INTERNATIONAL MIGRANTS BILL OF RIGHTS: A COMMENTARY

PREAMBLE

RECALLING the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth, and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world;

CONSIDERING the obligation of States under the Charter of the United Nations and the International Conventions on Human Rights to respect, protect and promote the human rights and fundamental freedoms of migrants;

RECOGNIZING that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone, including migrants, may enjoy economic, social, cultural, civil, and political rights;

EMPHASIZING the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for migrants to be guaranteed their full enjoyment without discrimination of any kind;

RECALLING the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities, the International Convention for the Protection of All Persons from Enforced Disappearance, and International Labour Organization Conventions concerning Decent Work for Domestic Workers, concerning Migration for Employment and concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, the Convention Against Transnational Organized Crime, and the Protocols thereto, including the Palermo Protocol to Prevent Suppress and Punish Trafficking in Persons, and other relevant international and regional instruments;

RECOGNIZING the legitimate interest of States in controlling their borders and that the exercise of sovereignty entails responsibility, including in the adoption of appropriate and comprehensive migration policies;

REALIZING the importance and extent of the migration phenomenon, which involves millions of individuals and affects all States in the international community;
RECOGNIZING that migrants have special needs that may require special accommodation in certain regards;

AFFIRMING that a balance should be struck between the interest of States in preserving the cultural heritage of their peoples and the interest of migrants in preserving their cultural identity;

REALIZING that the migrant, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights contained herein;

CONSIDERING that migrants bring special contributions to their communities, that the ability to participate in and influence one’s community is a significant part of human dignity;

RECOGNIZING the importance of governmental cooperation with civil society for upholding the rights of migrants and for promoting their participation in the civil, political, economic, social, and cultural spheres with equal opportunities, in every country;

URGING governmental, administrative, civil society, and other bodies, and actors and individuals dealing with migrants to implement this Bill in the recognition and development of principles, standards, and remedies affecting migrants;

RECOGNIZING that the rights in the present Bill shall be subject only to lawful restrictions permitted by other relevant international instruments;

AFFIRMING that nothing in this Bill shall be interpreted as restricting, modifying, or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law;

AFFIRMING that nothing in this Bill shall be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Bill; and

CONVINCED that a comprehensive and integral framework protecting and promoting the rights and dignity of all migrants will make a significant contribution to the international protection of their rights:

Commentary

(1) Paragraph 1 - RECALLING: The first paragraph encompasses introductory preambular language from a number of complementary international and regional human rights agreements to establish that the principles of the UN Charter are at the center of the

(2) Paragraph 2 - CONSIDERING: The second paragraph recalls language of complementary agreements to stress the obligation of States to promote universal respect for, and observance of, human rights and freedoms, and incorporates the contemporary

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2 International Covenant on Civil and Political Rights pmbl. ¶ 2, Mar. 23, 1976, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, …”) (hereinafter “ICCPR”).
6 Convention on the Rights of the Child pmbl. ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, …”) (hereinafter ”CRC”).
8 European Convention for the Protection of Human Rights and Fundamental Freedoms pmbl. ¶ 4, Nov. 4, 1950, 213 U.N.T.S. 221 (“Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world…”) (hereinafter “ECHR”).
9 UDHR, supra note 1, pmbl. ¶ 6. (“Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, …”) ; ICCPR, supra note 2, pmbl. ¶ 5. (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, …”); ICESCR, supra note 3, pmbl. ¶ 5 (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, …”); African Charter on Human and Peoples’ Rights pmbl. ¶ 11, June 27, 1981, 1520 U.N.T.S.
‘respect/protect/promote’ language, and adds a reference to the Conventions. It further makes explicit what is only implicit in existing international law: that migrants are entitled to enjoy the same rights and freedoms enjoyed by other persons.

(3) **Paragraph 3 - RECOGNIZING:** The third paragraph recognizes that the conditions necessary to achieve enjoyment of rights enunciated in complementary agreements are also necessary to achieve the enjoyment of the rights of migrants.

(4) **Paragraph 4 - EMPHASIZING:** This fourth paragraph embodies the principle of equality and non-discrimination. It borrows paragraph (c) of the preamble of the Convention on the Rights of Persons with Disabilities, affirming the nature of human rights as universal, indivisible, interdependent and interrelated and tying rights to the duty of non-discrimination, and applies the language specifically to migrants.

(5) **Paragraph 5 - RECALLING:** The fifth paragraph recognizes, through an upward reference, that the IMBR is fundamentally rooted in, builds upon and incorporates the core international human rights and labor agreements.

(6) **Paragraph 6 - RECOGNIZING:** The sixth paragraph recognizes that States have a responsibility to manage migration in a manner that is consistent with international
human rights law. It also acknowledges that the IMBR will assist governments in providing for the security and wellbeing of persons within their territory.

(7) Paragraph 7 - REALIZING: The seventh paragraph is an adaptation of the seventh preambular paragraph of the ICRMW. It acknowledges the importance and extent of global migration and stresses that it affects all States.

(8) Paragraph 8 - RECOGNIZING: The eighth paragraph mirrors the fourth preambular paragraph of the CRC. It justifies a document dedicated to the rights of migrants by acknowledging that migrants typically move in a new, unfamiliar and less secure world.

(9) Paragraph 9 - AFFIRMING: The ninth paragraph, rooted in the sixth preambular paragraph of the World Cultural Heritage Convention (UNESCO), conveys that migrants bring value to their receiving States through their cultural identity and diversity.

(10) Paragraph 10 - REALIZING: The tenth paragraph is an adaptation of the sixth preambular paragraph of the ICCPR. It recognizes that, while the rights contained herein are rights to which all persons, without exception, are entitled, the rights of migrants may remain illusory if their implementation is not claimed.

(11) Paragraph 11 - CONSIDERING: This paragraph refers to the civic rights of migrants. This is a general provision, which acknowledges that comprehensive protection of migrants’ human rights depends in part on the connection between the individual and the State. The paragraph also highlights that participation in one’s community is an element of the realization of human dignity.

(12) Paragraph 12 - RECOGNIZING: The twelfth paragraph is an adaptation of the language in CRPD preambular paragraphs (l) and (y). It acknowledges the critical role of the civil society sector in upholding the rights of migrants and urges governments to collaborate with civil society in the development of policies and principles affecting migrants.

(13) Paragraph 13 - URGING: This Bill is both a compilation of existing human rights norms and a statement of the continuing evolving standards of human rights. In this respect, the thirteenth preambular paragraph encourages all institutions and individuals dealing with migrants or charged with the implementation and protection of human rights and to apply the rights, standards and remedies enumerated in this document as appropriate. In applying any remedies enumerated in this Bill, if more favorable remedies exist on the national level or in other human rights documents, those more favorable remedies should be applied.

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17 ICRMW, supra note 16, pmbl. ¶ 7.
18 CRC, supra note 6, pmbl. ¶ 4;
19 UNITED NATIONS ENVIRONMENTAL, SCIENTIFIC AND CULTURAL ORGANIZATION, World Cultural Heritage Convention, pmbl. ¶ 6 (Nov. 17, 1972).
20 ICCPR, supra note 2, pmbl. ¶ 6; ICESCR, supra note 3, pmbl. ¶ 6.
21 CRPD, supra note 7, pmbl. ¶ (l), (y).
(14) **Paragraph 14 – RECOGNIZING:** The fourteenth paragraph emphasizes that only lawful derogations of the rights in this Bill are permitted. Some rights are subject to narrow limitations in situations that amount to public emergencies that threaten the life of the nation, such as certain situations of armed conflict. Other rights in the Bill are non-derogable, such as the right to life and the right to be free from slavery.

(15) **Paragraph 15 – AFFIRMING:** The fifteenth paragraph is a savings clause adapted from Principle 2 of the Guiding Principles on Internal Displacement. The purpose of this paragraph is to preserve the existing legal obligations of States and to ensure that the IMBR sets a minimum standard. More favorable provisions in international, humanitarian, regional, or domestic law shall not be impaired by the application of the rights in this Bill.

(16) **Paragraph 16 – AFFIRMING:** The sixteenth paragraph explicitly applies the prohibition of abuse of rights principle to the human rights enumerated in the IMBR. This clause forbids the State and any entity or person from using provisions of this Bill to deprive another person of access to and enjoyment of the human rights herein. The prohibition of abuse of rights is a well-established principle of international law and is included in many foundational human rights instruments, including the ICCPR and ICESCR. It was initially formulated as Article 30 of the UDHR, in part in response to groups with “nascent nazi, fascist or other totalitarian ideologies” using enumerated freedoms like speech to oppress and destroy the rights of other groups. The principle is generally invoked to prevent groups from using the freedoms of speech, assembly, and association to negate or destroy others’ human rights.

(17) **Paragraph 17 - CONVINCED:** The seventeenth paragraph, mirroring the fifteenth paragraph of the ICRMW, acknowledges that a unified document enunciating the rights of all migrants is a novel contribution to the field of international human rights law that will further efforts to respect, protect, and promote the rights of migrants.

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23 Guiding Principles on Internal Displacement, *infra* note 26, art. 2.
24 ICCPR, *supra* note 2, art. 5; ICESCR, *supra* note 3, art. 5; UDHR, *supra* note 1, art. 30; see also ECHR, *supra* note 8, art. 17; Charter of Fundamental Rights of the EU Art. 54; ICRMW, *supra* note 16, art. 81(2).
26 Id.
ARTICLE 1
DEFINITION OF MIGRANT

(1) The term “migrant” in this Bill refers to a person who is outside of a State of which he or she is a citizen or national, or in the case of a stateless migrant, his or her State of birth or habitual residence.

(2) The present Bill shall apply during the entire migration process of migrants.

Commentary

(1) This Article provides a purposefully broad and inclusive definition of “migrant.” Paragraph 1 establishes that “migrant” refers to individuals who are outside of the territory of the State of which they are a citizen or national, or in the case of stateless migrants, the State of birth or habitual residence. This definition captures stateless persons who have left a country to which they are indigenous or from which they are habitual residents. Thus, individuals are migrants regardless of whether their presence is temporary, lawful, for protection, or for economic reasons, etc.

(2) This definition does not include individuals who are present in the territory of a State where they hold secondary citizenship or nationality. It also does not apply to individuals who migrate – forcibly or voluntarily – within the borders of a State in which they are citizens, nationals or habitual residents. This broad definition applies to all Articles within the IMBR, except when particular enumerated rights are qualified to apply to one or more specific categories of migrants.

(3) Under current international law, there is no definitive, legal definition of who is considered a migrant for the purposes of human rights protection. Current international legal instruments related to the rights of migrants remain largely unconnected, while specific protections are limited to subcategories of migrants, such as refugees and asylum seekers or migrant workers. The term "migrant" advances the notion that all types of migrants are entitled to a unified set of basic protections regardless of their individual circumstances. The current categorizations do not articulate the protections that should apply to persons who are outside of their countries of origin or habitual residence or for stateless migrants, their country of birth or habitual residence. The IMBR bridges this gap in international human rights law.

(4) This article also describes the scope of the IMBR by clarifying that the IMBR applies to the entire process of migration of migrants. Thus, the IMBR applies during all stages of the migration process, including preparation for migration, departure, transit, admission, stay in a host State, repatriation, and return to the State of nationality.

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29 ICRCM arts. 2, 3, 6; Convention Relating to the Status of Refugees art. 1A, July 28, 1951, 189 U.N.T.S. 150.
Paragraph 1: The broad definition of migrant in Article 1 seeks to encompass definitions from a number of complementary international and regional instruments. These include the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention), the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention); the Charter of Fundamental Rights of the European Union (EU Charter); the Organization of American States’ (OAS) Cartagena Declaration on Refugees (OAS Declaration); the Organization of African Unity’s (OAU) 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention); and additional international instruments relating to non-citizens.

Persons with Special Protection under International Law: In line with the wide definition of "migrants," persons who are entitled to special protection under international law will receive the "most favorable standard." Nevertheless, if for any reason, de jure or de facto, the special protection ceases, these persons shall ipso facto be entitled to the benefits of the IMBR if they remain present within the territory of a State of which they are not citizens or nationals.

Persons with Special Status under International Law: Forced migrants – the term “migrant” in Paragraph 1 includes forced migrants for whom international or municipal law accords special status, including refugees, asylum seekers and the temporarily displaced, as ascribed both in international and regional treaties, agreements and conventions. Migrants, therefore, include refugees and asylum seekers who qualify for refugee status under the criteria set forth in the 1951 Refugee Convention, regional

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30 ICRMW, supra note 16, arts. 2, 3, 6.
38 See infra Commentary to Art. 11.
39 Pursuant to Article 1D of the 1951 Refugee Convention, supra note 24, refugees include persons who are “at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance,” as well as refugees “ipso facto… entitled to the benefits” of the 1951 Refugee Convention because the “protection or assistance” they receive “from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees has ceased for any reason,” without their position “being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.” See, e.g., UNITED NATIONS HIGH
instruments and agreements, and municipal legislation, as well as under any extended mandate of the United Nations High Commissioner for Refugees (UNHCR). Additionally, migrants include refugees or asylum seekers granted refuge under temporary international, regional or municipal protection schemes, or whose claims remain under review.

(8) The designation of “migrant” also applies to forced migrants who do not qualify for special status under international law, but nevertheless are forcibly displaced to, or are compelled to, find refuge in the territory of another country. The term “migrant” equally refers to stateless persons who are outside of a State of birth or habitual residence. Due attention should be given to the special relevance of the IMBR for the protection of migrants who do not enjoy the privilege of having the support of their country of origin, regardless of whether it ceased to exist or refuses to offer support.

(9) Lawfully Settled Migrants: The term migrant also encompasses persons who qualify for a durable legal status that entitles them to long-term residence, in compliance with host State immigration laws, as well as individuals who are de facto permitted to settle in spite of a specific residency status to the contrary. Paragraph 1 also applies to spouses who migrate for marriage. Migration for marriage primarily, but not exclusively, affects women. This phenomenon is noted in particular, because such migration arrangements

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40 UNHCR’s current extended mandate applies to individuals “outside their country of origin or habitual residence and unable or unwilling to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order,” including for example “foreign domination, intervention, occupation or colonialism.” United Nations High Commissioner for Refugees, Refugee Status Determination: Identifying Who is a Refugee 34 (2005).

41 The term ‘forced’ “is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.” Prosecutor v. Stakić, Case No IT-00-39-T, Trial Chamber I, Judgment, 729 (Sept. 27, 2006).

42 Such migrants include forcibly displaced individuals who have sought refuge because of violations of human, “economic, social and/or cultural rights, where victims perceive that survival in minimally acceptable conditions is at risk or impossible,” or whose claims have not yet been filed, have been rejected or are considered inadequate, yet are still present in a country in which they are neither citizens, nationals nor habitual residents. P.A. Taran, Human Rights of Migrants: Challenges of the New Decade, in The Human Rights of Migrants 29 (International Organization of Migration 2001).

43 Article 1 incorporates the 1954 Statelessness Convention definition, which holds that a “stateless person” means a person who is not considered as a national by any State under the operation of its law.” Convention relating to the Status of Stateless Persons, supra note 26, art. 1. It should be noted that stateless individuals who do not fall under the IMBR are nonetheless entitled to the full spectrum of human rights enshrined in the UDHR and outlined in international and national instruments, including the 1954 Statelessness Convention and the 1961 Convention on the Reduction of Statelessness.

44 Such persons include, for example, lawful permanent residents, recognized and intending immigrants, lawful long-term non-immigrant residents, and other individuals with recognized permanent status.
have the potential to make persons “vulnerable, since their legal status is linked to that of” another person.\textsuperscript{45}

(10) \textit{Lawful Temporary Migrants}: Paragraph 1 does not distinguish between migrants based on length of stay. Therefore, the definition of migrant includes persons intending to lawfully remain in the territory of another state temporarily, because such persons are equally entitled to the rights enumerated in the IMBR, including equal protection, due process and protection against discrimination. Such persons include, for example, tourists; people conducting business for a temporary period of time, including investors;\textsuperscript{46} students and trainees;\textsuperscript{47} and artists present within the territory of a State of which they are not a citizen or national. Nevertheless, length and original purpose of stay may serve as a relevant criterion for distinction in various contexts, as mentioned, for instance, in the commentary to Article 2(4). The IMBR also applies to irregular migrants that were, for a certain period, under regular status that excludes protection by other international instruments (such as students or tourists).

(11) \textit{Migrant Workers}: Paragraph 1 applies fully to “migrant workers” and incorporates the definition of migrant worker in the ICRMW.\textsuperscript{48} The IMBR adopts a broad definition of migrant to ensure a uniform standard of treatment.

(12) \textit{Irregular Migrants}: Paragraph 1 encompasses migrants who are not lawfully present in a State of which they are not nationals or citizens. Such persons include undocumented migrants; individuals with expired status; individuals “who enter without following required immigration procedures;”\textsuperscript{49} individuals “who enter as non-immigrants and then remain beyond the limits of their permission to remain,”\textsuperscript{50} or persons who otherwise lack the requisite documentation to remain. The term migrant also refers to irregular migrants who may be smuggled,\textsuperscript{51} trafficked,\textsuperscript{52} or otherwise irregularly entered


\textsuperscript{46} \textit{But cf.} ICRMW, supra note 16, art. 3(c) (excluding “persons taking up residence in a State different from their State of origin as investors” from the benefits of the Convention).

\textsuperscript{47} \textit{But cf. id.} The IMBR recognizes “students and trainees” as migrants, unlike ICRMW art. 3(e), which excludes these two categories of migrants.

\textsuperscript{48} ICRMW, supra note 16, art. 2. (“The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”)

\textsuperscript{49} Under the Convention, the migrant worker category explicitly includes frontier workers; seasonal workers; seafarers; workers on offshore installations “under the jurisdiction of a State of which [they] are not . . . national[s]”; itinerant workers; project-tied workers; specified-employment workers; and self-employed workers.

