreciation in the Strasbourg court has translated as judicial deference when it comes to public protection. Both decision-makers and courts appear reluctant to fully engage with the proportionality of deportation when the deportee is a 'foreign criminal' whose very existence is unequivocally presented as a threat to the public. Their family and private lives are devalued in the decision to deport and then purposefully undermined through a non-suspensive appeal process. Yet foreign criminals, their families and friends are also members of the public whose interests require protection by the state. The blanket public interest justification raises real ethical issues, obscuring the interwoven complexities of individual circumstances and personal histories, of lives made in Britain.

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[31] KO (Nigeria) v Secretary of State for the Home Dept. [2018] UKSC 53.
[32] MK (Sierra Leone) v Secretary of State for the Home Dept. [2015] UKUT 223 (IAC), [2015] INLR 563.
[33] Kiarie, para. 58.

Those who have lawfully situated their lives in a state and thereafter established their home should be regarded as unconditional members of civil society. As such they should be immune from punitive 'crimmigration' measures. At present these measures are imposed as soon as the 'foreign criminal' completes their sentence. Release from prison starts a process of surveillance with the ever-present prospect of detention and expulsion, during which time migrants and their families "live in limbo where their lives are unsettled, ungrounded and uncertain" (Hasselberg 2015, p. 566). As recent cases illustrate, a short prison sentence is never spent for the 'foreign criminal' who may be detained pending deportation several years after release.

Once removed the 'foreign criminal' will struggle to access support networks and is likely to be viewed with hostility and suspicion in an unfamiliar, dangerous environment. In such cases, as Lord Shaw recognises, the deportee has little alternative but to return to a life of criminality (Shaw 2018, para. 4.95). This places an additional burden on the resources of the country of nationality. To the extent that any country is responsible for the conditions that contributed to the deportee's criminality it must surely be the country where they have spent their formative years.

In these circumstances, as Carens has argued, expulsion must be viewed as morally wrong from the perspective of membership, fairness to other societies and the rights of family members (Carens 2013, p. 102). It is also legally wrong for two principle reasons. Firstly, as critical assessments on individual circumstances and risk are side-lined in favour of blanket 'public interest' justifications. Independent judicial scrutiny of decision-making is undermined through strong statutory language in s117C NIAA that does not adequately reflect the jurisprudence of the ECtHR. Secondly, the ability to argue effectively against expulsion on human rights grounds has been deliberately eroded in such a way that it undermines constitutional protections.

Whilst there is unlikely to be significant public or political support for extending the rights of permanent residents to a position of near equivalence, much of the response depends on how these issues are represented. Following the Windrush scandal some of Britain's most anti-immigration newspapers recognised the injustice and highlighted many individual stories of hardship. The public comments on these stories are revealing. There is widespread sympathy centred around the Britishness of the Windrush victims, described in comments as 'one of our own' and 'citizens in all but name' (Tapsfield and Drury 2018). This suggests that the abolition of the hostile environment and its demonisation of all migrants and ethnic minorities is critical to a fairer model of membership that respects the fundamental rights of the whole community.

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Article

Human Rights of Children in the Context of Migration Processes. Innovative Efforts for Integrating Regional Human Rights Standards in the Americas

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Abstract: This paper proposes a critical analysis of the innovative jurisprudential approaches taken by the Inter-American Court of Human Rights in integrating the content and scope of protection of the human rights of children, in the context of migration processes. How might one provide an effective protection to unaccompanied children that enter irregularly into the territory of a given country, when the safeguards guaranteed at the national level are elusive or inefficient? By focusing on the pioneering jurisprudence developed by the Inter-American Court of Human Rights in recent years, this paper intends to unveil how a systemic integration of children's rights, under the light of the current international law developments, could provide an effective protection for the rights of children in the context of migration processes. In fact, as a result of an evolutive, dynamic and effective interpretation, the regional tribunal has expanded the scope of protection of the American Convention on Human Rights, by taking into consideration and making known, references to instruments and provisions enshrined within the corpus juris of international human rights law, such as the UN Convention of the Rights of the Child, and—consequently—improving the level of protection of millions of children in the Americas.

Keywords: human rights; Inter-American Court of Human Rights; judicial interpretation; child rights; best interest principle; migration; systemic integration; international law; corpus juris

1. Introduction

The critical situation of migrant children in the Americas has deteriorated dramatically in recent years, to the point where children are nowadays affected by continuous violations of many of their fundamental rights; including—among others—the right to life, education, family life, health, access to justice, and the right to be heard.[1] In this context, the migration of children assumes a regional dimension that goes beyond the different national realities, equally affecting children in their countries of origin, transit and destination (CGRS 2015, p. 8).

This phenomenon has generated an increasing amount of children seeking asylum in the Americas.[2] In addition, it has situated child migrants in a particular situation of vulnerability, which has not yet

[1] For an overview of the situation of migrant children in the Americas, see—among others—Inter-American Commission of Human Rights (IACHR 2015a, 2015b).
[2] See (UN High Commissioner for Refugees (UNHCR) 2014).

been fully and effectively assessed at national or regional levels in the Americas.[3] The lack of national responses has paved the way for the emergence and development of a regional jurisprudence by the Inter-American Court of Human Rights (IACrtHR, the court or the Inter-American Court).[4] As a result, the regional tribunal has played a fundamental role in the recognition of the rights of children seeking asylum in the Americas, by means of developing their rights under the light of the *systemic* integration of International Human Rights Law (IHRL).[5]

In other words, by applying an *evolutive*, *dynamic* and *effective* interpretation of the American Convention on Human Rights (ACHR, the convention or the American Convention),[6] the court has interpreted its provisions under the light of all other universal or regional instruments that would be legally relevant and substantially connected with a specific case, in order to provide the most effective protection to migrant children in situation of vulnerability in the Americas. This innovative method of interpretation has not only expanded the scope of protection of children's rights, as recognized within the ACHR, but also generated a new legal narrative based on the 'humanization' of international law (Cançado Trindade 2013), and focused on children's needs and their situation of vulnerability as, for instance, the unaccompanied child (pro-homine principle).[7]

In fact, the regional tribunal has interpreted migration norms as an integral part of the human rights regime; that is, as a body of norms that not only contains provisions that directly address and provide entitlements to individuals but also that it has contributed to the further development and 'humanization' of the international human rights corpus juris for the protection of children's rights. In other words, the IACrtHR has developed a de-fragmentized and integrative approach toward IHRL, making—for instance—explicit references to various provisions of the UN Convention on the Rights of the Child (CRC) while examining the content and scope of Article 19 ACHR,[8] aiming at enhancing the level of protection of millions of migrant children in the Americas and expanding states' positive obligations in relation to them.

Hence, this paper proposes a critical analysis of the jurisprudence developed by the Inter-American Court, focusing in particular, on the method of interpretation used by this regional tribunal that paved the way for the *systemic* integration of children's rights under international law. In addition, special emphasis is given to the manner in which the court has interpreted and further developed the corpus juris for the effective protection and concrete implementation of children's rights.

2. Interpretation and Integration of IHRL in the Jurisprudence of the Inter-American Court

The Inter-American Court applies in its interpretation of the American Convention, both the traditional or general methods of interpretation in international law and specific human rights-related rules of interpretation, which have been developed throughout the case law of the regional tribunal (Fuentes 2016).

As traditional methods of interpretation based on international law, the court applies general and supplementary rules of interpretation, in accordance with the provisions enshrined in Articles 31[9] and

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3 Ibid. See also (IACHR 2010, 2013a).

4 The Inter-American Court of Human Rights was created on 18 July 1978 by the entering into force of the American Convention on Human Rights (1969), as an autonomous judicial institution with the purpose of the interpretation and application of the American Convention.

5 E.g., *Pacheco Tineo Family v. Plurinational State of Bolivia*, 25 November 2013, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 272.

6 The American Convention on Human Rights was adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

7 See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, IACrtHR, Advisory Opinion OC-21/14, Series A No. 21.

8 Article 19 ACHR (rights of the child) states that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

9 Article 31 VCLT states—in its first paragraph—that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

32[10] of the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT).[11] Hence, the first guidance in the interpretation of the American Convention is—in light of Article 31 VCLT—its own *object* and *purpose*, which in the case of the ACHR-as a human rights treaty—is "the protection of the fundamental rights of the human being."[12] Moreover, in the understanding of the IACrtHR, focusing on the object and purpose of the convention "respects the principle of the primacy of the text; that is, the application of the objective criteria of interpretation."[13]

Additionally, as indicated by the constant jurisprudence of the IACrtHR, it is important to highlight that the terms of an international human rights treaty have an autonomous and independent meaning,[14] whose content is informed not only by the object and purpose of the same instrument, but also "interpreted by reference to their normative environment" in which the convention is integrated (Koskenniemi 2006, p. 209). Consequently, the scope of protection of conventional rights cannot be limited neither reduced in their interpretation by the existence of different legal definitions or notions within the domestic legal systems of state parties. To put it clear, the scope of protection of conventional rights refers to autonomous notions and institutions that are not conditioned neither limited by national legal systems.

Furthermore, together with the above-mentioned general method of interpretation, it is important to notice that the court also applies supplementary means of interpretation—as enshrined in Article 32 VCLT—in a subsidiary manner.[15] For instance, in the views of the IACrtHR, the interpreter could make references to the preparatory work of a treaty in those cases in which is needed "to confirm the meaning resulting from that interpretation or when it leaves an ambiguous or obscure meaning, or leads to a result which is manifestly absurd or unreasonable."[16] In this context, it is relevant to bear in mind that the supplementary means of interpretation cannot be used in a way that would considerably contravene the object and purpose of the convention. In fact, the interpreter should keep in mind that the inherent purpose of all treaties "is to be effective,"[17] which in the case of human rights treaties means that their interpretation should be guided by the *teleological* purpose of delivering the effective protection of the human rights of individuals, together with "the creation of a legal order in which states assume obligations [...] towards the individuals subject to their jurisdiction."[18] Therefore, the interpretation of the ACHR has to be done "in such a way that the system for the protection of human rights has all its appropriate effects (effet utile)."[19] Based on this hermeneutical approach, the rights enshrined in the American Convention must not be interpreted in a sense that would reduce, restrict or limit their scope of protection in a way that could—consequently—substantially affect the object and purpose of this regional human rights treaty.[20]

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10 Article 32 VCLT recognizes the possibility to recourse to supplementary means of interpretation, such as "the preparatory work of the treaty and the circumstances of its conclusion."

11 The Vienna Convention on the Law of Treaties was adopted on 23 May 1969 and entered into force on 27 January 1980.

12 *Rights and Guarantees of Children*, *supra* note 7, para. 31.

13 *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, 8 September 1983, IACrtHR, Advisory Opinion OC-3/83, Series A No. 3, para. 50.

14 *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, IACrtHR, Merits, Reparations and Costs, Series C No. 79, para. 146.

15 See *Case of González et al. ("Cotton field") v. Mexico*, 16 November 2009, IACrtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 205, para. 68.

16 *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, *supra* note 13, para. 49.

17 *Case of González et al. ("Cotton field")*, *supra* note 15, para. 65.

18 Ibid, para. 62.

19 *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, 1 October 1999, IACrtHR, Advisory Opinion OC—16/99, Series A No. 16, para. 58.

20 According to the court, "[T]he efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties." *Case of the Constitutional Court* v. *Peru*, 24 September 1999, IACrtHR, Competence, Series C No. 55, para. 36.

The above interpretation is reinforced by the provisions enshrined in Article 29 ACHR,[21] which delineate the so-called principle of a *non-restrictive* interpretation (Comune and Luterstein 2012; Lixinski 2010). In fact, this provision precludes any restrictive interpretation of the rights and freedoms recognized in the convention through domestic legislation or other conventional obligations assumed by states Parties of the ACHR.[22]

In addition to this non-restrictive hermeneutical approach, the regional tribunal has further developed the conventional mandate to guarantee an effective protection of fundamental rights, by means of introducing a *contextual*, *historical* and *evolutive* interpretation of those rights. That is, an interpretation that could take into consideration all circumstances and contextual factors of the specific case under analysis.[23] To put it differently, if the interpretation does not take into consideration the evolution of the social institutions, legal systems and socio-cultural transformations that continually occur in our societies, it would be unable to provide an *effective* protection of the fundamental rights at stake in a given case. In fact, "human rights treaties are living instruments, the interpretation of which must evolve with the times and current living conditions."[24] Based on this consideration, the Inter-American Court has clearly stated in its constant jurisprudence that in matters of interpretation, it "must adopt the proper approach to consider [the scope of protection of a given right] in the context of the evolution of the fundamental rights of the human person in contemporary international law."[25]

2.1. Systemic Integration of the Corpus Juris of IHRL

As concluded above, the evolutive interpretation of the American Convention imposes the obligation to interpret the extension and scope of protection of conventional rights under the "present-day conditions,"[26] that is, paying due attention to the societal context in which the case has emerged. Therefore, in addition to the evolution that takes place in society, the interpreter needs to situate that interpretation in the context of the evolution of the legal system of reference or to whichever the American Convention is part of.

In other words, in order to interpret the extension of the scope of protection of a given right under the "current present day conditions," the interpreter must also consider all other instruments and agreements directly related to the American Convention (Article 31(2)(a)(b) VCLT), together with "any relevant rules of international law applicable in the relations between the parties" (Article 31(3)(c) VCLT). These provisions introduced the principle of *systemic* integration of international law (Mc Lachlan 2005; Koskenniemi 2006; Rachovitsa 2017) by which "norms should be interpreted as part of a whole, the meaning and scope of which must be defined based on the legal system to which they belong."[27] To put it clearly, "The interpretation of a treaty should take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also its

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[21] Article 29 ACHR (Restrictions Regarding Interpretation) reads as follows: "No provision of this Convention shall be interpreted as: (a) permitting any state party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any state party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; (d) … "

[22] In this sense, the court has stressed that: "Any interpretation of the Convention that […] would imply suppression of the exercise of the rights and freedoms recognized in the Convention, would be contrary to its object and purpose as a human rights treaty." *Ivcher Bronstein* v. *Peru*, 24 September 1999, IACrtHR, Competence, Series C No. 54, para. 41.

[23] See *Case of Yatama* v. *Nicaragua*, 23 June 2005, IACrtHR, Concurring Opinion of Judge Sergio Garcia-Ramirez, para. 7.

[24] *The Right to Information on Consular Assistance*, *supra* note 19, para. 114. See also *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, 28 November 2012, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 257, para. 245.

[25] *The Right to Information on Consular Assistance*, *supra* note 19, para. 115.

[26] Ibid, para. 114. See also *Case of the Gomez Paquiyauri Brothers v. Peru*, 8 July 2004, IACrtHR, Merits, Reparations and Costs, Series A No. 18, para. 165.

