'In the Shadow of Law' The Minimum Right to Health Entitlements of Undocumented Migrants in Europe

"The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them" [Hannah Arendt, 1986: 295-296]

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For those who have made me aware of this poignant topic,
through their struggle to receive medical care,
and then beyond to their endeavour to be recognised as human beings,
who deserve and are entitled to the protection of human rights.

This work is dedicated to them.
-The women of the refugee shelter in Tel Aviv-

ABSTRACT

The following thesis is an exploration of the minimum right to health entitlements of undocumented migrants in Europe. The purpose of this study is to find out what the minimum entitlements are regarding their right to health, within the human rights framework, as well as the entitlements afforded them in European State policies and in daily practice. International human rights law protects in its essence everyone and States are obliged to grant at least minimum levels of the right to health to undocumented migrants. Moreover, undocumented migrants face a higher risk to their health than others and are in need of transparent protection. Nonetheless, the major finding of this study is that undocumented migrants are in an extreme ambiguous position with regard to their health entitlements and general human rights. Therefore this thesis ascertains that undocumented migrants are situated 'In the Shadow of Law'. In addition, this study makes clear that undocumented migrants have an impeded right to health and even the essential levels are sometimes hampered. Lastly, this thesis identifies that their health entitlements are vague and do not seem to secure their right to health. The holistic picture drawn by this thesis exposes valuable information on the strong tension between the principle of universal human rights protection and the practical delivery of these rights to those who are undocumented.

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ACRONYMS AND ABBREVIATIONS

Banjul Charter	African Charter on Human and People's Rights
CEDAW	Convention on the Elimination against all Forms of discrimination Against Women
CESCR	United Nations Committee on Economic Social and Cultural Rights
CoE	Council of Europe
CRC	Convention on the Rights of the Child
Declaration of Non-Nationals	Declaration on the human rights of individuals who are not nationals of the country in which they live
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMN	European Migration Network
ESC	European Social Charter
ESC rights	Economic Social and Cultural rights
EU	European Union
HIV/AIDS	Human immunodeficiency virus infection / Acquired immunodeficiency syndrome
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
IND	Immigratie- en Naturalisatiedienst (The Dutch Immigration and Naturalisation Service)
Migrant Workers Convention	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

NGO	Non-Governmental Organisation
OHCHR	Office for the High Commissioner of Human Rights
PICUM	Platform for International Cooperation on Undocumented Migrants
Protocol of San Salvador	Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
WHO	World Health Organization

1. INTRODUCTION

1.1 Background to the Research Problem

Because of an insecure status, a higher risk of poverty and social exclusion, undocumented migrants face a high risk to their health.[1] This situation increases the need for access to healthcare services for undocumented migrants. Besides direct medical help to improve their condition, it diminishes their social exclusion and consequently advances their health status.[2] Nonetheless, due to migration control, *inter alia*, access to care services is often limited for undocumented migrants. In this context, rights and entitlements are more located in managed migration policies and less in human rights principles.[3] Bustamante, the former special Rapporteur on the human rights of migrants, also identifies serious deficiencies of the legal application of human rights norms concerning undocumented migrants. In his statement to the second session of the Human Rights Council he concluded: "The *de facto* denial that undocumented immigrants have rights, has led to new trends in some countries of destination that imply ominous ruptures of the rule of law of which the international community should not be indifferent."[4]

According to the European Migration Network (EMN) in all European Union (EU) Member States 'emergency medical care' is considered to be a human right regardless of immigration status, an entitlement applying therefore to undocumented migrants.[5] Also the Council of Europe (CoE) outlines 'emergency healthcare' as a minimum social

[1] Karl-Trummer et al, 2009, p.9, and Huber et al 2008, p.94. See also p.90 for health and illness patterns of undocumented migrants. For other studies referring to specific health problems of undocumented migrants see: Björngren Cuadra & Cattacin 2006, p. 78. And Baghir-Zada, 2007 p. 78, who elaborates on specific health problems derived from interviews with undocumented migrants and care takers in Sweden.
[2] Huber et al, 2008, p. 94.
[3] Cholewinski, 2005, p.18.
[4] Statement of Jorge A. Bustamante, Special Rapporteur on the human rights of migrants, Second Session of the Human Rights Council, 18 September 2006. He was special rapporteur on the human rights of migrants from August 2005-July 2011.
[5] European Migration Network, 2007, p.21.

right of undocumented migrants.[6] Both notions refer to a minimum entitlement to the right to health of undocumented migrants within the European context. However, access to care services is often impeded due to a lack of (legal and/or practical) implementation of human rights law, and other constraints undocumented migrants face in daily life. Factors which all together jeopardise enforceable health entitlements of undocumented migrants. This creates a situation in which undocumented migrants, a particularly vulnerable group, face barriers to the fulfilment of even the minimum entitlements of their right to health.

This thesis analyses this problematic situation. By doing so it draws on a critical discussion of the current state of affairs concerning the minimum entitlements of undocumented migrants' right to health. Hence, the significance of this thesis is grounded in a contribution to awarding attention for the case of undocumented migrants' access to healthcare services and consequently their right to health. A topic which needs to be further explored and unravelled.[7] By drawing a holistic picture including undocumented migrants' positions and health entitlements under human rights law, combined with the translation into practice, valuable information for gaining deeper insight into the topic is revealed.

1.2 Research Questions

A crucial question for this thesis is what the minimum entitlements are for undocumented migrants regarding their right to health, within the human rights framework and the translation in European State policies and daily practice. In addition, it has to be identified to what extent undocumented migrants' minimum health

[6] Council of Europe Parliamentary Assembly Resolution 1509, Human rights of irregular migrants, 2006, Article: 13(2): "Emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly."

[7] Several authors indicate a lack of information on specific health problems of undocumented migrants and other general data concerning their access to health care. See for instance: Huber, 2008, p.96. See also Karl-Trummer, 2009, p.9. Björngren Cuadra, 2011, p1. Björngren Cuadra states that the problematic nature of undocumented migrants' access to health care has only recently gained more attention both in research as in the public discourse.

entitlements are congruent with human rights standards, both on the policy level and in practice; since it is questionable whether being eligible to emergency care only[8] (the minimum level outlined by the CoE) actually ensures or contributes to the future fulfilment of the right to health of undocumented migrants. By scrutinising whether this minimum entitlement[9] is in line with the essential minimum elements of the right to health, constituting the 'core content', it shows if it is justified to call emergency medical care a 'human right', as done by the EMN. Because without these essential minimum elements of the core content, a right loses its significant status as a human right.[10] Based on the findings of the whole thesis, a general discussion is held on the legal status of undocumented migrants regarding their human rights, in particular the right to health.

To sum up, this study seeks to answer the following questions:

1. *What are the entitlements afforded undocumented migrants regarding their right to health under the human rights framework and how do these entitlements translate into European State policies?*

2. *To what extent are the minimum entitlements in European policies, and in daily practice (the Dutch situation in particular) in accordance with human rights standards?*

3. *Based on the findings of this study, what can be said about the legal status of undocumented migrants regarding their human rights, in particular the right to health?*

[8] Including entitlements which fall under the same notion such as: urgent medical care, immediate care, essential care.
[9] Idem.
[10] See also the text connected to footnote 163, Coomans speaks about 'essential levels' which constitute the core content, they are equivalent to the core obligations of States. See: Coomans, 1992, in: Coomans, 2002, p.166.

1.3 Delimitations

The author limits this study to (the hampered enjoyment of) the minimum health entitlements of undocumented migrant and their access to public health care. Parallel health networks outside public healthcare, which might arise due to dissatisfaction within civil society about access to care for undocumented migrants, are only slightly touched upon.[11] Potential changes of policies in the European countries are not covered and the study does not elaborate on improved access for undocumented migrants by matters of regularisation.[12] The study focuses on the legal and practical situation of undocumented adults in Europe and not on the specific situation of undocumented children who generally enjoy a broader legal protection.[13] By 'Europe' the EU Member States of the CoE are primarily intended.

Furthermore, the thesis does not go into detail about threats to public health assumed to be caused by (irregular) migration and access to health care within detention facilities is not included, which is in the Netherlands for instance compared to 'regular' access a far more distressing situation.[14] Although a detailed picture of the discussion in Europe as a whole goes beyond the scope of this thesis, *inter alia* a slight focus on the Netherlands provides an insight in denominators of the general situation in Europe.

1.4 Methods and Thesis Structure

The major part of this study involves an extensive desk research in order to identify and understand the relevant human rights framework, together with gaining a deeper understanding of the on-going discussions related to undocumented migrants and their access to public health care. The thesis draws on a range of sources, including published

[11] See subparagraph 4.4.3 of this thesis: 'A Counter Reaction to Non- Access: Parallel Health Networks'.
[12] Regularisation can be any state procedure which grants a legal status to an irregular resident.
[13] The broader legal protection of undocumented children is briefly mentioned in subparagraph 3.3.2.1 of this thesis.
[14] See for more information on the situation in the Netherlands of detaining asylum seekers and undocumented migrants: Amnesty International report of 2008, *'The detention of irregular migrants and asylum-seekers'* and the update report of 2010.

literature, reports from non-governmental organisations, government departments, other research reports related to human rights law and email communication with medical professionals and advocacy groups. In addition, the relevant human rights instruments as well as different conventions and charters are used efficiently. The methodology for this thesis is a blend of theoretical, legal and practical aspects of human rights, specifically with regard to the right to health for undocumented migrants. A minor case study is conducted on the country specific situation of the Netherlands and includes all above mentioned aspects.

The body of the thesis is comprised of four chapters, excluding this first introductory chapter. Chapter two 'Human rights of undocumented migrants in general' can be considered as a solid framework for the subsequent chapters and provides an introduction into the general status and protection of undocumented migrants under international human rights law. Chapter three 'Right to health of undocumented migrants' explains the most relevant aspects of undocumented migrants', often problematic, right to health. The chapter sets *inter alia* forward the 'core content', which is significant for determining the minimum health entitlements of undocumented migrants under human rights law. Consequently, chapter three lays the basis for the discussion of the right to health entitlements in chapter four 'Perceiving the minimum health entitlements'. Chapter four explores how the minimum health entitlements are perceived on the policy level as well in (legal) practice. Light is shed on common denominators within the European context regarding these entitlements. In the last chapter the findings of the study are presented.

2. HUMAN RIGHTS OF UNDOCUMENTED MIGRANTS IN GENERAL

2.1 Introduction to Chapter

Generally speaking human rights instruments grant rights to 'everyone', not only to nationals of State Parties.[15] This general rule is formulated as follows in the Universal Declaration of Human Rights:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[16]

Hence, also non-nationals –including undocumented migrants- benefit from the rights guaranteed in human rights instruments.[17] Nonetheless, this general rule has exceptions and the extent to which human rights apply to non-nationals, like undocumented migrants, can differ and has to be explored.

This chapter provides a coherent discussion of relevant legal subjects related to undocumented migrants and their protection under international human rights law. This exploration sheds light on the general status and human rights protection of undocumented migrants. This chapter elucidates to what extent undocumented migrants benefit from the principles enshrined within these human rights instruments. The chapter opens with the major term in this thesis: 'undocumented migrants'. Every subsequent sub-chapter begins with an explanation on terminology and continues with a discussion on the legal subject in question.[18] Respectively, (non)-citizens and nationals,

[15] Sepúlveda, 2003, p.259.
[16] Universal Declaration of Human Rights, 1948, Article 2.
[17] Sepúlveda, 2003, p.259. The explicit reference to the undocumented is added by the author.
[18] With one exception; the discussion on the legal subject in question is not held for subparagraph 2.5.1 'Asylum Seekers and Refugees'. The author considered it as more important to clarify that undocumented

lawful and unlawful aliens and other special categories of aliens like asylum seekers, refugees and migrant workers are discussed. This all leads to an overview of the general human rights protection of undocumented migrants. This overview provides the reader with a solid framework and introduction for the more specific study of undocumented migrants' minimum entitlements to the right to health in the sub-sequent chapters.

2.2 Undocumented Migrants

The term 'undocumented migrant' refers to a third-country national without a valid permit authorising a regular stay in the State in which the individual resides.[19] There are different ways for entering this category; 1. rejected asylum seekers, 2. people staying beyond their permitted period of entry and residence; and 3. people who entered the country of destination irregularly.[20]

In the relevant literature, reports and legal instruments many other synonyms or related terms to undocumented migrants are used. For this thesis the term 'undocumented migrants' is chosen primarily to make use of more neutral notion. Alternatively, 'irregular migrants' is used as opposed to 'illegal migrants'. The argumentation against the latter is that in the current political and public debate the term 'illegal' has a connotation of criminality.[21] The labelling of people with this severely loaded term can contribute to a political climate of intolerance towards those seeking asylum. Further, the act of residing in a country without the required papers is in most countries not a criminal offence but an administrative infringement.[22]

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migrants fall outside the scope of asylum and refugee law, than to discuss the legal protection of asylum seekers and refugees in detail.

[19] Björngren Cuadra & Cattacin, 2010, p.1.

[20] Björngren Cuadra, 2011, p.2

[21] Platform for International Cooperation on Undocumented Migrants, The use of correct terminology, available at: http://picum.org/en/our-work/undocumented-migrants/terminology (last accessed on 9 July 2012), see also: Weissbrodt, 2008, p.197.

[22] Idem.

2.3 (Non-) Citizens and Nationals

2.3.1 Terminology

In international law it is common to approach 'citizen' and 'national' as synonymous. Nonetheless, there can be a difference in the legal link towards the State in which the natural person is present.[23] A 'national' is a person who has the nationality of a State in which this person is present; nationality in this regard is the legal link of a person to that State.[24] For a 'citizen' this legal link does not necessarily have to be derived from nationality, although it usually is, and for that reason the two terms are often synonymous. An example in which citizenship does not coincide with nationality can be found in EU law in which citizenship is that of the union, while nationality is that of each Member State. This study follows the legal opinion of the United Nations office of legal affairs, which confirms that in some sense 'citizen', is synonymous with 'national',[25] since the different terms only rarely have a different meaning and the synonymy of the two terms is also found in several international instruments.[26]

2.3.2 Protection of Non-Citizens under Human Rights Law

For non-citizens, like undocumented migrants, the actual level of protection under the binding human rights treaties is more complex when compared to the protection of citizens. According to Vested-Hansen, this stems from the fact that the international human rights system is perceived to be based on the assumption that the primary obligation to protect individuals rests with the State in which the persons are citizens. Non-citizens residing in a State, consequently have less favourable protection than citizens.[27]

[23] United Nations Juridical Yearbook, 1980, p.190.
[24] Idem.
[25] Idem.
[26] Vested-Hansen, 2009, p.301-322, refers to Article 7 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990 A/RES/45/158, in which the term 'nationality' should be understood as 'citizenship'.
[27] Vested-Hansen, 2009, p.301.

Although general human rights law underwent positive developments with regard to legally binding obligations of States towards non-citizens, conventions aimed at specific groups still remain important. The value of these additional conventions is of importance as they give certain groups, as non-citizens, improved protection and they secure legal entitlements in areas of general human rights law in which ambiguity still prevails.[28] In addition, these conventions acquire legal entitlements related to the specific situations of particular groups of non-citizens.[29]

2.3.3 Common Problems of Non-Citizens' Rights

Weissbrodt[30] identifies some common problems regarding the rights of non-citizens. Although his arguments generalise for all non-citizens, they clarify the disjuncture between prescribed rights and the realities non-citizens face. He states that the prevalence of anti-immigrant sentiments serve to deny non-citizens the rights which they are guaranteed by international law. These sentiments result in harassment towards non-citizens in society at large, in politics, the media, and are at times also reflected in a country's legislation.[31] Chetail identifies this phenomenon as a perceived or a *de jure* distinction between citizens and non-citizens.[32] This can lead to a "widespread and mistaken view that migrants are somehow not entitled to the full protection of human rights law, often because of the belief that only citizens are entitled to these rights."[33]

An additional factor which contributes to the discrepancy between prescribed rights and reality is that non-citizens often do not assert their rights. Undocumented migrants are a particularly vulnerable group of non-citizens, as due to their fear of being reported they

[28] Vested-Hansen, 2009, p.302.
[29] Vested-Hansen, 2009, p.302. There are for instance special conventions for children (See: Convention on the Rights of the Child, CRC, 1989) or women (See: Convention on the Elimination against all Forms of discrimination Against Women, CEDAW, 1979).
[30] Weissbrodt, 2008.
[31] Weissbrodt, 2008, p.3.
[32] Chetail, 2009, p.225.
[33] Varennes, 2003, p.9.

often do not seek judicial remedies, which results in them being easily subjected to a variety of human rights abuses.[34]

2.4 Lawful and Unlawful Aliens

2.4.1 Terminology

An alien is seen as the opposite of a national or citizen of the forum State. Accordingly, an alien is a person who is under the jurisdiction of another nation or State and who does not hold the nationality of the State in which he or she is present.[35] An alien can be a 'lawful alien' or an 'unlawful alien'. Unlawful aliens are unlawfully present in the country in which they reside. Since undocumented migrants are not nationals of the State in which they are present, they are 'aliens'. However, because of their unlawful residence, undocumented migrants fall under the notion of 'unlawful aliens'. Consequently, provisions which apply exclusively to lawful aliens are not applicable to them. In order to clarify the legal position of undocumented migrants, the analysis below gives particular attention to if and how the discussed rights apply to unlawful aliens.

2.4.2 Rights of Aliens

2.4.2.1 Political Participatory Rights

Article 25 of the International Covenant on Civil and Political Rights (ICCPR), is the only provision that instead of guaranteeing an universal human right, enshrines a citizen's right. This exemplifies that the right to vote may be denied to aliens.[36]

[34] Weissbrodt, 2008, p.3.
[35] International Law Commission, 2006, p.38. Also Article 2 of the Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985. Doc. A/RES/40/144 uses this definition: 'any individual who is not a national of the State in which he or she is present'.
[36] Nowak, 2005, p.576.