\textsuperscript{50} David Weissbrodt, \textit{Protection of Non-Citizens in International Human Rights Law}, in \textit{INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES} 221, 229 (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007).

\textsuperscript{51} Id.

into a State where they are not nationals or citizens. A migrant’s unlawful entry into and presence within a State do not automatically abrogate or otherwise limit rights provided to all migrants in the IMBR, unless specifically noted otherwise.

(13) Defining who qualifies as a migrant brings to the fore important issues regarding the origins, destinations, patterns, volume and intensity of global migration. Cognizant of the complexity of international migration, the IMBR has purposefully provided a broad and encompassing definition. In this context, the IMBR and the commentary suggest a dynamic blueprint for indentifying various types of migration in a changing, global world. The underlying premise of Paragraph 1 is that migrants are entitled to human rights protections, regardless of their nationality, the cause of their migration, lawfulness or irregularity of their presence, or the temporary versus longstanding nature of their stay.

(14) Article 1 highlights important questions as to when an individual ceases to be a migrant. The designation of “migrant” ceases to apply when a migrant either returns to settle in their country of nationality, citizenship or habitual residence, or when he/she naturalizes in the State in which he/she is resident and thus no longer meets the definition of migrant. 53

(15) Paragraph 2: The language clarifying the scope of the IMBR in paragraph 2 is rooted in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). 54

(16) The broad language of paragraph 2 affirms that the rights of migrants endure throughout the entire migration process. The migration process includes various stages of migration during which migrants may be particularly vulnerable to certain abuses. During the entirety of his or her migration, a migrant may pass through or remain in the territory or custody of multiple States, or may interact with States in locations outside of their sovereign territory, such as the high seas. Paragraph 2 clarifies that the migrant is the possessor of the rights contained in the IMBR regardless of his or her geographic location or relationship to the sovereign in question.

(17) Paragraph 2 applies the rights’ construct to the entire migration life-cycle. While destination countries have the primary obligation to safeguard the rights of all persons on their territories, abuses often start in countries of origin, particularly in the process of migrant worker recruitment. Protecting migrants’ rights as human and labor rights is also

and the relationship with the smugglers ends upon arrival. Trafficked persons, although they may consent to transportation, do so under coercive and deceptive conditions, making the consent meaningless. Most importantly, victims of trafficking are not free upon their arrival. Instead, they continue to be exploited for profit.” DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 207 (2008). See also Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S 271.

52 Trafficking “involves the transportation of human beings for illicit purposes, such as sexual exploitation, child labor, forced labor, sweatshop labor, and other illegal activities.” Weissbrodt, supra note 44, at 207. See Palermo Protocol at 60.

53 The acquisition of foreign citizenship does not automatically or implicitly forfeit an individual’s right to citizenship in his or her home country. See infra Commentary to Art. 13(7).

54 ICRMW, supra note 16, art. 1(2).
a shared responsibility of countries of origin, transit and destination, and the international community as a whole.\(^{55}\)

(18) *Preparation for Migration and Departure*: Paragraph 2 applies fully to the period during which a migrant makes preparations to migrate in his or her country of origin. In particular, Paragraph 2 seeks to protect migrants during migrant worker recruitment.

(19) *Transit*: Paragraph 2 encompasses migrants in transit from their country of origin to a destination country, without regard to the duration of stay in the country where a migrant is currently present. In this regard, the IMBR seeks to protect in particular against abuse of migrants during smuggling, trafficking in persons, and while in transit through particularly inhospitable or perilous routes.

(20) *Admission*: Paragraph 2 clarifies that the rights contained in the IMBR remain attached when a migrant seeks admission to a State. In this context, in particular, the IMBR seeks to protect against unlawful detention or expulsion of migrants seeking admission to a State.

(21) *Stay in a host State*: Paragraph 2 applies fully to the entire duration of a migrant’s stay in a destination State.

(22) *Repatriation*: Paragraph 2 also applies during the process of voluntary or forcible repatriation of migrants. The IMBR seeks to protect the rights of migrants during expulsion or removal, and in particular, during the involuntary repatriation of vulnerable migrants, custody transfer of a migrant between States, and repatriations that take place in dangerous, remote or otherwise life-threatening locations.

(23) *Return to State of nationality*: Paragraph 2 also applies when a migrant has returned to a State of nationality or origin. Notably, then, temporary return to a country of nationality or citizenship does not extinguish all rights in the host country of imminent return. A migrant’s acquired rights are not forfeited upon return to the country of nationality or citizenship. This provision is particularly relevant in the context of cyclical migration.

ARTICLE 2
EQUAL PROTECTION

(1) All persons, including migrants, are equal before the law. Every migrant has the right, without any discrimination, to the equal protection of the law on the same basis as nationals of any State in which the migrant is present.

(2) The present Bill of Rights applies to all migrants without distinction of any kind, such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, disability, birth, gender, sexual orientation or gender identity or other status.

(3) In this respect, the law shall prohibit any discrimination and guarantee to migrants equal and effective protection against discrimination on any ground such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, property, marital status, disability, birth, gender, sexual orientation or gender identity or other status.

(4) Distinctions in the treatment of migrants are permissible, including in the regulation of admission and exclusion, only where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized.

Commentary

(1) Article 2 emphasizes two core and interrelated principles underlying the protection of the rights of migrants in the International Migrants Bill of Rights: non-discrimination and equality before the law. The phrasing of clause 1 of paragraph 1 emphasizes that individual migrants are rights-bearers while the rest of Article 2 makes clear that the prohibition on non-discrimination (both under the per se grounds of nondiscrimination in paragraph 3 and the test established in paragraph 4) includes and protects migrants. Importantly, the standard for distinctions permitted amongst and between migrants in paragraph 2 creates a presumption favoring the equal protection of migrants without unduly burdening states.

(2) The IMBR follows the general convention of human right instruments in positing a general standard of non-discrimination as broadly applicable, while explicitly allowing for variation in other articles.56 Thus, Article 2 shall be read as the rule of general application unless specifically displaced in the circumstances prescribed by a subsequent article.

(3) Paragraph 1, Clause 1, 2: That all persons are entitled to equality before and protection of the law is a fundamental tenet of human rights law. Both the UDHR and the

56 See, e.g., U.N. High Comm’r for Human Rights, General Comment No. 15, supra note 40, at 189 ¶ 2. A more specific standard displaces the general standard.
ICCPR recognize the principles of equality and equal protection. The principle has been widely affirmed in other human rights instruments and by human rights treaty bodies.

The IMBR, however, adopts a slightly different phrasing for the right in order to emphasize that equal protection must at a minimum afford protection on the same basis as nationals.

(4) Equality: The right to equality, and specifically equality before the law, is a right to be treated equally and in a non-arbitrary manner, even when the specific legal consequence of a law or action does not implicate an independent human right. It also follows that, as a general rule, equal factual situations involving migrants must be treated consistently with those involving citizens, as well as other migrants. This applies broadly – for example, in requiring equal access to criminal and civil complaint mechanisms; equal access to courts of law and administrative processes, including birth registration; and equal access to remedies and equality in the performance of civil and criminal judgments.

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57 UDHR, supra note 1, art. 7. (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); ICCPR, supra note 2, art. 26. (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”)

58 ICRMW, supra note 16, art. 18 (“Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals.”). ACHR art. 24; ACHPR, art. 3.


62 The contours of equal protection, while aided by the development of international human rights norms as providing various minimum standards of treatment, continues the long international legal traditional of recognizing the juridical capacity of aliens. See, e.g., ANDREAS HANS ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS, at 131, n.1 (La Haye 1949) (citing The Institute of International Law declaration of 1874 affirming that the juridical capacity of aliens “existe indépendamment, de toute stipulation des traites et de toute condition de reciprocite” (exists independent of any treaty stipulation and of any obligation of reciprocity [comity]; i.e. juridical capacity is absolute); U.N. Comm’r on Human Rights, Comment - The rights of Non-citizens; CERD - GENERAL RECOMMENDATION 30 ON DISCRIMINATION AGAINST NON-CITIZENS; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n
(5) Equal Protection: The right to ‘equal protection’ is a right to enjoy actual and effective protection of the law. This is a right directed at those promulgating laws and regulations. It mandates that States both refrain from enacting discriminatory laws and affirmatively promulgate measures that afford effective protection against discrimination for migrants (i.e. afford migrants substantive equality). Thus, there should be equal application of national legislation to migrants as well as citizens, and legislation itself should not be discriminatory.

(6) On the Same Basis as Nationals: Qualifying the guarantee of equal protection by the language ‘on the same basis as nationals’ reaffirms the importance of ensuring legal protection without regard to alienage. Rather than stating that migrants bear all the same rights as nationals, this clause stresses that migrants enjoy the same protection as nationals for all coextensive rights. Notably, the IMBR does not limit these obligations to rights provided by the IMBR.

(7) Paragraph 2: The restriction on the distinctions states may make when applying the IMBR to migrants is an essential tool to ensure states do not apply the Bill in a discriminatory manner. The restrictions in paragraph 2 reflect similar restrictions on the application of the ICCPR in its Article 2(1). This principle has been included widely in other human rights instruments as well, including in ICESCR Article 2, the ACHR Article 1(1), and the ECHR, Article 14. The IMBR follows the phrasing of the enumerated grounds of non-distinction in the ICRMW, while adding the grounds of

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63 Nowak, supra note 55, at 468-69.


65 This follows general human rights principles. See, e.g., UDHR, supra note 1, at pmbl. ¶ 1 (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

66 ICCPR, supra note 2 Art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)

67 ICESCR, supra note 3, art. 2; ACHR, art. 1(1); ECHR, supra note 8, art. 53.

68 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93, Art. 1(1), (“The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”).
disability and gender, sexual orientation or gender identity to reflect progression of the law in recent years.  

(8) **Paragraph 3**: The restriction on discriminatory treatment is a fundamental – and complementary – principle of the international human rights regime. Both the UDHR and the ICCPR prohibit discrimination. Paragraph 3 mandates that states refrain from discriminating against or between migrants on a number of enumerated bases. This list should not be seen as exhaustive, however, and it explicitly allows for breadth to encompass developments in customary international and human rights law. This wording echoes the affirmative obligation on States, noted above, to both enact non-discriminatory laws and to work to eliminate the discriminatory effect of all laws and policies. As should be clear from the non-exhaustive nature of the enumerated grounds, this affirmative obligation is not limited to distinctions between migrants and nationals and citizens. It includes affirmative obligations with regard to all grounds recognized as constituting discrimination *per se*, for example, with regard to sex-based discrimination.

(9) **Enumerated Grounds**: The IMBR follows the phrasing of the enumerated grounds of non-discrimination used in the ICRMW. In addition to the prohibited grounds of discrimination under the ICCPR, the ICRMW and the IMBR add ‘conviction,’ ‘ethnic origin,’ ‘nationality,’ ‘marital status,’ and ‘disability.’ Paragraph 3 also adds

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71 See Nowak, *supra* note 55, at 459 (“The prohibition on discrimination for reasons of certain personal characteristics has come to be the most essential element in a substantive structuring of the principle of equality . . . .”).

72 JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 238-39 (Cambridge Univ. Press 2005); see also Nowak, *supra* note 55, at 476-79 (discussing ICCPR Committee commentaries discussing positive measures (affirmative action) to mitigate horizontally discriminatory effect, such as in the workplace).


74 ICRMW, Article 7, “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”

75 ICERD, *supra* note 4, Art. 1 (defines racial discrimination to include discrimination on the basis of ethnic origin); ACHPR (Art. 2 prohibits distinctions based on individuals’ ethnic group).

76 U.N. High Comm’r for Human Rights, *General Comment No. 15, supra* note 56, at 189 ¶¶ 1-2; The position of Aliens under the Covenant, ¶¶ 1-2, 27th Sess., U.N. Doc. A/41/40 (Nov. 4, 1986) (“In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or
grounds considered ‘other status’ under the ICRMW and the ICCPR, such as gender identity and sexual orientation, reflecting the progression of the law in recent years.  

(10) **Paragraph 4:** The IMBR adds a specific legal test for making distinctions among and between migrants. The legal standard adopted in Paragraph 4 mandates legitimate action, objective justification, and reasonable proportionality, thus distinguishing between prohibited discrimination and lawful distinctions. In selecting this standard, the IMBR creates a presumption in favor of migrants drawn from commentators and ECHR jurisprudence, and explicitly rejects the more deferential standard articulated by the UN Human Rights Committee in General Comment 18. The standard flows directly from the principles of equality and non-discrimination, as was suggested by the Human Rights Committee in General Comment 15.

(11) The IMBR explicitly selects a standard for distinctions at the most protective end of current State practice and *opinio juris*. The test represents the optimal compromise between protecting sovereign functions and safeguarding the welfare of migrants. In selecting a test that hinges both on legitimacy and proportionality, the IMBR affirms that the rights of migrants derive both from their fundamental human dignity and status as persons before the law, as well as their ties to the community of the host State.

(12) **Regulation of admission and exclusion:** The IMBR does not limit the sovereign power of States to control admission of non-citizens at their borders or formulate immigration policy, as long as the exercise of those powers is reasonable. Thus, the her nationality or statelessness. Thus the general rule is that aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant."

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77 CEDAW, *supra* note 16, Art. 1 (defining prohibited discrimination to include distinctions made on the basis of marital status).

78 CRPD, Art. 5(2) (prohibiting discrimination on the basis of disability); CRC, Art. 2(1) (prohibiting discrimination on the basis of disability).


standard both acknowledges that States will and allows for States to make such
distinctions, and rejects any notion that States require an explicit ‘margin of
appreciation.’\(^8\)\(^4\) Indeed, the IMBR allows States to make reasonable distinctions among
and between migrants in light of foreign policy goals or on the basis of national
security.\(^8\)\(^5\) This standard strikes a balance between the needs and rights of States and the
need to protect migrants.

(13) **Legitimate Aim:** The IMBR language permitting only those distinctions based on a
legitimate aim should be read in reference to international and regional norms as well as
national norms and protections (i.e. not just rights within the IMBR or the core
international human rights treaties).\(^8\)\(^6\) The standard does not require that distinctions only
be made pursuant to law, but the broader requirements of equal protection generally do.
Thus, the IMBR constrains both discretionary and non-discretionary State action.

(14) **Objectivity and Reasonable Proportionality:** The IMBR further requires States to act
in a way that is objectively related to and reflects a reasonable proportionality between
the means employed and the legitimate goal pursued. This test is intentionally context-
specific.\(^8\)\(^7\) Fundamentally, the IMBR should be interpreted as creating a continuum of
reasonable and proportional distinctions.\(^8\)\(^8\) Most importantly, as a migrant’s contact and
connection with the host State increase, any distinctions made should tend towards more
favorable treatment. Consequently, migrants with less contact or connection with the host
State may receive less favorable treatment, as long as the treatment they receive complies
with the provisions of this Bill and other human rights protections. Thus, a State may, for
example, take into the account the longstanding connection of particular classes of migrants
(or of individual migrants) to the State when conferring benefits.\(^8\)\(^9\) The standard does not

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\(^8\)3 U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of
No. 35/1978, at ¶¶ 9.2(b)(ii)–9.2(b)(ii)3 (Apr. 9, 1981); Abdulaziz v. U.K., App. No. 9214/80,
9473/81, 9474/81, at ¶ 72 (1985).

appreciation doctrine but also indicating that states must provide ‘very weighty reasons’ to benefit from it;
holding that distinctions in emergency housing assistance between Austrian and non-European community
discriminatory in spite of State’s claim of special responsibility for citizens). *See also* U.N. High
No. 40892/98, at ¶¶ 12, 46, 49 (2003) (claim to disability benefits by a Côte d’Ivoire national resident in
France, citing Gaygusuz); *Abdulaziz v. U.K.*, App. No. 9214/80, 9473/81, 9474/81, ¶ 72 (1985); Proposed
Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-

\(^8\)5 *See* Martin, *supra* note 79, at 33 (discussing the traditional and historically fundamental sovereign
function of regulating admission of aliens).

\(^8\)6 Including, for example, obligations under the 1951 Refugee Convention and 1967 Protocol.

\(^8\)7 Joseph et. al., *supra* note 77, at 700.

\(^8\)8 *See* Martin, *supra* note 79, at 35.

\(^8\)9 *See*, e.g., Article 10, which envisions that States will take substantial connection into account when
creating opportunities for relief from removal.
prohibit *more favorable* treatment *per se*, such as measures taken by a State to protect a particular national group in a time of natural disaster in the State of origin.\(^9^0\)
ARTICLE 3
VULNERABLE MIGRANTS

(1) Every vulnerable migrant has the right to protection and assistance required by the migrant’s condition and status and to treatment which takes into account the migrant’s special needs.

(2) In all actions concerning child migrants, the best interests of the child migrant shall be a primary consideration. States shall undertake to ensure the child migrant such protection and care as is necessary for his or her well-being, and assure to the child migrant who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(3) States shall take in all fields all appropriate measures to ensure the full development and advancement of women migrants for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men, including the provision of special protection during pregnancy.

(4) States shall undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all migrants with disabilities without discrimination of any kind on the basis of disability, including through taking appropriate measures to enable migrants with disabilities to live independently and participate fully in all aspects of life.

Commentary

(1) Article 3 provides that particularly vulnerable migrants are entitled to protection and assistance required by their condition and to treatment that takes into account their special needs. According special protection to some groups of migrants does not violate the principle of equality as objectively disparate situations should not be treated equally and specific vulnerabilities should be taken into account. Human rights law deals with the special needs of certain categories of persons in specific instruments, including protections for children, women, and persons with disabilities. Article 3 reinforces these existing protections. When read in conjunction with the rest of the IMBR, Article 3 extends a right to special protection and treatment to all vulnerable migrants, including migrants who are vulnerable in multiple and intersecting ways, when realizing the rights contained herein.

