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## The Right to Movement as a Foundation for the Protection of Illegal Migrant's Rights

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### Abstract

*Since the rights to equality, nondiscrimination, and the integration of immigrants into society are incorporated in the universality and indivisibility of human rights, the complementarity and indivisibility of human rights demand that the enjoyment of rights be complementary through these means. Because unlawful migration is a true manifestation of the internationally established right to mobility, the State is likewise committed to ensuring accountability by providing remedies for rights abuses to migrants and refraining from making it a criminal act. The laws and policies created for the phenomena of migration should represent these commitments to responsibility and preventing discrimination against migrants.*

**Keywords:** Human Rights, Movement, Illegal Immigration, International, Protection.

### Introduction

The right to freedom of movement is considered one of the fundamental personal rights, as its presence is necessary for the existence and exercise of other rights, while others consider it as a relative right, as it is not absolute due to its connection to the political systems of countries, it narrows and expands according to political, economic, and security considerations. Therefore, some countries impose restrictions on their citizens leaving the country and on foreigners entering, for reasons related to the national economy, security, or public order, according to regulations imposed within the framework of respecting the laws set by the legislator to protect public order, and taking into account other rights and freedoms.

Migration is one of the most significant ways that the right to movement is exercised. It is not hyperbole to say that migration as a human act has historical roots in times before the state as we know it when people belonged to families and tribes and had no concept of borders. Migration was typically undertaken to reach grazing grounds or lands. For instance, agriculture was not aware of the current complications brought about by development and national security mandates in various nations.

The development of transportation between borders, the escalation of security and terrorist threats, and the turmoil that some countries are witnessing have led to the spread of the phenomenon of illegal immigration, which occurs by exercising the right to movement in an illegal manner, such as entering a country without a passport, or without a visa, for example. It turns from a legitimate right into an illegal act that generates huge sums of money for human trafficking professionals, especially since most countries adopt defensive and deterrent measures for illegal immigration, which do not take into account the nature of immigrants and the reasons that prompted them to migrate.

Some countries' residents are forced to migrate in search of safer regions as a result of the conditions

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they live in, such as armed conflicts or different human rights violations. Irregular migration is caused by a number of factors, including violations of human rights across generations, a lack of democracy, the inability to allow citizens to actively participate in politics through parties, or the absence of an environment that supports freedom of expression. In addition to religious persecution and a lack of strong national identity and allegiance, these factors contribute to migration, which drives people from developing to developed nations in an effort to raise their level of living.

Even migrants crossing to the other side are often treated discriminatively, in the absence of an international convention on the rights of illegal migrants. Therefore, the provisions of human rights conventions are applied on a case-by-case basis, activating the articles of conventions for the most vulnerable groups such as women, children, and persons with disabilities. Despite the assertion of the integration of human rights and their indivisibility, international action has restricted some rights to citizens of the state over foreigners.

In light of the above, our study will attempt to examine the manifestations of mutation in the contents of the right to work from a theoretical and applied perspective, focusing on concepts related to the right to mobility such as legal and illegal migration, asylum, exile, nationality, and the rights of undocumented migrants. We will also delve into the legal grounding of the right to mobility and investigate the actual enjoyment of it in the current international environment. Therefore, the problem of our study will revolve around: What is the reality of the actual enjoyment of the right to move in the context of tightening immigration policies and the lack of specialized legal mechanisms to protect the rights of undocumented migrants?

To study the various details in this paper, we have decided to employ the descriptive-analytical approach: as a complex and flexible method that includes a number of sub-research techniques and methods, especially since the subject of the study is characterized by dynamism and requires understanding and defining the international political and legal foundations for exercising the right to mobility, to demonstrate the relationship between this right and illegal migration, and to reveal the existing problematic issues between them.

The same approach was used to determine the jurisdiction of international human rights bodies by analyzing and describing the scientific material prevalent in legal and political literature on protecting the right to mobility and the rights of undocumented migrants in light of the problematic relationship between sovereign migration policies and the rights of undocumented migrants as human beings.