[27] *González et al ("Cotton field"), supra* note 15, para. 43.

context (Article 31(3)),"[28] which in the case of the American Convention—as a human rights treaty—is the "international human rights law."[29]

Therefore, when applying a *systemic* interpretation, the regional tribunal does not limit itself to the provisions contained within the American Convention (e.g., by exploring the interconnection or interrelation between relevant rights), but would rather contemplate all other regional or universal human rights instruments that could assist and provide guidelines on its hermeneutical efforts to determine the specific level of protection afforded by the ACHR in a given case.[30] The relevance of the *systemic* interpretation in international law has been highlighted by the International Court of Justice (ICJ) since it celebrated obiter dictum in the *Namibia* case, when sentenced that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[31]

However, it is noteworthy to mention that the principle of a *systemic* interpretation or integration of international human rights law does not provide the court with the possibility to resolve a specific case through the *direct* application of a different instrument than the ACHR.[32] Only violations to rights enshrined in the ACHR, or within other treaties that explicitly or implicitly recognize the competence of the court, will open the jurisdiction of the regional tribunal.[33] Accordingly, through the implementation of this principle, the court has been able to make references to other relevant instruments—part of the corpus juris of international human rights law—which provisions are capable to pave the way for the development of an evolutive, contextual and non-restrictive understanding of the rights recognized within the American Convention.[34]

In short, the court does nothing but apply the American Convention, interpreted under the light of the corpus juris of international human rights law. As mentioned by the IACrtHR,

> "The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between states and the human beings within their respective jurisdictions. This court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law."[35]

The importance of the corpus juris has been stressed by the former president of the Inter-American Court, Judge Cançado Trindade (currently serving as a judge at the ICJ), by manifesting that states are "bound by the corpus juris of the international protection of human rights, which protects every human person erga omnes, independently of her statute of citizenship, or of migration, or any other condition or circumstance."[36]

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28 *The Right to Information on Consular Assistance, supra* note 19, para. 113.

29 *Artavia Murillo, supra* note 24, para. 191.

30 In this sense, the court has declared that it could "address the interpretation of a treaty provided it is directly related to the protection of human rights in a member state of the Inter-American System," even if that instrument does not belong to the same regional system of protection. *Kitchwa Indigenous People of Sarayaku* v. *Ecuador*, 27 June 2012, IACrtHR, Merits and Reparations, Series C No. 245, para. 161.

31 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276* (1970), 21 June 1971, ICJ, Advisory Opinion, *I.C.J. Reports 1971*, p. 19.

32 In connection with the direct inapplicability of international instruments outside of the Inter-American System, see, e.g., "*Street Children" (Villagran Morales et al) v. Guatemala*, 19 November 1999, IACrtHR, Merits, Series C No. 32 paras. 192–95.

33 For an enumerative list of the treaties that—within the Inter-American System—have recognized the competence of the Commission, and the Court, for the reception of the individual complains, see Article 23 of the Rule of Procedure of the Inter-American Commission on Human Rights.

34 See *Sarayaku v. Ecuador*, *supra* note 30, para. 161. For further readings, see (Haeck et al. 2015).

35 *The Right to Information on Consular Assistance, supra* note 19, para. 115. See also *Rights and Guarantees of Children, supra* note 7, para. 60.

36 *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, IACrtHR, Advisory Opinion OC-18/03, Series A No. 18, Concurring Opinion of Judge Cançado, para. 85.

Furthermore, it is important to highlight that the *systemic* integration of the corpus juris of international human rights law does not only strengthen the coherency and reduce the fragmentation of international law's responses to human rights related cases, but also provides enhanced tools for the protection of persons or groups in situations of vulnerability. It is in this interpretative framework—for instance—that the court has acknowledged that migrant children find themselves "in a special condition of vulnerability."[37]

2.2. The Relevance of the Pro-Homine Principle and the Effective Protection of Rights

As a result of the hermeneutical focus on the object and purpose of a human rights treaty, the effective protection of human rights becomes intimately connected to the pro homine principle, also referred to as the pro persona principle (Medina Quiroga 2009; Miranda Bonilla 2015). In other words, human rights treaties need to be interpreted "in accordance with the canons and practice of International Law in general, and with International Human Rights Law, specifically, and [in a way] which awards the greatest degree of protection to the human beings under its guardianship."[38]

The American Convention does not constitute an exception to this principle. In fact, according to the regional tribunal:

> "[T]he American Convention expressly establishes specific standards of interpretation in its Article 29, which includes the pro persona principle, which means that no provision of the convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any state party or by virtue of another convention to which one of the said states is a party, or excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[39]

Hence, the pro persona principle constitutes an essential interpretative tool, which—combined with the *evolutionary* and *systemic* interpretation of the court—enlarges human rights' protection. Consequently, the *systemic* integration of international law applied by the court could not only result in the expansion of the human rights' protection in a specific case, but also on the prioritization and centrality of the individual's fate in the process of interpretation (De Oliveira Mazzuoli and Ribeiro 2016).

Among different groups in situations of vulnerability, the individual fate of children requires a special attention and enhanced levels of guarantees from state authorities.[40] The IACrtHR has not exempted itself from this responsibility. On the contrary, following the hermeneutical guidelines of the pro-persona principle, it has developed a case law aimed at strengthening the conventional protection of children's rights. Unveiling the interpretative paths taken by the regional tribunal in cases related to children's rights will be the subsequent focus of this paper. In fact, children's extreme vulnerability justifies additional hermeneutical efforts in order to support the development of more adequate and effective legal solutions able to match their quest for justice in the Americas.

3. Systemic Integration of IHRL in the Case of Children's Rights

Under the American Convention, children's rights are explicitly mentioned in Article 19, which establishes the right of every child to "measures of protection required by his condition as a minor on the part of his family, society, and the state." In the eyes of the IACrtHR, this provision "should respond to the new circumstances in which it will be projected and one that addresses the needs of the

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37 *Rights and Guarantees of Children*, *supra* note 7, para. 155.
38 *Case of Benjamin et al. v. Trinidad and Tobago*, 1 September 2001, IACrtHR, Preliminary Objections, Series C. No. 81, para. 70. See also (Pasqualucci 2013).
39 *Rights and Guarantees of Children*, *supra* note 7, para. 54.
40 See (IACHR 2011, 2013b, 2017).

child as a true legal person, and not just as an object of protection,"[41] taking into consideration "the changes over time and present-day conditions."[42]

Since its first judgement regarding the application of Article 19 ACHR, in the case of the "*Street Children" (Villagran-Morales et al.) v. Guatemala*,[43] the IACrtHR has built an interpretative framework able to deliver an effective protection of children's rights, based on the *evolutive* and *systemic* interpretation of the provisions contained in the above-mentioned norm. In particular, the court has systemically reinforced and integrated the international protection to children's rights by reaffirming the hermeneutical principle that "when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration (Article 31.2 of the Vienna Convention), but also the system within which it is (inscribed) (Article 31.3)."[44]

Following this judgment, the court has elaborated in recent years, a landmark jurisprudence on children's rights based on the expansive and non-restrictive interpretation of Article 19 ACHR. Indeed, as a result of this systemic approach, the court has made references to the interrelations that Article 19 ACHR has with other relevant provisions of ACHR (*internal* integration), but also to other relevant documents and instruments that integrate the corpus juris of IHRL (*external* integration).

For instance, by means of an *internal* integration, the court took into consideration other interconnected and interrelated provisions of the American Convention, such as the right to life (Article 4), the right to humane treatment (Article 5), the right to fair trial (Article 8) and judicial protection (Article 25) (Feria Tinta 2008). Therefore, by interpreting the scope of protection of Article 19 ACHR in connection with other provisions enshrined within the American Convention, the court has enhanced the protection of the rights of children by means of an *internal* systemic integration of this regional instrument, based on the interconnection and interrelation between conventionally protected rights (Feria Tinta 2007).

In addition to the above-mentioned *internal* integration of the convention, the regional tribunal has further reinforced children's rights protection by means of an *external* integration of the later instrument, under the light of the relevant instruments that are an integrative part of the corpus juris of international human rights law. In particular, the court was able to identify and provide content to the corresponding states' obligations for the protection of children's rights, within the normative framework of the American Convention, by means of reading Article 19 ACHR under the light of the fundamental principles enshrined in the CRC. For instance, the court has acknowledged on several occasions, the relevance of the principle of the best interest of the child—as respected by the CRC[45] under a wide array of different factual situations that put the ACHR in contact with other relevant instruments part of the corpus juris of international human rights law, such as in the contexts of armed conflicts,[46] forced disappearances[47] and migration.[48] Hence, we can do nothing but conclude that the IACrtHR has further developed the protection of children's rights afforded by the ACHR under the interpretative guidelines provided by its systemic interconnection and interrelation with other instruments that integrate the same international normative system.[49]

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41 *Juridical Condition and Human Rights of the Child*, 28 August 2002, IACrtHR, Advisory Opinion OC-17/02, Series A No. 17, para. 28.

42 Ibid, para. 21.

43 *"Street Children" (Villagran Morales et al) v. Guatemala*, 19 November 1999, IACrtHR, Merits, Series C No. 32.

44 Ibid, para. 192.

45 E.g., *Gomez-Paquiyauri Brothers v. Peru, supra* note 26, para 163.

46 See—among others—*Case of Vargas Areco v. Paraguay*, 26 September 2006, IACrtHR, Merits, Reparations and Costs, Series C No.155 and *Case of Santo Domingo Massacre v. Colombia*, 30 November 2012, IACrtHR, Preliminary Objections, Merits and Reparations, Series C No. 250.

47 See *Case of Gelman v. Uruguay*, 24 February 2011, IACrtHR, Merits and Reparations, Series C No. 215.

48 See, e.g., *Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5 and *Case of the Expelled Dominicans and Haitians v. Dominican Republic*, 28 August 2014, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 282.

49 In the words of the court: "Article 19 of the convention, in addition to granting special protection to the rights recognized therein, establishes a state obligation to respect and ensure the rights recognized to children in other applicable international instruments." *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5, para. 219.

A clear example of this systemic approach can be found in the above-mentioned "*Street Children*" case, where the court made its first interpretative references to the Convention on the Rights of the Child. In this case, the court highlighted a number of provisions of the CRC that should be taken into consideration for the determination of the "measures of protection" referred by Article 19 ACHR. Among these provisions, the regional tribunal has identified—for instance—the importance of the non-discrimination principle; the special assistance for children deprived of their family environment; the guarantee of survival and development of the child; the right to an adequate standard of living and the social rehabilitation of all children who are abandoned or exploited.[50]

In addition to its contentious jurisdiction, the court has also resorted to systemic references in one of its most influential advisory opinions; that is, the *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)*.[51] In this obiter dictum, the court identified a list of provisions of the CRC that should be taken into consideration as reference points for states when ensuring the effective realization of all rights of children. Among these provisions, the court has highlighted the specific importance of Article 3 (best interests of the child); Article 9 (separation from parents); Article 18 (parental responsibilities and state assistance); Article 20 (children deprived of family environment); Article 21 (adoption); Article 37 (detention and punishment); and Article 40 (juvenile justice).[52]

As an additional development of this jurisprudential approach, it would be important to mention the *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration an/or in Need of International Protection (2014)*.[53] Under the light of the fundamental principles of the CRC, the court has identified several obligations that states should comply with in order to achieve a "system of comprehensive protection" of children rights under Article 19 of ACHR.[54]

Therefore, in order to better understand the systemic integration of the regional standards for the protection of the rights of children, it becomes necessary to critically analyze the hermeneutical steps taken by the court when referring to the relevance of universal, regional and domestic norms—with binding or non-binding characters—under its conventional mandate (Tigroudja 2013, p. 466). In this regard, special attention will be given in the following section to the praetorian development of the notion of the corpus juris of international human rights law for the protection of children's rights.[55]

3.1. The Corpus Juris for the Protection of Children's Rights

As introduced in the previous sections, through the *systemic* integration of international law, the court drew interpretative inspiration and—to certain extent—applied other instruments that are part of the corpus juris of international human rights law while interpreting the scope of protection of conventionally recognized children's rights. And, even most importantly, by doing so the court has expressly acknowledged the existence of an international corpus juris for the protection of children's rights.[56]

Since the adoption of the "*Street Children*" case, the Inter-American Court has recognized that both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the rights of the child, which helps to

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50 "*Street Children*" *(Villagran Morales et al) v. Guatemala, supra* note 32, para. 196.
51 *Juridical Condition and Human Rights of the Child*, 28 August 2002, IACrtHR, Advisory Opinion OC-17/02, Series A No. 17.
52 Ibid, para. 59.
53 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, IACrtHR, Advisory Opinion OC-21/14, Series A No. 21. For further studies on this advisory opinion see—among others—(Arlettaz 2016).
54 *Rights and Guarantees of Children, supra* note 53, para. 69.
55 For an in deep study in this matter, see—for example—(Nola and Kilkelly 2016; Aguilar Cavallo 2008).
56 See, e.g., *Case of Forneron and daughter v. Argentina*, 27 April 2012, IACrtHR, Merits, Reparations and Costs, Series C No. 242, para. 44.

determine and further clarify "the content and scope of the general provision established in Article 19 of the American Convention."[57] As stated by the regional tribunal:

> "[T]he Court has repeatedly stressed the existence of a very comprehensive corpus juris of international law on the protection of the rights of the child, which the court must use as a source of law to establish 'the content and scope' of the obligations that states have assumed under Article 19 of the American Convention with regard to children; particularly, by specifying the 'measures of protection' to which this article refers."[58]

Further, while referring to the corpus juris of international law on the protection of the rights of the child, the court has highlighted that CRC is the most universally ratified treaty, reflecting in this way "a broad international consensus (opinio iuris comunis) favorable to the principles and institutions protected by this instrument."[59] In this regard, "the principles and rights recognized therein undoubtedly contribute decisively to establishing the scope of the American Convention when the individual entitled to the rights is a child."[60]

In fact, the relevance of the CRC in the integration of the child related provisions of the ACHR emerges, as evident from the case law of the court. However, the CRC is not the only instrument used by the regional tribunal in its systemic integration of the corpus juris of children's rights.[61] For instance, in the context of children and migration, the relevance of the 1951 Refugee Convention[62] and its 1967 Protocol,[63] together with the regional definition of refugee of the Cartagena Declaration,[64] have been highlighted by the court as integrative part of the international corpus juris.[65]

In addition, and even more importantly in the context of this paper, the *systemic* interpretation of Article 19 ACHR has paved the way for the identification and further clarification of the specific obligations that states have in relation to children and their families within migration processes (Dembour 2015; Beduschi 2018). To put it differently, the integration of the American Convention under the light of the provisions contained within the corpus juris for the protection of children's rights, was the hermeneutical tool that allowed the court to identify and further develop concrete procedural and substantive safeguards centered on delivering the most effective protection of the rights of children involved in a given case (effet utile).[66]

3.2. States' Main Obligations for the Effective Protection of Children's Rights

Under the normative framework of the American Convention, member states have not only assumed general obligations to respect, protect and fulfil conventionally recognized rights,[67] but also specific obligations regarding children's rights aiming at enhancing the effective protection of their rights.[68] Regarding the former, the first obligation that states assume under the convention is to respect

