

INTERNATIONAL MIGRANTS BILL OF RIGHTS, WITH COMMENTARY

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IMBR PRINCIPLES

Every migrant has the right to **dignity**, including physical, mental, and moral integrity.

Every migrant has the right, without any discrimination, to the **equal protection** of the law of any State in which the migrant is present.

Vulnerable migrants, including children, women, and migrants with disabilities, have the right to the protection and assistance required by their condition and status and to treatment which takes into account their special needs.

Every migrant has the inherent right to **life**.

Every migrant has the right to **liberty and security of person**.

Every migrant has the right to recognition everywhere as a **person before the law**.

Every migrant has the right to an effective **remedy**.

Every migrant has the right to **due process** of law.

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

Every migrant has the right to protection against discriminatory or arbitrary **expulsion** or deportation, including collective expulsion.

Every migrant has the right to seek and to enjoy in other countries **asylum**.

Every migrant has the right **against refoulement**.

Every migrant has the right to a **nationality**.

Every migrant **family** has the right to protection by society and the State.

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

Every migrant has the right to **freedom of opinion and expression**.

Every migrant has the right to **freedom of peaceful assembly and association**.

Every migrant has the right to participate in the **civil and political life** of the migrant's community and in the conduct of public affairs.

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

Every migrant has the right to **work** and to just and favorable conditions of work.

Every migrant has the right to the highest attainable standard of physical and mental **health**.

Every migrant has the right to an **adequate standard of living**.

Every migrant has the right to **education**.

Every migrant has the right to enjoy the migrant's own **cultures** and to use the migrant's own languages, either individually or in community with others, and in public or private.

PREAMBLE

RECALLING the principles proclaimed in the Charter of the United Nations which recognize 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 inter-relatedness 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, the 1951 Convention Relating to the Status of Refugees, and the Protocol thereto, 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 the migrant 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 U.N. Charter are at the center of the IMBR endeavor. These include the Universal Declaration of Human Rights (UDHR);¹ the International Cov-

1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl. ¶ 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (“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 . . .”).

enant on Civil and Political Rights (ICCPR);² the International Covenant on Economic, Social and Cultural Rights (ICESCR);³ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁵ the Convention on the Rights of the Child (CRC);⁶ the Convention on the Rights of Persons with Disabilities (CRPD);⁷ and the European Convention on Human Rights (ECHR).⁸

(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,⁹ and incorporates the contemporary “respect/protect/promote” language, adding a reference to the Conventions.¹⁰ Further, it makes explicit

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 [hereinafter ICCPR] (“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 . . .”).

3. International Covenant on Economic, Social and Cultural Rights pmbl. ¶ 2, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3 [hereinafter ICESCR] (“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 . . .”).

4. International Convention on the Elimination of All Forms of Racial Discrimination pmbl. ¶ 2, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD] (“Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings . . .”).

5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl. ¶ 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”).

6. Convention on the Rights of the Child pmbl. ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (“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 . . .”).

7. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, pmbl. (a), U.N. Doc. A/61/49 (Dec. 13, 2006) [hereinafter CRPD] (“*Recalling* the principles proclaimed in the Charter of the United Nations which recognize 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 . . .”).

8. Convention for the Protection of Human Rights and Fundamental Freedoms pmbl. ¶ 4, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 [hereinafter ECHR] (“Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world . . .”).

9. UDHR, *supra* note 1, at pmbl. ¶ 6 (“Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms . . .”); ICCPR, *supra* note 2, at 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, at 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. 217 [hereinafter Banjul Charter] (“*Firmly convinced* of their *duty* to promote and protect human and peoples’ rights and freedoms . . .”).

10. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, pmbl. ¶ 4, U.N. Doc. A/RES/61/177 (2006), *reprinted in* 14 INT’L. HUM. RTS. REP. 582 (2007) [hereinafter CPED]; CRPD, *supra* note 7, at pmbl. (b).

what is only implicit in existing international law: that migrants are entitled to enjoy the same rights and freedoms enjoyed by other persons.¹¹

(3) *Paragraph 3—RECOGNIZING*: The third paragraph recognizes that the conditions necessary to achieve enjoyment of rights enunciated in complementary agreements¹² are also necessary for migrants to achieve the enjoyment of those rights.¹³

(4) *Paragraph 4—EMPHASIZING*: The 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,¹⁴ affirming the nature of human rights as universal, indivisible, interdependent and interrelated and tying rights to the duty of non-discrimination, applying the language specifically to migrants.¹⁵

(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, refugee, and labor agreements.¹⁶

(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 can assist governments in providing for the security and well-being of persons within their territory.

11. Other Agreements similarly affirm the application of rights to specific groups of persons. *See, e.g.,* CRPD, *supra* note 7, pmb. (c) (“*Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination . . .”); *see also*, Walter Kalin, Guiding Principles on Internal Displacement: Annotations 6, (American Society of International Law, Studies in Transnational Legal Policy, No. 38) (2000), at vii, 11, *available at* <http://www.asil.org/pdfs/stlp.pdf>.

12. ICCPR, *supra* note 2, pmb. ¶ 4; ICESCR, *supra* note 3, at pmb. ¶¶ 4-5; American Convention on Human Rights pmb. ¶ 4, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143 [hereinafter ACHR].

13. *See supra* note 11.

14. *See supra* note 11.

15. *See supra* note 11.