ICCPR: Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a. To take part in the conduct of public affairs, directly or through freely chosen representatives.
b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
c. To have access, on general terms of equality, to public service in his country.[37]

Nowak elaborates in his commentary on the ICCPR on the formulation of political rights in the respective Covenant. They are seen as subjective rights of the individual, and in this case not of the human being but rather of the citizen.[38] The question who falls and who does not fall within the definition of citizenship depends, in principle, on the domestic jurisdiction of States parties, which decide upon the conditions under which aliens may acquire citizenship.[39] While it might be legitimate to permit distinctions between citizens and non-citizens, like migrants in certain circumstances,[40] they have to be proportional and must avoid serving as an accelerator to a denial of rights altogether.[41]

Although political participatory rights may legitimately be reserved for citizens under international law,[42] Weissbrodt assesses this exclusive application for citizens as problematic. According to him it limits non-citizens in participating in the political process and consequently they cannot sufficiently assure their legal protection or assert their human rights.[43] Additionally, a lack of citizenship acts as a significant barrier for

[37] International Covenant on Civil and Political Rights, 1966, Article 25.
[38] Nowak, 2005, p.568. The application of political rights exclusively to citizens is set forth in other conventions, with the exception of Article 3 First protocol (1952) to the ECHR. This is about the right to free elections, in which no explicit reference is made to citizens but to 'people'. Full text of Article 3 first protocol ECHR: "Right to Free Elections. The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."
[39] Nowak, 2005, p.568.
[40] See also Office of the United Nations High Commissioner for Human Rights, 2006, p.6.
[41] Cholewinski, 2005, p.28.
[42] Venice Commission, 2011, p.61.
[43] Weissbrodt, 2008, p.3.

effective participation and contributes to a sense of alienation which can lead to social exclusion and escalation of tensions in society.[44]

2.4.2.2 Declaration on the Human Rights of Non-Nationals

The United Nations adopted in 1985 the 'Declaration on the human rights of individuals who are not nationals of the country in which they live'.[45] The purpose of this declaration is to clarify the rights of aliens and to provide guidance for States in order to ensure that the fundamental human rights of the two international Covenants, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), are guaranteed to non-citizens as well.[46] Although the rights set forth in these two Covenants apply in general to everyone,[47] there are specific articles which differentiate the legal position of aliens as opposed to citizens and which further differentiate between unlawful and lawful aliens. Which rights aliens have, both lawful and unlawful, is an important question in need of assessment in order to clarify the legal position of undocumented migrants, which fall under the scope of 'unlawful aliens'. The Declaration was promulgated to elucidate the rights of aliens, for both civil and political rights of the ICCPR, as the economic and social rights of the ICESCR.[48]

[44] The Venice Commission, 2011, p.61.
[45] Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985, U.N. Doc. A/RES/40/144, further on referred to as 'Declaration of Non-Nationals'.
[46] The two international covenants are legally binding documents and require States which ratified them to protect the human rights of all individuals within its territory and subject to its jurisdiction. See also: Biegon, 2003, who provides a summarised version of the rights of aliens under the Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985. U.N. Doc. A/RES/40/144.
[47] See for example General Comment 15: The Position of Aliens under the Covenant, 1986. 11/04/198, Article 1 states: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness." Additionally, General Comment 15 provides specific interpretation of the position of aliens under the ICCPR. For the ICESCR see for instance General Comment 20 on Non-Discrimination in Economic Social and Cultural Rights E/C.12/GC/20, par.30, which states: "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."
[48] Biegon, 2003, p.1.

2.4.2.3 Rights of Aliens irrespective of Status

Article 5(1) of the Declaration of Non-Nationals is about rights which aliens should enjoy, which have to be "in accordance with domestic law and subject to the relevant international obligations of the State" in which aliens are present.[49] No explicit reference is made to the legal status of the alien, which indicates that in principle these rights should apply to all aliens. Also the prohibition of torture or inhuman and degrading treatment applies to all aliens irrespectively of status[50] as well as the right to communicate with the consulate of the State of which the alien is a national.[51] Besides this no alien shall be arbitrarily deprived of his or her lawfully acquired assets.[52]

Declaration of Non-Nationals: Article 5(1)

a. The right to life and security of the person, including freedom from arbitrary arrest or detention.
b. Protection against arbitrary or unlawful interference with privacy, family, home or correspondence.
c. Equality before the courts, including the free assistance of an interpreter.
d. The right to choose a spouse, to marry, and to found a family
e. Freedom of thought, opinion, conscience and religion.
f. The right to retain language, culture and tradition.
g. The right to transfer money abroad.

[49] Biegon, 2003, p.2.
[50] Article 6 is about the prohibition of torture and inhuman and degrading treatment. Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985, U.N. Doc. A/RES/40/144, Article 6.
[51] Article 10 is about the right to communicate with the consulate or diplomatic mission of the State of which the alien is a national. Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985, U.N. Doc. A/RES/40/144, Article 10.
[52] Article 9 is about that no alien shall be arbitrarily deprived of his or her lawfully acquired assets. Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985, U.N. Doc. A/RES/40/144, Article 9.

2.4.2.4 Restrictive Rights for Unlawful Aliens

The second part of article five, Article 5(2), stresses some conditions in order for the rights it refers to to be granted.[53] Still no reference is made to the legal status of the alien. Article 5(2) enshrines the following rights:

Declaration of Non-Nationals: Article 5(2)

a. The right to leave the country.
b. The right to freedom of expression.
c. The right to peaceful assembly.
d. The right to own property individually or in association with others.

Since the above article applies to all aliens, 'the right to leave the country' applies also to unlawful aliens. A right which is related to the right of freedom of movement. The right of freedom of movement is to be found in Article 5(3)[54] of the Declaration and in Article 12 ICCPR. Article 5(3) is only applicable to lawful aliens, which is in line with the scope of the relevant article on the Freedom of Movement in the ICCPR.

ICCPR: Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

[53] This emphasises that some rights of aliens may be susceptible to limitation or derogation under conditions by which these restrictions are lawful. Restrictions can be applied when they are: prescribed by law, necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and finally these restrictions are only lawful when they are consistent with the other rights recognised in the relevant international instruments.

[54] Article 5.3 is about the liberty of movement and freedom to choose the place of residence within the borders of the country and is also subject to the conditions adopted in article 5(2). See the previous footnote for these conditions.

4. No one shall be arbitrarily deprived of the right to enter his own Country.

An exception for the exclusive application of Article 12 to lawful aliens is found in Article 12(2) which applies also to unlawful aliens. It states: "Everyone shall be free to leave any country, including his own." A statement similar to Article 5(2) of the declaration. What can be derived from these clauses (Article 12(2) ICCPR and Article 5(2) of the Declaration) is that the freedom of movement for the unlawful alien is limited to a 'right to leave'. The General Comment on the freedom of movement clarifies paragraph 2 of Article 12 ICCPR:

> As the scope of article 12, paragraph 2 is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.[55]

Article 5(4) of the Declaration of Non-Nationals is also only applicable to aliens residing lawfully. It includes the right of a spouse and dependent minors to join a lawful alien as provided by national law.[56] Another article which is restricted to those who are lawful is Article 7 of the Declaration which is on the prohibition of arbitrary expulsion, comparable with Article 13[57] of the ICCPR.[58] To put it in a nutshell: several of the discussed rights merely apply to lawful aliens. The rights applicable to unlawful aliens are very limited.

[55] General Comment no.27: Freedom of movement (Art.12): 02/11/1999. CCPR/C/21/Rev.1/Add.9, par. 8.

[56] Only aliens lawfully residing in the country should be granted these rights, under the condition that they observe the country's laws and respect the customs and traditions of the people. See also: Biegon, 2004.

[57] Article 13 ICCPR: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[58] Nonetheless, when the legality of an alien is in dispute, any decision which can lead to expulsion or deportation still has to be taken in accordance with article 13 of the ICCPR, see: General Comment no.15: The position of aliens under the Covenant, 11/04/1986, par.9.

2.4.2.5 Social and Economic Rights

Within Article 8(1) of the Declaration of Non-Nationals the differentiation between lawful and unlawful aliens is continued, "Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights [...]":

Declaration of Non-Nationals: Article 8(1)

a. The right to safe and healthy working conditions, fair wages, and equal pay for equal work.
b. The right to join trade unions.
c. The right to social services, health care, education, and social security.

The social rights in the above article apply as such only to lawful aliens and exclude the unlawful. Contrary to the interpretation of the declaration is the ICESCR which grants these rights to everyone irrespective of status.[59] The only exception appears in article 2(3), however this is a very limited clause.[60] Nonetheless it indicates that there is no way for 'developed' countries to deny economic rights to non-nationals -such as undocumented migrants-. This is highly relevant for the research topic with its main focus on Europe.

> Article 2(3): Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

In May 2009 the United Nations Committee on Economic Social and Cultural Rights (CESCR) communicated, in its sessional rapport of 2009, the opinion that the ICESCR rights apply to non-nationals, regardless of legal status and documentation.[61] A guidance statement contrary to the guidelines of the Declaration of Non-Nationals, since

[59] See: United Nations Committee on Economic, Social and Cultural Rights, General Comment 20 on Non-Discrimination in Economic Social and Cultural Rights E/C.12/GC/20, par.30.
[60] See Sepúlveda, 2003, p.260. It has to be noted that this is a very limited exception, only developing States may impose limitations on the enjoyment of some of the Covenant's rights by non-nationals.
[61] Committee on Economic, Social and Cultural Rights, Sessional Report on the forty-second and forty-third sessions 2009. E/2010/22 E/C.12/2009/3, p.141.

the Declaration excludes unlawful aliens from the right to social security and other related human rights.[62]

Although the Declaration was adopted to clarify the rights of aliens under the two international covenants, ambiguity remains especially as to the granting of social and economic rights to unlawful aliens and consequently to undocumented migrants. The overall picture seems to be that of a restrictive interpretation of the Covenants' rights, with which the tension is reflected between the principle of universal human rights protection and the practical delivery of these rights to non-nationals in general and in particular to those who are in a country irregularly.[63] The application of social and economic rights to undocumented migrants (unlawful aliens) is dealt with in even greater detail in the following chapters of this thesis.

2.5 Special Categories of Aliens

2.5.1 Asylum Seekers and Refugees

It is easy to become confused by the different legal categories and whether undocumented migrants fall within their scope. Therefore the notions of asylum seeker and refugee are briefly explained. An asylum seeker is someone who seeks international protection, and whose claim has not been determined yet by the country were he or she seeks protection. An asylum seeker is therefore a potential refugee.[64] A refugee is someone who is on grounds provided by the 1951 Refugee Convention, already recognised as a refugee.[65] Refugees are forced to flee their country because of a threat of persecution. Therefore they seek protection in another State. Consequently, all

[62] Kapuy, 2011, p.37.
[63] Cholewinski, 2005, p.27. Cholewinksi states that the all-encompassing nature of the UDHR shows that international human rights in general do not distinguish between nationals and non-nationals in respect to the rights afforded to them.
[64] International Council on Human Rights Policy, 2010, p. 2.
[65] United Nations General Assembly, Convention Relating to the Status of Refugees, 1951, Art. 1.

refugees are initially asylum seekers, but not all asylum seekers are recognised as refugees.[66]

Since undocumented migrants are irregular in a State, they do not have an official status. They are not within a status determination process (asylum process) yet, or failed to acquire a status. For this reason undocumented migrants fall not within the scope of protection granted to asylum seekers or refugees.[67] However, if someone is undocumented because of irregular border crossing,[68] the person can still potentially fall within the category of asylum seekers and eventually refugees, when the asylum process is initiated. This category of undocumented migrants might therefore enjoy in future, the protection of asylum seekers and refugees.

2.5.2 Migrant Workers

2.5.2.1 Terminology

According to Article 2(1) of the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families[69] the term 'migrant worker' refers to: "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[70] This definition includes undocumented migrants and victims of trafficking, and thus does not exclude migrants who may not be properly remunerated.[71] According to the Convention, migrant workers

[66] The short descriptions of both notions (asylum seeker and refugee) are based on the definitions provided by: International Council on Human Rights Policy, 2010, p. 2.
[67] See also: Betts, 2010, pp. 209-236.
[68] This is the third way for entering the category of 'undocumented migrant'. See: subparagraph 2.2 'Undocumented Migrants' for more information on terminology of the term undocumented migrants and the possible ways for entering this category.
[69] International Convention on the protection of the Rights of All Migrant Workers and Members of their Families, 1990, A/RES/45/158. Further referred to as 'Migrant Workers Convention'.
[70] International Convention on the protection of the Rights of All Migrant Workers and Members of their Families, 1990, A/RES/45/158, Article 2.1.
[71] Weissbrodt, 2008, p.183.

are considered as non-documented, or in an irregular situation, if they are not authorised to enter, to stay and to engage in a remunerated activity in the State of employment.[72]

2.5.2.2 The Migrant Workers Convention

As stated above, the Migrant Workers Convention applies to migrant workers regardless of status. It applies therefore also to undocumented migrant workers and probably to most undocumented migrants, since in practice many of them are in some form of employment.[73] As mentioned before, the importance of additional conventions to the general human rights framework is to strengthen the legal position of certain groups in areas in which ambiguity still remains.[74] With regard to undocumented migrants, the Migrant Workers Convention strongly refers to the importance of the protection of the fundamental rights of people involved in irregular migration, since the problems involved in the case of irregular migration are considered as even more serious than within regular migration.[75] A point of key importance lies in the fact that this Convention for the first time explicitly guarantees minimum standards for undocumented migrant workers.[76]

The rights in part III of the Convention apply to both migrant workers in a regular and irregular situation. It incorporates the full range of fundamental rights and entitlements which are also adopted in general human rights treaties, apart from two additional rights: Articles 15 and 32. These articles entail the rights of migrants regarding their protection against arbitrary deprivation of property and the right to transfer earnings and savings.[77] Part IV the Convention differentiates between migrant workers who are in a

[72] International Convention on the protection of the Rights of All Migrant Workers and Members of their Families, 1990, A/RES/45/158, Article 5.
[73] Cholewinski, 2005, p.9.
[74] See subparagraph 2.3.2 of this thesis for the first referral to the importance of additional conventions.
[75] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, A/RES/45/158, preamble.
[76] Guilbert, 2007, p.4.
[77] Vested-Hansen, 2009, p.315. On this page this author refers to these two articles of the Migrant Worker Convention.

regular situation and undocumented migrants. Some entitlements such as the right to family reunification can only be invoked by the first group under specific conditions.[78]

2.5.2.3 International Labour Organisation

The International Labour Organisation (ILO) also addresses the right of migrant workers, with two conventions numbers 97 and 143 respectively.[79] The first convention applies only to migrants lawfully present in the host State. In article 1 of the second convention (number 143) an obligation for States to respect the basic human rights of all migrant workers, is stated. However, the right to equal opportunity and treatment applies to undocumented migrants only with respect to rights arising out of past employment.[80] In conclusion, compared to the Migrant Workers Convention, under the ILO conventions undocumented migrants receive substantially less protection. Furthermore, due to a low ratification rate of both ILO conventions, especially among EU Member States, the potential legal protection is even further undermined.[81]

2.5.2.4 Ratification of the Migrant Workers Conventions

Although a positive development can be determined in the gradual mitigation of deficiencies within the international protection towards the human rights for non-citizens,[82] the current non-ratification state of the Migrant Workers Convention within

[78] Although regular migrants also do not have an unequivocal right to family reunification. It implies for States that they have to carry out 'appropriate measures' such as facilitating reunification. It depends on the interpretation and concrete application of human rights treaty provisions whether this right can be invoked, see: Vested-Hansen, 2009, p.318.

[79] Respectively Convention 97 'Migration for Employment Convention',C97, 1949, and Convention 143 'Migrant Workers Convention', C143,1975.

[80] ILO Convention 143 'Migrant Workers Convention, C143, 1975. See also Weissbrodt, 2008, p.185. Rights arising out of past employment are with regard to remuneration, social security and other benefit.

[81] As to date only 23 countries have ratified ILO convention nr 143. Portugal, Cyprus, Italy and Sweden are the only EU states which ratified the convention. Convention 97 has currently 49 ratifications. The status of ratification can be consulted at the web page of the web page of the ILO, available at http://www.ilo.org/ilolex/english/newratframeE.htm (last accessed on 9 July 2012).

[82] By means of the existence of new treaties and improved interpretation of non-discrimination provisions, see Vested Hansen, 2009, p.321.

the EU does not contribute to strengthen the legal position of undocumented migrants. Unfortunately none of the EU Member States has ratified the Migrant Workers Convention, the only convention which explicitly guarantees minimum human rights standards for undocumented migrants. To date forty five States have ratified and fifteen have signed the Convention.[83] A similar trend can be found with regard to the ratification of the ILO treaties, as most of the ratifications come from predominantly migrant-sending countries which makes the conventions only binding upon these countries.

2.5.2.5 Council of Europe Instruments

In comparison to the international human rights instruments and international labour standards discussed above, which are in themselves already limited in their application to undocumented migrants compared to other legal subjects, Council of Europe instruments are even more restrictive.[84] The main treaty on migrant workers, the 'European Convention on the Legal Status of Migrant Workers'[85] includes within its scope only lawfully residing migrant workers. This is in contrast to the International Migrant Convention which is applicable to all migrant workers, regardless of status. Similarly, the European Social Charter and its revised successor apply in general only to foreigners who are nationals of other contracting parties "lawfully resident and working regularly" within the territory of another contracting party.[86] Once more, undocumented migrants are excluded from the general application of a human rights instrument.

[83] The status of ratification of the Migrant Workers Convention can be consulted at the web page of the Office for the High Commissioner of Human Rights, (http://www.ohchr.org/english/bodies/docs/ratificationstatus.pdf) last accessed on 10 July, 2012.
[84] Cholewinski, 2005, p.30.
[85] Council of Europe, European Convention on the Legal Status of Migrant Workers, 1977, ETS 93.
[86] Council of Europe, European Social Charter (Revised),1996, ETS 163, Appendix, par. 1.

2.6 Concluding remarks

In this chapter the most relevant legal subjects associated with undocumented migrants were discussed. This overview sheds light on the embedment of undocumented migrants as a legal subject in the general human rights legal framework. They face the common complications of non-citizens or aliens when asserting their rights. Besides these complications, an evaluation of the legal categories in which undocumented migrants are incorporated visualises that even within these categories the undocumented person has a discerned position. For instance, the legal protection of aliens moderates, through its sub-categories of lawful aliens as opposed to unlawful aliens, the legal position of undocumented migrants. The same tendency can be determined within the category of migrant workers versus their irregular counterparts. Furthermore, undocumented migrants simply fall outside the general legal scope of some important international instruments, and the only convention which for the first time explicitly guarantees minimum standards for undocumented migrants 'The Migrant Workers Convention', lacks ratification.[87] The overall conclusion can be drawn that the legal position of undocumented migrants is particularly ambiguous. In the next chapter there will be a particular focus on the right to health of undocumented migrants.

[87] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, A/RES/45/158.