### **Mutations in the Contents of the Right to Movement**

The right to freedom of movement is associated with a number of important issues such as nationality, foreigners' status, stateless individuals, refugees, and immigrants. These issues have become more prominent in the context of globalization, which casts its shadow on freedom of movement and the restrictions imposed on it. Globalization, which calls for the elimination of borders and free movement of capital, individuals, goods, and services, has had contradictory effects on the right to freedom of movement for individuals compared to the movement of capital and goods<sup>1</sup>

### **The Legal Establishment of the Right to Movement**

The right to freedom of movement is the right to move from one place to another, to leave and return to the country without restriction or prevention except according to the law, or it is the citizen's freedom to move within his country on one hand and his right to leave it on the other hand. Some see freedom of travel and movement as the ability of the individual to change his place according to his will, to go and come as he pleases, and some have called it "freedom of movement," meaning his right to move from one place to another within his country or to move from one country to another, and to return to

his country whenever he wants and however he wants without restrictions.<sup>2</sup>

The government is not allowed to prevent any of its citizens from leaving the country or to deport them outside the country, or to restrict their movement by imposing forced residence on them and preventing them from traveling except within the boundaries imposed by the law. Therefore, freedom of movement is a fundamental freedom on which a set of rights is based, such as the right to work, vote, receive medical treatment, and others, as these rights have no value if there is no freedom of movement or the freedom to come and go. This freedom is manifested in the individual's right to travel from one place to another within and outside the country without restriction except within the limits of the law, i.e., as required by the security interests of the country.<sup>3</sup>

Different types of movement can be distinguished (land, sea, air), but the most clear and widespread is land movement. Land transportation is done in various forms and methods, such as walking and using vehicles. However, the most important method of land transportation is walking, as it requires a great deal of freedom, and is linked to human natural movement. Freedom of movement is considered a fundamental principle that many democratic countries have enshrined and protected in their constitutions and laws, considering it a natural right of humans, necessary since primitive times before the concept of borders between countries existed, where individuals moved freely without being subject to control or licensing.<sup>4</sup>

The right to freedom of movement is considered one of the most important fundamental rights and freedoms, as human nature involves movement, and it is impossible to imagine a human being rooted in a place without leaving it. International instruments for human rights have highlighted this right and worked to enshrine it. Article 13 of the Universal Declaration of Human Rights laid the foundation for this right, elaborated in Article 12 of the International Covenant on Civil and Political Rights, as well as addressed in Article 05 of the European Convention on Human Rights, Article 22 of the American Declaration of Human Rights, and Article 12 of the African Charter on Human Rights and Peoples' Rights.<sup>5</sup>

The Universal Declaration of Human Rights of 1948 emphasizes the importance of freedom of movement and the necessity for individuals to enjoy this freedom. It states the right of individuals to freedom of movement and choice of residence within the borders of a state in Article 13, as well as the right of individuals to leave any country, including their own, and to return to their country. It also affirms in Article 14 that every individual has the right to seek asylum in other countries and to enjoy it free from persecution, provided that the persecution is not already arising from a non-political crime or acts contrary to the purposes and principles of the United Nations.

Article 12 of the International Covenant on Civil and Political Rights of 1966 stipulated the provisions of the right to freedom of movement, guaranteeing every lawfully resident individual within the territory of a state the right to freedom of movement, to choose their residence within that territory, and to leave any country, including their own, subject to the limitations necessary to protect national security, public order, public health, morals, or the rights and freedoms of others. It is also prohibited to arbitrarily deprive anyone of the right to enter their own country. Article 13 of the Covenant affirmed that the right to freedom of movement is guaranteed equally for both citizens and lawfully resident foreigners, and prohibited their expulsion without legal justifications related to public order and public morals.

As for regional protection of human rights, whether American, European, or African, we find that it has given attention to the right to freedom of movement. This right is guaranteed by Article 8 of the American Declaration of the Rights and Duties of Man 1948, which emphasizes the right to freedom of movement in the American Convention on Human Rights 1969 in Article 22. The European Union emphasized the importance of the right to freedom of movement in Article 45 of the European Union Charter of Human Rights 2000. Article 12 of the African Charter on Human and Peoples' Rights 1981 also emphasized the need to protect the right to freedom of movement as an individual and collective

right, especially to escape persecution and racial discrimination.

### **The Right to Movement in Light of the Current International Environment**

The freedom of movement is relative and linked to the existence of states, the dedication of their borders, the increase in populations, and the abundance and development of transportation means. Freedom of movement is subject to the regulations and laws of each country, which regulate it according to what they see as suitable for their national interest, and in a manner that does not contradict their national sovereignty. Freedom of movement narrows and expands according to political, economic, and security considerations. Rich countries tighten restrictions on allowing citizens of underdeveloped and poor countries to enter their territories, while they are more lenient with citizens of strong industrial countries.<sup>6</sup>

