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ACCESS TO JUSTICE FOR REFUGEES AND MIGRANT WORKERS: GLOBAL TRENDS

MANYA - I.D. 825

LIST OF ABREVIATIONS

LEGAL INSTRUMENTS

ACHPR	African Charter on Human and Peoples' Rights
ADRDM	American Declaration on the Rights and Duties of Man
ArCHR	Arab Charter on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms ACHR American Convention on Human Rights
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
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

INTERNATIONAL BODIES

ACommHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CAT	Committee against Torture CERD Committee on the Elimination of Racial Discrimination
CCPR	Human Rights Committee

CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ExCom	UNHCR Executive Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
UNHCR	UN High Commissioner for Refugees

TABLE OF CASES

- ACommHPR, *Good v. Botswana*, Communication No. 313/05, 47th Ordinary Session, Judgment of 26 May 2010.
- Desmond McKenzie and Others v. Jamaica, IACHR, Cases 12.023—12.044—12.107—12.126— 12.146.
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- ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 2776/09, ECHR 2012, Judgment of 23 February 2012.
- ECtHR, Saadi v. United Kingdom, [GC], no. 13229/03, ECHR 2008, Judgment of 29 January 2008.
- Haitian Interdictions Case, IACHR, op. cit., fn. 46, paras. 151–163.
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- I/A Court H.R., On the Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, 17 September 2003.
- Organisation Mondiale Contre la Torture (OMCT) and Others v. Rwanda, ACommHPR, Communications No. 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session, October 1996.
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CHAPTER 1: INTRODUCTION

***Every day, all over the world, people make one of the most difficult decisions in their lives: to leave their homes in search of a safer, better life.*[1]**

Humanity has always been on the move, since earliest times. But the level of human mobility that we are witnessing today is unprecedented. New economic opportunities become an incentive for some people to move, and migration has its horizons embedded in economy. Others move to tackle poverty, food insecurity, armed conflict, terrorism, persecution, or human rights abuses and violations. Not just this, some people do so in response to the adverse implications of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors.[2] Many move, indeed, for a combination of these reasons. More people than ever before live in a country other than the one in which they were born.

Migrants, both refugees and migrant workers, are present in all countries in the world. Most of them move without occasion. Most have moved to countries where they believe they will find better jobs and/or welfare benefits than their own countries. As emphasized in the New York Declaration for Refugees and Migrants in 2015,[3] their number crossed 244 million, growing at a rate faster than the rate of growth of world's population. However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, three million asylum seekers, and over 40 million internally displaced persons.[4]

The Member States of the United Nations in 2015 in its Sustainable Development Goals Agenda 2016–2030[5] recognized that

> *the positive contribution of migrants for inclusive growth and sustainable development international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons. Such*

[1] https://www.amnesty.org/
[2] UNDP, Human Development Report 2009—Overcoming barriers: Human Mobility and Development, 2009, p. 2.
[3] New York Declaration for Refugees and Migrants (Resolution 71/1). www.unhcr.org/newyorkdeclaration .
[4] (A/RES/71/1, PP 1 and 3).
[5] (A/RES/70/1)

> *cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries. We underline the right of migrants to return to their country of citizenship, and recall that States must ensure that their returning nationals are duly received.*

In Goal 10[6] entitled Reduce inequality within and among countries, they brought into operation their preambular statement and committed themselves in target 10.7 to *Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.*[7]

It has become an integral part of international human rights law that *all human beings are born free and equal in dignity and rights.*[8] Distinctions are later made among migrant workers and refugees; however the basic foundation for discourse of rights remains the same.

International refugee law and international migration law separately affected and led to the development of International human rights law, however neither is exclusive of each other. Both the fields of law are interdependent and interrelated. Migrants and refugees are often on the fringe of effective protection given various legal instruments in support. However, in part, their vulnerability finds its roots from the fact of state sovereignty, from the particular role ascribed to states themselves as protectors or guardians of human rights, and from a tendency to limit certain rights within a context of community or citizenship. Simply because of their lack of citizenship, non-nationals are perceived to stand outside the community and on that basis may be denied the substantive and procedural entitlements that citizens or nationals are accorded to.

The phenomenon of flight from economic deprivation, poverty, and disadvantage poses a range of difficult legal, ethical, and policy challenges for policy makers and decision makers in the same manner. The question that becomes pertinent is as to how should states that receive such persons respond to claims based on economic and social deprivation? Particularly, what are the international legal principles that operate to constrain the decision making authority of states receiving such persons. Also, what rights are provided in international law for those wishing to avoid repatriation to a situation in which they will be subject to economic deprivation?

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[6] The 2030 Agenda for Sustainable Development, Goal 10.
[7] Ibid.
[8] The Universal Declaration of Human Rights (***UDHR***) ***Article 1***.

In dealing with such questions, time plays a factor. What then becomes the point of discussion is the immediate provision of facilities to such people. It is during such occasions when these groups face severe violation of human rights. An assessment of the access to justice for refugees and migrant workers becomes relevant on such parameters.

Around the globe today, access to justice enjoys an active and ardent recovery. It is a point both of academic inquest and political challenge. Moreover, it is both a social phenomenon and a significant obligation that motivates action and study. Although access to justice has been a topic of strategic advocacy and empirical research since the early 20th century, the recent resurgence makes it look much new[9]. The tendency of practitioners' and scholars' to conceptualize access as a social problem that is faced by lower status groups, such as poor people is one legacy of early work in this direction. Another legacy is the desire to precipitate, in diversity of ways, questions of justice to matters of law.[10] Given this orienting construction, classical access to justice research stresses heavily on empirically presenting how law falls short of its sought promise. Also, traditional research regularly depended on an extension of law – more or progressively moderate legal advisors, more or all the more inviting courts and hearing tribunals, more extensive involvement of juries, new and better rights – as the policy solution to injustice or inequality.

The signs of a free society – universal rights not to be detained arbitrarily or without trial, access to justice, to fair and public trial with equality of arms, freedom from double punishment, freedom of movement; and those of a humane one – the rule of universal access to subsistence, shelter and health services at the purpose of need – have all been raised doubt about, have must be battled for over and over and are progressively delicate and contingent when connected to refugees and migrant workers.[11]

In this research work, I wish to bring to the fore the issues of access to justice for vulnerable groups, specifically refugees and migrant workers, who face injustices for various facets of reasons although there has been an explicit recognition of their human rights. The gap between such recognition and realization of these rights has been attempted to be highlighted in the present work. Moreover, an effort has been made to provide for recommendations for change needed in this direction. For this, I first attempt to bring out a case for injustices to refugees and migrant workers. Thereafter, bring to the light loopholes in the legal framework for

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[9] Smith, R. H. (1919). Justice and the poor (Carnegie Foundation for the Advancement of Teaching Bulletin No. 13. 2nd ed.). Boston: The Merrymount Press.

[10]

[11] Migration in an interconnected world: New directions for action, para. 15; UNDP, Human Development Report 2009, p. 26.

the protection of human rights of refugees and migrant workers. Finally, attempt to present the judicial mechanism and possible changes that can be brought about to strengthen the access to justice mechanism.

RESEARCH METHODOLOGY

AIMS AND OBJECTIVE

The researcher aims at delving into the need and necessity to analyze the gaps which need to be filled in order to facilitate Access to Justice for Refugees and Migrant Workers and to study the justice mechanism for effective implementation of the rights of refugees and migrant workers.

The objectives can be broadly said to be as:

i. To understand the concept of Access to Justice;
ii. To understand the need for securing Access to Justice for Refugees and Migrant Workers;
iii. To appraise the legal framework existing to safeguard the rights of Refugees and Migrant Workers;
iv. To examine the critical issues prevalent in the existing legal regime for refugees and migrant workers; and
v. To suggest a legal framework to comprehensively secure Access to Justice for Refugees and Migrant Workers.

STATEMENT OF PROBLEM

Migration of workers and flow of refugees is a highly stimulating and controversial political issue in most Countries of destination. One of the essential attribute of the sovereign State is the control over national borders. National political debates on refugees and migrants can be a flashpoint for social and political anxieties about national identity, security, economic uncertainty and social change.

These political conflicts are also conspicuous in national law, which sets the framework within which refugees' and migrants' human rights are in jeopardy. States adopt increasingly restrictive rules, often fuelled by popular hostility to immigrants and refugees. The effects of such policies and laws often have is acute, with increasing vulnerability to exploitation and abuse. There are, therefore, indispensable interests at stake for both the State and the individual with regard to access to justice issues for refugees and migrant workers.

SCOPE AND LIMITATION

Laws for the protection of refugees and migrants are wide in nature which includes both domestic and International Instruments. Due to wide range of the topic the

researcher would be confining the research only to the study of migrant workers. Also, given the wide nature of international refugee law and international migrant law, only the parts that are relevant for the present study have been dealt with. The limited scope is necessary for better understanding of the concept.

HYPOTHESIS

The contemporary developments in the interpretation of the International Migration Law and the Refugee Convention by state parties, in concurrence with other significant developments in international human rights law and theory, enable the Migration Convention and the Refugee Convention to respond in a more refined manner to the claims of persons fleeing social and economic deprivation. However, the actualization of access to justice for refugees and migrant workers is not satisfactory as it stands today.

RESEARCH QUESTIONS

The researcher seeks to answer the following questions in the research work:

1. What is the impact of emphasis on human rights of refugees and migrant workers on the rights of locals of the country of destination?
2. How can access to justice be fully incorporated into national development strategies?
3. Whether there are glitches in access to justice for refugees and migrant workers?
4. What are the causes of injustice in safeguarding the human rights of refugees and migrant workers?
5. What are the loopholes in legal framework concerning refugees and migrant workers affecting access to justice?
6. What changes are required in the judicial mechanism concerning justice for refugees and migrant workers?

CHAPTERIZATION

The whole work has been divided in six chapters.

Chapter One is titled as Introduction and Research Methodology. In this chapter, the elementary introduction to the topic has been provided and a background to the whole issue dealt with in the research has been captured. In the research methodology, the researcher has provided the information as to statement of problem, aims and objective of the study, research questions, hypothesis, research method, style of writing etc.

Chapter Two is titled as Refugees and Migrant Workers- Human Rights and Violations. In this chapter the researcher has attempted to describe briefly the human rights available to refugees and migrant workers under various Human Rights Treaties and Specific Conventions pertaining to protection of rights of migrant workers and refugees. Moreover, the researcher has tried to build a case for injustices to the above mentioned vulnerable groups with the help of case laws and examples. This chapter also tries to bring out the disparity between skilled and unskilled migrant workers and difference in implementation of formers' rights vis-à-vis latters'.

Chapter Three as titled as Access to Justice. In the chapter, emphasis has been laid on the definition of access to justice with the changing times. This chapter also encompasses various approaches to access to justice, need for access to justice, barriers to access to justice, etc. Lastly, this chapter also brings into light the need for special access to justice mechanism for vulnerable groups.

Chapter Four is titled as Legal Framework for Protection of Refugees and Migrant Workers- A Critical Analysis. This chapter mainly deals with the legal framework for the protection of rights of refugees and migrant workers. The researcher also deals with critical issues present in the refugee and migration law which are to an extent cause of the injustices or lapse in realization of access to justice for refugees and migrant workers.

Chapter Five is titled as Judicial Mechanism- A Re-Analysis. In this chapter, an attempt has been made to discuss the necessity of increasing the role of judiciary in the process of attaining access to justice for refugees and migrant workers.

The last chapter i.e. Chapter Six is a conclusive chapter in which some suggestions and the way out for the problems have been provided. In conclusion, the paper has demonstrated clearly that, there is inevitable movement of people across borders; however, it is the duty if the states to take care of the human rights of such people. At the same time, rights of people of countries of origin should not be jeopardized. Moreover, the laws to provide access to justice for refugees and migrant workers need substantial changes in order to strengthen the justice mechanism. Detailed suggestions and recommendations in this regard have been provided after the concluding portion.

SOURCES OF DATA

Information and data for the research has been collected through review of literature from both primary and secondary sources.
Primary Sources: Primary Sources used herein are the International Instruments, statutory enactment and case laws.

Secondary Sources: Secondary sources used in the study are the text books, journals and online database.

MODE OF CITATION

The Researcher has followed a uniform system of citation throughout the research work.

CHAPTER 2: REFUGEES AND MIGRANT WORKERS- HUMAN RIGHTS AND VIOLATIONS

It has been a part of human history throughout that they leave the place where they grew up. While the extent of movement may vary from the next village or city, to sometimes a need to leave their country entirely; it may also be sometimes for a short time, but sometimes forever.

Today, more people than ever before live in a country other than the one in which they were born. In 2017, the number of migrants reached 258 million, compared to about 173 million in 2000. However, the proportion of international migrants in the world population is only slightly higher than that recorded over the past decades, equaling 3.4% in 2017, compared to 2.8% in 2000 and 2.3% in 1980.

There are various reasons for such movement of individuals. While many individuals migrate out of necessity, many others move out of choice. There are approximately 68 million forcibly displaced persons, including over 25 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.

People migrate for different reasons,[12] such as reuniting with their families; seeking better economic opportunities; and escaping human rights abuses, including armed conflict, persecution, and torture.[13] Migrants are generally entitled to the same human rights protections as all individuals, although limitations may be imposed by States on migrants' rights in some ways, for instance, with regard to voting and political participation. Many human rights treaties explicitly prohibit discrimination on the basis of national origin and require States to ensure that human rights of migrants (refugees and migrant workers) are equally protected. In addition, like other predominantly susceptible groups, migrant workers and refugees have been given extraordinary protections under international law, to

[12] IACHR, Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, OAS Doc. OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, para. 61; General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their family, CMW, UN Doc. CMW/C/GC/2, 28 August 2013.

[13] Amnesty International, People on the Move.

deal with situations where their rights are most at risk, such as in the place of work, in imprisonment, or in shipment. The treaties that a State has ratified will ascertain the protections afforded to a refugee or a migrant, such as access to social security.[14]

There are plethoras of reasons for people around the globe to seek to recreate their lives in a different state. Some people leave home to get a job or an education. Others are forced to flee persecution or human rights violations such as torture. Millions flee from armed conflicts or other crisis or cruelty. Some feel unsafe and might have been targeted for various reasons like their ethnicity, religion, sexuality or political opinions.

These journeys that start with the hope for a better prospect might be full of danger and fear such as human trafficking and other forms of exploitation. Some are seized by the authorities as soon as they arrive in their country. A lot of them face daily racism, xenophobia and discrimination.

While States keep hold of discretion to supervise migrants' entry and exit through their land, human rights values pertains to this management. And, international lawful values limit who they can oust and under what situations. According to the principle of *non-refoulement*, States must not deport a migrant to a country where he or she is likely to face torture or serious human rights violations.

When people move out of their nation's border, they might not realize it then, but their status for the world has changed. They are now called migrants. And this might become a reason for them to often find themselves in an inferior position to those around them, who hold the passport of the country in which they live.

Whether migrants have entered with consent or they are undocumented, migrants will generally find their rights degraded as compared to the rights of the citizens of their country of residence. The extent to which these rights are violated and the extent to which migrants are excluded from legal safeguard, varies extensively from jurisdiction to jurisdiction. A legal migrant may face violence at place of work or sub-standard conditions of work and a lack of labor rights guard and be afraid of claiming legal protection because a supervisor threatens dismissal and subsequent loss of a work permit. A refugee may become caught in the complex, long, and often random web of a refugee qualification process, during which rights are truncated and the aspirant is hovered in a legal midpoint without identity. Most vulnerable among these groups are the undocumented migrant.

People finding themselves in this situation, while having a titular privilege to their human rights, in effect lack, because of their fear of being recognized and deported, any occasion to defend those privileges, or to access the solutions

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[14] International Commission of Jurists, *Migration and International Human Rights Law: A Practitioners' Guide* (2014), 54.

which should protect them.[15] They risk exposure to economic or physical exploitation, to destitution, and to summary return to their country of origin, where some may face danger to their safety or even to their life.

Whether someone migrates to escape war, famine, persecution, natural catastrophes, economic depression, or just to find a better chance for a better life, the person often finds the insecurity, restrictions and sometimes destitution of their situation in the country of destination preferable to that at home. [16]

As regards admission, or attempted admission, of a migrant to the alien state, a number of wide, at times overlapping, groups of migrants can be identified:

• **Regular migrants:** migrants who enter the State after having obtained an authorization, whether temporary or not, by the destination State;

• **Undocumented migrants:** migrants who enter the State in an irregular fashion, without having the proper documentation; or migrants who entered in a regular fashion whose authorization expired and who have remained, nonetheless, in the national territory. This research work have used the terminology as suggested by the UN General Assembly,[17] to avoid the term illegal migrant and use undocumented or irregular migrant as synonyms.

• **Asylum-seekers or refugees:** migrants who enter a country, whether regularly or irregularly, in order to escape persecution in their country of origin as defined by Article 1A of the Geneva Refugee Convention.

• **Other migrants needing protection**: this category includes several kinds of migrants whose status is not well-defined but who are in need of international protection, recognized, to varying extents, by international law. These include stateless persons (whether or not they are asylum-seekers or refugees), victims of trafficking, unaccompanied children whose status has not been defined, failed asylum-seekers or undocumented migrants who cannot be expelled due to principle of *non-refoulement.*

This classification is only partially appropriate, since, as was recognized by the Global Commission on International Migration,

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[15] Global Group on Migration (GMG), Statement on the Human Rights of Migrants in Irregular Situation, 30 September 2010, http://www.globalmigrationgroup.org/sites/default/files/uploads/news/GMG Joint Statement Adopted 30 Sept 2010.pdf.

[16] IACHR, Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, OAS Doc. OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, para. 56. CMW, General Comment No. 2.

[17] General Assembly (GA) resolution 3449(XXX), Measures to ensure the human rights and dignity of all migrant workers, 9 December 1975, para. 2.

> *an individual migrant may belong to one or more [...] categories at the same time. She or he may move successfully from one category to another in the course of the migratory movement, or may seek to be reclassified from one category to another, as when an economic migrant submits a claim to asylum in the hope of gaining the privileges associated with refugee status.*[18]

By option or might of situation, the condition of a migrant is almost never constant. An economic migrant might become a refugee while in the country of destination. A refugee might lose his status and become an undocumented migrant because the circumstances which led to a fear of persecution cease to exist in his country of origin. A regular migrant might become undocumented if she overstays a residence permit term, or might be regularized, through amnesties, or regular employment. Overstaying has been identified as one of the major channels through which a migrant acquires irregular status. As the UNDP pointed out, in some island states, such as Australia and Japan, overstaying is practically the only channel to irregular entry; even in many European countries, overstay appears to account for about two thirds of unauthorized migration.[19]

The present research deals with detailed study on refugees and migrant workers. As noted above, these two groups intersect with each other. It therefore becomes pertinent to elaborate on these and draw a clear distinction between the two to understand this study as required.

2.1 Migrant Defined

There is no clear, universally agreed upon definition of a migrant, sometimes referred to as international migrant.[20] Some human rights experts and bodies distinguish between internal migrants (internally displaced persons) and international migrants; and between migrants who moved forcefully and those who moved voluntarily to progress their circumstances. Therefore, generally, there are four categories of mobile persons to which international law may refer:

- people who have moved voluntarily within one State for the purpose of improving their situation,
- people who were compelled to move internally within one State,
- people who moved voluntarily across a border for the purpose of improving their situation, and
- people who were compelled to move across a border.

[18] Migration in an interconnected world: New directions for action, para. 15; UNDP, Human Development Report 2009, p. 26.
[19] UNDP, Human Development Report 2009, p. 26.
[20] Office of the United Nations High Commissioner for Human Rights (OHCHR), *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration* (2013), 7.

Migrants comprise of different class of persons, including but not only migrant workers, migrants in an irregular situation, victims of human trafficking, and smuggled migrants.[21]

2.1.1 Migrant Worker

Migrant workers are individuals who depart abode to discover job outside of their homeland or home country. Persons who move for job in their own state are internal migrant workers. Persons who move for job to a different state are generally called foreign or international migrant workers.

The United Nations defines migrant as

> *an individual who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate.*

Under such a description, those travelling for shorter periods as tourists and business persons would not be considered migrants.

The UN Migration Agency (IOM) defines a migrant as

> *any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.*

The International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW) defines migrant worker under Article 1 as

> *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.*[22]

The ICRMW is the most wide-ranging accord on the rights of migrant workers and outlines migrants' political and civil rights, as well as their social, economic, and cultural rights. Most of the provisions of the ICRMW are valid to all migrant workers, both documented and non-documented, and their families, but some provisions specifically apply to irregular, or non-documented, migrants.

The Committee on Migrant Workers (CMW) noted that

> *while the ICRMW outlines the minimum rights afforded to migrant workers, States may expand the scope of these rights, including with respect to irregular migrants.*

Additionally, the Committee stated

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[21] *Ibid.*

[22] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 01 July 2003), 220 UNTS 3, Art. 1

that parties to the ICRMW must interpret their obligations towards migrants in accordance with other human rights treaties and other international treaties that they have ratified.[23]

Besides the ICRMW, several other international instruments also provide protections for all human beings at work, including migrant workers. The ILO Migration for Employment Convention (Revised), 1949 (No. 97) protects migrant workers particularly, guaranteeing basic rights such as access to health care and the right to nondiscrimination. Numerous worldwide human rights treaties and the fundamental ILO Conventions provide for workers' rights to just functioning circumstances and equal pay, the ability to form and join trade unions, and access to social security.[24]

2.1.2 Non-documented Migrant Worker

An irregular migrant worker, or a non-documented migrant worker, may be defined as

a person who enters a country without authorization for the purpose of obtaining employment.

In 1975, the UN General Assembly requested UN organs and agencies to use the terms non-documented and irregular migrant workers instead of terms like illegal migrant worker.[25] Since that time, other international bodies have made a point of using these terms to avoid the stigma attached to terms such as illegal migrant.[26] The International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW) also uses the non-documented or irregular migrant worker and defines them as

a migrant who is not authorized to enter, to stay and to engage in a remunerated activity in the State of employment.[27]

Irregular migrant workers have the identical rights as other migrant workers under the ICRMW, and, as with other migrant workers, States may not, on the basis of his irregular status, withdraw an irregular migrant worker the rights afforded to him under the ICRMW.[28] As with documented or regular migrants, States must construe their duties towards irregular migrant workers in keeping with the

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[23] CMW, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their family*, UN Doc. CMW/C/GC/2, 28 August 2013, para. 8.

