

# INSTRUMENTALISING EFFECTIVENESS AND EMPIRICAL LEGAL SCHOLARSHIP IN HUMAN RIGHTS LEGAL INTERPRETATION<sup>1</sup>

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## 1 INTRODUCTION

The effectiveness of the legal norms of human rights raises many empirical legal questions. Has a treaty been effectively implemented by state parties (Sikkink, 2017)? Has the general level of human welfare corresponding with the content of rights increased (Cope et al., 2019; Simmons, 2009)? Can individuals effectively access the content of a right (Gionco & Celoria, 2018)? The concept of a ‘jurisprudence of consequences’ within the context of human rights legal adjudication invites further inquiry into the principle of effectiveness – not merely of effectiveness of a treaty implementation – but rather, the larger inquiry of effectiveness human rights legal jurisprudence (Obodo, 2020; Protopapa, 2020; Rietiker, 2010). How can empirical legal data be methodologically incorporated into a judicial analysis of the effectiveness of human rights? This contribution strives to illustrate how the legal analysis of the principle of effectiveness can be informed by empirical legal data, as part of this edited volume into defining the scope of a ‘jurisprudence of consequences’. Following the interpretive process prescribed by the Vienna Convention on the Law of Treaties (VCLT), this chapter asserts that empirical data can be used (1) to problematise normative assertions or assumptions of effectivity; (2) as guide through obscure interpretation; and (3) to confirm textual analysis. Further, this chapter suggests that empirical interpretive insights are not limited to the legal context of human rights interpretation but can form an initial scaffolding to instrumentalise a ‘jurisprudence of consequences’.

Arthur Selwyn Miller introduced the concept of a ‘jurisprudence of consequences’ in 1965 to address the law-making nature of US Supreme Court constitutional jurisprudence. Selwyn Miller argued that because such decisions have legislative effects, the Court’s jurisprudence should be informed not only by

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1. This chapter communicates conclusions from a PhD dissertation research funded by the Dutch Research Council (NWO) Project #406.18.RB.020, Claim-Making as Rights-Making: Irregular Migrants Reshaping International Human Rights Law.

legal precedent but also by the effects of judgments. Miller called for a two-faceted impact analysis of judgments; (1) that judges appreciate the consequences of their decisions, and (2) legal academics evaluate the social effect of judicial decisions and the extent to which they further ‘the attainment of social goals’ (Miller, 1965, p. 368). This chapter will engage the principle of effectiveness as a doctrinal bridge between the adjudicator and the academic – the normative and the empirical. As a principle of human rights law, ‘effectiveness’ means that rights should be practical, not simply rights on paper or illusory.

This rule simply implies that the drafters of a treaty have adopted a norm in order to be applied and, thus, the judge has to choose, among different possibilities, that interpretation which is most likely to guarantee the effectiveness of the treaty (*ut res magis valeat quam pereat*). (Rietiker, 2010, p. 256)

To a certain extent, the principle of effectiveness in human rights law can disrupt the causative arc of a ‘jurisprudence of consequences’ – considering not only the effects of a current opinion on the future of the affected individual or group but also the activities of the group and jurisprudential precedent that came before the opinion. Indeed, Miller’s ‘jurisprudence of consequences’ looked in two directions – back at precedent and forward at the effects of judgments. This Janus face of jurisprudence is at home in the common law system but is relevant to a broader theory of the ‘jurisprudence of consequences’, also in the civil law tradition (Postema, 2002). To appreciate the consequences of judicial decisions, the judge can look at the current empirical situation related to the right (reliant on the scholarship of legal academics) to forecast the potential effects of further jurisprudence. To this end, this chapter will discuss the instrumentalisation of the principle of effectiveness – on whether and how a human rights adjudicator can examine empirical legal scholarship to evaluate effectiveness.

This chapter will explore three moments in the process of treaty interpretation from the VCLT and show how empirical data can inform application of the principle of effectiveness in those instances. The analysis herein will focus on three classic civil and political rights found in most or all human rights treaties – the freedoms of expression, assembly and association. However, I will examine these freedoms for a rights-holder where there is particular difficulty in effective human rights protection – undocumented migrants (Dembour & Kelly, 2011). Although undocumented migrants are formally included within the personal scope of these rights, relying on them proves more difficult in practice (Bosniak, 1991; Noll, 2010). In the absence of robust litigation from migrants, the scope and content of these rights has been moulded to the concept of the citizen. In such a legal environment, empirical legal research can be used to provide meaning to “populat[e] the categories” that human rights law has “called into being” (Niezen, 2014).