In light of the global trend towards economic globalization and the liberalization of trade restrictions, which require opening borders and restricting restrictions on goods and the movement of capital, the phenomenon of migration has increased, which is the movement from one place to another in search of a better reality to escape from a bad situation. United Nations estimates indicate that the number of migrants in the world, it has reached the limits of 200 million people, but to the extent that immigrants contribute to building host societies, this represents a loss of human resources for the countries from which they migrate, and immigration can cause the creation of economic, political, and social tensions in the host countries.<sup>7</sup>

Migration is influenced by the policies of the most powerful countries within the framework of globalization, as history witnesses forced migrations in which major countries have contributed, the most important of which is the migration of Palestinians after being expelled and displaced by the Zionists from their homes since 1948. The internal and external migration of Iraqis due to the American occupation of Iraq and the state of insecurity that the country has experienced in the years following this occupation is also considered. According to the International Organization for Migration statistics for the year 2006, the number of migrants and displaced persons exceeded seven million people. Undoubtedly, the main common factor in the motives for migration is the low economic level and absolute poverty, in addition to the fear of killing and genocide, especially in the midst of growing racial and sectarian tensions in the era of globalization.<sup>8</sup>

The observer of modern migration laws in northern countries finds them primarily focused on strict restrictions in the field of legal migration, requiring a visa for entry, followed by obtaining a residence and work permit under certain conditions. These prohibitive conditions, coupled with poor conditions in the countries of origin, have led to the proliferation of illegal migration through new methods and routes, notably seen in the world through poignant drowning scenes in what has become known as death boat journeys. Furthermore, some industrialized countries establish discriminatory provisions for exercising the right to mobility through what is known as "selective migration," which allows only skilled, experienced, and qualified migrants to enter their territories.<sup>9</sup>

Human right "to leave any country, including his own" is selectively invoked in the context of globalization, where this right was strongly upheld in the face of the Soviet Union, which refused to allow Jews to leave to occupied Palestine. However, the same right was ignored even after the issuance of General Assembly Resolution 194, which affirms the right of Palestinians to return to their homes or receive compensation if they choose not to return. Those who used to urge the Soviet tyrants to abide by Article 13 of the Universal Declaration of Human Rights were its main opponents when it came to the Palestinians.<sup>10</sup>

Globalization has contributed to the increase in the number of refugees due to the spread of areas of tension and the negative environmental, economic, and political effects that have led to the inflation of

the number of refugees. This has led to growing concerns among asylum donor countries about their political and economic stability. Governments have resorted to closing borders and pushing refugees to return to dangerous areas or even face death due to the concern of these governments for national security and the safety of local populations. One horrifying example of this is Guinea's closure of its borders in 1999 to refugees from Sierra Leone, who were in large numbers, mostly children and women who had limbs amputated by rebel forces.<sup>11</sup>

In fact, the right to asylum, which is closely related to the right to movement, has undergone profound transformations in the context of globalization after its standards and provisions were subjected to politicization, which established selectivity that deprived victims of oppression and terrorism of asylum according to political desires and agendas, and included the perpetrators of genocide crimes with the right to asylum, including in particular the issues of humanitarian asylum, which is It is something that must be taken into account and its methods must be determined to ensure the application of the legal rules related to asylum, away from selective matters and political desires.<sup>12</sup>

### **International Protection of the Rights of Illegal Immigrants**

Adapting to illegal migration is difficult due to its dual nature. On one hand, the illegal migrant violates a range of international and national texts regulating migration and mobility procedures, while on the other hand, they rely on their right to seek a better life due to the deteriorating conditions in their country. Faced with the security restrictions imposed by advanced countries, migrants fall prey to the worst forms of exploitation to reach those countries, making them victims and criminals at the same time, especially after various legislations criminalize illegal migration.<sup>13</sup>

While many criticize the term "illegal migration" or "unlawful migration" because migration is inherently permissible, especially when the motive is justified, and considering the right to mobility as a fundamental right of migration as previously mentioned since human rights are universal, indivisible, and exercised equally, they encompass all individuals regardless of gender, religion, or legal status, as stated in international and regional agreements.

There is no specific agreement solely addressing the rights of illegal migrants, unlike other thematic agreements. Therefore, the applicable agreements vary, leading to multiple mechanisms depending on the violated right. However, we will proceed to discuss some relevant mechanisms concerning the rights of migrants within and outside the United Nations system.