(2) Paragraph 1: Paragraph 1 is adapted from Principle 4(2) of the Guiding Principles on Internal Displacement. While paragraphs 2 through 4 enumerate obligations of states

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92 CRC, supra note 6.
93 CEDAW, supra note 16.
94 CRPD, supra note 7.
towards particular vulnerable migrants—child migrants, women migrants, and migrants with disabilities—the rights in Paragraph 1 apply to all vulnerable migrants.

(3) Origins of Paragraph 2: The CRC Articles 3(1), 3(2) and 12(1) state that the rights contained in Paragraph 2 apply to all children, including child migrants. Article 7 of the CRPD affirms that children with disabilities, including migrant children with disabilities, possess the rights in Paragraph 2.

(4) Origins of Paragraph 3: Paragraph 3 is an adaptation of CEDAW Articles 3 and 11(2)(d). The CRPD Article 6 affirms these rights for women with disabilities, including women migrants with disabilities.

(5) Origins of Paragraph 4: Paragraph 4 applies CRPD Articles 4 and 9 specifically to migrants with disabilities. Through paragraph 4, the IMBR also stresses all principles of the CRPD, listed in CRPD Article 3.

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96 CRC, supra note 6, arts. 3(1), 3(2), 12(1).
97 CRPD, supra note 7, art. 7.
99 CRPD, supra note 7, art. 6.
100 CRPD, supra note 7, art. 4(1), 9(1).
101 CRPD, supra note 7, art. 3.
ARTICLE 4
LIFE

Every migrant has the inherent right to life. This right shall be protected by law. No migrant shall be arbitrarily deprived of his or her life.

Commentary

(1) The right to life is a fundamental right of all persons, as codified in numerous international human rights instruments. Article 4 of the IMBR creates an affirmative responsibility on the part of States to not deprive migrants of the right to life.

(2) In the migration context, the right to life for migrants is threatened by numerous factors and in a variety of contexts. Migrants in transit between countries face harsh conditions and dangerous routes, as a result of extremes of climate and weather as well as unsafe or overcrowded vehicles, boats, and other means of transportation. Detained migrants suffer from threats to their health and safety, due to isolation, unsafe conditions, and lack of access to health care. Additional rationales for enunciating the right to life in the migrant context include: hate crimes against migrants; deaths during smuggling, flight, border crossing, or otherwise when seeking entry; and violations of the right to life by border authorities or other government forces. Article 4 of the IMBR creates an affirmative responsibility of States to protect the lives of migrants, just as States have a responsibility to protect the lives of all persons within their jurisdiction. States in particular should guard against abduction, threatening or resulting in death, for reasons of extortion, organ theft or otherwise; death during the migrant journey, including during the smuggling of migrants; and death in detention.

(3) The language of paragraph 1 is drawn directly from the ICCPR, Article 6. The right to life is also enumerated in other international instruments, including the UDHR, the ICRMW, and the Guiding Principles on Internal Displacement.

102 Maria Jimenez, Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border, ACLU of San Diego & Imperial Counties and Mexico’s National Commission of Human Rights (October 2009) (estimates of migrant deaths at the southern U.S. border from approximately 1994 to 2009 ranged from 3,861 to 5,607 deaths. Although the U.S. border patrol does perform search and rescue of migrants, there have been concerns that there have been both a decrease in the number of rescues and a rise in the number of deaths in recent years). See, e.g., Europe Migrant Deaths: Record Number of Migrants Died While Trying to Reach Continent, UN Says, HUFFINGTONPOST.COM, http://www.huffingtonpost.com/2012/01/31/europe-migrant-deaths_n_1244132.html (last visited Jul. 21, 2012) (migrants worldwide have perished trying to reach final destinations).


104 ICCPR, supra note 2, art. 6.

105 UDHR, supra note 1, Art. 3, Dec. 10, 1948.

106 ICRMW, art. 9.

ARTICLE 5
LIBERTY AND SECURITY OF PERSON

(1) Every migrant has the right to liberty and security of person. No migrant shall be arbitrarily arrested, detained, or otherwise deprived of liberty.

(2) States shall ensure that deprivations of liberty occur only in accordance with and as authorized by law and only when determined to be necessary, reasonable in all the circumstances, and proportionate to a legitimate objective.

(3) Detention shall occur only as measure of last resort and shall last no longer than required by the circumstances. Detention shall occur only pursuant to an individualized determination of the need to detain, and the migrant shall have the right to appeal conditions, legality, and length of detention.

(4) Every migrant deprived of his or her liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(5) Every migrant who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Commentary

(1) Article 5 affirms a number of fundamental elements of the right to liberty and security of the person as it relates to detention or other deprivations of the liberty of migrants. Paragraph 1 asserts a basic principle of the right to liberty and security of person. Implicit in this paragraph is the presumption of non-detention. Paragraph 2 reproduces core procedural protections against arbitrary detention. Paragraph 3 further protects against arbitrary detention and explicitly conditions the State’s ability to detain migrants. Paragraph 4 incorporates a respect for dignity in detention conditions. Paragraph 5 asserts compensation for violations of these rights.

(2) The right of migrants to liberty and security of the person is violated with alarming frequency. States increasingly use detention at the border, criminal enforcement, and other forms of detention or deprivations of liberty to punish irregular migrants. In some cases, including many involving migrants with no effective nationality, or where there are no diplomatic relations between the host State and the country of origin, a State’s inability to remove migrants may render detention indefinite. Additionally, the use of criminal penalties in lieu of, or to reinforce, administrative enforcement violations of immigration law is of increasing concern. Article 5 thus attempts to codify those

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fundamental protections necessary to ensure adequate protection of the rights of migrants when detained or otherwise deprived of liberty.

(3) Paragraph 1: Paragraph 1 is rooted in the rights of liberty and security of the person, as well as the prohibition on arbitrary detention, and applies regardless of legal status. The wording of the IMBR is adapted directly from the ICCPR, Article 9(1). This choice of language affirms a presumption of liberty and sets non-detention as the norm.

(4) The purpose of paragraph 1 is to affirm that migration alone is an insufficient basis for depriving migrants of liberty and that wrongful detention is incompatible with the human right of liberty and security of person. These principles are codified in both the Charter of the United Nations and the UDHR. In order to safeguard the rights and autonomy of migrants, the IMBR affirms a presumption of non-detention, promotes the liberty and security of person of migrants, and includes limits carefully constrained to protect the interests of sovereign States.

(5) Paragraph 2: Paragraph 2 is derived from Article 9(1) of the ICCPR and includes the requirements of non-arbitrariness and procedural fairness. The prohibition against arbitrary detention is a process right mandating that States define precisely the cases in which deprivation of liberty is permissible. It places a legal obligation on both legislators and law enforcement. The general standard for determining arbitrariness is that action must be reasonable and necessary in all the circumstances, and must not contravene national or international law, including the IMBR.

(6) Paragraph 3: The rights in paragraph 3 are derived from the right to be free from arbitrary detention in paragraphs 1 and 4 of ICCPR Article 9. Paragraph 3 states the presumption in favor of liberty by mandating that detention only occur as a measure of

112 ICCPR, supra note 2, art. 9; UDHR, supra note 1, art. 9.
113 ICCPR, supra note 2, art. 9(1).
114 Volra, supra note 111, at 53 (citing United States Diplomatic and Consular Staff in Tehran, ICJ Rep. (1980)).
115 Nowak, supra note 55, at 160 (noting that although a process right, liberty of the person is tied to the freedom of movement, and thus only implicated when that freedom has been abridged).
116 Id. at 172.
117 Id. at 173 (citing Van Alphen v. the Netherlands (finding that although a particular detention was lawful it was not reasonable or necessary in all the circumstances, and was therefore arbitrary; weighing flight risk, interference with evidence, risk of further criminal conduct, etc.; notably, detention cannot be justified by a domestic law that violates binding international minimum standards). See Joseph et al., supra note 77, at 342 (citing A. v. Australia (ICCPR Committee 560/93)).
118 ICCPR, supra note 2, arts. 9(1), 9(4).
119 UN Working Group on Arbitrary Detention (WGAD), Annual Report 2008, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82 (hereinafter WGAD Report); Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers’ Deputies, principle XI.1. See also Conclusion No. 7 (XXVIII) Expulsion, ExCom, UNHCR, 28th Session, 1977, para. e; Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers, ExCom, UNHCR, 37th Session, 1986, para. B; Concluding
last resort. Paragraph 3 also requires that detention shall not be continued beyond the period for which the state can provide appropriate justification. Indefinite detention for immigration purposes is not lawful under international law. It should be noted that excessive length of detention, or uncertainty as to its duration, also raises issues of cruel, inhuman or degrading treatment.

(7) When choosing to deprive of liberty, States must first consider whether less intrusive measures, such as alternatives to institutional detention, would suffice to achieve legitimate aims. Critically, however, deprivations of liberty in the context of alternatives to institutional detention must also comport with the requirements of the right to liberty and security of person. Lesser restrictions on liberty must comport with the requirements of rights to freedom of movement, protected under ICCPR Article 12.

(8) Paragraph 3 also provides migrants the right to challenge detention. Clause 2 of paragraph 3 is a synthesis of paragraphs 1 and 4 of ICCPR Article 9. Thus, it both places an obligation on States and provides a specific right to migrants. It also impliedly incorporates other commentary that has stressed the links between legal personhood (as a fundamental expression of liberty) and prohibitions on arbitrary detention and the common-law-derived right of habeas corpus. This restriction applies to all forms of observations. The Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context. Concluding Observations on Sweden, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12 (detention should be for the shortest possible time); Concluding Observations on Costa Rica, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 (expressing concern at failure to limit the length of administrative detention of non-nationals and recommending “the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite.”).


WGAD Report, supra note 122 (acknowledging “the sovereign right of states to regulate migration,” yet cautioning that “immigration detention should gradually be abolished…. If there has to be administrative detention, the principle of proportionality requires it to be a last resort.”).

A. v. Australia, supra note 120.

Id.

The Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context. Concluding Observations on Sweden, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12 (detention should be for the shortest possible time); Concluding Observations on Costa Rica, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 (expressing concern at failure to limit the length of administrative detention of non-nationals and recommending “the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite.”).


ICCPR Art 12. See also Article 2 of Protocol 4 ECHR, Article 22 ACHR, Article 12 ACHPR and Article 26 ArCHR.

GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 97 (1983) (“The rule of international law requires that there be available some procedure whereby the underlying legality of executive action can be questioned, such as the writ of habeas corpus in common law jurisdictions”; citing the North Sea Continental Shelf Cases for proposition that the ICCPR ‘embodies and crystallizes’ pre-existing rules of customary international law).

ICCPR, supra note 2, arts. 9(1), 9(4).

“To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus.” Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (J. Scalia, dissenting) (quoting Blackstone) (emphasis added).
detention, including detention at the border, and not just detention in connection with removal.

(9) **Paragraph 4**: Most fundamentally, paragraph 4 is rooted in the right to be free from torture and cruel inhumane and degrading treatment. The ICCPR makes a more specific application of the prohibition on torture, cruel inhumane and degrading treatment for the right of detained persons to be treated with humanity and respect for their human dignity. Detention standards on conditions of detention are contained in various international authorities. The UNHCR Revised Guidelines on Detention of Asylum Seekers similarly demand that conditions of detention for any asylum seeker deprived of liberty be humane and with respect for the inherent dignity of the person.

(10) Even where deprivations of liberty of migrants can be justified under international human rights law, additional constraints are imposed on States regarding the conditions of detention and the treatment of detainees. Accordingly, facilities holding migrants must be sufficiently clean, safe and healthy to comport with the freedom from torture and cruel, inhumane or degrading treatment. Deprivations of liberty should not be punitive in nature, and migrants should not be held in criminal detention facilities. To be compatible with human dignity, conditions of detention should not subject detainees to a level of suffering beyond that inherent in detention. Moreover, the cumulative effect of a number of poor conditions may lead to violation of the prohibition of cruel, inhumane and degrading treatment.

(11) **Overcrowding**: One of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of

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129 CAT, supra note 5, art. 16; ICCPR, supra note 2, art. 7; ECHR, supra note 8, art. 3; ACHR, supra note 12, art. 5; ACHPR, supra note 9, art. 8.
130 ICCPR, supra note 2, art. 10(1). See also ACHR, supra note 12, art. 5(2); ACHPR, supra note 9, art. 5; League of Arab States, Arab Charter on Human Rights, art. 20, May 22, 2004, reprinted in 12 Int’l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008 (hereinafter ArCHR).
133 CAT, supra note 5, art. 16; ICCPR, supra note 2, art. 7; ECHR, supra note 8, art. 3; ACHR, supra note 12, art. 5; ACHPR, supra note 9, art. 8.
detention is overcrowding.\textsuperscript{137} Paragraph 4 prohibits severe overcrowding and less severe overcrowding when in conjunction with other poor conditions of detention.\textsuperscript{138}

(12) \textit{Access to Health Care}: The right to health for all migrants, provided in Article 21 also applies to migrants deprived of liberty. Inadequate healthcare or access to essential medicines for migrants deprived of liberty may also violate the prohibition on cruel, inhumane and degrading treatment and paragraph 4. Lastly, security measures applied during medical treatment must also comport with the requirements of paragraph 4.\textsuperscript{139}

(13) \textit{Protection from Violence}: With respect to migrants deprived of liberty, the State has a heightened obligation to protect and a special duty of care.\textsuperscript{140} Accordingly, excessive or inappropriate use of physical restraint or physical or sexual assaults of migrants deprived of liberty may also violate paragraph 4.

(14) \textit{Paragraph 5}: States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.\textsuperscript{141} In accordance with this general principle, paragraph 5 restates the right to reparation, including compensation, for persons, including migrants, found by domestic or international courts or other competent authorities to have been wrongfully detained.\textsuperscript{142}

\textsuperscript{138} Orchowski v. Poland, ECtHR, Application No. 17885/04, Oct. 22, 2009, paras. 122-123.
\textsuperscript{139} Henaf v. France, ECtHR, Application No. 65436/01, Nov. 27, 2003, paras. 49-60.
\textsuperscript{140} Salman v. Turkey, ECtHR, GC, Application No. 21986/93, June 27, 2000.
\textsuperscript{141} 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, G.A. Resolution 60/147, Dec. 16, 2005.
\textsuperscript{142} ICCPR, supra note 2, art. 9(5); ECHR, supra note 8, art. 5(5); ArCHR, supra note 134, art. 14.7.
Every migrant has the right to dignity, including physical, mental, and moral integrity.

Commentary

(1) The concept of human dignity is a foundational concept in the UDHR. Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights.” The UN Charter also affirms the “dignity and worth of the human person” as a basic concept. Numerous international human rights instruments confirm the status of human dignity as the cornerstone of international human rights law. In identical statements in their preambles, the ICCPR, ICESCR, and CEDAW proclaim that the rights they seek to protect “derive from the inherent dignity of the human person.” Article 70 of the ICRMW explicitly recognizes a migrant’s right to human dignity. Numerous regional human rights instruments also explicitly give an affirmative right to human dignity.

(2) The purpose of Article 6 is to ensure that migrants are treated with dignity. The UN Special Rapporteur on the human rights of migrants emphasized that respecting the dignity of migrants is obligatory under States’ human rights obligations. Physically, dignity means that migrants, by virtue of their humanity, must be “afforded the basic requirements to live as a human being who is valued.” Psychologically, dignity means that migrants must not be demeaned or treated as if they have no value. Thus, the concept of human dignity requires that the value and integrity of each individual migrant be respected based on our common humanity. Violations of certain fundamental rights such as the rights to life, liberty, due process, and freedom from torture and discrimination may concurrently violate the right to dignity by their very nature.

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143 UDHR, supra note 1 (references to human dignity appear in the Preamble twice and in Articles 1, 22, and 23).
144 Id.
147 ICRMW, supra note 16, art. 70.
148 See, e.g., ACHPR, supra note 9, art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being…”); ACHR, supra note 12, art. 11 (“Everyone has the right to have his honor respected and his dignity recognized… Every person has the right to have his physical, mental, and moral integrity respected…”).
151 Id.
152 See, e.g., Pedro Miguel Vera Vera et al. v. Ecuador, IACHR Case 11.535, February 24, 2010. (“Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of the human person. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals must be treated with dignity and respect. Therefore, Article 5(1) guarantees to all persons the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons
ARTICLE 7
LEGAL PERSONHOOD

(1) Every migrant has the right to recognition everywhere as a person before the law.

(2) To give effect to this right to migrants and migrant families, every child shall be registered immediately in the country of the child’s birth. A child shall be provided with a birth certificate that provides permanent, official and visible evidence of a state’s legal recognition of his or her existence as a member of society.

(3) Every migrant has the right to all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. It shall be unlawful for anyone, other than a duly authorized public official, to confiscate, destroy, or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory, or work permits.

Commentary

(1) Paragraph 1: The purpose of paragraph 1 is to reaffirm that every person, including a migrant, has the right to be recognized as a person before the law. This right includes all of the responsibilities required and protections offered by a legal system. The paragraph seeks to address that while citizens may possess rights not afforded to non-citizens, the right to recognition as a person before the law is a right that must be afforded equally and is non-derogable. The right is enshrined in the UDHR, Article 16 of the ICCPR and other relevant international instruments.