This contribution to a ‘jurisprudence of consequences’ will show how political freedoms (expression, assembly, association) can be interpreted for the undocumented migrant<sup>2</sup> rights-holder under the principle of effectiveness. The interpretive argument laid out in this chapter is grounded in empirical data collected from 2019 to 2022 on the organising practices of three organisations of undocumented migrants in Amsterdam.<sup>3</sup> During this time, I conducted qualitative research with three such organisations, employing triangulated methods of participant observation; semi-structured interviews; and document review.<sup>4</sup> Section 2 of this chapter will provide an introduction to the three cases, while Section 3 will provide a description of the VCLT legal interpretive framework. The discussion in Section 4 will then show how the empirical data from the cases could be used within an analysis of effectivity guided by the interpretive framework from the VCLT. The conclusions will suggest a broader application of the methodological development for other areas of law based on the principle of effectivity.

## 2 INTRODUCTION TO THE CASE STUDIES

To select case organisations, I used Gerring’s diverse case selection method, which focuses on a few case studies that together capture the variation in a subject (Gerring, 2007, p. 58). Using the diverse case selection method, I selected three case studies, each focusing on one of the three political freedoms of speech, assembly and association. In doing so, I was able to gain insight into these rights in context. To explore the freedom of expression, I conducted research with a cooperative of Pan-African undocumented migrants in Amsterdam with active or previous asylum claims. This cooperative, ‘PrintRights’, was organised while members were residing in the emergency shelter system in Amsterdam during the pandemic. The group decided to manufacture and distribute face masks to fellow shelter residents and later to sell those masks to the general public. They intentionally organised under the freedom to distribute printed works, which falls within the scope of the freedom of expression, to protect their economic activity. The case study revealed three issues with effective protection of undocumented migrant speech: the definition of government interference; the analysis of what is protected

2. To be undocumented means to have no migration status or citizenship from the country in which one resides. ‘Undocumented’ is a flexible category, referring to non-nationals who have entered irregularly, fallen out of status, or remained in the territory after the denial of an asylum or other migration status application.
3. Ethical approval was granted for this case study by the Vrije Universiteit Amsterdam, Faculty of Law, Ethics Committee for Legal and Criminological Research (CERCO).
4. This chapter will engage with this body of data as a vehicle for the empirical legal methodological argument, and, thus, qualitative data analysis is not the focus of the argumentation. For the full examination of the qualitative data discussed herein, please refer to the dissertation manuscript Jordan Dez (2025) *The Political Rights of Migrants: Undocumented Migrant Politics as Human-rights making Practice*.

expression; and the failure to examine the political nature of speech. PrintRights will be discussed in Section 4.1 to show how empirical data can problematise normative assumptions or assertions of effectivity.

To explore the freedom of assembly, I researched Amsterdam City Rights, a collaboration between documented and undocumented people who fight for the rights of undocumented people in the municipality of Amsterdam. The group first organised in 2018 to communicate with the municipality of Amsterdam undocumented people's feedback on shelter regulations. Initially, they had little response from the municipality, as one undocumented member recounts:

It sucks when you write to someone and they don't give you feedback. 'I will not meet up with you', or 'this is not possible'. If you just send mail, and last month we sent ... no reply this week, no reply, no reply, no reply. It really sucks. If you respond to our mails, that is a plus. If you give us a zoom meeting, now we cannot really have physical contact, to talk about what are the things we want to change, that is a plus. I know it has been a very gradual, tedious process, but we shall be there. We shall be there. And now the municipality acknowledges our work, our principles, some of the things we are trying to do. [ACR 1]

Eventually, the municipality responded by inviting 120 undocumented people to a public forum to provide feedback on the shelter system, which forum resulted in 24-hour shelter and removal of security guards from the shelter. Amsterdam City Rights continues to provide a forum (WhatsApp group and weekly meeting) where undocumented people can voice their complaints and organise solutions. When this research was conducted, the group was composed of undocumented people of all backgrounds, documented migrants and citizens. Amsterdam City Rights targeted their claims for political inclusion and human rights at the municipality in order to be heard. My fieldwork with the group was the longest of the three case studies, beginning in 2019 and still ongoing through 2022. Over this period, Amsterdam City Rights created a political voice for undocumented people within the municipality. Towards the end of this period, the group was being consulted by both social organisations and the municipality on policy initiatives that affected undocumented people. Amsterdam City Rights will be discussed in Section 4.2 to show how empirical data can be used to fill the gaps in obscure interpretation, here particularly, the freedom of assembly and the right to consultative voice.