[24] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, arts. 7-9; International Labour Organization Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (adopted 9 July 1948, entry into force 4 July 1950), 68 UNTS 17; ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (adopted 1 July 1949; entry into force 18 July 1951), 96 UNTS 257; ILO Equal Remuneration Convention, 1951 (No. 100) (adopted 29 June 1951, entry into force 23 May 1953), 165 UNTS 303.

[25] UN General Assembly, Resolution 3449(XXX), Measures to ensure the human rights and dignity of all migrant workers, UN Doc. A/RES/32/120, 9 December 1975, para. 2.

[26] Council of Europe Parliamentary Assembly, Resolution 1509 (2006), Human Rights of Irregular Migrants, 27 June 2006, para. 7.

[27] ICRMW, Art. 5.

[28] ICRMW, Art. 25(3).

international human rights treaties they have ratified.[29] The ICRMW does, though, balance the authority of the State to regulate the entry and exit of migrant workers with migrants' rights.[30]
Several instruments also protect against the exploitation of migrant workers and forced labor or slavery.[31]

2.1.3 Refugee

The 1951 Refugee Convention defines a refugee

> *as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.*

The 1951 Refugee Convention and its 1967 Protocol, as well as other international and regional instruments, outline refugees' rights and States' responsibilities with respect to refugees. States' obligations include adhering to the principle of non-refoulement providing access to just and competent asylum procedures, and ensuring value for basic human rights.[32]

2.2 Human Rights of Migrant Workers and Refugees

Human rights, as they are guaranteed in both domestic and international law, have a vital role in shielding refugees and migrantworkers caught up in these dominant forces. The Global Migration Group[33] recently recalled that the

> *fundamental rights of all persons, regardless of their migration status, include:*

[29] *General Comment No. 2*, 28 August 2013, paras. 6, 8.
[30] *Ibid.*
[31] ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (adopted 24 June 1975, entry into force 9 December 1978), 1120 UNTS 323; ILO Forced Labour Convention, 1930 (No. 29) (adopted 28 June 1930, entry into force 1 May 1932), 39 UNTS 55; Abolition of Forced Labour Convention, 1957 (No. 105) (adopted 25 June 1957, entry into force 17 January 1959), 320 UNTS 291; International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976), 999 UNTS 171, art. 8.
[32] IJRC's Thematic Guide on Asylum & The Rights of Refugees.
[33] The Global Migration Group (GMG) is an inter-agency group bringing together heads of the International Labour Organisation (ILO), the International Organisation for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), the UN Conference on Trade and Development (UNCTAD), the UN Development Programme (UNDP), the UN Department of Economic and Social Affairs (UNDESA), the UN Education, Scientific, and Cultural Organisation (UNESCO), the UN Population Fund (UNPF), the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNCF), the UN Institute for Training and Research (UNITR), the UN Office on Drugs and Crime (UNODC), the World Bank and UN Regional Commissions.

- *The right to life, liberty and security of the person and to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;*

- *The right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status;*

- *The right to be protected from abuse and exploitation, to be free from slavery, and from involuntary servitude, and to be free from torture and from cruel, inhuman or degrading treatment or punishment;*

- *The right to a fair trial and to legal redress;*

- *The right to protection of economic, social and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work; and*

- *Other human rights as guaranteed by the international human rights instruments to which the State is party and by customary international law.*[34]

2.2.1 Migrant Workers

According to international human rights norms, which are based upon the intrinsic pride of every individual, migrants enjoy the basic rights given to all people in spite of of their permissible status in a State.[35] The Human Rights Committee has overtly declared that, with the exception of Article 25 of the ICCPR, which pertains to political participation, all the rights guaranteed in the ICCPR apply to migrants.[36] The rights discussed below apply to all migrants and do not comprise an exhaustive list.

<u>Right to Life</u>

All migrants have a right to life, and States have an obligation to ensure that no migrant is arbitrarily deprived of this right.[37] States should indict right to life

[34] 5 GMG, Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation.

[35] Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A(III) (UDHR), Art. 1; Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, UN Doc. HRI/GEN/1/REV.9(VOL.I), 11 April 1986; Amnesty International, In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest (2012), 13.

[36] *General Comment No. 15: The position of aliens under the Covenant,* 11 April 1986.

[37] ICCPR, Art. 6; ICRMW, Art. 9.

violations, as well as extrajudicial killings which occur during a migrant's passage from the country of origin to the country of destination and vice versa.[38]

States also have a responsibility to alleviate loss of life at land and sea border crossings.[39] Generally, under international human rights law and the international law of the sea, the State has a duty to protect and ensure the right to life of individuals at sea within the State's territory or that a ship under the State's jurisdiction comes across. The international law of the sea in particular has developed provisions concerning the rescue and protection of individuals, including migrants, lost at sea. For example, Article 98 of the UN Convention on the Law of the Sea (UNCLOS) spaces a duty on shipmasters to help any individual found at sea who is at risk of being misplaced and save people in suffering if well-versed of their need for help, so long as such dealings do not gravely imperil the ship, crew, or passengers. Article 98(2) of UNCLOS dictates that coastal States have a positive obligation to cooperate with neighboring States to promote effective search and rescue services.[40]

Equality and Non-Discrimination

International human rights law assures liberty from inequity in the gratification of human rights for all people, including migrants. For example, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights states,

> *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*[41]

When migrants belong to one of the groups protected by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), or the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the non-discrimination and equality provisions are also applicable to them.[42]

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[38] UN General Assembly, Resolution 23/20, Human rights of migrants, UN Doc. A/HRC/RES/23/20, 26 June 2013, para. 4(c).

[39] *Id.* at para. 4(d).

[40] International Commission of Jurists, Migration and International Human Rights Law: A Practitioner's Guide (2014), 101.

[41] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976), 993 UNTS 3, art. 2(2). *See also* ICCPR, art. 2(1).

[42] Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981), 1249 UNTS 13, art. 1; Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990), 1577 UNTS 3, art. 2(1); International Convention on the Elimination of all Forms of Racial Discrimination (adopted 7 March 1966, entry into force 4 January 1969), 660 UNTS 195, art. 1(1); Committee on Elimination of Racial Discrimination (CERD), General Recommendation No. 30: Discrimination against non-citizens, UN Doc. CERD/C/64/Misc.11/rev.3, 19 August 2004.

Regional human rights instruments in the Inter-American, European, African and other regional human rights systems also guarantee the right to nondiscrimination.[43]

Additionally, a migrant's right to nondiscrimination in the workplace is protected.[44] The ILO Declaration on Fundamental Principles and Rights at Work advocates for non-discrimination in the workplace in addition to other rights. Article 2 states:

> *All Members, even if they have not ratified the [ILO] Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.*

The Inter-American Court of Human Rights held in its Advisory Opinion *On the Juridical Conditions and Rights of Undocumented Migrants*[45] that the principle of non-discrimination and equality has reached the status of *jus cogens* or a decisive norm of general international law. Therefore, all States are bound to these rules in spite of whether they have ratified specific international treaties.

The Court emphasized:

> *A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination.*

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[43] American Convention on Human Rights Pact of San José, Costa Rica (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, OASTS No. 36, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, art. 1 (American Convention); African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 21 ILM 58 (African Charter), art. 2; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), 12 Int'l Hum. Rts. Rep. 893 (2005) (ArCHR), art. 3; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 221 (European Convention on Human Rights, as amended) (ECHR), art. 14.

[44] Vincent Chetail, *Sources of International Migration Law, in Foundations of International Migration Law* (Brian Opeskin et al., eds., 2012), 79.

[45] I/A Court H.R., On the Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, 17 September 2003, para. 173(4).

In this way, the migratory status of a person can by no means be a validation for grudging him of the pleasure and exercise of his human rights, including those related to employment.[46]

Protection against Arbitrary Arrest and Detention

Persons, including migrants, should not be subjected to capricious arrest or detention under international human rights law.[47] Under Article 9 of the ICCPR, a State must not arbitrarily arrest and detain an individual, and the State must show that other less intrusive measures besides detention have been considered and found to be insufficient to prove detention is not arbitrary. The lengthened imprisonment of a migrant is not reasonable simply by the need to wait for an entry permit or until the end of removal procedures when reporting obligations or other necessities would be less invasive actions to guarantee that the migrant's state of affairs complies with national law.[48]

The European Court of Human Rights (ECtHR) has held that holding a migrant for an unreasonably long period of time without informing him of the reason for detention violates the European Convention on Human Rights (ECHR). In *Saadi v. the United Kingdom*, Saadi fled Iraq and arrived in London where he claimed asylum and was granted temporary admission. However, immigration officials detained Saadi in January 2001 for 76 hours before Saadi's representative was informed of the reasons why Saadi was being detained. The European Court of Human Rights found that the United Kingdom violated Article 5(2) (everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him) of the ECHR because Saadi was not promptly notified about why he was detained. The ECtHR noted that in order for States to comply with the European Convention detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.[49]

Article 16(4) of the ICRMW specially protects migrant workers and their families from individual or collective arbitrary arrest or detention. The Committee on Migrant Workers notes that in order for arrest or detention to not be subjective, it must be prescribed by law, pursue a legitimate aim under the ICRMW, be necessary in the specific circumstances, and proportionate to the legitimate aim.[50]

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[46] *Id.* at paras. 133-134.
[47] African Charter, art. 6; American Convention, art. 7; ArCHR, art 14; ECHR, art. 5; ICCPR, art. 9.
[48] Human Rights Committee, A v. Australia, Communication No. 560/1993, Views of 30 April 1997, para. 8.2.
[49] ECtHR, Saadi v. United Kingdom, [GC], no. 13229/03, ECHR 2008, Judgment of 29 January 2008, paras. 67-74.
[50] *General Comment No. 2*, 28 August 2013, para. 23.

Additionally, the CMW stresses that the criminalization of irregular migration does not constitute a legitimate interest in regulating irregular migration.[51] Furthermore, the CMW emphasizes that lawful administrative detention may transform into an arbitrary detention if it exceeds the time period for which a State can properly justify the detention.[52]

Protection against Torture or Inhuman Treatment

The prohibition of torture is a *jus cogens* or peremptory norm of international law, which means that States have an obligation to enforce the prohibition of torture even if that State has not ratified a relevant treaty. Additionally, Article 2(2) of the Convention against Torture states that a State may never cite exceptional circumstances, including war or a public emergency, to justify torture. The ICCPR and regional human rights treaties also prohibit torture and cruel, inhuman, or degrading treatment.[53] Article 7 of the ICCPR extends the prohibition against torture or inhuman treatment to nonconsensual medical or scientific experimentation.

The ICRMW generally guarantees migrant workers the right to be free from torture and cruel, inhuman, or degrading treatment under Article 10 and specifically guarantees detained migrant workers the right to humane treatment during detention under Article 17(1). To guarantee the latter provision, States parties are compelled to make certain that they supply sufficient surroundings in agreement with international human rights standards, as well as by providing enough food and drinking water; allowing contact with family and friends; providing access to competent medical employees; and protecting them from merciless conduct, including sexual exploitation. Additionally, accused migrants should not be located together with convicted persons.[54]

Non-Refoulement

Non-refoulement, a fundamental principle of refugee law, refers to the duty of States not to refoule, or return, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.[55] Non-refoulement is unanimously recognized as a human right. It is expressly stated in human rights treaties such as Article 3 of the Convention against Torture and Article 22(8) of the American Convention on Human Rights.

The right of non-refoulement is also valid to individuals who do not have refugee status and may be interpreted more generally than under the 1951 Convention relating to the Status of Refugees. Non-refoulement includes the responsibility to

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[51] *Id.* at para. 24.
[52] *Id.* at para. 27.
[53] ICCPR, art. 7; ECHR, art. 3; American Convention, art. 5(2); ArCHR, art. 8; African Charter, art. 5.
[54] *General Comment No. 2*, 28 August 2013, paras. 36-48.
[55] 1951 Convention relating to the Status of Refugees, art. 33(1).

not return a migrant to a State where he or she would face a real risk of persecution or other serious human rights violations, including torture and cruel, inhuman or degrading treatment or punishment; lack necessary medical treatment; or be threatened with the risk of onward refoulement.[56]

States' obligations with respect to non-refoulement also apply extraterritorially whenever they function and hold individuals abroad, including in the context of armed conflict or offshore detention or refugee processing facilities. Unlike under the 1951 Refugee Convention, which bases the principal of *non-refoulement* on the individual's refugee status, *non-refoulement* in the context of the Convention against Torture applies regardless of refugee status.[57]

<u>Prohibition against Collective Expulsion</u>

The prohibition of collective expulsion of migrants is part of customary international law, and, therefore, every State, regardless of the international treaties it has ratified, is still bound by the obligation to uphold the prohibition.[58] Additionally, many of the chief human rights instruments forbid the collective expulsion of aliens.[59] Article 22(1) of the ICRMW also prohibits the collective expulsion of migrants and requires States to decide each migrant worker's case individually.

While the ICCPR does not contain a provision that overtly prohibits the collective expulsion of aliens, the Human Rights Committee has found that the prohibition can be read into the provisions of the ICCPR and found that collective expulsion may amount to a crime against humanity. The Human Rights Committee has found that Article 13, which regulates the procedural aspect of expulsion, prohibits collective or mass expulsions.[60] The Committee noted further that the

> *deportation or forcible transfer of population without grounds permitted under international law [under the Rome Statute of the International Criminal Court], in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.*[61]

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[56] CMW, *General Comment No. 2*, 28 August 2013, para. 50.

[57] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/70/303, 7 August 2015, para. 38.

[58] Third report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur, UN Doc. A/CN.4/581, 19 April 2007, para. 115.

[59] Protocol 4 to the ECHR, art. 4; African Charter, art. 12(5); American Convention, art. 22(9); ArCHR, art. 26(2); ICRMW art. 22(1).

[60] General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

[61] Human Rights Committee, General Comment No. 29: States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13(d).

Moreover, the Committee declared that a State's ability to derogate from Article 12, which guarantees freedom of movement, does not justify introducing collective expulsion measures.[62]

The prohibition on collective expulsion also pertains to migrants intercepted at sea. The Committee on Migrant Workers notes that this duty pertains to all areas over which a State exercises effective control, possibly including vessels on the high seas.[63] The European Court on Human Rights has held that returning 24 individuals along with around 200 other individuals intercepted in international waters back to a country where they are at risk of pain or brutal, ruthless, or undignified conduct violated the prohibition of inhumane treatment under Article 3 of the ECHR. While the decision did not discuss the prohibition of collective expulsion explicitly, the ECtHR did state that States' obligations under international human rights law applies to situations in which migrants were intercepted at sea.[64]

Procedural Safeguards in Individual Expulsion Proceedings

As part of the duty to respect and ensure international human rights law, States have an obligation to provide sufficient, proper, and useful remedies to victims of violations of international human rights law and international humanitarian law.[65] The Human Rights Committee found that when it is possible for a substantive human right to be violated during an individual expulsion, extra procedures are necessary to guarantee the right to an effective remedy and a stricter form of strict scrutiny must be applied to the expulsion proceeding.[66]

Article 22 of the ICRMW dictates that States ensure that procedural safeguards are in place to protect migrants during individual expulsion proceedings. These safeguards comprise, but are not restricted to, communicating the choice to expel to a migrant in words he or she understands; to provide the decision and reasoning in writing except if doing so would put at risk national security; permitting a migrant to supply a clarification as to why he or she should not be barred and ensuring that the decision to expel is reviewed by a competent authority, during which time the individual may seek a stay of removal. Additionally, Article 22(6) of the ICRMW notes that States must permit an

[62] *Id.*

[63] *General Comment No. 2*, 28 August 2013, para. 51.

[64] ECtHR, Hirsi Jamaa and Others v. Italy [GC], no. 27765, ECHR 2012, Judgment of 23 February 2012, paras. 128-129.

[65] UN General Assembly, Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005, arts. 2-3.

[66] Human Rights Committee, Ahani v. Canada, Communication No. 1051/2002, Views of 15 June 2004, paras. 10.6-10.8.

individual to settle claims for wages within a logical time before or after his or her departure.[67]

The African Commission on Human and Peoples' Rights held that Botswana violated a number of Mr. Good's rights, including Article 7, the right to have one's cause heard. The right to have one's cause heard includes: (a) the right to an appeal to competent authorities; b) the right to be presumed innocent until proven guilty by a competent court or tribunal; c) the right to defense, including the right to choose defense counsel; and d) the right to be tried within a reasonable time by an impartial court or tribunal.[68]

Family Rights

International human rights norms require States to consider migrants' family life and their family members in decisions regarding their access, imprisonment, or eviction. For example, the ICRMW obligates States parties to pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children when a migrant worker is detained and to take suitable actions to make sure the safety of the unity of the families of migrant workers.[69] The Inter-American Commission on Human Rights has similarly concluded that States subject to its jurisdiction must take into account a migrant's family ties, and the brunt on his family members, in the host country in determining whether to deport him or her.[70]

Protection against Labor Exploitation

Migrants are protected against labor exploitation under ILO conventions, the ICRMW, and other major human rights treaties. Article 11 of the ICRMW explicitly prohibits forced labor, slavery, and servitude. Article 8 of the International Covenant on Civil and Political Rights states that no one shall be held in slavery or servitude. States have an responsibility to take actions to prevent all forms of enforced or obligatory labor by migrant workers, which includes eliminating the use of unlawful imprisonment and withholding travel documents as a means to force migrants into compulsory labor.[71]

The Committee on the Elimination of Racial Discrimination (CERD) noted that although States may enact laws requiring individuals to have a work permit, all individuals are entitled to the enjoyment of labor and employment rights, including

[67] ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), art. 9(1).

[68] ACommHPR, Good v. Republic of Botswana, Communication No. 313/05, 47th Ordinary Session, May 2010.

[69] ICRMW, arts. 17(6), 44.

[70] IACHR, Report No. 81.10, Case 12.562, *Wayne Smith, Hugo Armendariz, et al.* (United States), July 12, 2010.

[71] ILO Forced Labour Convention (No. 29), art. 11; *General Comment No. 2*, 28 August 2013, para. 60.

the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.[72]

With respect to migrant children, the Committee on the Rights of the Child (CRC) recommended that

> *States develop labor and migration policies in accordance with the Convention on the Rights of the Child and ILO Conventions No. 138 concerning Minimum Age for Admission to Employment, No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and No. 189 concerning decent work for domestic workers.[73] Additionally, the Committee suggested that States implement monitoring systems concerning child rights violations in the workplace.[74]*

Right to Social Security

Article 27 of the ICRMW outlines the right to social security and notes that all migrant workers and their families, regardless of their status, have the right to receive the same treatment as nationals insofar as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. If migrants are not entitled for a particular advantage, States have an responsibility to decide whether it is likely to compensate persons who have made donations with respect to that benefit.[75] The Committee on Migrant Workers elaborated that if repayment is not possible, States should give objective reasons for reaching its decision in each case.[76] However, a decision to not repay aid should not discriminate solely on the basis of nationality or migration status.[77]

Other universal and regional human rights bodies have found that migrant workers have a right to social security. The Committee on Economic, Social and Cultural Rights (CESCR) stated that where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.[78] The Inter-American Court on Human Rights reached a similar conclusion as the Committee on Economic, Social and Cultural Rights when it noted that a State will violate the human rights of a migrant worker, regardless of his or her migration status, when it denies the right to a pension to a migrant worker who has made the necessary

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[72] General Recommendation No. 30 on discrimination against non-citizens, 19 August 2004, para. 35. *General Comment No. 2*, 28 August 2013, para. 62.

[73] CRC, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, para. 90.

[74] *Ibid.*

[75] ICRMW, art. 27.

[76] *General Comment No. 2*, 28 August 2013, para. 69.

[77] *Ibid.*

[78] CESCR, General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19, 4 February 2008, para. 36.

contributions and fulfilled all the conditions that were legally required of workers, or when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees.[79]

Right to Highest Attainable Standard of Physical and Mental Health

The ICRMW under Article 28 only requires States to provide migrant workers and their families with medical care that is urgently needed to save their lives on the same basis as nationals, but a State's obligation to ensure the right to health is much broader under international human rights law.[80] Article 12 of the International Covenant on Economic, Social and Cultural Rights establishes the right to attain the highest standard of health for all persons, and the Committee on Economic, Social and Cultural Rights concluded, persons, irrespective of their nationality, residency or immigration status, are entitled to [both] primary and emergency medical care.[81] Furthermore, the Committee on the Elimination of Racial Discrimination noted that States have an obligation to ensure… the right of (undocumented) non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.[82]

According to the International Commission of Jurists, when a healthcare system normally provides treatment beyond primary and emergency medical care, the exclusion of asylum-seekers, or documented or undocumented migrant workers and members of their families from the system would violate Article 12 [of the] ICESCR read together with Article 2, Article 5 [of the] ICERD, or (in cases involving children) Article 24 [of the] CRC.[83]

Migrant children have particular protections regarding the right to health under international human rights law. The Committee on the Rights of the Child has stated that

> *when implementing the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health under article 24 of the Convention, States are obligated to ensure that unaccompanied and separated children have the same access to health care as children who are . . . nationals.[84] The Executive Committee of UNHCR emphasized that refugee or asylum seeker children have a right to the highest attainable standard of*

[79] On the Juridical Conditions and Rights of Undocumented Migrants. 17 September 2003. para. 154.

[80] *General Comment No. 2*, 28 August 2013, para. 72.

[81] CESCR, General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19, 4 February 2008, para. 37.

[82] *General Recommendation No. 30: Discrimination against non-citizens*, 19 August 2004, prmbl. and para. 36.

[83] International Commission of Jurists, Migration and International Human Rights Law: A Practitioner's Guide (2014), 249.

[84] CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 46.