(2) Paragraph 2: The purpose of paragraph 2 is to recognize the importance of birth registration as a means for preserving the right to recognition as a person before the law by providing an official record of the existence of a person and to allow an individual to retain documentation of this official record through the issuance of a birth certificate. Regardless of nationality laws of individual countries, all children should be registered
immediately after birth on the territory of the country of their birth.\textsuperscript{156} Birth registration should be free of charge and should be performed without delay.\textsuperscript{157} This paragraph seeks to address that children born to migrants do not always have equal access to birth registration and denial of registration leaves children vulnerable to statelessness, as addressed in the Inter-American Court of Human Rights case, \textit{Yean and Bosico v. Dominican Republic}.\textsuperscript{158} The right to registration immediately after birth is enshrined in the ICCPR, the CRC and other relevant international instruments.\textsuperscript{159}

(3) \textit{Paragraph 3}: The purpose of paragraph 3 is to recognize the importance of identity documents that provide a record of an individual’s existence as a means of preserving the right to recognition as a person before the law. In the case of migrants who fall under the protection of the 1951 Convention on the Status of Refugees and its 1967 Protocol or the Guiding Principles on Internal Displacement, the authorities shall issue identity documents or facilitate the issuance of new documents.\textsuperscript{160} The protection for migrants against the destruction of such documents originates in the ICRMW.\textsuperscript{161}

\textsuperscript{156} \textit{See} General Assembly Resolution, Rights of the Child, G.A. Res 65/197 para 43(j), U.N. Doc A/RES/65/197 (March 30, 2011); Human Rights Council Resolution 16/12 (March 24 2011); The nationality of children, Recommendation CM/Rec (2009)13 adopted by the Committee of Ministers of the Council of Europe on 9 December 2009 and explanatory memorandum, para 57 (“States should register the birth of every child born on their territory, even in cases of the illegal presence of foreign or stateless parents, or when the parents of the child are unknown. States should not refuse the registration because of the foreign nationality of the child.”); Ineta Siemele, A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents, para 25 (“A State, at least, should register a child ‘immediately after birth.’ This does not guarantee nationality to a child but it ensures some recognition by the legal system.”).

\textsuperscript{157} The nationality of children, Recommendation CM/Rec (2009)13 adopted by the Committee of Ministers of the Council of Europe on 9 December 2009 and explanatory memorandum, para 57.

\textsuperscript{158} \textit{Yean and Bosico v. Dominican Republic}, Inter-American Court of Human Rights, 8 September 2005.


\textsuperscript{160} Convention Relating to the Status of Refugees, art. 27 (“The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.”); see Guiding Principles on Internal Displacement, Principle 20(2) (“[T]he authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions. . .”).

\textsuperscript{161} ICRMW, art. 21 (“It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits.”); see also ILO Convention 189, Concerning Decent Work for Domestic Workers, June 2011, art. 9(c) (“Each Member shall take measures to ensure that domestic workers…(c) are entitled to keep in their possession their travel and identity documents.”)
ARTICLE 8
REMEDI

Every migrant has the right to an effective remedy for acts violating the rights guaranteed to the migrant by the relevant domestic law as well as international law, including those rights or freedoms herein recognized.

Commentary

(1) The remedy clause of the IMBR finds its roots in Article 8 of the UDHR and Article 2(3) of the ICCPR. Article 8 of the UDHR is one of a series of articles that are seen as the first articulation of a right to a fair trial in a modern, multilateral document. Article 8 specifically ensures that every person is given some form of judicial or administrative recourse in the event of a violation of national or international law, and IMBR Article 8 reiterates that right for migrants. ICCPR Article 2(3) provides a remedy to persons whose rights and freedoms in the ICCPR itself have been violated. In that vein, IMBR Article 8 explicitly provides migrants with a remedy for any violations of the rights and freedoms mentioned in the IMBR.

(2) Coupled with the equality provisions found in Article 2 of the IMBR, this remedy clause provides migrants with the same ability to avail themselves of national and international law as any national of the receiving State, empowering them to seek recourse against violations of their rights by the government or private parties, in accordance with governing national and international laws. International and regional bodies have affirmed that a right to a remedy applies to all migrants, regardless of status. Remedies for human rights violations must be “prompt, effective, accessible, impartial and independent, must be enforceable, and lead to cessation of or reparation for the human rights violation concerned.”

162 UDHR, supra note 1, art. 8; ICCPR, supra note 2, art. 2(3); see also ICRMW Art. 83; ICERD Art. 6; CAT Art. 14; CPED Art. 8(2); ECHR Art. 13; ACHR Art. 25; 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, adopted by the General Assembly Resolution A/RES/60/147 of 16 December 2005.
163 These articles are UDHR, supra note 1, arts. 8-11. See Beth Simmons, Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights, 16(2) IND. J. GLOBAL LEGAL STUD. 437-81 (2009).
**ARTICLE 9**

**DUE PROCESS**

(1) Every migrant has the right to due process of law before the courts, tribunals, and all other organs and authorities administering justice, as well as those specifically charged with making status determinations regarding migrants.

(2) States shall provide legal aid and representation in criminal proceedings. States should provide legal representation to migrants in all proceedings related to their legal status as a migrant.

(3) Every migrant shall be entitled to interpretation in a language the migrant can understand in criminal proceedings. Migrants should be entitled to interpretation in a language the migrant can understand in all proceedings.

(4) The migrant shall be informed of the availability of such interpretation, aid and representation upon receiving the civil complaint, administrative summons, or upon arrest.

(5) Migrants should be free from disproportionate penalties on account of entry, presence or status, or on account of any other offense which can only be committed by migrants.

**Commentary**

(1) The right to due process of law is a fundamental check on arbitrary treatment and the violation of other rights. Article 9 thus affirms a strong principle of customary international law grounded in comity and historical notions of equality and echoed in human rights law and jurisprudence. In affirming a general right to due process for migrants, the IMBR goes further than other international instruments to give specific content to the implications of personhood for migrants before the law.

(2) The international community has long realized the importance of due process of law as a check on rights abuses. Although implicitly applicable to migrants by virtue of their personhood, the right to due process is subject to particularly pronounced abuses by governments. Of particular concern is administrative detention of migrants, the increasing use of criminal sanctions as a policy response to increases in migration, and State responses to terrorism.

(3) **Paragraph 1:** Paragraph 1 affirms the general right of due process before all adjudicatory institutions to all migrants. Human rights law establishes due process as

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167 UDHR, supra note 1, arts. 6, 10, 11; ICCPR, supra note 2, arts. 14, 16; ICEDR art. 5(a); ICRMW, supra note 16, arts. 17(1), 18(1); Declaration of Individuals Who Are Not Nationals art. 5(1-c), A/RES/40/144 (1985); CRC arts. 12(2), 40(1); ECHR, supra note 8, art. 6(1).
an essential consequence of personhood in a fair legal regime. Due process is recognized in more than one international legal instrument as a fundamental human right, and migrants’ due process rights fall under general human rights protections. Despite these general protections, particularly heightened abuses affecting migrants require specific provisions aimed at enshrining migrants’ rights to the same treatment as nationals of a State. Both classes are entitled to the respect of due process under international human rights law. Article 9(1) achieves this by reiterating the human right to due process and applying it explicitly to migrants, thereby eliminating any misconception that migrants can be treated in an inferior way to nationals with regards to due process.

(5) The right to due process is intended to include all of the procedural guarantees of Article 13 of the ICCPR (essentially an opportunity to be represented and heard before a competent decision maker). The IMBR, like the ICCPR, prohibits collective expulsion.\(^{168}\) Importantly, the IMBR does not limit the right to due process to those with lawful status, but provides this right explicitly to all migrants.\(^{169}\)

(6) Paragraph 2: Paragraph 2 recognizes the right of migrants to be provided free legal assistance and representation when they cannot afford it. The State must provide free legal assistance and representation to low-income migrants in criminal cases where they are defendants. As far as possible, duly taking into account the circumstances of the individual case, the financial needs of the migrant, and the fundamental rights at stake, the State shall provide free legal assistance and representation to migrants all proceedings related to his or her status as a migrant.\(^{170}\) Due to the special and critical nature of administrative proceedings related to the legal status of migrants and their families, especially expulsion or deportation proceedings, the State has a duty to provide low-income migrants free legal assistance and representation in those cases wherever possible.\(^{171}\)

(7) Access to counsel is an essential element of due process, and the provision of legal aid and representation to the poor is grounded in notions of state responsibility in the context of international human rights obligations.\(^{172}\) ICCPR Article 14 expressly recognizes a right to free counsel in criminal but not civil cases.\(^{173}\) However, the Human Rights Committee has emphasized that Article 14 applies to both criminal and civil
The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person is entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he or she does not have sufficient funds to pay. The United Nations Basic Principles on the Role of Lawyers states that governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons, and that professional associations of lawyers should cooperate in the organization and provision of services, facilities, and other resources. The principle of providing legal representation at public expense to litigants who are unable to afford it is widely accepted and observed: Canada, Australia, New Zealand, Brazil, Madagascar and South Africa have statutes or a constitutional provision providing for free civil counsel for those in need. The European Court of Human Rights ruled in 1979 in Airey v. Ireland that free civil counsel to facilitate access to the courts was a basic right. Thereafter, the Council of Europe required its members to provide free counsel. Each country has met this requirement, but with limits in the form of merit-based and need-based eligibility standards. This principle is also grounded in treaty law: the OAS Charter explicitly recognizing a right to counsel, and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have recognized that the right applies in both civil and criminal cases.

(8) As a recognized human right, the right to state-funded legal assistance is essential in criminal proceedings due to the fundamental rights at stake. This right, however, is not limited to criminal proceedings and should be expanded to include all proceedings related to a migrant’s status to ensure that the right to due process of the IMBR is meaningfully secured. This right has special relevance in the context of immigration proceedings due to the fundamental rights at stake, and States should make every effort to provide migrants

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179 Lidman, supra note 174, at 292.
182 For a discussion of the historical development of free legal aid and the priority of criminal cases, see Skinnider, supra note 169.
with free legal aid and representation in proceedings related to their status or the status of their family members.\textsuperscript{183}

(9) Paragraph 3: The right of a migrant to an interpreter draws from international human rights norms. In the criminal context, the ICCPR explicitly guarantees defendants the right to be informed of their charges in detail in a language they understand.\textsuperscript{184} The ICCPR also provides for defendants to enjoy the free assistance of an interpreter.\textsuperscript{185} In the civil context, there is no explicit international right to interpretation but it can be inferred from the provisions of the ICCPR, the CAT and the UDHR.\textsuperscript{186} These documents all contain language on due process and fairness that underscores the importance of a defendant’s awareness of charges and proceedings.\textsuperscript{187} Although the grounds for this requirement are much stronger in criminal cases, the civil and administrative contexts (particularly immigration proceedings) should also be considered important, due to the human rights interests at stake and the importance of integrity and fairness in the legal process.

(10) A defendant needs to be fully aware of the charges or details of the proceedings brought against him or her, whether in the criminal, civil, or administrative contexts, in order to properly defend himself or herself. This is especially relevant where the defendant is a migrant who may not sufficiently understand the language or legal culture of the host country. As noted in paragraph 6 of this Commentary above, while the defendant’s right to an interpreter is explicit in the ICCPR for criminal matters, it is only an inferred right in the civil context. Article 9(3) explicitly provides for interpretation to be offered to migrant defendants so that they may understand in detail the charges and proceedings brought against them. It also extends the right to an interpreter, making it applicable in civil, criminal and administrative proceedings.

(11) Although the IMBR did not adopt the language of the ICCPR, which promised the “free assistance of an interpreter,” the host government should defray the costs of the interpretation service in order to ensure that financial considerations do not interfere with migrant defendants’ exercise of their rights.

(12) Paragraph 4: This paragraph makes it mandatory that a migrant be duly informed of his or her right to free counsel, interpretation, and other aid promptly after receiving notice of the criminal, civil, or administrative proceedings to which he or she is a party.

\textsuperscript{183} See Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), para. 126; Vélez Loor v. Panama, IACtHR, Series C No. 218, Judgment of 23 November 2010, para. 146.

\textsuperscript{184} ICCPR, supra note 2, art. 14(a) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”).

\textsuperscript{185} ICCPR, supra note 2, art. 14(f) (“In the determination of any criminal charge against him, everyone shall be entitled . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court”).

\textsuperscript{186} Compare KATHY LASTER & VERONICA TAYLOR, INTERPRETERS & THE LEGAL SYSTEM 73 (Federation Press 1994) with ECHR, supra note 8, art. 6 (interpreted as not applying to immigration proceedings).

\textsuperscript{187} UDHR, supra note 1, art. 10; ICCPR, supra note 2, art. 9(2)-(5); CAT, supra note 72, art. 13, 14.
(13) In order to prevent abuses and to ensure the full enjoyment of the rights secured under it, the IMBR provides that migrant defendants be given notice of their entitlement to counsel and to an interpreter. In addition, migrants in civil and immigration cases must be notified of representation, aid, and interpretation at the outset of a proceeding. Due to migrants’ potential unfamiliarity with local legal procedures and language, early notification of these services is critical.

(14) Paragraph 5: Paragraph 5 builds on language in Article 31 of the 1951 Refugee Convention. Freedom from disproportionate penalties also builds on general due process and nondiscrimination principles. States should particularly ensure that their detention and expulsion policies meet the appropriate proportionality standards.

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188 Refugee Convention, supra note 24, Art. 31, (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”)
ARTICLE 10
VICTIMS OF CRIME

(1) Every migrant victim of crime has the right to assistance and protection, including access to compensation and restitution.

(2) Migrant victims of crime have the right to assistance that ensures their physical, psychological, and social recovery, especially where they have been victims of trafficking in persons.

Commentary

(1) This Article seeks to establish the right of migrant victims of crime to receive assistance and protection regardless of their immigration status. Ensuring this right may require the disaggregation of law enforcement from immigration control because concerns over immigration status may otherwise expose migrants to manipulation and abuse. Because migrant victims of crime, especially in cases of human trafficking, may experience particular trauma, States should provide assistance that ensures migrants’ physical, psychological, and social recovery.

(2) As non-citizens, migrants face unique challenges in accessing local law enforcement mechanisms. Migrants may fail to report crimes or to seek assistance due to ignorance about local laws or concerns about immigration enforcement, leaving them particularly vulnerable to crime, exploitation, and manipulation.189

(3) Of particular concern are victims of human trafficking, who are subjected to treatment amounting to arbitrary detention, slavery, rape, or cruel, inhuman and degrading treatment,190 and often struggle to receive assistance even after they are discovered.191

(4) Paragraph 1: Paragraph 1 establishes the right of migrant victims of crime to receive assistance and protection from local law enforcement. This right is most strongly recognized in instruments addressing trafficking in persons, including the Protocol to Prevent,Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) attached to the UN Convention Against Organized Crime,192 and the Council of Europe Convention on Action Against Trafficking in Human Beings.193 The IMBR draws on these and other instruments contemplating State obligations towards


192 Palermo Protocol, supra note 16.

victims of crime to establish a general right of migrant victims of crime to protection and assistance.\footnote{38}

(5) Without an established right to protection and assistance irrespective of immigration status, victims of crime who are migrants may hesitate to come forward and may become susceptible to threats and intimidation by abusive partners, predatory employers, and other potential assailants.\footnote{90} This Article recognizes the right of migrants to access local law enforcement when they have been subjected to mistreatment. Moreover, public safety is best served by encouraging victims of crime to report abuse, thus denying perpetrators the opportunity to commit crimes against individuals silenced by the fear of possible immigration enforcement actions. This recognition is reflected in a growing State practice of providing special protections to migrant victims of crime actively cooperating with criminal prosecutions.\footnote{96} The IMBR goes further than other instruments in recognizing that all migrant victims of crime are entitled to genuine assistance and protection.

(6) Taking appropriate measures to provide assistance and protection to migrant victims of crime requires separation of law enforcement from immigration control. When such considerations are linked through concurrent enforcement, migrant victims of crime become vulnerable to exploitation and manipulation by criminals threatening to retaliate by reporting migrants to immigration authorities. Disaggregation of law and immigration enforcement also requires meaningful protections for migrant victims of crime who depend on their abuser for immigration status.

(7) Special attention should be given to address racism and xenophobic practices by law enforcement officials towards migrant victims of crime.\footnote{97} States’ obligation to ensure that migrants are assisted without discrimination on account of race or national origin is derived from the ICERD, as further affirmed by the international community in the Durban Declaration, which states that “policies towards migration should not be based on racism, racial discrimination, xenophobia and related intolerance.”\footnote{98}

(8) Because the provision of such services is costly, States should also consider supporting the right of migrant victims established in paragraph 1 to compensation and restitution by providing victims with the ability to pursue legal action and recover damages from those responsible, particularly any business entities that have knowingly

\footnote{38} See Art. 25(2) of United Nations Convention against Transnational Organized Crime; Recommendation Rec(2002)5, CMCE, op. cit., fn. 80, Article 24. See also MIGRATION AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE No. 6 at 83.

\footnote{90} See, e.g. Fiona David, LAW ENFORCEMENT RESPONSES TO TRAFFICKING IN PERSONS: CHALLENGES AND EMERGING GOOD PRACTICE, AUSTRALIAN INSTITUTE OF CRIMINOLOGY: TRENDS & ISSUES, Dec. 2007.

\footnote{96} See, e.g., Art 24(1) of the United Nations Convention against Transnational Organized Crime (“Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences.”). See further MIGRATION AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE No. 6 at 88.

\footnote{97} See MIGRATION AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE No. 6 at 34.

\footnote{98} Declaration of World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, para. 12. See also paras. 16, 38, 47-51.
and unlawfully profited from the labor of migrants, and especially victims of human trafficking.

(9) **Paragraph 2:** Paragraph 2 recognizes that migrant victims of crime may require special assistance and support in order to recover from abuse. This is particularly the case for victims of human trafficking, and the Palermo Protocol\(^{199}\) and the Council of Europe Convention make special recognition of this fact.\(^{200}\) The IMBR recognizes that all other migrant victims of crime, especially victims of domestic abuse, may require special assistance for addressing their physical and psychological needs, including basic assistance such as translation and counseling regarding their legal rights. This is particularly the case because migrants may lack understanding of local laws and customs, may struggle to access institutions providing assistance, and tend to lack access to informal support networks due to their status. Article 10 should be read in conjunction with the due process rights contained in Article 9, and the right to health in Article 21.