16. UDHR, *supra* note 1; ICCPR, *supra* note 2; ICESCR, *supra* note 3, ICERD, *supra* note 4; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; CAT, *supra* note 5; CRC, *supra* note 6; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families arts. 2, 3, 6, Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter ICRMW]; CRPD, *supra* note 7; CPED, *supra* note 10; Convention Relating to the Status of Refugees art. 1A, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; Convention Concerning Decent Work for Domestic Workers, June 16, 2011, I.L.O. No. 189, *available at* http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:2551460:NO [hereinafter ILO Convention 189]; Convention Concerning Migration for Employment, July 1, 1949, I.L.O. No. 97, 1616 U.N.T.S. 120 [hereinafter ILO Convention 97]; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, Dec. 9, 1978, I.L.O. No. 143, 1120 U.N.T.S. 323 [hereinafter ILO Convention 143]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA Res. 55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/45/49 (Vol. I) (Nov. 15, 2000) [hereinafter Palermo Protocol].

(7) *Paragraph 7—REALIZING*: The seventh paragraph is an adaptation of the seventh preambular paragraph of the ICRMW.¹⁷ 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.¹⁸ It justifies a document dedicated to the rights of migrants by acknowledging that migrants typically move in an 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.¹⁹

(10) *Paragraph 10—REALIZING*: The tenth paragraph is an adaptation of the sixth preambular paragraph of the ICCPR.²⁰ 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).²¹ 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 continually evolving standards and state practice regarding 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 to apply the rights, standards and remedies enumerated in this document as appropriate. If more favorable remedies exist on the national level or in other human rights documents, those more favorable remedies should be applied.

17. ICRMW, *supra* note 16, at pmb. ¶ 7.

18. CRC, *supra* note 6, at pmb. ¶ 4.

19. Convention Concerning the Protection of the World Cultural and Natural Heritage, pmb. ¶ 6, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

20. ICCPR, *supra* note 2, at pmb. ¶ 6; ICESCR, *supra* note 3, at pmb. ¶ 6.

21. CRPD, *supra* note 7, at pmb. ¶¶ (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.²² 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.²³ 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, 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 the 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 included in many foundational human rights instruments, including the ICCPR and ICESCR.²⁴ 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.²⁵ The principle is commonly invoked to prevent groups from using the freedoms of speech, assembly, and association to negate or destroy others’ human rights.²⁶

(17) *Paragraph 17—CONVINCED*: The seventeenth paragraph, mirroring the fifteenth paragraph of the ICRMW,²⁷ 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.

22. Human Rights Comm., *General Comment No. 29 on States of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), at [http://www.unhcr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf).

23. See Commission on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/146/89/PDF/G9514689.pdf?OpenElement> [hereinafter *Guiding Principles on Internal Displacement*].

24. ICCPR, *supra* note 2, at art. 5; ICESCR, *supra* note 3, at art. 5; UDHR, *supra* note 1, at art. 30. See also ECHR, *supra* note 8, at art. 17; Charter of Fundamental Rights of the European Union art. 54, Dec. 7, 2000, 2000 O.J. (C. 364) 1; ICRMW, *supra* note 16, at art. 81(2).

25. See U.N. Secretary-General, *Annotation on the Text of the Draft International Covenants on Human Rights*, ¶ 55, U.N. Doc. A/2929 (July 1, 1955), at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf.

26. Annotation on the Text of the Draft International Covenants on Human Rights, *supra* note 25.

27. ICRMW, *supra* note 16, at pmbl. ¶ 15.

ARTICLE 1
DEFINITION OF MIGRANT

(1) The term “migrant” in this Bill refers to a person who is outside of a State of which the migrant is a citizen or national, or, in the case of a stateless migrant, the migrant’s 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 in which they are habitual residents. Thus, individuals are migrants regardless of whether their presence is temporary, lawful, for protection, or for economic or other reasons.

(2) This definition does not include individuals who are present in the territory of a State where they hold secondary citizenship or nationality. Further, it 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.²⁸ 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 categories of migrants, such as refugees and asylum seekers or migrant workers.²⁹ 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 term “migrant” advances the notion that all categories of migrants are entitled to a unified set of basic protections regardless of their individual circumstances. 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. 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.

28. See Guiding Principles on Internal Displacement, *supra* note 23.

29. ICRMW, *supra* note 16, at arts. 2, 3, 6; 1951 Refugee Convention, *supra* note 16, at art 1A.

(5) *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);³⁰ the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention);³¹ the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention);³² the Charter of Fundamental Rights of the European Union (EU Charter);³³ the Organization of American States (OAS) Cartagena Declaration on Refugees (OAS Declaration);³⁴ the Organization of African Unity (OAU) 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention);³⁵ and additional international instruments relating to non-citizens.³⁶

(6) *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.

(7) *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 described both in international and regional treaties, agreements and conventions.³⁷ Therefore, “migrants” include refugees and asylum seekers³⁸ who qualify for refugee status under the criteria set forth in the 1951 Refugee Convention,³⁹ regional

30. ICRMW, *supra* note 16, at arts. 2, 3, 6.

31. Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

32. 1951 Refugee Convention, *supra* note 16.

33. Charter of Fundamental Rights of the European Union, *supra* note 24, at art. 18.

34. Cartagena Declaration on Refugees (Cartagena de Indias, 22 November 1984) OAS/Ser.L/V/II.66, doc. 10, rev. 1 rev.1, ¶ 5 [hereinafter Cartagena Declaration].

35. Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, Sept. 10, 1969, 1001 U.N.T.S. 45.

36. See U.N. High Comm’r for Refugees, The Rights of Non-Citizens, U.N. Doc. HR/Pub/06/11, U.N. Sales No. E.07.XIV.2 (2006); Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, annex, Supp. (No. 53) at 252, U.N. Doc. A/40/53 (Dec. 13, 1985).