3. RIGHT TO HEALTH OF UNDOCUMENTED MIGRANTS

3.1 Introduction to Chapter

In order to address health as a human right, each of the existing human rights instruments uses their own particular language.[88] At the United Nations level 'right to health' is the terminology most commonly used; other terms are 'right to health care', or 'right to health protection'.[89] In this thesis the author chose the umbrella term 'right to health', since it is best in line with the international treaty provisions which proclaim both the right to health care services, but also the right to a number of underlying preconditions for health.[90]

The right to health is enshrined as a fundamental human right and therefore a right irrespective of legal status or financial capital. Consequently, it should protect particular socio-economically disadvantaged groups -such as undocumented migrants- from extreme disadvantages.[91] It does not entail the means to claim complete health and is not a 'right to be healthy',[92] but it is used as a shorthand expression referring to the more sophisticated treaty-based texts.[93] It does require governments and public authorities to have policies and action plans in place which should lead to available and accessible health care for all in the shortest possible time.[94]

This chapter begins with introducing the background regarding a problematic right to health of undocumented migrants. Subsequently, the chapter continues with an

[88] Toebes, 2001, p.169.
[89] Toebes, 2001, p.196. The term 'right to health care' is more commonly used in nationals discussions regarding the access to health care services and priority setting of access to health care services.
[90] The author's decision is in line with the reasoning of Asher, 2004, p. 28. See also: Toebes, 2001, p.170.
[91] Karl-Trummer, et al., 2009, p.11. The words 'undocumented migrants' is added by the author. Undocumented migrants fall under the notion of socio-economically disadvantaged groups.
[92] Mary Robinson former UN High Commissioner for Human Rights in: World Health Organization, 25 Questions and answers on health and human rights, 2002, p.11. See also: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health. E/C.12/2000/4, par. 8.
[93] Toebes, 2001, p.170.
[94] Idem.

overview of the right to health in a framework of human rights instruments. The international framework concerning the right to health is presented followed by the European human rights instruments. Undocumented migrants' legal entitlements in Europe are clarified, as well as the State obligations and the core content of the right to health. The chapter refers briefly to the justiciability of the right to health. The sum of all these sub-chapters is a framework which lays the basis for the discussion of the right to health entitlements in chapter four.

3.2 A Problematical Right to Health of Undocumented Migrants

3.2.1 Background to a limited Right to Health

The enjoyment of the right to health of migrants in general, and for undocumented migrants specifically, is hampered compared to the health rights of citizens.[95] Factors such as discrimination, language, cultural barriers and legal status are the basis for this difference.[96] The Special Rapporteur on the Right to Health stresses that the right to health is to be enjoyed by all without discrimination. This is especially important for vulnerable individuals and groups such as undocumented migrants. They are precisely the sort of group that international human rights law is designed to protect.[97] He also emphasises that sick undocumented persons should not be denied their human right to medical care.[98]

Nonetheless, several States have explicitly enounced that they are not able or are not willing to provide the same level of protection to migrants as to their own citizens.[99]

[95]Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.18.
[96] World Health Organization, 2003, p.6, see also: Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.19, and Weissbrodt, 2008, p.3.
[97] Report of the Special Rapporteur on the Right to Health on his mission to Sweden, A/HRC/4/28/ Add.2, 2007, par. 73.
[98] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.20.
[99] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.19.

Most countries define their health obligations towards undocumented migrants in terms of 'essential care' or 'emergency health care' only.[100] The irregular status of undocumented migrants is seen by the World Health Organisation (WHO) as the most important determining factor of a limited access to health services.[101]

The WHO identifies some underlying rationales for restrictive laws and policies regarding undocumented migrants' access to healthcare. One of them is the idea that undocumented migrants themselves are primarily responsible for their precarious situation. Secondly, it is considered as expensive for taxpayers to allow undocumented migrants access to health services. Lastly, it is believed that exclusion from social benefits will deter future undocumented migrants.[102] Generally speaking, restrictive migration laws and policies are based on these presumptions and "allowing irregular migrants access to health services is therefore often considered charity or 'generosity' on behalf of the State."[103] However, this argumentation is far away from the legal obligations of States in relation to the health of every person within their jurisdiction.[104]

3.2.2 General Difficulties

Without denying that the individual person has her or his own specific circumstances, there are general obstacles to be identified concerning undocumented migrants' realisation of their right to health. Major difficulties faced by undocumented migrants are as follows:[105]

[100] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.19.
[101] World Health Organization, 2003, p.19.
[102] Idem.
[103] Idem.
[104] For an overview of the obligations for states regarding the right to health see subchapter 3.4 'State Obligations'.
[105] The major difficulties summed up are merely based on the report of the Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.19 and complemented with difficulties and obstacles found in other literature (see subsequent footnotes). See also: Chetail, 2009, p.226, for an elaboration on the realisation of the right to health of migrants in general, and their vulnerable situation with regard to health issues.

- Inadequate coverage by State health systems.
- Inadequate information. Both at the supply and demand level.[106]
- Fear of being reported to the police or immigration authorities.[107]
- Female domestic workers are particularly vulnerable to sexual abuse and violence.
- Undocumented migrants are at higher risk of ending up working in unsafe and unhealthy working conditions.
- The conditions in detention centres may be conducive to the spread of diseases.
- Especially trafficked persons are at particular risk of physical violence and abuse.[108]

3.2.3 Interests of States to improve Protection

Protection of undocumented migrants' human rights is not necessarily inconsistent with the realisation of political, economic, and social interests of the State.[109] Therefore States should be more pressured in the international political climate to focus on the undocumented migrants themselves, rather than the migration processes and its management.[110] Otherwise denial and jeopardising undocumented migrants' human rights, even the minimum levels, continue to take place.

There are other reasons which lie within States' interest to improve the protection of undocumented migrants' human rights. This is the importance to incorporate the

[106] A general lack of information both on the side of the undocumented migrants as for health providers can be determined. Also the Council of Europe recognises that "Measures should also be taken to ensure that not only migrants are well informed about their entitlement to use the health system, but that health care professionals at all levels are also aware of these rights" see: Council of Europe Recommendation CM/Rec(2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care, C11.

[107] Björngren Cuadra, 2011, p.2. The explicit obligation to denounce is only present in two European Union member states (Lithuania in certain circumstances and in Sweden) However; the fear to be reported does not have to be related with existing regulations. Also when there is no explicit obligation to report to the authorities this fear is prevalent among undocumented migrants. See also: Karl-Trummer, 2009, p.8. See also: Mladovsky 2007, he confirms with his review on migration and health in the EU that a lack of knowledge and mistrust among irregular migrants are serious obstacles for their access to medical care even when they are entitled to.

[108] Especially trafficked persons also face extreme hurdles related to their right to reproductive health (sexually transmitted diseases, including infection with HIV/AIDS, unwanted pregnancies)

[109] Cholewinski, 2005, p.18.

[110] Idem.

position of undocumented migrants in the principle of social inclusion.[111] Within the context of anti-discrimination policies, it is extremely important not to deter undocumented migrants from their human rights protection. Restrictive access to social services, such as medical care, increases undocumented migrants' marginalisation and stigmatisation in society. Together with negative policies the underlying triggers can erupt for increased racism.[112]

3.3 Legal Framework

3.3.1 International Enshrinement of the Right to Health

As a predecessor for the right to health the WHO was the first organisation to formulate an explicit 'right to health'.[113] Following its example the right to health can be found in a considerable number of international human rights treaties and other documents setting standards for the right to health.[114] The first human rights treaty requiring states to recognise and realise progressively the right to health was the ICESCR. The Covenant provides key provisions for the protection of the right to health in international law. Article 12 of the Covenant recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[115] Additionally the Covenant mandates that State parties to the Covenant undertake the following steps to achieve its full realisation:

- The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.
- The improvement of all aspects of environmental and industrial hygiene.

[111] Cholewinski, 2005, p.18.
[112] Weissbrodt, 2008, p.3, see also Cholewinski, 2005, p.18.
[113] Constitution of the World Health Organization, adopted by the International Health Conference, signed at 22 July 1946, entered into force on 7 April: "… the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition." See also Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.1.
[114] Besides this international enshrinement, the right to health can as well be found in domestic legislation and national constitutions.
[115] International Covenant on Economic Social and Cultural Rights, 1966, Art.12 (1).

- The prevention, treatment and control of epidemic, endemic, occupational and other diseases.
- The creation of conditions which would assure to all medical service and medical attention in the event of sickness.[116]

The Covenant stresses on 'everyone', therefore it includes the undocumented migrant within its general scope. Since the ICESCR more treaties have recognised the right of health or referred to elements of it, such as the right to medical care:[117]

International treaties:

- International Covenant Economic Social and Cultural Rights (ICESCR, 1966) Art.12 (1).
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1966) Art.5(e-iv).
- Convention on the Elimination against all Forms of discrimination Against Women (CEDAW, 1979) Art. 11.1(f), Art.12, Art. 14 (2b).
- Convention on the Rights of the Child (CRC, 1989) Art. 24(1), 25, 39.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art.28.
- European Social Charter (ESC, 1961), and revised Charter Art. 11.
- Charter of Fundamental Rights of the European Union, Art.35.
- African Charter on Human and People's Rights (Banjul Charter, 1981) Art. 16.
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988) Art. 10.
- Several ILO Conventions address occupation health issues. *Inter alia:* Convention No. 155 'Occupational Safety and Health' (1981), Convention No. 161 'Occupational Health Services (1985).

Other instruments:[118]

- Universal Declaration of Human Rights (UDHR, 1948) Art. 25.
- National constitutions and other legislations dealing with health-related obligations.
- Interpretative statements on particular health-related standards adopted by UN treaty monitoring bodies, including General Comment 14 and General Recommendations.
- UN world conference outcome documents.
- Codes of conduct.
- Ethical, professional and technical standards, principles and guidelines.

Box 1: Overview documents setting standards for the right to health.[119]

[116] International Covenant on Economic Social and Cultural Rights, 1966, Art.12 (2).
[117] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.1.
[118] With the exception of the UDHR, these instruments do not necessarily address human rights issues per se but can serve as authoritative sources for standards for the right to health.

The CESCR, which monitors and interprets the ICESCR, has adopted General Comment 14 regarding "the right to the highest attainable standard of health." General Comments are authoritative interpretations of the content of human rights provisions. General Comment No. 14 clarifies a number of aspects and emphasises that States parties should respect the right of undocumented migrants to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their equal access to preventive, curative and palliative health services.[120] General Comment 14 also explains how the right to health should be understood:

> … the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.
> … [It is] an inclusive right extending to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.[121]

What can be derived from the above text is that the right to health is an inclusive right. It does not only entail access to health care and the availability of healthcare facilities but it includes a wide range of factors which are underlying determinants or preconditions of good health.[122] Freedoms and entitlements can be derived from the right to health.[123] The freedoms include the right to have control over one's own health and body, to be free from non-consensual medical treatment and experiments, and to be

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[119] Overview is slightly based on Asher, 2004, p.25. together with the information to be found in: Toebes, 2001, p.173.
[120] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 34. See also the Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against non-citizens, 10/01/2004, par. 36.
[121] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 9 and 11.
[122] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.3.
[123] For references to freedoms and entitlements of the right to health see: Evans, 2002, p. 205. See also: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4 and Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.3.

free from torture and other cruel, inhuman or degrading treatment or punishment. Entitlements include: the right of access to an equitable system of health protection "providing equality of opportunity for everyone to enjoy the highest attainable level of health."[124] And further:

- Access to essential medicines.
- The right to prevention, treatment and control of diseases.
- Maternal, child and reproductive health.
- Equal and timely access to basic health services.
- The provision of health- related education and information.
- Participation of the population in health- related decision making at the national and community levels.[125]

Another important treaty with regard to health rights, in particular for undocumented migrants, is The Migrant Workers Convention. The Convention stipulates that all migrant workers -regardless of status- have the right to receive any "medical care that is urgently required for the preservation of their life" and "the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned."[126] This emergency medical care may not be refused to them because of irregularity with regard to stay or employment. The Convention further protects all migrant workers in the workplace and demands that they shall enjoy treatment not less favourable than applies to employed nationals of the State in respect of conditions of work, including health and safety.[127] However, as discussed in chapter two, the ratification status of the Migrant Workers Convention, which protects both regular and undocumented migrants, is extremely low. Currently none of the EU member states have ratified this convention, which for the first time explicitly guarantees minimum standards for undocumented migrants.[128]

[124] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.3.
[125] This overview is from: Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.4.
[126] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 A/RES/45/158, Article 28.
[127] International Convention on the Protection of the Rights of Workers and Members of their Families, 1990, A/RES/45/158, Article 25.
[128] Guilbert, 2007, p.4.

3.3.2 European Enshrinement of the Right to Health

3.3.2.1 Council of Europe

At the European level the main human right instruments enshrining social rights are found within the Council of Europe framework. The CoE preserves 'The right of protection of health' in Article 11 of the European Social Charter (ESC) and its Additional Protocols.[129] Article 13 refers to 'The right to social and medical assistance'.[130] The Appendix of the ESC states that it "[...] includes foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned."[131] This would exclude undocumented migrants from the application of the ESC.

The European Committee of Social Rights has identified the difficulties with the restriction in the appendix. A limitation attached to a wide variety of social rights, impacting them differently.[132] At the CoE level, in the formal complaint *FIDH v. France* about the restrained access to health care for undocumented migrants, it becomes clear that undocumented migrants are not entirely excluded from the reach of the ESC. In this particular case the restriction in the appendix:

> [...] threads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.[133]

[129] Council of Europe, European Social Charter (Revised), ETS 163, Article 11.
[130] Council of Europe, European Social Charter (Revised), ETS 163, Article 13.
[131] Council of Europe, European Social Charter (Revised), ETS 163, Appendix, paragraph 1.
[132] This recognition by the European Committee of Social Rights of the difficulties with the restriction can be found in: European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, par. 30.
[133] European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, par. 30.

Moreover the Committee stated that:

> [...] legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.[134]

Nonetheless, since there existed a certain form of medical assistance for undocumented migrants in France,[135] and treatment was available for emergencies and life threatening conditions, the Committee concluded that there is no violation of Article 13 of the Revised Charter.[136] This entitlement to emergency care is also recognised as a minimum social right of undocumented migrants in 'Council of Europe Resolution 1509 on Human Rights of Irregular Migrants'.[137] The CoE also recognised in a recent recommendation that special attention should be paid to the entitlement of undocumented migrants to health service provisions.[138] Although Resolution 1509 is considered as 'soft law' it is relevant for the interpretation of the right to health for undocumented migrants in the context of the CoE Member States.

> Article 13: In terms of economic and social rights, the Assembly considers that the following minimum rights, *inter alia*, should apply:
>
> 13 (2) Emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly.

[134] See European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, par. 32.
[135] See European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, par. 32: " As regards Article 13 the Committee notes that the legislation in question does not deprive illegal immigrants of all entitlement to medical assistance, since it does provide for: – state medical assistance (AME) to meet certain costs incurred by any foreign national resident in France for an uninterrupted period of more than three months, without meeting the lawful residence conditions; – treatment for other illegal immigrants for emergencies and life threatening conditions. "
[136] With nine votes to four, see: European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, Conclusion (1).
[137] Council of Europe Parliamentary Assembly Resolution 1509, Human rights of irregular Migrants, 2006, Article 13(2).
[138] Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care, C8 (d).

Article 13 (3) refers to social protection of undocumented migrants:

> 13 (3) Social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity. Children are in a particularly vulnerable situation and they should be entitled to social protection, which they should enjoy on the same footing as national children.[139]

The emphasis on the importance of extra protection of the children of undocumented migrants can be deduced from the above articles. This is also clear from the French example. Besides the alleged violation of Article 13 of the ESC 'The right to social and medical assistance', there was also an alleged violation of article 17 'The right of mothers and children to social and economic protection'. The Committee ruled that the situation in France was in violation of the rights enshrined in article 17, and not in violation with article 13.[140] This illustrates the wider reach of the Charter concerning medical assistance for undocumented children and mothers which should go further than life threatening conditions and emergencies alone.

3.3.2.2 European Union

The principle of universal access to healthcare has been incorporated into the EU Charter of Fundamental Rights and is captured in several States' constitutions.[141] Article 35 of the Charter reads: "Everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices [...]."[142] Despite this governing standard universal coverage tends to be universal only in principle. Entitlements concerning healthcare coverage for failed asylum seekers and undocumented immigrants are unclear and may be virtually non-existent.[143] One of the major reasons for this is that

[139] Council of Europe Parliamentary Assembly Resolution 1509, Human rights of irregular Migrants, 2006, Article 13(3).
[140] European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, Conclusion (2).
[141] Björngren Cuadra & Cattacin, 2010, p.5.
[142] European Union, Charter of Fundamental Rights of the European Union, 2000, art.35.
[143] Wörz, et al, 2006, p.2.

EU rules largely focus in the first place on deportation arrangements, paying only limited attention to the status and the rights of undocumented migrants.[144]

3.4 State Obligations

3.4.1 The Tripartite Typology 'Respect-Protect-Fulfil'

Social rights, and so also the right to health, are subjected to the principle of progressive realisation contained in Article 2(1) of the ICESCR.[145] Nonetheless, it is now well established that this notion of progressive realisation does not imply that the ICESCR does not impose obligations of immediate effect.[146] Consequently, there are immediate obligations for States parties to the Covenant concerning the right to health,[147] such as the guarantee that the right to health has to be exercised without discrimination, the obligation to take steps towards its full realisation and the prohibition of retrogressive measures.[148] Obligations imposed on States parties can be distinguished as obligations to 'respect', 'protect', and 'fulfil'.[149] The obligation to respect entails that States are obliged to respect equal access to available health services, not to impede these services to individuals or groups, and to refrain from acts which encroach upon people's health. [150] Under this responsibility to respect the CESCR explicitly refers to undocumented migrants:

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[144] Platform for International Cooperation on Undocumented Migrants (PICUM), 2001, p.76. See also Vogel & Cyrus, 2008, p.1-9.

[145] International Covenant on Economic Social and Cultural Rights, Art 2(1) "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." For an extensive explanation of the principle of progressive realisation see: United Nations High Commissioner for Human Rights, Report of the High Commissioner to the substantive session of ECOSOC (E/2007/82), 2007.

[146] Sepúlveda, 2003, p.128.

[147] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 30

[148] "These steps must be deliberate, concrete and targeted towards the full realization of the right to health." United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 30-32

[149] Eide et al, 2001, p.23.

[150] Toebes, 2001, p.180.

> In particular, States are under the obligation from denying or limiting equal access for all persons, including […] *illegal immigrants* to preventive, curative and palliative health services […].[151]

Secondly, "The obligation to protect requires States to take measures that prevent third parties from interfering with Article 12 guarantees"[152] and thirdly the obligation to fulfil: "to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health."[153] A structural failure of a state to offer adequate health services to certain segments of society, such as irregularly residing immigrants, may be a violation of the obligation to fulfil.[154]

3.4.2 Guiding Principles

The framework of the right to health consists of the guiding principles and the core content of the right to health.[155] The guiding principles are based on the availability, accessibility, acceptability and quality of health care services.[156] These four standards of criteria are used to evaluate the attainment of the right to health.[157] 'Availability' is about a sufficient quantity of health care facilities, goods, services, personnel and health programmes which have to be available within a State Party. Secondly, the criterion of 'accessibility' requires that "health facilities, goods and services have to be accessible to

[151] Italics added by author. See: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 34.
[152] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 33.
[153] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 33.
[154] Toebes, 2001, p.18.
[155] See next subchapter.
[156] See for an extensive elaboration on the guiding principles of the right to health: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 12. See also subparagraph 4.4.1 of this thesis about one of the sublevels of accessibility, 'economic accessibility'.
[157] Brand & Russell, 2002, p.45

everyone without discrimination".[158] Thirdly 'acceptability' refers to the requirement that health facilities goods and services have to be culturally acceptable and respectful of medical ethics. The last criterion 'quality' requires that they are scientifically and medically appropriate and of good quality.