### **The United Nations Mechanisms for Protecting the Rights of Illegal Migrants**

The United Nations organization operates on five main bodies with authorities aimed at embodying the purposes of the United Nations Charter, especially the promotion of human rights and peoples' rights. Given that protecting the rights of migrants is part of this goal, all the main bodies have addressed this issue except the Trusteeship Council, where there is a range of reports and recommendations issued by the General Assembly, the Economic and Social Council, the Security Council, the Human Rights Council, and the International Court of Justice related to issues of illegal migrants' rights.<sup>14</sup>

Gathered in Marrakech in December 2018, representatives of 164 states adopted the Global Compact for Safe, Orderly and Regular Migration, a treaty prepared under the auspices of the United Nations that proposes principles of migration policy to governments. Although this pact addresses sensitive issues such as irregular migration, migrant rights, or the development of their country of origin, its recommendations are measured and non-binding. This has not prevented it from being the subject of fierce controversies, which have led to the withdrawal or hesitations of several immigration countries such as the United States, Australia, Israel, Belgium, Italy, Switzerland, or Austria.<sup>15</sup>

The Special Rapporteur is among the non-treaty procedures. The Special Procedures of the Human Rights Council exercise jurisdiction over states even without their ratification of human rights conventions. The Human Rights Council has 41 thematic mandates and 14 country mandates, and the Special Procedures contribute to the oversight of human rights through country visits, sending letters, receiving complaints and reports, providing advice and reports, and conducting studies.<sup>16</sup>

The Special Rapporteur on the human rights of migrants was established by the Commission on Human Rights established the mandate of the Special Rapporteur on the human rights of migrants in 1999 in accordance with Resolution 44/1999, his mandate was extended by decisions of the Committee and by decisions of the Human Rights Council that replaced it.<sup>17</sup>

Although human rights treaty mechanisms, represented by human rights committees or regional courts, require the exhaustion of local remedies, what distinguishes special procedures is the absence of this condition.

Successive resolutions that renewed the mandate of the Special Rapporteur for Migrants assigned powers, including: working to strengthen the protection of the rights of migrants, especially vulnerable groups, receiving information about the conditions of migrants and making recommendations regarding them for the effective implementation of human rights standards, while submitting periodic reports to the Human Rights Council.<sup>18</sup>

One of the most important means is for the Special Rapporteur to conduct field visits, which allow him to have direct and actual insight into the reality of migrants' rights in countries witnessing large waves of illegal immigration, which usually results in reports submitted to the Human Rights Council containing conclusions and recommendations presented to the countries concerned.<sup>19</sup>

The Special Rapporteur receives letters or letters of allegations based on documented information about human rights violations of migrants, and sends the letter to the countries concerned through the Office of the High Commissioner for Human Rights.

The Human Rights Council also has powers, the most important of which are the reports that states submit to the Council, and through the universal periodic review mechanism, and through the decisions issued by the Council successively, where states are obligated, even if the obligation is moral, by emphasizing the necessity of respecting international convention texts. And the standards it contains, which are based on the principles of equality and non-discrimination, the two international covenants, the Convention against Torture, the CEDAW Convention, the Convention on the Rights of the Child, the Vienna Convention on Diplomatic Relations, and other agreements related to the rights of migrants.<sup>20</sup>

Although there are other mechanisms related to human rights, they are concerned with legal migrants only, and they mainly stem from the International Convention on Migrant Workers, which entered into force in 2003, but Articles 28 and 69 of the Convention<sup>21</sup> Pays special attention to the phenomenon of migrant smuggling by requesting states to take the necessary measures to prevent and stop the movement and employment of migrant workers in an irregular situation,<sup>22</sup>The committee established under the agreement also ensures its implementation and monitors the extent of its respect.

In the same context, we refer to the Protocol to Combat the Smuggling of Migrants by Land, Sea and Air of 2000, which is a protocol based primarily on the humane treatment of migrants and their basic rights, and which acknowledged in its preamble the absence of a convention dealing with the rights of irregular migrants, while recognizing the security dimension of the phenomenon of illegality and what it may represent. Possible criminal or terrorist threats, which led him to criminalize smuggling, but the criminalization does not include migrants within the meaning of Article 6 of the Protocol and the

protection of persons who are victims of the crime of smuggling according to Articles 4 and 5 of the same Protocol.<sup>23</sup>

We have previously discussed the mechanisms directly related to the rights of illegal immigrants, and related to the international human rights system. Below, we will discuss other mechanisms related to illegal immigration outside the United Nations system.

### **International Cooperative Protection of the Rights of Illegal Immigrants**

Given the complexity of the phenomenon of migration, and the lack of a convention dealing with the rights of irregular migrants, the international community has sought to find several mechanisms to address the phenomenon of irregular migration, some of which we will discuss below.