37. See *supra* notes 25-31.

38. See *infra* Commentary to Art. 11.

39. Pursuant to Article 1D of the 1951 Refugee Convention, *supra* note 16, 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., U.N. High Comm’r for Refugees, Revised UNHCR Note on the Applicability of

instruments and agreements, and municipal legislation, as well as under any extended mandate⁴⁰ of the United Nations High Commissioner for Refugees (UNHCR). Additionally, “migrant” includes 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 forcibly⁴¹ displaced or are compelled to find refuge in the territory of another country.⁴² The term “migrant” equally refers to stateless persons who are outside of a State of birth or habitual residence.⁴³ Due attention should be given to the special relevance of the IMBR to 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 conformity 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.⁴⁴ 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

the 1951 Convention relating to the Status of Refugees to Palestinian Refugees (2009), at <http://www.refworld.org/pdfid/4add77d42.pdf> (clarifying a long-standing inconsistency on the part of UNHCR with regard to the second clause of Article 1D).

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.” U.N. High Comm’r for Refugees, Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee (Sept. 1, 2005), at <http://www.refworld.org/docid/43141f5d4.html>.

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. Krajisnik*, Case No. IT-00-39-T, Judgment, ¶ 729 (Int’l Crim. Trib. for the Former Yugoslavia 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 Migration Vol. 38 (6), 2000).

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 31 at, 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 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. *See* 1961 Convention on the Reduction of Statelessness art. 1, para. 1, Aug. 30, 1961, 989 U.N.T.S. 175.

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.

arrangements have the potential to make persons “vulnerable, since their legal status is linked to that of” another person.⁴⁵

(10) *Lawful Temporary Migrants*: Paragraph 1 does not distinguish between migrants based on length of stay. Therefore, “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;⁴⁶ students and trainees;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 3(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) *Migrant Workers*: Paragraph 1 applies fully to “migrant workers” and incorporates the definition of migrant worker from the ICRMW.⁴⁸ The IMBR adopts a broad definition of migrant to ensure a uniform standard of treatment.

(12) *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;”⁴⁹ individuals “who enter as non-immigrants and then remain beyond the limits of their permission to remain;”⁵⁰ or persons who otherwise lack the requisite documentation to remain. “Migrant” also refers to irregular migrants who may be smuggled,⁵¹ trafficked,⁵² or otherwise irregularly entered

45. Nicola Piper & Margaret Satterthwaite, *Migrant Women*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 240, 49-51 (Ryszard Cholewinski, et al. eds., T.M.C. Asser Press 2007).

46. *But cf.* ICRMW, *supra* note 16, at 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).

47. *But cf.* ICRMW, *supra* note 16, at art. 3(c) (the IMBR recognizes “students and trainees” as migrants, unlike ICRMW art. 3(e), which excludes these two categories of migrants).

48. ICRMW, *supra* note 16, at 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.”). Under the ICRMW, 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. *Supra* note 16, at art. 2.

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

50. Weissbrodt, *Protection of Non-Citizens in International Human Rights Law*, *supra* note 49.

51. The U.N. Protocol Against the Smuggling of Migrants by Land, Sea and Air seeks to distinguish between victims of trafficking and smuggling. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational

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 identifying 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 the migrant naturalizes in the State in which the migrant is a 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 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 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 geographic location or relationship to the sovereign in question.

Organized Crime, GA Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, UN Doc. A/45/49 (Vol. I) (Nov. 15, 2000). Article 3 of the Protocol "states that smuggled migrants have consented to being transported—usually for a fee—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, *Protection of Non-Citizens in International Human Rights Law*, *supra* note 49, at 207. See also, Palermo Protocol, *supra* note 16, at art. 3(a).

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

54. ICRMW, *supra* note 16, at art. 1(2).

(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 begin in countries of origin, particularly in the process of migrant worker recruitment. Protecting migrants' rights as human and labor rights is also 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 while in the 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 involuntary 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 repatriation that takes 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, temporary return to a country of nationality, citizenship or habitual residence 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, citizenship or habitual residence. This provision is particularly relevant in the context of cyclical migration.

55. Ryszard Cholewinski, *Human Rights of Migrants: The Dawn of a New Era?*, 24 GEO. IMMIGR. L.J. 615 (2010).

ARTICLE 2
HUMAN DIGNITY

Every migrant has the right to dignity, including physical, mental, and moral integrity.

Commentary

(1) Human dignity is a foundational concept in the UDHR.⁵⁶ Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights.”⁵⁷ The U.N. Charter also affirms the “dignity and worth of the human person” as a basic concept.⁵⁸ 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.”⁵⁹ Article 70 of the ICRMW explicitly recognizes a migrant’s right to human dignity.⁶⁰ Numerous regional human rights instruments also explicitly give an affirmative right to human dignity.⁶¹

(2) The purpose of Article 2 is to ensure that migrants are treated with dignity. The U.N. Special Rapporteur on the Human Rights of Migrants emphasized that respecting the dignity of migrants is required by States’ human rights obligations.⁶² 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.”⁶³ Psychologically, dignity means that migrants must not be demeaned or treated as if they have no value.⁶⁴ 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.⁶⁵

56. UDHR, *supra* note 1 (references to human dignity appear in the Preamble twice and in Articles 1, 22, and 23).

57. UDHR, *supra* note 1.

58. U.N. Charter, pmb1.

59. Evadne Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 303 (2007).

60. ICRMW, *supra* note 16, at art. 70.

61. *See, e.g.*, Banjul Charter, *supra* note 9, at art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being . . .”); ACHR, *supra* note 12, at 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 . . .”).