To explore the freedom of association, I researched with the Migrant Domestic Workers, unionised with the FNV union. The FNV Migrant Domestic Workers are comprised of roughly thirty undocumented migrant domestic workers, who engaged in remunerated domestic work, such as child care, cleaning and elder care services. All of the union members in this group were also members of grass-roots migrant associations (Eleveld & Van Hooren, 2018). Such migrant associations provide particular services for the undocumented migrant worker that

are not yet provided by the formal trade union. For example, migrant associations provided legal representation for people who are in immigrant detention and accompaniment to negotiate rights against private employers. Within migrant associations, undocumented migrant workers were able to engage in rights-making that might be more applicable to their undocumented status than their marginalised workers status. Migrant associations also organised around labour rights, in ways that are outside of the normal collective bargaining methods of the formal trade union, such as quitting an employer to allow for re-negotiations; using social gatherings to educate about labour rights; creating communities of coping to discuss labour exploitation. While the textual interpretation of the freedom of association favours a broad scope, given the different international textual provisions on this right, Section 4.3 will show how a supplementary analysis using the principle of effectiveness can be used to confirm the textual analysis.

### 3 LEGAL FRAMEWORK

This section will demonstrate how empirical data can be incorporated into doctrinal treaty interpretation guidelines from the VCLT, Articles 31 and 32. As mentioned previously, this research assessed freedoms of expression, assembly and association from multiple human rights treaties and their corresponding case law. The research began with the International Covenant on Civil and Political Rights (ICCPR), as the major international multinational treaty on civil and political rights. For each right discussed herein, I reviewed the relevant text and corresponding international case law of the ICCPR as well as three major regional human rights treaties – the American Convention on Human Rights, the African Charter on Human and People's Rights, and the European Convention on Human Rights. In reading systemically, I also referred to specialised migrant-focused instruments, such as the 1951 Geneva Convention Relating to the Status of Refugees, the UN International Convention on the Rights of Migrant Workers and Their Families (ICMW) and the Council of Europe, Convention on the Participation of Foreigners at the Local Level (Local Participation Convention).

Of note, in general, undocumented migrants are included within the scope of political freedom in international human rights law. For example, the general jurisdictional statement of the ICCPR, Article 2(1), binds the state to the protection of the rights in the Covenant for all individuals within the state party's territory and subject to the state party's jurisdiction. General Comment 15 of the UN Human Rights Committee (HRC), as reiterated by General Comment 31, clarifies that the general personal scope of the ICCPR includes all migrants (*ICCPR General Comment 31*, 2004, p. 31). Nonetheless, as discussed in Section 4, the adjudication of these rights for undocumented migrants, and their experiences engaging in organising activities protected by these freedoms, raises issues regarding effective

protection. Section 4 will discuss the three freedoms individually and dialogue the doctrinal analysis from the VCLT with each of the three empirical case studies from this research project. Each of the three examples illustrates a way that the analysis of effectiveness can be informed by empirical data.

Consistent with the interpretive method from Article 31 of the VCLT, I read human rights norms textually (with their ordinary meaning), teleologically (in the context of the full treaty and in light of its object and purpose) and systemically (in the context of plural normative instruments of international law (Lo, 2017b; McLachlan, 2005; Slingenberg, 2014). Article 31 of the VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Reading teleologically means to read the relevant substantive provisions of the treaties within the larger context of the respective conventions. For example, in both the European Convention on Human Rights (ECHR) and the ICCPR, the principle of effectiveness is relevant to this teleological reading. The ICCPR states at Article 2(2):

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or the measures *as may be necessary to give effect to the rights* recognised in the present Covenant. (emphasis added)

Similarly, the ECHR at Article 1 states:

The High Contracting Parties *shall secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention. (emphasis added)

This means that the substantive provisions of the conventions should be read together with the obligation to effectively secure rights people in practice.

It is particularly through the application of the principle of effectiveness, as both a primary and a supplementary principle of interpretation, that this chapter finds possibility for engagement with empirical legal studies. Following the interpretive methodology of the VCLT, the principle can be applied at different stages of the interpretive process; either within a textual analysis under Article 31 VCLT or a supplementary analysis under Article 32 VCLT. Accordingly, I propose here a narrow methodological development, where recourse can be had to empirical legal scholarship to inform an analysis of the effectiveness of a right, within the guidance of the VCLT.