Among the existing mechanisms, the Global Migration Group, established by the United Nations Secretary-General in 2006, and a working group consisting of 10 international bodies including the International Organization for Migration, the United Nations High Commissioner for Refugees, the United Nations High Commissioner for Human Rights, and the United Nations Population Fund.<sup>24</sup>

The team specializes in a number of tasks related to the human rights of migrants, including unifying approaches to dealing with all types of migration while promoting human rights and governance of migration policies, and focusing on protecting migrants who are victims of human trafficking.

The International Organization for Migration, established in 1951 as an intergovernmental organization, is a mechanism that aims to promote the human rights of migrants, through the humanization of migration management, and it works to do so in four contexts: migration and development, regulating migration, facilitating migration, and addressing forced migration.<sup>25</sup>

The International Organization for Migration often provides services to migrants, but it does not provide the required protection for migrants as its charter does not stipulate this. Rather, it is assisted in this by other relevant international governmental organizations.<sup>26</sup>

There are many mechanisms, especially at the European level, but the diversity of mechanisms for managing migration has led to the absence of a unified international institutional mechanism<sup>27</sup>This will weaken the legal protection of the rights of irregular migrants.

We must point out that international protection of the rights of migrants will remain below the required level when security considerations overwhelm it, and in the absence of an international institutional framework that takes the International Bill of Human Rights into account, especially what relates to basic human rights. Therefore, among the suggestions presented in this regard, is to create a framework International to protect the rights of migrants, including the establishment of an International Organization for Migration affiliated with the United Nations, or merging the International Organization for Migration and the United Nations High Commissioner for Refugees, or expanding the jurisdiction of the latter to include migrants, or integrating the International Organization for Migration within the United Nations system with the expansion and revision of its mandate.<sup>28</sup>

And in general, regardless of the mechanisms in place at the level of the United Nations human rights system, regionally, or in domestic laws, they must respect the basic human rights of migrants. It is not reasonable for a person to risk their life fleeing a country that violates their rights, only to have their basic rights violated and disregarded elsewhere.

### **Conclusion**

Between the difficulty of establishing a comprehensive definition of the right to freedom of movement

and the necessity of protecting it, international documents have directed the text on the rights associated with movement without the burden of defining them, in order to avoid ideological disputes and to maximize the number of ratifications. Some have called this "conceptual flexibility" or "constructive ambiguity," which allows states to impose their own interpretation on the right being protected. This has led to an inflation of texts guaranteeing the right to freedom of movement, whether directly or indirectly.

The right to freedom of movement is guaranteed to all citizens within their own country. However, reality and the law allow states to restrict this right in a manner that does not infringe upon the right itself and balances the requirements of public security, health, and public order. The right to freedom of movement is not an absolute right, as it can be limited by clear and specific regulations, especially concerning irregular migrants.

The widening gap between the poor and insecure South and the rich and stable North has led to the emergence of armies of refugees, legal migrants, and illegal migrants as a result of international relations built on inequality and tensions. Cases of statelessness have emerged on both collective and individual levels. Despite the fact that the right to nationality is enshrined in a range of international texts, cases of statelessness are on the rise due to many countries refusing to grant nationality to individuals, stripping them of their other rights under the pretext of not possessing nationality, which is at the core of state sovereignty. Western countries only grant their nationality to brains and talents in order to benefit from their expertise, while imposing impossible conditions on others to eventually get rid of them. Despite the absence of an international institutional framework to protect the rights of irregular migrants, the international standard framework obliges all countries to respect the fundamental human rights connected to human dignity and enable them to access justice in case of violation. It is not an exaggeration to say that there is a need to establish an international mechanism to protect the human rights of irregular migrants, but the reality prevents this due to conflicting interests, escalating fears, and increasing racial discrimination against migrants. However, the most important thing in this issue is to respect human rights in the countries of origin of migrants first before discussing respect for these rights in transit or destination countries. A human rights approach in addressing irregular migration is more necessary now than ever.

## Footnotes

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- 21- Article 28 states: Migrant workers and members of their families have the right to receive any medical care urgently required to preserve their lives or to avoid irreparable harm to their health, on the basis of equal treatment with nationals of the State concerned. They shall not be deprived of this emergency medical care due to any violation regarding residence or employment.

- Article 69 states:1 - When there are migrant workers and members of their families in an irregular situation on their territory, States Parties shall take appropriate measures to ensure that this situation does not persist.
  - 2 - Whenever the States Parties concerned consider the possibility of regularizing the status of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the State of employment, and other relevant considerations, in particular considerations related to their family situation.
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