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57 See *Case of the "Street Children," supra* note 32, para. 194 and *Juridical Condition and Human Rights of the Child*, *supra* note 51, para. 24.
58 *Rights and Guarantees of Children*, *supra* note 7, para. 57.
59 Ibid.
60 Ibid.
61 See (IACHR 2008).
62 Convention Relating to the Status of Refugees, adopted on 28 July 1951, entered into force on 22 April 1954.
63 1967 Protocol to the 1951 Geneva Convention Relating to the Status of Refugees, adopted on 31 January 1967 and entered into force on 4 October 1967.
64 Cartagena Declaration on Refugees, adopted by the "Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems," held in Cartagena, Colombia, from 19 to 22 November 1984.
65 *Rights and Guarantees of Children*, *supra* note 7, para. 249.
66 See—among others—*Gomez-Paquiyauri Brothers v. Peru*, *supra* note 26, para. 151.
67 The Inter-American Court has addressed, on several occasions under its contentious jurisdiction, the scope of states' obligations to respect, protect and fulfil human rights. See e.g., *Velásquez Rodríguez v. Honduras*, 29 July 1988, IACrtHR, Merits, Series C No. 4 and *Yean and Bosico Girls v. Dominican Republic*, 8 September 2005, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 130. See also (IACHR 2013a).
68 See *Rights and Guarantees of Children*, *supra* note 7, title VI. See also (IACHR 2017, pp. 32–62).

and ensure human rights "to all persons subject to their jurisdiction" without any discrimination (Article 1(1) ACHR).[69] On several occasions, the court has acknowledged that this provision imposes on states, the obligation to guarantee the effective exercise and enjoyment of rights to all individuals regardless of the person's nationality, residency or migratory status.[70]

In addition, states are also obliged to comply with Article 2 ACHR; that is, to adapt their domestic legal systems to the provisions enshrined in the American Convention.[71] In other words, according to the principle of effet utile, national norms (including constitutional provisions) should contribute to the effective realization of conventional rights, which include the abrogation or modification of laws that could result in any type of discrimination or could prevent or otherwise restrict the effective implementation of conventional norms.[72] In the wording of the court, "States not only have the positive obligation to adopt the necessary legislative measures to ensure the exercise of the rights established in this instrument (ACHR), but they must also avoid promulgating those laws that prevent the free exercise of these rights and avoid the elimination or amendment of laws that protect them."[73]

The general states' obligations to respect, protect and guarantee have been further specified in connection with those particular situations that deserve special attention from state authorities, such as in the case of persons or groups in situation of vulnerability (Lavrysen 2014, pp. 113–14).[74] For instance, in the case of children, the Inter-American Commission of Human Rights (IACHR)[75] has also repeatedly referred to the need to adopt domestic legislation in accordance with the CRC and the corpus juris of the rights of the child in conjunction with measures that prevent any type of violation and guarantee the effective exercise of children's rights without discrimination.[76] The IACHR has identified positive obligations that state authorities should put in place—within their domestic jurisdictions—in order to fulfil children's rights. These measures include the need to implement different types of policies and strategies,[77] together with the introduction of a wide array of legislative, administrative, social and educational measures aiming at enhancing the effective level of protection of children's rights.[78] Further, state authorities should guarantee effective institutional protection, by means of introducing or developing mechanisms or institutions in charge of the implementation and execution of those policies, as well as their monitoring and evaluation.[79]

Article 19 ACHR has not been an exception regarding the development of states' obligations for the specific protection of children's rights. The interpretative centrality of Article 19 ACHR has been clearly acknowledged by the court when recognized that this provision "concerns the obligation to

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[69] Article I ACHR (Obligation to Respect Rights) states that: "(1) The state's parties to this convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[70] *Rights and Guarantees of Children*, *supra* note 7, para. 62.

[71] Article II ACHR (Domestic Legal Effects) reads as follows: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the state's parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[72] *Rights and Guarantees of Children*, *supra* note 7, para. 65.

[73] *Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 5, para. 236.

[74] *Case of Perozo et al. v. Venezuela*, 28 January 2009, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 195.

[75] The Inter-American Commission was created by Resolution VIII, of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago de Chile, in 1959. See for further readings regarding the Inter-American Commission—among others (Goldman 2009).

[76] See (IACHR 2017).

[77] For an in-depth study on this matter, see (IACHR 2017). The Inter-American Commission refers to a wide array of policies, including basic social policies or universal policies (which involve all children, such as health and education plans), social development policies (necessary to overcome situations of vulnerability, inequality or exclusion), special protection policies (for minors in an specific risk situation) and legal defense policies (aimed at building a specialized justice system for children).

[78] Ibid, pp. 32 et seq. See also Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child* (Articles 4, 42 and 44 paragraph 6), 2003.

[79] See (IACHR 2017).

adopt measures of protection in favor of all children, based on their condition as such, and this has an impact on the interpretation of all the other rights established when the case relates to children."[80] Thus, state authorities should provide enhanced level of protection to children, which need to take into consideration their specific situation of vulnerability. As stated by the court,

> "The protection due to the rights of the child, as subjects of law, must take into consideration their intrinsic characteristics and the need to foster their development, offering them the necessary conditions to live and develop their aptitudes taking full advantage of their potential. [...] For this reason, the convention stipulates that the pertinent measures of protection for children must be special or more specific than those established for the rest of the population; i.e., the adults."[81]

In other words, Article 19 ACHR should be understood as an additional, supplementary protection that reinforces the scope of protection of other rights when their beneficiaries are children, due to the fact that their physical and emotional development requires special protection.[82] Based on this premise, it would be possible not to conclude—together with the regional tribunal—that the American Convention vests "a preferential treatment for children, precisely because of their special vulnerability, and in this way, endeavors to provide them with the adequate mechanism to achieve the effective equality before the law enjoyed by adults, owing to their condition as such."[83]

In fact, following its pronouncement on the case of the *"Street Children,"* the Inter-American Court has analyzed in numerous occasions the content and extent of "measures of protection"—and the correspondent states' obligations—considering, as mentioned above, the Convention on the Rights of the Child as the most suitable instrument for the interpretation of Article 19 ACHR.[84] In this sense, the systemic integration of the convention under the provisions of the corpus juris for the protection of the rights of the child has paved the way towards the identification of a wide array of obligations that states should comply with; in particular, under the light of the principles and norms contained in CRC.[85] In the words of the court:

> "When the protection of the rights of the child and the adoption of measures to achieve this protection is involved, the following four guiding principles of the convention on the rights of the child should transversely inspire and be implemented throughout every system of comprehensive protection: the principle of non-discrimination; the principle of the best interest of the child; the principle of respect for the right to life, survival and development; and the principle of respect for the opinion of the child in any procedure that affects her or him in order to ensure the child's participation."[86]

The central question addressed by this jurisprudence is how to deliver effective protection to children's rights. As highlighted by the IACrtHR, measures contained in Article 19 shall include a comprehensive protection; "they must promote the full enjoyment of all rights recognized in the convention on the rights of the child and in other applicable instruments, especially the right to health, adequate nutrition, to education, as well as to play and the recreational activities appropriate for the child's age."[87] Moreover, states should generate the necessary conditions that "guarantee a dignified

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80 *Rights and Guarantees of Children, supra* note 7, para. 66.
81 Ibid.
82 See—among others—*Case of the "Juvenile Reeducation Institute" v. Paraguay*, 2 September 2004, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 112, para. 147.
83 *Rights and Guarantees of Children, supra* note 7, para. 66.
84 E.g., *Gomez-Paquiyauri Brothers v. Peru, supra* note 26 and *"Juvenile Reeducation Institute" v. Paraguay, supra* note 82.
85 *Juridical Condition and Human Rights of the Child, supra* note 51, para. 98.
86 *Rights and Guarantees of Children, supra* note 7, para. 69.
87 Ibid, para. 164.

existence"[88] and would allow children to develop a project of life.[89] In this sense, state authorities are responsible for supporting children with building their life plan; that is, generating the societal conditions and institutional frameworks that could be conducive for their adequate development.[90]

These obligations are especially relevant vis-à-vis children in a particular situation of vulnerability, such as the case of children in the context of migration. In this regard, and perhaps even more importantly in connection with the aim of this paper, the regional tribunal has specifically stressed that states' obligations need to follow a 'human rights approach' while implementing immigration policies for children, taking into account both the protection and development of the child.[91]

In fact, in connection with states' obligations towards migration, it is adequate to say that state authorities have the obligation to assure the fulfilment of the principle of the best interest of the child within migration processes and—in particular—during the enactment of state's policies that could directly or indirectly affect the wellbeing of migrant children.[92] Thus, any judicial or administrative decision related to the entry, stay, detention or expulsion of the child, or his or her family, should take due consideration of the hermeneutical centrality of this principle.[93] In addition, the court has expressly identified states' specific obligations—derived from the corpus juris for the protection of the child—aiming at ensuring the respect and fulfilment of the rights of unaccompanied or separated children in migration proceedings. In this sense, it would be possible to mention the duties of state authorities in relation to the appropriate arrangements regarding the reception and accommodation of migrant children; determinations of their identities and compositions of their families; enquiries of the whereabouts of family members; and facilitation of family reunification, all in accordance with the best interest principle, which also includes giving adequate consideration to the views of the unaccompanied child.[94]

Hence, we can do nothing but conclude that the expansive interpretation of states' obligations in relation to the measures of protection contained in Article 19 ACHR shows a clear awareness of the specific needs of the protection of children in the Americas, by the regional tribunal. Thus, the court has repeatedly highlighted the need to adopt special measures regarding the protection of children, which has been translated into concrete obligations upon state authorities. In this sense, the *systemic* integration of the American Convention, under the light of the corpus juris of international human rights law, has also paved the way for the recognition of a specific set of minimum guarantees afforded to children in the context of migration processes, independently of other legal conditions, such as the migration status of their family members.[95]

4. Effective Guarantees for the Protection of Children in the Context of Migration Processes

As introduced above, the Inter-American Court has developed an important case law regarding human rights of children with special focus on child migrants (Olmos Giupponi 2017). One of the key elements of this jurisprudence is the strengthening of procedural guarantees, as enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) ACHR. In fact, these rights, which are equally recognized for all persons under the jurisdiction of the court "must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial

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88 *"Street Children" v. Guatemala, supra* note 32, para. 144.

89 In fact, IACrtHR has understood that: "The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the state to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in performing its natural function of providing protection to the children who are members of the family." *Juridical Condition and Human Rights of the Child, supra* note 51, para. 53.

90 See (IACHR 2017, para. 44).

91 *Rights and Guarantees of Children, supra* note 7, para. 68.

92 Ibid, para. 70.

93 Ibid.

94 Ibid, para. 167.

95 See *Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5, para. 224.

proceedings where the rights of a child are discussed."[96] In other words, effective access to justice, equality and due process need to be ensured, under the interpretative guidelines of the principle of the best interest of the child, as a primary consideration during administrative or judicial proceedings involving children.[97]

These jurisprudential developments could be explained partially by the flexible and innovative approaches that the IACrtHR has taken in connection with the exercise of its advisory jurisdiction (Pasqualucci 2014). In fact, the *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)*, together with the *Advisory Opinion on The Right of Information in relation to Consular Assistance within the Framework of the Guarantees of Due Process of Law (1999)* and *the Advisory Opinion on The Juridical Condition and Rights of Undocumented Migrants (2003*), have been considered foundational obiter dicta in the process of the humanization of international law, aiming at reinforcing the protection delivered to individuals (Cançado Trindade 2007).

The doctrinal line developed under the advisory jurisdiction, was consolidated and reinforced within it contentious jurisdiction, such as in the case *Velez Loor v. Panama*.[98] In this case, the court specifically recognized that irregular migrants in detention are entitled to a set of minimum guarantees in light of the provisions contained within the international corpus juris of human rights for the protection of migrants' rights.[99] Indeed, as a result of this integrative approach, specific rights for the protection of migrants have been acknowledged by the court, such as the rights to legal aid, information, effective access to consular assistance and appeal, among others.[100] Moreover, in the case of *Pacheco Tineo Family v. Bolivia*,[101] the court has reinforced the recognition of a set of fundamental guarantees—in line with several sources of international law—that states should observe in immigration proceedings, such as the obligation to provide the applicants with a competent interpreter, legal assistance or representation, and the opportunity to communicate with the United Nations High Commissioner for Refugees (UNHCR).[102]

Regarding the specific development of the rights of the child, the court made clear efforts in its *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)* to integrate and reinforce the application of procedural guarantees provided by the American Convention to all proceedings involving children, by means of making interpretative references to CRC, the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),[103] the Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)[104] and the Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[105] Among these guarantees, the court stressed the importance of the intervention of a competent, impartial and independent judicial body;[106] the right to appeal and

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96 *Juridical Condition and Human Rights of the Child, supra* note 51, para. 95. See also—among others—*Case of Mendoza et al. v. Argentina*, 14 May 2013, IACrtHR, Preliminary Objections, Merits and Reparations, Series C No. 220, para. 148.

97 See, e.g., *Juridical Condition and Human Rights of the Child, supra* note 51, para. 98. In fact, as recognized by Ortiz: "[I]n the light of the incorporation of the Convention on the Rights of the Child to the corpus juris, the Inter-American system has developed more specific parameters that provide content to the effective access to justice of children," (Ortiz 2015, p. 337).

98 *Velez Loor v. Panama*, 23 November 2010, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 218. See notably for a comprehensive analysis of the main findings of the case (Mason 2012).

99 *Velez Loor v. Panama*, supra note 98, para. 99.

100 Ibid, paras. 132, 153, 179.

101 In connection with the importance of this case in the jurisprudence of the IACrtHR, see (Arlettaz 2015).

102 *Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5, para. 159.

103 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UN Doc. A/RES/40/33, adopted on 29 November 1985.

104 United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), UN Doc. A/RES/45/110, adopted on 14 December 1990.

105 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UN Doc. A/RES/45/112, adopted on 14 December 1990.