(10) Paragraph 2 seeks to ensure that migrant victims of crime are provided with special protections to address their unique vulnerabilities and any physical or psychological trauma. Especially in cases of human trafficking, States should consider providing, *inter alia*, appropriate housing; counseling and information, particularly with regard to legal rights, in a language understood by the victim; medical, psychological and material assistance; and employment, education and training opportunities.

(11) In general, regard should be had for the age, gender and special needs of victims. In the case of children, particular attention should be paid to the provision of housing, education, and other care.

(12) Nongovernmental organizations often play a special role in providing assistance to migrant victims of crime, who may fear government authorities or require special expertise.\(^{201}\) States are encouraged to cooperate with nongovernmental organizations and other elements of civil society in providing assistance to migrant victims of crime. This perspective reflects best practices among practitioners,\(^{202}\) as well as the language of instruments addressing the needs of victims of human trafficking.\(^{203}\)

\(^{199}\) Palermo Protocol, Art. 6(3) (“Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons…”).

\(^{200}\) Art 12 of Council of Europe Convention (“Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery.”).


\(^{202}\) See David, *supra* note 190.

\(^{203}\) See, e.g., Article 10(2) of the Palermo Protocol. (“States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials [which] should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”).
ARTICLE 11
EXPULSION

(1) Every migrant has the right to protection against discriminatory or arbitrary expulsion or deportation, including collective expulsion. States shall expel a migrant only when justified by the specific facts relevant to the individual concerned and only pursuant to a decision reached in accordance with and authorized by law.

(2) Migrants have a right to an effective remedy when expulsion would give rise to a case of violation of human rights.

(3) Except where compelling reasons of national security otherwise require, a migrant shall be allowed to submit the reasons against his or her expulsion and to have his or her case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. Pending such review, the migrant concerned shall have the right to seek a stay of the decision of expulsion.

(4) The decision to expel a migrant shall be communicated to the migrant in a language the migrant understands. Upon request where not otherwise mandatory, the decision shall be communicated to the migrant in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The migrant shall be informed of these rights before, or at the latest, at the time the decision is rendered.

(5) Expulsion from a State shall not in itself prejudice any rights of a migrant acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her. A migrant shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

(6) In effectuating the expulsion of a migrant from its territory, a State shall ensure the respect of the rights guaranteed to the migrant by relevant domestic and international law, including those rights or freedoms herein recognized.

Commentary

(1) Article 11 imposes a limitation on the ability of States to remove a migrant arbitrarily or without due process of law. While the IMBR respects the sovereign right of States to remove aliens from their territories, it places restrictions on this right under international law and takes into consideration the particular vulnerability of migrants during expulsion. Arbitrary expulsion, deportation, and removal of migrants is a human rights issue with serious and complicated consequences for migrants and their families, as well as States of origin and receiving States.\textsuperscript{204} States too often deport migrants without regard for their

rights under international law, including on the basis of prohibited discriminatory grounds, en masse, and without consideration for their safety in transit or upon return.205 The international law governing expulsion is evolving and States must take measures to ensure that they protect both substantive and procedural rights of migrants during expulsion.206

(2) *Paragraph 1:* The prohibition on arbitrary expulsion derives from ICCPR Article 13 and from Article 22(2) of the ICRMW. Both treaties allow States to expel migrants only when the decision is reached in accordance with law and minimum process requirements are met.207 If a State seeks to remove, deport, or expel a migrant, such a decision must be justified by an application of the facts of the particular migrant’s circumstance and the applicable law. In restricting expulsion to decisions made on the basis of specific facts and in accordance with law, paragraph 1 echoes the prohibitions on discrimination and against arbitrariness.208

(3) The prohibition on discriminatory or arbitrary expulsion includes collective expulsion, which is specifically prohibited in the ICRMW,209 and in several regional instruments governing human rights, such as the Fourth Protocol to the European Convention on Human Rights,210 the American Convention on Human Rights,211 the African Charter on Human and People’s Rights,212 and the Arab Charter on Human Rights.213 The Human Rights Committee has also affirmed that collective expulsion would be a violation of ICCPR Article 13.214

(4) Fundamental procedural protections are required in all circumstances in which a migrant is subject to a State’s jurisdiction. A State must respect a migrant’s substantive human rights during the entry process.215 However, there are limited procedural protections for migrants at entry.216

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See the International Law Commissions project to draft articles on the expulsion of aliens.207


ACHR, art. 22(9).

ACHPR, art. 12.


HRC General Comment 15, *supra* note 56, para. 10.

States must respect these rights (e.g. right to life) whenever a migrant is subject to its jurisdiction.

Paragraph 2: To ensure the right to an effective remedy, States are obligated to provide opportunities for relief from expulsion when expulsion would give rise to violation of that migrant’s human rights. For example, states are obligated to provide opportunities for remedy when expulsion would give rise to refoulement or a violation of the right to respect for family life. According to the UN Basic Principles and Guidelines on the right to a remedy and reparation, remedies for violations of international human rights must be available, adequate, effective, prompt and appropriate.

Paragraph 3: The IMBR extends to all migrants the procedural rights in Article 22(4) of the ICRMW, namely the right to submit reasons against expulsion, have the case reviewed by the competent authority, and seek a stay of the decision of expulsion. While ICCPR Article 13 and Article 1 of Protocol 7 of the ECHR only apply to migrants lawfully in the territory, the protections in ICRMW Article 22(4) apply regardless of status. Paragraph 3 follows the language in the ICRMW and applies to all migrants.

Paragraph 4: Paragraph 4 also provides fundamental procedural protections required in all circumstances to guarantee the realization, in practice and not just in theory, of the rights of migrants. Paragraph 4 seeks to enable migrants to understand and take advantage of their rights in the context of expulsion by invoking and extending to all migrants the protections of Article 22(3) of the ICRMW.
(8) *Paragraph 5:* Paragraph 5 derives from Articles 22(6) and 22(9) of the ICRMW, and seeks to ensure that expulsion does not interfere with any wages or entitlements due to a migrant.\footnote{ICRMW, art. 22(6), art. 22(9).}

(9) *Paragraph 6:* Paragraph 6 affirms that States have an obligation to uphold all other relevant legal obligations, including the obligations contained in the IMBR, when expelling a migrant. In the expulsion context, this obligation prohibits States from practicing unsafe repatriations and expulsions that violate the right to dignity or the prohibition on cruel, inhumane or degrading treatment.\footnote{See International Law Commission, A/CN.4/L.797, 24 May 2012, Draft Article 21.}
ARTICLE 12
ASYLUM

(1) Every migrant has the right to seek and to enjoy in other countries asylum.

(2) States shall ensure access, consistent with relevant international and regional instruments, to fair and efficient status-determination procedures for migrants seeking asylum within their effective control, whether or not they are within the State’s territory.

(3) No state shall expel or return in any matter a migrant who has been granted asylum or other international protection.

Commentary

(1) Paragraph 1: The purpose of paragraph 1 is to reaffirm the well-established principle that every person, including every migrant, has a right to seek and to enjoy in other countries asylum. The omission of “from persecution” is in recognition of the practice in some countries and regions of the world of granting asylum to persons not considered to be refugees under the definition articulated in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, or have defined the conception of a refugee more broadly. The “right to seek and to enjoy in other countries asylum from persecution” was originally enshrined in Article 14 of the UDHR and reaffirmed in numerous General Assembly Resolutions.

(2) Paragraph 2: The purpose of paragraph 2 is to give effect to this right for migrants and strengthen the right to asylum through procedural safe-guards that are absent from the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. These procedures should extend to the frontier and extraterritorially, including to migrants seeking asylum and interdicted on the high seas, in order to preserve the right of non-

228 See e.g. Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1(2), Sept. 10, 1969, 1001 U.N.T.S.45 (“The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”).

229 UDHR, supra note 1.


231 Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S 150; UNHCR, Fair and Efficient Asylum Procedures: a non-exhaustive overview of applicable international standards. See also UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, at paras. 4-5 (Noting “it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.”)

232 See e.g. UN High Comm’r for Refugees Executive Committee Conclusion No. 15, 1979, at para (c) (“[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.”); UN High Comm’r for Refugees, UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, available at http://www.unhcr.org/refworld/docid/45f17a1a4.html; The Haitian
refoulement. Fair and efficient procedures include that a trained official of the State shall make a determination of refugee status and the granting of asylum and shall examine complementary protection needs to ensure that migrants in need of international protection are identified and granted such protection. States should not bar the substantive determination of a migrant’s claim for asylum for failure to seek asylum within a certain time limit or for seeking asylum during removal proceedings. A migrant should have the right to legal assistance and representation. A migrant should have a right to an effective remedy before a court or tribunal against a negative decision taken on their application for asylum or a decision to withdraw refugee status.

(3) Paragraph 3: The purpose of paragraph 3 is to reaffirm the principle of non-refoulement, deemed to be “intrinsically linked” to a granting of asylum and to reiterate that it is not limited to those formally recognized as refugees. The principle of non-refoulement was articulated in Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol and applies to persons “where there are substantial grounds for believing that [they] would be in danger of being subjected to torture” under the UN Convention Against Torture. The principle of non-refoulement is non-

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Convention Relating to the Status of Refugees, article 31 (1) (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”); Asylum Processes (Fair and efficient asylum procedures) EC/GC/01/12 (May 31, 2001) 20. (“A fundamental safeguard in some systems, which should, in UNHCR’s view, be promoted for all, is the recognition that an asylum-seeker’s failure to submit a request within a certain time limit or the non-fulfillment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect is credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles.”); Jabari v. Turkey, x Eur. Ct. H.R. x, x (2000) (“In the Court’s opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.”)

UNHCR, Fair and Efficient Asylum Procedures: a non-exhaustive overview of applicable international standards; UNHCR EXCOMM Agenda for Protection Goal 1, Objective 2, point 2, of the Programme of Action.


Convention Relating to the Status of Refugees, art. 33.

CAT, art. 3.
derogable and is considered a cornerstone principle of international law protecting individuals. This paragraph serves as a complementary articulation of the IMBR Article 13 principle of non-refoulement.

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ARTICLE 13
NON-REFOULEMENT

(1) Every migrant has the right against refoulement.

(2) No migrant shall be expelled or returned in any manner to another State where there are substantial grounds for believing that he or she would be subjected to torture or cruel, inhuman or degrading treatment or punishment.

(3) No migrant shall be expelled or returned in any manner to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, political opinion, or other grounds protected under this Bill.

(4) States shall respect the non-refoulement rights of all migrants within their effective control, whether or not they are within the State’s territory.

Commentary

(1) Paragraph 1: Non-refoulement is a non-derogable right possessed by all migrants. The principle of non-refoulement is a peremptory norm and is one of the strongest constraints on a State’s ability to control entry and expulsion.\(^{243}\)

(2) Paragraph 2: Paragraph 2 is derived from Article 3 of the Convention Against Torture (CAT), which states, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”\(^{244}\) However, paragraph 2 provides that migrants shall not be “expelled or returned in any manner” to explicitly guard against scenarios such as chain refoulement, reflecting the position, as articulated by the Human Rights Committee, that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”\(^{245}\) The Human Rights Committee and the European Court of Human Rights have interpreted the ban on refoulement as being inherent in the prohibitions against torture or inhuman or degrading treatment or punishment in Article 7 of the ICCPR\(^{246}\) and Article 3 of the European

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245 Human Rights Comm., General Comment No. 20: art. 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.7, para. 9.

246 See Human Rights Comm., General Comment No. 20: art. 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.7, para. 9;
Convention, respectively. Article 13 of the IMBR understands the country of return to designate not only the country to which removal is to be effected directly, but also any other country to which the migrant may be removed afterwards.

(3) **Paragraph 3**: The purpose of paragraph 3 is to give effect to the non-refoulement rights of all migrants under Article 33 of the 1951 Refugee Convention, which states, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Like paragraph 2, paragraph 3 also recognizes that States have an obligation to ensure that migrants are not put at risk, directly or indirectly, by their return to any other country. The IMBR expands the grounds upon which a migrant may claim a threat to life or freedom to include “other grounds protected under this Bill” to encourage States to recognize the need to protect migrants from persecution on grounds that may not be specifically mentioned in the 1951 Convention or its Protocol, but that still trigger non-refoulement obligations, such as persecution (for any reason) that constitutes cruel, inhuman or degrading treatment under CAT, the ICCPR, or the ECHR. Although Article 33(2) of the Refugee Convention lists two exceptions (one for public order and the other for national security), these exceptions apply only in extreme and limited circumstances.

(4) **Paragraph 4**: The purpose of paragraph 4 is to establish protection against refoulement for all migrants who are subject to a State’s jurisdiction or effective control, whether or not the migrant is within the State’s territory. The scope of protection...
should include migrants seeking asylum or migrants interdicted on the high seas, and prohibits so-called “push-backs,” in which States intercept vessels at sea and summarily return migrants to sending States without an individualized determination of protection needs. This “extraterritorial” understanding of non-refoulement is bolstered by the intent of States party to the 1951 Refugee Convention not to place migrants at risk of serious harm or persecution, and the nature of the IMBR as a set of norms derived from the fundamental dignity of all migrants, rather than their ties to a particular sovereign.

257 See e.g. UN High Comm’r for Refugees Executive Committee Conclusion No. 15, 1979, at para (c) (“[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.”); UN High Comm’r for Refugees, UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; The Haitian Centre for Human Rights et al. v. United States, Case 10.675, 10.675, Inter-American Commission on Human Rights (IACHR), para 156-157 (March 13, 1997); Brief of UNHCR in support of Respondents, Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993); Medvedyev and Others v. France, ECtHR, GC, Application No. 3394/03, Judgment of 29 March 2010, paras. 62-67 (extending applicability of the ECHR to a French warship’s interception and effective control of a boat on the high seas).


ARTICLE 14
NATIONALITY

(1) Every migrant has the right to a nationality.

(2) Every person has the right to the nationality of the state in whose territory he or she was born if the person does not have the right to any other nationality.

(3) States shall provide for, and should encourage, the naturalization of migrants, subject to limitations and conditions that are non-arbitrary and accord with due process of law.

(4) States shall recognize the right of expatriation and renunciation of citizenship, subject only to conditions and limits based on compelling considerations of public order or national security.

(5) Neither marriage nor the dissolution of marriage shall automatically affect the nationality of either spouse or their children. States shall not remove the nationality of a citizen who marries a non-citizen unless the citizen takes affirmative steps to renounce his or her citizenship. States shall grant women equal rights with men with respect to the nationality of their children.

(6) No migrant shall be arbitrarily deprived of his or her nationality nor denied the right to change his or her nationality. States should not consider a migrant’s acquisition of foreign nationality to be an automatic or implied basis of renunciation of the nationality of the State of origin.

(7) States should allow children having multiple nationalities acquired automatically at birth to retain those nationalities.

Commentary

(1) The foundation of this article is the fundamental right of every person to a nationality. This right includes the ability to change one’s nationality without arbitrary interference by a sovereign State. States should also take reasonable measures to combat statelessness, and should not act so as to render persons stateless. This article affirms that unreasonable barriers to the renunciation or acquisition of a nationality must not be erected. Furthermore, to better enable migrants to achieve full enjoyment of the social, political, cultural, labor, and other rights within this Bill, States should encourage the naturalization of resident lawful migrants. While this article recognizes the general right of sovereign States to determine when to bestow citizenship and nationality rights, this

260 See UDHR, art. 15 (“(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”).
261 International law has long recognized citizenship and nationality laws as falling within the sovereign powers of States. See Convention on Certain Questions Relating to the Conflict of Nationality Laws arts. 1 & 2, Apr. 12, 1930, 179 L.N.T.S. 89; see also MICHAEL WALZER, SPHERES OF JUSTICE 39 (1983) (arguing that the survival of democratic communities depends upon their exercise of some control over membership status within their own national communities).
article also recognizes necessary limits on this power: in particular, States may not unreasonably burden the free movement of persons by way of unduly restrictive citizenship and nationality laws, nor may States exercise their sovereign powers over citizenship and nationality in a manner that conflicts with international law norms. A non-exhaustive list of such norms includes preserving gender equality, marriage rights, and rights of the child. This article articulates the limits applicable to States’ sovereign power to prescribe citizenship and nationality laws. Pursuant to Article 1, a migrant who gains citizenship in a host State ceases to be a migrant.

(2) Migrants frequently encounter problems of legal status as a result of the citizenship and nationality laws of both receiving States and States of origin. In particular, migrants may encounter resistance in naturalizing where they reside, and they may risk the unwanted forfeiture of nationality rights and privileges in a State of origin as they seek or obtain nationality in another State. In each of these cases, this article favors inclusion under citizenship and nationality laws, and this article strongly disfavors the involuntary renunciation of one’s citizenship and nationality under a State’s internal laws. In the case of an otherwise stateless person, this article recognizes that person’s right to the nationality of the state in which they were born should no other nationality be available to them.

(3) Paragraph 2: The goal of paragraph 2 is to ensure that everyone has the right to a nationality. A person’s right to the nationality of the state in which he or she was born is explicitly provided for in the American Convention, the European Convention on Nationality of 1997, the Convention on the Reduction of Statelessness, and the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

262 There is ample modern and historical support for placing boundaries around the scope of a sovereign State’s power to draft its citizenship and nationality laws. Article I of the 1930 Hague Convention on Nationality recognized that such laws must be consistent with international conventions, international custom, and general principles of international law. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1. The earlier advisory opinion of the PCIJ in the Tunis-Morocco case already suggested that, in the future, international law would develop so as to impose restrictions on sovereign States’ authority to draft and administer nationality laws. See Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7). The Nottebohm case directly incorporates considerations of international law norms in evaluating the legitimacy of a sovereign’s nationality laws. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6). More recently, the Strasbourg European Convention on Nationality of 1997 declared in Article III, Paragraph 2 that States shall determine their own nationality laws only insofar as such laws are consistent with international conventions, customary international law, and general international principles regarding nationality. European Convention on Nationality art. 3.2, Nov. 6, 1997, ETS No. 166.