> *health.[85] Additionally, States have an obligation to provide medical or other special care, including rehabilitation assistance, to assist the social reintegration of refugee children and adolescents, especially those that are unaccompanied or orphaned.[86]*

Right to Primary Education

States have an obligation to provide free and compulsory primary education at public institutions for all children.[87] Article 30 of the ICRMW expands on this obligation, noting that States may not refuse or limit a child's access to public pre-school educational institutions or schools based on a parent's or child's irregular situation.

According to the CMW, States have certain obligations to ensure the migration status of a child or a child's parents does not prevent the child from receiving an education.[88] To ensure this right, the CMW notes that States have an obligation to eliminate school fees and minimize the impact of costs for school materials and uniforms. Additionally, the CMW emphasizes that to ensure access to education, States should not require schools to share information about the migration status of a child or the child's parents with immigration authorities or conduct immigration enforcement operations on or near school property.[89]

Freedom of Movement

Migrants have the right to freedom of movement within the territory of the State in which they are located, the right to leave a State, and the right to return home to their own State.[90] This right does not guarantee the right of entry into any State.[91]

Limitations to the right to depart a State or to liberty of movement in a State of habitation must be provided by law and indispensable to achieve a legal aim, and if a migrant wishes to return to her own State, another State cannot randomly prevent her from doing so.[92] While the guarantee against subjective removal from a State as provided for under Article 13 of the International Covenant on Civil and Political Rights does not protect undocumented migrants, if the status of a migrant

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[85] UNHCR, Conclusion No. 84 (XLVIII) on Refugee Children and Adolescent, UNHCR, 48th session, 1997, para. (a)(iii).

[86] *id.* at para. (b)(vi).

[87] Convention on the Rights of the Child, art. 28(1)(a); ICESCR, art. 13.2(a), 14; American Convention, art. 13.3(a); European Social Charter (revised) (adopted 3 May 1996, entry into force 1 July 1999), 2151 UNTS 277, art. 17.

[88] *General Comment No. 2*, 28 August 2013, paras. 75-77.

[89] *Ibid.*

[90] ICCPR, art. 12; ICRMW, art. 39; Convention on the Rights of the Child, art. 10(2); ICERD, art. 5; General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986; Committee on the Elimination of Racial Discrimination, General Recommendation No. 22: Article 5 and refugees and displaced persons, UN Doc. A/54/18, 24 August 1996.

[91] *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 5.

[92] ICCPR, art. 12(3); *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 8.

is in disagreement, the Human Rights Committee has stated that a State must still take the rights under Article 13 into account.[93]

Right to Enjoy Culture in Community with Others

Under Article 27 of the International Covenant on Civil and Political Rights, migrants who belong to an ethnic, religious, or linguistic minority group have the right to enjoy, carry out, and use their civilization, faith, and tongue together with other members of their community.[94] The Human Rights Committee has stated that this right applies to all individuals within a territory, including those who do not have everlasting residency status or are temporarily in the State.[95] Furthermore, the determination that an ethnic, religious, or linguistic minority exists is not one that the State makes but depends on objective factors.[96] The State has a positive obligation to protect the right and the identity of the minority group through policy initiatives and to prevent the infringement of the right by third parties.[97]

Permissible Restrictions on Migrants' Human Rights

While the core human rights principles apply evenly to migrants and non-migrants, in spite of of their legal status in a country, and prohibit discrimination on the basis of national origin, there are exceptions to these regulations.[98] International human rights law does permit States to treat citizens and non-citizens in a different way if the difference in treatment serves a legitimate State objective and is proportional to its achievement.[99]

Specifically, States may reserve the right to vote and to be elected to political office to its citizens. For example, the Convention on the Rights of Migrant Workers and their Families only safeguards migrants' right to contribute in elections in their countries of origin.[100] States may also restrict non-citizens' ability to enter and remain in the country, subject to the practical and substantive limits described above, including the principle of *non-refoulement*.

In the realm of economic and social rights, States have been less keen to treat migrants and non-migrants equally, and some instruments – such as the European Social Charter – allow governments to grant certain public benefits to lawfully present migrants only. International law is less developed in this area.

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[93] *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 9.

[94] ICCPR, art. 27; Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 5.1.

[95] *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, para. 5.2.

[96] *Ibid.*

[97] *Ibid.* at para. 6.1-6.2.

[98] *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986; International Convention on the Elimination of All Forms of Racial Discrimination, arts. 1(2) and (3).

[99] *e.g.,* Committee on Elimination of Racial Discrimination (CERD), General Recommendation No. 30: Discrimination against non-citizens, UN Doc. CERD/C/64/Misc.11/rev.3, 19 August 2004.

[100] ICRMW, art. 41.

SELECTED CASE LAW

- In *A. v. Australia*,[101] the Human Rights Committee found Australia had violated the right to liberty under Article 9 of the ICCPR by arbitrarily detaining the applicant, a migrant and Cambodian national who arrived to Australia by boat. He alleged that he was arbitrarily detained in Australia while his application for refugee status was pending. His detention was arbitrary, he argued, because there was no legitimate reason to detain him; at the time of filing his application, his detention had lasted for over three and a half years; and there was no available judicial review of his detention. The Human Rights Committee found that the State's justifications for detention – that the applicant was a flight risk and had entered the country illegally – were insufficient to keep the applicant in detention for a total of four years in violation of the rights to liberty and security of Article 9(1) of the ICCPR. Additionally, the Committee found that the State's restricted ability under recently passed legislation to review the lawfulness of detention of migrants was in violation of Article 9(4).
- In *Hirsi Jamaa and Others v. Italy*,[102] the European Court of Human Rights held that Article 3 of the European Convention on Human Rights, which prohibits torture and cruel, inhuman, or degrading treatment, places an obligation on State parties not to expel migrants to a country where the State party is aware that the migrants face risk of the treatment prohibited under Article 3. The 24 applicants, who are nationals of Somalia and Eritrea and were sent by Italian police to Libya, alleged that the Italian authorities returned them to a country where they were likely to face torture or cruel, inhuman, or degrading treatment within the country and likely to be repatriated back to their countries of origin where they would also likely face similar treatment. Because the Italian authorities knew the applicants were likely to be exposed to treatment as described under Article 3 both within Libya and in their home countries, which they were likely be sent back to once in Libya, the European Court held that Italy violated Article 3 of the Convention.
- In *Good v. Botswana*,[103] the African Commission on Human and Peoples' Rights held that the inability to challenge an order of removal in the judicial system is a violation of the right to fair trial and right of non-nationals to be expelled according to the law. The complainant is a national of Australia who was working in Botswana when the President ordered him removed from the country after he wrote and published an article critical of the government.

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[101] Human Rights Committee, *A. v. Australia*, Communication No. 560/1993, Views of 3 April 1997, UN Doc. CCPR/C/59/D/560/1993.

[102] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 2776/09, ECHR 2012, Judgment of 23 February 2012.

[103] ACommHPR, *Good v. Botswana*, Communication No. 313/05, 47th Ordinary Session, Judgment of 26 May 2010.

National legislation prohibited the domestic courts from hearing an appeal of an executive order of removal. The African Commission found violations of articles 7(1) and 12(4) of the African Charter on Human and Peoples' Rights, which guarantees the right to have one's cause heard by a competent tribunal and the right of non-nationals to only be expelled in accordance with the law. Furthermore, because the deportation orders, which were carried out the same day as the court's ruling that it could not hear the complainant's case, did not take into account the complainant's family and the mutual support they derive from one another, the removal of the complainant violated his right to family life under Article 18.

- In *Ramón Martinez Villareal* (United States),[104] the Inter-American Commission on Human Rights found that the United States violated the rights to due process and a fair trial under the American Declaration on the Rights and Duties of Man because the State failed to inform the applicant, who was convicted of a crime in the United States, of his right to consular relations. The Inter-American Commission referenced the obligations under Article 36 of the Vienna Convention on Consular Relations to inform the rights under the American Declaration. Article 36 of the Vienna Convention requires a State party to inform a non-national who has been arrested or detained that they have a right to communication with the consular office of their home State. A lack of communication with the consular office could result, the Commission noted, in due process violations due to factors including a lack of familiarity with the State's judicial system or a language barriers.

2.2.2 Refugees

There are six categories of important concern.

1. Persons who assert to be refugees are usually permitted to enter and remain in the terrain of a state party until and unless they are found not to be Convention refugees.
2. They should not be capriciously held in custody or otherwise penalized for seeking safety.
3. It should be possible to meet necessary safety and economic survival requirements while the host state takes whatever actions it deems essential to confirm the claim to Convention refugee status.
4. Basic individual dignity must be respected, including by respect for property and related rights, conservation of family unity, glorifying freedom of thought, conscience, and religion, and by the provision of primary education to refugee children.

[104] IACHR, Merits Report No. 52/02, Case 11.753, *Ramón Martinez Villareal*(United States), 10 October 2002.

5. Authoritative documentation of identity and status in the host state should be made available.
6. Asylum-seekers must have access to a meaningful remedy to enforce their rights, including to seek a remedy for breach of any of these primary protection rights.

The most urgent need of refugees is to safe entry into a territory in which they are protected from the danger of being mistreated. This essential worry must someway be acquiescent to the truth that all of the earth's region is controlled or claimed by governments which, to a greater or lesser extent, limit admission by non-citizens. This clash of priorities has led to proposals to lease land from states on which to shelter refugees,[105] and even to attempts to establish internationally supervised sanctuaries for would-be refugees within the territory of their own states.[106] To date, however, limited international authority and resources have prevented these options from replacing entry into a foreign state as the most logical means to access safety. The stakes are high: refugees denied admission to a foreign country are likely either to be returned to the risk of persecution in their home state, or to be thrown into perpetual orbit" in search of a state willing to authorize entry.

There are many historical cases which illustrate the potentially grave consequences of a failure to recognize this need of refugees to be able to enter another state. A particularly notorious example involved 907 German Jews who fled persecution in their homeland aboard the ocean liner St. Louis. After the Cuban government refused to recognize their entrance visas, these refugees were denied permission to land by every country in Latin America. The United States dispatched a gunboat to ensure that the St. Louis remained at a distance which prevented its passengers from swimming ashore. Canada argued that the passengers of the St. Louis were not a Canadian problem. As Abella and Troper observe, the Jews of the St. Louis returned to Europe, where many would die in the gas chambers and crematoria of the Third Reich.[107]

Similarly blunt denials of access continue to face modern refugees. One of the most notorious cases was the pushback" order issued by the Thai Ministry of the Interior in 1988. The government deputized fishermen in Khlong Yai to prevent entry of any boats which might be carrying Vietnamese refugees, an order interpreted by fishermenas a mandate to abuse defenceless boat people. Smugglers, fearing prosecution or vigilante attack, dumped their human cargo into

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[105] E. Burton, Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries, (1987) 19(1) Columbia Human Rights Law Review 307.

[106] These regimes are effectively critiqued in B. Frelick, Preventive Protection and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia, (1992) 4(4) International Journal of Refugee Law 439; and A. Shacknove, From Asylum to Containment, (1993) 5(4) International Journal of Refugee Law 516.

[107] I. Abella and H. Troper, None is Too Many: Canada and the Jews in Europe 1933–1948 (1992), at 64.

the gulf.[108] Nepal has often refused entry to Tibetan asylum-seekers, including Buddhist monks and nuns, who have thereupon been returned to, and jailed by, Chinese authorities.[109] Hundreds of refugees fleeing conflict in Sierra Leone were summarily sent back by Guinea.[110] Namibia imposed a dusk-to-dawn curfew – with soldiers being ordered to shoot violators – along a 450 km stretch of the Kavango river in late 2001. This effectively prevented Angolan refugees seeking to escape violence in that country's Cuando Cuban Province from being able to seek asylum, since Angolan government and UNITA patrols could be safely avoided only at night.[111] In the wake of the flight of ethnic Albanians from Kosovo, Greek officials simply turned away twenty busloads of refugees at the Macedonian border on the grounds that because they had not been informed of the influx, they were not prepared to admit the refugees.[112] And Jordan admitted only about 150 of more than 1,000 Iranian, Palestinian, Sudanese, Somali, and Syrian refugees who had received asylum in Iraq, but who were forced to flee that country when threatened by armed Iraqis after the collapse of Saddam Hussein's government.[113] Turn-back policies can also be implemented by the complete closure of borders. Both Zaïre and Tanzania at times simply closed their borders to refugees attempting to flee the brutal conflict for dominance between Hutus and Tutsis in Northeastern Africa.[114] Tanzania's Foreign Minister reportedly told his Parliament

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[108] A. Helton, Asylum and Refugee Protection in Thailand, (1989) 1(1) International Journal of Refugee Law 20 (Helton, Thailand''), at 28.

[109] In 1990, Nepalese border guards refused entry to forty-three Tibetan asylum-seekers, including twenty-seven monks and six nuns, who were thereupon jailed by Chinese authorities in Gutsa Prison: US Committee for Refugees, Tibetan Refugees: Still At Risk'' (1990), at 2. There are also efforts to remove the Tibetans after they have entered Nepal. In a recent operation carried out jointly by Nepalese and Chinese authorities, the Tibetans were carried crying and screaming into vehicles before being driven in the direction of the border'': Amnesty International, Nepal: Forcible Return of Tibetans to China Unacceptable, June 2, 2003.

[110] Refugee influx concerns President, (1999) 41 JRS Dispatches (Jan. 15, 1999).

[111] Curfew could trap Angolan refugees, says UNHCR, UN Integrated Regional Information Networks, Oct. 30, 2001.

[112] J. Hooper, They vanished in the night: 10,000 refugees unaccounted for after camp cleared, Guardian, Apr. 8, 1999, at 1.

[113] The refugees told UNHCR that groups of armed Iraqis forced them from their homes and threatened that, if they refused to leave Iraq, the men would be killed and the women raped. Others said that they fled because of the lack of food and water in the places where they normally reside, including the Bijii and Balediyat neighborhoods in Baghdad, and the al-Hurriya and al-Tash refugee camps outside of Baghdad'': Human Rights Watch, US and Allies Must Protect Refugees; Jordan Should Not Block Trapped Refugees, Apr. 23, 2003.

[114] On August 19, 1994, Deputy Prime Minister Malumba Mbangula of Zaïre declared that no refugees would be allowed to cross from Rwanda into Zaïre. Immediately prior to his announcement, 120 refugees per minute had been crossing into Zaïre at the frontier post of Bakavu: Le Zaïre ferme ses frontières aux réfugiés, Le Monde, Aug. 22, 1994, at 4. As some 50,000 refugees attempted to flee ethnic clashes in Burundi, the Tanzanian government officially closed its border with Burundi on March 31, 1995: US Agency for International Development, Rwanda: Civil Strife/Displaced Persons Situation Report No. 4, Apr. 5, 1995, at 4. The Tanzanian Prime Minister told Parliament that [t]he gravity of the situation, especially for those coming from Burundi and Rwanda, has made it inevitable for Tanzania to take appropriate security measures by closing her border with Burundi and Rwanda'': Speech by the Prime Minister to the Parliament of

that [e]nough is enough. Let us tell the refugees that the time has come for them to return home, and no more should come.[115] In 1999, Macedonia cited the failure of Greece, Turkey, Bulgaria, and the European Union to do enough for Kosovo Albanian refugees as justification for its decision to close its borders to all but the most frail refugees, as well as those destined for another country.[116] After providing a haven for more than 2 million Afghan refugees, the Pakistani government closed its borders to most new arrivals in November 2000,[117] arguing that it had not received the support it required from the international community.[118] Its policy was adopted by the other five countries bordering Afghanistan after the September 11, 2001 attack on the World Trade Center.[119]

Blunt barriers can serve much the same end as border closures. During the apartheid era, South Africa erected a 3,000 volt electrified, razor wire fence to prevent the entry of refugees from Mozambique.[120] In the summer of 2002, France

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Tanzania, June 15, 1999, at 5, on file at the library of the Oxford University Refugee Studies Centre.

[115] Border closure triggers debate, Guardian, July 19, 1995.

[116] Macedonia today effectively closed its borders to tens of thousands of ethnic Albanian refugees caught in no-man's land at the Kosovo frontier, saying the numbers had driven it to the breaking point ... The Interior Minister ... said it was time for its neighbors ... to take up their share of the burden ... Macedonia has become increasingly bitter in recent days about what it sees as the slow response of its neighbors and Western nations to provide help'': Beleaguered Macedonia tries to staunch flood from Kosovo, New York Times, Apr. 4, 1999, at A-10.

[117] Tens of thousands [of refugees] have been camped in the open since January [2001] ... The UNHCR said that more than 80,000 were squatting in squalid conditions on a strip of land at Jalozai, and more were arriving each day'': E. MacAskill, Pakistan keeps Annan from world's worst' camp, Guardian, Mar. 13, 2001, at 14.

[118] Pakistan rightly complains about the economic burden of supporting such a large influx of people. More than 30,000 crossed in the weeks before the border was closed. The UNHCR appealed for $7.5 million for its Afghan programme this year. It received just $2 million. For every $200 donated for each refugee in the Balkans, just $20 is given for each Afghan refugee. That's a quarter of the cost of one ticket for the Khyber steam train'': R. McCarthy, Comment, Guardian, Nov. 27, 2000, at 20.

[119] K. Kenna, Pakistan closes border to desperate Afghans, Toronto Star, Nov. 3, 2001, at A14. If we open the gates freely, we will have to be ready for another 2 million refugees, Pakistan's president, Gen. Pervez Musharraf, said recently. There will be social and economic problems. Do we want another 2 million refugees?: R. Chandrasekaran, Predicted outpouring of Afghan refugees is more like trickle, Washington Post, Nov. 1, 2001, at A-21. Many refugees said they tried to enter Pakistan, only to be turned away. Although the United Nations estimates that more than 130,000 refugees have crossed into Pakistan since Sept. 11 [2001], most either have Pakistani identification cards, family members willing to sponsor them, or the money to hire smugglers to take them across unmanned sections of the border'': J. Pomfret, Refugees endure lives of squalor in Taliban camp, Washington Post, Nov. 21, 2001, at A-01. By November 2001, [a]n estimated 100,000 asylum-seekers [were] stranded in the Afghanistan desert'': K. Kenna, Pakistan closes its border to Afghani males, Hamilton Spectator, Nov. 28, 2001, at C-05. See generally Human Rights Watch, Closed Door Policy: Afghan Refugees in Pakistan and Iran'' (2001).

[120] As of 1990, official statistics reported that ninety-four refugees had been killed trying to get through the fence: C. Nettleton, Across the Fence of Fire, (1990) 78 Refugees 27, at 27–28. But observers report that the toll was likely much higher. On the 9th of July 1988, while on a visit to the fence ... a soldier on the border assured me that while patrolling the fence he used to find between 4–5 bodies per week (in the fence) which, if true, would then mean an average of 200 casualties per year on the southern section of the fence'': South African Bishops' Conference, Bureau for

and the United Kingdom cooperated to build a double fence around the French railway terminal near Calais in order to close the last loophole'' for refugees wishing to travel to Britain in order to seek asylum.[121] A year later, the British immigration minister reported that the French port was proving impenetrable, without any noticeable shift of asylum-seekers to other ports in northern France or Belgium.[122]

All these rights are human rights to which all persons, without exception, are entitled. Persons do not acquire them because they are citizens, workers, or on the basis of a particular status. No-one may be deprived of their human rights because they have entered or remained in a country in contravention of the domestic immigration rules, just as no-one may be deprived of them because they look like or are foreigners, children, women, or do not speak the local language. This principle, the universality of human rights, is a particularly valuable one for migrants.
Most of the time, national legislation will not provide them with a remedy, or will create many obstacles to its access, such as the threat of an automatic expulsion or deportation once the migrant contacts the authorities. In this world, migrants have rights, but no or little way to make use of them or ask for their respect. They are legally voiceless.

International law—and, in particular, international human rights law and international refugee law—may provide an, albeit incomplete, answer to the problem. States' legal systems are becoming increasingly open to the influence of international law. In many countries it is now possible to invoke, in one way or another, international law in domestic courts in order to claim the respect and implementation of human rights, including for migrants. Even in countries where that is not possible, or when the international human rights law claim has failed in the national system, if the country is a party to an international or regional human rights treaty, it is often possible to challenge the State at the international level for its failure to do so. International law can be a powerful tool for change: either for the actual situation of the individual migrant, through redress in domestic courts, or for the advancement of policy or laws that can ameliorate migrants' situation, through claims before international mechanisms.

Refugees, The Snake of Fire: Memorandum on the Electric Fence Between Mozambique and South Africa'' (1989), at 2–3.
[121] A. Travis, French to close last' way for refugees to use tunnel, Guardian, June 26, 2002, at 8.
[122] A. Travis, New asylum centres open by end of year, Guardian, May 9, 2003, at 6, quoting remarks by immigration minister Beverley Hughes to the House of Commons on May 8, 2003.

CHAPTER 3: ACCESS TO JUSTICE

Access to justice has been recognized as a basic principle of the rule of law. In the absence of access to justice, people are unable to exercise their rights, have their voice heard, hold decision-makers accountable or challenge discrimination.

3.1 ACCESS TO JUSTICE DEFINED

Access to justice is a key element of the rule of law, which is central to actualize the rights of human beings. The Universal Declaration on Human Rights states that *every person is entitled to a fair and accessible judicial system.* This includes the right to equal protection and due legal process for all, irrespective of their religion, race, gender and ethnicity.[123]

There are various definitions and meanings of the term Access to Justice some of these are quoted as follows:

Access to Justice, according to Santosh from Saudi Arabia[124] means:

> *… the ability of people (especially marginalized groups) to seek and obtain a remedy through formal or informal institutions of justice for grievances. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.*

Access to Justice, according to Pastor Kawi from Qatar, means:

> *… when government offices freely entertain/settle disputes between migrant workers and their employer mostly involving contract violations; when the Ministry of Labor and Social Affair implement Labor Laws and amicably settle disputes but it endorse or recommend filling charges to the Labor Court when employer does not response or show up during the scheduled appointment officially arranged; and when the National Human Rights Committee (NHRC) does the mediation and recommend measures to refer complains of injustice to Police Department, Ministry of Labor and Social Affair and finally to the Supreme Judicial Council for filling of charges.*

For Jabir from Oman, access to justice means:

> *… securing vested rights through the use of courts, missions and tribunals. In another words, right to access to complaints, redress*

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[123] Commonwealth. A strategic framework for access to justice in the Federal Civil Justice System.
[124]Insights gathered during MFA consultations. Challenges on Access to Justice for migrants Written Contribution of Migrant Forum in Asia to the Special Rapporteur on the Human Rights of Migrants on the issue of Access to Justice and Remedies for Migrants.

and legal system when a migrant falls in a difficult or distress situation can be called access to justice for migrants.