106 *Juridical Condition and Human Rights of the Child, supra* note 51, para.120.

effective remedy;[107] and children's right to participation in accordance with the specific conditions of the child and his or her best interest.[108]

This development has been further consolidated with the identification of the need for the introduction of a differential treatment able to provide enhanced guarantees and level of protection to migrant children, based on the implementation of the principle of effectiveness. The important task of introducing specific procedural safeguards in the context of migration processes that take into account the needs of children within judicial procedures, was further developed by the court in the latter case of *Pacheco Tineo Family*. Accordingly, the regional tribunal highlighted in this decision that the fundamental principles enshrined in CRC should guide the substantial and procedural aspects of asylum procedures.[109] Based on these considerations, the regional tribunal recognized that migrant children have the right to participate and express their opinion in asylum proceedings, but not only that.[110] In fact, parallel to the substantive obligation to respect and fulfil this right, state authorities have the procedural obligation to enable and facilitate enjoyment by means of introducing and implementing adequate procedures for children,[111] all in accordance with the "assessment, determination, consideration and protection of the best interest of the child."[112] In the views of the court, the best interest principle 'should always prevail' when children are involved in asylum procedures in all decisions that affect them both directly or indirectly.[113]

As a corollary of these jurisprudential developments, the court has adopted one of its most influential advisory opinions in relation to child migrants' rights; that is, the *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (2014).*[114] In fact, this decision has consolidated the importance of the pro-homine principle and *systemic* integration as hermeneutical tools that have paved the way for reading the American Convention under the light of both the corpus juris for the protection of children and the corpus juris for the protection of migrants.[115]

In particular, the court analyzed Article 1 (obligation to respect rights), Article 2 (domestic legal effects), Article 7 (right to personal liberty), Article 8 (right to fair trial), Article 19 (rights of the child) and Article 25 (right to judicial protection) ACHR in line with a wide array of relevant sources of international human rights law. Based on this integrative approach, the IACrtHR has developed a set of specific procedural guarantees that states should observe in immigration procedures which involve children.[116] Indeed, through a dynamic, systemic and evolutive interpretation of the provisions of the American Convention under the light of provisions contained within the corpus juris of international human rights law, the IACrtHR has identified—among others—the obligation to provide children with a translator or interpreter free of charge;[117] a legal representative;[118] a guardian when the applicant is an unaccompanied or separated child;[119] and the opportunity to communicate with consular authorities.[120] Moreover, the court has also analyzed children's rights to be notified of the existence of

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[107] Ibid, para. 121.
[108] Ibid, paras. 99–102.
[109] *Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5, para. 224.
[110] Ibid, para. 219.
[111] Ibid, para. 224.
[112] *Rights and Guarantees of Children*, *supra* note 7, para. 70.
[113] *Pacheco Tineo Family v. Plurinational State of* Bolivia, *supra* note 5, para. 224.
[114] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, IACrtHR, Advisory Opinion OC-21/14, Series A No. 21. For further studies on this advisory opinion see—among others—(Arlettaz 2016).
[115] See *Rights and Guarantees of Children*, *supra* note 7, para. 59.
[116] Ibid, Sections VII, VIII, XII.
[117] Ibid, paras. 124–25.
[118] Ibid, paras. 129–31.
[119] Ibid, paras. 132–36.
[120] Ibid, paras. 126–28.

the proceedings and of the decisions adopted concerning entry, permanence or expulsion;[121] the right of the child to immigration procedures conducted by a specialized official or judge;[122] and the right to appeal before a judicial authority with suspensive effect.[123]

It is important to highlight that the recognition of most of the above-mentioned rights happened by means of highlighting the centrality and interpretative relevance of the CRC and its fundamental principles. In particular, the IACrtHR interpreted the right of the child to be heard and to participate in every stage of immigration proceedings in light of Article 12 (respect for the views of the child) CRC and in accordance with the interpretative guidance offered by the Committee on the Rights of the Child under its General Comment No. 12.[124] These interpretative references facilitated the effective jurisprudential recognition of the principle that "children must be heard so that the decision taken accords with their bests interests."[125] To put it differently, state authorities should ensure under the American Convention that all processes related to children migrants conduce to the effective realization of their rights, in accordance with their best interests.[126] For instance, state authorities should create the substantive and procedural conditions that guarantee an environment, which is not intimidating or inappropriate to the child, so that "the child feels respected and safe when expressing her or his views in an appropriate physical, mental and emotional environment."[127]

Furthermore, the court has also referred extensively to children's right to personal liberty during immigration proceedings. In this sense, IACrtHR resorted to different international norms in order to support the development of the principle of non-deprivation of liberty of children based on their *irregular* migratory status. In fact, it is important to notice that the court did not only made references to the provisions of CRC but—additionally—to other international instruments[128] including *'soft law'* international guidelines and recommendations, such as the UNCHR's Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,[129] the Beijing Rules and the Tokyo Rules. Based on these instruments, and on the evolution of the corpus juris of international human rights law, the regional tribunal has clearly indicated that "the deprivation of the liberty of a child in this context can never be understood as a measure that responds to the child's best interest."[130] The Court has categorically concluded that those kind of detentions are "arbitrary, and consequently, contrary to both the convention and the American Declaration."[131]

Lastly, it is noteworthy to highlight that in its latest advisory opinion on migration, that is, the Advisory Opinion *on The institution of asylum, and its recognition as a human right under the inter-American system of protection (2018)*, the court has recognized that children are entitled to a differential treatment in

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121 Ibid, paras. 117–19.
122 Ibid, paras. 120–21.
123 Ibid, paras. 140–42.
124 United Nations Committee on the Rights of the Child, *General Comment No. 12, The right of the child to be heard*, 2009.
125 *Rights and Guarantees of Children*, *supra* note 7, para. 122. See for further readings regarding the labor of UN Committees in developing standards in connection to children in the context of migration: Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017.
126 In the words of the Court: "[A]ny immigration policy that respects human rights, as well as any administrative or judicial decision concerning the entry, stay or expulsion of a child, or the detention, expulsion or deportation of her or his parents associated with their own migratory status, must give priority to the assessment, determination, consideration and protection of the best interests of the child concerned." *Rights and Guarantees of Children*, *supra* note 7, para. 70.
127 Ibid, para. 123.
128 The Court considered the concept of deprivation of liberty in a broad sense in line with international human rights law while referring for instance to Article 4 (2) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted on 9 January 2003, entered into force 22 June 2006.
129 United Nations High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.
130 *Rights and Guarantees of Children*, *supra* note 7, para. 154.
131 Ibid.

asylum procedures.[132] In this sense, the regional tribunal stressed the importance of states' obligations to adapt asylum procedures to the specific needs of children and adolescents.[133]

To conclude, it would be possible to say that the *rationale* of these decisions could be found on the emphasis made by IACrtHR in connection with the special condition of vulnerability of migrant children and the need to address this situational condition by reinforcing the effective protection of their rights. As it will be described within the following paragraphs, specific procedural guarantees afforded to children within immigration proceedings are nothing but a concrete realization of this general rule.[134]

4.1. Expanding States' Positive Obligations: The Case of Unaccompanied Children

As critically analyzed throughout this paper, the systemic integration of the American Convention's provisions for the protection of children's rights, under the light of the specific norms and principles enshrined within the corpus juris of international human rights law, has led towards the development of a more effective and 'children friendly' regional jurisprudence. In fact, while examining states' obligations towards children involved within migration processes, the court has highlighted on numerous occasions, how important it is to pay attention to their special situation of vulnerability in order to provide effective measures of protection (Beduschi 2018).

In other words, the intrinsic vulnerability connected with the condition of being a child migrant, considered under the interpretative light of the pro persona principle, justifies the increased levels of protection afforded by the convention together with the identification of tightness obligations over state authorities' shoulders.[135] This interpretative rule is—of course—fully applicable to the case of unaccompanied migrant children,[136] in which their specific condition of vulnerability requires from state authorities, higher levels of protection by means of introducing additional safeguards.[137] In fact, while referring to the personal factors of the child that lead to specific supplementary positive obligations from states, the court expressly highlighted the situation of vulnerability of the child who is separated or unaccompanied.[138] To put it differently, the effective implementation of the rights enshrined in the convention requires taking into special consideration all circumstances of the unaccompanied child when deciding over the extension and scope of protection of those rights. This is nothing but the *contextual* application of the principle of the effect utile.[139] As highlighted by the regional tribunal,

> "The Court will also place special emphasis on those conditions and circumstances in which migrant children may find themselves in a situation of additional vulnerability that entails an increased risk of violation of their rights so that the state must adopt measures to prevent

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[132] *The institution of asylum, and its recognition as a human right under the inter-American system of protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, 30 May 2018, IACrtHR, Advisory Opinion OC-25/18, Series A No. 25.

[133] Ibid, para. 99.

[134] As mentioned by the court, "In view of the special condition of vulnerability of child migrants in an irregular situation, states are obliged, under Articles 19 of the American Convention and VII of the declaration, to choose measures that promote the care and well-being of the child to ensure its comprehensive protection, rather than the deprivation of her or his liberty." *Rights and Guarantees of Children, supra* note 7, para. 155.

[135] See—among others—*Nadege Dorzema et al. v. Dominican Republic*, 24 October 2012, IACrtHR, Merits, Reparations and Costs, Series C No. 251, para. 152 and *Pacheco Tineo Family v. Plurinational State of Bolivia, supra* note 5, paras. 217–19.

[136] See *Rights and Guarantees of Children, supra* note 7, paras. 89–93.

[137] Ibid, para. 167. See also Committee on the Rights of the Child, *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin*, 2005 and Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 2013.

[138] See *Rights and Guarantees of Children, supra* note 7, para. 71.

[139] See—among others—*Case of the Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010, IACrtHR, Merits, reparations and costs, Series C No. 214, para. 250 and *Velez Loor v. Panama, supra* note 98, para. 99.

> and reverse this type of situation as a priority, as well as to ensure that all children, without exception, may fully enjoy and exercise their rights under equal conditions."[140]

The hermeneutical relevance of the above-mentioned principles, in order to guarantee the effective protection and realization of children's rights within the context of asylum procedures, has been highlighted by the court in its jurisprudence constant.[141] In this sense, one of the main procedural safeguards afforded to children is to determine their special condition, not only as minors but also to determine whether they are unaccompanied or separated from their families.[142] Indeed, based on the provisions contained in the CRC and the guidelines set by the Committee on the Rights of the Child,[143] the court concluded that owing to the high vulnerability that affect children who are unaccompanied, the determination procedure should be done immediately upon arrival, as these minors are exposed to severe risks (such as child trafficking, exploitation and abuse) that could seriously affect them.[144] In addition to the determination of their current status as unaccompanied children, state authorities are also responsible for tracing their family members, and if possible, to seek and facilitate the reunification of unaccompanied children with their families as soon as possible, as required by the principle of the best interest of the child.[145]

Within this context, the court has also emphasized the need to enable unaccompanied children to participate in every stage of the proceedings and to guarantee their right to effective access to legal assistance, including consular support from the diplomatic delegations of their country of origin that exist in the country of transit or destination where children are located.[146] In this sense, international human rights law and—in particular—children's rights, intersect with migration norms and consular relations' provisions, providing a systemic normative framework (i.e., corpus juris) able to deliver an integrative protection to unaccompanied children in the context of migration processes (Fuentes 2018).

Further, among the positive obligations that states have to adopt towards this vulnerable group, the duty to appoint unaccompanied children with a guardian as soon as possible has been identified; that is, as soon as their condition as unaccompanied is determined.[147] Moreover, state authorities are equally responsible for monitoring the quality and exercise of these guardianships,[148] "in application of the principle of the effet utile and the needs for protection in cases of persons or groups in a vulnerable situation."[149] Finally, the right to the appointment of a guardian has been also recognized in cases where unaccompanied children are deprived of their liberty due to migration reasons.[150] In this context, state parties have to provide unaccompanied children with both a legal representative and a guardian, and guarantee the right to information and communication between them.[151]

At this point, it is important to clarify that, in the case of migrant children that are unaccompanied or separated from their family, the regional tribunal has stressed that the deprivation of liberty is inappropriate.[152] The *rationale* behind this inter dictum of the court resides in the fact that states have the positive obligation to prioritize the adoption of measures of special protection "based on the principle of the best interest of the child, assuming its position as guarantor with the greatest care and responsibility."[153] In other words, this restrictive approach is nothing but a direct consequence of the

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[140] *Rights and Guarantees of Children*, *supra* note 7, para. 71.
[141] Ibid, paras. 51–60.
[142] Ibid, para. 86.
[143] E.g., Committee on the Rights of the Child, *General Comment No. 6*, *supra* note 137.
[144] *Rights and Guarantees of Children*, *supra* note 7, paras. 89–93.
[145] Ibid, para. 105,
[146] Ibid, paras. 123, 128.
[147] Ibid, para. 116.
[148] Ibid, para. 136.
[149] Ibid, para. 71.
[150] Ibid, para. 204.
[151] Ibid, paras. 130–36, 204.
[152] Ibid, para. 157.
[153] Ibid, para. 157.

hermeneutical integration of the American Convention with the provisions stipulated by the corpus juris for the protection of the rights of the child.

To conclude, it is important to mention—as an additional consequence of the effective implementation of the pro-persona principle in the context of child's rights—the fact that state authorities are also responsible for providing adequate accommodation to unaccompanied children, due to their situation of vulnerability. Moreover, the court has identified several safeguards and guidelines in relation to reception arrangements in order to guarantee—for instance—that unaccompanied children are never accommodated with adults,[154] or—even more importantly—that accommodation arrangements fulfil the basic conditions necessary for the "holistic development" of children based on the "principle of the child's best interest and comprehensive protection."[155]

4.2. Hermeneutical Integration of the Corpus Juris of Migrants for the Protection of Unaccompanied Children

As mentioned above, the American Convention demands the introduction of specific positive obligations that could enable or facilitate the effective enjoyment of the conventionally protected rights by persons or groups of individuals in a situation of vulnerability. In fact, the regional tribunal has adopted a human rights approach towards migration and children's rights, continuously emphasizing the special situation of vulnerability and the consequent need of special measures regarding the protection of migrants.[156] As stated by the regional tribunal, "Based on the special needs for protection of migrants, this Court interprets and provides content to the rights that the convention recognizes to them, in keeping with the evolution of the international corpus juris applicable to the human rights of migrants."[157]

In this sense, refugee law and the rights of migrants are also considered as an integrative part of this corpus juris, and—therefore—their relevant provisions could be utilized for the clarification of the extension and scope of protection of the rights recognized in the convention. The expansion of the scope of protection of key conventional provisions has been a tangible result of this interpretative approach.[158] Among these provisions, it is possible to mention Article 8 (right to a fair trial); Article 25 (right to judicial protection); Article 22 (freedom of movement and residence, right to seek and be granted asylum and non-refoulement); and Article 19 (rights of the child) ACHR.

Regarding the specific integration of the provisions of the convention for the protection of the rights of migrants, it is essential to refer to one of the most important advisory opinions delivered by the court; that is, the *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (2003)*.[159] In this additional obiter dictum, the regional tribunal has emphasized states' obligations to adopt special measures able to ensure the effective enjoyment of human rights of migrants.[160] In particular, the court stressed that all rights recognized in the ACHR, such as the right of access to justice for all persons—including of course children, are preserved "irrespective of the migratory status of the protected persons."[161] To put it differently, the regular or irregular migratory status of an individual under a given national legal system cannot be used to prevent migrants from the enjoyment of their fundamental rights. In the words of the regional tribunal, the protection afforded by the

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[154] Ibid, paras. 176–79.
[155] Ibid, para. 181.
[156] E.g., *The Right to Information on Consular Assistance*, *supra* note 19, *Velez Loor v. Panama*, *supra* note 98, *Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 5.
[157] *Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 5, para. 129.
[158] See—among others—*Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 5.
[159] *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, IACrtHR, Advisory Opinion OC-18/03, Series A No. 18. For further studies on this advisory opinion see—among others—(Lyon 2004; Beduschi 2015).
[160] *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 159, para. 117.
[161] Ibid, para. 118

convention is guaranteed "without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason."[162]

Unaccompanied child migrants are not and could not be seen as an exception to this rule. As mentioned above, their specific situation of vulnerability demands—on the contrary—the introduction of specific legislative and administrative measures able to guarantee their effective protection. In their particular case, the principle of equality and non-discrimination demands state authorities to treat unaccompanied migrant children differently; that is, providing them with a differential treatment (positive actions) that would fully address their vulnerable condition.[163] As indicated by the court, "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things."[164]

In the case of the unaccompanied migrant child, the application of the pro-persona principle requires from state authorities to take all necessary measures that take into consideration their specific situation of vulnerability, under the interpretative guideline of the best interest of the child principle. In this sense, it would be possible to conclude—together with the European Court of Human Rights (ECrtHR)—that "The right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is also violated when states without an objective and reasonable justification fail to treat differently persons [i.e., unaccompanied migrant children] whose situations are significantly different."[165] In other words, a difference in treatment is only discriminatory when "it has no objective and reasonable justification."[166]

Therefore, distinctions in treatment able to match de facto vulnerable conditions of these children need to be introduced by state authorities in order to avoid violations to the protective mandate given by the American Convention. In fact, the introduction of differentiate treatments "constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness."[167] E.g., unaccompanied migrant children. Among the different positive obligations that need to be developed within domestic legal systems, it would be possible to mention—for instance—the need to avoid the deprivation of liberty of unaccompanied children based on their migration status; the obligation to proactively search the whereabouts of the members of their families; the need to provide adequate legal assistance, access to education, health care, etc.