263 ACHR, art. 20, “Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.”


265 Convention on the Reduction of Statelessness, art. 1, “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”

266 Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 15 “Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State.”
and is implicit in the UDHR\textsuperscript{267} and the CRC.\textsuperscript{268} The realization of a person’s right to the nationality of the state in which they were born would ultimately lead to the elimination of statelessness if this right were universally exercised. However, states need not confer nationality automatically under these treaties. States should ensure that there is an expedited process for acquiring nationality for those who would otherwise be without a nationality. A process that is so onerous as to defeat the object and purpose of this right is a violation of this right.

(4) \textit{Paragraph 3}: Naturalization of resident lawful migrants should be encouraged, as naturalization furthers the exercise of a migrant’s other rights and preserves the right to change one’s nationality. The goal of naturalization is justified by the inherent inequality involved in having two distinct classes of residents within one State. This dichotomy of legal status is particularly problematic when a non-naturalized class is subject to the laws of a State without enjoying participation and voting rights within the sovereign State.\textsuperscript{269} Temporary workers present one example of such a problem: despite formal guarantees of legal protections, these migrants frequently encounter difficulties in exercising their rights and in enforcing fair working conditions, while the availability of such vulnerable, often low-wage workers may also damage the bargaining power of local unions and worsen wage and working conditions for naturalized workers in the same industry.\textsuperscript{270} Thus, naturalization not only improves the condition of the migrant, but it also preserves the legal rights of already naturalized residents and citizens in the receiving State.

(5) Factors that strengthen a claim to naturalization include: duration of residence; economic, social, and family ties; community and linguistic integration; legal status; the best interest of the child; and humanitarian grounds. This list of factors for evaluating the strength of a naturalization claim is non-exhaustive, and these factors must be applied in a case-by-case analysis of individual naturalization claims. Under such an analysis, the absence of any one factor or set of factors is not \textit{per se} dispositive of a claim to naturalization; conversely, a very strong claim under any one factor—such as the right to family unification or the necessary interests of the child—may suffice on its own to sustain a claim. A necessary result of this balancing of factors favoring or disfavoring a claim to naturalization is that the unlawful status of a migrant’s entry into a State shall not absolutely bar the migrant’s ultimate naturalization in that State.

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\textsuperscript{267} UDHR, art. 15, “Everyone has the right to a nationality.” This conference of a universal right does not specify which state has the corresponding duty of providing the nationality, however the most logical construction of this article is that each person has at a minimum the right to the nationality of the country in which he or she is born.

\textsuperscript{268} CRC, art. 7, “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality…” and art. 8, “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality…” Because birth registration and right to nationality are both included in the same paragraph of article 7 of the CRC it is implicit in this article that the child shall be both registered in the state in which it is born and entitled to acquire the nationality of that state.

\textsuperscript{269} See PHILLIP COLE, PHILOSOPHIES OF EXCLUSION 10 (2000).

Paragraph 4: The right of expatriation is itself a norm of international law.\(^{271}\) To properly protect this right, exceptions allowing for States to refuse expatriation must be read narrowly: “[C]ompelling considerations” should be limited to necessary, proportional responses to existing exigencies, and not merely broad-based, preemptive policies directed at hypothetical, future threats to State sovereignty. Thus, while an imminent threat of grave national harm may sustain a State’s refusal to allow citizens to expatriate, more abstract concerns regarding the long-term preservation of State resources will not justify refusing expatriation.

Paragraph 5: In keeping with the trend of gender-neutral citizenship law and the concept that the renunciation or acquisition of a nationality should be a positive act, this paragraph recognizes both the equality of men and women with regards to their own nationality in the act of marriage, and with respect to the nationality of their children as affirmed by CEDAW\(^{272}\) and the Convention on the Nationality of Married Women.\(^{273}\) In the event that a State retains laws that automatically confer nationality upon marriage, this Bill shall not be taken as an affirmative action for the renunciation of other nationalities. In particular, the act of marriage must not result in gender discrimination by automatically changing the nationality of one spouse to reflect that of the other—as has most often been the case with women having their nationalities changed forcibly to reflect the nationality of their husbands.\(^{274}\) This paragraph further incorporates important considerations of gender equality as, in the case of illegal forced marriages, this paragraph prevents further harm from being visited upon forced migrants by ensuring that nationality in the involuntary spouse’s State of origin is not simultaneously and involuntarily surrendered upon marriage. Likewise it ensures gender equality for children of marriages between nationals of two different States.

Paragraph 6: Paragraph 6 incorporates two important concerns. First, the renunciation of nationality should be an affirmative process; second, States should not construct “trap doors” through which the enjoyment of one’s rights in areas such as marriage results in the inadvertent loss of nationality. One has a clear right under international law to marry the person of one’s choosing.\(^{275}\) Exercise of this right must not nullify the enjoyment of other essential rights, such as those regarding nationality.

\(^{271}\) See, e.g., UDHR, art. 15 (noting that “no one shall be . . . denied the right to change his nationality”).

\(^{272}\) CEDAW art. 9 (“States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband…States Parties shall grant women equal rights with men with respect to the nationality of their children”); see also, Unity Dow v. Attorney-General (Botswana) [June 1991], Botswana, (holding that the automatic bestowal of the father’s nationality to the exclusion of the mother’s infringed the right not to be discriminated against on the basis of sex).

\(^{273}\) Convention on the Nationality of Married Women, art. 1, “…neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.”

\(^{274}\) See CEDAW, art. 9(1).

\(^{275}\) See, e.g., UDHR, art. 16.
recognition of plural citizenship, and the policy strongly disfavoring any renunciation of citizenship not involving an active declaration of intent from the individual citizen directly affected by the loss of citizenship. While States’ retain authority to draft domestic citizenship laws that do not recognize plural citizenship rights, transparency and effective notice should always characterize citizenship laws. This paragraph also favors trends towards the recognition of plural citizenship in at least some circumstances. Paragraphs 6 and 7 complement each other, such that plural nationality acquired automatically by any means—just as plural nationality acquired automatically and specifically through marriage—should not constitute an automatic renunciation of one’s original nationality.

(8) Paragraph 7: This paragraph builds upon and clarifies the existing nationality rights of children. Just as every person is entitled to a nationality, every child must have the right to acquire a nationality. The right to acquire a nationality necessarily includes the right to preserve that nationality. Paragraph 6 of this article establishes that a full recognition of these rights should extend to the recognition of a child’s plural nationalities acquired automatically at birth. Moreover, preserving equality between men and women with respect to the nationality of their children requires the acceptance of plural nationality under this paragraph. Traditionally, there has been some resistance in international law to allowing for dual or plural nationalities. However, there is a very strong movement towards the recognition of plural nationalities, and those States still formally rejecting the practice often acquiesce by failing to enforce internal laws requiring exclusive nationality. This Bill favors the trend towards recognition and adopts the position that, in general, the interests of the children covered by this paragraph shall best be served by permitting plural nationality.

\[276\] See, e.g., ICCPR, art. 24.3; CRC, supra note 6, art. 7.1.  
\[277\] See CRC, art. 8.1.  
\[278\] See CEDAW, art. 9.2.  
\[279\] See T. Alexander Aleinikoff, Between Principles and Politics: The Direction of U.S. Citizenship, in FROM MIGRANTS TO CITIZENS 137-41 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000), reprinted in THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 90-91 (2008); The Hague Convention on Certain Questions Relating to the Conflict of Nationality Law (1930) (Preamble) reads: Being convinced that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only. In article 12 (second paragraph) the Convention seems more worried about children being able to renounce their dual nationality with respect to children of career diplomats. “The law of each State shall permit children of consuls de carrière, or of officials of foreign States charged with official missions by their Governments, to become divested, by repudiation or otherwise, of the nationality of the State in which they were born, in any case in which on birth they acquired dual nationality, provided that they retain the nationality of their parents.”  
ARTICLE 15
FAMILY

(1) Every migrant family is entitled to protection by society and the State.

(2) States shall take all appropriate measures to facilitate the reunification of migrant family members with nationals or citizens.

(3) Children with no effective nationality have the right to return to either parent’s State of origin and to stay indefinitely with their parent or parents regardless of the children’s citizenship.

(4) States should grant derivative immigration status and timely admission to dependent family members of migrants who are lawfully settled within the State. States should consider extending derivative immigration status to non-dependent family members of lawfully settled migrants.

Commentary

(1) This article establishes the importance of the family and addresses family rights that are especially pertinent to migrants. It builds upon prior international legal precedent in establishing a right that should not be controversial. The most crucial and basic social grouping is the family. Families may be by biological ties, but may also include individuals with mutual dependencies. As migration can lead to extended periods of family separation and uncertainty, State treatment of the family can greatly impact the protection families receive in regard to other rights. Migrants are particularly vulnerable when separated from their family. The family’s right to be together and the family’s right to reunify once separated are of utmost importance.

(2) Paragraph 1: This paragraph defines the protection given by society and the State to the family grouping. The right to protection of the family by the state is derived directly from ICCPR Article 23(1): “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” ICESCR Article 10(1) also establishes that “[t]he widest possible protection shall be accorded to the family, which is the natural and fundamental group unit of society, particularly for its

281 “This standard should not be controversial as it merely reflects broad international agreement [as embodied in various human rights treaties].” See Ryan T. Mrazik & Andrew I. Schoenholtz, Protecting and Promoting the Human Right to Respect for Family Life: Treaty-Based Reform and Domestic Advocacy, 24 Geo. Immigr. L.J. 651, 672.
282 The definition of “family” should be construed broadly. “Because one’s family can include parents, siblings, grandparents, adult children, and others, establishing the existence or non-existence of a family life involves a fact-based, flexible, and substantive evaluation of situations where the right to respect for family life might attach.” Mrazik and Schoenholtz, supra note 1, at 653. See also Yogyakarta Principles, Principle 24, http://www.yogyakartaprinciples.org (last visited Nov. 1, 2011) (“Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.”)
283 ICCPR, art. 23(1).
establishment and while it is responsible for the care and education of dependent children. Article 12 of the UDHR guards against “arbitrary interference” with the family, among other things (including “privacy, … home or correspondence”). The CRC and CEDAW also protect the right to family relations (see above: CRC, arts. 8, 9, 10, 16 and CEDAW arts. 9, 16) as expressed through ensuring the family is not separated from the child (as in CRC art. 9) or retaining a family structure under law (see CEDAW art. 16). This provision extends the right of ICRMW Article 44(1), which calls upon “States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.”

(3) A State is responsible for protecting families, with no discrimination between citizens and non-citizens. The prohibition against discrimination on the basis of national origin can be found in Article 2(2) of the ICESCR, which guarantees all rights in that Convention “without regard … to social origin” and in Article 2(2) of the ICCPR. Furthermore, the right to non-interference with the family is protected by the ICCPR. Article 17 of the ICCPR states that: “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”

(4) The conception of the family as the “fundamental group unit of society” is recognized in international law and is derived from social needs, biological connections, and dependency relationships between the individuals in the family unit. The right to protection of the family implies the right of family members to live together. The “two main principles” that underlie the “right to respect for family life” are: “(1) the family is the natural and fundamental unit of society, and (2) maintaining the family unit is in the best interests of the child.”

(5) Paragraph 2: The rights contained in this paragraph derives from the CRC’s right of a child to be raised by his or her family. Children should not be separated from their parents against their will, and in cases where children are separated, family reunification

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284 ICESCR, art.10(1).
285 UDHR, art.12.
286 CRC, arts. 8, 9, 10, 16; CEDAW, arts. 9, 16.
287 ICRMW, art. 44(1).
288 This protection is outlined by Mrazik and Schoenholtz, see supra note 2. Mrazik and Schoenholtz state that the inclusion of “arbitrary” as a qualifier “suggests a need for a measure of discretion in state decisions that affect an individual’s right to respect for family life.” Id. at 683.
289 ICCPR, art. 23(1); ICESCR, art. 10(1); UDHR, art. 16(3); CRC, arts. 8, 9, 10, 16; ICRMW, art. 44.
292 CRC, art. 9(1).
should be pursued unless contrary to the best interests of the child.\textsuperscript{293} Children separated from their parents “face greater risks of, \textit{inter alia}, sexual exploitation and abuse, military recruitment, child labor (including labor for their foster families) and detention.”\textsuperscript{294} In particular, this paragraph intends to prevent situations in which a migrant child is born in the parents’ host country and granted legal status or citizenship in that country only to be forbidden from returning with the parents to the parents’ country of origin. In accordance with the CRC, separation should only occur when it is in the best interests of the child, and should not occur on the basis of citizenship. This right should be read in the context of the IMBR’s broad \textit{non-refoulement} provision.\textsuperscript{295}

(6) Children are entitled to special protection and assistance by the State when they are temporarily or permanently deprived of their family.\textsuperscript{296} Under the CRC, discrimination based on national or social origin is impermissible and so States have an obligation to provide special protection and assistance to all children regardless of national or social origin. Furthermore, Article 22 of the CRC, which refers to children who are seeking refugee status or are refugees, calls on States Parties to assist the United Nations in “trac[ing] the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.”\textsuperscript{297} If the family cannot be found, then “the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”\textsuperscript{298} This provision also relates to State obligations to children under IMBR Article 3(2).

(7) The CRC also requires States to treat applications of children or parents to enter or leave for the purpose of family reunification in a “positive, humane and expeditious manner.” Such applications “shall entail no adverse consequences for the applicants and for the members of their family.”\textsuperscript{300}

(8) \textit{Paragraph 3}: A child should grow up in a family environment\textsuperscript{301} and should be raised by his or her parents.\textsuperscript{302} Understanding that the migration process can cause differences in

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\item \textsuperscript{293} U.N. Comm. on the Rights of the Child, \textit{General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of their County of Origin}, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) (“The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child’s view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.”).
\item \textsuperscript{294} See \textit{General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin.}
\item \textsuperscript{295} IMBR Article 13, \textit{see also General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin} (“Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a ‘reasonable risk’ that such a return would lead to the violation of fundamental human rights of the child.”)
\item \textsuperscript{296} CRC Art. 20(1), Art. 22(2).
\item \textsuperscript{297} CRC Art. 22(1).
\item \textsuperscript{298} CRC Art. 22(2).
\item \textsuperscript{299} IMBR Art. 3(2).
\item \textsuperscript{300} CRC Art. 10(1).
\item \textsuperscript{301} CRC, pmbl.
\item \textsuperscript{302} See Adalah, Expert Opinion on the Right to Family Life and Non-discrimination, Open Society Justice Initiative (2008); CRC, art 9.
\end{itemize}
citizenship and effective nationality between children and their parents, this paragraph ensures that citizenship or de facto statelessness will not prevent children from joining their parents, should they return to the State of origin or to another new location.

(9) Paragraph 4: This article builds on the foundation of the family as the fundamental group unit of society. The right to protection of the family implies the ability of family members to live together.\(^{303}\) The first portion of this paragraph emphasizes the right to migrate for dependent family of legally settled migrants. The CRC provides that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.”\(^{304}\) Additionally, the ICRMW instructs States to “take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor, dependent, unmarried children.”\(^{305}\) The European Court of Human Rights has upheld the right of a child (or of a substantial equivalent) to join her/his legal resident parents under the European Convention on Human Rights’ right to family.\(^{306}\)

(10) Distinctions among family members that follow the standard presented in Article 2(4) of this Bill (made pursuant to a legitimate aim, with an objective justification, and with reasonable proportionality between the means employed and the aims sought to be realized) are valid; this paragraph is not meant to supplant the Bill’s equal protection article.

(11) The second portion of this paragraph encourages States to consider extending legal status to non-dependent family members of lawfully settled migrants. The extension of derivative immigration status to non-dependent family members of lawfully settled migrants follows from several human rights instruments that establish the family as the "fundamental group unit of society," including the ICCPR, the ICESCR, the UDHR, the CRC, and the ICRMW.\(^{307}\) The animating concern throughout this Article is that, as the fundamental group unit of society, the family is deserving of State protection, and this includes both individuals who are dependent and those who are non-dependent but comprise part of a family.

\(^{303}\) See ICCPR General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 5.

\(^{304}\) CRC, Article 10(1).

\(^{305}\) ICRMW, ¶ 3, art. 44(2).


\(^{307}\) See ICCPR, art. 23(1); ICESCR, art. 10(1); UDHR, arts. 12 (protecting against “arbitrary interference with … privacy, family, home or correspondence), 16(3); CRC, arts. 8, 9, 10, 16; ICRMW, art. 44.
ARTICLE 16
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION OR BELIEF

(1) Every migrant has the right to freedom of thought, conscience, and religion or belief.

(2) This right shall include freedom to have or to adopt a religion or belief of one’s choice, and freedom, either individually or in community with others and in public or private, to manifest one’s religion or belief in worship, observance, practice and teaching. Migrants shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

(3) States shall undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Commentary

(1) Paragraph 1: The purpose of paragraph 1 is to reaffirm the right to freedom of thought, conscience and religion for migrants. This is of particular importance for migrants who may practice a religion unfamiliar in their country of residence. Under Article 4.2 of the ICCPR, the right to freedom of thought, conscience and religion is non-derogable. The right to freedom of thought, conscience and religion was enshrined in Article 18 of the Universal Declaration of Human Rights, Article 18 of the ICCPR and other international instruments. According to the Human Rights Committee General Comment 22, the rights protected in this article are “far-reaching and profound.” Additionally, according to General Comment 15, the rights guaranteed in the Convention “apply to everyone . . . irrespective of his or her nationality” and “must be guaranteed without discrimination between citizens and aliens.”