3.4.3 Core Content and Core Obligations

The core content and the core obligations are especially important to outline for this thesis, since they clarify the minimum right to health entitlements of all individuals regardless of status and documentation. [159] Consequently, the minimum health entitlements of undocumented migrants are revealed. In general, for all of the rights enshrined in the ICESCR, the minimum core obligation is to ensure the satisfaction of minimum essential levels of each of the rights.[160]

> [...] the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.[161]

[158] Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility. See subparagraph 4.4.1 of this thesis for more information on 'economic accessibility' in relation to the access to healthcare for undocumented migrants.
[159] The ICESCR rights apply to everyone regardless of legal status and documentation, see: United Nations Committee on Economic, Social and Cultural Rights, General Comment 20 on Non-Discrimination in Economic Social and Cultural Rights E/C.12/GC/20, par. 30.
[160] United Nations Committee on Economic, Social and Cultural Rights, General Comment No.3, on the nature of States Parties obligations, para.10. See also International Covenant on Economic Social and Cultural Rights, Art. 2(1). See also Sepúlveda, 2003, p.365.
[161] United Nations Committee on Economic, Social and Cultural Rights, General Comment No.3, On the nature of States Parties obligations, par.10.

Accordingly, also for the right to health minimum essential levels have to be ensured, otherwise a State party is *prima facie* failing to meet its obligations under the Covenant. To determine the implications and content of these minimum levels it is necessary to clarify the concepts of 'minimum essential level' and 'minimum core obligation.'[162] Firstly, the minimum essential level of each right is the "essential elements without which a right loses its substantive significance as a human right."[163] These elements constitute the 'minimum core content' of each right, which is not subject to progressive realisation.[164] The minimum core is the intrinsic and fundamental element of a human right.[165]

Secondly, the 'minimum core obligations' are those obligations necessary to satisfy the minimum essential elements, and so 'the core content' of each right.[166] Without a satisfaction of these core obligations States are *prima facie* in violation of the Covenant and the State should justify the situation of non-compliance.[167] In General Comment 3 the CESCR refers to this situation:

> In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[168]

[162] Sepúlveda, 2003, p.366.
[163] Coomans, 1998, p.125-146.
[164] See United Nations High Commissioner for Human Rights, Report of the High Commissioner to the substantive session of ECOSOC (E/2007/82), 2007. See also Article 2(1) of the ICESCR which refers to progressive realisation as: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"; International Covenant on Economic Social and Cultural Rights, 1967.
[165] Coomans, 1992 in: Coomans, 2002, p.166.
[166] Sepúlveda, 2003, p.366. See also: Toebes, 2001, p.176.
[167] Sepúlveda, 2003, p.366
[168] United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, The Nature of States Parties' Obligations, E/1991/23 , par.10.

The Committee's approach to these minimum standards has not been a coherent one.[169] As exemplified in the above citation, the failure to meet the core obligations is exceptionally justifiable. Conversely, in its later General Comment 14 about the right to health it is said that they are non-derogable. The Committee stresses that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations [...] which are non-derogable."[170] States must guarantee the essential elements for the right to health under all circumstances, irrespective of available resources. This entails a guarantee of a minimum level of access to the essential material components of the right to health.[171] In General Comment 14 on the highest attainable standard of health, the CESCR sets forth the core obligations of the right to health which include at least the following:

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for *vulnerable or marginalized groups.*[172]
- To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone.
- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.
- To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs.[173]
- To ensure equitable distribution of all health facilities, goods and services.
- To adopt and implement a national public health strategy and plan of action [...] shall give particular attention to all *vulnerable or marginalized* groups.[174]

These core obligations should satisfy the minimum essential levels of each right and so the core content of each right.[175] However, to clarify these minimum essential levels, the essential basic health services set forward by The Health For All and Primary Health

[169] Yeshanew, 2011, p.307.
[170] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 47.
[171] Office of the United Nations High Commissioner for Human Rights & World Health Organization, 2008, p.5.
[172] Italics added by author.
[173] See for the WHO essential drugs list: 'WHO Model List of Essential Medicines', 2011, available at: http://www.who.int/medicines/publications/essentialmedicines/en/index.html (last accessed on 6 July, 2012).
[174] Italics added by author. These core obligations can be found in: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par.43-44.
[175] Sepúlveda, 2003, p.366. See also: Toebes, 2001, p.176.

Care Strategies of the WHO, can be considered as these essential levels.[176] Consequently, they present the core content of the right to health.[177] Below minimum health services were indicated, which are in line with paragraph 44 of General Comment 14. The only difference is that the General Comment adds one extra component to its core health obligations, the last one of below enumeration which is about 'training for health personnel.'[178] Chapter four will elucidate that this component of the core content is especially important with regard to undocumented migrant' access to healthcare services.

Concerning health care:

- Maternal and child health care, including family planning.
- Immunisation against the major infectious diseases.
- Appropriate treatment of common diseases and injuries.
- Provision of essential drugs.

Concerning underlying preconditions of health:

- Education about prevailing health problems.
- Food supply promotion and proper nutrition.
- Adequate supply of safe water and basic sanitation.[179]
- Appropriate training for health personnel, including education on health and human rights.[180]

To stress again the argumentation of Coomans, without meeting the core content (i.e. above minimum health services) a right loses its substantive significance as a human

[176] World Health Organization, Report of the International Conference on Primary Health Care, 1978. See Toebes, 2001, p.176. who states this idea.
[177] Toebes, 2001, p.176.
[178] The author of this thesis considers it as important to add, besides the essential basic health care services outlined by the WHO which are considered by Toebes (2001) as the core content of the right to health (with whom the author agrees), the component about 'training for health personnel' to be found in General Comment 14, par. 44, since the author is of the opinion that this component is extremely important to be part of the core content, especially with regard to the access to healthcare facilities for undocumented migrants. This point will be clarified in chapter four of this thesis and in the final concluding chapter.
[179] Below enumeration is from Toebes, 2001, p.177, who based her summary on the report of the World Health Organization 'Report of the International Conference on Primary Health Care', 1978.
[180] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 44 (e).

right.[181] Whether this core content is met concerning the right to health for undocumented migrants, is a question which should be kept in mind while reading this thesis. A discussion on this matter is presented in the concluding chapter.

3.5 Justiciability

3.5.1 Justiciability of the Right to Health

Obligations to fulfil social economic and cultural rights, among them the right to health, are more difficult to identify and therefore less likely to be justiciable.[182] Claims to provide or facilitate health services are difficult to delineate and are often rejected by courts. The underlying argumentation is that to deal with these cases can be considered as an interference with the domain of policy makers.[183] This does not imply that claims have no chance of success. "Cleary defined obligations to fulfil the right to health as well as providing access to a certain specific health-related service are most likely to be successful."[184] A more definite outlined core content might be a means to make minimum social rights better justiciable. However, the continuing discussion on its explicit content indicates that this is not likely to happen in the near future. The idea of directly justiciable minimum core obligations is one which is hard to embrace.

3.5.2 The Core Content as a Model towards Justiciability

Nevertheless, according to Yeshanew, the core content of the right to health could be used to ensure the justiciability of cases.[185] "Courts or other monitoring organs may, for instance, comfortably ensure the justiciability of cases involving duties to respect and protect or cases involving discriminatory practices by applying the minimum core

[181] See also text connected to footnote 163, Coomans speaks about 'essential levels' which constitute the core content, they are equivalent to the core obligations. See: Coomans, 1992 in: Coomans, 2002, p.166.
[182] Toebes, 2001, p.184.
[183] Yeshanew, 2011, p.385.
[184] Toebes, 2001, p.184.
[185] Yeshanew, 2011, p.308.

model."[186] Although there are various definitions and an inconsistency of common standards, a denominator of the core content is the inclusion of negative obligations together with the understanding that it can strengthen the future of economic, social and cultural rights of the marginalised and the disadvantaged.[187] Nonetheless, it has not been commonly applied by courts and it has had limited judicial or quasi-judicial application so far.[188]

3.6 Concluding Remarks

This chapter began with the right to health and its difficulties for undocumented migrants. Indeed, the overview of the international enshrinement of the right to health indicates that although human rights law grants undocumented migrants with several entitlements, it is assumable that it is common to entitle them only some minimal entitlements. Enshrined in the core content, for instance, which consists of essential elements without which a right loses its substantive status as a human right. Whether this core content is sufficiently translated into the minimum entitlements of European State policies can be determined by assessing if they are in compliance with the essential levels of the core content. The following chapter elaborates further on these minimum entitlements enshrined in European policies.

[186] Idem.
[187] Idem.
[188] Yeshanew, 2011, p.309.

4. PERCEIVING THE MINIMUM HEALTH ENTITLEMENTS

4.1 Introduction to Chapter

It has become apparent that access to emergency care is denoted by the CoE in Resolution 1509 as a minimum standard for undocumented migrants concerning their right to health.[189] This minimum standard of emergency care has many equivalent terms. Other terms in use at the domestic level are, for instance, urgent medical care, immediate care and essential care.[190] The Dutch health entitlement for undocumented migrants is called 'necessary medical care'. The provision of minimum entitlements to undocumented migrants is identified by Toebes as a tendency in the industrialised world of excluding undocumented migrants from public health care services.[191] Also Björngren Cuadra notifies a trend of a minimum standard in European countries,[192] which is recognised in some states' constitutions or special acts.[193] The latter can be found in the Netherlands as the 'Linkage Law'.[194] The Dutch case is used in this chapter as an example to exemplify general characteristics regarding the health entitlements of undocumented migrants.

The chapter starts with an overview of the policies of European Union Member States concerning the minimum standard of emergency care. This is done to indicate the legal entitlements of undocumented migrants concerning access to health care at the domestic level in Europe. Other issues covered are the ambiguous definition of these entitlements, which can widen or limit the access to care, and the relevant case law concerning undocumented migrants with serious medical problems is discussed. This is done with the underlying question whether health entitlements are still applicable when

[189] Council of Europe Parliamentary Assembly Resolution 1509. Human rights of irregular Migrants, 2006, Article 13(2).
[190] Geddie et al, 2007, p.6.
[191] Toebes, 2001, p.188.
[192] Björngren Cuadra, 2011, p.4.
[193] Toebes, 2001, p.188.
[194] Linkage Law, 1998 (In Dutch: *'Koppelingswet'*).

the expulsion of an undocumented migrant is at issue, and to ascertain if serious medical problems can be a ground to invoke the principle of non-refoulement. The final part of the chapter consists of a discussion on the country specific situation in the Netherlands. By discussing the underlying rationales for hampered access to health care, the differing situation between legal entitlements and practice is unveiled. Moreover, it elucidates how the minimum entitlement to the right to health for undocumented migrants is perceived in the Netherlands, both in policy and in practice.

4.2 European Policies concerning Minimum Standards

The Council of Europe claims that they intervened in the European migration debate to bring standards closer to international law and fundamental rights.[195] Nonetheless, the bottom line with regard to access to social benefits for undocumented migrants seems to be emergency or urgent care in most CoE Member States.[196] This is confirmed by the findings of the 'Exploratory Report on the Access to Social Protection for Illegal Labour Migrants' of the CoE Committee of Experts.[197] Whether this entitlement can be considered as a sufficient means to fulfil or to realise the right to health for undocumented migrants is one of the research questions of this thesis and is revisited in the last chapter.

The Committee of Experts considered in its report that in accordance with general international human rights standards no person, regardless of legal status, should be denied access to a minimum level of social protection. According to their findings this obligation is in most of the Member States "usually defined in terms of basic or

[195] Platform for International Cooperation on Undocumented Migrants, 2010, p.6. See also: Cholewinski, 2005.
[196] See also: Council of Europe, European Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 2004. And the overview of the findings of the 'Health Care in NowHereland' project 'fact sheet policies' Karl-Trummer et al. 2010, which shows that only in a few European countries the policies entitle undocumented migrants to access to services beyond emergency care, (respectively, Spain, Italy, France, The Netherlands, Portugal) in the rest of the countries access is either restricted to emergency care only or even to an extent which makes emergency care inaccessible.
[197] Council of Europe, European Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 2004.

emergency medical treatment and the provision of social assistance to prevent destitution and to enable the person concerned to live in dignity."[198] Affirmative findings can also be found in the conclusions of the research project 'Health Care in NowHereland'[199] in which the policies on health care for undocumented migrants in the EU were analyzed and categorised in three levels. Levels based on the minimum entitlement of emergency healthcare outlined by the CoE.[200]

1. 'No rights'

A classification for policies which restrict the entitlements for undocumented migrants to an extent which makes emergency care inaccessible. Including policies with unpredictable access, which ask payment before providing emergency care, or charge the undocumented migrant giving rise to a considerate debt. Nine Member States can be found to be applying this level of rights.[201]

2. 'Minimum rights'

A classification for policies which entitle undocumented migrants to emergency care (or care referred to as 'immediate'/'urgent'). Thirteen Member States can be found to be applying this level of rights.[202]

[198] Council of Europe, European Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 2004. See also: Cholewinski, 2005, p.49.
[199] The EU Project, 'Health Care in NowHereland', worked on the issue of improving healthcare services for undocumented migrants. The running time of the project was from January 2008-December 2010. The project consisted of an extensive cooperation between experts within research and the field, who identified and assessed contextualised models of good practice within healthcare for undocumented migrants. They built upon compilations of policies in the EU 27 at national level, but also practices of healthcare for undocumented migrants at regional and local level. The project was funded by DG Sanco, Austrian Federal Ministry of Science and Research, Fonds Gesundes Österreich. For a list of partners of the project see: Björngren Cuadra & Cattacin, 2010, p. 3.
[200] Björngren Cuadra & Cattacin, 2010, p.10-16.
[201] Finland, Ireland, Malta, Sweden, Bulgaria, Czech Republic, Latvia, Luxembourg and Romania. See: Björngren Cuadra & Cattacin, 2010, p.10-16.
[202] Austria, Belgium, Estonia, Germany, Greece, Hungary, Lithuania, Poland, Slovak Republic, Slovenia Cyprus, Denmark and United Kingdom. See: Björngren Cuadra & Cattacin, 2010, p.10-16.

3. ‘Rights’

A classification for policies which entitle undocumented migrants to care involving services beyond emergency care, such as primary and secondary care. Five Member States can be found to be applying this level of rights.[203]

According to these findings most of the EU Member States entitle undocumented migrants to a minimum entitlement of emergency health care only. However a considerable number of States are classified as granting not even this minimum entitlement to undocumented migrants.

4.3 An Ambiguous Minimum Entitlement

4.3.1 The Dutch Entitlement of ‘Necessary Medical Care’

In the Netherlands the minimum health entitlement for undocumented migrants is referred to as ‘necessary medical care’. The Dutch situation reveals one of the central problems in Europe regarding the topic of the minimum health entitlements, namely the debate surrounding the definition and content of this minimum standard of undocumented migrants’ right to health.[204] In the parliamentary debates before the introduction of the ‘Linkage Law’[205] it was decided, due to strong resistance, to abandon the initial proposal to make healthcare only accessible in acute life threatening situations and to change the wordings from ‘urgent medical care’ to ‘necessary medical care’.[206]

[203] Italy, Spain, Portugal, Netherlands, France, See: Björngren Cuadra & Cattacin, 2010, p.10-16.
[204] European Migration Network, 2007, p.21.
[205] Linkage Law, 1998 (In Dutch: ‘*Koppelingswet*’). The Linkage Law links entitlements concerning collectively financed provisions to the residence status of the immigrant, with an intention to discourage illegal residency in the Netherlands.
[206] The House of Representatives (*Tweede Kamer*), Kamerstuk 19637, no. 452, 1999.

The situation in which necessary medical care has to be granted was defined vaguely as 'a situation in which the provision of medical care cannot be withheld or delayed without jeopardising the undocumented person's life or health or the Dutch public health.'[207] However, the meaning of the term has continued to be subject to discussions at political and medical professional levels[208] and in 2007 an independent commission recommended to define the concept as 'responsible and appropriate medical care which [...] is effective and targeted, given in a patient-oriented manner and fine-tuned to the patients/s actual needs.'[209] The House of Representatives states in its official document, regarding this entitlement, that it is the physician who determines the necessity of care and their professional responsibility holds primacy. It is on them to decide whether care is necessary and not postponable.[210] This standpoint gives the responsibility to determine as to which medical treatment undocumented migrants are entitled, almost entirely to medical personnel. This results in a continuing ambiguous practise examining what 'necessary medical care' might mean and to which care undocumented migrants are entitled.[211]

The extent of medical treatment falling under the minimum entitlement for undocumented migrants is therefore unclear and left to the provider.[212] The situation in the Netherlands regarding these two points of ambiguity around the content and the 'power' of the medical provider to determine is representative for the general situation in other European countries. Especially for important, but not immediately life threatening cases, this situation can cause ambiguity and dilemmas for medical providers if patients cannot afford to pay.[213] For instance in Sweden undocumented migrants are eligible for 'immediate care,' but what is meant by immediate care is not specified in the Swedish legislation, therefore medical personnel have a great deal of

[207] Author's own translation, see for the official text in Dutch: The House of Representatives (*Tweede Kamer*), Kamerstukken II, 1994/95, 24 233, no. 3, The Hague, 1994/1995.
[208] Health for Undocumented Migrants and Asylum seekers, 2009, p.3.
[209] Author's own translation, see for official text in Dutch: Commissie Medische zorg voor (dreigend) uitgeprocedeerde asielzoekers en illegale vreemdelingen, 2007, p.13 (Commission Medical Care for (imminent) failed asylum seekers and illegal Aliens).
[210] The House of Representatives (*Tweede Kamer*), Kamerstuk 29 689, no. 83, The Hague, 2006.
[211] Referral to this situation is made in: European Migration Network, 2007, p.21.
[212] Anderson, 2009, p.3.See also Huber, 2008, p. 90-91.
[213] Anderson, 2009, p.3.

interpretative freedom.[214] This can lead in two directions: the access to health care can be restricted or can be widened for undocumented migrants.