Based on the above considerations, together with a careful reading of the relevant conventional provisions under the light of the pro-persona and effet utile principles, it would be possible to conclude that the lack of introduction of additional safeguards for the protection of the rights of unaccompanied children would not only amount to a discriminatory treatment but also affect his or her right to life, survival and development.[168] In fact, as recognized by the Committee on the Rights of the Child, the obligation to ensure, to the maximum extent possible, the survival and development of the child (as enshrined in Article 6 CRC) refers to "a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development."[169]

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[162] Ibid.

[163] See *Rights and Guarantees of Children, supra* note 7, para. 71. In fact, according to Bierwirth: "The principle of non-discrimination prohibits, for example, the different treatment of asylum-seeking children from differing countries of origin. All such children must be subject to the same general rules of procedure and must enjoy the same social rights. However, the principle of non-discrimination, if properly understood, does not prevent, but may in fact call for, a differentiation among refugee and asylum-seeking children on the basis of different protection needs deriving, for example, from their health status, age, trauma and/or persecution." (Bierwirth 2005, p. 102).

[164] See *Juridical Condition and Human Rights of the Child, supra* note 51, para. 47.

[165] *Case of Thlimmenos v. Greece*, Judgment of 6 April 2000, ECrtHR, No. 34369/97, para. 44.

[166] *Case of Willis v. The United Kingdom*, Judgment 11 June 2002, ECrtHR, No. 36042/97, para. 39. See also—among others—*Case of Wessels-Bergervoet v. The Netherlands*, Judgment of 4 June 2002, ECrtHR, No. 34462/97, para. 46 and *Case of Petrovic v. Austria*, Judgment of 27 March 1998, ECrtHR, Reports 1998-II, para. 30.

[167] *Judicial Condition of Undocumented Migrants, supra* note 159, para. 89.

[168] See *Rights and Guarantees of Children, supra* note 7, para. 69 et. seq.

[169] Committee on the Rights of the Child, *General Comment No. 5, supra* note 78, para. 12.

5. Conclusions

This paper has critically analyzed how the Inter-American Court has enlarged the conventional protection of children's rights—and more specifically of migrant children—by means of implementing a *systemic*, *evolutive*, *dynamic* and *effective* interpretation of the American Convention under the light of human rights instruments that are part of the corpus juris of international human rights law.

In fact, the court has interpreted the convention under the light of all type of relevant norms and instruments (binding and non—binding) that integrate the corpus juris of international human rights law and even recognize the existence of the corpus juris for the protection of children. In particular, the regional tribunal has highlighted the interpretative importance of the provisions contained within the Convention on the Rights of the Child—as interpreted by the Committee on the Rights of the Child—for the determination of the extension and scope of protection of Article 19 ACHR.

The integration of the latter provision—under the light of the corpus juris for the protection of children's rights—has led to the development of concrete procedural and substantive safeguards based on the implementation of the principles of effective protection (effet utile) and the best interest of the child. Examples of these safeguards can be found in the recognition of the right of the child to be heard, in regard to all the aspects of legal proceedings that could directly affect him or her, and that his or her views are adequately taken into account.[170] In other words, the specific situation of vulnerability that is inherently connected with the condition of being a minor demands from state authorities, higher levels of protection, including the obligation to determine, in the terms of Articles 19 ACHR, and in conformity with an evaluation of the best interest of the child, "the special measures of protection that are required to ensure their life, survival and development."[171]

Migrant children are not an exception to this hermeneutical rule. In their case, a differential procedural treatment is needed in order to guarantee equal access to the protection offered by the regional system, "based on the recognition that they do not participate in migratory proceedings under the same conditions as an adult."[172] Among these guarantees, one can mention the obligation to provide the child with a translator; the right to participate in every stage of the proceedings; the right to effective access to legal assistance, including consular support; and the appointment of a guardian.[173] Further, the court has recognized additional positive obligations that states should adopt in connection to unaccompanied children due to their specific situation of vulnerability. In this regard, for the regional tribunal, it would not be sufficient to provide adequate reception and accommodation facilities to unaccompanied child migrants in order to guarantee their effective protection, but also additional, concrete and specific efforts need to be allocated in order to—for instance—identify the whereabouts of his or her family members, among others.[174]

To conclude, the *systemic*, *dynamic* and *evolutive* integration of the American Convention, under the relevant provision of the corpus juris for the protection of the rights of the child, has paved the way for the development of higher levels of protection to migrant children's rights in the Americas. This integration has not only contributed to the further *"harmonization of international law and principles"* (Pasqualucci 2013, p. 13), but also—and even most importantly—to the affirmation of the imperative centrality of the protection and the superior interest of the human being under international law.[175] The enhanced protection of the rights of migrant children is nothing but a reaffirmation of this gradual and constant process toward the 'humanization' of international law (Cançado Trindade 2013, p. 391 et seq).

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[170] Committee on the Rights of the Child, *General Comment No. 12*, *supra* note 124, para. 123.
[171] *Rights and Guarantees of Children*, *supra* note 7, para. 103.
[172] Ibid, para. 114.
[173] See Section 4.
[174] See Section 4.1.
[175] See *Juridical Condition and Human Rights of the Child*, *supra* note 41, Concurring Opinion of Judge Cançado Trindade, para. 18.

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Abbreviations

ACHR	American Convention on Human Rights
CRC	UN Convention on the Rights of the Child
IACHR	Inter-American Commission of Human Rights
IACrtHR	Inter-American Court of Human Rights
IHRL	International Human Rights Law
UNHCR	UN High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

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Expanding the Protection of Children's Rights towards a Dignified Life: The Emerging Jurisprudential Developments in the Americas

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Abstract: The Inter-American Court of Human Rights (IACrtHR) has developed in recent years an innovative jurisprudence that has integrated the entity and extension of States' obligations regarding children's rights—as established in Article 19 ACHR—through the evolutive, dynamic, and effective interpretation of the American Convention on Human Rights (ACHR). In fact, by acknowledging the existence of an international corpus juris for the protection of children's rights, the Court has examined this provision in the light of instruments enshrined within the corpus juris, such as the UN Convention on the Rights of the Child. This process of normative integration was not only limited to the application of international instruments adopted outside of the Inter-American system, but also includes internal references to interconnected rights recognised within the American Convention. Consequently, by analysing the scope of Article 19 ACHR in the light of Article 4 ACHR (right to life) and the corpus juris for the protection of children, the Inter-American Court has further expanded the protection of children's rights towards the protection of the right to a dignified life. While focusing on the landmark jurisprudence developed by IACrtHR, this paper seeks to unveil the hermeneutical paths undertaken by the regional tribunal in connection with the systemic integration of Article 19 ACHR. In particular, it focuses on the emerging jurisprudential development of positive obligations upon States Members regarding the effective protection of children's right to a dignified existence.

Keywords: American Convention of Human Rights; Convention on the Rights of the Child; Inter-American Court of Human Rights; right to a dignified life; systemic interpretation

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1. Introduction

In recent years, the Inter-American Court of Human Rights (IACrtHR, the Court, or the Inter-American Court)[1] has developed a landmark jurisprudence on children's rights based on the evolutive, dynamic and effective interpretation of the American Convention on Human Rights (ACHR, the Convention, or the American Convention).[2] As a result of this jurisprudential development, the Court has expanded the scope of protection of Article 19 ACHR (rights of the child),[3] by means of interpreting its provisions in connection with other relevant norms enshrined in the American Convention, such as Article 4 (right to life), Article 5 (right to humane treatment), and Article 7 (right to personal liberty), among others.

[1] The Inter-American Court of Human Rights is as an autonomous judicial institution with the purpose of the interpretation and application of the Convention on Human Rights. It was created on 18 July 1978 by the entering into force of the American Convention on Human Rights (1969) and it has adjudicatory and advisory jurisdiction.
[2] The American Convention on Human Rights (ACHR) also denominated "Pact of San Jose, Costa Rica" was adopted on 22 November 1969 and entered into force on 18 July 1978.
[3] Article 19 ACHR (rights of the child) states that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state".

In addition to the above-mentioned internal integration of the provisions of the American Convention, the Court has further extended the scope of protection of children's rights through an external integration of those provisions. This hermeneutical step was possible by interpreting Article 19 ACHR in the light of other international instruments that integrate the corpus juris of international human rights law. In other words, through a systemic interpretation of the American Convention, the regional tribunal has affirmed that in cases related to the rights of children, the United Nations Convention on the Rights of the Child (CRC)[4] is the most suitable instrument for the interpretation of Article 19 ACHR.[5]

In this regard, the Court has acknowledged that both the American Convention and the Convention on the Rights of the Child form part of the same comprehensive legal system, that is, the international corpus juris for the protection of children's rights. Within this legal framework, the CRC should guide and support the regional tribunal while determining "the content and scope of the general provision established in Article 19 of the American Convention" in cases related to children's rights.[6] Moreover, the expansive integration of the scope of protection of Article 19 ACHR, in the light of the provisions enshrined in the CRC, has paved the way for the identification of concrete positive obligations regarding children's rights. As an example of this jurisprudential trend, it would be possible to mention the recognition of the right of children to a *dignified* existence, which has been identified as protected within the scope of Article 19 ACHR (in connection with Article 4 ACHR). In addition, and as a direct consequence of this recognition, the regional tribunal has identified and clarified the extension of States' positive obligations regarding the effective protection of this right (Pasqualucci 2008), demanding increased level of protection from States authorities as part of their conventional obligations emanated from the protection of the right to life. In other words, States have the positive obligation to generate the necessary conditions capable of guaranteeing children's dignified existence. Furthermore, through this expansive interpretation, the court has recognised that the individual fate of children in situations of vulnerability requires increased level of protection from States authorities, such as children under detention.

Children's right to a dignified life is a fundamental right strictly connected to the realisation of other rights such as the right to development, education, and health. Therefore, this paper proposes a critical analysis of the hermeneutical steps undertaken by the Inter-American Court in connection with the systemic integration of Article 19 ACHR, focusing in particular on the right of children to a dignified life. Special attention is given to the way in which the corpus juris for the protection of the rights of the child has been interpreted and applied by IACrtHR in order to enhance the effective protection of children's right to a dignified existence.

Accordingly, the article will first outline the methods of interpretation applied by the Inter-American Court. It will then discuss the systemic integration of Article 19 ACHR (Rights of the Child) in light of the international instruments part of the corpus juris of international human rights law relevant for the protection of children's rights. This will lead to a discussion on the praetorian construction of the right to (a dignified) life and the emerging jurisprudential development of positive obligations for the protection of a dignified life in connection to the rights of the child.

2. The Court's Interpretative Paths

As a general rule, the regional tribunal in its analysis of the American Convention applies both traditional and particular rules of interpretation. The former finds expressions in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention

[4] The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990.

[5] For an in-depth study on this matter, see—for example—(Nola and Kilkelly 2016).

[6] "*Street Children*" *(Villagran-Morales et al.) v. Guatemala*, 19 November 1999, IACrtHR, Merits, Series C No. 32, para. 24.

or VCLT), and the latter has been a jurisprudential creation of the Inter-American Court, as recognised by the court in the early 1980s in its very first advisory opinion.[7]

In line with Article 31 VCLT,[8] the first guidance in the interpretation of the American Convention is provided by its own object and purpose, which in the case of a human rights treaty such as the American Convention is the "effective protection of human rights".[9] In the views of the Court, this method of interpretation not only "respects the principle of the primacy of the text, that is, the application of the objective criteria of interpretation",[10] but also guarantees the teleological purpose of delivering effective protection of the human rights of individuals.[11] In other words, when interpreting the American Convention, the role of the interpreter is to identify the 'autonomous regional meaning' of the terms and legal institutions enshrined in the Convention in order to deliver an effective protection of those rights. As stated by the Court:

> "The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[12]

Additionally, the Court also applies—in a subsidiary manner—supplementary methods of interpretation, in accordance with Article 32 VCLT.[13] For instance, IACrtHR could take into consideration the preparatory work of a treaty in order "to confirm the meaning resulting from that interpretation or when it leaves an ambiguous or obscure meaning, or leads to a result which is manifestly absurd or unreasonable".[14] Nonetheless, it is important to bear in mind that the inherent purpose of all treaties is to be effective.[15] Therefore, supplementary methods of interpretation cannot be applied in a way that could lead towards an interpretation that manifestly contradicts the object and purpose of the American Convention. Thus, the interpretation of the Convention should always be executed "in such a way that the system for the protection of human rights has all its appropriate effects (effet utile)".[16]

In addition to the interpretative pre-eminence of the object and purpose of the ACHR, it would be important to mention another interpretative principle that has gained significant recognition within the jurisprudence of the regional tribunal, that is, the pro-homine or

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7 See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, 24 September 1982, IACrtHR, Advisory Opinion OC-1/82, Series A No.1, para. 33.

8 Article 31 VCLT—in its first paragraph—reads as follows, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

9 In this sense, the Court has said that "[t]he safeguard of the individual in the face of the arbitrary exercise of the powers of the State is the primary purpose of the international protection of human rights". *Yatama v. Nicaragua*, 23 June 2005, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 127, para. 167.

10 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, 24 September 1982, IACrtHR, Advisory Opinion OC-2/82, Series A No. 2, para. 29.

11 See *Velásquez Rodríguez v. Honduras*, 26 June 1987, IACrtHR, Preliminary Objections, Series C No. 1, para. 30.

12 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, IACrtHR, Merits, Reparations and Costs, Series C No. 79, para. 146 and *Right to Information on Consular Assistance in the Framework of Guarantees for Due Process of Law*, 1 October 1999, IACrtHR, Advisory Opinion OC-16/99, Series A No. 16, para. 114. See also, *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, 28 November 2012, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 257, para. 173.

13 Article 32 VCLT recognises the possibility to recourse to supplementary means of interpretation, such as "the preparatory work of the treaty and the circumstances of its conclusion".

14 *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, 8 September 1983, IACrtHR, Advisory Opinion OC-3/83, Series A No. 3, para. 49.

15 *Velásquez Rodríguez v. Honduras*, *supra* note 11, para. 30.

16 *The Right to Information on Consular Assistance*, *supra* note 12, para. 58.

pro-persona principle.[17] Based on the normative content of Article 29 ACHR,[18] the Court has concluded:

> "[N]o provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party, or excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[19]

Based on these premises, it appears clear that the interpretation of the ACHR should not be performed in a way in which it could deprive efficacy or unjustifiably limit the scope of protection of the rights recognised therein (Fuentes 2015).[20] Anything to the contrary denies the centrality of the protection of the individual fate in the process of interpretation, as hermeneutically required by the pro-homine principle (Fuentes 2018).