## 4 DISCUSSION

Connecting human rights legal doctrine to empirical data on the use of human rights is no simple task as it attempts to bridge the ‘ought-is’ divide (Ansems, 2021, pp. 132-135; Davies, 2020; Taekema & Klink, 2023). As argued by Fischman, there is something special about empirical legal scholarship that sets it apart from empirical methods used in the social sciences. Empirical legal scholarship can be, or according to Fischman, should be, normatively driven (Fischman, 2013). The ELS academic is not only counting treaty ratification, or creating metrics for wellness of society, but connecting the subjective normative standard with the activities on the ground. In instrumentalising effectivity, the question is not (exclusively) ‘how much’ but rather ‘how is this working (or not)?’, ‘what are the practical barriers here?’, ‘must this norm work differently for this group?’, ‘how has this worked (or not) for others in a similar position?’. The principle of effectiveness creates an infrastructure for connecting legal and empirical analysis – for translating everyday occurrences into the language of law or rights (Wilson, 2007). The following section will discuss how the VCLT treaty interpretation method can be engaged in this translation process.

### 4.1 *Article 31 Teleological Reading: ELS Can Problematises Normative Assertions or Assumptions of Effectivity*

This first subsection will focus on the effectivity of the freedom of expression as explored through the case of PrintRights. I make particular reference to cases from the HRC and the European Court of Human Rights, adjudicating the freedom to hold and express opinions (Art. 19 ICCPR; Art. 10 ECHR respectively).<sup>5</sup> As described previously, under an Article 31 VCLT analysis of the textual provisions of both of these treaties for undocumented migrants, effectiveness can be read teleologically into these provisions: the state must ‘give effect to rights’ (ICCPR) and ‘secure [rights and freedoms] for everyone in the territory’ (ECHR). I will discuss here two relevant cases and then proceed to show how empirical legal data can bring the effectiveness of the courts’ holdings into question (*Case of Alidjah-Anyame v. The United Kingdom (dec.)*, 1999; *Case of Sharif Baban v. Australia*, 2003). This discussion begins with an examination of the 2003 HRC case of *Sharif Baban v. Australia*. In that case, an Iraqi Kurd and his son travelled to Australia to claim asylum and were detained on arrival. They were held continually in

5. ICCPR Art. 19(2) “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” ECHR Art. 10 (1). “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

detention during their initial asylum procedures and unsuccessful appeal of denial of status. Baban subsequently participated in a hunger strike within a recreation room of the detention centre to protest his prolonged migrant detention. The state party reacted by transferring Baban and his fellow hunger strikers to a different detention facility and kept them in isolation, stating that the hunger strike and occupation of the recreation room prevented some detainees from receiving medical care and threatening the medical health of certain vulnerable (diabetic, pregnant, minor) detainees. Baban challenged the transfer and isolation as a violation of his freedom of expression under Article 19 ICCPR. The HRC refused to answer the threshold question of whether a hunger strike was protected expression but found that in any case, the government action was legitimate under Article 19(3). This means that without even examining the scope of protected content, the HRC began its analysis with the permissibility of government interference.

Similarly, freedom of expression of an undocumented migrant under Article 10 ECHR was addressed in the 1999 admissibility decision of *Alidja-Anyame v. UK*. This case concerned a Ghanaian national who originally came to the UK as a student. While studying, the applicant joined the Ghanaian Democratic Movement, which was highly critical of the ruling party in Ghana and distributed pamphlets for the Movement. The applicant travelled back to Ghana also to circulate pamphlets, for which he became wanted by Ghanaian authorities, and subsequently returned to the UK to finish his studies. While in the UK, he requested asylum before the end of his study but was denied. He contested his subsequent deportation as violative of, inter alia, Articles 10 and 11 ECHR (expression; assembly and association, respectively). Previous case law of the European Court of Human Rights (ECtHR) established that deportation or denial of an application for migration status would be deemed to interfere with protected expression only if the interference was expressly motivated to suppress expression – a ‘content-based’ restriction (*Case of Cox v. Turkey*, 2010; *Case of Nolan and K. v. Russia*, 2009). The burden is implicitly on the applicant to establish the motivation of the government. The ECtHR ruled in *Alidja-Anyame* that generally, “deportation of an alien pursuant to immigration controls does not therefore constitute an interference with the rights guaranteed under these Articles”. This means that if an undocumented migrant is detained pursuant to speaking out at a demonstration and placed in migrant detention, this can be deemed permissible unless the migrant can prove a content-based intention of the government.