4.3.2 Interpretative Freedom: Expansion or Restriction of Care

Clear legislation about the access to care might result in restrictive access for undocumented migrants.[215] This is because it limits the interpretative freedom of care takers. A relevant situation recently occurred in Greece where health treatment of undocumented migrants has always been restricted to 'emergency care' only. However, medical staff has constantly provided more extensive care. In May 2012 the Greek health ministry announced a new directive which clarifies who can receive care. This directive excludes undocumented migrants from elective medical treatment. Nonetheless, it is as yet uncertain how this will affect the access to medical care for undocumented migrants. Greek medical professionals have expressed their strong resistance against the new measure and resistance to implement the new rules.[216]

More common is a vague definition of the minimum entitlement which results in unclear legislation and consequently interpretative freedom for care takers. It also pinpoints that legislation and entitlements in policies concerning undocumented migrants do not often correspond with the situation in practice. This interpretive freedom can go in two ways: the access for undocumented migrants becomes stricter or it becomes wider. In a negative direction access can be refused or denied to undocumented migrants. Reasons for this can be that medical staff are not aware or do not agree with the regulations. Furthermore, the Hippocratic Oath which binds physicians to take to care for patients, regardless of their residence status, does not exist for receptionists and administrative staff. [217] Additionally, administrative and bureaucratic complexities might erupt from this ambiguous situation. For example in

[214] Björngren Cuadra & Cattacin, 2006, p.77.
[215] Björngren Cuadra, 2011, p.3.
[216] Platform for International Cooperation on Undocumented Migrants , PICUM Bulletin, May 2012.
[217] Björngren Cuadra, 2011, p.3.

the Dutch context care takers can only be refunded when care falls under the notion of 'necessary medical care' for which an extensive and bureaucratic funding scheme is in place. This can all together seriously jeopardise the access to health care for undocumented migrants.

In a positive direction the access to health care services extends to more than the minimum entitlements, it opens a 'window of opportunity'.[218] Since doctors can decide to a great extent which treatment falls under an entitlement as 'emergency care'. A clarification of legislation could in this situation imply stricter access, 'closing of the window of opportunity'.[219]

4.3.3 Contradictory Demands

Another underlying ground for either restricted or widened access is the outcome of a paradoxical situation for physicians when confronted with medical requests from undocumented migrants. The European project 'Health Care in NowHereland'[220] points out the contradictory demands medical professionals have to cope with concerning the medical requests of undocumented migrants. For instance, when doctors provide care they may act against legal and financial regulations.[221] On the other hand, if they deny care, and consequently exclude the most vulnerable, they violate human rights, their Hippocratic Oath, and other professional guidelines and legislations.[222] A situation in Denmark provides a good example. On the one hand, Danish physicians are in a dilemma between their Hippocratic Oath and a wish to give more than emergency care only to undocumented migrants, whilst on the other hand they face a statement that the duty to provide treatment does not apply for elective care. Physicians who want to give

[218] Björngren Cuadra, 2011, p.2-3.
[219] Björngren Cuadra, 2011, p.2.
[220] Björngren Cuadra & Cattacin, 2010, research project 'Healthcare in NowHereland'. See footnote 199 for more information on this research project.
[221] Björngren Cuadra & Cattacin, 2010. See also: Schoevers, 2011, p. 39.
[222] Guidelines to which medical professionals are bounded are for instance related to the application of their knowledge in the interest of the patients, general public health and to offer (qualitative) care to every patient equally in equal situations. See also: Schroevers, 2011, p.39-40.

elective treatment are facing a lack of clear guidelines on how to act. They might be inclined to bypass the public system.[223]

4.4 Accessibility of Health Care

4.4.1 Economic Accessibility

As mentioned in 4.3.1 undocumented migrants in Sweden are entitled to 'immediate care'. However, it is a conditioned entitlement which sets forth that undocumented migrants have to cover all the incurred costs themselves. This situation questions the access to health care in reality for undocumented migrants in Sweden.[224] According to the extensive studies of 'Health care in NowHereland', Sweden can be clustered among nine other EU member states which have policies that restrict the right to health to an extent that makes emergency care inaccessible.[225] The clustering was done based on national policies, and accordingly to the legal situation for undocumented migrants. Day to day practice can differ as elucidated in sub-paragraph 4.3.2 on the interpretative freedom of health care policies.[226]

The Swedish situation exemplifies the 'economic accessibility' of health entitlements for the undocumented migrant. Economic accessibility is a sublevel of 'accessibility', one of the guiding principles of the right to health.[227] Accessibility can be broken down into four dimensions: non-discrimination, physical accessibility, information

[223] Hansen, 2007, p. 50-51.
[224] Björngren Cuadra & Cattacin, 2006, p.77.
[225] Karl-Trummer et al, 2010, p.2. The nine EU countries are: Finland, Ireland, Malta, Sweden, Bulgaria, Czech Republic, Latvia, Luxembourg Romania, Björngren Cuadra & Cattacin, 2010, p.11.
[226] The typology used in the summary report of Health Care in NowHereland concerns policies in regards to the right to healthcare. Obstacles in implementing are not considered in the summary report (but are in the country specific reports), even if such processes might impair access, or if implementation of restrictive policies gives rise to more access in spite of the policy. See: Björngren Cuadra & Cattacin 2010, p.9.
[227] Björngren Cuadra, 2011, p.2. According to the guiding principles the right to health entails being able to receive care which is: available, accessible, acceptable and of good quality. See also: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 12.

accessibility and economic accessibility. Economic accessibility or 'affordability' is explained by the CESCR as follows:

> Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.[228]

Björngren Cuadra examined European Union member state policies regarding the minimum entitlement of access to emergency health care.[229] She is of the opinion that in order to discuss the entitlements of undocumented migrants the notion of 'right' needs further clarification. This clarification can be drawn from the concept of 'accessibility'.[230] Björngren Cuadra is mainly concerned with economic accessibility, because the level of co-payment and affordability for patients are the central issues comparing different European policies on their level of accessibility for undocumented migrants. This entails *inter alia* that care is not considered as accessible when it is only accessible in return for payment of full cost. An entitlement like this is called a 'financially conditioned right', not consistent with the notion of right embodied in the human rights framework.[231] It is not congruent with the notion of economic accessibility (affordability) outlined by CESCR as one of the dimensions which constitute the notion of accessibility,[232] which in turn is an essential element in the right to health.[233] It does not imply that requesting a moderate fee is unreasonable when it is proportional to what is asked from other patients and when it does not seriously impair accessibility.[234]

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[228] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, section 12b.
[229] Björngren Cuadra, 2011, pp. 1-6.
[230] Accessibility can be broken down into four dimensions: non-discrimination, physical accessibility, economic accessibly and information accessibility.
[231] Björngren Cuadra, 2011, p.2.
[232] Björngren Cuadra & Cattacin, 2010, p.9.
[233] United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par.12(b).
[234] Björngren Cuadra, 2011, p.2.

Returning to the Swedish example, the entitlement of undocumented migrants in the regular Swedish health care system can be identified as a 'financially conditioned right'. The current policy entitles undocumented migrants to 'immediate care', however since it is a financially conditioned right it is questionable if (and if so 'how') undocumented migrants obtain access to this care in Sweden.

4.4.2 Common Practical Barriers in the European Context

A financially conditioned right as in the Swedish situation is among the barriers against undocumented migrants seeking healthcare. It is among the main obstacles arising at hospitals where undocumented migrants are often requested to prove that they can pay before they receive care.[235] The final report of the "Access to Health Care for Undocumented Migrants"[236] project outlined the main obstacles faced by undocumented migrants when seeking health care in the EU. It mentions the requirement to provide documentation to prove the ability to cover hospital expenses as a serious barrier. A second barrier is the lack of information[237] concerning the entitlements of undocumented migrants, at the supply side as well as for the undocumented migrants themselves who are often unaware about the workings of the health care system.[238] Complicated and restrictive reimbursement systems for healthcare providers and bureaucratic and administrative factors also play a huge role in hindering access.[239] Thirdly, the fear of undocumented migrants to be reported to the immigration authorities when they seek care is a serious barrier for access. "The anxiety migrants

[235] Platform for International Cooperation on Undocumented Migrants, 2007, p. 9.
[236] The project was led by the Platform for International Cooperation on Undocumented Migrants and it involved extensive country studies of 11 EU Member states: Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Portugal Spain, Sweden and the United Kingdom, see in bibliography: Platform for international Cooperation on Undocumented Migrants, 2007. See also: Huber et al, 2008, for further information on barriers of access to healthcare services for people at risk of social exclusion.
[237] See also footnote 106 for relevant sources and information on the lack of information.
[238] Platform for International Cooperation on Undocumented Migrants, 2007, p.9. and see also: Huber et al 2008, p. 77 and Carrera & Merlino, 2009, p.26.
[239] In the Netherlands these factors are among the most important hindering access to health care for undocumented migrants. See for more information on the country specific situation in the Netherlands subparagraph 4.6 and the conclusions in chapter 5.

experience may not have much to do with the regulations that exist on paper,"[240] because an explicit obligation to report is only present in Lithuania and (in certain circumstances) Sweden. The fourth major barrier is the lack of cultural mediators and translators at hospitals and other medical centres which seriously complicates communication. This is also one of the major difficulties mentioned by a Dutch emergency care physician, who explains that although there may be a possibility to make use of a interpreter on the phone (a facility which is not always present) the communication with undocumented migrants remains extremely difficult.[241]

4.4.3 A Counter Reaction to Non-Access: Parallel Health Networks

It has been outlined that access to public healthcare is constrained for undocumented migrants, who are in many countries effectively left behind by the official health systems.[242] According to Kananen, the significant gap between the formal recognition of universal human rights and the actual access to those rights, serve as a justified ground for civil society to provide services to let undocumented migrants at least enjoy access to basic social rights.[243] The functioning of these 'parallel health networks' is of importance in guaranteeing minimum levels of social protection and preventing social exclusion.[244] These networks usually consist of special clinics and other civil society initiatives, which often function solely on donations and voluntary work. An example is the 'Global Clinic' in Helsinki. Although initiated very recently (April 2011) it is nonetheless still the first clinic of its kind in Finland.[245] Undocumented migration was

[240] Björngren Cuadra, 2011, p.2.
[241] Interview via email with Ms. L. Ruijs, Emergency department physician, Radboud University Hospital Nijmegen, the Netherlands, June 2012.
[242] Huber et al, 2008, p.91.
[243] Kananen, European civil society steps up to protect undocumented migrants, 2011, available at: http://www.thebeginner.eu/europe/491-human-rights-for-all (last accessed on 9 July 2012).
[244] Huber et al, 2008, p.91. See also the study of Baghir-Zada, 2007.
[245] See for more information on the Global Clinic in Helsinki: Simola, 2011 'Finland's first clinic for undocumented migrants was received with both enthusiasm and opposition', available at: http://picum.org/fr/actualites/blog/30080/ (last accessed on 8 July 2012). See also the article on the website of Mundoscope Wordpress, Global Clinic – Healthcare for Undocumented Migrants, 2011, Available at: http://mundoscope.wordpress.com/2011/01/30/global-clinic-healthcare-for-undocumented-migrants/ (last accessed on 8 July 2012). Both sources can be found in the bibliography under the section 'websites'.

earlier seen as a phenomenon that not really concerns Finland, and has only recently been taken into account.[246] This despite the fact that the approximate number of 1500 undocumented migrants in the year 2003, was estimated to be doubled to a maximum of 3000 in 2011.[247] Although this number is still small in comparison with other European countries[248] when it comes to human rights, numbers should not make a difference in the enjoyment of a right, -such as the right to health-.

The model of the Global Clinic is based on similar health facilities in Sweden, where seven clinics are operative. The clinic is run entirely by voluntary medical professionals and operates only for a few hours a week. Patients can be treated anonymously by a general practitioner, and a few medical specialists can provide phone consultants. Consequently, in life threatening situations undocumented migrants are redirected to hospitals.[249] Although the services are limited, the Global Clinic contributes to enhanced healthcare for undocumented migrants in a country of which its policy is categorised as 'no rights'.[250]

[246] Simola, 2011. See for the webpage of this article the previous footnote.
[247] Because of the irregularity of undocumented migrants exact numbers can in general not be provided. Besides this, there are no official statistics published on the number of undocumented migrants in Finland. Nonetheless, the Finnish National Bureau of Investigation estimated the number of undocumented migrants in 2011 between two and three thousands, see the website of the United Nations High Commissioner for Refugees, 9-10 August 2011, available at: http://www.unhcr.se/dk/medier/baltic-and-nordic-headlines/2011/august/9-10-august-2011.html (last accessed on 9 July 2012).
[248] For instance in the Netherlands between 60,000 to 225,000 undocumented migrants are estimated to reside, see for more information on the number of undocumented migrants in the Netherlands footnote 274 of this thesis.
[249] Simola, 2011, 'Finland's first clinic for undocumented migrants was received with both enthusiasm and opposition', available at: http://picum.org/fr/actualites/blog/30080/ (last accessed on 8 July 2012).
[250] *Inter alia* because without a Finnish security number it is complicated to receive care, and besides this the high costs of treatment prevent undocumented migrants to seek care. See for the classification of 'no rights subparagraph 4.2 of this thesis. And for more country specific information on the situation in Finland regarding undocumented migrants and healthcare: Health Care in NowHereland, Country Report Finland, 2010.

4.5 Expulsion of Undocumented Migrants with Medical Problems

4.5.1 Principle of Non- Refoulement

From the explorations set forward in the previous sub-chapters it can be derived that the scope of the right to health applicable to undocumented migrants depends on the law of the country where the persons resides, and the interpretation in daily practice of undocumented migrants' health entitlements.[251] Likewise, the decision to extradite undocumented migrants with medical problems to their country of origin is primarily a national matter.[252] International treaty obligations which provide sick undocumented migrants with resident permits solely on medical grounds do not exist. Nonetheless, if expulsion would lead to inhuman or degrading treatment the principle of non-refoulement may play a role, as may Article 3 of the European Convention on Human Rights (ECHR).[253]

The principle of non-refoulement as guaranteed under international law, refers to the prohibition of returning aliens to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk.[254] Article 3 of the ECHR enshrines the prohibition of torture and inhuman and degrading treatment,[255] which has in certain circumstances an extraterritorial effect.[256] To what extent this principle of non-refoulement is applicable for undocumented migrants based on medical grounds needs further study. This indicates the scope of their health entitlements when expulsion is at issue, and what is considered as severe medical reasons on which people are not allowed to be extradited, because expulsion would mean that the person will be subjected to inhumane or degrading treatment on the basis

[251] Besides the previous sub-chapters of this chapter, see also: Derckx, 2006, p.313.
[252] Derckx, 2006, p.313. For more information on (temporary) non-expulsion based on medical reasons in the Dutch domestic context see subparagraph 4.5.4 of this thesis.
[253] Derckx, 2006, p.313, for Article 3 see: ECHR, 1950, Article 3 Prohibition of torture: 'No one shall be subjected to torture or inhuman or degrading treatment or punishment'. This prohibition is absolute in nature, it applies irrespective of the victim's conduct.
[254] Stoyanova, 2008, p.1.
[255] ECHR, 1950, Article 3 Prohibition of torture. 'No one shall be subjected to torture or inhuman or degrading treatment or punishment.'
[256] Jacobs et al, 2010, p.179.

of its medical background.[257] For example the specific medical treatment needed is not available in the home country of the undocumented migrant. In order for a medical condition to fall within Article 3 it 'must attain a minimum level of severity'.[258]

4.5.2 High Threshold of Article 3 ECHR

It is extremely difficult to fall within the scope of Article 3 on the basis of medical circumstances. The European Court of Human Rights (ECtHR) has repeatedly emphasised that aliens subject to expulsion, can in principle not claim any entitlement to remain in the expelling State on the basis of benefiting from medical, social, or other forms of assistance.[259] The exceptionality of situations which fall within the scope of article 3 resulting in a high threshold becomes clear when examining the relevant case law of the ECtHR. Admissibility solely on grounds of medical problems is seldom.[260] Up to now the Court has held only once in a health case context that Article 3 would be violated if deportation had taken place.[261] In the case of *D v. The United Kingdom*,[262] D, a convicted drug smuggler with HIV/AIDS, was subject to deportation on completion of his prison sentence. The Court concluded that because of the 'very exceptional circumstances' of the case, deportation would be in violation of Article 3 amounting to inhuman treatment.[263] The ECtHR considers three elements when answering the question whether there is a 'very exceptional situation':

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[257] A situation amount to inhuman treatment by the Strasbourg court relevant for the topic of non-refoulement and medical reasons is "deportation or extradition where there is a real risk of inhuman treatment in the proposed country of destination", Jacobs et al, 2010, p.172. The division between inhuman treatment and degrading treatment is not always made, and sometimes the Strasbourg Court does not distinguishes, see for instance: ECtHR *II v Bulgaria*, (App. 44082/98), 9 June 2005, in which the court refers simply to 'inhuman and degrading treatment'.

[258] ECtHR *Ireland v The United Kingdom*, 18 January 1978, Series A No 25, (1979- 80) 2 EHRR 25, par.162. See also: Jacobs, 2010, p. 168: "(…) even activity which is undesirable or illegal, will not fall within the scope of the prohibition in Article 3 unless it causes sufficiently serious suffering or humiliation to the victim."

[259] Derckx, 2006, p.314.

[260] Derckx, 2006, p.318.

[261] Derckx, 2006, p.314. for the case and the final decision of the court: ECtHR *D. v. the United Kingdom*, 2 May 1997, Appl. No. 30240/96, p.18.

[262] Also known as the 'St. Kitts case'. See: ECtHR *D. v. the United Kingdom*, 2 May 1997, Appl. No. 30240/96.

[263] Jacobs et al., 2010, p.180.

1. State of health of the person.
2. The care facilities provided in the country of origin.
3. Moral or social support by one's relatives in the receiving country.[264]

In the case of *D* all these elements were taken into consideration and were met. The Court stated that the applicant was in advanced stage of AIDS, there was a predictable lack of health services and no form of moral or social support in the country of origin.[265] To illustrate the high threshold for finding a breach of Article 3 a few health related court cases will be exemplified below, related to each of the three elements constituting a very exceptional situation.

4.5.3 Health Related Court Cases

To begin with the first element, 'the state of health of the irregular person in question', a distinction can be made between persons suffering from HIV/AIDS and from other diseases. In order to have HIV/AIDS cases admissible, the illness has to be in a terminal or advanced stage. If not at such a stage and medical treatment is available and there is support from one's family, there is no breach of Article 3.[266] Illustrative of this is the case of *Amegnigan v. The Netherlands.*[267] Amegnigan argued that given his HIV-infection expulsion to Togo would be in violation of his rights under Article 3 of the Convention. Although the Court acknowledged the assessment of Amegnigan's treating specialist that his health condition would relapse if treatment were to be stopped, according to the Court his illness had not attained an advanced or terminal stage. This was one of the reasons why the application was held to be inadmissible. Besides that, it was considered that treatment in Togo would be possible, although at considerable cost.