62. U.N. GAOR, 57th Sess., U.N. Doc. A/57/292 (Aug. 8, 2002) (“Migration should thus take place in conditions that respect the dignity of migrants, in line with States’ human rights obligations.”).

63. Grant, *supra* note 59, at 312.

64. *Id.*

65. *See, e.g.*, Pedro Miguel Vera Vera et al. v. Ecuador, Case 11.535, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 5 rev. ¶ 37 (2010), available at <http://www.cidh.oas.org/demandas/11.535%20Pedro%20Miguel%20Vera%20y%20otros%20Ecuador%2024%20febrero10%20Eng.pdf>. (“Among

ARTICLE 3
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 3 emphasizes two core and interrelated principles underlying the protection of the rights of migrants in the IMBR: 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 3 makes clear that the prohibition on non-discrimination (both under the *per se* grounds of non-discrimination 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.

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 deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty.”)

(2) The IMBR follows the convention of human right instruments in positing a general standard of non-discrimination as broadly applicable, while explicitly allowing for variation in other articles.⁶⁶ Thus, Article 3 shall be read as the rule of general application unless specifically displaced in the circumstances prescribed by a subsequent article.

(3) *Paragraph 1*: 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 ICCPR recognize the principles of equality and equal protection.⁶⁷ The principle of equal protection has been widely affirmed in other human rights instruments and by human rights treaty bodies;⁶⁸ however, the IMBR adopts a slightly different phrasing for the right in order to emphasize that equal protection must at a minimum afford protection to migrants on the same basis as nationals of a State.⁶⁹

(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.⁷⁰ It also follows that, as a general rule, factual situations involving migrants must be treated consistently with those involving citizens, as well as other migrants.⁷¹ This applies broadly—for example,

66. See, e.g., Human Rights Comm., *General Comment No. 15: The Position of Aliens under the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 11, 1986) (A more specific standard displaces the general standard).

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

68. ICRMW, *supra* note 16, at 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, *supra* note 12, at art. 24; Banjul Charter, *supra* note 9, at art. 3.

69. ICRMW, *supra* note 16, at 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.”); U.N. Econ. & Soc. Council, Sub-Comm’n on the Promotion and Prot. of Human Rights, *Progress Report of the Special Rapporteur on the Rights of Non-Citizens*, ¶ 50, U.N. Doc. E/CN.4/Sub.2/2002/ (June 5, 2002) (“In general, international human rights law requires the equal treatment of citizens and noncitizens.”) [hereinafter ECOSOC]; U.N. Comm. on Econ., Soc. and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Comm. on Econ., Soc. and Cultural Rights, Dom. Rep.*, ¶ 34, U.N. Doc. E/C.12/1/Add.16 (Dec. 12, 1997) (“State[s] party . . . take all necessary measures to ensure that Haitian immigrants in the Dominican Republic enjoy their economic social and cultural rights fully and without discrimination.”).

70. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 465 (2d rev. ed., N.P. Engel 1993).

71. NOWAK, *supra* note 70, at 467; *General Comment No. 15*, *supra* note 66, ¶¶ 1-3, 7, 9; Ibrahim Gueye et al. v. France, Comm. No. 196/1983 (3 April 1989), ¶ 9.4, U.N. Doc. Supp. No. 40 (A/44/40) at 189 (1989); Comm. on the Elimination of Racial Discrimination, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Recommendation 30 on Discrimination Against Non-Citizens*, 189-90 ¶¶ 1, 3, 4, 6, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004); U.N. Econ. & Soc. Council, Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-Citizens*, ¶¶ 21-23, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003); Comm. on the Elimination of Discrimination, *General Recommendation XIV, Definition of Discrimination*, (Forty-second session, 1993), U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008); *General Comment No. 15*, *supra* note 66, ¶ 4.

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.⁷²

(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).⁷³ Thus, there should be equal application of national legislation to migrants as well as citizens, and legislation itself should not be discriminatory.⁷⁴

(6) *On the Same Basis as Nationals*: Qualifying the guarantee of equal protection with 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.⁷⁵

(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).⁷⁶ This principle has been included widely in other human rights instruments as well, including in ICESCR Article 2, the American Conven-

72. The contours of equal protection, while aided by the development of international human rights norms that provide various minimum standards of treatment, continues the long international legal tradition of recognizing the juridical capacity of aliens. *See, e.g.*, ANDREAS HANS ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS*, 131, n.1 (Leiden, A.W. Sijthoff 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)); Comm. on the Elimination of Racial Discrimination, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Recommendation 30 on Discrimination Against Non-Citizens*, *supra* note 71; Econ. & Soc. Council, Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-Citizens*, *supra* note 71; U.N. High Comm’r for Human Rights, Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 469, U.N. Doc. A/59/18-24 (2004); *General Comment No. 15*, *supra* note 66, ¶ 4.

73. NOWAK, *supra* note 71, at 468-69.

74. Human Rights Comm., *General Comment No. 18: Non-Discrimination*, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989); RICHARD B. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 46 (Manchester Univ. Press 1984).

75. This follows general human rights principles. *See, e.g.*, UDHR, *supra* note 1, at pmb1. ¶ 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”).