The data from PrintRights problematises the conclusions in this jurisprudence. First, as seen in the ECtHR case law, the enforcement of migration law (through the denial of status/benefits; migrant detention; or deportation of undocumented migrants) will not be deemed to interfere with undocumented migrant expression unless the migrant can establish that the government intended to interfere with expression. The PrintRights case revealed that the fear of deportation (the



enforcement of migration law) has a chilling effect on migrant speech (Dez, 2022). One respondent recounted this chilling effect:

To move around and speak with our voices – even though there are all these laws and other stuff, I am not in a privileged position to do that. That is why, most of the time, when I am invited to speak at a protest, I am like, nah. And many other people they fear that this will have an effect on their procedures ... ‘We are accepting you in our country, and what you can do is come and speak against it’ bloody hell. [PR1]

Whether or not speech will be ‘chilled’ is indeed itself an empirical question, which can be examined by examining both the past and the current legal environment for expression, and the consequences of the judicial decision on speech. In other Article 10 case law the ECtHR has indeed invoked the principle of effectiveness to examine whether speech was chilled. In a recent Grand Chamber decision of the ECtHR, the court emphasised the need for effective protection of speech by removing barriers to revelations in the context of whistle blowing. Criminal sanctions of whistle blowing could have a chilling effect on future expression, rendering the freedom of expression ineffective in that context (*Case of Halet v. Luxembourg*, 2023, paras. 203-204). The standard from *Alidja-Anyame*, namely that undocumented migrant detention and deportation that interferes with expression is not deemed ‘government interference’, contributes to the overall chilling of undocumented migrant speech and thus undermines effective protection.

A second empirical legal conclusion from the PrintRights case, also following the first conclusion, was that the undocumented identity of the claimant must be considered when identifying the protected conduct. PrintRights formed their expression with an awareness of migration enforcement. The group was formed to reduce the risk of interaction with migration police on public transit; they designed their name and logo to invoke an affirmative legality of the freedom of expression; they minimised their public speech-making out of fear of deportation; and they made masks with human rights and political messages to refute the narrative of criminality of the undocumented. PrintRights expressed themselves on highly contested political issues from the perspective of a disenfranchised minority that is directly affected by those issues – this is highly valuable political speech that should narrow the government’s margin to interfere (Reventlow & McCully, 2021). However, the opposite approach was taken by the HRC, which brings me to my third ELS conclusion for this case study. Returning to *Sharif Baban*, conducting a substantive examination that considers the undocumented status of the speaker requires, first and foremost, that the protected expression is first identified. The reluctance of the HRC to identify the protected activity but instead to skip to the analysis of the overshadowing power of the state to interfere is a challenge to the textual assertion that the freedom of expression is for everyone.

In a case like *Sharif Baban*, considering the undocumented status of the claimant is indeed relevant to the expressive act. Mr Sharif Baban had no public stage on which to speak. Hunger striking is frequently engaged in as a political strategy of undocumented migrants and asylum seekers in response to conditions of detention, or lack of viable migration status options (McGregor, 2011; Stierl, 2019). The UN Special Rapporteur on migrant rights has commented that migrant detainees are particularly vulnerable to retaliation for speaking out about detention conditions (Crépeau, 2014). In *Baban*, the HRC accepted Australia's regulation of hunger striking, without discussing the potentially retaliatory motives of the government. Under the justification provided by Australia in *Baban*, a state party can easily legitimate retaliation for hunger striking under the logics of public health and public order. But there is an expressive difference between a citizen simply not eating at home and an out-procured and thus undocumented migrant in a detention centre going on hunger strike. The identity of the speaker in relationship to the state, the location and conditions of the speaker at the time, and the communicative intention are relevant to this inquiry yet not examined by the HRC in *Sharif Baban*.