[264] Derckx, 2006, p.315. See also: Buyse, 2008 'Grand Chamber Judgement N. V. UK' available at: http://echrblog.blogspot.fi/2008/05/grand-chamber-judgment-in-n-v-uk_28.html (last accessed on 9 July, 2012).
[265] ECtHR *D. v. the United Kingdom*, 2 May 1997, Appl. No. 30240/96.
[266] Derckx, 2006, p.316.
[267] ECtHR, *Amegnigan v. the Netherlands*, 25 November 2004, Appl. No 26629/04. See also: ECtHR, *Francico J. Arcila Henao v. The Netherlands,* 24 June 2003, Appl. No 13669/03.

The Court notes that adequate treatment is in principle available in Togo.[268] Furthermore:

> [...] it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in Togo where his mother and a younger brother are residing. The fact that the applicant's circumstances in Togo would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention.[269]

Medical conditions other than HIV/AIDS have also been taken into consideration by the Court,[270] one of which is that the state of health does not have to be one of an immediate threat to life.[271] But besides the case *of D. v. The United Kingdom* no other case based on medical grounds has ever been found admissible by the Court.[272] *Salkic and others v Sweden*, a traumatized family from Bosnia Herzegovina complained, *inter alia*, under Article 3 of the Convention. They argued that extradition from Sweden would cause "irreparable damage to all members of the family due to their very poor mental health."[273] In the case of one of the children there would be a be a high probability of suicide.

The *Salkic* case pin points the second element which constitutes a situation as 'very exceptional', which is the availability of the care facilities in the country of origin. One of the reasons why the application of the *Salkic* case did not disclose the exceptional circumstances was because there were health facilities available in Bosnia Herzegovina. Consequently, the case was declared inadmissible:

> The Court is aware that, even though mental health care in Bosnia and Herzegovina clearly is not of the same standard as in Sweden, there are health care centres which include mental health units and there are

[268] ECtHR *Amegnigan v. the Netherlands*, 25 November 2004, Appl. No 26629/04, p.9.
[269] ECtHR *Amegnigan v. the Netherlands*, 25 November 2004, Appl. No 26629/04, p.9.
[270] See also: ECtHR *Nasimi v. Sweden*, 16 March 2004, Appl. No 38865/02.
[271] Derckx, 2006, p.316.
[272] See: ECtHR *D. v. the United Kingdom*, 2 May 1997, Appl. No. 30240/96.
[273] Quotation continued with: "[...] and in particular to the children who might never recover from another trauma of being forced to move yet again." See: ECtHR *Salkic and others v. Sweden*, 29 June 2004, Appl. No. 7702/04, p.8.

> apparently several on-going projects to improve the situation. In any event, the fact that the applicants' circumstances in Bosnia and Herzegovina are less favourable than those enjoyed by them while they were in Sweden cannot be regarded as decisive from the point of view of Article 3.[274]

It can be derived from this statement and other relevant case law[275] that the Court examines how comprehensive medical treatment is for the applicant in the country of origin, irrespective of any shortage of money or practical barriers to reach the hospital.[276] "Not the level of care is decisive, but the possibility of treatment in general."[277] The notion of availability of health facilities does not include accessibility of facilities. Only availability is part of the decision to grant permission to remain in Europe on medical grounds. Accessibility of medical treatment is taken less into consideration, although it is one of the guiding principles of the right to health.[278]

The third point is the consideration of available moral support in the country of origin. It plays a role when justifying expulsion whether the applicant has family in their own country. The mere fact that there is family in the country of origin seems to indicate to the Court that there is consequently also moral and social support.[279] A general conclusion like this can be considered as overly simplistic reasoning, since family members do not automatically have to be supportive of or are able to be supportive.

[274] ECtHR *Salkic and others v. Sweden*, 29 June 2004, Appl. No. 7702/04, p.10.
[275] See for instance: ECtHR *Bensaid v. The United Kingdom*, 6 February 2001, Appl. No. 30240/96.
[276] Derckx, 2006, p.316.
[277] Derckx, 2006, p. 316-317.
[278] According to the guiding principles the right to health entails being able to receive care which is: available, accessible, acceptable and of good quality. See: United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, par. 12.
[279] Derckx, 2006, p.318. See for instance ECtHR *Amegnigan v. The Netherlands*, 25 November 2004, Appl. No 26629/04, p.9 and see the text connected to footnote 269 for the relevant paragraph referring to the presumed family support of this case.

4.5.4 The Dutch Situation: Temporary Non-Expulsion

In the Netherlands there are two pathways based on medical reasons for suspending the expulsion of undocumented migrants. The first one is the 'Article 64 application'[280] which entitles an undocumented migrant with a state of health making it inadvisable to travel to "legally remain in the Netherlands for a period depending on the illness/treatment".[281] This is not a residence permit and is usually only granted for six months. The second option is a temporary residence permit for severely ill undocumented migrants called a 'permit for medical emergency',[282] with a duration of one year with a possibility of one renewal.[283] The conditions for obtaining this residence permit are in line with the three elements the ECtHR brings forward in its judgement; a severe health condition which if untreated will lead to death within three months, the unavailability of necessary health care in the country of origin in which "financial reasons and individual effective access are not considered to be valid arguments"[284] and insufficient moral or social support in the country of origin. An extra element in the Dutch context is that it has to be proven that medical care does not suffice in the appellant's country (e.g. the undocumented migrant will recall traumatic experiences if sent back). The condition of 'availability of adequate health care in the country of origin' is highly disputable. Quoting refugee lawyer B. Wegelin "It is an illusion to think that when there is something [e.g. medication *authors addendum*] for the

[280] See Article 64 of the Dutch Alien Act (In Dutch: *Vreemdelingenwet)* also for the conditions necessary to be fulfilled in order to be granted this entitlement.
[281] Health for Undocumented Migrants and Asylum Seekers, HUMA Network, 2009, p.11.
[282] In Dutch: 'Verblijfsvergunning op grond van een medische noodsituatie'.
[283] See Article 16 of the Dutch Alien Act 2000 for the conditions and Article 3.57 of the Ministerial Act concerning Aliens (In Dutch: *Vreemdelingenbesluit)* for more extensive information on the conditions of renewal.
[284] Health for Undocumented Migrants and Asylum Seekers, 2009, p.13-16, provides the opinion of Médecins du Monde about the situation in practice regarding access to health care for undocumented migrants in the Netherlands. See also the answers of the Dutch Immigration and Naturalisation Service (IND) in the Q&A after renown current affairs programme 'Zembla' in which the IND explicitly state that in the Dutch policy only the availability of health services are taken into account when deciding on granting residence permits for medical emergencies (and not individual accessibility).
See: Zembla, Questions and Answers after broadcast on 22 January 2011, 'Ziek en Uitgezet' (Sick and Expelled) in which IND answers questions concerning expulsion of sick undocumented migrants. Available at:
http://zembla.vara.nl/fileadmin/uploads/VARA/be_users/documents/tv/pip/zembla/2011/Ziek_en_uitgezet/Antwoorden_IND_over_BMA.pdf (last accessed on 9 July, 2012).

president's son of an African country, that a person who will be expelled from the Netherlands also gets this treatment."[285]

4.6 The Example of the Netherlands

4.6.1 Context of the Access to Health Care

Between 60,000 to 225,000 undocumented migrants are estimated to reside in the Netherlands.[286] This corresponds to 0.4% - 1.4% of the population, which within the European context is a medium ratio.[287] All undocumented migrants are legally entitled to 'necessary medical care' (in Dutch: *'medisch noodzakelijke zorg'*).

Compared to other EU policies the Netherlands seem to have a promising situation. According to the research program 'HealthCare in NowHereland'[288] the Netherlands is among the countries in which policies concerning undocumented migrants and their access to health care, indicates that they have rights beyond emergency care only, such as primary care.[289] However in practice undocumented migrants are often deprived from this care.[290] In April 2012 the report 'Access to Healthcare for Vulnerable Groups in the European Union in 2012' was released by Médecins du Monde.[291] This report

[285] Author's translation from Dutch to English, original quote can be found on the website of 'Zembla': http://zembla.vara.nl/Afleveringen.1973.0.html?&tx_ttnews[tt_news]=37478&cHash=a692a958d1847224dc5e86684026245f (last accessed on 9 July 2012).

[286] Because of the irregularity of undocumented migrants, exact numbers cannot be provided. Nonetheless In the year 2005-2006 Van der Heijden et al., 2006, indicates the number of undocumented migrants around 129000 in the year 2006, based on the number apprehended undocumented migrants.

[287] Baldwin-Edwards & Kraler, 2009, p.41.

[288] See Björngren Cuadra & Cattacin, 2010, for the summary report of this research project.

[289] Björngren Cuadra & Cattacin, 2010, p.11. In the research outcome of the HealthCare in NowHereland project the Dutch policy is among four European policies given the typology 'rights' in which the rights for undocumented migrants go beyond merely access to emergency care. The other countries with the same typology are: Italy, Spain, Portugal and France.

[290] Platform for International Cooperation on Undocumented Migrants, 2007. See also: Björngren Cuadra & Cattacin, 2010. And the article on the website of Médecins du Monde 'Toegang tot medische zorg voor ongedocumenteerden' (Access to Medical Care for the undocumented), 29th of May 2012: http://www.doktersvandewereld.org/2012/05/toegang-tot-medische-zorg-in-ter-apel, (last accessed on 9 July 2012).

[291] In this report the main findings are drawn from daily data collection in 2011 in five different health centres of Médecins du Monde. Among them their health centre in Amsterdam, the Netherlands. More

brought forward that more than a quarter of the undocumented migrants seeking healthcare in the Netherlands are once, or repeatedly, refused the access to necessary medical care, due to financial, communication and administrative reasons. Another outcome was that the special regulation to compensate care providers for treatment to undocumented migrants is not a sufficient guarantee for proper accessibility.[292]

4.6.2 Policy Framework

As stressed before, in the Netherlands undocumented migrants have the right to 'necessary medical care'. In 1998 with the implementation of the 'Linkage law',[293] undocumented migrants are excluded from social security including health insurance.[294] The Linkage Law links entitlements concerning collectively financed provisions to the residence status of the immigrant, with an intention to discourage illegal residency in the Netherlands and as an attempt to prevent undocumented migrants to root in Dutch society which would complicate deportation.[295]

Funding was made available for the provision of necessary medical care as a mean of compensation for medical professionals for medical help to uninsured persons without legal residency.[296] After the reform of the health insurance law a new financing system has been implemented as of January 2009, with the intention of improving healthcare

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than 4,800 clients of Médecins du Monde projects from five different European countries have been interviewed. Topics like living conditions, health and access to care were discussed. The main conclusion of the report is that undocumented migrants in the European Union and in the Netherlands are often unfairly denied access to medical care.

[292] Médecins du Monde, 2012.

[293] See: Linkage Law, 1998 (In Dutch: *Koppelingswet*).

[294] Health for Undocumented Migrants and Asylum seekers, 2009, p.13.

[295] Dorn et al, 2011.

[296] See for the whole text: The House of Representatives (*Tweede Kamer*), Kamerstuk 19637, no. 452 1999. The special financing fund was called 'Koppelingsfonds' (Linkage Fund). This financial compensation arrangement was enshrined in the previous Dutch Care Insurance Act (*Zorgverzekeringswet*), June 2005, Article 122a.

for the uninsurable who in the former system often had hampered access, especially to secondary care.[297]

Under the entitlement of 'necessary medical care' falls in principle care which is in accordance with the basic healthcare insurance package in the Netherlands. Respectively Article 11 of the Dutch Care Insurance Act[298] and Article 6 of the General Act on Special Medical Expenses[299] cover this care of the basic insurance package, which entails the following:

- Primary care:
  Care provided by general practitioners, midwives, maternity care, pharmacists, dentist physiotherapists and laboratory testing.

- Secondary care:
  Care provided by hospitals, rehabilitation centres and ambulances.

- Special medical expenses care (AWBZ):
  Indicated care for the disabled, mental health, elderly and home care.[300]

Nonetheless, for reimbursement under the Dutch funding scheme medical professionals still have to determine that care was needed because of 'medical necessity'.[301] Therefore the vagueness of the entitlement still stays intact, despite the explicit wording in above legal clauses.

[297] Diaz, 2010. The new reimbursement scheme replacing the Linkage Fund is called 'CVZ Regeling Financiering Zorg Illegalen' ('Financial Arrangements Care Illegal Aliens' translation by author).
[298] Care Insurance Act, 2005. (In Dutch: *Zorgverzekeringswet*).
[299] General Act on Special Medical Expenses, Article 6, 1967, (In Dutch: *Algemene Wet Bijzondere Ziektekosten (AWBZ)*).
[300] Authors own translation and summary, based on the information to be found on the website of Lampion: http://www.lampion.info/te-verlenen-zorg/toegang-tot-de-zorg-voor-illegalen (last accessed on 7 July, 2012). Lampion is a platform for cooperation on health issues in the Netherlands and is the national platform for information on healthcare concerning undocumented migrants.
[301] Senate of the Netherlands, Kamerstukken II, no 3, 2008.

4.6.3 Applicability of Legal Entitlements: Situation in Practice

The situation in practice is complicated and undocumented migrants often do not receive the care they are entitled to in the Netherlands.[302] In 2009, just after the implementation of the new funding scheme, Médecins du Monde's biggest concern was whether the "implementation of the new funding scheme has effectively reached the health professionals." Various medical institutions and individual care givers were not familiar, or aware yet, with the funding scheme and therefore undocumented migrants faced the risk of being refused care they were entitled to.[303]

Three years later, this concern has not been diminished and hampered access is still mainly caused by a general lack of knowledge among both health professionals and undocumented migrants themselves. Health entitlements of the undocumented are unknown and there is an inefficient understanding of the functioning of the health system for people without documents.[304] Moreover, the bureaucratic procedures necessary to obtain reimbursement of costs were and are often burdensome to medical provider.[305]

Also Ms Midde, coordinator migrant of care at Médecins du Monde Netherlands, identifies as the main difficulty the lack of knowledge of care takers, receptionists and patients and mentions the unawareness of policy makers about the health entitlements

[302] Sijmons & Derckx, 2010, pp.1747-1753.

[303] Health for Undocumented Migrants and Asylum seekers, 2009, Vision of Médecins du Monde on the situation in practice in the Netherlands, concerning access to healthcare for undocumented migrants. See also Diaz, 2009, who confirms this lack of knowledge among care takers and other medical institutions as hospitals.

[304] Médecins du Monde, 2012. Also during a closed expert meeting on access to care for undocumented migrants '*Expert Meeting over zorgtoegankelijkheid' in* 2010 (32 professionals participated; municipal governments representatives, medical professions, research and patient organisations and migrant advocacy/support groups.) there was recognition in the concern that health professionals are often insufficiently aware of the possibilities of health care to undocumented migrants. Undocumented migrants themselves should also be better informed on their entitlements. Information available at: www.doktersvandewereld.org/2011/12/expertmeeting-over-zorgtoegankelijkheid (last accessed on 30 June 2012).

[305] Kromhout et al, 2008, pp. 49-51. See also: Dorn et al 2011 and the opinion of Pronk, (former Dutch minister) & Wollfers (chairman Medecins de Monde the Netherlands), 2012. Available at: http://www.doktersvandewereld.org/2012/02/door-strafbaarstelling-illegaal-verblijf-komen-gezondheid-van-ongedocumenteerde-personen-en-de-volkgezondheid-in-het-gedrang/ (last accessed on 7 July 2012).

and existing legislation. In addition, Ms Midde provides some practical examples of the existing discrepancies between health entitlements and practice in the Netherlands: [306]

> When not being able to show an insurance card or proof of identification, or when being asked to collect money at home, people feel burdened, ashamed and the fear might exists to attract the attention of the police or the immigration office. Consequently, people return home and do not dare to return back to either doctor or hospital. Many people are unaware that they are entitled to access to care or do not know how the Dutch healthcare system works. In addition, there are several other barriers which make it difficult to receive care: language and cultural barriers, financial constraints and daily concerns about how to make ends meet which complicates to fulfil appointments.[307]

It can be stated as positive that the Netherlands has an extensive funding scheme to make care for undocumented migrants more accessible. Additionally, the entitlements undocumented migrants have are beyond emergency care only, and entail a wide range of medical services. Nonetheless in practice there are still many hurdles in place, which altogether endanger undocumented migrants' enjoyment of the right to health.

4.7 Concluding Remarks

This chapter started with a referral to the present situation of granting undocumented migrants merely with a minimum entitlement of their right to health. This is a noticeable trend within the European context. However, the entitlements are vague, and the extent of them in practice depends less on policies and more on the individual decisions made by medical professionals. They often creatively interpret entitlements or feel at times obliged to bypass the public system in order to provide the undocumented migrant with necessary care. Efforts to diminish barriers to access to public healthcare are also endeavoured to be promoted by parallel health networks consisting of *inter alia* special

[306] Interview via email with Ms. M. Midde, Coordinator migrant care Médecins du Monde Netherlands, June 2012.
[307] Interview via email with Ms. M. Midde, Coordinator migrant care Médecins du Monde Netherlands, June 2012. Author's own translation from Dutch to English.

health clinics for undocumented migrants. Looking at expulsion cases, it seems that the health entitlements undocumented migrants have do not prevent them from being expelled, only in extremely severe medical circumstances. However, medical conditions might postpone expulsion. Important to stress is that within the decision making on expulsion 'accessibility' of health services in the country of origin, is hardly taken into account, mostly 'availability', another guiding principle of the right to health.

The last part of the chapter has elucidated the situation in Netherlands with regard to the access to 'necessary medical care' for undocumented migrants. At first glance it seems that the entitlements undocumented migrants are extensive. However, reference is made now to the Dutch policy and the legal entitlements on paper, which are the legal entitlements undocumented migrants 'in principle' have. In practice, the situation is diverse and there are several situations to be appointed in which the realisation of the health entitlements of undocumented migrants is hampered in the Netherlands.

5. CONCLUSIONS

This study was set out to explore the minimum entitlements of undocumented migrants regarding their right to health, within the human rights framework and the way in which it translates in European State policies and daily practices. The study has also sought to examine to which extent undocumented migrants' minimum health entitlements, in particular the one outlined by the CoE, are congruent with human rights standards, both on the policy level and in practice. Since at times even the minimum levels of human rights are denied to undocumented migrants, the holistic picture drawn by this thesis exposes valuable information for a deeper understanding of the topic, which is intended to contribute greater awareness of the situation of undocumented migrants and the ambiguities regarding their right to health.