76. ICCPR, *supra* note 2, at 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,

tion on Human Rights (ACHR) Article 1(1), and the ECHR Article 14.⁷⁷ The IMBR follows the phrasing of the enumerated grounds of non-distinction in the ICRMW,⁷⁸ while adding the grounds of disability and gender, sexual orientation or gender identity to reflect progression of the law in recent years.⁷⁹

(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.⁸⁰ Paragraph 3 mandates that States refrain from discriminating against or between migrants on a number of enumerated bases;⁸¹ however, this list should not be seen as exhaustive. It explicitly allows for breadth to encompass developments in customary international and human rights law. This wording echoes the affirmative obligation on States, to both enact non-discriminatory laws and to work to eliminate the discriminatory effect of all laws and policies.⁸² 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. It includes affirmative obligations with regard to all grounds recognized as constituting discrimination *per se*, for example, with regard to sex-based discrimination.⁸³

(9) *Enumerated Grounds*: The IMBR follows the phrasing of the enumerated grounds of non-discrimination used in the ICRMW.⁸⁴ In addition to the

language, religion, political or other opinion, national or social origin, property, birth or other status.”).

77. ICESCR, *supra* note 3, at art. 2; ACHR, *supra* note 12, at art. 1(1); ECHR, *supra* note 8, at art. 53.

78. ICRMW, *supra* note 16, at 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.”).

79. See CRPD, *supra* note 7. See generally, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, http://www.yogyakartaprinciples.org/principles_en.pdf (last visited Mar. 18, 2014) [hereinafter YOGYAKARTA PRINCIPLES]; Joslin v. N.Z., Comm. No. 902/1999, U.N. Doc. A/57/40 at 214 (2002); Jarvinen v. Finland, Comm. No. 295/1988, ¶ 6.2, U.N. Doc. CCPR/C/39/D/295/1988 (1990); *General Comment No. 15*, *supra* note 66, ¶ 3.

80. UDHR, *supra* note 1, at art 7; ICCPR, *supra* note 2, at art. 26.

81. See NOWAK, *supra* note 70, 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 . . .”).

82. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 238-39 (Cambridge Univ. Press 2005); see also NOWAK, *supra* note 70, at 476-79 (discussing ICCPR Committee commentaries discussing positive measures (affirmative action) to mitigate horizontally discriminatory effect, such as in the workplace).

83. See, e.g., Comm. on Elimination. of Discrim. Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38 (1994), at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

84. ICRMW, *supra* note 16, at art. 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,

prohibited grounds of discrimination under the ICCPR, the ICRMW and the IMBR add “conviction,” “ethnic origin,”⁸⁵ “nationality,”⁸⁶ “marital status,”⁸⁷ and “disability.”⁸⁸ Paragraph 3 also adds 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.⁸⁹

(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,⁹⁰ and explicitly rejects the more deferential standard articulated by the U.N. Human Rights Committee in General Comment 18.⁹¹ 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 on legitimacy and proportionality, the IMBR affirms that the rights of migrants derive 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

religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”).

85. ICERD, *supra* note 4, at art. 1 (defining racial discrimination to include discrimination on the basis of ethnic origin); Banjul Charter, *supra* note 9, at art. 2 (prohibiting distinctions based on individuals’ ethnic group).

86. *General Comment No. 15*, *supra* note 66, ¶¶ 1-2 (“In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or 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.”).

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

88. CRPD, *supra* note 7, at art. 5(2) (prohibiting discrimination on the basis of disability); CRC, *supra* note 6, at art. 2(1) (prohibiting discrimination on the basis of disability).

89. See generally YOGYAKARTA PRINCIPLES, *supra* note 79; *Joslin v. N.Z.*, *supra* note 79; *Jarvinen v. Finland*, *supra* note 79, ¶ 6.2; *General Comment No. 15*, *supra* note 66, ¶ 3.

90. GUY S. GOODWIN GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 78 (Oxford Univ. Press 1978) (citing Judge Tanaka’s dissent in *The South West African Cases* and the ECHR decision in the *Belgian Linguistics* cases). See also Joan Fitzpatrick, *The Human Rights of Migrants*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 172, 176 (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser Press 2003); SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL AND COMMENTARY* 700-28 (2d ed., Oxford Univ. Press 2004).

91. General Comment 18 does not mention proportionality. *General Comment No. 18*, *supra* note 74, ¶ 13. See also, David A. Martin, *The Authority and Responsibility of States*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 31, 35 (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser Press 2003).

borders or formulate immigration policy,⁹² as long as the exercise of those powers is reasonable.⁹³ Thus, the standard acknowledges that States are allowed to, and may make such distinctions, and rejects any notion that States require an explicit “margin of appreciation.”⁹⁴ 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.⁹⁵ This standard strikes a balance between the needs and rights of States and the need to protect the rights of 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).⁹⁶ The standard does not require that distinctions only be made pursuant to law, though 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.⁹⁷ Fundamentally, the IMBR should be interpreted as creating a continuum of reasonable and proportional distinctions.⁹⁸ Most importantly, as a migrant’s contact and connection with the host State increase, any distinctions made should tend toward 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 account the longstanding connection of particular classes of migrants (or of

92. See, e.g., Martin, *supra* note 91 (discussing James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 803 (1983) (suggesting that states can maintain immigration regimes that give preference on the basis of, for example, economic status)).

93. U.N. Econ. & Soc. Council, Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-Citizens*, *supra* note 72, ¶ 21; Human Rights Comm., Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134, ¶¶ 9.2(b)2(ii)2-9.2(b)2(ii)3 (1981); Abdulaziz v. U.K., App. No. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471, 499 (1985).