(2) Paragraph 2: The purpose of paragraph 2 is to reaffirm that the freedom of thought, conscience, religion or belief includes the right to retain one’s religion or belief, the right to change one’s religion or belief, the right to adopt a religion or belief, and the right to adopt atheistic views. These rights encompass the right to worship or assemble in connection with a religion or belief, including through ritual or ceremonial acts. These

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308 ICCPR art. 4(2).
309 IC RMW, art. 12; ECHR, art. 9; ACHPR, art. 8; ACHR, art. 12; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art. 1(1), Nov. 25 1981, G.A. Res. 36/55, U.N. Doc. A/RES/36/55.
rights are without limit.\textsuperscript{314} The second clause of this article supports these rights by reaffirming the right to be free from coercion. The protection of these rights for migrants are of particular importance when they are members of a minority religion or belief and are vulnerable to State agents or others who try to convert or prevent the conversion of persons through unethical or forcible means.\textsuperscript{315} The text of this paragraph derives from Article 18 of the UDHR, Article 18 of the ICCPR, and other international instruments.\textsuperscript{316}

(3) Paragraph 3: The purpose of paragraph 4 is to reaffirm the right of migrant parents or legal guardians to provide religious and moral education to their children. This includes a respect for the cultural identity and values of the country from which migrant children may originate.\textsuperscript{317} Children should have access to religious and moral education in accordance with the wishes of their parents and should not be compelled to receive instruction against the wishes of their parents. The text of this article derives from Article 18 of the ICCPR, Article 14 of the CRC, and other international instruments.\textsuperscript{318}

\begin{thebibliography}{99}
\bibitem{315} See ICCPR Art. 27; ICCPR \textit{General Comment 23: The rights of minorities (Art. 27)}, 04/08/1994. CCPR/C/21/Rev.1/Add.5, para. 5.2; Report of the Special Rapporteur of the Commission on Human Rights on freedom of religion or belief, 30 September 2005, A/60/399, paras. 40-68.
\bibitem{317} CRC, art. 14(2)(c).
\bibitem{318} ICCPR, art. 18 (4); CRC, art. 14(2); ICRMW, art. 12 (4); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art. 5, Nov. 25 1981, G.A. Res. 36/55, U.N. Doc. A/RES/36/55.
\end{thebibliography}
ARTICLE 17
FREEDOM OF OPINION AND EXPRESSION

(1) Every migrant has the right to hold opinions without interference.

(2) Every migrant has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

Commentary

(1) Paragraph 1: The purpose of paragraph 1 is to reaffirm the well-established principle that every person, including every migrant, has the right to freedom of opinion. The right to freedom of opinion was originally enshrined in Article 19 of the UDHR. Paragraph 1 tracks the language from Article 19 of the ICCPR and Article 13 of the ICRMW. The UN Human Rights Committee has stated that the freedom of opinion contained in ICCPR Article 19 extends to protect the right of an individual to change their opinion and the freedom not to hold or express an opinion. The Committee has also stated that no individual may be subjected to an impairment of his or her human rights based on his or her actual, perceived or supposed opinions. There are no exceptions or reservations to the right to freedom of opinion, and therefore, the Human Rights Committee has declared that it can never become necessary to derogate from the freedom of opinion during a state of emergency.

(2) Paragraph 2: The purpose of paragraph 2 is to reaffirm the well-established principle that every person, including every migrant, has the fundamental right to freedom of expression. The UN General Assembly has declared that the “freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the United Nations is consecrated.” It is important to note that the guarantee protects both the right to impart information and the right to seek and receive information and ideas. The “right to freedom of expression” was originally enshrined in Article 19 of the Universal Declaration of Human Rights. Paragraph 2 tracks the language from Article 19 of the ICCPR and Article 13 of the ICRMW.

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319 UDHR.
320 ICCPR art. 19, ICRMW Article 13.
321 General Comment 34, para 9 and 10.
322 General Comment 34, para. 8.
324 General Comment, para. 5.
325 Resolution 59(1), 14 December 1946.
326 Mendel, at 4, 5, Mavlonov v. Uzbekistan, 27 April 2009, Communication No. 1334/2004, para. 8.4 (UN Human Rights Committee held that the refusal of Uzbek authorities to register a newspaper denied the right of both the expression rights of the editor but also of the reader to receive information and ideas).
327 The European Convention on Human Rights, the ACHR and the ACHPR guarantee the right to freedom of expression, respectively at Article 10, Article 9, and Article 13.
ARTICLE 18
FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION

(1) Every migrant has the right to freedom of peaceful assembly and association.

(2) These rights shall include freedom to form associations and trade unions in the State of residence for the promotion and protection of the migrant’s economic, social, cultural, and other interests.

Commentary

(1) Paragraph 1: The purpose of paragraph 1 is to reaffirm the right to peaceful assembly and association for migrants. The right to peacefully assemble and the right to associate are enshrined in many of the core human rights instruments, including the UDHR, ICCPR, the CRC, the ICERD, the ECHR, the Banjul Charter, and the American Convention on Human Rights. The Human Rights Committee has further interpreted the ICCPR to ensure that “aliens receive the benefit of the right of peaceful assembly and of freedom of association.” The UN Human Rights Council has highlighted the importance of these rights and reiterated that the rights apply to migrants. The Special Rapporteur on the rights to freedom of peaceful assembly and of association was even more explicit in stating that the rights of assembly and association in the ICCPR apply to non-nationals, including stateless persons, refugees, and migrants.

328 UDHR, Art. 20(1) (“Everyone has the right to freedom of peaceful assembly and association.”).
329 ICCPR, Art. 21 (“The right of peaceful assembly shall be recognized.”); Art. 22(1) (“Everyone shall have the right to freedom of association with others…”).
330 CRC, Art. 15(1) (“States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.”)
331 ICERD, Art. 5(d)(ix) (“…States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to freedom of peaceful assembly and association…”)
332 ECHR Art. 11(1) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”)
333 ACHPR, Art. 10(1) (“Every individual shall have the right to free association provided that he abides by the law.”); Art. 11 (“Every individual shall have the right to assemble freely with others.”)
334 ACHR, Art. 15 (“The right of peaceful assembly, without arms, is recognized.”); Art. 16(1) (“Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”).
(2) The right to peacefully assemble and the right to associate facilitate the exercise of many other rights and are essential to a functioning democracy. The rights allow individuals to “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.”

For migrants, who do not have the right to vote, who are often of a cultural, ethnic, or religious minority, and who are often in labor situations with few bargaining rights, the ability to assemble and associate without fear of reprisal is an important way to engage in the polity and to claim other civil, cultural, economic, political and social rights.

(3) Paragraph 2: The freedom to form associations and trade unions is explicitly enumerated in several of the core human rights documents, including the UDHR, the ICCPR, the ICESCR, the ICERD, the ICRMW, and the ECHR. The right to form and join trade unions is also protected by the ILO in ILO Convention 87. Additionally, the ILO Congress declared in 1998 that all members of the ILO have the obligation to respect, promote, and realize certain fundamental rights, including freedom of association. Freedom of association includes the right to form and join an association, to operate the association freely and to be protected from undue interference, to access funding and resources, to take part in the conduct of public affairs, and to not be

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340 UDHR, Art. 23(4) (“Everyone has the right to form and to join trade unions for the protection of his interests.”).
341 ICCPR, Art. 22(1) (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”).
342 ICESCR, 8(1) (“The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.”).
343 ICERD, Art. 5(e)(ii) (“…States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to form and join trade unions.”).
344 ICRMW, Art. 26(1) (“States Parties recognize the right of migrant workers and members of their families: (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned…”)
345 ECHR Art. 11(1) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”)
346 Freedom of Association and Protection of the Right to Organise Convention (C87), ILO, adopted on 9 July 1948, Art. 2 (“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.” (emphasis added)).
subject to unlawful termination.\textsuperscript{348} The freedom to join trade unions applies to workers, not only regardless of citizenship, but also “irrespective of their migratory status.”\textsuperscript{349} This right should be read in concert with the labor rights protected by this Bill in article 19.

\textsuperscript{348} Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, para 53-76.

\textsuperscript{349} Advisory Opinion on Undocumented Migrants, IACtHR, op. cit., para. 157 (“The safeguard of [freedom of association and to organize and join a trade union] for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which ‘[a]ll human beings are born free and equal in dignity and rights.’”\textsuperscript{3})
ARTICLE 19
CIVIL AND POLITICAL LIFE

(1) Every migrant has the right to participate in the civil and political life of his or her community and in the conduct of public affairs.

(2) This right shall include the freedom to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

Commentary

(1) The right to civil and political life extends from the idea that it is in the interest of all people to have a voice in the policies that affect them. As emphasized in the IMBR preamble, “migrants bring special contributions to their communities, [and] the ability to participate in and influence one’s community is a significant part of human dignity.” Migrants often create new familial and community roots in their location of residence while still maintaining similar connections in their State of origin. This article encourages States to extend civic rights to migrants by providing some avenues for migrant voices to be heard.

(2) Paragraph 1: The language “participate in the civil and political life” allows for a range of interpretations. In practice, States should grant voting rights for migrants in local elections, but can also facilitate civic participation by soliciting comments on pertinent proposed laws or policies, soliciting migrants’ opinions, through a representative on deliberative or advisory bodies, and providing full information about civic rights and duties. The right may also be realized in part by facilitating association and assembly, whether on community or trade-group grounds. Assembly and association rights will also support migrant participation in the conduct of public affairs by allowing migrants to exert “influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”

(3) The right to participate in the civil and political life of the community builds on ideas in the ICCPR and the ICERD. Though these documents limit civic rights on the basis of citizenship, they serve as evidence of the importance of these concepts to the full

353 ICCPR, supra note 2, art. 25 (“Every citizen shall have the right . . . to take part in the conduct of public affairs.”); ICERD, supra note 4, art. 5(c) (“Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”).
enjoyment of human rights. The Human Rights Committee explicitly mentions the possibility that permanent residents might “enjoy [civic] rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.” While international human rights law does not require direct electoral participation for migrants, European countries, and the European Union as a whole, provide successful models of non-citizen participation in civil and political life, including local elections. In addition, immigrant suffrage is a growing trend and currently available on some level in more than 40 countries. This immigrant suffrage trend reflects strong policy arguments in favor of enfranchising migrants, especially those migrants who pay taxes, may be drafted into military service, and otherwise bear the responsibilities of citizenship to the host country.

(4) Paragraph 2: Paragraph 2 is derived from ICRMW Article 41 and requires States of origin to allow their citizens living abroad to vote and be elected. The right to vote externally draws support from the principle of universal suffrage. The UDHR recognizes the right of every person to take part in government, directly or through freely chosen representatives, and to have equal access to public service. The ICCPR and various regional instruments grant citizens the right to vote and to stand for election without unreasonable restrictions. However, the Human Rights Committee and the European Commission on Human Rights have stated that residency requirements are generally

355 See, e.g., European Convention on the Participation of Foreigners in Public Life at the Local Level, Strasbourg, Feb. 5, 1992, Europ. T.S. No. 144 (guaranteeing freedom of expression, assembly and association, encouraging the establishment of consultative bodies to represent foreign residents at local levels, and guaranteeing the right to vote and to stand for election in local authority elections); Treaty on European Union, art. 8b, Feb. 7, 1992, art. G(C) 86, 31 I.L.M. 247 (1992)(“Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.”).
356 Immigrant Voting Project, http://www.immigrantvoting.org (last visited September 23, 2012) (updated list of all countries that provide such rights, as well as extensive discussion of the topic).
358 ICRMW, Art. 41 (“Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation”) (applies to regular migrant workers and their families).
359 UDHR, Art. 21.
360 ICCPR, supra note 2, art. 25 (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”). See also Art. 13 of the ACHPR; Art. 23 of the ACHR; and Art. 3 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 9), 213 U.N.T.S. 262, entered into force May 18, 1954 (available at http://www1.umn.edu/humanrts/euro/z20prot1.html).
considered reasonable requirements for voting. While there is significant divergence in State practice regarding who is eligible for external voting, and many migrants’ voting rights are effectively suspended during migration, over 100 countries expressly allow their citizens to vote from abroad. The trend in State practice to enable and encourage external voting is particularly prominent for elections in post-conflict States.

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361 ICCPR, General Comment 25, para. 11 (e.g. residence requirements that exclude homeless from voting are not reasonable); see “X v. United Kingdom,” Secretariat of the European Commission of Human Rights, Decisions/Reports of the Council of Europe by the European Commission on Human Rights, App. Nos. 7730/76 (1979) and 7566/76 (1976) (“This right [universal suffrage] was neither absolute nor without limitations but subject to such restrictions imposed by the Contracting States as are not arbitrary and do not interfere with the free expression of the people’s opinion.”).


363 Id.

ARTICLE 20
LABOR

(1) Every migrant has the right to be free from slavery, servitude, or forced or compulsory labor.

(2) Every migrant has the right to work, and States shall take progressive measures to safeguard this right.

(3) Every migrant has the right to just and favorable conditions of work, including fair and equal remuneration, minimum working age, maximum hours, safety and health standards, protection against unfair dismissal, and collective bargaining.

(4) States shall ensure the effective abolition of child labor.

(5) States shall ensure the elimination of discrimination in respect of employment and occupation.

(6) Migrants shall be entitled to treatment at least as favorable as that accorded to citizens with respect to labor conditions and employment.

(7) States should require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.

Commentary

(1) This Article reaffirms a number of existing labor rights found in key international human rights instruments. The right to work, as provided by ICESCR, is an inherent part of human dignity. The essence of the right to work is not an absolute right to obtain employment, but rather the right to freely choose employment and to not to be unfairly deprived of employment.365 The right to freely choose work necessarily includes an absolute prohibition of slavery, servitude, and forced labor. The right to work also entails a range of rights in the workplace.

(2) In addition to the core human rights instruments (see below, paragraph 8), the ILO Declaration on Fundamental Principles and Rights at Work establishes that all Member States, even if they have not ratified the appropriate Convention, have obligations arising from membership in the ILO to respect, promote, and realize the principles and rights in four categories: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and

365 ICESCR, Art. 6(1).
occupation. The ILO has eight fundamental Conventions that cover these four principles.\textsuperscript{366} The four principles are addressed in this IMBR labor article.

(3) Many migrants leave their native countries in search of better economic prospects. Even those motivated by other factors such as persecution, discrimination or armed conflict must earn a livelihood upon settling in receiving States. Migrants often must overcome significant obstacles in finding employment, including language barriers, lack of knowledge of the local job market, non-recognition of qualifications from the State of origin and poor understanding of local employment laws.

(4) Upon securing employment, migrants face additional challenges, including discrimination, harassment, poor and unsafe working conditions, persistent job insecurity and fear of expulsion upon employment termination. These challenges often persist because local labor laws may be inapplicable to migrants or governments may simply refuse to apply relevant laws to situations of migrant employment. Migrants also are often employed in the informal economy, where it is much harder for them to obtain the protection of the State, particularly when migrants are in an irregular status.

(5) Numerous migrants arrive in receiving States as the result of smuggling or human trafficking operations. Such migrants are typically subject to highly exploitative terms of employment and are sometimes compelled into commercial sex work or other forms of forced labor. Migrants are also often highly susceptible to various forms of economic exploitation and physical abuse, as their ability to remain in the receiving State may be tied to continued employment with the same sponsoring employer. This last problem is particularly acute for those migrants employed as domestic workers.\textsuperscript{367}

(6) One of the reasons States typically restrict immigration is to protect the domestic labor market, shielding native workers from competition and attempting to ensure low levels of unemployment. However, States sometimes encourage the migration of certain classes of workers in order to fill a lacuna or restructure the domestic labor market. Special categories or conditions of employment are created to promote the inflow of these migrants and to regulate their activities upon arrival. However, such measures may facilitate exploitative or discriminatory practices on the part of employers.\textsuperscript{368}

\textsuperscript{366} Conventions on Forced Labour, 1930 (No. 29) and on Abolition of Forced Labour, 1957 (No. 105), on the Elimination of Discrimination (employment and occupation), 1958 (No.111); on Equal Remuneration, 1951 (No. 100) and Discrimination (Employment and Occupation), 1958 (No. 111); on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and on the Right to Organise and Collective Bargaining, 1949 (No. 98); and on Minimum Age, 1973 (No. 138) and on the Worst Forms of Child Labour, 1999 (No. 182).


\textsuperscript{368} JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR LAW, 226-27 (2005).
Paragraph 1: The prohibition of servitude, slavery, and forced labor has long been recognized in international law as one of the first peremptory norms. Slavery is outlawed by the 1926 Slavery Convention, and the prohibition of slavery and servitude can be found in the UDHR, ICCPR, ECHR, ACHR, ACHPR and ICRMW. Forced labor is defined by ILO Convention 29 as “all work or service for which the said person has not offered himself voluntarily”. Forced labor is banned in the ICCPR, ICESCR, ICRMW, ECHR, ACHR, ACHPR, as well as in ILO Conventions No. 29 and 105 (174 and 169 ratifications respectively).

Paragraph 2: The right to work derives from numerous human rights instruments, including the UDHR, ICESCR, ICERD, CEDAW, CRC, ICRMW, ADRDM, and the Additional Protocol to the ACHR. The core elements of the right to work are the rights to freely choose employment and to not to be unfairly deprived of employment. The right to work also entails a range of rights in the workplace.

Paragraph 3: The right to just and favorable conditions of work is detailed in Article 7 of the ICESCR. It is also provided by Article 5 of ICERD, and ACHPR Article 15, which asserts the right to work under equitable and satisfactory conditions.

The right to just and favorable remuneration is enshrined in UDHR Article 23. The UDHR links this right to the ability of the individual to provide an “existence worthy of human dignity” for himself and his family. This right is echoed in the American Declaration of the Rights and Duties of Man Article XIV, ICESCR Article 7, ICERD Article 5 and the ILO Philadelphia Declaration. Article 25 of the ICRMW provides that migrant workers should enjoy treatment not less favorable than that received by nationals with regard to remuneration.