Recapitulating, the study has sought to answer the following questions:

1. What are the entitlements afforded undocumented migrants regarding their right to health under the human rights framework and how do these entitlements translate into European State policies?
2. To what extent are the minimum entitlements in European policies, and in daily practice (the Dutch situation in particular) in accordance with human rights standards?
3. Based on the findings of this study, what can be said about the legal status of undocumented migrants regarding their human rights, in particular the right to health?

In below text these questions are answered.

1. What are the entitlements afforded undocumented migrants regarding their right to health under the human rights framework and how do these entitlements translate into European State policies?

Within the human rights framework there are several health entitlements which are explicitly relevant to undocumented migrants. Although generally speaking human rights are granted to everyone, there can be a difference in the level of enjoyment. However, to prevent that a right loses its status as a human right, the minimal essential levels enshrined as the 'core content' have to be fulfilled. Since undocumented migrants often have a limited and unclear relationship with their right to health, due to restrictive laws, migration policies and other practical barriers, it is important to identify what this core content is. It shows the minimum core obligations for States and consequently the minimum health entitlements of undocumented migrants under the human rights framework.

The core obligations of the right to health set forward by the CESCR stress that two of the six obligations explicitly matter concerning the right to health of vulnerable and marginalised groups, in which one can argue undocumented migrants fall. The first is the obligation to ensure the right of access to health facilities, goods and services on a non-discriminatory basis. The second obligation is to adopt and implement a national public health strategy and plan of action. In particular these two obligations highlight the considerable importance placed by the CESCR toward the extra protection of vulnerable and marginalised groups such as undocumented migrants. All the core obligations together lay out the minimum elements which compose the core content of the right to health. The minimum health entitlements for undocumented migrants derive from these elements. When they are not met, the right to health is not safeguarded for undocumented migrants:

Concerning health care:

- Maternal and child health care, including family planning.
- Immunisation against the major infectious diseases.
- Appropriate treatment of common diseases and injuries.
- Provision of essential drugs.

Concerning underlying preconditions of health:

- Education about prevailing health problems.
- Food supply promotion and proper nutrition.
- Adequate supply of safe water and basic sanitation.
- Appropriate training for health personnel, including education on health and human rights.

This list represents the minimum health entitlements, based on the recommendations of the WHO and the CESCR. The Council of Europe translated the minimum entitlement for undocumented migrants as 'the right to emergency health care.' This minimum entitlement to emergency healthcare has been used to measure the current state of affairs in European policies with regard to health entitlements for undocumented migrants. This thesis elucidated that undocumented migrants are in domestic policy often entitled to only minimum guarantees concerning their right to health. In half of the EU Member States the minimum aspiration of emergency care is the standard, however shockingly in nine Member States it has been found that the minimum standard is below the one outlined by the CoE.

Research question 2: To what extent are the minimum entitlements in European policies, and in daily practice (the Dutch situation in particular) in accordance with human rights standards?

The Council of Europe claims that they intervened in the European migration debate to bring standards closer to international law and fundamental rights. As mentioned before, the core content enshrines the minimum essential levels, without which the right to health would lose its status as a human right. Therefore, if the Council of Europe lives up human rights standards, the minimum entitlement recommended by the Council

should be in line with the core content outlined above. The minimum entitlement of emergency care raises doubts whether this is a good starting point to realise these goals.

If the core content can be sustained with the fulfilment of the minimum essential levels, it can certainly be stated that the right to emergency care is too vague and too narrow to provide proper guidance for States to fulfil their core obligations. Within the CoE resolution 1509 and the translation to Member State policies there is often only a reference to an entitlement of 'emergency care' or similar notions, and none are made to the factual minimum essential levels of the right to health, which together appear to be broader than only emergency health care.

Although the core content is broader, it is still risky to overemphasise on the minimum core as a safeguard towards the realisation of the right to health. The reason being that it can possibly jeopardise the actual State obligations which need to be carried out to work on the realisation of the full scope of the right to health. It has to be avoided that States primarily focus on these minimum levels, which can result in the least and lowest level of the right to health for undocumented migrants. A group which faces a high risk to their health, and is factually in greater need than others of sufficient protection.

However, instead of affording concrete social rights and entitlements to undocumented migrants, the focus is often on migration control in Europe. The Dutch situation outlined in this thesis, elucidated both of these points. Firstly, health entitlements granted to undocumented migrants are extremely vague and secondly, the social protection system is used to manage and control immigration. In this context, a situation may arise in which access to rights and entitlements are located in managing migration policies and not in human rights principles.

The essence of human rights is that they are for everyone; especially for the most vulnerable they should serve protection. However, States are not eager to grant human rights to migrants in particular not to the undocumented. This is clearly visible in the non-ratification of The Migrant Worker's Convention among European States, the only

Convention which explicitly enshrines minimum essential levels of rights for undocumented migrants. This situation makes apparent that there is a long way ahead, especially when one realises that even the minimum levels of human rights are often difficult to be enjoyed by undocumented migrants.

The minimal health entitlements undocumented migrants have, do not seem to play a significant role when expulsion is at issue and their health is at severe risk. Expulsion might be postponed, but in general it does not prevent sick undocumented migrants from being expelled in the long term. Striking is to see that when expulsion is at issue, 'accessibility' one of the important general principles of the right to health, is not taken into account. In this respect expulsion decisions are not in accordance with human rights standards. Emphasis on 'availability' of health services means that if a sick undocumented migrant does not have the sufficient resources, treatment cannot be continued in the country of origin and his or her health condition worsens.

In the Netherlands the problems with access to health care services are mainly related to hampered implementation of the health policies; since its policy on paper with regard to health care for undocumented migrants, is among the best in Europe. The Dutch policy grants undocumented migrants with entitlements beyond emergency care. The impeded access is especially due to a lack of information on both the supply and demand level. It seems that the impeded access for undocumented migrants has to do with not fulfilling the last component of the core content of the right to health: "Appropriate training for health personnel, including education on health and human rights." However, not only health personnel, also undocumented migrants have extreme difficulties with understanding and using the Dutch health care system. Therefore, for both care takers as well as undocumented migrants knowledge with respect to the functioning of the health system and the rights of undocumented migrants has to be improved

The barrier of access to healthcare due to inadequately being informed, both at the supply and demand level, is one of the common denominators for the situation in Europe as a whole. Therefore, the author is of the opinion that besides appropriate

training for health personnel, the core content of the right to health must also entail training and awareness programmes aimed on the demand level. This does not necessarily imply a reconstruction of the core content of the right to health. This 'new' element can, according to the author, be interpreted as part of an already existing minimum element: the 'education about prevailing health problems.' The combination of the latter with the existing core obligation on a public health strategy aimed on marginalised groups, results in the interpretation that education for *inter alia* undocumented migrants is part of the core content. Since this thesis elucidated that major complications are caused by a lack of information, an extra emphasis on education in the core content of the right to health is highly recommended.

Nonetheless, of major importance is that States must be more pressured to let undocumented migrants at least enjoy the minimum elements of their right to health. The current *status quo* of the tension between the principle of universal human rights protection and the practical delivery of rights jeopardises the right to health of undocumented migrants. The scope of this thesis did not allow for a comparative country study. Nonetheless, the slight focus on the Netherlands, one of the best policy examples, but with still severe shortcomings concerning implementation of undocumented migrants' health entitlements, is indicative for a precarious state of the right to health for undocumented migrants in the European context.

Research question 3: Based on the findings of this study, what can be said about the legal status of undocumented migrants regarding their human rights, in particular the right to health?

The overall picture seems to be that the legal position of undocumented migrants is extremely ambiguous, even under human rights law which essentially grants rights to 'everyone'. Chapter two made apparent that undocumented migrants fall outside the general legal scope of some important international instruments. A convention, such as the Migrant Workers Convention, could diminish this ambiguity, since additional

conventions secure legal entitlements in areas of general human rights law in which ambiguity remains. Besides this, it is the only convention which explicitly guarantees minimum entitlements for undocumented migrants. However, the absence of ratification of the Migrant Workers Convention has resulted in its being binding upon only a minority of States, predominantly among migrant sending countries.

An evaluation of the legal categories in which undocumented migrants are subject to, finds that even within these categories, the undocumented migrant has a discerned and indistinct position compared to his/her documented counterpart. Particularly striking is the fact that even the interpretation of the legal protection of the ICESCR has been discussed; since the interpretation of the Declaration of Non-nationals excludes undocumented migrants in the scope of ESC rights. Although the Declaration is not legally binding, it reflects the existing tension and difficulties with granting these rights to undocumented migrants. This has been a recurring issue throughout the whole body of this thesis, which became extra worrisome since the findings revealed that even granting minimum levels of the right to health to undocumented migrants is complicated. If there is already ambiguity around one of the main human rights conventions, concerning who are granted social and economic rights, then one can understand that the translation into the domestic context may prove defective.

Undocumented migrants are often only entitled to emergency care within the European context. Nonetheless, this thesis elucidated that the entitlements of undocumented migrants can differ substantially in practice. This confirms that the rights and entitlements of the undocumented migrant tell us little about the actual situation, which is a statement in accordance with previous reasoning. It highlights the ambiguity of the legal status of undocumented migrants and their entitlements. The situation shows that the actual entitlements in daily life are coexisting with laws which ought to be applicable to undocumented migrants, but which are shrouded in vagueness. This causes a lack of clarity regarding the if and the how entitlements apply to undocumented migrants. The legal status of undocumented migrants can therefore figuratively be considered as situated ‘In the Shadow of Law’.

It is the responsibility of medical professionals regarding how to interpret the undocumented migrants' entitlements, consequently they are given the space to 'manoeuvre' within the law, and access to care often depends on how care takers bypass or creatively interpret the legal and public health system. By doing so, it can widen the access to health care for undocumented migrants even when the legal entitlements seem to be more restricted. In some circumstances this might seem to be work in favour of undocumented migrants, since it can extent the access to health care services. Nonetheless, it appears that the legal entitlements of undocumented migrants apply in their own ambiguous and particular way and often do not clarify their status.

Although the current situation might sometimes widen the access to health care it is highly questionable whether these circumstances are desirable. The situation comes along with a legal and social limbo which results in a highly insecure position for the individual, which is according to the author a *de facto* denial of the rights of undocumented migrants. This creates an inhuman situation in which one of the most disadvantaged groups in the world is not acknowledged their right to health, sometimes even at the minimum essential levels. The need to bypass or creatively interpret entitlements, in order to let undocumented migrants somehow 'enjoy' their human rights must be condemned. The current ambiguous position of undocumented migrants does not contribute to a change of attitude towards the recognition of the right to health of undocumented migrants. It is an emergency creation to seek a solution for the denial or hampering of the right to health of undocumented migrants, which is an attempt situated 'In the Shadow of Law.'

In summation, the overall reflection presented in this thesis is the strong tension between the principle of universal human rights protection and the practical delivery of these rights, in particular to those who are undocumented in a country.

BIBLIOGRAPHY

MONOGRAPHS AND ARTICLES [308]

Anderson, E., Huber, M., Access to Health Care for Migrants, Ethnic Minorities, and Asylum Seekers in Europe. Vienna, European Centre for Social Welfare Policy and Research, 2009, available at: http://pdc.ceu.hu/archive/00005528/ (last accessed on 9 July 2012).

Arendt, H., The Origins of Totalitarianism, London: André Deutsch, 1986.

Asher, J., *The Right to Health a Resource Manual for NGO's.* London: Commonwealth Medical Trust, 2004, available at: http://srhrl.aaas.org/manuals/health/RTH.pdf (last accessed on 9 July 2012).

Baldwin-Edwards, M. Kraler, A. Regine Regularisations in Europe, International Centre for Migration Policy Development (ICMPD) available at: http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/regine_report_january_2009_en.pdf (last accessed on 9 July 2012).

Baghir-Zada, R., 'Strategies for obtaining Access to Healthcare: The Case of Undocumented migrants in Sweden', pp.75-83, in Bjorngren Cuadra, C., Cattacin, S., *Migration and Health: Difference sensitivity from an organisational perspective*, Malmö: Malmö IMER/MIM, 2007.

Betts, A.,'Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants', pp. 209-236 in *International Journal of Refugee Law*, vol. 20, no. 2, 2010.

Bicocchi, L., LeVoy, M., Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework. Brussels, Platform for International

[308] Including documents with clear author.

Cooperation on Undocumented Migrants (PICUM), 2007, available at: http://picum.org/picum.org/uploads/file_/Undocumented_Migrants_Have_Rights_1.pdf (last accessed on 9 July 2012).

Biegon, R., Collins, M., Scott Ferguson, I., The Rights of Non-Citizens Study guide, University of Minnesota Human Rights Center, 2003, available at: http://www1.umn.edu/humanrts/edumat/studyguides/noncitizens.html (last accessed on 9 July 2012).

Björngren Cuadra, C., 'Right of access to health care for undocumented migrants in EU: a comparative study of national policies]', pp. 1-6, in *The European Journal of Public Health,* June 9, 2011.

Björngren Cuadra, C., Cattacin, S., Policies on Health Care for Undocumented Migrants in the EU27: Towards a Comparative Framework. Health Care in NOWHERELAND, Summary Report, 2010, available at: http://files.nowhereland.info/698.pdf (last accessed on 9 July 2012).

Björngren Cuadra, C., Cattacin, S., *Migration and Health: Difference sensitivity from an organisational perspective*, Malmö: Malmö IMER/MIM, 2006.

Brand, D., & Russell, S., *Exploring the core content of socio-economic rights: South African and international perspectives*, Cape Town: ABC Press, 2002.

Calavita, K., 'Law, Citizenship, and the Construction of (Some) Immigrant "Others"', pp. 401-420, in *Law & Social Inquiry,* vol. 30, no. 2., 2005.

Carrera, S., & Merlino, M., *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, CEPS Papers in Liberty and Security in Europe, Centre for European Policy Studies, Brussels, 2009.

Chetail, V., Giacca, G., 'Who Cares? The Right to Health of Migrants', pp. 224-234 in: Robinson, M., Clapham, A., (eds.), *Realizing the Right to Health*. Zurich: Ruffer & Rub, 2009.

Cholewinski, R., *Irregular Migrants: Access to Minimum Social Rights*. Strasbourg: Council of Europe Publishing, 2005.

Cholewinski, R., Perruchoud R., MacDonald, E., *International Migration Law: Developing Paradigms and Key Challenges*. The Hague: TMC Asser Press, 2007.

Diaz, M., 'Arts niet op de hoogte van nieuwe financiële regeling' (Physicians unaware of new financial regulations), in SekSoa Magazine, vol. 1, no.1, 2012.

Coomans, F., *De internationale bescherming van het recht op onderwijs*, Thesis, Maastricht University, 1992.

Coomans, F., 'Identifying violations of the right to education', pp.125-146, in: Boven, T., Flinterman, C., Westerdorp, I. (eds.), *The Maastricht guidelines on violations of economic, social and cultural rights,* Utrecht: Netherlands Institute of Human Rights, 1998.

Coomans, F., 'In search of the core content of the right to education', pp.159-182, in Brand, D., Russell, S. (eds), *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives,* Pretoria: Protea Book House, 2002.

Derckx, V., 'Expulsion of Illegal Residents (aliens) with Medical Problems and Article 3 of the European Convention on Human Rights', pp. 313-319, in *European Journal of Health* Law, vol. 13, no. 4, 2006.

Dorn T., Ceelen, M., Tang, M., Browne, J., Keyzer, K., Buster, M., Das, K., 'Health care seeking among detained undocumented migrants: a cross-sectional study', in *BMC Public Health* 2011, vol. 11, 2011.

Eide, A., Krause, C., Rosas, A., *Economic, Social and Cultural Right.* The Hague: Kluwer Law International, 2001.

Evans, T., 'A human right to health?' pp. 197-215, in *Third World Quaterly* vol.23, no. 2, 2002.

Geddie, E., Oikonomou, C., LeVoy, M., Access to Health Care for Undocumented Migrant Women in Europe, Platform for International Cooperation on Undocumented Migrants, 2007, available at: http://www.migration4development.org/content/ access-health-care-undocumented-migrant-women-europe (last accessed on 9 July 2012).

Guilbert, A., The U.N. Migrant Workers Convention: Steps Towards Ratification in Europe, Brussels: European Platform for Migrant' Workers Rights, 2007, available at: http://www.epim.info/wp-content/uploads/2011/02/The-UN-Migrant-Workers-Convention-steps-towards-ratification-in-Europe.pdf (last accessed on 9 July 2012).

Hansen, A., Krasnik, A., Høg E., 'Access to health care for undocumented immigrants: rights and practice.', pp. 50-51, in *Danish Medical Bulletin,* vol.54, no.1, 2007.

Heijden, P., Gils, G., Cruijff, M., Hessen, D., Een schatting van het aantal in Nederland verblijvende illegale vreemdelingen in 2005, (An estimation of the number of illegal aliens in the Netherlands in 2005) Utrecht, Interuniversitaire Onderzoekschool voor Psychometrie en Sociometrie (IOPS), Universiteit Utrecht, 2006.

Huber, M., Anderson S., Wahlbeck, K., Tamsma, N., Torres, F., Jelfs, E., Bremner, J., Quality in and equality of access to healthcare services, Brussels: European Commission, 2008, available at: http://www.ehma.org/files/HealthQuest_en.pdf (last accessed on 9 July 2012).

Jacobs, G., White, R., Ovey, C., *The European Convention on Human Rights*. Oxford: Oxford University Press, 2010.

Karl-Trummer, U., Björngren Cuadra, C., Novak Zezula, S., Two Landscapes of NowHereland Fact Sheet Policies, Health Care in NOWHERELAND, 2010, available at: http://files.nowhereland.info/763.pdf (last accessed on 9 July 2012).

Karl-Trummer, U., Metzler, B., Novak-Zezula, S., Health Care for Undocumented Migrants in the EU: Concepts and Cases. Brussels: International Organisation for Migration (IOM), 2009, available at: http://www.migrant-health-europe.org/files/Health%20Care%20for%20Undocumented%20Migrants_Background%20Paper%286%29.pdf (last accessed on 18 June 2012).

Kamto, M., Special Rapporteur on the Expulsion of Aliens, International Law Commission Fifty-eighth session Geneva, 1 May-9 June and 3 July-11, Second report on the expulsion of aliens, UN GA A/CN.4/573, 2006.

Kapuy, K., *The social security position of irregular migrant workers. New insights from national social security law and international law*, Cambridge: Intersentia, 2011.

Kromhout M., Wubs H., Beenakkers, E., *Illegaal verblijf in Nederland*. Den Haag: WODC Research and Documentation Center of the Ministry of Justice: 2008.

Mladovsky, P., Migration and health in the EU. Research Note. European Commission Directorate-General Employment, Social Affairs and Equal Opportunities, Unit E1 - Social and Demographic Analysis, Brussels, 2007, available at: http://www.ec.europa.eu/social/BlobServlet?docId=3948&langId=en (last accessed on 9 July 2012).