According to the Law Council of Australia,

> *access to justice includes access to information, understanding legal problems, getting help when required, understanding outcomes and having your voice heard when laws are made.*[125]

There are various components to make sure that there is effective participation in the judicial system. It includes not just active participation in the law reform process, and adequate access to tribunals, courts, but also other forms of alternative dispute resolutions mechanisms.

The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' has highlighted the right of equal access of justice for all, particularly with respect to vulnerable groups. The Declaration of the High-level Meeting on the Rule of Law[126] in this regard emphasizes

> *the right of equal access to justice for all, including members of vulnerable groups, and reaffirmed the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all.*[127]

Legal rights are of no meaning unless they can be effectively asserted. The only possible way to achieve this is through provision of effective access to justice which as already mentioned, is an essential attribute of rule of law.

The United Nations Development Programme has defined access to justice

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[125] Law Council of Australia Access to Justice, https://www.lawcouncil.asn.au/tags/access-to-justice

[126] G.A. Dec. 67/1,U.N. Doc. A/RES/67/1, at 3,(Nov. 30, 2012).

[127] Id at para. 14 and 15.

> *as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.*[128]

The concept of access to justice', like that of justice' is nebulous, and one of the reasons why it has been consistently brought out in legal and political discourse is because it is capable of a variety of meanings subject to the values and perceptions of the commentators.[129] Professor Paterson has attempted to address the concept of access to justice' as follows:

> *Access to Justice as a phrase can be traced back to the nineteenth century, but as a concept it is a comparative newcomer to the political firmament, coming into frequent use only in the 1970s. Since then there has been no holding it. Hundreds of books, articles and reports have included it in their title, not to mention a swathe of initiatives from lawyer associations, politicians, governments, charities and NGOs around the world. As the redoubtable Roger Smith noted in 2010, In general...the phrase access to justice has a well-accepted, rather vague meaning and denotes something which is clearly – like the rule of law – a good thing and impossible to argue you are against. The strength and weakness of the phrase is in its nebulousness. In short, access to justice is like community' in being a feel- good concept- one that everyone can sign up with unethical examination.*[130]

Moreover, SDG[131] 16.3 commits the international community to promote the rule of law at the national and international levels and to ensure equal access to justice for all by 2030.

Increasing access to justice, especially for disadvantaged groups, not only strengthens the rule of law in a country but has a direct impact on an individual's quality of life. Legal aid empowers people to understand and exercise their rights

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[128] U.N.D.P, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf (last visited March 30, 2019).

[129] Ronald Sackville, *Some Thoughts On Access To Justice*, http://www.austlii.edu.au/au/journals/FedJSchol/2003/22.html (last visited March 30, 2019).

[130] A Paterson, *Lawyers and the Public Good: democracy in Action?*, *in* THE HAMLYN LECTURES 60 (2011)

[131] UN Sustainable Development Goals. Available from https://sustainabledevelopment.un.org/sdgs

and can help to address the root causes of exclusion and systemic biases. Goal 16 on building peaceful, just and inclusive societies therefore includes a dedicated target on the rule of law and access to justice, which is to be considered an important accelerator of progress across the entire 2030 agenda, as it contributes to the achievement of poverty eradication (SDG 1), gender equality (SDG 5), decent work (SDG 8), reduced inequalities (SDG 10), among others.

Through the adoption of the 2030 Agenda, and the inclusion of an explicit goal on peaceful, just and inclusive societies, Member States recognized the interdependence of justice, peace and development. Still, while a lot of progress has been made, many people in all corners of the world continue to live without access to justice and affordable legal aid. Global rates of pre-trial detention, for instance, remain worryingly high and stagnant over the last decade, at about 31%. And in crisis-affected contexts, where there is high demand for legal services, the justice system often lacks institutional capacities and financial resources to respond to the many grievances in society.

Legal aid programmes can help to close this justice gap by bringing the justice system closer to the people it is meant to serve. The extent to which these programmes are able to promote and protect the rights of the most marginalized – including women, youth, persons with disabilities, minority groups, LGBTI, and communities displaced by conflict, disaster or forced evictions, among others - is key to an effective justice system and essential for leaving no one behind on the path to a peaceful and sustainable future.

The concept of Access to Justice has both descriptive and normative dimensions. In its descriptive sense it deals with the extent of access to legal services which enables citizens to assert and protect their legal rights.[132]In its normative sense the expression conveys an ideal of equal access which envisages that the State must afford to each citizen equal opportunity or capacity to enforce and assert his or her legal rights. Access of justice may thus be viewed as the most basic human right which enables the enforcement of other legal rights and is often associated with other allied human rights such as the right to effective remedy, right to fair trial as well as the right to legal aid.

In fact, access to justice may be viewed from several perspectives, in a narrow sense, it may be confined to the right of an individual to have access to courts of law which operate in accordance with the standards of justness, fairness, expediency and cost effectiveness, in order to seek redress.[133]A wider view of this

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[132] Tom Cornford, *The meaning of access to justice*, *in* ACCESS TO JUSTICE-BEYOND THE POLICIES AND POLITICS OF AUSTERITY 28(2016).

[133] Francesco Francioni , *The Rights of Access to Justice under Customary Law, in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1 (2007)

expression, on the other hand moves beyond the traditional courtrooms and is concerned with equality of access to legal services, availability of alternatives to traditional dispute resolution systems, and removal of barriers which prevent marginalised people from obtaining redressal.[134]

An even broader view of the expression envisages that law is but one of the multiple means of doing justice as it is limited in what it can achieve, methods such as alternative dispute resolution, citizen participation in politics and policy-making etc. should also be recognized. Thus, Access to justice is not merely concerned with legal aid but envisages a wide range of techniques and mechanisms, including making adjudication speedier, cheaper, introducing alternative dispute redressal mechanisms, etc. to facilitate equal access to justice and to counteract various social, economic, political or other inequalities which may serve as barriers for marginalised groups with regard to access to justice.[135]

3.2 Approaches to Access to Justice

There are two main approaches to the use of the term access to justice.

1. At the very minimum - and indeed as originally conceived - it is a term seen as being concerned with the means for securing vested rights, particularly through the use of courts and tribunals.

From this perspective the particular focus has been on developing means of overcoming the obstacles faced by certain groups in making use of the processes established to provide redress where rights are considered not to have been respected.

These have included public funding for legal advice and representation, special procedures (such as class actions and public interest litigation), simplified procedures (for smaller claims) and less judicial procedures (such as mediation).

2. The term access to justice has increasingly been defined in a somewhat broader manner than the essentially procedural approach just described, with the focus being more on ensuring that legal and judicial outcomes are themselves just and equitable.

The broader view of access to justice can thus be seen as being particularly concerned with the substantive aspect of justice - notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives.

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[134] Access to Justice Advisory Committee Access to Justice: An Action Plan (Canberra, 1994);
[135] R smith, justice: Redressing the balance (London, Legal Action Group, 1977) 9

It may thus be concerned as much with the ability to seek and exercise influence on law-making as with ensuring access to law-implementing processes and institutions.

In theory, equal justice under law is difficult to oppose. In practice, however, it begins to unravel at key points, beginning with what we mean by justice. In most discussions, equal justice implies equal access to the justice system. The underlying assumption is that social justice is available through procedural justice. But that, of course, is a dubious proposition. Those who receive their day in court do not always feel that justice has been done, and with reason. The role that money plays in legal, legislative, and judicial selection processes often skews the law in predictable directions. Even those who win in court can lose in life. Formal rights can be prohibitively expensive to enforce, successful plaintiffs can be informally blacklisted, and legislatures may overturn legal rulings that lack political support.[136]

These difficulties are seldom acknowledged in discussions of access to justice, which assume that more is better, and that the trick is how to achieve it. But even from a purely procedural standpoint, that assumption leaves a host of conceptual complexities unaddressed. What constitutes a legal need? A vast array of conflicts and concerns could give rise to legal action. How much claiming and blaming is our society prepared to subsidize? Does access to law also require access to legal assistance, and if so, how much is enough? For what, for whom, from whom? Should government support go to only the officially poor or to all those who cannot realistically afford lawyers? Under what circumstances do individuals need full-blown representation by attorneys, as opposed to other less expensive forms of assistance? How do legal needs compare with other claims on our collective resources? And, most important, who should decide?

3.3 Need for Access to Justice

Access to justice is integral to achieving the Sustainable Development Goals (SDGs) and inclusive growth. An estimated four billion people around the world live outside the protection of the law, mostly because they are poor or marginalized within their societies. They can be easily cheated by employers, driven from their land, preyed upon by the powerful and intimidated by violence. The lack of legal accountability allows local corruption to undermine economies, diverting resources from where they are needed the most. Lengthy delays in processing legal cases inhibit individual economic activity, while the inability to enforce contracts deters people from entering into them. Overcrowded prisons are

[136] See Geoffrey Hazard, Jr., After Legal Aid is Abolished, 2 Journal of the Institute for the Study of Legal Ethics 375, 386 (1999); Stephen Pepper, Access to What?, 2 Journal of the Institute for the Study of Legal Ethics 269, 272 (1999).

full of poor people waiting months or even years for a first trial, forced to give up work opportunities and unable to support their families. Women, who often face multiple forms of discrimination, violence and sexual harassment, are particularly affected by legal exclusion. Addressing these legal challenges will be essential to enable the basic protection of human rights, from protection of property to legal identity and freedom from violence.[137]

Legal empowerment—the ability of people to understand and use the law for themselves—enables even those who are most marginalized to achieve justice, meet their basic needs, hold authorities to account, protect their interests and participate in economic activities in an inclusive manner.

3.4 Link of Access to Justice to The Sustainable Development Goals

In September 2015, member states of the United Nations made an important breakthrough by agreeing on a Sustainable Development Goal (SDG) 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice for all, which recognizes the intrinsic links between access to justice, poverty reduction and inclusive growth. The SDGs provide a unique opportunity to reflect on how national governments can ensure that economic growth, development, and poverty reduction strategies integrate equal access to justice and legal empowerment initiatives, as integral elements necessary to achieve these objectives.

Access to justice, as well as being a central element of SDG 16, is crucial to implementing many of the other SDGs, such as eradicating poverty and hunger (SDG 1 and SDG 2).[138] It gives farmers and other agrarian communities the tools they need to improve their tenure security, which has been shown to lead to more productive investment. Similarly, the ability to access and enforce regulatory frameworks helps to determine whether contracts and labor and environmental standards — critical for fair development outcomes — are respected in practice.

3.5 Link of Access to Justice to Inclusive Growth

The law underlies nearly every aspect of people's lives, including health, employment, education, housing, and entrepreneurship.[139] In many countries, unequal access to and discrimination in these sectors create real barriers to economic participation, especially for traditionally marginalized populations (youth, the elderly, women, migrants). However, these sectors depend upon legal frameworks for their operations and legitimacy. Providing people access to justice

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[137] OECD (2015) Expert Roundtables on Equal Access to Justice, Background Notes, unpublished

[138] Le Blanc D, (2015) Towards Integration at Last? The Sustainable Development Goals as a Network of Targets, DESA Working Paper No. 141 ST/ESA/2015/DWP/141

[139] Civil Service India n.d., Inclusive Growth and Issues arising from it. Available from:http://www.civilserviceindia.com/subject/General-Studies/notes/inclusive-growth-and-issues-arising-from-it.html

enables them to tackle these inequalities, and to participate in legal processes that promote inclusive growth.[140]

The inability to access legal and justice services can be both a result and a cause of poverty. People who are more vulnerable to social exclusion typically report more justice problems than other groups. Furthermore, as legal problems tend to trigger and cluster with other legal and non-legal problems, these same groups appear to experience an increased rate of non-legal challenges as well. Data show that legal problems spark other problems, thus contributing to a cycle of decline which inhibits economic productivity.

3.6 Barriers To Access To Justice

Many economic, structural, and institutional factors hinder access to justice, including the complexity and cost of legal processes, time, and geographical and physical constraints. Importantly, many people — especially those in vulnerable and marginalized groups — neither recognize their problems as legal ones, nor identify the potential legal remedies for those problems. Cost, including opportunity cost, and trust in the justice system are also important factors in determining whether or not people seek legal assistance, or take action at all, to resolve their legal problems.

3.7 People-Focused Access To Justice

To design appropriate solutions to local justice problems, governments must start with an effective understanding of its population's legal needs and experiences in accessing justice. Understanding these legal needs requires a focus on outcomes – i.e., the ability of people to address their legal needs in a fair, cost efficient, timely and effective manner. Today, more than 37 countries rely on national legal needs surveys to determine baseline data for understanding their people's legal problems. By 2017, the World Justice Project will conduct legal needs surveys in more than 100 countries. The data gathered through this type of approach will be invaluable in mapping the gaps in delivering justice so that governments can plan and implement national development strategies that meet national needs.

As the majority of injustices faced by people today involve civil rather than criminal matters, national measurements of justice must go beyond criminal justice. In Colombia, a 2013 survey established that approximately 40% of the population had had a legal issue in the preceding four years, with fraud, theft, access to public services, and housing the most common problems. In the United States, an

[140] Open Law Library (2015), The Legal System needs to be redesigned by normal people for normal people, 18 November 2016. Available from: http://www.openlawlab.com/2015/11/18/the-legal-system-needs-to-be-redesigned-by-normalpeople-for-normal-people/

ABA[141] study of lowand moderate-income households revealed that nearly half of all households had had at least one legal need in the preceding 12 months, with the most common issues personal finance, consumer issues, and housing and property. Legal needs surveys also demonstrate how people typically seek to solve their justice problems without relying on formal justice systems. In Ukraine,[142] a 2010 survey found that respondents with a legal problem most commonly first pursued direct negotiation with the other party, and then sought resolution with government authorities. Only nine percent actively sought a remedy in court. As such, effective measurement of progress on SDG 16.3 must look at people's experiences of resolving a justice dispute, rather than administrative data on cases processed.

3.7.1 Understanding Justice Pathways

Although courts in formal justice systems are critical for access to justice and the rule of law, relatively few legal problems are resolved through the court system or even through formal alternative dispute resolution processes. When faced with legal problems, people will often turn to non-court based processes, and even non-legal services. Income, distance, personal capability and the manner in which services are made available are key factors that influence people's use of legal and other services.

In the area of criminal justice,[143] some countries with few qualified lawyers have placed paralegals in communities to educate rural populations about their rights when a family or community member has been arrested and imprisoned. Paralegals offer free basic legal advice to vulnerable groups and help the latter navigate the complexities of the criminal justice system. Without the intervention of paralegals, people would stand a much higher risk of being wrongfully imprisoned, often for extended periods of time, or exposed to ill-treatment by police or to corruption before their case is re solved. Furthermore, formalizing paralegalism in such places is a low-cost way for justice ministries to provide access to justice for economically marginalized groups. Globally, the use of pre-trial detention, and its impact on economic prospects for individuals and communities.

3.8 Vulnerable groups Defined

In general parlance vulnerability may be understood as susceptibility of a particular group or individual to harm or risk. Martha Fineman describes

[141] American Bar Association (ABA) (1994) Comprehensive Legal Needs Study, Legal Needs and Civil Justice: A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study, ABA Consortium on Legal Services and the Public.
[142] Ukraine (2010), Legal Capacity of the Ukrainian Population, National Survey
[143] Currie A, (2009), The Legal Problems of Everyday Life, in Sandefur R.L. (ed.), Access to Justice: Sociology of Crime Law and Deviance, Vol 12, Emerald, p. 37

vulnerability as a universal, inevitable, enduring aspect of the human condition[144] Vulnerability is thus an intrinsic part of human nature as there will always be groups within the society which will require special protection of their rights and interests owing to their exposure to potential risk and harm.[145] Vulnerability, again is a nebulous concept and is immensely difficult to define with absolute precision.

The Brasilia Regulations Regarding Access To Justice For Vulnerable People defines vulnerable people as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law.[146] In other words, vulnerable people or vulnerable group refers to that section or group of the society that has a higher propensity (as compared to other groups of the society) of being subjected to violence, poverty discrimination, violation of human rights etc. Not only are vulnerable groups at a higher risk for violation of their human rights, but various factors such as sex, religion, disability, language, race, sexual orientation, birth, nationality etc. further perpetuate their risk of social exclusion, stigmatization and discrimination. These vulnerable groups include, but are not limited to refugees, migrant workers, refugees, persons with disabilities, indigenous people, women and children etc.

In context of access to justice, these vulnerable groups face a plethora of barriers which deter them from obtaining legal remedies, hence the need for concerted efforts at both international, regional as well as domestic levels to ameliorate their problems and enable such people to overcome the systemic marginalisation and inequalities that they have been subjected to. Seeking justice can be a particularly daunting task for such vulnerable persons who, owing to barriers such as illiteracy, poverty, discriminatory legal system, stereotyping, corruption and bias mong judicial actors, onerous procedures, etc. are both unable to seek redress, and discouraged from doing so owing to lack of faith in the judicial system. Moreover, in an adversarial system of justice, such vulnerable groups might be unable to seek justice owing to purely economic reasons as they cannot afford adequate representation or bear the costs of litigation. It is due to these aforementioned barriers to justice that there is need to ensure that such vulnerable groups are able to seek and obtain redressal through both formal and informal justice systems.

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[144] Fineman, Martha Albertson (2008) The Vulnerable Subject: Anchoring Equality in the Human Condition, Yale Journal of Law & Feminism: Vol. 20: Iss. 1, Article 2. Available at: http://digitalcommons.law.yale.edu/yjlf/vol20/iss1/2

[145] The Human Rights Protection Of Vulnerable Groups, http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups(last visited March 30, 2019).

[146] Brasilia Regulations Regarding Access to Justice for Vulnerable People https://www.osce.org/odihr/68082?download=true (last visited March 30, 2019).

CHAPTER 4: LEGAL FRAMEWORK FOR PROTECTION OF REFUGEES AND MIGRANT WORKERS- A CRITICAL ANALYSIS

Human rights will be rights to which all people are entitled regardless. People don't gain them since they are natives, specialists, or have some other status. The Universal Declaration of Human Rights (UDHR) asserted in 1948 that every single individual are brought into the world free and equivalent in poise and rights.[147]

The lawful structure for the present talk is the all inclusive system of worldwide human rights law, material to every person, contained in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). These arrangements are enhanced by provincial human rights instruments of general breath: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols and the Revised European Social Charter (ESCr) in the Council of Europe framework; the American Declaration on Rights and Duties of Man (ADRDM), the American Convention on Human Rights (ACHR) and its Additional Protocol in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), for the Inter-American framework; the African Charter on Human and Peoples' Rights for the African one; and the Arab Charter on Human Rights for the Arab framework.

Other explicit human rights bargains further expand the structure for the regard, assurance, advancement and satisfaction of the human privileges of explicit classes of individuals or address explicit human rights, a significant number of which are of noteworthy for a few or all transients. These incorporate, at a worldwide dimension, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC) and its Protocols; the Convention on the Rights of Persons with Disabilities (CRPD); the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED). These arrangements are enhanced by numerous other worldwide and local settlements and models, considered all through the Guide.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is the human rights arrangement explaining specific models routed to vagrant specialists and

[147] Article 1, Universal Declaration of Human Rights (UDHR).

individuals from their families. It has not yet been broadly approved, and none from the most created nations are involved with it.[148]

As regards refugees, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol[149] address various medicines to its Contracting Parties as for the financial, social and social privileges of exiles. In any case, those medicines leave practically speaking a wide edge of gratefulness to States. The Covenant ought to be viewed as supplementing the Geneva Convention.

These settlements establish the foundation of the examination of the particular human rights issues which are tended to by the present research.

An essential guideline of worldwide human rights law is that States have commitments not exclusively to regard, yet in addition to ensure and satisfy human rights. The obligation to regard requires the State not to make a move that straightforwardly damages a specific right. The obligation to secure requires the State, through enactment, approach and practice, to guarantee the assurance of rights, including by finding a way to keep outsiders from disregarding rights. The obligation to satisfy forces on a State's commitments to encourage, give or elevate access to human rights.[150]

4.1 HUMAN RIGHTS TREATIES DEALING WITH MIGRANT WORKERS AND REFUGEES

- Universal Declaration of Human Rights, 1948

This non-binding instrument establishes the overriding principles of equality and non-discrimination applicable to everyone, everywhere and always (Art. 2).

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[148] At 10 January 2014, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) had 47 State Parties.

[149] Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (v) of 14 December 1950, entered into force on 22 April 1954, u.n.t.s., vol. 189, p. 150; Protocol Relating to the Status of Refugees, signed in New York on 31 January 1967, u.n.t.s., vol. 606, p. 267.

[150] See, generally, International Commission of Jurists, Courts and Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability, ICJ Human Rights and Rule of Law Series No. 2, Geneva, 2008, pp. 42–53. See also a complete description in The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, ACommHPR, Communication No. 155/96, 30th Ordinary Session, 13–27 October 2001, paras. 44–48; and, General Recommendation No. 24: Women and Health, CEDAW, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 1999, paras. 13–17. See also, Article 6, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted 22–26 January 1997 (Maastricht Guidelines). The Maastricht Guidelines were adopted in an expert conference held in Maastricht, 22–26 January 1997, at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The instrument has been extensively employed by the CESCR to interpret the ICESCR).

- International Covenant on Civil and Political Rights,1966

Art. 8: prohibits slavery and slave trade in all their forms as well as forced labour.

Art. 13: establishes a due process for expulsion of an alien lawfully in the territory of a country.

Art. 22: establishes the right to freedom of association.

- International Covenant on Economic, Social and Cultural Rights, 1966

Art. 7-10: recognizes the right of everyone to the enjoyment of equal and satisfactory working conditions, the right to form trade unions and join them, and the right to enjoy social security, including social insurance and maternity leave.