94. Gaygusuz v. Austria, App. No. 17371/90, 23 Eur. H.R. Rep. 364, 381-82 (1996) (noting the margin of 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 national are discriminatory in spite of State’s claim of special responsibility for citizens). See also *General Comment No. 15*, *supra* note 66, ¶ 5; Poirrez v. France, App. No. 40892/98, 40 Eur. H.R. Rep. 2, 38, 46, 47 (2003) (claim to disability benefits by a Cote d’Ivoire national resident in France); Abdulaziz, 7 Eur. H.R. Rep. at 499; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 62 (Jan. 19, 1984).

95. See Martin, *supra* note 91, at 33 (discussing the traditional and historically fundamental sovereign function of regulating admission of aliens).

96. Including, for example, obligations under the 1951 Refugee Convention and 1967 Protocol.

97. Joseph et. al., *supra* note 90, at 700.

98. See Martin, *supra* note 91, at 35.

individual migrants) to the State when conferring benefits.⁹⁹ The standard also does not 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.¹⁰⁰

ARTICLE 4 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 shall be a primary consideration. States shall undertake to ensure the child migrant such protection and care as is necessary for the child's well-being, and assure to the child migrant who is capable of forming the child's 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 4 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 and legal status. 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.¹⁰¹ Human rights law deals with the special needs of certain categories of persons in specific

99. See, e.g., INT'L MIGRANTS BILL OF RIGHTS, art. 10, 28 GEO. IMMIGR. L.J. 17 (envisioning that States will take substantial connection into account when creating opportunities for relief from removal).

100. For example, the practice of according temporary protection to migrants independent of *non-refoulement* obligations. Such a measure would fall within the bounds of the legal test and therefore not be discriminatory.

101. Kalin, *supra* note 11, at 22.

instruments, including protections for children,¹⁰² women,¹⁰³ and persons with disabilities.¹⁰⁴ Article 4 reinforces these existing protections. When read in conjunction with the rest of the IMBR, Article 4 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.¹⁰⁵

(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 toward 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.¹⁰⁶ Article 7 of the CRPD affirms that children with disabilities, including migrant children with disabilities, possess the rights in Paragraph 2.¹⁰⁷

(4) *Origins of Paragraph 3*: Paragraph 3 is an adaptation of CEDAW Articles 3 and 11(2)(d).¹⁰⁸ The CRPD Article 6 affirms these rights for women with disabilities, including women migrants with disabilities.¹⁰⁹

(5) *Origins of Paragraph 4*: Paragraph 4 applies CRPD Articles 4 and 9 specifically to migrants with disabilities.¹¹⁰ Through Paragraph 4, the IMBR also stresses all principles of the CRPD, listed in CRPD Article 3.¹¹¹

ARTICLE 5

LIFE

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

Commentary

(1) The right to life is a fundamental right of all persons, as codified in numerous international human rights instruments. Article 5 of the IMBR creates an affirmative responsibility on the part of States to not deprive migrants of the right to life.

102. CRC, *supra* note 6.

103. CEDAW, *supra* note 16.

104. CRPD, *supra* note 7.

105. See Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, ¶¶ 12-108, A/HRC/17/26/Add.1-5 (May 2, 2011).

106. CRC, *supra* note 6, at arts. 3(1), 3(2), 12(1).

107. CRPD, *supra* note 7, at art. 7.

108. CEDAW, *supra* note 16, at arts. 3, 11(2)(d). See also Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 26 on Women Migrant Workers*, UN Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

109. CRPD, *supra* note 7, at art. 6.

110. CRPD, *supra* note 7, at arts. 4(1), 9(1).

111. CRPD, *supra* note 7, at art. 3.

(2) In the migration context, the right to life 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.¹¹² Detained migrants suffer from threats to their health and safety, due to isolation, unsafe conditions, and lack of access to health care.¹¹³ Additional rationales for enunciating the right to life in the migration 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 5 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 subject to their jurisdiction.

(3) The language of Paragraph 1 is drawn directly from the ICCPR, Article 6.¹¹⁴ The right to life is also enumerated in other international instruments, including the UDHR,¹¹⁵ the ICRMW,¹¹⁶ and the Guiding Principles on Internal Displacement.¹¹⁷

ARTICLE 6

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. States should cease the detention of children on the basis of their immigration status.

(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

112. 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) (estimating that 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).

113. Will Matthews, *Immigration Detention: A Death Sentence for Too Many*, ACLU BLOG OF RIGHTS (Oct. 24, 2011, 2:35 PM), <http://www.aclu.org/blog/immigrants-rights/immigration-detention-death-sentence-far-too-many>.

114. ICCPR, *supra* note 2, at art. 6.

115. UDHR, *supra* note 1, at art. 3.

116. ICRMW, *supra* note 16, at art. 9.

117. Guiding Principles on Internal Displacement, *supra* note 23, at Principle 10.

migrant shall have the right to appeal the conditions, legality, and length of detention.

(4) Every migrant deprived of 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 6 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.¹¹⁸ In some cases, including many involving stateless migrants, 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.¹¹⁹ Additionally, the use of criminal penalties in lieu of, or to reinforce, administrative enforcement against violations of immigration law is of increasing concern.¹²⁰ Article 6 thus attempts to codify those 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,¹²¹ as well as the prohibition on arbitrary detention. It applies regardless of legal status.¹²² The wording of the IMBR is adapted directly from the ICCPR Article 9(1).¹²³ 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 deten-

118. See, e.g., G.A. Res. 63/184, U.N. Doc. A/RES/63/184 (Mar. 17, 2009).

119. See, e.g., Katherine Perks & Jarlath Clifford, *The Legal Limbo of Detention*, 32 FORCED MIGRATION REV. 42 (2009).

120. See, e.g., Navanethem Pillay, Opening Remarks at the Panel Discussion on "Human Rights of Migrants in Detention Centres" (Sept. 17, 2009), available at <http://www2.ohchr.org/english/issues/migration/taskforce/docs/HCStatementPanelMigrants.pdf>.