A 'jurisprudence of consequences' that addresses the effects of judgement and that is aware of the effects of past judgements, and use of the right, could provide effective judicial interpretations flowing from such empirical legal data as that collected from PrintRights. Such data problematises the current analysis of freedom that is not contextualised to the experience of being a deportable subject. Because they are subject to migration enforcement, undocumented migrants may be more likely to engage in expressive conduct other than speaking on a stage or in a protest – such as distribution of products with political messages. The message here is to provide not for an expansive definition of speech for migrants but for a jurisprudence that could minimally effectively protect the vulnerable expression of the deportable migrant to the point that an adjudicator could at least reach the merits of the claim. For example, where an undocumented migrant has shown that they have engaged in protected expression, and that expression was interrupted by migration enforcement action, the burden could switch to the state to prove that the interference was content-neutral. In order to 'secure' or 'give effect' to the freedom of expression for everyone, stopping and detaining a migrant pursuant to migration law enforcement (thus, migration policing, as opposed to policing to maintain public order) within a certain geographical and temporal window of public peaceful protest should be deemed *prima facie* content interference. To this end, an adjudicator should consider the chilling effect their definition of interference could have on the expression of other undocumented migrant rights-subjects. Reference can be made to empirical legal scholarship to understand the effect and extent of chilling on migrant expression.

#### 4.2 *Article 32(a) VCLT: ELS as a Guide through Obscure of Interpretation*

This subsection will turn to an analysis of the freedom of assembly for undocumented migrants as informed by the case of Amsterdam City Rights. Freedom of peaceful assembly, enshrined in Article 21 ICCPR, protects the rights of “individuals to express themselves collectively” (Human Rights Committee, 2020, para. 1). In General Comment 37 of the ICCPR, the HRC clearly included undocumented migrants within the personal scope of the freedom of assembly.<sup>6</sup> While there is ample empirical data available on undocumented migrant social movements and activism, there is little case law tying the reality of migrant organising with the legal norm of the freedom of assembly. In the absence of previous jurisprudence, where should the adjudicator look to inform a ‘jurisprudence of consequences’? Article 32 VCLT addresses the use of supplementary means of interpretation when meaning is obscure.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

‘Supplementary means of interpretation’ includes more than just the preparatory works and circumstances of a treaty’s conclusion (Lo, 2017). Interpretative principles, such as the principle of effectiveness, can and do serve as supplementary means of interpretation. In the absence of individual adjudication and specific guidance for the application of this freedom to the undocumented rights-subject, there is a gap in the current interpretation of what it means to effectively protect the freedom of assembly for undocumented migrants. In the language of the VCLT Article 32, the meaning of this right for these rights subjects is ‘ambiguous or obscure’.

The threshold for using supplementary analysis due to ‘ambiguous or obscure’ meaning of an Article 31 analysis is relatively low (Lo, 2017, p. 226). Where there are obscurities in the interpretation of a freedom, empirical legal scholarship can be referenced to understand how a right is used and what is needed for its effective protection. I will discuss one example of an ambiguity or obscurity within the normative content of the freedom of assembly from the ICCPR. The HRC’s General Comment 37 does not indicate what it means to include undocumented migrants within the sphere of protection, and this despite an extremely detailed guidance for

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6. Para. 5 of General Comment 37 reads: “Everyone has the right of peaceful assembly: citizens and non-citizens alike. It may be exercised by, for example, foreign nationals, migrants (documented or undocumented), asylum seekers, refugees and stateless persons.”

the state and municipality on how to govern assembly in a way that respects the core of the right. Although undocumented migrants are formally included within the scope of the right, the General Comment generally contemplates a citizen, with formal political rights, as its rights subject. This tension can be found in the first sentence of the General Comment:

The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping *their* societies ... Together with other related rights, it also constitutes the very foundation of a system of *participatory* governance based on democracy, human rights, the rule of law and pluralism. (emphasis added)

The connection of the freedom of assembly to participatory democracy and governance is somewhat intuitive given the nature of this right, but it raises questions about the *demos* (the political community, or, 'the people') of this participatory process. Migrants, including undocumented migrants, are usually excluded from many formal political participation rights in the country of origin.<sup>7</sup> Assembly enables 'individuals' to participate in shaping 'their' societies. The possessive 'their' is not connected to the ownership of citizens to their democratic system of governance through their constitution of 'the people'. Indeed, the only time citizens are mentioned in the General Comment is in conjunction with non-citizens statement of personal scope; that assembly is for citizens and non-citizens alike. Of note, General Comment 37 requires state parties to ensure effective facilitation of the right for members of groups that face discrimination or face 'particular challenges in participating in assemblies'. Does effective protection of migrant assembly require the opportunity for formal participation in political process? Or does effective protection of the freedom of assembly only require a duty not to interfere with the collective voice and gathering of undocumented migrants?