- UN Convention on the Elimination of All Forms of Discrimination against Women, 1979

Art. 11: establishes the obligation of all the State Parties to work for the elimination of discrimination against women in the field of employment.

General Recommendation No. 17: recommends taking into account the unremunerated domestic activities of women as a contribution to the gross national product.

General recommendation No. 26: considers that countries of destination should ensure that migrant women workers enjoy the same rights as national women workers.

- UN Convention on the Elimination of All Forms of Racial Discrimination, 1990

General Recommendation No. 30: recommends removing any obstacle preventing the enjoyment of economic, social and cultural rights by non-citizens, notably in the area of employment among others, and any discrimination in relation to working conditions and work requirements.

4.2 The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights

In the New York Declaration for Refugees and Migrants adopted on 19 September 2016[151] following the abnormal state whole gathering of the General Assembly on tending to enormous developments of exiles and transients, the Heads of State and Government and High Representatives reaffirmed the human privileges everything being equal and vagrants, paying little respect to status, and they

[151] Statement by the Committee on Economic, Social and Cultural Rights

swore to completely ensure such rights.[152] They recalled that [t]hough their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms.[153] The Heads of State and Government and High Representatives promised to move towards the reception in 2018 of a worldwide minimal on displaced people and a worldwide minimized for sheltered, deliberate and normal relocation.

As the universal network is thinking about how to address the circumstance of individuals escaping strife and mistreatment from war-ridden nations and how to answer the difficulties raised by movement streams, questions emerge with regards to the scope of monetary, social and social rights to which the general population concerned ought to be entitled in the nations through which they travel or in which they look for a place of refuge and settle. Against this foundation, the Committee on Economic, Social and Cultural Rights wishes to review the certifications given by the International Covenant on Economic, Social and Cultural Rights.

4.2.1 The Reception of Refugees and Migrants: Immediate Obligations under the Covenant

All individuals under the purview of the State concerned ought to appreciate the Covenant rights: this incorporates haven searchers and outcasts, just as different transients, notwithstanding when their circumstance in the nation is sporadic. As respects displaced people, the 1951 Geneva Convention identifying with the Status of Refugees and the 1967 New York Protocol[154] address various solutions to its Contracting Parties regarding the monetary, social and social privileges of outcasts. Be that as it may, those medicines leave by and by a wide edge of thankfulness to States. The Covenant ought to be viewed as supplementing the Geneva Convention.

The Covenant clarifies that the rights it perceives must be logically acknowledged, to the greatest accessible assets of each State party (workmanship. 2, para. 1). Nonetheless, this does not imply that States gatherings may interminably defer making a move so as to verify the privileges of people under their locale. Additionally, the Covenant forces various commitments of prompt impact. Such commitments apply notwithstanding to assist people who are a piece of an

[152] A/71/L.1, para. 5.
[153] Id., para. 6
[154] Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (v) of 14 December 1950, entered into force on 22 April 1954, u.n.t.s., vol. 189, p. 150; Protocol Relating to the Status of Refugees, signed in New York on 31 January 1967, u.n.t.s., vol. 606, p. 267.

enormous gathering of outcasts or vagrants all of a sudden falling under the concerned States' ward.

4.2.2 The Prohibition of Discrimination on Grounds of Nationality or Legal Status

Under the Covenant, the prerequisite to ensure all rights without segregation forces a prompt commitment on the States parties. Each State is left a specific edge of gratefulness to choose which estimates it ought to receive to continuously understand the privileges of the Covenant gave such advances are purposeful, concrete and focused as obviously as conceivable towards gathering the commitments perceived in the Covenant.[155] Whatever estimates it adopts ought to anyway not prompt segregation. A distinction in treatment that does not fulfill such conditions ought to be viewed as unlawful segregation restricted under article 2, para 2 of the Covenant. What's more, Article 3 of the Covenant forces on States gatherings to guarantee the equivalent right of people to the happiness regarding the Covenant rights. As per General Comment No. 20 (2009), an absence of accessible assets can't be considered as a target and sensible support for distinction in treatment except if each exertion has been made to utilize all assets that are at the State gathering's air with an end goal to address and take out the segregation, as an issue of need.[156]

The Committee has made it clear that protection from discrimination cannot be made conditional upon having a regular status in the host country. It emphasized, for instance, that since [t]he ground of nationality should not bar access to Covenant rights, all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care,[157] furthermore, that (notwithstanding the privilege to independent work which is ensured to all outcasts under the 1951 Geneva Convention identifying with the Status of Refugees) any distinction in treatment in access to business would require support as per the criteria set out in the first section.[158] The Committee notes in such manner that entrance to training and access to business are significant channels for coordination inside the host nation, and will diminish the reliance of outcasts or vagrants on open help or private philanthropy.

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[155]General Comment No. 3 (1990): The nature of States parties' obligations (E/1991/3), para. 5.

[156] General Comment No. 20 (2009): Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights) (e/c.12/gc/20), para. 13.

[157] General Comment No. 20 (2009): Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights) (e/c.12/gc/20), para. 30 (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).

[158] General Comment No. 18 (2006): The right to work (e/c.12/gc/18), para. 31.

Steady with the necessity of non-separation, States gatherings should give explicit consideration to the useful impediments that specific gatherings of the populace may experience in the happiness regarding their rights under the Covenant. Because of their shaky circumstance, haven searchers and undocumented transients are at specific danger of confronting segregation in the delight in Covenant rights.[159]

Article 2(3) of the Covenant sets up one restricted exemption to the guideline of non-segregation on grounds of nationality in the pleasure in the privileges of the Covenant. This arrangement expresses that: Creating nations, with due respect to human rights and their national economy, may decide to what degree they would ensure the monetary rights perceived in the present Covenant to non-nationals.

This special case just applies to creating nations, and it just concerns financial rights, specifically access to work. It enables these States to decide the degree to which they will ensure such rights, without enabling them to preclude the delight from claiming such rights completely. While recognizing the worries identified with the insurance of nationals' entrance to work, the Committee would note, be that as it may, that a vagrant who approaches business or to independent work for the most part will add to the residential economy (though the individual may require social help whenever left with no way to a salary). It likewise takes note of that, while instruction has in some cases been portrayed as a monetary right, the privilege of every youngster to training ought to be perceived by States autonomously of the nationality or the lawful status of his or her folks.

4.2.3 Core Obligations

The fundamental least substance of each privilege ought to be saved in all conditions, and the relating obligations stretched out to all individuals under the State's compelling control, no matter what. The Committee underlined in the past that the obligations to verify opportunity from yearning,[160] to guarantee access to water to satisfy basic needs,[161] access to essential drugs[162] or to education complying with minimum educational standards,[163] are core obligations of the State and should therefore not be restricted on the basis of nationality or legal status.

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[159] See, e.g., General Comment No. 15 (2002): The right to water (E/C.12/2002/11), para. 16 (States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees).

[160] General Comment No. 12 (2000): The right to adequate food (E/C.12/1999/5), paras. 6, 14 and 17.

[161] General Comment No. 15 (2002): The right to water (E/C.12/2002/11), para. 37.

[162] General Comment No. 14 (2000): The right to the highest attainable standard of health (E/C.12/2000/4), para. 43.

[163] General Comment No. 13 (2000): The right to education (E/C.12/1999/10), para. 57

The Committee has asserted in the past that [i]n request for a State gathering to have the option to credit its inability to meet in any event its base center commitments to an absence of accessible assets it must exhibit that each exertion has been made to utilize all assets that are at its attitude with an end goal to fulfill, as an issue of need, those base commitments.[164] Despite the fact that States gatherings to the Covenant ought to suit displaced people and vagrants' inflows similar with the degree of the greatest assets accessible, they would not, on a fundamental level, be supported in confining the happiness regarding the basic substance of the Covenant rights based on an absence of assets, notwithstanding when gone up against with an unexpected and quantitatively critical progression of outcasts. As substantiated by the Committee in its Statement on neediness, received in 2001, in light of the fact that center commitments are non-derogable, they keep on existing in circumstances of contention, crisis and cataclysmic event.[165]

4.2.4 The Integration of Refugees and Migrants and the Specific Vulnerability of Undocumented Migrants

Past the prompt obligation to guarantee that the fundamental least substance of the Covenant rights are ensured to all displaced people and vagrants under their locale, States gatherings to the Covenant should consider the Covenant in characterizing the states of reconciliation of outcasts and transients who are settling inside their domain. The Committee draws the consideration of the States parties, specifically, to the way that delight in the Covenant rights ought not rely upon the lawful status of the people concerned. The absence of documentation regularly causes it unimaginable for guardians to send their kids to class, or for vagrants to approach medicinal services, including crisis restorative treatment, to take up business, to apply for social lodging or to participate in a financial movement in an independently employed limit.

This circumstance can't go on without serious consequences. Pending a choice on their case to be reconized as evacuees, shelter searchers ought to be conceded a brief status enabling them to appreciate monetary, social and social rights without segregation. This goes past the rudimentary obligation to enlist youngsters during childbirth, as expressed by Article 7(1) of the Convention on the Rights of the Child and by Article 29 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Nor can undocumented vagrants who are not looking for shelter essentially be disregarded. Without partiality to the likelihood for State to arrange that they leave the region, the very nearness of such vagrants under the State's ward forces on the State certain commitments,

[164] General Comment No. 3 (1990): The nature of States parties' obligations (E/1991/3), para. 10.
[165] E/C.12/2001/10, para. 18.

including obviously the essential commitment to recognize their essence and the way that those transients can guarantee rights against national specialists.

In its General Comment No. 14 (2000), the Committee reviewed that States gatherings have an obligation to regard the privilege to wellbeing by guaranteeing that all people, including vagrants, have equivalent access to preventive, therapeudic and palliative wellbeing administrations, paying little respect to their legitimate status and documentation.[166] The Committee knows that vagrants face explicit hindrances in such manner. Documentation might be required from those looking for access to medicinal services. Vagrants, especially the individuals who don't talk the language of the host nation, may not know about their qualifications. Vagrants in an unpredictable circumstance may likewise dread being confined for expelling, especially in nations where open authorities have an obligation to give an account of sporadic transients. Notwithstanding guaranteeing access to medicinal services without segregation, exacting dividers should exist between social insurance work force and law authorization specialists, and sufficient data ought to be made accessible in the dialects generally spoken by transients in the host nation, so as to guarantee that such circumstances don't result in vagrants maintaining a strategic distance from to look for and get human services.

In its General Comment No. 23 (2016) on the privilege to simply and great states of work, perceived under Article 7 of the Covenant, the Committee recognized transient specialists as a gathering whose rights were especially in danger. It noticed that such specialists, specifically in the event that they are undocumented, are defenseless against misuse, long working hours, unjustifiable wages and perilous and unfortunate workplaces. It recorded various elements that may increment such defenselessness, including circumstances where the business has authority over the transient laborer's habitation status or that bind vagrant laborers to a particular manager; the failure for the laborers worried to talk the national language(s); the dread of backlashes from bosses; and inevitable ejection if these laborers look to whine about working conditions.[167] It pursues that, notwithstanding laws and approaches guaranteeing that vagrant specialists appreciate treatment that is no less good than that of national laborers in connection to compensation and states of work, explicit proportions of insurance may must be received to assist undocumented laborers, to guarantee that any maltreatment of their circumstance of defenselessness is successfully tended to, and that they don't dread documenting objections with the skilled experts.

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[166] General Comment No. 14: The right to the highest attainable standard of health (E/C.12/ 2000/4), para. 34.
[167] e/c.12/gc/23, para. 47, e).

Comparative concerns emerge as respects the privilege to lodging. The Committee has over and over discovered that transients were housed in unacceptable conditions, in some cases in geologically isolated zones. Its worries were reverberated in such manner by the Committee on the Elimination of Racial Discrimination which, in its General Recommendation No. 30 (2004), asked States gatherings to evacuate snags that anticipate the pleasure in financial, social and social rights by non-natives, outstandingly in the [area] of … lodging and to ensure the equivalent delight in the privilege to satisfactory lodging for residents and non-residents, particularly by staying away from isolation in lodging and guaranteeing that lodging offices forgo participating in unfair practices.[168]

In its General Comment No. 19 (2007), the Committee recalled that migrants should be entitled to access non-contributory schemes for income support, affordable access to health care and family support. Restrictions on access to such schemes, including the requirement of a qualification period, should be reasonable and proportionate.[169] The expansion of government disability contributory advantages to refuge searchers and undocumented transients presents explicit difficulties, in any case, since the unsafe (and in some cases transitory) circumstance of these gatherings may make it hard for them to be coordinated in such plans. The Committee notes, nonetheless, that notwithstanding when they are sporadically utilized, frequently by corrupt managers trying to diminish costs by not paying standardized savings commitments, specialists having a place with these classes do add to the financing of the government managed savings framework by making good on circuitous regulatory expenses. The powerlessness of undocumented specialists to acquire government disability advantages expands their helplessness and their reliance on their bosses.

The Committee perceives that the powerlessness of ladies and young lady vagrants and outcasts to dealing and different types of sexual orientation based savagery and misuse builds amid clashes and fiascos. Such helplessness is additionally exacerbated on account of undocumented ladies and young lady transients and displaced people, who are hesitant to report such maltreatment because of their lawful status and as they may need trust in the experts and dread expulsion.

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[168] cerd/c/64/Misc.11/rev.3, paras. 29 and 32.
[169] General Comment No. 19 (2007): The right to social security (e/c.12/gc/19), para. 37.

4.2.5 Data Collection as a Basis for National Rights Plans

The Committee takes note of that in various cases, the States gatherings' reports give lacking data on the degree to which perceived displaced people, refuge searchers and undocumented transients appreciate the privileges of the Covenant. The Committee urges States gatherings to gather such information, so as to enable the Committee to survey the degree to which they consent to their commitments under the Covenant. The gathering of such information can make a noteworthy commitment to the reception and usage of arrangements went for improving, for example, access to work, to training or to medicinal services of vagrants, including undocumented transients, under the State gathering's purview.

4.2.6 International Cooperation

As confirmed by Articles 2, para. 1, 11, para. 2, b), 22 and 23 of the Covenant, the realization of the rights of the International Covenant on Economic, Social and Cultural Rights is a common objective of all States parties. As members of the United Nations, they have pledged to cooperate in fulfilling this aim.[170] International assistance and cooperation are particularly required in order to allow States facing a sudden influx of refugees and migrants to comply with their core obligations as defined above. As the Committee made clear in its Statement on poverty, such obligations give rise to national responsibilities for all States and international responsibilities for developed States, as well as others that are in a position to assist'.[171] The Committee is aware that, when confronted by large flows of migrants fleeing conflict or persecution, some States face a heavier burden than others. It sees any measure that States parties adopt to support the realization of the rights of the Covenant on the territory of other States as contributing to the aims of the Covenant.

4.3 REFUGEES

The international right to seek asylum was first recognised in the Universal Declaration of Human Rights which states in Article 14.1 that everyone has the right to seek and to enjoy in other countries asylum from persecution.[172] While not enshrining a right of asylum, the Geneva Convention relating to the Status of Refugees of 1951, read together with its Additional Protocol of 1967 (Geneva Refugee Convention), contains a set of rights and entitlements that follow from the recognition of refugee status. The Convention provides a quasi-universal definition of refugee in Article 1A.2 according to which a refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality,

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[170] Charter of the United Nations, art. 56.

[171] E/C.12/2001/10, para. 17.

[172] See, Guy S. Goodwin-Gil, The Refugee in International Law, Oxford University Press, 2nd Edition, 1998, p. 175; and Alice Edwards, Human Rights, Refugees and The Right To Enjoy' Asylum, 17 Int'l J. Refugee L. 293 (2005), p. 299. Within the European Union, the right of asylum is enshrined in Article 18 of the Charter of Fundamental Rights of the European Union (EU Charter).

membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Although the right of asylum is not guaranteed by binding international human rights law treaties at a global level, the right is protected in several regional instruments. The American Declaration on the Rights and Duties of Man protects the right, in Article XXVII, to seek and receive asylum. The ACHR, in Article 22.7, protects the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes. Despite the seemingly more liberal reference to a right to seek and receive or be granted asylum, the Inter-American Commission has stressed that this right implies no guarantee that it will be granted.[173] However, it does assure the right to be heard in presenting the asylum application and other procedural guarantees discussed below.[174] The Commission has generally interpreted these provisions in light of the Geneva Refugee Convention.[175] The meaning of asylum under the American Convention and Declaration may also include the other forms of asylum recognised in several Inter-American Conventions on the subject.[176]

The African Charter on Human and Peoples' Rights also recognises the right of asylum in Article 12.3: Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. The African Commission on Human and Peoples' Rights (African Commission) has held that this right should be read as including a general protection of all those who are subject to persecution, that they

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[173] Report on the situation of human rights of asylum seekers within the Canadian refugee determination system, OAS Doc. OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000 (IACHR, Report on Canada), para. 60.
[174] Ibid.
[175] Desmond McKenzie and Others v. Jamaica, IACHR, Cases 12.023—12.044—12.107—12.126— 12.146, Report No. 41/00, Merits, 13 April 2000, para. 229; Donnason Knights v. Grenada, IACHR, Case 12.028, Report No. 47/01, Merits, 4 April 2001, para. 111; Haitian Interdictions Case, IACHR, op. cit., fn. 46, paras. 151–163.
[176] Convention on Territorial Asylum, OAS, A-47, adopted on 28 March 1954; Convention on Diplomatic Asylum, OAS, A-46, adopted on 28 March 1954; Treaty on Asylum and Political Refuge, adopted on 4 August 1939; Convention on Political Asylum, OAS, A-37, adopted on 26 December 1933; Convention on Asylum, adopted on 20 February 1928, at the Sixth International Conference of American States. Due to the limited number of States and reach of subject-matter of these conventions, they will not be dealt with in this Guide.

may seek refuge in another state.[177] The Commission has not yet offered an interpretation of the right to obtain asylum contained in the Charter.

Article 28 of the Arab Charter on Human Rights (ArCHR) recognises only a right to seek political asylum in another country in order to escape persecution, while the ECHR contains no mention of the right of asylum.

4.3.1 When someone is a refugee

A person falls within the definition of a refugee from the moment he or she meets the criteria of Article 1A.2 of the Geneva Refugee Convention. A determination by the State to grant refugee status is not a determination of the status, but only its formal recognition.[178] Therefore, a refugee attains such status even before the State of asylum provides the refugee with relevant documentation or ensures that the status is affirmed under domestic laws and procedures, although the protection of his rights afforded by the Geneva Refugee Convention will be limited until the State determines whether the refugee's situation fulfils the Convention's definition. The Geneva Refugee Convention recognises a range of rights of the refugee, which will be considered in different chapters of this research, and whose protection depends on the recognition of refugee status.[179]

For refugee status to be recognised under the Geneva Refugee Convention, the following criteria must apply:

1. a well-founded fear of persecution;

2. the persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion;

3. the person must be outside the country of his or her nationality or, if stateless, outside the country of his or her former habitual residence;

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[177] Organisation Mondiale Contre la Torture (OMCT) and Others v. Rwanda, ACommHPR, Communications No. 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session, October 1996.

[178] See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNCHR, Geneva, September 1979 (UNHCR Handbook), para. 28. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) seems to contrast to this universal regime as it establishes in its Article 1.6 that it is apt to the State of asylum to determine whether an applicant is a refugee. Nevertheless, as the Convention declares that it is complementary to the Geneva Convention relating to the status of refugees of 1951, read together with its Additional Protocol of 1967 (Geneva Refugee Convention) (Preamble, para. 9; Article 8.2), determine must be interpreted as recognition and not as granting of refugee status.

[179] The OAU Refugee Convention generally recognises more limited rights than the Geneva Refugee Convention. Its protection regime cannot, therefore, substitute that of the older Convention, apart for those people falling under the definition of Article 1.2 of the OAU Refugee Convention who are not contemplated by the Geneva Refugee Convention, or for States which have ratified the OAU Refugee Convention but not the Geneva Refugee Convention or its Additional Protocol.

4. the person must be unable or, owing to such fear, unwilling to avail him or herself of the protection of that country.

i) Well-founded fear of persecution

The requirement of well-founded fear includes a subjective examination (that the individual personally has fear) and an objective one (that the fear is well-founded). The first criterion will depend on the subjective situation of the person and therefore will need to be assessed on a case-by-case basis. The second criterion will require an examination of the factual circumstances alleged and also a consideration of the individual case and person alleging the fear, as different persons face different risks depending on their situation, and will have different reasons for a fear to be well-founded.[180]

Persecution is an evolving concept under international law. While no general definition of persecution is available, the UN High Commissioner for Refugees (UNHCR) has identified some general categories of situations that will amount to persecution (the list is not exhaustive):

• a threat to life or liberty on account of one of the listed grounds;

• other serious infringements of human rights on account of one of those grounds;[181]

• discrimination leading to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn his/her living, right to practice his/her religion, or access to normally available educational facilities;

• discriminatory measures not amounting as such to persecution, but that produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his/her future existence;

• criminal prosecution or fear of it for one of the grounds enlisted in the refugee definition or excessive punishment or fear of it for a criminal offence.[182]

ii) Grounds of persecution

Persecution must have a causal link with one of the grounds listed in the refugee definition, set out below. As recalled by the UNHCR, it is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not

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[180] See, for more detail, UNHCR Handbook, op. cit., fn. 66, paras. 37–50.
[181] This concept is not defined in international human rights law. The UNHCR Handbook provides a non-exhaustive list and is likely to develop over time.
[182] See, UNHCR Handbook, op. cit., fn. 66, paras. 51–60.

necessary that it be the sole, or even dominant cause.[183] It is possible that different grounds will overlap and that a refugee might claim asylum based on more than one ground. It is not necessary that the person actually possesses the characteristics for which he or she is being persecuted, only that these characteristics are imputed to them by their persecutors.