The right to form trade unions is a more specific application of the right to freedom of association indicated in Article 18. The explicit right to form and join trade unions is found in UDHR Article 23, ICERD Article 5, ICCPR Article 22 and ECHR Article 11. ACHR Article 16, and ACHR Article 15 do not mention union organization, but do recognize the right to freedom of association, a right that has commonly been interpreted to encompass the right to join unions. Even so, none of these treaties explicitly recognizes the right to collective bargaining. In mandating this right, the IMBR draws inspiration from ILO Conventions 87 and 98 (150 and 160 ratifications respectively), which both...
provide for the right to union organization as well as the right to collective bargaining. The collective bargaining right is further guaranteed by ILO Convention 154 (40 ratifications), is part of the ILO’s Philadelphia Declaration, and is implicit in the ILO Constitution.378

(12) States should also follow the standards set in ILO Convention 189 Concerning Decent Work for Domestic Workers to ensure that domestic workers are protected by and benefit from labor laws.

(13) Paragraph 4: The effective abolition of child labor is one of the ILO’s four fundamental principles of work and is binding on all ILO members, regardless of whether they have signed the corresponding conventions. In addition, the ICESCR protects children from economic and social exploitation, and requires a minimum age of employment.379 The CRC also requires States to protect all children “from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.”380

(14) Paragraph 5: Prohibition of discrimination in the workplace is guaranteed by the ICESCR and the ICERD and is one of the ILO fundamental principles.381 IMBR Article 2 provides protection against discrimination, including in the workplace. The Committee on the Elimination of Racial Discrimination explicitly recommends that States “take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.” The Committee also explains that while States may condition jobs upon a work permit, labor and employment rights attach when an employment relationship is established.382 ILO Conventions 100 and 111 provide ILO standards on the elimination of discrimination.

(15) Additionally, the Committee on the Elimination of Discrimination Against Women has commented specifically on the human rights abuses of women migrant workers, and the need for specific measures to guarantee equality.383

(16) Paragraph 6: Paragraph 6 is derived from Art. 25 of the ICRMW. Art. 25 stresses that regardless of immigration status, migrants shall receive treatment at least as favorable as citizens in workplace conditions. The ICRMW specially lists remuneration,

379 ICESCR, art. 10.
380 CRC, art. 32(1).
381 See CESCR, General Comment No. 18, para. 18; CESCR; CESCR, General Comment No. 20, para. 30 (ICESCR 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”); ILO
382 CERD, General Recommendation No. 30, para. 33. See also Inter-American Court of Human Rights, Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003. (“[T]he migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed.”)
383 CEDAW, General Comment No. 26.
hours of work, rest, safety, health, termination of employment, and minimum working age. The paragraph is also supported by ILO Convention 97 and Articles 10 and 12(g) of ILO Convention 143.  

(16) Paragraph 7 is based on Article 8 of the ILO Convention 189 Concerning Decent Work for Domestic Workers. The terms and conditions of employment should include the name and address of the employer and of the worker; the address of the usual workplace or workplaces; the starting date and, where the contract is for a specified period of time, its duration; the type of work to be performed; the remuneration, method of calculation and periodicity of payments; the normal hours of work; paid annual leave, and daily and weekly rest periods; the provision of food and accommodation, if applicable; the period of probation or trial period, if applicable; the terms of repatriation, if applicable; and terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

384 ILO Convention 97, Art. 6 (“Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters: [remuneration, hours of work, minimum age, collective bargaining, social security, etc.].”)

385 ILO Convention 189, Art. 7, 8.
ARTICLE 21
HEALTH

Every migrant has the right to the enjoyment of the highest attainable standard of physical and mental health, including equal access to preventive, curative, and palliative health services, and the right to an adequate standard of living and to the underlying determinants of health.

Commentary

(1) The right to the enjoyment of the highest attainable standard of health is a foundational human right. Beyond the importance of health to individual and societal flourishing, it is strongly linked and necessary to the provision of many other human rights, such as the right to human dignity and the right to life. It was first enunciated in the Constitution of the World Health Organization, and later enumerated in the UDHR, the ICESCR, and many other international and regional human rights treaties. It is understood as the right to health care that is available, accessible, acceptable, and of appropriate and good quality. Additionally, mothers are accorded special protection during a reasonable period before and after childbirth. An adequate standard of living and the underlying determinants of health include, but are not limited to, access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. States are obligated to respect the right to health, meaning they cannot limit access for any persons regardless of immigration status. Legal measures securing

387 See id. at para. 3; see also Purohit and Moore v. The Gambia, Afr. Comm'n on Human and Peoples' Rights, Comm. No. 241/2001 (2003) (“enjoyment of the human right to health … is crucial to the realization of all the other fundamental human rights and freedoms”).
389 UDHR, supra note 1, art. 25.
390 ICESCR, supra note 3, art. 12(1).
392 ICESCR Gen. Com. 14, supra note 380, at para 12. Though the ICRMW only explicitly grants emergency medical care and access to health services contingent on participation in regulatory schemes, Article 81(1) states that more favorable rights from other instruments (like the general right to health) are retained.
394 ICESCR Gen. Com. 14, supra note 380, para. 11.
395 Id. at para. 34; see also CESCR, Int'l Fed. Of Human Rights League v. France, Complaint No. 14/2003. Nov. 3 2004, para. 32 (stating “legislation or practice which denies entitlement to medical assistance to
access to health care for migrants, particularly irregular migrants, are lacking in many countries and where they exist, migrants and health providers are often unaware of them and the laws remain unimplemented.\textsuperscript{396} Administrative, financial and linguistic barriers exacerbate this lack of access, as does a fear of denunciation to police or immigration authorities.\textsuperscript{397} Due to these widespread difficulties in accessing health care, many migrant populations are particularly at risk of violations of their rights to health.

\textsuperscript{396} U.N. High Comm’r for Human Rights, \textit{Right to Health Fact Sheet No. 31}, at 19 (June 2008), available at \url{http://www.ohchr.org/Documents/Publications/Factsheet31.pdf}.

\textsuperscript{397} \textit{Id.} at 18; World Health Org. (WHO), \textit{International Migration, Health and Human Rights}, at 21-23 (Dec. 2003), available at \url{http://www.who.int/hhr/activities/en/intl_migration_hhr.pdf}. 

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foreign nationals, within the territory of the State Party, even if they are there illegally, is contrary to the Charter”); Federal Constitutional Court (2012, in German), 1 BvL 10/10 vom 18.7.2012, Absatz-Nr. (1 - 140), press release available at: \url{http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-056en.html} (court finds that German Asylum Seekers Benefit Act violates human right to a minimum existence because the benefits had not been updated in 19 years).
ARTICLE 22
EDUCATION

(1) Migrants and their children have the right to education.

(2) States shall make primary education free and compulsory for all children including migrants and their children. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State.

(3) States shall encourage the development of secondary education and shall make it accessible to all, including migrants and their children, on the basis of equal treatment with nationals.

(4) States shall make higher education equally accessible to all including migrants and their children, on the basis of capacity.

Commentary

(1) This Article clarifies that the well-established right to education applies to migrants and their children regardless of their legal status. The Article provides paragraphs corresponding to the three stages of education that are covered by various human rights treaties. Paragraph 2 clearly expresses that migrants and their children are encompassed in the obligation to provide free and compulsory primary education as well as preschool education. Paragraph 3 reiterates the international law obligation of all States’ to provide secondary education to migrants and their children on the basis of equality of treatment with nationals. Paragraph 4 duly treats higher education.

(2) Paragraph 1: The right to education is well established in international and regional human rights instruments. In spite of the numerous international conventions that recognize and reiterate the right to education for all people, this right is not always practically accessible to migrants and their children. The inaccessibility of education is particularly acute for migrants and their children whose parents are not lawfully settled in the host state.

(3) Paragraph 2: The right to education and specifically the right to free and compulsory primary education is formally recognized in the UDHR, the ICESCR, the ICERD, the CEDAW, the CRC, the CCRMW, the CRPD, the ACHPR, the ECHR, the African Charter on the Rights and Welfare of the Child, the OAU Doc. CAB/LEG/24.9/49 (1999), and the Universal Declaration of Human Rights as evidence of customary international law norms.

398 ICESCR, Art. 13; ICERD, Art. 5(e)(v); CEDAW, Art. 10; CRC, Arts. 28 and 29; ICRMW, Arts 12.4, 30, 43.1(a), 45.1(a) and 45.4, CRPD, Art. 24; ACHPR, Art. 17; ECHR, Art. 2; The African Charter on the Rights and Welfare of the Child, Art. 11, OAU Doc. CAB/LEG/24.9/49 (1999), entered into force Nov. 29, 1999.

399 UDHR, art. 26(1) (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”); see Filartiga v. Peña-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (using the Universal Declaration of Human Rights as evidence of customary international law norms).

400 ICESCR, art. 13 (“The States Parties to the present Covenant recognize the right of everyone to education . . . . Primary education shall be compulsory and available free to all.”).
CEDAW and the CRC. This right to education has also been incorporated into regional organizations such as the Charter of the OAS and the ECHR. The Committee on Economic, Social, and Cultural Rights has explicitly interpreted the right to education to extend “to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.”

(4) This Article both highlights the non-discrimination principle and provides a universal floor by guaranteeing primary and secondary education for all children on a basis of equality of treatment with nationals. Because linguistic barriers can further disadvantage migrants and their children, the IMBR incorporates the right to preschool education from the ICRMW. States should also refrain from using school lists as a way to find and remove irregular migrants. Such a practice would force migrant parents to not send their children to school because of the threat of expulsion, rendering the right to education a nullity for migrant children lacking sufficient legal status.

(5) Paragraph 3: The right to secondary education is likewise provided for in international treaties and legal instruments. The UDHR, the ICESCR, the CEDAW and the CRC provide for the right to secondary education. The human

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401 CEDAW, art. 10 (“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women . . . .”).
402 CRC art. 28 (“States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular . . . [m]ake primary education compulsory and available free to all.”).
403 Charter of the Organization of American States art. 49, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (“The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education . . . . Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge.”); 1st Protocol of ECHR, art. 2 (“[n]o person shall be denied the right to education”).
404 Unlike the OAS Charter that creates an affirmative obligation to provide compulsory elementary education, the EU protocol, the 1st Protocol of European Convention on Human Rights and Fundamental Freedom, creates a “negative” right under which States may not deprive people of educational opportunities. Publicists have interpreted this negative construction of the right as deriving from the fact that the EU Member States did not think about the necessity of establishing a public education system, since each of the Member States already had a system in place. Further, since the adoption of Article 28 of the CRC all signatories have an affirmative obligation to provide free primary education to all children.
406 While the language from the various treaties does not specify that primary education shall be on granted on a basis of equality of treatment, the greater requirement that it be not only free, but compulsory and based on its fundamental nature, it should be argued a fortiori that primary education should be granted on the basis of equality of treatment with nationals.
407 ICRMW, art. 30 “…Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay…”
408 UDHR, art. 26(1) (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory,” which implies that the right to education does not limited to elementary education).
409 CESCR, art. 13 (“Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means.”).
410 CEDAW, art. 10 (“States Parties shall take all appropriate measures to eliminate
rights bodies that monitor and interpret these treaties reaffirm that the principle of nondiscrimination applies to all migrants, regardless of status.\(^{411}\) On the national level, Article 13 of the French Constitution says that the organization of free and secular public education at all levels is a duty of the state.\(^{412}\) While France is a leading example of constitutional guarantees, in countries such as Canada, the United States, and Germany, the right to education is not explicitly recognized. Nevertheless, courts in these countries have effectuated a right to education for all classes of people with equal protection principles.\(^{413}\)

(6) Paragraph 4: International law instruments also protect the right to access to higher education. The UDHR,\(^{414}\) the ICESCR,\(^{415}\) and the CRC\(^{416}\) all guarantee the absolute right to access to higher education on the basis of merit. This right to education has also been incorporated into the CEDAW\(^{417}\) and the charters of regional organizations such as the OAS and the ECHR.\(^{418}\)
ARTICLE 23
CULTURE

(1) Every migrant has the right to enjoy the migrant’s own cultures and to use his or her own languages, either individually or in community with others, and in public or private.

(2) The right to cultural enjoyment includes the freedom of migrant parents to ensure the religious, cultural, linguistic, and moral education of their children, in conformity with their convictions, by choosing for their children schools other than those established by the public authorities.

(3) States shall not impede, but should encourage and support, migrants’ efforts to preserve their cultures by means of educational and cultural activities, including the preservation of minority languages and knowledge related to a migrant’s culture. Nothing in this Article shall mean that States may not adopt measures to promote acquisition and knowledge of the majority, national, or official language or languages of the State.

(4) States should take appropriate steps to promote public awareness and acceptance of the cultures of migrants by means of educational and cultural activities, including minority languages and knowledge related to the migrant’s own culture.

Commentary

(1) Article 23 asserts the fundamental right of migrants to enjoy their own cultures. Accordingly, the article proposes a framework for respecting, protecting and promoting migrants’ cultural rights that derives from both the civil and political rights regime as well as the economic, social and cultural rights regime. This framework, in recognition of the many ways in which culture may be manifested, is expansive in order to effectively promote respect for the cultures of migrants.

(2) The UDHR states that “[e]veryone has the right to freely participate in the cultural life of the community.” 419 The UDHR also protects cultural rights that may be “indispensable for [a person’s] dignity and the free development of [the person’s] personality.” 420 The ICCPR recognizes the right of migrants, as “ethnic, religious, or linguistic minorities … to enjoy their own culture … or to use their own language.” 421 Article 27 of the ICCPR also recognizes minorities’ right to “practice their own religion.” 422 The IMBR promotes a framework that respects the communal nature of cultural development and practice. This document, following the ICCPR, applies to all persons, without regard to nationality or status. 423 This article, therefore, reaffirms States’ obligation to provide equal protection for the cultural rights of all people, including migrants. Drawing from both the UDHR and the ICCPR, this article affirms that migrants may participate in and contribute to both

419 UDHR, art. 27.
420 Id. at art. 22.
421 ICCPR, art. 27.
422 Id.
423 Id. at art. 2(1).
the national culture of the State in which they reside and the minority culture of a migrant community or communities.

(3) **Paragraph 1:** A migrant’s right to a cultural identity includes his or her right to reject—as well as accept—in whole or in part, association with a particular group identity, as emphasized by the phrase “individually or in community” in Article 23(1) of the IMBR. Thus, neither the State nor a cultural group should assume that a person’s cultural background automatically demonstrates adherence to particular loyalties, beliefs, or practices. The right to a cultural identity is rooted in the individual right to self-determination and does not by itself provide a right to make decisions on behalf of others without their consent. Protecting cultural rights should be seen as opening doors and never as coercive.

(4) **Paragraph 2:** This paragraph promotes parents’ rights to educate their children in conformity with their beliefs as a universal human right with special bearing on migrants. Human rights instruments recognize a parental right to direct the moral upbringing of one’s children. The ICESCR recognizes that the right derives from “respect for the liberty of parents.” This right takes on additional practical importance when considered in the context of migration. This paragraph should be construed to permit the education of temporary migrant workers’ children in the language of the migrants’ State of origin and, as far as possible, in accordance with the educational standards of that State of origin. In the case of settled migrants, migrant children’s interest in preserving their culture and maintaining a culturally-based support network may be in competition with their interest in successful integration in the host State. States should take measures to ensure that such balancing decisions are left to the discretion of migrant parents. States with an objective of educating all children within the State system should pursue this objective not through compulsion, but through balancing, such as providing meaningful alternatives to elements that infringe on the rights contained herein.

(5) **Paragraph 3:** Paragraph 3 clarifies the obligations established in paragraph 23(1) of this article, and underscores the importance of State support for migrants’ efforts to preserve their cultures and languages. Under paragraph 3, States are not obligated to allocate resources to language and cultural preservation, but such a practice is encouraged and resources that are available should be distributed on a non-discriminatory basis. Official support for such activities should complement the activities of stakeholders from within relevant migrant communities. Paragraph 3 also encourages efforts by signatory States to promote the social, cultural, and/or linguistic integration of migrants. This recognizes the fundamental importance of understanding and communication in fostering tolerant relationships between migrant and non-migrant communities. However,

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424 *Id.* at art. 18.4; UDHR, art. 2(3); ECHR, *supra* note 8, Protocol 1, art. 2; ICESCR, *supra* note 3, art. 13(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note X, art. 5(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 12; UNESCO Convention against Discrimination in Education, art.2(b), Dec. 14, 1960, 429 U.N.T.S. 93 (*entered into force* May 22, 1962).

425 ICESCR, *supra* note 3, art. 13(3).

426 See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 45(4).
integration must be balanced against respect for migrants’ rights. For example, the European Court of Human Rights has suggested that “pursu[ing] an aim of indoctrination … might be considered as not respecting … [the] religious and philosophical convictions [of migrants].”

(6) Paragraph 4: According to the UDHR, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” Because tolerance and respect for migrants will depend in part on knowledge of minority cultures, States’ obligations to respect, protect, and promote the human rights of migrants suggests that States should encourage understanding and tolerance of migrants’ cultures through appropriate cultural activities. The ICRMW affirms, “States Parties shall ensure respect for the cultural identity of migrant workers and … may take appropriate measures to assist and encourage efforts in this respect.” These efforts may include, inter alia, incorporating the study of migrants’ culture or history in public education, providing funding for museums, teaching minority languages in public school systems, facilitating the organization of cultural fairs, and supporting public broadcasting in minority languages.

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428 UDHR, preamble; see also ICCPR, art. 27; ICERD, art. 7.
429 ICRMW, art. 31.