Finally, the effective protection of the rights and freedoms enshrined in the Convention also requires the adequate consideration of relevant contextual factors that could affect or intersect in a given case. This interpretational approach incorporates into the hermeneutical process the consideration of societal changes under "present day conditions."[21] As highlighted by IACrtHR, the regional tribunal "must adopt the proper approach to consider [the interpretation of a given right] in the context of the evolution of the fundamental rights of the human person in contemporary international law."[22] This also means that, in order to deliver an effective protection of rights in a given case, the interpreter needs to consider the contextual, historical, and evolutive interpretation of those rights. Hence, the effective protection of rights would be based on an interpretation that would take into consideration all circumstances and contextual factors of the specific case under analysis.[23]

2.1. Systemic Interpretation of the American Convention

As introduced above, the contextual and evolutive interpretation of the American Convention provides the hermeneutical tool that facilitates a coherent integration of its provisions under the current evolution of the Inter-American System. In this sense, an up-to-date interpretation of the provisions enshrined in the Convention requires that the interpreter takes into consideration not only the instruments and agreements directly related to it (in accordance with Article 31(2)(a)(b) VCLT), but also "any relevant rules of international law applicable in the relations between the parties" (cf. Article 31(3)(c) VCLT).

In other words, in order to determine the extension of the scope of protection of a given conventional right, the interpreter should analyse its contents in the light of any other relevant rules or provisions enshrined within different human rights instruments that have been ratified, adopted, or otherwise agreed upon by a given State. International law permanently evolves; and international human rights law (IHRL) is not an exception to this general principle. On the contrary, its provisions and norms are under constant

[17] For an in-depth study on this matter, see—for example—(Mazzuoli and Ribeiro 2016).

[18] Article 29 ACHR (restrictions regarding interpretation) reads as follows: "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; (d) . . . "

[19] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, IACrtHR, Advisory Opinion OC-21/14, Series A No. 21, para. 54.

[20] In this sense, the Court has stressed that "[a]ny interpretation of the Convention that [. . .] would imply suppression of the exercise of the rights and freedoms recognized in the Convention, would be contrary to its object and purpose as a human rights treaty". *Ivcher Bronstein v. Peru*, 24 September 1999, IACrtHR, Competence, Series C No. 54, para. 41.

[21] *The Right to Information on Consular Assistance*, *supra* note 12, para. 114.

[22] Ibid, para. 115.

[23] As Judge Sergio Garcia-Ramirez highlighted, "[i]t would be useless and lead to erroneous conclusions to extract the individual cases from the context in which they occur. Examining them in their own circumstances—in the broadest meaning of the expression: actual and historical—not only contributes factual information to understand the events, but also legal information through the cultural references—to establish their juridical nature and the corresponding implications". *Case of Yatama v. Nicaragua*, *supra* note 9, Concurring Opinion of Judge Sergio Garcia-Ramirez, para. 7.

development following the changes in society, with the aim of providing meaningful and up-to-date effective protection to human beings.

Following this line of thought, we must conclude that international human rights norms "should be interpreted as part of a whole, the meaning and scope of which must be defined based on the legal system to which they belong."[24] As stated by the International Court of Justice (ICJ): "[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[25]

Therefore, the evolutive interpretation of the American Convention needs to consider and needs to be based on its systemic integration (Mc Lachlan 2005; Koskenniemi 2006; Rachovitsa 2017), taking into consideration other documents and instruments that are part of the same system, that is, the international human rights law system.[26] Indeed, the principle of systemic integration of international human rights law is the reason why the IACrtHR does not hermeneutically limit itself to the text of the American Convention, but expands its considerations to other human rights instruments—part of the same system—that could be relevant in a specific case.[27]

However, it is important to notice that the integration of the scope of protection of a given conventionally protected right, by virtue of its systemic interpretation in the light of international human rights law, does not mean that the Court would resolve a given case through the direct application of a different instrument than the American Convention.[28] Only violations to rights contemplated in the Convention, or within other treaties that expressly or implicitly recognise the competence of the regional tribunal, will open the jurisdiction of the Court.[29]

Based on these considerations, it is possible to conclude that the principle of systemic integration constitutes a key hermeneutical tool that enables the regional tribunal to take into consideration other relevant instruments, part of the corpus juris of international human rights law, which would provide the Court with a better understanding of the rights enshrined in the American Convention (Fuentes 2018).

2.2. The Interpretative Relevance of the Corpus Juris of IHRL and the Pro-Homine Principle

As introduced above, the systemic integration of international law provided the Court with the possibility to interpret the American Convention in the light of other universal and regional instruments that integrate the corpus juris of international human rights law. In the words of the regional tribunal:

> "The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this

[24] *Artavia Murillo*, *supra* note 12, para. 191. See also *González et al. ("Cotton field") v. Mexico*, 16 November 2009, IACrtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 205 para. 43 and *The Right to Information on Consular Assistance*, *supra* note 12, para. 192.

[25] *Legal Consequences of States of the Continued Presence of South Africa in Namibia (South West Africa)*, *Notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, ICJ, Advisory Opinion, ICJ Reports 1971, pp. 16 and 31.

[26] *The Right to Information on Consular Assistance*, *supra* note 12, para. 113; and *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012, IACrtHR, Merits and Reparations, Series C No. 245, para. 161.

[27] In this sense, the Court has declared that "it could "address the interpretation of a treaty provided it is directly related to the protection of human rights in a Member State of the Inter-American System," even if that instrument does not belong to the same regional system of protection". *Sarayaku v. Ecuador*, *supra* note 26, para. 161.

[28] In connection with the direct inapplicability of international instruments outside of the Inter-American System, see—among other resolutions—the following cases: "*Street Children*" *v. Guatemala*, supra note 6, para. 192–95; *Bámaca Velásquez v. Guatemala*, 25 November 2000, IACrtHR, Merits, Series C No. 70, para. 208–10; *Plan de Sánchez Massacre v. Guatemala*, 29 April 2004, IACrtHR, Merits, Series C No. 105, Separate Concurring Opinion of Judge Sergio Garcia-Ramírez, para. 19.

[29] For an enumerative list of the treaties that—within the Inter-American System—have recognised the competence of the Commission, and the Court, for the reception of the individual complains, see Article 23 of the Rule of Procedure of the Inter- American Commission on Human Rights.

question in the context of the evolution of the fundamental rights of the human person in contemporary international law".[30]

The incorporation of the notion of the corpus juris of international human rights law within the jurisprudence of the court has been one of the key developments that has paved the way for a pro-persona integration of international human rights law (Cançado Trindade 2007). Based on this jurisprudential development, States cannot simply disregard the compliance with their international human rights' obligations, by allegations based on the lack of ratification of a given treaty.[31] In other words, all instruments that integrate the corpus juris of IHRL (such as international treaties, declarations, and decisions) could be used as a valid reference for the interpretation of the scope of protection of the rights enshrined in the ACHR, independently of their potential biding character.[32] It is, therefore, in this sense that the Court has declared that States are "bound by the corpus juris of the international protection of human rights, which protects every human person erga omnes, independently of her statute of citizenship, or of migration, or any other condition or circumstance".[33]

With the incorporation of the pro-homine or pro-persona principle, the regional tribunal has enhanced the effective protection of the rights recognised in the American Convention, based on the application of the "principle of the rule most favourable to the human being".[34] In other words, the incorporation of the pro-homine principle facilities the interpretation of the Convention "in accordance with the canons and practice of International Law in general, and with International Human Rights Law, specifically, and which awards the greatest degree of protection to the human beings under its guardianship."[35]

Based on the above considerations, it is imperative to conclude that the systemic integration of the American Convention—in the light of the relevant provisions of the corpus juris of international human rights law—together with the centrality of the pro-homine principle, have become essential hermeneutical tools for the effective protection of human rights, especially in cases of individuals or groups in situations of vulnerability.[36] As it will be further analysed in the following paragraphs, the protection of the rights of the child developed by the regional tribunal is an unequivocal confirmation of this interpretative path.

3. Systemic Integration of Article 19 ACHR (Rights of the Child)

Article 19 ACHR specifically recognises the right of every child "to measures of protection required by his condition as a minor on the part of the family, society and the state". This provision has been complemented through the hermeneutical action of the Court by providing effective realisation to the aim and purpose of the Convention, that is,

[30] *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, IACrtHR, Advisory Opinion OC-18/03, Series A No. 18, para. 120, *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 172, para. 67, *Ituango Massacres v. Colombia*, 1 July 2006, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 148, para. 157. See also, *Rights and Guarantees of Children*, *supra* note 19, para. 60.

[31] According to Judge Cançado Trindade: "The rights protected thereunder, in any circumstances, are not reduced to those "granted" by the State: they are inherent to the human person, and ought thus to be respected by the State. The protected rights are superior and anterior to the State, and must thus be respected by this latter, by all States, even in the occurrence of State disruption and succession". Cf. ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Dissenting Opinion of Judge Cançado Trindade, para. 58.

[32] Ibid.

[33] *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 30, para. 85

[34] See *Baena-Ricardo et al. v. Panama*, 2 February 2001, IACrtHR, Merits, Reparations and Costs, Series C No. 72, para. 189; *Herrera-Ulloa v. Costa Rica*, 2 July 2004, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 107, para. 184; *Ricardo Canese v. Paraguay*, 31 August 2004, IACrtHR, Merits Reparations and Costs, Series C No 111 para. 181; *Mapiripán Massacre*, 15 September 2005, IACrtHR, Merits, Reparations and Costs, Series C No. 134, para. 106; *Boyce et al. v. Barbados*, 20 November 2007, IACrtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 169, para. 5; *Atala Riffo and daughters v. Chile*, 24 February 2012, IACrtHR, Merits, Reparations and Costs, Series C No. 254, para. 84; and *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 30, para. 156. For an in deep study on this matter, see also (Lixinski 2010).

[35] *Case of Benjamin et al. v. Trinidad and Tobago*, 1 September 2001, IACrtHR, Preliminary Objections, Series C. No. 81, para. 70.

[36] As stated by the Court: "[A]ny person who is in a vulnerable condition is entitled to special protection which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights." *Ximenes-Lopes v. Brazil*, 4 July 2006, IACrtHR, Merits, Reparations and Costs, Series C No. 149, para. 103. See also *Maritza Urrutia v. Guatemala*, 27 November 2003, IACrtHR, Merits, Reparations and Costs, Series C No. 103, para. 87; and *Bámaca Velásquez v. Guatemala*, *supra* note 28, para. 150.

the protection of human rights in accordance with current developments of international human rights law (Fuentes and Vannelli 2019).

For IACrtHR, the interpretation of Article 19 ACHR "should respond to the new circumstances in which it will be projected and one that addresse[s] the needs of the child as a true legal person, and not just as an object of protection,"[37] considering "the changes over present day conditions".[38] Further, in the eyes of this regional tribunal, Article 19 ACHR provides an additional protection to those individuals who are in need of higher measures of protection due to their physical and psychological development.[39]

In fact, since the first judgment in which the Inter-American Court dealt specifically with the rights of children, the case of the "*Street Children" (Villagran Morales* et al.*) v. Guatemala*, the Court has interpreted Article 19 ACHR under the principles of dynamic, evolutive and systemic integration. As highlighted by IACrtHR, "when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration (Article 31.2 of the Vienna Convention), but also the system within which it is (inscribed) (Article 31.3)."[40]

Following the footsteps of this leading case, the Court has developed in recent years an expansive interpretation of Article 19 ACHR, through building systemic references to provisions enshrined within various kinds of relevant documents and instruments (binding or not, universal, regional, or domestic) (Tigroudja 2013).

As a result of the systemic integration of Article 19 ACHR, in the light of relevant provisions of the international corpus juris for the protection of the rights of the child, the regional tribunal has analysed and developed the content of the "measures of protection" enshrined in this provision, and its corresponding states' obligations. Indeed, through this systemic hermeneutical approach, the regional tribunal has made references both to other international human rights instruments that integrate the corpus juris of IHRL, including references to soft law documents (external integration) and to interconnected provisions within the text of the American Convention (internal integration).

3.1. External Integration: The Convention on the Rights of the Child

The special emphasis on the protection of the rights of the child could be consistently traced throughout the jurisprudence of the Court under both its contentious and advisory jurisdictions. In fact, the Court has increasingly used the notion of vulnerability in order to enhance the level of effective protection of children's rights and, as a consequence of this hermeneutical action, equally expand the content of States' obligations.[41]

In order to fully understand these jurisprudential developments, the legal analysis should be guided by the interpretative method used in the "*Street Children*" case, where the Court has made its first interpretative references to the Convention on the Rights of the Child. As it will be discussed below, the result of this systemic integration has been the enhancement of the protection of children in the region. This has been achieved by means of clarifying the states' obligations that are intimately connected with the special situation of minors facing manifest vulnerability, such as children temporarily living in the streets and children unlawfully detained.

For example, the Inter-American Court resorted to the evolutive and systemic integration of Article 19 ACHR by recognising the interpretative relevance of the provisions

[37] *Juridical Condition and Human Rights of the Child*, 28 August 2002, IACrtHR, Advisory Opinion OC-17/02, Series A No. 17, para. 28.

[38] Ibid, para. 21.

[39] See *Mapiripán Massacre v. Colombia*, *supra* note 34, para. 152; "*Juvenile Reeducation Institute" v. Paraguay*, 2 September 2004, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 112, para.147; *Gomez Paquiyauri Brothers v. Peru*, 8 July 2004, IACrtHR, Merits, Reparations and Costs, Series A No. 18, para. 164; *Juridical Condition and Human Rights of the Child*, *supra* note 37, para. 54; and *Ituango Massacres*, *supra* note 30, para. 244.

[40] "*Street Children*" *(Villagran Morales et al) v. Guatemala*, *supra* note 6, para.192.

[41] The Court has recognised the vulnerability of children on several occasions. See—among others—*Girls Yean and Bosico v. Dominican Republic*, 8 September 2005, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 130, para. 134; and *V.R.P, V.P.C., et al. v. Nicaragua*, 8 March 2018, IACrtHR, Preliminary objections, merits, reparations, and costs, Series C No. 350, para. 156.

enshrined within the international corpus juris for the protection of children's rights. In the words of the Court:

> "Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention."[42]

The interpretation of Article 19 ACHR in the light of the principles and norms contained in CRC has contributed to the identification and development of special measures that States have to implement for the effective protection of children. Accordingly, the Court highlighted a number of provisions of the CRC that should be taken into consideration for the determination of the "measures of protection" referred by Article 19 ACHR. Among these provisions, it would be possible to mention Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (survival and development), Article 20 (children deprived of family environment), Article 27 (adequate standard of living), and Article 37 CRC (detention and punishment).[43] As stated by the Court, the hermeneutical role played by these norms is to "allow [the Court] to define the scope of the 'measures of protection' referred to in Article 19 of the American Convention, from different angles", which could influence the full enjoyment of children's rights.[44]

For instance, the enhancement of the protection of children, through the development and identification of "measures of protection", has also been reaffirmed through the external references to the CRC in cases of children under detention. In this sense, Articles 2, 6, and 37 CRC should be taken into consideration in cases of children deprived of their liberty. As stressed by IACrtHR:

> "The provisions transcribed above allow us to specify, in several directions, the scope of the 'measures of protection' mentioned in Article 19 of the American Convention. Several such measures stand out, including those pertaining to non-discrimination, prohibition of torture, and the conditions that must exist in cases of deprivation of the liberty of children."[45]

Moreover, the Court expressly acknowledged, in relation to children in the context of migration, that Article 19 ACHR "in addition to granting special protection to the rights recognized therein, establishes a State obligation to respect and ensure the rights recognized to children in other applicable international instruments".[46] Therefore, by means of reading Article 19 ACHR under the interpretative light of Articles 12 (respect for the views of the child) and 22 (refugee children) CRC, the Court has recognised children's right to be heard in immigration proceedings and children's right to receive appropriate protection and humanitarian assistance from the State.[47]

Further, in connection with children who are members of minority groups or with indigenous origin, the Inter-American Court has taken into consideration Article 30 CRC to identify additional measures of protection and complementary obligations anchored on Article 19 ACHR. For instance, children's right to their own culture, their own religion, and their own language has been identified as protected under the text of the American

[42] "*Street Children*", *supra* note 6, para. 194. See *also Juridical Condition and Human Rights of the Child*, *supr*a note 37, para. 24; *Gomez-Paquiyauri Brothers v. Peru*, *supra* note 39, para. 166; *Santo Domingo Massacre v. Colombia*, 30 November 2012, IACrtHR, Preliminary Objections, Merits and Reparations, Series C No. 250, para. 238; *Forneron and daughter v. Argentina*, 27 April 2012, IACrtHR, Merits, Reparations, and Costs, Series C No. 242; para. 137. In this context, the Court "has repeatedly stressed the existence of a very comprehensive corpus juris of international law on the protection of the rights of the child, which the Court must use as a source of law to establish 'the content and scope' of the obligations that States have assumed under Article 19 of the American Convention with regard to children; particularly, by specifying the 'measures of protection' to which this article refers." Cf. *Rights and Guarantees of Children*, *supra* note 19, para. 194.