Race: this term has to be understood broadly as including not only strictly race, but also colour, descent or national or ethnic origin.[184] Furthermore, it may entail members of a specific social group of common descent forming a minority within a larger population. International human rights law, in particular ICERD, is based on a similarly broad notion of race, and the Geneva Refugee Convention should be interpreted in light of this. Racial discrimination is an important element in establishing persecution.[185]

Religion: this term is considered to have three possible different manifestations, which are not cumulative conditions. It includes a belief (conviction or values about the divine or ultimate reality or the spiritual destiny of humankind, including atheism); an identity (as membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality or ancestry); or a way of life (where religion manifests in certain activities as wearing of particular clothing, observance of particular practice).[186]

Nationality: this term is not to be understood merely as citizenship. It refers also to membership of an ethnic or linguistic group[187] and includes national origin and statelessness.

Membership of a particular social group: The term social group should be interpreted as having fluid and evolving content. A social group may be country specific or may be defined with reference to international human rights law. To identify a social group, UNHCR adopts the following standard: a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is

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[183] Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, UNHCR, UN Doc. HCR/GIP/06/07, 7 April 2006, para. 29 (UNHCR Guidelines on victims of trafficking).

[184] See, Declaration and Action Programme on Racism, Racial Discrimination, Xenophobia and Related Intolerance, para. 2.

[185] See, UNHCR Handbook, op. cit., fn. 66, paras. 68–70.

[186] See, for more information, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/04/06, 28 April 2004 (UNHCR Guidelines on Religion-Based Refugee Claims); see also, UNHCR Handbook, op. cit., fn. 66, paras. 71–73.

[187] See, UNHCR Handbook, op. cit., fn. 66, paras. 74–76.

otherwise fundamental to identity, conscience or the exercise of one's human rights. [188] As outlined in more detail below in Box No. 1, women, who face persecution related to their sex or gender, will constitute a particular social group for the purposes of refugee status. Lesbian, gay, bisexual and transgender individuals who face discrimination on the basis of their sexual orientation or gender identity will also qualify as members of a particular social group. The size of the group is not a relevant element.[189]

iii) Persecution by non-State actors

Persecution may originate not only from State action, but also from that of non-State actors under circumstances indicating that the State was unwilling or unable to offer protection against the threatened persecution.[190] In the case of non-State actors, in particular, the causal link must satisfy one of these two tests:

• There is a real risk of being persecuted at the hands of a nonState actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or

• The risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for Convention reasons.[191]

4.3.2 When a refugee is not a refugee: cessation and exclusion clauses

International refugee law provides for conditions and situations under which a person ceases to be recognised as a refugee or because of which it is forbidden to recognise someone as a refugee. These are called respectively cessation and exclusion clauses.

i) Cessation of refugee status
According to Article 1C of the Geneva Refugee Convention, the Convention ceases to apply when:
• The refugee has voluntarily re-availed him or herself of the protection of the country of his nationality; or

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[188] Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/02/02, 7 May 2002 (UNHCR Guidelines on Membership of a particular social group), para. 11.
[189] 7 See for more, ibid. See also, UNHCR Handbook, op. cit., fn. 66, paras. 77–79.
[190] UNHCR, Agents of Persecution, UNHCR Position, 14 March 2005, para. 4. See also, UNHCR Handbook, op. cit., fn., para. 66; Concluding Observations on France, CCPR, Report of the Human Rights Committee to the General Assembly, 52nd Session, Vol. I, UN Doc. A/52/40 (1997), para. 408; Recommendation 1440 (2000) Restrictions on asylum in the Member States of the Council of Europe and the European Union, Parliamentary Assembly of the Council of Europe (PACE), para. 6.
[191] See, UNHCR Guidelines on Membership of a particular social group, op. cit., fn. 76, para. 23

- Having lost his or her nationality, the refugee has voluntarily reacquired it; or
- The refugee has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
- The refugee has voluntarily re-established him or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- The refugee can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail of the protection of the country of his or her nationality or residence, unless there are compelling reasons arising out of previous persecution for refusing to avail of the protection of the country of nationality or residence.[192]

While the application of the cessation clauses rests with the State,[193] the UNHCR Executive Committee (ExCom) has set forth strict conditions which it considers must apply to their application:

Changes in the country of origin or nationality must be of fundamental character, stable and durable, i.e. of such a profound and enduring nature that international protection becomes uncalled for;[194]

The fundamental character must be established objectively and in a verifiable way and must include the general human rights situation, as well as the particular cause of fear of persecution;[195]

The decision of cessation must be on the individual case. All refugees affected by group or class decisions must have the possibility to have the application of cessation clauses in their cases reconsidered on grounds relevant to their individual case.[196]

The UNHCR documents and the ExCom conclusions and recommendations, although they do carry binding force, provide the only comprehensive and authoritative guidance on refugee status determination procedures (RSDPs), and have been followed in State practice and by national courts, in particular

[192] The OAU Refugee Convention includes two other reason for cessation of refugee status, taken from the exclusion clauses, which are: (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or (g) he has seriously infringed the purposes and objectives of this Convention (Article 1.4, OAU Refugee Convention).
[193] Conclusion No. 69 (XLIII) Cessation of Status, ExCom, UNHCR, 43rd Session, 1992, Preamble, para. 2.
[194] Conclusion No. 65 (XLII) General, ExCom, UNHCR, 42nd Session, 1991, para. (q).
[195] Conclusion No. 69, UNHCR, op. cit., fn. 91, para. (a).
[196] Ibid., para. (d). See also, paras. (b) and (c).

considering that UNHCR has a duty to supervise the application of the Geneva Refugee Convention under its Article 35.[197]

ii) Exclusion from refugee status

Article 1F of the Geneva Refugee Convention lists grounds for automatic exclusion from recognition of refugee status. These occur when there are serious reasons for considering that:

• The person seeking refugee status has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes (Article 1F(a));[198]

• He or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee (Article 1F(b));

• He or she has been guilty of acts contrary to the purposes and principles of the United Nations (Article 1F(c)).[199]

Although national practice increasingly tends to widen the circumstances in which these criteria apply (a tendency strengthened in the European Union (EU), for example, by Article 12.2 of the EU Qualification Directive[200] ; see, Box No. 3 below) it is well established in international standards that the exclusion clauses must be applied restrictively.[201]

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[197] Cecilie Schjatvet, The making of UNHCR's guidance and its implementation in the national jurisdiction of the United Kingdom, Norway and Sweden, Hestenes og Dramer & Co., Research report for the Norwegian Directorate of Immigration, 2010, Chapter 3.

[198] See, Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948; the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols; the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and most recently the 1998 Statute of the International Criminal Court which entered into force on 1 July 2002 (Rome Statute).

[199] The OAU Refugee Convention adds the exclusion clause of when he has been guilty of acts contrary to the purposes and principles of the Organisation of African Unity (Article 1.5(c)).

[200] Directive 2011/95/EC of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees and for persons eligible for subsidiary protection, and for the content of the protection granted (recast), EU, Official Journal L 337/9, 20/12/2011 (EU Qualification Directive).

[201] UNHCR Handbook, op. cit., fn. 66, para. 149. See also, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Geneva Convention relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/03/05, 4 September 2003 (UNHCR Guidelines on Application of the Exclusion Clauses), para. 2; Recommendation Rec(2005)6 of the Committee of Ministers to Member States on exclusion from refugee status in the context of Article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, adopted by the CMCE on 23 March 2005 at the 920th meeting of the Ministers' Deputies, paras.1 (a), (b) and (g), and 2.

4.3.3 **Issues in Refugee Law**

- Professor Jastram likewise draws on crafted by Michelle Foster, in her book, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation, who calls for consistency between human rights law and evacuee law and the need to address the divergences in these two zones of the law. Teacher Jastram takes note of that Michelle Foster backers that displaced person law judges should utilize a base center commitment approach in choosing what dimension of infringement of financial human rights establishes persecutory treatment for deciding Convention evacuee status.[202] This expects judges to make a qualification among center and outskirts human rights. In any case, this way to deal with the assurance of evacuee status and shelter cases dependent on financial human rights infringement isn't, Professor Jastram notes, without its faultfinders.

  The individuals who are reproachful of embracing the base center commitment way to deal with outcast status assurance call attention to that the human rights articulated in the worldwide shows and pledges are illustrated in dubious and vague ways. It is likewise contended that human rights law is growing and enhancing, yet this additionally conveys its very own danger of divided standards and experts. The fact of the matter was likewise made that consistency in displaced person status and refuge settling is hard to accomplish when judges are applying human rights law without seeing completely the standards and the experts on which these are based. Teacher Jastram expressed that this clarifies why this is such a vexing and mistaking region for outcast status and haven candidates as well as for displaced person law adjudicators and judges too.

  Juan Osuna started by taking note of that the issue of the infringement of financial, social and social rights as a reason for a case to outcast status is attached to various different issues. The edge that the candidate for haven must meet to be resolved a Convention outcast is high when monetary, social and social rights infringement are the premise of the well-established dread of mistreatment. He noticed that every day life in the candidate's nation of nationality must be painful. Juan Osuna said this is without a doubt a high test to meet.
- Equity Esme Chombo expressed that her comments would be centered explicitly around Southern Africa. She noticed that there is plainly a wellestablished human ideal for evacuees to endure when they face abuse in their very own nations. Be that as it may, there are confinements, she expressed, for the individuals who case haven based on a privilege to work

[202] Kate Jastram, Economic Harm as a Basis for Refugee Status, Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1–2, 2008, p. 15.

or a privilege to social insurance. Equity Chombo called attention to that the Republic of South Africa has the biggest number of shelter searchers in Africa and despite the fact that haven searchers reserve an option to work in the Republic of South Africa there has been communicated restriction from numerous South Africans about the open doors given to refuge searchers to work there.[203]

Justice Mactavish also referred to the Federal Court of Appeal of Canada decision in Sanchez,[204] which ruled that the asylum applicant would have to give up his sideline business. Chief Justice John D. Richard ruled in Sanchez that,

In this case, Mr. Sanchez was being targeted by FARC for what he was doing, i.e. reporting violators of the city's by-laws to the authorities, not for what he was in an immutable or fundamental way. Denial of his side business interest would therefore not affect a fundamental principle of human rights.[205]

Mr. Sanchez was an engineer, who's full-time job was with the Columbian Ministry of Agriculture, with a specialty in environmental clean-up, and his sideline business was reporting signage violations to the local authorities.[206]

On the certified question before the Federal Court of Appeal, the ruling was, persons claiming to be in need of protection solely because of the nature of the occupation or business in which they are engaged in their own country generally will not be found to be in need of protection unless they can establish that there is no alternative occupation or business reasonably open to them in their own country that would eliminate the risk of harm.[207]

Justice Mactavish concluded her judicial commentary by stating that economic, social and cultural rights are a bit amorphous and hard to define.

4.4 Migrant Workers

4.4.1 UN Convention for the Protection of the Rights of all Migrant Workers and members of their families, 1990

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is the most comprehensive international treaty in the field of migration and human rights. It is an instrument of

[203] See Human Rights Watch, South Africa: Protect Victims of Xenophobic Violence: Provide Basics of Food, Water, Shelter, and Safety to Displaced, June 5, 2008. www.hrw.org/en/news/2008/06/05/south-africa-protect-victims-xenophobic-violence (accessed August 30, 2009). Human Rights Watch, South Africa, Events of 2008, World Report 2009, www.hrw. org/en/world-report/2009/south-africa (accessed August 30, 2009).

[204] Sanchez v. Canada (Citizenship and Immigration) 2007 FCA 99 (March 8, 2007).

[205] Ibid., paragraph 19.

[206] Ibid., paragraph 3.

[207] Ibid., paragraph 20.

international law meant to protect one of the most vulnerable groups of people: migrant workers, whether in a regular or irregular situation.

Adopted in 1990 by the United Nations (UN) General Assembly,[208] it sets a worldwide standard in terms of migrants' access to fundamental human rights, whether on the labour market, in the education and health systems or in the courts. At a time when the number of migrants is on the rise, and evidence regarding human rights abuses in relation to migration is increasing,[209] such a convention is a vital instrument to ensure respect for migrants' human rights.

Yet the ICRMW suffers from marked indifference: only forty-one states have ratified it and no major immigration country has done so. Even though it entered into force on 1 July 2003, most countries are reluctant to ratify the treaty and to implement its provisions. This stands in sharp contrast to other core human rights instruments, which have been very widely ratified.[210] This circumstance features how vagrants remain generally overlooked regarding access to rights; while the need to secure ladies and youngsters, for instance, is – in any event on paper – uncontested, conceding rights to transients isn't comprehended as a need. Despite the fact that transients' work is progressively fundamental on the planet economy, the noneconomic part of relocation – and particularly the human and work privileges of vagrants – remains an ignored component of globalization.

The ICRMW is an extensive instrument that covers the whole relocation process from the enlistment and takeoff in the State of source, vagrant rights amid travel, just as amid the time in the State of goal and upon return (Article 1(2)).

It contains a general non-separation provision which includes nationality, conviction, age, conjugal status, birth or different status and financial position as disallowed reason for segregation to the non-comprehensive rundown of secured grounds set out in the past center human rights instruments. This was done so as to mirror the regular grounds on which transient laborers frequently experience segregation.

Board on the Protection of the Rights of every Migrant Worker and Members of their Families, General Comment No. 1 on transient local laborers takes note of

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[208] General Assembly Resolution 45/158 of 18 December 1990.

[209] For recent evidence on the violation of migrants' human and labour rights, see Amnesty International (2006) and Shelley (2007).

[210] These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965, 173 parties); the International Covenant on Civil and Political Rights (ICCPR, 1966, 164 parties); the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966, 160 parties); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979, 186 parties); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984, 146 parties); and the Convention on the Rights of the Child (CRC, 1989, 193 parties). Status as at June 2009 (www2.ohchr.org/english/bodies/ratification/index.htm [last accessed 9 April 2009]).

that MDWs are at expanded danger of specific types of misuse and misuse, to a great extent because of disconnection and reliance normal for local work, and that female MDWs face extra dangers because of their sexual orientation, including sex based savagery. The Committee approaches part States to address the privileges of vagrant household laborers inside the bigger system of average work for local specialists.

The hidden reason for the ICRMW is the acknowledgment that every single vagrant laborer, both in standard and in sporadic circumstance, are above all else individuals qualified for the delight in major rights without separation.

The Convention does not present another arrangement of rights but rather to a great extent repeats the benchmarks accommodated by the International Bill of Human Rights, for example, the privilege to life ,the privilege to be free from torment and the privilege to opportunity of still, small voice and religion and it develops rights and qualifications which are as of now completely or somewhat secured by past instruments.

The methodology has a comparative justification to the fundamental contentions for creating explicit universal law in connection to ladies, kids and people with inabilities to arrange and expand on the specificities of utilization of global human rights law to these defenseless classifications.

ICRMW gives a wide meaning of a vagrant specialist concentrating on the commitment in a compensated action incorporating people in the nation of source who are in arrangement of taking up a compensated movement in a nation where they are not nationals, the individuals who are as of now working in such a nation, and the individuals who are never again working however are still in a nation of which they are not nationals or are coming back to their nation of starting point.

Moreover, the ICRMW gives meanings of explicit classifications of vagrant laborers, for example, occasional specialists, venture tied laborers just as a meaning of individuals from the family who likewise appreciate rights under the Convention.

Besides, the ICRMW covers certain classifications of vagrant laborers, for example, wilderness specialists and independently employed people, which are prohibited under the transient explicit ILO shows.

Critically, the Convention plans to advance compelling insurance, for example by a few arrangements on guaranteeing vagrants' entrance to lawful cures, hence conquering any hindrance between lawful arrangements and true happiness regarding rights.

One positive pattern that can be watched is that a large portion of the States Parties are creating and embracing authoritative measures, open approaches, procedures, and national activity plans and projects on numerous regions significant to the usage of the Convention.

A few of the States Parties have now embraced measures identified with movement as a rule, for instance they received a relocation law(perceiving various rights to both standard and sporadic vagrants, or measures identifying with work movement, including the appropriation of a meaning of transient specialist which is in accordance with the one gave in the Convention.

Other applicable activities embraced by States Parties incorporate measures meant to: regularize sporadic transients anticipate and rebuff dealing, just as separation, prejudices and xenophobia, including authoritative measures to move the weight of verification on the respondent when the inquirer has set up a by all appearances case.

The Committee on Migrant Workers has watched the accompanying issues identifying with the usage of ICRMW

The issue of getting information on relocation and the information it receives is seldom disaggregated fittingly. Intermittently, the State Parties supply general measurements on transients in their domain however neglect to give data and markers on their entrance to fundamental administrations, precise information on the quantity of sporadic vagrant laborers and individual from their families in the region of the States Party, and the quantity of their own nationals abroad.

There is frequently an absence of preparing of and data on the Convention and its arrangements among open authorities, bury alia, judges, investigators, cops, migration authorities, work overseers, social specialists and different operators of the State who manage vagrant laborers and individuals from their families, just as data accessible to transient specialists.

Transient specialists and individuals from their families who are casualties of separation frequently face obstructions when endeavoring to practice their entitlement to a successful cure in the States Parties. This is a basic appropriate for vagrant specialists and individuals from their families who need to document grumblings and get a viable review in the courts if their rights under the Convention have been damaged. Such right additionally explicitly perceived by Article 83 of the Convention.

4.4.2 The Migration for Employment Convention (revised), 1949 (No. 97)

Protects regular migrant workers from discrimination and exploitation, ensuring equality of treatment between regular migrant workers and national workers with respect to hours of work, rest period and holidays.

4.4.3 The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Entitles transient laborers in unpredictable status to equity of treatment in working conditions and in regard of rights emerging out of their past business. It gives both uniformity of treatment and balance of chances for vagrant laborers in standard status and individuals from their families. This uniformity additionally applies to standardized savings, worker's organization and social rights.

As we see evolving socio-political conditions in the nations of goal, we have to put a similarly sharp eye to the subtleties of those progressions and how these progressions influence the normal vagrant, upon whom the nation of birthplace and goal depend and the other way around for the assurance and improvement of their own rights.Aside from the instances of maltreatment and segregation we see on a practically customary premise whether it is through work on the field or through media, there is a need to development and spotlight on cases that have achieved the phases of suit. Legitimate bodies of evidence by transients against their backers comprise a huge segment of guaranteeing their rights and insurance by the condition of occupation. The legitimate procedure, experts included and resulting move made for the case demonstrate how well the nations of both beginning and occupation can guarantee their laws and organizations finish.

There are a few lacunae in legitimate and institutional channels for how vagrants and displaced people may verify equity for themselves. In cases that require mediation either as legitimate guide, interpretation (from Arabic to English for instance) or money related, vagrants over the Middle East frequently resort to implies outside the built up arrangement of protest enrollment and goals.

All through the movement procedure, vagrants, especially undocumented, face treacheries of a lawful sort. From enlistment to repatriation, they are looked with proceeded with quandaries of gambling capture. The conditions to the entrance to equity for specialists are especially influenced by work, sexual orientation, the limit of the nation of birthplace and their phase of the movement procedure.

Relocation, as an intricate wonder, renders the vagrant, intentionally and something else, dependent on the authoritative and implementation organizations of the nations of goal and missions of the nations of inception in the previous. Fundamentally, the inquiry we and our individuals/accomplices on the field, look to reply in our work is that of guaranteeing the confidence of the laborer while

securing their rights. In any case, that winds up overpowering when vagrants have little to few rights (regardless of current changes) and face proceeded with prejudicial frames of mind from nearby experts and the insufficiency of their own missions to support them.

4.4 Challenges of Country of Origin

As an institution that is meant to be the foremost line of defence, migrants are heavily reliant on their missions to inform, represent and aid them legally in their country of destination.[211] In spite of respective understandings being chalked out between nations of source and goal explicitly on transient issues, the understandings themselves need in considerable substance to guarantee all-adjust security of vagrants and may even influence their rights. In spite of effective and quick working of the legislature of the nation of goal, the limits of international safe havens and offices of nations of birthplace are especially telling. In specific cases, the nations of beginning are late in their reaction to situations where the vagrant specialist has had an ideal and just decision articulated. The missions neglect to profit by the energy of the case, and neglect to guarantee satisfactory assistance to the vagrant at the perfect time.

Nations of starting point, aside from in specific cases that addition media consideration, waver to change the fragile equalization in the connections they keep with nations of goal. They also neglect to consider the nation of goal responsible for the states of their reciprocal understandings or to the approval of shows in such manner. Subsequently, undocumented specialists are not adequately secured by their very own international safe havens (basically on the grounds that they are of an unlawful status in the goal nation). Undocumented transients are especially powerless in nations of goal and their attention to their legitimate status or the standards of movement are deficient. Missions were additionally observed to be deficient in guaranteeing free legitimate guide and help to their very own nationals and did not include themselves in instances of detainment. When imparting to international safe havens about specific issues, the government offices react that they are unfit to mediate with issues of nearby law.

In what is an especially irritating pattern, international safe havens and missions are not educated regarding the captures and confinement of their nationals from the police or Labor office. The transient is indicted while depending on the legitimate guide that they have organized or is offered to them star bono. The international safe havens are late in tending to these issues and thus transients are urged to likewise utilize the administrations of non-legislative social orders

[211] Challenges on Access to Justice for migrants Written Contribution of Migrant Forum in Asia to the Special Rapporteur on the Human Rights of Migrants on the issue of Access to Justice and Remedies for Migrants

thoughtful to their motivation to repatriate and settle cases with their support out of court. Amid instances of reprieve (Kuwait and Saudi Arabia as late models), vagrant laborers were empowered excitedly by their international safe havens to leave amid the period to anticipate further capture or fines and levy. In any case, the missions were wasteful in arrangement with the topic of pay of these laborers. Barely any source nations have the foundation or institutional capacities to guarantee a smooth recovery and reintegration process. Consulates furnished with the intensity of lawyer for instances of pay are moderate and the bureaucratic gone around for vagrants and their families back in the nation of origin is tedious.

For suit, certain missions do offer lawful exhortation and mindfulness however the training isn't basic nor drawing in and sufficiently extensive to be a significant asset to the specialist. Missions additionally need budgetary limit and assets to manage specialists issues, with (at times) 1 Labor attaché or Legal advisor for all cases. Transients henceforth depend on NGO's controlled by vagrants or other common society bodies that incorporate religious, social and philanthropy based associations to subsidize the repatriation of laborers in their refuge or the expelling focuses. These associations empower interpretation of reports, prison appearance, escort amid hearings, contact with the approach and the support, as a non-administrative figure. This puts those helping the upset vagrants into further threat thinking about that transient activists and philanthropy specialists help these vagrants at their very own hazard.