121. Shyla Vohra, *Detention of Irregular Migrants and Asylum Seekers*, in INTERNATIONAL MIGRATION LAW 49, 49-51 (Ryszard Cholewinski et al. eds., 2007).

122. ICCPR, *supra* note 2, at art. 9; UDHR, *supra* note 1, at art. 9.

123. ICCPR, *supra* note 2, at art. 9(1).

tion is incompatible with the human right of liberty and security of person. These principles are codified in both the U.N. Charter and the UDHR.¹²⁴ 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 precisely define the cases in which deprivation of liberty is permissible.¹²⁵ It places a legal obligation on both legislators and those enforcing the laws.¹²⁶ The general standard for determining arbitrariness is that action must be reasonable and necessary in all circumstances, and must not contravene national or international law, including the IMBR.¹²⁷

(6) Paragraph 2 emphasizes that States should not detain children for migration-related reasons. Detention based on migration status or parental migration status is not in the child's best interest and is a violation of the CRC.¹²⁸ States should implement alternatives to deprivation of liberty, such as the Child-Sensitive Community Assessment and Placement Model.¹²⁹ States should also not detain other vulnerable groups or individuals.

(6) *Paragraph 3*: The rights in Paragraph 3 are derived from the right to be free from arbitrary detention stated in Paragraphs 1 and 4 of ICCPR

124. Vohra, *supra* note 121, at 53.

125. NOWAK, *supra* note 70, 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).

126. NOWAK, *supra* note 47, at 172.

127. NOWAK, *supra* note 47, at 173 (citing *Van Alphen v. the Netherlands*, Comm. No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), at <http://www.refworld.org/docid/525414304.html> (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 90, at 342 (citing *A. v. Australia*, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), at <http://www1.umn.edu/humanrts/undocs/html/vws560.html>).

128. Comm. on the Rights of the Child, *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005), at <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>; Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶¶ 32, 78 (Sept. 28, 2012), at <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> [hereinafter 2012 Day of General Discussion]. See also Special Rapporteur on the Human Rights of Migrants, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, U.N. Doc. A/HRC/11/7 (May 14, 2009), at <http://www.refworld.org/pdfid/4a3b51702.pdf>; U.N. Secretary-General, Note to the General Assembly, transmitting Human Rights of Migrants Report of the Special Rapporteur, U.N. Doc. A/64/213 (Aug. 3, 2009).

129. INT'L DETENTION COAL. [IDC], CAPTURED CHILDHOOD ch. 6 (2012) available at <http://idcoalition.org/ccap>. See also 2012 Day of General Discussion, *supra* note 128, ¶ 35.

Article 9.¹³⁰ Paragraph 3 states the presumption in favor of liberty¹³¹ by mandating that detention only occur as a measure of last resort.¹³² Paragraph 3 also requires that detention shall not be continued beyond the period for which the State can provide appropriate justification.¹³³ Indefinite detention for immigration purposes is not lawful under international law.¹³⁴ It should be noted that excessive length of detention, or uncertainty as to its duration, also raise issues of cruel, inhuman or degrading treatment.¹³⁵

(7) When choosing to deprive a migrant of liberty, States must first consider whether less intrusive measures, such as alternatives to institutional detention, would suffice to achieve legitimate aims.¹³⁶ 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 requirement of the right to freedom of movement, protected under ICCPR Article 12.¹³⁷

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

131. Human Rights Council, Rep. of the Working Grp. on Arbitrary Detention, ¶¶ 67, 82, U.N. Doc. A/HRC10/21 (Feb. 16, 2009), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement> [hereinafter 2009 WGAD Report]; Council of Europe: Comm. of Ministers, *Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* (July 1, 2009), available at <http://www.refworld.org/docid/4a857e692.html>. See also The U.N. Refugee Agency, Executive Committee, Detention of Refugees and Asylum-Seekers, EXCOM Conclusion No. 44 (XXXVII) ¶ (b) (Oct. 13, 1986), <http://www.unhcr.org/print/3ae68c43c0.html>; The U.N. Refugee Agency Executive Committee, Expulsion, EXCOM Conclusion No. 7 (XXVIII) ¶ (e) (Oct. 12, 1977), <http://www.unhcr.org/print/3ae68c4320.html>; Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bahamas, ¶ 17, U.N. Doc. CERD/C/64/CO/1 (Apr. 28, 2004); *Neptune v. Haiti*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 90 (May 6, 2008); *Álvarez and Iñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 53 (Nov. 21, 2007); *Vélez Lóor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 116, 166-71 (Nov. 23, 2010).

132. Human Rights Council, Rep. of the Working Grp. on Arbitrary Detention, ¶¶ 58-59, U.N. Doc. A/HRC13/30 (Jan. 18, 2010) [hereinafter 2010 WGAD Report] (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 the last resort.”).

133. *A v. Australia*, Comm. No. 560/1993, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997), at <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.

134. *Id.*

135. The Committee Against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context. Comm. Against Torture, Concluding Observations of the Committee Against Torture: Sweden, ¶ 12, U.N. Doc. CAT/C/SWE/CO/5 (June 4, 2008) (detention should be for the shortest possible time); Comm. Against Torture, Concluding Observations of the Committee Against Torture: Costa Rica, ¶ 10, U.N. Doc. CAT/C/CRI/CO/2 (July 7, 2008) (expressing concern at failure to limit the length of administrative detentions of non-nationals and recommending “[t]he State Party should . . . set a maximum legal period for detention pending deportation, which should in no circumstance be indefinite.”).