[43] "*Street Children*", *supra* note 6, para. 195.

[44] Ibid, para. 196.

[45] See *Gomez-Paquiyauri Brothers v. Peru*, *supra* note 39, para. 168.

[46] *Pacheco Tineo Family v. Plurinational State of Bolivia*, 25 November 2013, IACrtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 272, para. 219.

[47] Ibid.

Convention.[48] Following the same interpretative line, the Court has also resorted to Article 35 CRC (abduction, sale, and trafficking) in cases related to adoption and, in this manner, contributing to the clarification of the content and extension of the "measures of protection" that States should comply with when fulfilling their conventional obligations.[49]

In addition to the systemic integration through judicial decisions, the IACrtHR has further expanded the scope of protection and content of Article 19 ACHR by including extensive references to CRC under its advisory jurisdiction (Pasqualucci 2014). For instance, under the *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)*, the IACrtHR acknowledged the interpretative relevance of CRC for the determination of children's rights in cases of separation from parents; determination of parental responsibilities and State's assistance; cases of adoption; and cases related to juvenile justice.[50]

As a step forward regarding these jurisprudential developments, it would be important to mention the *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (2014)*.[51] This decision has consolidated the importance of the pro-homine principle and systemic integration as hermeneutical tools that have paved the way for reading the American Convention in the light of both the corpus juris for the protection of children and the corpus juris for the protection of migrants (Fuentes and Vannelli 2019).

In line with the fundamental principles enshrined within the CRC, the regional tribunal has identified several obligations that States should comply with in order to achieve a "system of comprehensive protection" of children's rights under Article 19 ACHR.[52] In particular, the IACrtHR has highlighted four guiding principles of the CRC that have the transversal capacity to guide and inspire this hermeneutical process. These principles are "the principle of non-discrimination, the principle of the best interest of the child, the principle of respect for the right to life, survival and development, and the principle of respect for the opinion of the child in any procedure that affects her or him in order to ensure the child's participation".[53]

Indeed, by stressing the interpretative centrality of CRC, the Court has deliberately enhanced the protection of children's rights in immigration procedures.[54] In particular, the regional tribunal recognised the right to be heard and to participate in immigration procedures, in the light of the provisions contained in Article 12 CRC and in connection with the interpretative guidance offered by the Committee on the Rights of the Child under its General Comment No. 12.[55] Furthermore, when analysing the protection of children under migration, the Court acknowledged that the 1951 Convention,[56] its 1967 Protocol,[57] and the regional definition of refugee contained in the Cartagena Declaration[58] integrate the corpus juris of international law on the protection of the rights of the child.[59]

[48] *Xakmok Kasek Indigenous Community v. Paraguay*, 24 August 2010, IACrtHR, Merits, Reparations, and Costs, Series C No. 214, para. 261.

[49] *Forneron and daughter v. Argentina*, *supra* note 42, para. 138–39.

[50] In the words of the Court: "[I]f we take into account that the Convention on the Rights of the Child refers to the best interests of the child (Articles 3, 9, 18, 20, 21, 37 and 40) as a reference point to ensure effective realization of all rights contained in that instrument. Their observance will allow the subject to fully develop his or her potential. Actions of the State and of society regarding protection of children and promotion and preservation of their rights should follow this criterion." *Juridical Condition and Human Rights of the Child*, *supra* note 37, para. 59.

[51] For further studies on this advisory opinion see—among others—(Arlettaz 2016).

[52] *Rights and Guarantees of Children*, *supra* note 19, para. 69.

[53] Ibid.

[54] In this sense, the Inter American Court has identified—among others—children's right to a legal representative, a guardian when the applicant is an unaccompanied or separated minor, the opportunity to communicate with consular authorities, the right of the child to be notified during the proceedings, to appeal, and to have the immigration process conducted by a specialized official or judge. See *Rights and Guarantees of Children*, *supra* note 19, paras. 116–43.

[55] United Nations Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, 2009. See *Rights and Guarantees of Children*, *supra* note 19, paras. 122–23.

[56] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951. Entry into force: 22 April 1954.

[57] UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967. Entry into force: 4 October 1967.

[58] Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19–22 November 1984.

[59] *Rights and Guarantees of Children*, *supra* note 19, para. 59.

Moreover, the Court has also identified special guarantees that States must implement in line with the international corpus juris in order to protect children in the context of armed conflicts. In effect, in addition to the rights and principles enshrined in CRC, the Court has stressed the relevance of the provisions contained in the Protocol II of the Geneva Convention,[60] which also need to be considered as part of the corpus juris for the protection of children.[61]

Finally, it is noteworthy to bear in mind that the Convention on the Rights of the Child has not been the only instrument applied by the regional tribunal in its external integration of Article 19 ACHR. In fact, the Court has extended the corpus juris of children's rights through both its contentious and advisory jurisdictions to other international treaties and soft law documents.[62] For instance, in the context of children under detention, the regional tribunal has made references to both CRC and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador),[63] as part of the corpus juris of for the protection of children.[64]

3.2. Internal Integration of ACHR's Provisions

As introduced above, interpretative references to instruments adopted outside of the Inter-American system, such as the CRC, have been decisive for the development of a broad interpretation of the normative content enshrined in Article 19 ACHR. In other words, under the guidelines of the pro-homine principle, the regional tribunal has integrated the content of the latter provision with relevant principles and norms as part of the corpus juris of international human rights law.

In addition to these external references, the Court has also highlighted the hermeneutical relevance of the internal interconnections and interrelations that Article 19 ACHR has with other provisions of the American Convention (Feria Tinta 2007). For instance, Article 19 ACHR has been examined and applied in connection with other conventionally protected rights, such as the right to life (Article 4), right to humane treatment (Article 5), right to personal liberty (Article 7), right to fair trial (Article 8), right to a name (Article 18), judicial protection (Article 25), and more.[65] In these cases, the content and scope of the "measures of protection" and corresponding States' obligations have been determined by exploring the normative interconnection and interrelation between these provisions.[66] The Court has also resorted to a careful balancing exercise between possible competing rights when required by the specific circumstances of each case.[67]

In this context, it would be important to mention a landmark case that could shed light on the manner in which the Court internally integrated the text of the Convention,

[60] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Entry into force: 7 December 1978.

[61] As expressed by the Court: "The content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child, especially its Articles 6, 37, 38 and 39, and of Protocol II to the Geneva Conventions, as these instruments and the American Convention are part of a very comprehensive international corpus juris for protection of children, which the States must respect". *See Mapiripán Massacre v. Colombia*, *supra* note 34, para. 153.

[62] IACrtHR has considered as part of the corpus juris for the protection of children—among others—the American Declaration of the Rights and Duties of Man (1948), the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985), UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, 1990), and the UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules, 1990).

[63] Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999.

[64] "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 148.

[65] For an overview of the case law of the Inter-American Court in relation to the rights of children, see—among others—(Feria Tinta 2008).

[66] The Court analysed the scope of Article 19 ACHR under a wide array of different situations such as: forced disappearance (*Gelman v. Uruguay*, 24 February 2011, IACrtHR, Merits and Reparations, Series C No. 215), detention ("*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39), armed conflicts (*Mapiripán Massacre v. Colombia*, *supra* note 34; and *Ituango Massacres v. Colombia*, *supra* note 30), migration (*Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 46; and *Case of the Expelled Dominicans and Haitians v. Dominican Republic*, 28 August 2014, IACrtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 282).

[67] In this sense: "The Court emphasizes that children enjoy the rights established in the American Convention, in addition to the special measures of protection contemplated in 19 of the Convention, which must be defined according to the circumstances of each specific case." *Atala Riffo and daughters v. Chil*e, *supra* note 34, para. 196.

that is, the case of the *"Juvenile Reeducation Institute" v. Paraguay*.[68] In this case, the Inter-American Court decided not to examine Article 19 ACHR separately but, on the contrary, in connection with the right to humane treatment (Article 5 ACHR) and the right to life (Article 4 ACHR). In fact, Article 19 ACHR was considered as an "added right" for those who are in need of special protection "because of their physical and emotional development".[69] Accordingly, IACrtHR concluded—while referring to children deprived of their liberty—that States have additional obligations that emerge from the joint application of Articles 4, 5, and 19 ACHR.[70] In the words of the Court:

> "The examination of the State's possible failure to comply with its obligations under Article 19 of the American Convention should take into account that the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights. The measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment".[71]

Hence, we must conclude that the internal references made by the Court between conventionally interconnected and interrelated rights, such as children's right to life and humane treatment, have paved the way for the reinforcement and expansion of the scope of protection of Article 19 ACHR. Indeed, it is important to stress that the interpretation of children's rights could not lead to an unjustifiable restriction in the enjoyment of other conventionally protected rights; therefore, their interpretation must adequately balance all potentially competing rights.[72] In other words, the principle of the most favourable interpretation—or pro-persona principle—will require the interpreter to always take into consideration the interconnection and interrelation between conventionally protected rights, in the light of the object and purpose of the American Convention (Fuentes 2017).

An additional interpretative step made by the regional tribunal was to reinforce the protective effect of the internal references between Article 19 ACHR and other interrelated and interconnected rights of the Convention by means of expanding that interconnection with express references to other instruments that are part of the corpus juris for the protection of the rights of the child. Among them, it would be possible to mention the Convention on the Rights of the Child (Articles 3, 6, and 27); the General Comment No. 5 of the Committee on the Rights of the Child;[73] UN Rules for the Protection of Juveniles Deprived of Their Liberty; and UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), etc.[74]

For instance, through a systemic integration of the interrelated provisions enshrined in the American Convention, the Court was able to further develop States' obligations regarding children's right to life under detention, as requested by the normative content of Article 19 ACHR.[75] Thus, as the particular situation of vulnerability connected with the situation of children deprived of their liberty, the responding State "must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child."[76] As stated by the Court, "the child's detention or imprisonment does not deny the child his or her right to life or restrict

[68] "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 150.
[69] Ibid, para. 147.
[70] Ibid, para. 172.
[71] Ibid, para. 149
[72] See *Yakye Axa v. Paraguay*, *supra* note 30, para. 146.
[73] UN Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003.
[74] "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, paras. 161–63.
[75] Ibid, para. 160.
[76] Ibid.

that right"; therefore, state authorities "must be particularly attentive to that child's living conditions while deprived of his or her liberty".[77]

Another relevant case illustrating the relevance of the internal integration of conventional norms in the case of children's rights is the case of *Girls Yean and Bosico v. Dominican Republic*. In this case, the IACrtHR has further reaffirmed its approach to not examine Article 19 ACHR in isolation, but rather, in conjunction to other conventionally protected rights, such as the right to education; right to equal protection; right to a name; and right to nationality, among others.[78] For instance, it would be important to notice that, in connection with the right to education, the Court has stressed the existing correlation between special protection afforded to children's rights (Article 19 ACHR) and States' obligation to ensure their progressive development (Article 26 ACHR). Based on this inherent connection, the IACrtHR has concluded that States are responsible for guaranteeing "free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development".[79]

Based on the above considerations, this paper will explore within the following paragraphs the hermeneutical steps taken by the Inter-American Court that have paved the way to the expansion of the scope of protection of the right to life (Article 4 ACHR) in the case of children. In particular, the internal and external integration of the ACHR's provisions will be analysed in line with the corpus juris for the protection of children, which has contributed to the recognition of the right to a dignified life, as protected under Article 19 ACHR.

4. Praetorian Construction of the Right to (a Dignified) Life

The right to life is recognised in Article 4(1) of the American Convention, which establishes that "Every person has the right to have his life respected". The Court has acknowledged in several occasions that this right "plays a key role in the American Convention as it is the essential corollary for realization of the other rights".[80] To state the obvious, life is an indispensable precondition for the enjoyment of any other right.

The fundamental character of the right to life is reaffirmed by the entity of States' obligations. In this sense, it is important to remember that the American Convention imposes to States the general obligations to respect, protect, and fulfil the realisation of conventionally recognised rights.[81] In particular, under Article 1(1) ACHR, States have assumed the obligation to respect and protect human rights to "all persons subject to their jurisdiction" without discrimination of any kind. This obligation is complemented by Article 2 ACHR, which imposes to States the obligation to guarantee the full domestication of the Convention within their legal systems. As an essential feature of the jurisprudential developments towards a more effective regional system for the protection of fundamental rights, the Court has consistently paid attention—in its contentious jurisdiction—to the clarification of the content and extension of the States' general obligations to respect, protect, and fulfil.

Coming back to the scope of protection of the right to life, the regional tribunal has acknowledged that the obligation to respect the right to life included both States'

[77] Ibid.

[78] In the words of IACrtHR: "[T]he Court will not rule on the alleged violation of Article 19 of the American Convention in isolation, but will include its decision in this regard together with the examination of the other articles that are relevant to this case." *Girls Yean and Bosico v. Dominican Republic*, 8 September 2005, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 130, para 135.

[79] Ibid, para. 185.

[80] "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 156. According to the Court: "When the right to life is not respected, the other rights vanish because the bearer of those rights ceases to exist. States have the obligation to ensure the conditions required for full enjoyment and exercise of that right." Ibid. See also *Gomez Paquiyauri Brothers v. Peru*, *supra* note 39, para. 128.