CHAPTER 5: JUDICIAL MECHANISM- A RE-ANALYSIS

To realize access to justice for refugees and migrant workers, there are ample of safeguards in the form of legal protection, legislations and various policies at international, national and regional levels. However, as we have seen, these safeguards are not sufficient to actualize such access to justice.

Mere presence of legal right and principles is not sufficient. Courts and tribunals are needed to be accommodated with the judges and lawyers who are well equipped with not just the technicalities of the International, national and regional Migration and Refugee Law, but also the application of the same with the basic human rights principles provided under various human rights treaties.

Moreover, the problem of Refugees and Migrants has been looked from the lens of political perspective. Such issues in the world take a political stage more often than the legal stage. However, as it has been tried to put succinctly by the researcher that access to justice for refugees and migrant workers become an important attribute when the realization of human rights of refugees and migrant workers are concerned.

As already been discussed in Chapter Three that access to justice is an important attribute of rule of law, it is pertinent to mention that for rule of law to exist, the role of judiciary must be at par with that of the State, thereby maintaining separation of power. In this regard, to analyse the role of judiciary becomes essential. In this Chapter, the researcher attempts to discuss the judicial mechanism and to lay emphasis on the rule of judges and lawyers to achieve effective access to justice.

5.1 ROLE OF JUDGES AND LAWYERS IN RELATION TO ACCESS TO JUSTICE FOR REFUGEES AND MIGRANTS

5.1.1 Principles on the role of judges and lawyers

These Principles herein after discussed were developed by the International Commission of Jurists (ICJ) based on consultations, including the 2016 ICJ Geneva Forum of Judges and Lawyers and at the March 2016 session of the UN Human Rights Council, as well as the ICJ's global research, experience and expertise.

While the International Court of Justice targets for the Principles to reflect the widest level of support among those who were consulted, they do not necessarily reflect the views of each and every individual participant who participated in the consultations.

The Principles primarily address the role of judges and lawyers, including prosecutors and government lawyers. However, the ICJ urges all legislators, executive officials, and all other persons exercising legal or de facto authority

(whether as a public official or under a delegation of state authority or by contract), also to implement, uphold and respect the role of judges and lawyers in protecting the rights of refugees and migrants, including as set out below.

These Principles should further be secured by a wider framework of laws, policies, and practices that implement and guarantee human rights and the rule of law at the national, regional and international level.

In these Principles the term refugees and migrants is to be given a broad interpretation and taken as a whole. It includes asylum seekers, stateless persons, victims of human trafficking, unaccompanied or separated children, and other persons in the context of migration without any limitations. It also applies irrespective of whether a person's entry, presence or stay is affected by national law to be regular or irregular.

The Principles referred to are intended to harmonize the implementation of existing international instruments for the protection of refugees and migrant workers, including without limitation: the Universal Declaration of Human Rights; the Convention relating to the Status of Refugees and its Protocol; the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights; the 1951 Geneva Convention on Refugees; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the New York Declaration for Refugees and Migrants; as well as relevant regional treaties and standards.

5.1.2 General Principles

1. *Every State must respect, protect and fulfill the human rights of every person on its territory or otherwise within its jurisdiction, without discrimination.*
   All refugees and migrants are entitled to the full range of internationally-recognized human rights, excepting any particular rights that international law explicitly recognizes only in relation to citizens or nationals.

Under international human rights law, the responsibility of States towards persons do not depend on the particular standing or recognition of standing of such persons under national or international law, except for a limited number of provisions explicitly relevant to particular categories. For instance, all the rights recognized by the International Covenant on Civil and Political Rights apply to everyone, with the only exception of the rights under Article 25 i.e. participation in public life, voting and election, access to serve in the public service, which the ICCPR expressly guarantees only to citizens.

The question regarding the jurisdiction of a State when the individual is in jurisdiction while outside that State's regular territory falls to be determined by general international law as well as any specific treaty provisions by which a State is bound.

2. *Judges and lawyers have a particularly important role to play in ensuring that all persons, including refugees and migrants, are treated as equal before the law and receive equal protection of the law without discrimination.*

For the effective protection of human rights and also the maintenance of the rule of law, the role of an independent judiciary and legal profession has more generally been recognized in, for instance, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors. Without these legal instrumentalities, realization of human rights would be a tough task.

3. *Refugees and migrants are entitled to a fair and effective process for determination of their status, under conditions that preserve human dignity, human rights, and the rule of law. This includes the right to an individual examination, and the right to an effective legal remedy, including the right to appeal to a separate, competent and independent judicial authority.*

Judges and lawyers must approach all claims in a manner that respects each claimant's personal dignity and recognizes the seriousness of the task being undertaken. In interpreting legal provisions, judges should wherever possible give generous interpretation to those provisions that are protective of human rights, and strict interpretation to those that limit rights. In cases where several interpretations or provisions are available and equally applicable, judges should apply those that offer the most protection for refugees and migrants.

Judges and lawyers must ensure that fair and legal process is respected in any proceeding or other procedure that could affect the rights or status of a refugee or migrant.

Judges should not reject any individual's claim based solely on the fact that the individual shares a common characteristic with members of a group, e.g., ethnicity, nationality, or political opinion. However, judges may make decisions granting protection based on membership of a specific group.

Judges and lawyers active in proceedings relating to status determination, removals, detention or other aspects relevant to the situation of refugees and migrants, should have adequate knowledge of refugee, human rights, and humanitarian protection law and practice, and be familiar with the use of interpreters and cross-cultural interviewing techniques.

Judges and lawyers should be sensitive to the circumstances of affected individuals, their particular needs, and the risks to which removal from the state jurisdiction may expose them. At all times the confidentiality of a status determination application should be respected; in any judicial review or appeal the identity of the person should be protected from disclosure.

Judges should proactively seek to apply any accelerated procedures that allow for swift positive decisions, particularly in cases that are prima facie well-founded. Conversely, however, accelerated procedures should not be applied in any case where the acceleration could lead to rejection of a well-founded claim.

In addition to its essential role in safeguarding human rights and the rule of law, involvement of the judiciary in asylum procedures improves consistency of decision-making, brings greater certainty to the legal framework through interpreting and applying legal definitions and provisions, and helps to establish and maintain procedural fairness.

The requirement for an individual assessment of the situation of each person, capable of determining whether the involuntary transfer of that person will violate the State's international obligations, is in line with the prohibition of collective expulsions, and the right to an effective remedy for violations of the refoulement prohibition under international law.

In some circumstances, persons who arrive at but have not yet crossed a border may be entitled to protection against refoulement under international law, and the refusal to admit the person onto the State's territory may itself violate the State's international obligations. Persons whose rights have been violated in this manner should, like others, have access to an effective remedy as contemplated by Principle 10.

4. *The obligations of States to respect, protect and fulfill the human rights of migrants and refugees apply regardless of whether the individuals concerned are part of a large movement.*

The existence of a large movement does not justify limiting or circumventing the essential role of judges and lawyers in upholding the human rights of migrants and refugee and the rule of law.

Whether a movement is considered to be large depends on the rate of arrival, the geographical context, the capacity of the receiving State to respond, and the impact on the receiving State caused by the sudden or prolonged nature of the movement, rather than on the absolute number of people moving. Such movements often involve a mixed flow of refugees and migrants.

Principle 4 does not preclude States from developing procedures designed to address the practical challenges of large movements, such as prima

facie recognition, or instituting mobile facilities for hearing and adjudicating claims. Any such measures must not, however, have the purpose or effect of limiting the individuals' rights or diminishing the State's respect for those rights, or otherwise reducing the quality and fairness of decision-making.

For instance, if, in the context of a large movement, timely individual status determinations prove impractical, impossible, or unnecessary, authorities may use group determination procedures pursuant to which all individuals who meet certain criteria are prima facie regarded as refugees without detailed individualized assessment. Judges should similarly apply any presumptions of inclusion available under national law. On the other hand, even in the context of large movements, no decision that would adversely affect the individual should be taken without a detailed, individualized assessment with due procedural safeguards.

Any executive, legislative, or administrative measures adopted to address large movements must be subject to substantive judicial review capable of ensuring the conformity of such measures with the rule of law, human rights, fundamental fairness, and procedural guarantees.

Large movements of refugees and migrants do not generally, in themselves, constitute grounds for States to invoke provisions in international human rights instruments allowing for derogation from rights in situations of exception.

In their application to refugees and migrants (as for others), including in the context of large movements, any measures of derogation adopted for any reason must fully comply with the requirements of international human rights law. These include non-discrimination, demonstrable necessity, proportionality, and time-limitedness. Measures must be limited to the extent strictly required by the particular situation, including as regards their duration, geographical coverage and material scope. Measures must not adversely impact those rights recognized as non-derogable by treaties, or as peremptory norms of customary international law. Further, article 4(1) of the ICCPR for instance explicitly prohibits derogations that would be inconsistent with the State's other obligations under international law; this would include, for instance, international humanitarian law and international refugee law.

5.1.3 Determinations of Entitlement to International Protection

5. *Determination of a person's entitlement to international protection must guarantee and respect safeguards of procedural fairness and be subject to an effective appeal before, or other substantive review by, a competent, independent and impartial judicial authority.*

International protection throughout these Principles includes protection based on refugee or statelessness status, subsidiary, complementary, temporary protection or stay arrangements, or other humanitarian status, and any additional forms of protection otherwise based on international human rights law.

Principle 5 does not preclude a State from entrusting the initial determination of entitlement to international protection to a judicial, rather than administrative, authority. If a State decides to structure its system in this way that judicial authority must itself meet international standards of competence, independence and impartiality of the judiciary.

Judges and lawyers should ensure that, throughout the status determination process, including at any appeal or review, the necessary procedural safeguards are respected to ensure a fair and thorough examination of each individual case. Procedural safeguards must not be denied – summarily or otherwise – on the grounds that a prima facie risk of harm has not been made out.

Important procedural safeguards include, without limitation:

- Access to the procedure must be effective in practice. For example, fees may not be imposed on those unable to pay. Time limits must be reasonable and subject to extension in appropriate cases. Access to the procedure should not be conditional on submission of documentation, such as official identity documents, in respect of which there may be a reasonable explanation for their absence.
- Persons must from the outset be informed of the nature and stages of the process, as well as about their rights.
- Persons should have access to legal advice and representation, as further elaborated under Principle 7.
- Persons and their lawyer must be given due notice of procedural steps and hearings.
- Persons and their lawyer must have sufficient time to gather, present and evaluate relevant evidence:

They must be informed of, and given reasonable opportunity to consider and respond to, the evidence to be used in the procedure, as well as access more generally to relevant information within the possession of the authorities.

They must have the opportunity to present evidence, including particularly about the person's individual circumstances, country of origin, and to refute or mitigate any grounds for exclusion, and to make submissions on the merits as well as any procedural questions.

Government authorities and lawyers have a duty to present evidence in their possession that would be relevant to assessing the truth, particularly when it is to the benefit of the person.

The judge or other decision-maker has a duty, shared with lawyers representing the government and the person, to proactively inquire in search of the truth about the entitlement of the person to international protection.

In relation to evidentiary gaps, the person should be given the benefit of the doubt where necessary and appropriate.

- The person must receive a face-to-face interview or hearing, in a reasonably conducive environment and accompanied by their lawyer, before the person who will decide on their entitlement to international protection. At the interview or hearing the person must be able to enter into the substance of their claim and personal circumstances.
- Where necessary, competent and qualified interpretation and translation services must be made available, including without charge if the person cannot pay, before any decision capable of adversely affecting the individual is taken.
- Procedures should be adapted in light of any vulnerabilities or risk factors in the case, such as for example for survivors of torture, victims of trafficking, survivors of gender-based violence, children, and disabled persons.
- Persons and their lawyers should in all cases be provided in timely fashion with a written reasoned decision. Any decision adversely affecting the individual concerned, including in particular if the claim is rejected or declared inadmissible, should contain both the factual and legal reasoning on which it is based.
- Persons should have an effective right to appeal against any determination that the person is not entitled to international protection, whether arising from ordinary or accelerated procedures.
- A negative decision should be accompanied by notification of the right to appeal and a detailed explanation of the appeal procedure, including and any applicable time limits (which must be of reasonable length and subject to extension in appropriate cases).

6. *On appeal or review, courts must not be limited to assessing only whether the appropriate procedures were legally followed.*

   The judge must be enabled to examine fully the merits of the case, including the determination of status, and to make any order the judge deems necessary to ensure international

protection of an individual entitled to it, or to otherwise remedy aspects of the decision found to have been made in error.

Appeals proceedings should guarantee rigorous scrutiny of both the facts and the law, including as regards the merits of the person's claim to international protection, based on up-to-date information.

If examination of the merits is not automatic in all reviews or appeals under a given national system, the judge must at minimum examine the merits of the case whenever requested to do so by or on behalf of the person seeking protection (when such request is not manifestly unfounded), or the judge is aware of other reasons to believe the initial decision may have been incorrect.

Judges should seek for appellate review to provide oversight, monitor quality, promote consistency, and provide guidance to improve the reasoning of future decisions.

To ensure that that the right to a remedy is both practical and effective, and that the rule of law is respected, judges must be able to play a meaningful and effective role on appeal or review. To this end, appeals should have a suspensive effect on the removal of the applicants from the jurisdiction pending the final decision.

As with other factual and legal questions relevant to the case, the judge must be enabled to inquire into whether a deemed safe country of origin or third country is actually safe in the case of the individual circumstances of the person, and to set aside any presumption in this regard.

7. *From the moment that a person indicates an intention to apply for international protection, or there is otherwise reason to believe that the person may be entitled to such protection, the person has the right to effective and confidential access to competent legal advice and representation, including by an independent lawyer of his or her own choosing.*

   The State has a positive obligation to inform the person of this right.

   Where the person cannot afford to pay for legal advice and representation, independent legal advice and representation should be made available free of charge.

A person need not explicitly reference any form of international protection status to be, in effect, claiming a need for international protection. If there is any reasonable doubt whether a person is entitled to international protection, they should (including particularly for the purposes of application of these Principles) be presumed to be so entitled until such time as the doubt is resolved. States must provide all information needed for persons to be aware of and access international protection procedures, and where

circumstances suggest the person may be entitled to protection, must assess potential entitlement on their own initiative even if the person has not made an express request for such protection.

Legal professional associations and States should cooperate to ensure competent independent legal assistance for those persons who cannot afford to pay for it. Costs of such assistance, to the extent not borne by the legal profession, individual lawyers, or civil society, are ultimately the responsibility of the State.

Effective access to legal assistance should be available at the earliest opportunity, including in border zones, transit zones and reception centers, even before status determination proceedings begin, in order to facilitate access to fair and efficient proceedings. States should facilitate effective face-to-face communication, including where necessary through interpretation and translation services.

Legal counsel should ensure that the person understands his or her rights and responsibilities, the nature and purpose of the procedure, the status and steps of his or her application or process, the possible avenues and opportunities for international protection, and the elements and evidence necessary to establish entitlement to protection.

Lawyers should provide their clients with quality, confidential legal and procedural advice, ensure the person's interests are fully and accurately presented, and seek to ensure that the person's rights are protected and respected throughout the process, including by accompanying the applicant to interviews and hearings, preparing submissions, collecting evidence, and developing and presenting legal arguments.

General safeguards for the role of lawyers, such as the UN Basic Principles on the Role of Lawyers, must equally be respected in relation to refugees and migrants, including among others:

- the right of lawyers to meet and communicate in private with their clients;
- the obligation for State and non-State actors to respect the confidentiality of lawyer-client communications;
- protection of lawyers from intimidation, hindrance, harassment or improper interference;
- ensuring lawyers are able to travel and to consult with their clients freely both within their own country and abroad;
- ensuring lawyers are not subjected to or threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;

- ensuring that where the security of lawyers is threatened as a result of discharging their functions, they are adequately safeguarded by the authorities;
- ensuring that lawyers are not identified with their clients or their clients' causes as a result of discharging their functions;
- ensuring that lawyers have access to appropriate information, files and documents in the State's possession or control at the earliest possible time and in all cases in sufficient time to enable lawyers to provide effective legal assistance to their clients.

Judges and lawyers should work to ensure that processing timelines and interview and proceeding scheduling provide applicants with enough time to retain and effectively consult with a lawyer. This is especially important when the lawyer and client are only able to communicate through an interpreter. To the extent permitted, judges should consider extending the time for legal consultation based on the circumstances of the individual case in order to ensure fairness and effectiveness of the procedures.

Legal professional associations and States should work together to prepare contingency plans for ensuring legal assistance wherever there is a risk of large movements of refugees and migrants.

When advising and representing a person in respect of potential claims to international protection, lawyers should consider and identify all of the relevant grounds, and seek and receive informed instructions from the person.

Given the particular challenges children face in interactions with the legal system, children have a particularly acute need for specialized legal assistance, free of charge, in all matters affecting them.

Judges, lawyers, and legal professional associations should strive to ensure that an applicant is assisted by the same lawyer from the initial reception through the end of the proceedings and, if that is not possible, the new lawyer is familiarized with the case before transfer.

States and legal professional associations should work together to ensure that qualified and competent legal personnel are permanently posted at or near to high traffic international borders and all reception centers and that an up-to-date list of such persons is available at all international borders and reception centers.

While all applicants should ideally have access to a fully qualified and competent lawyer, temporary recourse to alternative legal assistance such as paralegals and law students under the effective supervision of a lawyer may be considered when strictly necessary to deal with insufficient capacity.

If there is insufficient capacity in the legal profession in the country, among other things, the legal profession and the State should consider whether it is possible to facilitate competent practitioners from other jurisdictions to be able temporarily to practice in the country.
In positive group determinations of prima facie eligibility where there is no potential detriment to the individual, individual access to a lawyer may be less necessary, less urgent or less resource-intensive, and legal assistance resources may be distributed to more complex, individual claims in which there is a potential detriment. Such considerations do not apply in any case where the group determination would potentially provide lesser protection than an individual determination would have, and the group determination prejudices any future individual determination.

8. *Every deprivation of liberty of any refugee or migrant must be subject to prompt and automatic judicial review of the lawfulness of detention, with guarantees of fair and effective process in each individual case.*
   The judicial authority must be able to make a prompt and effective order for release if it finds that the detention is unlawful under national law or international human rights or refugee law.
   The detainee has a right to a qualified, independent and competent lawyer to assist in such proceedings.

Principle 8 applies to any detention of a migrant or refugee on any ground, whether criminal, administrative or otherwise. It is without prejudice to the position of many (including the ICJ) that no-one should be deprived of liberty solely on grounds of their immigration status, including in cases of irregular entry. International law prohibits, for instance, detention of a refugee or migrant on the basis of his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status. Refugees and migrants may, at most, be detained for immigration-related reasons only exceptionally. Detention of children on grounds of their or their parents' migration status violates the rights of the child and is incompatible with the best interests of the child, and the detention of children solely for immigration-related purposes should be prohibited in all circumstances. In the case of stateless persons, being undocumented or lacking required immigration / residence permits cannot, by itself, constitute grounds for detention.

International human rights law and standards recognize that anyone who is deprived of liberty by arrest or detention on any grounds has the right to

challenge the lawfulness of the detention before a court and to be ordered released if the detention is found not to be lawful (e.g. ICCPR, article 9(4)). Additionally, those arrested on criminal grounds have the right to be brought promptly before a judge or other judicial officer (e.g. ICCPR, article 9(3)). See also the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Articles 4, 11, 32, 37.

Review of the lawfulness of the deprivation of liberty should include consideration of the legal and factual basis asserted to justify the detention, as well as its necessity, reasonableness and proportionality. In assessing the impact of detention, judges should take into account the age, gender, state of health and other relevant personal circumstances of the individual.

Judges should, in each individual case, as part of determining whether the detention is lawful and non-arbitrary in relation to the facts and law, should fully consider all available alternatives to detention, ensure such alternatives do not in practice amount to detention by another name, and ensure that detention is only ordered as a time-limited measure of last resort when no alternative is available.

International standards emphasize the importance of the promptness of the detainee's access to the court, of the hearing and deliberation by the court, the issuance of a decision, and execution of any order for release. Judges and lawyers should therefore do their utmost to avoid any undue delay at all stages of the process. In general, judicial review should take place no later than 24 to 48 hours after the decision to detain the person. In particular, if the national legal system generally provides for judges to review the lawfulness of detention at the same time as other questions relevant to the applicant's status determination, but the status determination is prolonged, judges have a duty to separately evaluate the question of detention without further delay.

National legal systems should provide for automatic periodic judicial review of the lawfulness, necessity and proportionality of any ongoing detention. The refugee or migrant and his or her representative should be able to attend and provide information and submissions to such periodic reviews.

Judges, lawyers, and legal professional associations should, together with States, ensure that refugees and migrants in detention have unconditional, effective, prompt, and regular confidential access to competent and independent legal assistance, including without charge in cases where the person cannot pay.

egal professional associations should work with states to ensure that an up-to-date list of contact information of qualified legal personnel is available to all persons detained in airport transit zones and at other points of entry.

Lawyers should, to the extent possible, monitor the conditions of detention and ensure the rights of refugees and migrants in detention are being respected and that they are being held in a dignified and humane manner. Judges should, to the extent permitted by national law, exercise a similar monitoring function, and legislators should provide for this where not already provided for. Persons deprived of their liberty must be ensured effective remedies, including judicial remedies, where the conditions of detention do not comply with international standards (see also Principle 10).

9. *Persons lawfully in the territory of a State, and other persons who claim or otherwise may be entitled to international protection, may not be removed involuntarily from the jurisdiction of a State without recourse to a fair and effective procedure.*
   Such persons have a right of access to a qualified, independent and competent lawyer, both in removal proceedings and in cases where the return is said to be voluntary.
   Summary, arbitrary, collective or mass expulsions or removals should be prohibited in national law.

A person is presumptively entitled to international protection whenever the person effectively claims such entitlement, or there are other reasons to believe he or she may be entitled to it.