In instrumentalising effectiveness to alleviate obscurity of interpretation, the inferential process must find some standard, some horizon against which effectiveness could be measured. At what point can the exercise of the right be deemed effective? Eva Brems makes a relevant distinction here between a 'maximalist' and a 'minimalist' approach to human rights law (Brems, 2009). While a minimalist approach is geared toward avoiding human rights violation, a maximalist approach is a best-practice approach that works towards a horizon of human rights realisation. Brems critiques the minimalist violation-centred approach as inadequately attending to the spectrum of approaches to human rights that states might practice. Some states in some circumstances can do more

7. For example, Article 25 ICCPR limits passive and active voting rights to citizens. However, of note, there is a narrow right under international law for status migrants to vote in local elections and participate in consultative voice forums (See, e.g., CoE Local Participation Convention; UN Migrant Workers Convention).

than merely hover above the borderline of violation. The examples she provides to illustrate these different conceptions of duty fulfilment are indeed taken from the freedom of assembly. Brems quotes the text of Article 21 ICCPR and then comments:

Does this mean that a rule requiring authorisation of the police for a public demonstration is a human rights violation? Does it imply that the organisers of a demonstration have the freedom to choose the time and place of the demonstration? These questions concern the determination of the borderline. The answer cannot be given on the basis of the rule alone; it requires interpretation by an authoritative body. (Brems, 2009, p. 351)

Brems notes that while an adjudicator may be focused on where to locate the borderline of violation, certain states may go much farther than merely avoiding violation, espousing a higher voluntary commitment to human rights (Brems, 2009, p. 371).

The empirical data available on migrant organising, including Amsterdam City Rights, can fill in the gaps of maximalist and minimalist interpretations of effectiveness of the freedom of assembly. Amsterdam City Rights had fought for its right to be heard by the municipality. The years of organising to have their voice ‘heard’ were protected under a minimalist interpretation of effective protection of assembly. Consistent with the analysis of expression in Section 4.1, under a minimalist conclusion, one that guides the state away from violation, migration policing at peaceful and registered public assemblies with the intent of stopping the sharing of information would render the freedom of assembly ineffective for undocumented migrant activists and is likely a violation of the freedom of assembly. Amsterdam City Rights also shows the benefits of a maximalist approach to protecting assembly – where the municipality has reached out to the group to consult on policy that directly affects the group (as discussed in Section 2 when introducing the case). A maximalist approach to the freedom of assembly of undocumented migrants that is rooted in a municipality’s voluntary commitments to human rights protection could go a step further and offer not only the commitment to allow undocumented migrants to safely assemble and politically express, but a commitment to institution building in order to hear those voices that have no formal political membership.

#### 4.3 *Article 32: ELS to Confirm Textual Analysis*

A third way to use empirical legal scholarship is in a confirmatory supplementary analysis under VCLT Article 32. I will discuss this third mechanism using the analysis of the freedom of association for undocumented migrants and the empirical case of the unionised undocumented migrant domestic workers in the Netherlands. Supplementary analysis under Article 32 VCLT can be engaged in the

face of obscurity, but also to confirm a textual interpretation. This interpretative mechanism is useful in the context of the freedom of association of undocumented migrants. The ICCPR Article 22 protects the freedom of association: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” The material scope of this freedom protects the right to form and join an association, such as trade unions or private associations, such as a political party, professional or sporting club or an NGO (Joseph & Castan, 2013, sec. 19.13). There are varying treaty texts on the freedom of association under international human rights law, which must be reconciled when interpreting the breadth of this freedom for undocumented migrants under a systemic analysis of Article 31. In a systemic Article 31 analysis, international norms must be read in the context of other relevant international treaties. In this light, courts will often include in their review of the law a review of the provisions of other international instruments on subject. The relevant legal question for this section is, do undocumented migrants have the freedom merely to join trade unions, or do they also have the freedom to form their own associations?