[81] The Inter-American Court has addressed in several occasions under its contentious jurisdiction the scope of States' obligations to respect, protect and fulfil human rights. See e.g., *Velásquez Rodríguez v. Honduras*, 29 July 1988, IACrtHR, Merits, Series C No. 4; *Yean and Bosico Girls v. Dominican Republic*, *supra* note 78; *Gonzalez et al. ("Cotton Field") v. Mexico*, *supra* note 24; *Baldeon Garcia v. Peru*, 6 April 2006, IACrtHR, Merits, Reparations and Costs, Series C No. 147; *Indigenous Community Sawhoyamaxa v. Paraguay*, 29 March 2006, IACrtHR, Merits, Reparations and Costs, Series C No. 145; and *Massacre of Pueblo Bello v. Colombia*, 31 January 2006, IACrtHR, Merits, Reparations and Costs, Series C No. 140. See also (Lavrysen 2014).

negative obligation to abstain from jeopardising this right and the positive obligation to adopt measures to ensure the effective exercise of this right.[82] In this sense, the Court has stated that,

> "Compliance with Article 4 of the American Convention, in conjunction with Article 1(1) of this same Convention, not only requires that a person not be deprived arbitrarily of his or her life (negative obligation) but also that the States adopt all the appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights of all persons under their jurisdiction."[83]

Based on these jurisprudential developments, the Court has identified a number of measures that need to be implemented—as States' positive obligations—in order to create the necessary conditions in society that could enable the fulfilment of the right to life.[84] For instance, the regional tribunal has recognised the need to put in place a legal framework that discourages any threat to this right. It has demanded the establishment of an effective system of administration of justice for the investigation, punishment and reparation of any deprivation of life by states' agents or private individuals.[85] Additionally, even more importantly in the context of this paper, the Court has recognised States' positive obligations to adopt measures to effectively guarantee the right to life, which includes the obligation "of generating minimum living conditions that are compatible with the dignity of the human person".[86] As mentioned elsewhere, the result of this jurisprudence is the praetorian introduction of the right to a dignified life (Fuentes 2015).

4.1. Scope of Protection and Extension of the Right to a Dignified Life

Under both its contentious and advisory jurisdictions, the Court has systematically built the content and scope of protection of the right to a dignified life, in particular regarding individuals or groups in situations of vulnerability. Clear examples of this development could be found in cases dealing with indigenous peoples, children, and persons under detention. In the framework of these cases, the Court has acknowledged that States have a general obligation "to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority".[87]

Under the evolutive and systemic interpretation of the American Convention, the IACrtHR proceeded to analyse the extent of States' positive obligations aiming at facilitating indigenous peoples' access to a dignified life, especially by means of protecting the access and enjoyment of their ancestral lands (Antkowiak 2013; Fuentes 2021). For instance, in the *Yakye Axa* case, the Court examined if the State of Paraguay took the necessary positive measures to guarantee the dignified life of the members of the Yakye Axa Community in light of the corpus juris for the protection of indigenous communities.[88] In this context, through an external and internal integration of the text of the Convention, the Court made interpretative references not only to numerous provisions of the American Convention, but also to several sources of international law, aiming to determine the content and extension of Article 4 ACHR.[89]

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[82] See "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 158; and *Gomez Paquiyauri Brothers v. Peru*, *supra* note 39, para. 129.

[83] *Gomez Paquiyauri Brothers v. Peru*, *supra* note 39, para. 129.

[84] See—among others—*Myrna Mack Chang v. Guatemala*, 25 November 2003, IACrtHR, Merits, Reparations and Costs, Series C No. 101; *Huilca-Tecse v. Peru*, 3 March 2005, IACrtHR, Merits, Reparations and Costs, Series C No. 121; and *Juan Humberto Sanchez v. Honduras*, 7 June 2003, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 99.

[85] *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 81, para. 153.

[86] *Indigenous Community of Yakye Axa*, *supra* note 30, para. 162.

[87] Ibid.

[88] Ibid, para. 163.

[89] Ibid.

Among instruments that integrate the above-mentioned corpus juris, the IACrtHR has made specific references to the ILO Convention No. 169[90] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", in combination with Article 1(1) and Article 26 ACHR.[91] By means of incorporating these references, the regional tribunal has clarified the scope of protection of Article 4 ACHR. That is, through an expansive interpretation of the right to life, the Court has not only included within its scope of protection the right to a dignified life, but it has also emphasized that the latter involves the right to health, right to food, right to access to clean water, right to education, and the right to cultural identity, among others.[92] For instance, in the *Yaxye Axa Community* case, the IACrtHR highlighted the interconnection of these fundamental rights and the importance of an integrated protective approach vis à vis groups in situations of vulnerability, such as indigenous peoples. In the wording of the regional tribunal,

> "Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity".[93]

A similar interpretative path has been used by the Court in order to establish the connection between the right to communal property of indigenous peoples over their traditional lands and territories—as protected by Article 21 ACHR—and their right to a dignified life—as protected under Article 4 ACHR. In this sense, the Inter-American Court considered that States' denial to guarantee the members of Yaxye Axa Community their right to communal property had a negative effect on their right to a dignified life, as it deprived them from accessing to their traditional means of subsistence, including the use and enjoyment of the natural resources traditionally used or possessed.[94] In this regard, Justices Cançado Trindade and Ventura Robles have particularly emphasized the relation between the right to a dignified existence and the right to property, by expressing that the latter "is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life".[95]

Finally, it is worthwhile to stress that most indigenous communities in the Americas live under structural conditions of vulnerability. These positions of manifest vulnerability reinforce the need for the introduction of jurisprudential safeguards, capable to guarantee their equal access to dignified life conditions.[96] As mentioned elsewhere, indigenous peoples' cultural distinctiveness (e.g., language, religion, or land tenure systems), together with their particular situation of vulnerability, would require the adoption of specific measures of protection—or positive actions—in order to guarantee equal opportunities in the enjoyment of conventionally protected rights (Fuentes 2015).

The application of these jurisprudential developments, which emphasize the hermeneutical importance of the situation of vulnerability that negatively affects and limit the effective enjoyment of conventionally protected rights, is not limited to the case of indigenous

[90] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, 27 June 1989.

[91] *Indigenous Community of Yakye Axa*, *supra* note 30, para. 163. The Court had a similar pronouncement in *Xakmok Kasek v. Paraguay*, where it examined the right to a decent existence in connection with the right to water, food, health and education. Based on a wide array of sources of international law the Court declared that the State had not provided "the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk, and this constitutes a violation of Article 4(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community." *Xakmok Kasek v. Paraguay*, *supra* note 48, para. 217.

[92] For an in deep study on this matter, see—for example (Harrington 2013) and (Keener and Vasquez 2009).

[93] *Indigenous Community of Yakye Axa*, *supra* note 30, para. 167.

[94] Ibid, para. 168.

[95] *Indigenous Community of Yakye Axa*, *supra* note 30, Dissenting Opinion of judges Cançado Trindade and Ventura Robles, para. 20.

[96] It has been said that "[t]the State's duty to take positive measures to protect the right to life, even when it includes providing for vulnerable populations affected by extreme poverty, cannot be limited to them, given that assistance, by not attacking the root causes of poverty in general, and extreme poverty in particular, can not create those conditions for a dignified life". *Xákmok Kásek v. Paraguay*, *supra* note 48, Concurring and dissenting opinion of Judge A. Fogel Pedrozo, para. 23.

peoples. Other groups in situations of vulnerability, such as the case of children, benefit from these interpretative approaches too (Fuentes and Vannelli 2019).

4.2. Emerging Jurisprudential Developments of Positive Obligations for the Protection of a Dignified Life in Cases of Children's Rights

As introduced above, the right to a dignified life has been constructed by the Court throughout its evolving jurisprudence.[97] Since its very first decision in which the regional tribunal addressed the application of Article 19 ACHR, that is, in the *Street Children* case, the Court linked the rights of the child to the right to a dignified existence. Additionally, as a consequence of this jurisprudential development, it has elaborated upon the States' obligation to generate the societal conditions that would guarantee the full enjoyment of this right, allowing children to develop a project of life.[98] In the words of the Inter-American Court:

> "In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it".[99]

Accordingly, States have the duty to prevent the direct infringement or arbitrary deprivation of the right to life by its agents or any individual. However, the States obligation extends beyond that. In addition to this negative obligation, States also have the positive obligation to generate the necessary societal conditions capable to guarantee a dignified existence and allow children to harbour a project of life towards the "full and harmonious development of their personality."[100] These obligations assume even more relevancy in cases of children affected by special conditions of vulnerability, such as the case of children deprived of their liberty and under the custody of the State.[101]

In this context, the Court has repeatedly referred to the right of every person under detention to live in conditions that are compatible with their dignity.[102] However, when the person deprived of his or her liberty is a child, States have additional obligations in accordance with Articles 4 and 19 ACHR, and therefore, it should take special measures based on the best interest principle.[103] In fact, "to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty".[104]

Consequently, the Court has recognised—in light with the provisions of the CRC and the authoritative interpretations made by the Committee on the Rights of the Child—that the provisions of health care and education are included within States' duty to "ensure to the maximum extent possible the survival and development of the child",[105] and additionally "ensure to them that their detention will not destroy their life plans".[106] Further,

[97] In this regard, the Inter-American Commission has expressed that: "The concept of decent life, as it relates to children, developed by the Inter-American Court and the Inter-American Commission, coincides with the concept used by CRC and by the Committee on the Rights of the Child in their decisions, and presumes a close link with the concept of integral development of the child" (IACHR 2013, para. 104).

[98] "*Street children*", *supra* note 6, para. 191.

[99] Ibid, para. 144

[100] Ibid, para. 191.

[101] See "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39.

[102] See e.g. *Bulacio v. Argentina*, 18 September 2003, IACrtHR, Merits, Reparations and Costs, Series C No. 100, paras. 126 and 138.

[103] In this sense, the Court has stated: "In the case of the right to life, when the person the State deprives of his or her liberty is a child, which the majority of the alleged victims in the instant case were, it has the same obligations it has regarding to any person, yet compounded by the added obligation established in Article 19 of the American Convention. On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 160.

[104] Ibid.

[105] Cf. Article 6 CRC

[106] "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 161.

based on these principles, the Court has recognised States' obligation to provide children under detention with schooling and educational training, "so that they could undergo social rehabilitation and develop a life project".[107] In this sense, the regional tribunal has stated that one of the most appropriate ways to ensure a decent life "is through training that enables them to develop appropriate skills and abilities for their autonomy, insertion in the workforce, and social integration".[108]

Based on the above considerations, we must conclude that the rationale behind the positions assumed by the IACrtHR is the enhancement of the protection of children in situations of vulnerability. As stated by the Court, "education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights".[109]

Moreover, the regional tribunal has made special emphasis on the right to education by acknowledging that this right assumes a key role in contributing to the possibilities of the child towards the enjoyment of a dignified life.[110] The advisory jurisdiction of the Inter-American Court provided the suitable and flexible judicial environment for the development and further elaboration of the concept of children's right to a dignified life, highlighting the importance of the education as a vehicle for their development. For instance, on the *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)*, the regional tribunal has further identified several "measures of protection" derived from the provisions enshrined in Article 19 ACHR.

Not surprisingly, the hermeneutical channel that has paved the way for this expansive interpretation has been the internal integration of Article 19 ACHR with other provisions of the Convention (e.g., Article 4 ACHR), and external references to the corpus juris for the protection of children. Among those external provisions used by the regional tribunal for the identification of the States' positive obligations towards children's right to a decent life,[111] it would be important to highlight Article 23(1) CRC.[112] In this regard, the Court has acknowledged that the right to education assumes an essential role in contributing both to the possibilities of enjoyment of a dignified life and to the prevention of unfavourable situations for children.[113] As highlighted by the IACrtHR, "[i]t is mainly through education that the vulnerability of children is gradually overcome".[114] Therefore, the latter right "stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention".[115]

Further, in connection to children in the context of armed conflicts, the Court reiterated that States' obligation to respect the right to life, "takes on special aspects in the case of children, and it becomes an obligation to prevent situations that might lead, by action or omission, to breach it".[116] In the case of *Mapiripán Massacre v. Colombia*, the regional tribunal stated that the State of Colombia exposed the children of Mapiripán to constant insecurity and violence, affecting their right to a decent life.[117] The Court concluded that the State "did not take the necessary steps for the boys and girls of the instant case to have and develop a decent life".[118]

[107] *Mendoza et al. v. Argentina*, 14 May 2013, IACrtHR, Preliminary objections, merits and reparations, Series C No. 260, para. 316.
[108] Ibid.
[109] *Juridical Condition and Human Rights of the Child*, *supra* note 37, para. 86.
[110] Ibid, para. 84.
[111] Ibid, para. 80.
[112] Article 23(1) CRC refers to children who suffer some type of disability and reads as follows: "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community".
[113] *Juridical Condition and Human Rights of the Child*, *supra* note 37, para. 84.
[114] Ibid, para. 88.
[115] Ibid, para. 84
[116] *Mapiripán Massacre v. Colombia*, *supra* note 34, para. 162.
[117] Ibid.
[118] Ibid.

Finally, it is important to note that the jurisprudence of the Inter-American Court has also influenced the doctrinal position assumed by the Inter-American Commission on Human Rights (the Commission or IACHR). The Commission has also referred to these judicial developments regarding the right of children to a decent life and—by doing so—contributed to the effective protection of their rights in the Americas. For instance, the Commission has identified States' positive obligations to guarantee children with the necessary conditions to develop their "life in dignity" when they find themselves in residential care (IACHR 2013). In the views of the IACHR, States shall ensure children's effective enjoyment of all their rights: "in order to be able to consider that the conditions for a decent life and the overall harmonious development of the child exist" (IACHR 2013, para. 563).

5. Conclusions

This paper has critically examined how the Inter-American Court has expanded the scope of protection of the right to life, as recognised by the American Convention on Human Rights, in the particular case of children. By means of implementing a systemic, evolutive, dynamic and effective interpretation of the Convention in the light of the corpus juris of IHRL, the regional tribunal was able to stress the hermeneutical importance of the corpus juris for the protection of children at the time of interpreting the provisions contained within the American Convention. In this sense, the Court has highlighted the contribution made by the Convention on the Rights of the Child in the development of a pro-children jurisprudence, that is, a jurisprudence that recognised the interpretative centrality of the principle of the best interest of the child.

The integration of Articles 19 and 4 ACHR in the light of the corpus juris for the protection of the rights of the child has led to the development of children's rights to a dignified life and to the identification of concrete positive obligations upon States Members regarding the effective realisation of this right. Examples of these obligations can be found in connection with children under detention where the State should "ensure to the maximum extent possible the survival and development of the child"[119] and "ensure to them that their detention will not destroy their life plans".[120] The Court has also acknowledged positive measures to guarantee children's right to a dignified life in cases concerning indigenous communities or in the context of armed conflict based on the specific situation of vulnerability that is inherently connected with the condition of being a minor.[121]

In short, the systemic, dynamic and *evolutive* integration of the American Convention, under the corpus juris for the protection of the rights of the child, has paved the way for the development of higher levels of protection of children's rights in the Americas. Through the expansive interpretation of the Convention applied by the Court, States could be found responsible for violations to the right to life, even when individuals have not been deprived of it. In fact, the regional tribunal has expanded the scope of protection of the right to life as recognised under Article 4 ACHR, by means of including the protection of the right to a dignified existence. Therefore, in the case of children, Article 19 ACHR needs to be interpreted in connection with Article 4 ACHR.

The contrary introduces an unjustifiable restriction to the protection of the superior interest of the child under international law (i.e., pro-homine principle) and, therefore, it would be detrimental to secure children's conditions for a dignified existence in the Americas.

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119 Cf. Article 6 CRC.

120 "*Juvenile Reeducation Institute*" *v. Paraguay*, *supra* note 39, para. 161.

121 See Section 4.

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Abbreviations

Abbreviations

ACHR	American Convention on Human Rights
CRC	Convention on the Rights of the Child
IACHR	Inter-American Commission of Human Rights
IACrtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
VCLT	Vienna Convention on the Law of Treaties

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