Nowak, M., *UN Covenant on Civil and Political Rights. CCPR Commentary*. Kehl am. Rhein: Engel Verlag, 2005.

Schoevers, A., *Hiding and Seeking Health problems and problems in accessing health care of undocumented female immigrants in the Netherlands,* Nijmegen: Radboud University, 2007.

Sepúlveda, M., *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Right.s* Antwerp: Intersentia Uitgevers N.V., 2003.

Sijmons, J., Derckx, V., 2010, '*Zorg aan Vreemdelingen een chronisch gebrek'*('*Care for Aliens a chronical defect'),* pp. 1747-1753, in *Nederlands Jusristen Blad,* vol. 27, 2010.

Stoyanova, V., 'The Principle of Non-Refoulement', pp. 1-11, in *Interdisciplinary Journal of Human Rights Law,* vol. 3, 2008.

Toebes, B. 'The right to Health', pp. 169-190 in Eide, A., Krause, C., Rosas, A., (eds.), *Economic, Social and Cultural Right.* The Hague: Kluwer Law International, 2001.

Varennes, F., Strangers in Foreign Lands. Diversity, Vulnerability and the Rights of Migrants, UNESCO-MOST Working Paper 9, 2003, Available at: http://www.unesco.org/most/paper_devarennes.pdf (last accessed on 9 July 2012).

Vested-Hansen, J., 'Refugees, Asylum-Seekers and Migrant Workers', pp. 301-322 in Krause, C., Scheinin, M., (eds.), *International Protection of Human Rights: a textbook.* Åbo: Åbo Akademi University, 2009.

Vogel, D., Cyrus, N., 'Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies', pp. 1-9 in *Focus Migration*, no. 9, 2008.

Weissbrodt, D., *The Human Rights of Non-Citizens*. Oxford: Oxford University Press, 2008.

Wörz, M., Foubister, T., Busse, R., 'Access to Health care in the EU Member States', pp.1-8, in *Euro Observer*, vol.8, 2006.

Yeshanew, S., *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System.* Åbo: Åbo Akademi University Press, 2011.

TREATIES, DECLARATIONS, RESOLUTIONS AND RECOMMENDATIONS

1948 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

1949 International Labour Organization, Migration for Employment Convention (Revised), C97, 1 July 1949, C97, entry into force 22 January 1952.

1950 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Entry into force: 3 September 1953.

1951 United Nations General Assembly, Convention Relating to the Status of Refugees, adopted 28 July 1951, entry into force 22 April 1954, United

Nations, Treaty Series, vol. 189, p. 137, 189 UNTS 137, amended by the Protocol relating to the Status of Refugees, adopted 31 January 1967, entry into force 4 October 1967, 606 UNTS 267.

1960 United Nations General Assembly, Convention Relating to the Status of Stateless Persons, adopted on 28 September 1954, entry into force 6 June 1960. United Nations, Treaty Series, vol. 360, p. 117.

1966 International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, adopted on 16 December 1966, entry into force 23 March 1976.

1967 International Covenant on Economic Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3, adopted on 16 December 1966, entry into force 3 January 1976.

1975 International Labour Organization, Migrant Workers Convention (Supplementary Provisions), C143, 24 June 1975, C143, entry into force: 9 December 1978.

1977 Council of Europe, European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS 93, entry into force: 1 May 1983.

1979 United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, entry into force: 3 September 1981.

1985 United Nations General Assembly, Declaration on the human Rights of individuals who are not nationals of the country in which they live, adopted on 13 December 1985 by the General Assembly, A/RES/40/144.

1986 United Nations Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.

1989 United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Entry into force: 2 September 1990.

1990 United Nations General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by General Assembly Resolution 45/158 on 18 December 1990, A/RES/45/158.

1996 Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, Entry into force: 1 July 1999.

1999 United Nations Human Rights Committee, CCPR General Comment No. 27: Article 12 Freedom of Movement, 2 November 1999, CCPR/ C/21 /Rev.1/ Add.9.

2000 European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000, 2000/C 364/01.

2000 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23.

2000 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

2004 United Nations Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, 10/01/2004

2006 Council of Europe Parliamentary Assembly Resolution 1509, Human rights of Irregular Migrants, text adopted by the parliamentary assembly (18th sitting) on 27 June 2006.

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

2011 Recommendation of the Committee of Ministers to Member States on Mobility, Migration and Access to health care, CM/Rec(2011)13, text adopted by the Committee of Ministers on 16 November 2011.

CASE LAW AND FORMAL COMPLAINTS

1978 *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 18 January 1978.

1997 *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997.

2001 *Bensaid v. The United Kingdom*, 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001.

2003 *FIDH (The International Federation for Human Rights*) *v. France*, Complaint No. 14/2003, European Committee of Social Rights, decision 8 September 2004.

2003 *Francico J.Arcila Henao v. The Netherlands*, 13669/03, Council of Europe: European Court of Human Rights, 24 June 2003.

2004 *Nasimi v. Sweden*, 38865/02, Council of Europe: European Court of Human Rights, 16 March 2004.

2004 *Salkic and Others v. Sweden*, 7702/04, Council of Europe: European Court of Human Rights, 29 June 2004.

2004 *Amegnigan v. The Netherlands*, 25629/04, Council of Europe: European Court of Human Rights, 25 November 2004.

2005 *II v. Bulgaria*, 44082/98, Council of Europe: European Court of Human Rights, 9 June, 2005.

REPORTS OF INTERNATIONAL ORGANISATIONS

Amnesty International, The detention of irregular migrants and asylum-seekers, AI Index: EUR 35/002/2008 (public), 27 June 2008, available at: http://www.amnesty.org/en/library/info/EUR35/002/2008/en (last accessed on 9 July 2012). The updated version of this report (only in Dutch):

Amnesty International, Vreemdelingendetentie in strijd met de mensenrechten, (Detention of aliens in breach of human rights), no Index no., November 2010, available at: http://www.amnesty.nl/sites/default/files/public/rapport vreemdelingendetentie_1.pdf (last accessed on 9 July 2012).

Commissie Medische zorg voor zorg voor (dreigend) uitgeprocedeerde asielzoekers en illegale vreemdelingen, Arts en Vreemdeling, (Commission Medical Care for (imminent) failed asylum seekers and illegal Aliens, Doctor and Alien,)2007. Available at:http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Arts-en-vreemdeling-rapport-van-de-commissie-Medische-zorg-voor-dreigend-uitgeprocedeerde-asielzoekers-en-illegale-vreemdelingen-2007.htm, English Summary available at: http://www.pharos.nl/documents/doc/arts_en_vreemdeling_summary.pdf (both websites last accessed on 9 July 2012).

Committee on Economic, Social and Cultural Rights, Sessional Report on the forty-second and forty-third sessions, 2-22 May 2009, 2-20 Nov. 2009. E/2010/22 E/C.12/2009/3, available at: http://tb.ohchr.org/default.aspx?ConvType=18&docType=36 (last accessed on 9 July 2012).

Council of Europe, European Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 6h Meeting, Limassol, 25-26 May 2004, exploratory Report on the Access to Social Protection for Illegal Labour Migrants, prepared by Schoukens, P. and Pieters, D., 2004.

European Migration Network, Illegally Resident Third Country Nationals in EU Member States: state approaches towards them, their profile and social situation, 2007. Available at: http://ec.europa.eu/homeaffairs/doc_centre/immigration/docs/studies/emn_synthesis_report_illegal_immigration_final_january_2007.pdf (last accessed on 9 July 2012).

Health Care in NowHereland, Country Report Finland, Policies on Health Care for Undocumented Migrants in EU27, 2010, available at: http://files.nowhereland.info/656.pdf (last accessed on 8 July 2012).

Health for Undocumented Migrants and Asylum seekers, HUMA Network, Access to health care for undocumented migrants and asylum seekers Law and Practice The Netherland 2009, available at:
www.humanetwork.org/content/download/.../NETHERLANDS.pdf
(last accessed on 9 July 2012).

International Council on Human Rights Policy, Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence, 2010, available at:
http://www.ichrp.org/files/summaries/41/122_pb_en.pdf2010
(last accessed on 8 July 2012).

International Law Commission, Fifty-eighth session Geneva, 1 May-9 June and 3 July-11, Second report on the expulsion of aliens, UN GA A/CN.4/573, 2006, available at: http://untreaty.un.org/ilc/sessions/58/58docs.htm (last accessed on 9 July 2012).

Médecins du Monde, Access to Health Care for Vulnerable Groups in the European Union in 2012, An overview of the condition of persons excluded from the healthcare systems in Europe, 2012, available at: http://www.hal.inserm.fr/docs/00/69/58/27/PDF/Medecins-du-Monde-EU-advocay-paper-on-access-to-healthcare.pdf (last accessed on 9 July 2012).

OESCE, IOM, ILO Geneva, Handbook on Establishing Effective Labour Migration Policies (Mediterranean edition)**:** 169, 2007, available at: http://www.ilo.org/public/english/protection/migrant/download/osce_iom_ilo_medhandbook_en.pdf
(last accessed on 9 July 2012).

Office of the United Nations High Commissioner for Human Rights & World Health Organization, Fact Sheet No. 31, The Right to Health, 2008, available at:
http://www.unhcr.org/refworld/docid/48625a742.html (last accessed on 18 June 2012).

Office of the United Nations High Commissioner for Human Rights, The Rights of Non-Citizens, New York and Geneva, 2006, available at: http://www.ohchr.org/Documents/Publications/noncitizensen.pdf (last accessed on 9 July 2012).

Platform for International Cooperation on Undocumented Migrants, Access to Health Care for Undocumented Migrants in Europe, Brussels, 2007, available at: http://picum.org/picum.org/uploads/file_/Access_to_Health_Care_for_Undocumented_Migrants.pdf (last accessed on 9 July 2012).

Platform for International Cooperation on Undocumented Migrants, Health Care for Undocumented Migrants, 2001, available at: http://picum.org/picum.org/uploads/publication/Health%20Care%20for%20Undocumented%20Migrants%202001.pdf (last accessed on 10 July 2012)

Platform for International Cooperation on Undocumented Migrants, PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe. Brussels, 2010, available at: http://picum.org/picum.org/uploads/publication/Annual%20Concerns%202010%20EN.pdf (last accessed on 9 July 2012).

Solidar, Solidar Position on the European Commission Communication on illegal immigration: a rights-based approach to the question of irregular migration. Brussels, 2006, available at: http://cms.horus.be/files/99931/MediaArchive/migration/illegal immigration_communication_Solidar_position.pdf (last accessed on 9 July 2012).

Special Rapporteur on the Right to Health, Report on his mission to Sweden, A/HRC/4/28/ Add.2, 2007, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/111/82/PDF/G0711182.pdf?OpenElement (last accessed on 9 July 2012).

United Nations High Commissioner for Human Rights, Report of the High Commissioner to the substantive session of ECOSOC (E/2007/82), 2007. Dedicated to the issue of progressive realisation of economic, social and cultural rights, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/394/33/PDF/N0739433.pdf?OpenElement (last accessed on 26 June 2012).

United Nations Juridical Yearbook, 1980, available at: http://untreaty.un.org/cod/UNJuridicalYearbook/html/volumes/1980/dtSearch/Search_Forms/dtSearch.html (last accessed on 18 June 2012).

Venice Commission, The Participation of Minorities in Public Life, Strasbourg: Council of Europe Publishing, 2011.

World Health Organization, 25 Questions and answers on health and human rights, Health and human rights publication series No 1., 2002. Available at: http://www.who.int/hhr/information/25%20Questions%20and%20Answers%20on%20Health%20and%20Human%20Rights.pdf (last accessed on 9 July 2012).

World Health Organization, 'Who Model List of Essential Medicines', 2011, available at: http://www.who.int/medicines/publications/essentialmedicines/en/index.html, (last accessed on 6 July 2012).

World Health Organization, Report of the International Conference on Primary Health Care, Alma-Ata, 1978, available at: http://whqlibdoc.who.int/publications/9241800011.pdf (last accessed on 9 July 2012).

World Health Organization, Global Strategy for Health for All by the Year 2000, adopted in WHO resolution WHA.34.36, 1981, available at: http://whqlibdoc.who.int/publications/9241800038.pdf (last accessed on 9 July 2012).

World Health Organization, International Migration, Health and Human Rights, Health & Human Rights Publication Series, No. 4, 2003, available at: http://apps.who.int/bookorders/anglais/detart1.jsp?codlan=1&codcol=15&codcch=560 (last accessed on 9 July 2012)

DUTCH LAWS AND OFFICIAL PUBLICATIONS

Alien Act (*Vreemdelingenwet)*, November 2000, available at: http://wetten.overheid.nl/BWBR0011823/geldigheidsdatum_29-06-2012 (last accessed on 9 July 2012).

General Act on Special Medical Expenses (*Algemene Wet Bijzondere Ziektekosten ,AWBZ*), December 1967, available at: http://wetten.overheid.nl/BWBR0002614/geldigheidsdatum_29-06-2012 (last accessed on 9 July 2012).

Care Insurance Act (*Zorgverzekeringswet*), June 2005, available at: http://wetten.overheid.nl/BWBR0018450/geldigheidsdatum_29-06-2012 (last accessed on 9 July 2012).

Linkage Law *(Koppelingswet*), March 1998, available at: http://wetten.overheid.nl/BWBR0009511/geldigheidsdatum_29-06-2012 (last accessed on 9 July 2012).

Ministerial Act concerning Aliens (Vreemdelingenbesluit) November 2002, available at: http://wetten.overheid.nl/BWBR0011825/geldigheidsdatum_29-06-2012 (last accessed on 9 July 2012).

The House of Representatives (*Tweede Kamer*), Kamerstuk 19637 no 452, The Hague, 1999, available at: https://zoek.officielebekendmakingen.nl/kst-19637-452.html (last accessed on 9 July 2012).

The House of Representatives (*Tweede Kamer*), Kamerstukken II, 1994/95, 24 233, no. 3, The Hague, 1994/1995, available at: https://zoek.officielebekendmakingen.nl/kst-24233-3.html (last accessed on 9 July 2012).

The House of Representatives (*Tweede Kamer*), Kamerstuk 29 689, no. 83, The Hague, 2006, available at: https://zoek.officielebekendmakingen.nl/kst-29689-83.html (last accessed on 9 July 2012).

Senate of the Netherlands (*Eerste Kamer*), Kamerstukken II, no. 3, The Hague, 2008, available at: https://zoek.officielebekendmakingen.nl/kst-20072008-31249-C.html (last accessed on 9 July 2012).

WEBSITES

Buyse, 2008 'Grand Chamber Judgement N. V. UK' available at: http://echrblog.blogspot.fi/2008/05/grand-chamber-judgment-in-n-v-uk_28.html (last accessed on 9 July 2012).

Expert Meeting over Zorgtoegankelijkheid (Expertmeeting Access to Care) November 2011, more information available at: http://www.doktersvandewereld.org/2011/12/expertmeeting-over-zorgtoegankelijkheid (last accessed 9 July 2012).

International Labour Organisation, ratification status Migrant Workers Conventions, available at: http://www.ilo.org/ilolex/english/newratframeE.htm
(last accessed on 9 July 2012).

Kananen, European civil society steps up to protect undocumented migrants, 2011, available at: http://www.thebeginner.eu/europe/491-human-rights-for-all
(last accessed on 9 July 2012).

Lampion, Toegang tot de zorg voor illegalen (Access to care for illegal persons), available at: http://www.lampion.info/te-verlenen-zorg/toegang-tot-de-zorg-voor-illegalen (last accessed on 7 July 2012).

Médecins du Monde, Toegang tot medische zorg voor ongedocumenteerden, (Access to Medical Care for the undocumented), 2012, available at:
http://www.doktersvandewereld.org/2012/05/toegang-tot-medische-zorg-in-ter-apel.
(last accessed on 9 July 2012).

Mundoscope Wordpress, Global Clinic – Healthcare for Undocumented Migrants, 2011, Available at: http://mundoscope.wordpress.com/2011/01/30/global-clinic-healthcare-for-undocumented-migrants/ (last accessed on 8 July 2012).

Office for the High Commissioner of Human Rights, The status of ratification of the Migrant Workers Convention, available at: http://www2.ohchr.org/english/law/cmw-ratify.htm (last accessed on 10 July 2012).

Platform for International Cooperation on Undocumented Migrants, The use of correct terminology, available at:
http://picum.org/en/our-work/undocumented-migrants/terminology
(last accessed on 9 July 2012).

Platform for International Cooperation on Undocumented Migrants, PICUM Bulletin, May 2012, available at: http://picum.org/en/news/bulletins/34547/
(last accessed on 9 July 2012).

Pronk, J., Wollfers, I., Door strafbaarstelling illegaal verblijf komen gezondheid van ongedocumenteerde personen en de volksgezondheid in het gedrang, 2012. Available at: http://www.doktersvandewereld.org/2012/02/door-strafbaarstelling-illegaal-verblijf-komen-gezondheid-van-ongedocumenteerde-personen-en-de-volkgezondheid-in-het-gedrang/ (last accessed on 7 July 2012).

Simola, A. 'Finland's first clinic for undocumented migrants was received with both enthusiasm and opposition', 2011, available at:
http://picum.org/fr/actualites/blog/30080/ (last accessed on 8 July 2012.

United Nations High Commissioner for Refugees, 9-10 August 2011, available at: http://www.unhcr.se/dk/medier/baltic-and-nordic-headlines/2011/august/9-10-august-2011.html (last accessed on 9 July 2012).

Zembla, Dutch Current affairs Programme, Questions and Answers after broadcast on 22 January 2011, 'Ziek en Uitgezet' (Sick and Expelled) available at:
http://zembla.vara.nl/fileadmin/uploads/VARA/be_users/documents/tv/pip/zembla/2011/Ziek_en_uitgezet/Antwoorden_IND_over_BMA.pdf For information on the broadcast of 22 January 2011, see:
http://zembla.vara.nl/Afleveringen.1973.0.html?&tx_ttnews[tt_news]=37478&cHash=a692a958d1847224dc5e86684026245f (both websites last accessed on 9 July 2012).

OTHER SOURCES

Statement of Jorge G. Bustamante, Former Special Rapporteur on the human rights of migrants (August 2005-July 2011), Second Session of the Human Rights Council, 18 September 2006.

Interview via email (in Dutch) with Ms. L. Ruijs, Emergency department physician, Radboud University Hospital Nijmegen in the Netherlands, June 2012.

Interview via email (in Dutch) with Ms. M. Midde, Coordinator migrant care Médecins du Monde Netherlands, June 2012.

World Health Organization, Constitution of the World Health Organization, adopted by the International Health Conference, signed at 22 July 1946, entered into force on 7 April 1948, available at: http://www.who.int/governance/eb/who_constitution_en.pdf (last accessed on 9 July 2012).