This norm has been subject to an evolving scope through time. Article 15 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and Article 16 of the ECHR, both developed in the 1950s, limited the freedom of association to trade union membership in the Refugee Convention and to non-political organisations in both instruments. The broad UN human rights treaties of the 1960s and 1970s had a wider applicability to ‘everyone’, without particular caveats for migrant associations. The 1990s saw an inclusion of political rights for documented migrants in the International Convention on the Rights of Migrant Workers and All Members of Their Families (ICMW) but limited associational rights for undocumented migrants. The ICMW grants undocumented migrants the right to join trade unions (Art. 26) but reserves the right to form associations to documented migrants (Art. 40). The Committee on Migrant Workers (CMW) quickly expressed in its first and second General Comments that this provision may be read with ‘broader’ human rights treaties, refuting a *lex specialis* reasoning that would interpret undocumented migrants as having the right only to join but not to form associations based on the ICMW (CMW 2011; CMW 2013). Throughout these three time periods, the International Labour Organisation has been consistent in interpreting the scope of the freedom of association broadly for migrants to include undocumented migrants (*Case no. 2121 (Spain)*, 2001). I conclude that the international norm on the freedom of association favours a broad reading for migrants –consistent with the ICCPR and ILO, and the General Comments of the Committee on Migrant Workers. Undocumented migrants have the freedom to form and to join trade unions.

I use empirical data on the FNV Migrant Domestic Workers to inform an analysis of effectivity, which confirms my Article 31 VCLT conclusion that undocumented migrants have the freedom to form and to join trade unions. Based

on the empirical data, I assert that this broader reading of the right effectively protects the freedom to join a trade union because the organising practices of migrant associations is intrinsically connected to joining a trade union. Migrant associations and trade unions are engaged in a practice of hybrid organising, where the right to join a union and the right to form an association are not severable from each other (Schwenken & Hobden, 2021). Here, a union member comments on the important role of grass-roots organising *within* the union:

You know, we're supposed to have a *bestuurder* ('administrator'), somebody that's an officer who strategizes with us, launches campaigns with us, studies the political situation, what is, how should we do things, etc. And then since 2020, they stopped being available ... In a way, that's positive because it made us stand on our own, organize ourselves, we're still having the name of the FNV behind us, because they are still, we're still part of them, they need us, they want us to be part of that [MDW16].

Rather than merely favouring the broader interpretation of the freedom of association, the empirical legal data indicated that the freedom to form associations is essential to the effective protection of the narrower freedom to join trade unions. Effective protection of undocumented migrants' right to join a union requires its companion, the right to form a migrant association. Migrant associations are essential for migrant domestic workers organising *within* the union – recognition from the union must be fought for by undocumented workers (Albin & Mantouvalou, 2016). Migrant associations ensure that the specific labour right needs of undocumented workers are met – needs that could not be addressed within the collective bargaining model of the union. Empirical legal scholarship here had a confirmatory function of interpretation based on effectiveness. The case study with the FNV Migrant Domestic Workers showed how the freedom to form migrant associations was essential for the effective exercise of the freedom to join a trade union, because the unique rights position of undocumented workers required self-organising to further the very particular interests of these workers within a trade union structure that is built around the collective bargaining solutions that do not fit the labour position of the undocumented migrant domestic worker. Empirical legal scholarship confirmed the textual analysis by examining the effectiveness of the freedom to join a trade union and the freedom to form a migrant association.

## 5 CONCLUSION

I have provided three illustrations of how empirical legal scholarship can be engaged by those tasked with interpreting the scope of human rights. Relying on the doctrinal method from the VCLT, I have shown how to incorporate the principle of effectiveness into an Article 31 or Article 32 analysis. The conclusions

provided herein do not need to be limited to the application of the VCLT or human rights norms. Parallels may be found even in areas of climate litigation within the human rights context – filling the gaps of normative standards and the meaning of ‘real risk’ (*Case of KlimaSeniorinnen v. Switzerland*, 2020; *Case of Urgenda Foundation v. The Netherlands*, 2019; Scholten, 2025). Beyond human rights, however, using empirical data to problematise assumptions of effectivity; fill in normative gaps; and confirm a textual analysis can have wide methodological application in law – as my fellow contributors in this volume have shown. In appealing for legal analysis that incorporates empirical data, this chapter also encourages future research on the way individuals use human rights norms to inform such ‘jurisprudence of consequences’. As shown previously, such research has the potential to reveal what is missing from jurisprudence and what could be gained by effective interpretation. Human rights scholarship on effectiveness often has as its focus the acts of protection, implementation or violation by the state. In my take on the ‘jurisprudence of consequences’, I encourage more attention to the use of the contents of rights by individuals. ‘Consequences’ are not a unidirectional causative arc from jurisprudence to everyday life but a back and forth discussion between rights-holder, adjudicator, state and scholar. In the world of human rights, such a discussion can have as its lodestone the horizon of effective protection.

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