Principle 9 is based on, among other sources: article 13 of the International Covenant on Civil and Political Rights (ICCPR); non-refoulement obligations arising from for instance articles 6 and 7 of the ICCPR; articles 32 and 33 of the Refugee Convention; and similar provisions in regional treaties and instruments. To the extent that some of these sources contemplate exceptions to certain procedural guarantees in the context of national security or public order, any such exceptions must be strictly construed, and applied only when and to the extent absolutely necessary and proportionate (including that greater restrictions of procedural safeguards may only be applied when lesser restrictions would demonstrably be ineffective). Further, such exceptions are inapplicable in relation to certain grounds for international protection: for example, in relation to the risk of torture.[212]

Judges should ensure in removal proceedings that the record is complete, including where necessary by proactively asking questions of the person and the State, and where possible through independent research, to ensure that justice is done. Judges should consider the individual circumstances of every individual with due diligence and good faith and ensure that adequate

[212] Human Rights Committee, Mansour Ahani v. Canada, No. 1051/2002 (2004)).

justification has been presented, and that the removal is not prohibited under international human rights and refugee law and standards, before issuing a removal order. In particular, obligations of non-refoulement, whether arising under international human rights or refugee law, must be fully respected.

Access to a lawyer in removal proceedings is necessary to ensure the fairness and effectiveness of the process. Access to a lawyer in cases where the return is said to be voluntary is necessary to ensure that the will of the migrant is being exercised voluntarily.

If the consent of a person who claims or otherwise may be entitled to international protection is sought for his or her removal, the person's lawyer (or, if the person is without a lawyer, another independent lawyer) should be present to ensure that any consent to voluntary return processes is fully informed and given free of any coercion and that persons do not sign anything without fully understanding the document's content and consequences.

Particularly in the context of large scale movements, judges should issue temporary protection measures if needed to prevent mass expulsions at borders. Where such measures are not currently recognized in national law, legislators should provide for them.

Judges and lawyers should ensure that any removal orders are provided in writing, in a language the person understands, with the reasons for expulsion and information on how to challenge the removal order.

Judges and lawyers should analyze any readmission agreements entered into by the State, and the factual circumstances, to ensure that no one is removed without effective human rights guarantees. Judges should be confident that no person is removed to a country without a well-functioning asylum system with the resources, infrastructure, and rule of law necessary to guarantee the human rights of the person.

Judges and government lawyers should ensure that persons claiming or who otherwise may be entitled to international protection, and their lawyers, are fully aware of any removal proceedings and any evidence relied upon to justify removal, and should allow the person and their lawyer sufficient time to prepare and submit evidence and arguments against their expulsion. Judges should never allow such a person to be expelled without a reasoned decision making sufficient reference to the relevant legal provisions and the facts of the individual case after fully hearing the person and their reasons against expulsion.

In order to ensure that the role of the courts in relation to such matters is meaningful and effective, in cases where a person challenges a removal order on the basis that it will violate the State's non-refoulement obligations,

the person has the right to an appeal with suspension of the effects of the order pending hearing and decision on the appeal.

5.2 EFFECTIVE REMEDY AND ACCESS TO JUSTICE

1. *Refugees and migrants, like other persons, have at all times and in all circumstances the right to an effective remedy and reparation for violations of human rights, which includes access to the courts and access to legal advice and representation.*

   Refugees and migrants who allege they have been victims of crimes, whomever the perpetrator, also have the right to equal access to justice and equal treatment in the process of investigation, prosecution of such crimes, as well as in any procedures for compensation or other forms of reparation.

Principle 10 applies to all violations of human rights and crimes, not only those related to a person's status as a refugee or migrant. It includes the full range of civil, political, economic, social and cultural rights recognized under international law (as well as relevant regional instruments).

Principle 10 applies both to violations and crimes in the State of ultimate destination, and to those that occur when a refugee or migrant is in transit. These Principles do not directly address questions relating to the territorial jurisdiction of courts to deal with violations or crimes that have occurred in another State.

Refugees and migrants must have effective access to justice for human rights violations, without discrimination. In particular, they must in law and practice have access to all necessary remedies before the domestic courts, on an equivalent basis to nationals of the State.

The right to access to an effective remedy and reparation for violations of human rights, without discrimination, is recognized both by particular treaties (such as the International Covenant on Civil and Political Rights, article 2(3)), and more generally: see for example the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The right to equal access to justice for other crimes is inherent in the non-discrimination clauses of human rights treaties. It is also recognized in instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and is further reflected in article 16 of the Refugee Convention.

Refugees and migrants must have effective access to qualified, independent, and competent lawyers for the purpose of receiving advice and representation concerning alleged human rights violations by or in the State, on an equivalent basis to nationals of the State.

Lawyers and judges should seek to ensure that refugees and migrants are not removed from the State as a consequence of asserting their right to access justice.
Lawyers should consider using strategic litigation to challenge any systemic deficiencies in refugees' or migrant's access to services and to strengthen status determination procedures.
Judges and lawyers should ensure that effective child- and gender sensitive information and procedures for seeking remedies are available.

5.3 IMPARTIALITY, EQUALITY, AND INDEPENDENCE BEFORE THE LAW

1. *Whenever a decision in relation to a refugee or migrant is entrusted to a judicial body, the body must meet international standards of judicial competence, independence and impartiality.*

In line with the UN Basic Principles on the Independence of the Judiciary:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.

The Human Rights Committee, interpreting articles 13 (due process in expulsions) and 14 (independence of judiciary / fair hearing) of the ICCPR, has stated:

The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this

paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.[213]

The Committee has stated that while article 14(1) does not in general directly apply to expulsion and deportation procedures, which are more specifically addressed by article 13 ICCPR, at the same time: The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable. All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.[214]

To be impartial, when assessing the credibility of individuals, judges need to take into account cultural differences, trauma, and other individual circumstances and factors particular to the individual and the country concerned, that may explain behaviors the judge would otherwise infer as reducing credibility, such as lack of details, lack of corroborating documentary evidence, or inaccuracies or inconsistencies in testimony or documentary evidence.
In order to enhance the competence, independence and impartiality of the judiciary and legal process, judiciaries, States, legal professions, civil society, and international and regional agencies should cooperate to ensure initial and continuing training of judges and lawyers on:

- International refugee law and relevant international human rights law,
- National immigration laws,
- The national framework of refugee and immigration processes and procedures,
- Cultural competency, detection and countering of inherent bias, and cross-cultural interviewing skills,
- Country conditions and country of origin information,
- Migration and human trafficking issues, and
- The specific needs and vulnerabilities of persons at heightened risk of abuse (including for instance women, children, persons with disabilities, trafficked persons, abuse victims, torture victims, indigenous persons, and persons subject to discrimination or violence on the basis of their

[213] General Comment no 32, para 7
[214] General Comment no 32, paras 17 and 62

actual or imputed sexual orientation or gender identity), and how to sensitively interact with such persons.

While individual judges should generally remain outside of debate within political institutions about refugee and migration issues, judges and lawyers should be ready when appropriate to insist, both to others within their professions and when necessary to the broader public, on the human rights of all persons, including refugees and migrants, and the fundamental role of independent judges and lawyers in upholding these rights and the rule of law in this context. International, regional and national professional associations, as well as judicial and bar councils, may have a particular role to play in this regard.

With proper protections to ensure independence and impartiality, as well as full procedural safeguards of fairness, specialized tribunals with expertise in immigration and asylum law can be a further means of ensuring effective and efficient access to justice.

2. *Judges and lawyers should ensure that refugees and migrants have access to a qualified and independent interpreter in preparation for, during, and if relevant following, all proceedings including status determinations, detention proceedings, removal proceedings, and appeals.*

For the right to procedural fairness and to an effective remedy to be meaningful, and to ensure the quality and justness of judicial decisionmaking, persons affected by such proceedings must be able to understand and to participate as regards both the decision-maker and the person's lawyer; where the person is not competent in the language used in the proceeding, interpretation becomes necessary.

All court decisions and similar legal documents relevant to the status or rights of a person should be translated into and presented to the person in a language the person is known to understand.

Legal professional associations, individual lawyers, judges, and administrative officials should ensure that interpreters are competent, independent, and not biased in any way against refugees and migrants. They must ensure that there is sufficient ability for meaningful communication between the individual, their lawyer, and the decision-maker throughout all aspects of the process.

3. *Judges and lawyers must ensure equal treatment, equal protection of the law, and equality before the law, without discrimination, in accordance with international standards.*

   Formal equality of treatment is not enough; judges and lawyers should consider and counter-act the potential for

formally neutral measures or standards to result in indirect discrimination in their actual impact.

Consistent with the principle of non-discrimination, the rights of those at heightened risk of discrimination or other human rights violations and abuses must be ensure at all times, including but not limited to: persons with disabilities; women; children; trafficked persons; stateless persons; victims of torture and other such abuses; members of national, ethnic, religious or linguistic minorities; indigenous persons; stateless persons; persons subject to discrimination or violence on the basis of their actual or imputed sexual orientation or gender identity.

Judges and lawyers should recognize and correct any real disadvantages a person who claims or otherwise may be entitled to international protection might have and, to the extent possible, should institute any necessary countervailing measures to help reduce or eliminate the obstacles. (Where the judge is not able to institute such measures directly, he or she should at minimum affirm the need for such measures and take appropriate remedial action in their absence.)

Judges should consider the heightened risks of violations of fundamental rights upon return to their country of origin of such persons due to their specific vulnerability.

Judges and lawyers should be aware of, advise on, and consider the variety of claims that might be available to different applicants especially where there may be additional options for certain classes of people including women, children, and trafficking victims.

Judges and lawyers need to be aware of the special vulnerabilities of those in detention such as children who may be more likely to withdraw their claims and agree to return as a result of misunderstandings or the threat of prolonged detention or uncertainty.

Judges should be aware of child-specific forms and manifestations of persecution entitling the child to protection under international law. In matters relating to children, judges should make the best interests of the child a primary consideration. Judicial procedures should be adapted to the specific needs of children. Determination of the status of unaccompanied or separated children should be treated with urgency, as should cases in which the age of a child is being disputed. Legal assistance should be assured age determinations processes.

Legal professional associations should work with States to develop gender and age sensitive policies and capacities to ensure the rights and address

the particular needs of children, prevent separation of families, and prevent and respond to cases of gender-based violence.

Lawyers should ensure that female asylum-seekers are given the opportunity to lodge an individual application separate from male relatives, have the right to be given their own legal advice, and are given the opportunity to be interviewed in private and separately from their male relatives and by a female interviewer, with similarly separate hearings if desired.

In assessing credibility judges must fully consider and take account of sensitive circumstances and any particular vulnerabilities of or risks to the individual, including how disability or trauma can affect memory, the manner in which evidence is given, and the way questions are answered. Judges should tailor their inquiry and questioning appropriately to the needs of the applicant. Judges and lawyers should ensure that the interview and hearing environment is not intimidating, hostile, or insensitive to those with particular vulnerabilities.

Any disability or particular vulnerability should not negatively affect access to legal aid, the right to be present and heard, or any of the other rights set out in these Principles.

Judges and lawyers should strive to minimize re-victimization or trauma. When interviewing those at heightened risk, judges and lawyers should generally use open-ended questions that enable the more difficult issues to emerge and the individual to approach their trauma in a manner they are most comfortable with

Especially regarding children, judges should be aware of and fully consider any conflicts of interest between the government agencies making assessments as to age and eligibility for social services and the outcome of that decision.

Judges should seek to ensure that refugee and migrant children are placed in the same facilities as and have equal access to social services and education as would be a child national in need of state protection.

It is the role of the judge and the lawyer to protect individuals against any risk of abuse arising from the imbalance of power between the government and the individual.

Where a person is unable to read, decisions regarding the person should be communicated to him or her orally, in addition to the written judgment or order.

5.4 NATIONAL JUDICIARIES AND INTERNATIONAL LAW

1. *Judges should be aware of the international human rights and refugee law and standards applicable to the State. Judges should be aware that, as an organ of the State, an act (or*

failure to act) by the judge that is inconsistent with international law will place the State in violation of its international legal obligations. Judges should accordingly seek to ensure that all decisions and other acts or inaction by the judge are fully consistent with the State's international legal obligations.

2. *In order that judges are not asked to apply national laws that potentially would lead the judge to violate international human rights or refugee law, legislators and executive officials should regularly review, and if necessary amend, all laws and regulations applicable to refugees and migrants to ensure that the national legal framework is fully consistent with the obligations of the State under international human rights and refugee law.*
3. *When a judge is confronted with an apparent conflict between national and international law, in which an application of national law by the judge could constitute a violation by the State of its international human rights or refugee law obligations, the judge should use any judicial means and techniques or discretion at his or her disposal to avoid the potential violation, including for instance interpretative techniques and constitutional doctrines, remedies or references.*

If the judge is of the opinion that a contravention would be an inescapable outcome of applying the domestic law, the judge should make this clear to the person, his or her legal representative, and the government, and:

(1) where the legal act or omission would make the adjudicator accountable for or complicit in a felony under international law, the adjudicator should reject to do the act or abstain from from the oversight, and mention his or her reasons for such;

(2) where the legal act or omission would comprise or add to a violation of international human rights or refugee law not constituting a crime under international law, the adjudicator, if he or she does not decline to act (or to omit to act), should at least clearly state in the decision, order or judgment that he or she believes the act or omission to be in the infringement of the State's international human rights or refugee law obligations but that the adjudicator considered that he or she was nonetheless inescapably obliged by domestic law to make such a ruling. In such conditions, any control to defer the

function of the decision, order or judgment so as to maintain the circumstance of the affected individual awaiting appeals to domestic or international bodies should be exercised.

Judges, judges associations, lawyers, and legal professional associations, in their respective roles as guarantors of human rights, should as appropriate promote or support ratification or accession to and domestic implementation of international instruments for the protection of refugees and migrants.

CONCLUSION

Access to Justice cannot be completely effective without a collaborative effort of not just countries of destination and countries of origin, but also an efficient and paramount role of courts, tribunals, judges and lawyers. Not just these, but civil societies and other international organizations' role also become pertinent in the overall successful realization of the rights of refugees and migrant workers. At the same time, in quest to facilitate effective rights to these vulnerable groups, the rights of locals of countries of destination must also be taken care of.

Migration, be it in the form of the issue of refugees or migrant workers, will not come to an end. More so, in the highly globalized world it is highly probable that the rate of movement across borders will only increase. But, human rights of all the persons are most fundamental which cannot be disregarded in any instance.

Human rights of all the persons born on this earth are safeguarded by various international, national and regional instruments. All the persons not just include vulnerable groups like refugees and migrant workers, but also the residents of those countries to which these groups migrate. While the issues related to State Sovereignty and rights of migrants and refugees are highly contrasted and debated, the rights of those who actually accommodate the refugees and migrants are not much discussed about.

The human rights of refugees and migrant workers look beautiful through various international and regional instruments. However, in reality there are serious violations of these rights. There has been a constant effort to bring out a case for real instance gross violation of such rights. Multitude of cases and examples reflect the same. Moreover, the difference in violation of rights within migrant worker groups i.e., of skilled and unskilled migrants is of exemplary importance. The desire of developed countries to be the first in the race leads to such difference in treatment of the migrant workers on the basis of their skills. Again, the debate bends to the power orientation of the world. Developed world is able to control the rights of the people moving at their whims and fancies.

Every one of these rights are human rights to which all people, regardless, are entitled. People don't procure them since they are natives, specialists, or based on a specific status. Nobody might be denied of their human rights since they have entered or stayed in a nation in negation of the residential migration rules, similarly as nobody might be denied of them since they look like or are outsiders, kids, ladies, or don't talk the nearby language. This rule, the comprehensiveness of human rights, is an especially important one for transients.

The truth, in any case, is that rights are deceptive if there is no real way to guarantee their execution. A national legitimate framework that can give compelling access to equity and solutions for infringement of human rights is

thusly basic. The entire contraption of lawful principles, legal counselors, judges, investigators, legitimate professionals and activists must work successfully to furnish transients with lawful solutions for infringement of their human rights.

More often than not, national enactment won't furnish them with a cure, or will make numerous deterrents to its entrance, for example, the risk of a programmed ejection or expelling once the transient contacts the specialists. In this world, transients have rights, yet no or little approach to utilize them or request their regard. They are lawfully voiceless.

Universal law—and, specifically, global human rights law and worldwide outcast law—may give a, yet inadequate, response to the issue. States' legitimate frameworks are ending up progressively open to the impact of worldwide law. In numerous nations it is currently conceivable to conjure, somehow, global law in residential courts so as to guarantee the regard and usage of human rights, including for transients. Indeed, even in nations where that is beyond the realm of imagination, or when the worldwide human rights law case has flopped in the national framework, if the nation is involved with a global or territorial human rights arrangement, it is regularly conceivable to challenge the State at the universal dimension for its inability to do as such. Worldwide law can be a useful asset for change: either for the real circumstance of the individual vagrant, through review in local courts, or for the headway of approach or laws that can enhance transients' circumstance, through cases before global systems.

SUGGESTIONS AND RECOMMENDATIONS FOR CHANGE

1. **FOR COUNTRIES OF DESTINATION**

a) Suggestions related to Legal concerns

- There is a need for a minimum qualification or sensitization of interpreters in cases of physical and sexual abuse of domestic workers and refugees, particularly women and children.
- E-Locker must be provided to all migrant workers who have approved visa, irrespective of it being professional or visit visa, in cases of confiscation of documents. There must also be regular updation of e-Locker with the scans of labour card, passport, UID, ATM card, and other visa documents where applicable.[215]
- Migrant Workers must be allowed to register the case in case of necessity at the departments so related without unnecessary intervention of the embassy.
- In cases of prosecution, more transparency should be brought it. The embassy must be informed of such cases and access to view the information so passed to the Embassy should be allowed.

b) Suggestions related to the Administrative Concerns

- Maximum possible attempt to minimize the language barriers should be made both in case of refugees and migrant workers.
- For offices who have to deal with migrant workers and refugees directly, those people should be hired who could communicate with workers and refugees lodging grievances or who could speak English.
- It should be the duty of States to provide quality interpreters during court hearings, processing, verdict and documentation.
- Moreover, the countries of destination should prioritise, shorten and simplify litigation process in cases of refugees and migrant workers.
- For cross border claims, a cross border mechanism should be established.
- Capacity of related departments and authorities should be developed on priority basis.
- Special training should be provided to those who have to conduct consultations with embassies, police, legal officials with regards to available services for access to justice for refugees and migrant workers.
- Inter-departmental coordination of all services, complaints registration, detainment and deportation, and resolution of legal cases as an urgent and immediate requirement should be made.

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[215] Challenges on Access to Justice for migrants Written Contribution of Migrant Forum in Asia to the Special Rapporteur on the Human Rights of Migrants on the issue of Access to Justice and Remedies for Migrants

- Budget allocation for the training of the government officials and the audit training should be timely made.
- The role of the first Point of Contact at the ministries and departments at the country of destination should be prioritized. Their capacities should be clearly developed to deal with refugees and migrants with the minimum capacity of speaking English.
- A higher authority should be readily available in cases of trouble or difficulty or refusal in registering a case.

c) Suggestions related to Financial Concerns

- Paralegal and pro bono services should be provided for migrant workers and refugees.
- Legal fees and dues of processing and registration for low-income and domestic workers should be lowered.

2. **FOR COUNTRIES OF ORIGIN**

a) Suggestions related to Capacity Building

- Establishment of Legal Clinics (Separate for Domestic Workers/Skilled/Criminal) free of cost for migrant workers.
- Establishment of Legal Assistance Fund where both countries of origin and destination provide financial support throughout the entire process.
- State funding of lawyers
- Widening the scope of support provided by diplomatic missions to migrant domestic workers facing exploitation or abuse.

b) Suggestions related to Legal Concerns

- Developing a simplified procedure in accessing justice that is easy, quick and efficient with guaranteed interpreter and admission of bona fide defence advocates.
- Embassies need to hire one-time Legal Consultant to draft possible defence for the common cases that are usually encountered and faced so it facilitates the process prior to court hearing.
- Ensure speedy execution of court judgements
- Provide shelters for embattled migrant workers awhile awaiting their cases.

3. **FOR DOMESTIC WORKERS**

a) Suggestions related to Gender sensitization for all stakeholders

- Awareness should be raised of domestic workers on all legal and judicial services upon arrival of migrants and pre arrival.
- There should be increased presence of women in legal process. Also, special care should be taken care of elderly people.

- Domestic workers should be allowed to present their case and adequate interpretative facilities should be provided in this regard.
- Domestic workers should be educated and sensitized on the use of internet, gadgets, mobile phones, hotline to document evidence and taking care of personal documents.

b) Suggestions related to Protecting Mechanisms

- There should be increased vigilance of agencies and sponsors on granting visit visas to women in lieu of crimes like prostitution and such.
- Labour inspection should be improved by recognizing the employers home as a work place.
- Provision of psycho-social support during case processing should be increased on a priority basis.
- Accessible and easy educational materials should be provided.
- The system for case financing and availability of mission staff should be strengthened and improved.

c) There should be provisions for free legal aid and representation of domestic workers.

d) The access to lawful work should be provided until case finalizes and to follow up on the case, cross border, if they are sent back.

4. For Civil Society Organizations (Both Destination and Origin Countries)

- Collaborative efforts from the CSOs of both the countries are required in such cases of movement across borders.
- Members of diasporas' honorary counsels' should be allowed to sign documents and work in limited official capacity and support so as to authenticate the work done by them, lessening the administrative burden and thereby attempting to improve overall efficiency.
- Embassies should be allowed to provide special status or recognition to enable migrants and refugees to assist other migrants and refugees at legal cases as a trustworthy ally to governments and a representative of civil society.
- CSOs should be allowed to take the responsibility of raising awareness and funds with the help of high skilled and better off migrants and refugees for the welfare of those who are facing unfair criminal charges.
- Another important role of CSOs is to raise awareness on domestic workers rights, international conventions, national laws and policies with key stakeholders (employers, police, foreign embassies and consulates,

parliamentarians, media, domestic workers and migrant workers groups). These should be empowered in an efficient manner without restrictions to perform the above mentioned role effectively.

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