136. *C. v. Australia*, Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 23, 2002); See INT’L DETENTION COAL., *THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION* (2011) available at <http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>.

137. ICCPR, *supra* note 2, at art. 12; ECHR, *supra* note 8, at art. 2; ACHR, *supra* note 12, at art. 22; Banjul Charter, *supra* note 9, at art. 12; League of Arab States, Arab Charter on Human Rights, at art. 24, May 22, 2004, reprinted in 12 Int’l Hum. Rts. Rep. 893 (2005) (entered into force Mar. 15, 2008) [hereinafter Arab Charter].

(8) Paragraph 3 also provides migrants the right to challenge detention.¹³⁸ Clause 2 of Paragraph 3 is a synthesis of Paragraphs 1 and 4 of ICCPR Article 9.¹³⁹ 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 link between legal personhood (as a fundamental expression of liberty) and prohibitions on arbitrary detention and the common-law-derived right of habeas corpus.¹⁴⁰ This restriction applies to all forms of 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.¹⁴¹ The ICCPR makes a 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.¹⁴² Standards on conditions of detention are contained in various international authorities.¹⁴³ 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.¹⁴⁴

(10) Even where deprivations of the 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 obligations of humane treatment as well as the

138. 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).

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

140. *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting) (“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*.”) (quoting 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 131-133 (1765)).

141. CAT, *supra* note 5, at art. 16; ICCPR, *supra* note 2, at art. 7; ECHR, *supra* note 8, at art. 3; ACHR, *supra* note 12, at art. 5; Banjul Charter, *supra* note 9, at art. 5.

142. ICCPR, *supra* note 2, at art. 10(1). *See also* ACHR, *supra* note 12, at art. 5(2); Banjul Charter, *supra* note 9, at art. 5; Arab Charter, *supra* note 137, at art. 20.

143. First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners* (1955) available at <http://www.globaldetentionproject.org/fileadmin/docs/Standard-Minimum-Rules-for-the-Treatment-of-Prisoners.pdf>; *Body of Principles for the Protection of All Persons Under Any Form of Detention Imprisonment*, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990); U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Mar. 16, 2011).

144. THE U.N. REFUGEE AGENCY, *DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION* (2012), <http://www.unhcr.org/refworld/docid/503489533b8.html>.

freedom from torture and cruel, inhumane or degrading treatment.¹⁴⁵ Deprivations of liberty should not be punitive in nature, and migrants subject to administrative detention should not be held in criminal detention facilities.¹⁴⁶ To be compatible with human dignity, conditions of detention should not subject detainees to a level of suffering beyond that inherent in detention.¹⁴⁷ Moreover, the cumulative effect of a number of poor conditions may lead to a violation of the prohibition against cruel, inhumane and degrading treatment.¹⁴⁸

(11) *Overcrowding*: One of the most frequent obstacles to the respect of human dignity and to the prohibition of cruel, inhumane and degrading treatment and other forms of ill-treatment in places of detention is overcrowding.¹⁴⁹ Paragraph 4 prohibits severe overcrowding and less severe overcrowding when in conjunction with other poor conditions of detention.¹⁵⁰

(12) *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 4.¹⁵¹

(13) *Protection from Violence*: With respect to migrants deprived of liberty, the State has a heightened obligation to protect and a special duty of care.¹⁵² Accordingly, excessive or inappropriate use of physical restraint and any physical or sexual assaults of migrants deprived of liberty may also violate Paragraph 4.

(14) *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.¹⁵³ In accordance with this general principle, Paragraph 5 restates the right to reparation, including compensation, for persons, includ-

145. CAT, *supra* note 5, at art. 16; ICCPR, *supra* note 2, at art. 7; ECHR, *supra* note 8, at art. 3; ACHR, *supra* note 12, at art. 5; Banjul Charter, *supra* note 9, at art. 8.

146. Human Rights of Migrants, International Standards and the Return Directive of the E.U., Inter-Am. Comm'n H.R., Resolution 03/08 (July 25, 2008).

147. S.D. v. Greece, App. No. 53541/07, Eur. Ct. H.R., ¶ 45 (2011); M.S.S. v. Belgium, App. No. 30696/09, 53 Eur. H.R. Rep. 2, 72 (2011); "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 151-55 (Sept. 2, 2004).

148. Dougoz v. Greece, App. No. 40907/98, 29 Eur. H.R. Rep. CD147 (2011); Z.N.S. v. Turkey, App. No. 21896/08 Eur. Cr. H.R. (2010); Charahili v. Turkey, App. No. 46605/07, 55 Eur. H.R. Rep. 11 (2010); M.S.S. v. Belgium, 53 Eur. H.R. Rep. at 73-74.

149. Special Rapporteur on Torture, Civil and Political Rights, Including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Human Rights Council, ¶ 49, U.N. Doc. E/CN.4/2004/56 (Dec. 23, 2003).

150. Orchowski v. Poland, App. No. 17885/04 Eur. Ct. H.R., ¶¶ 122-23 (2009), at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95314#{"itemid":\["001-95314"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95314#{).

151. Henaf v. France, App. No. 65436/01, 40 Eur. H.R. Rep. 44, 999-1001 (2005).

152. Salman v. Turkey, App. No. 21986/93, 34 Eur. H.R. Rep. 17 (2002).

153. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

ing migrants, found by domestic or international courts or other competent authorities to have been wrongfully detained.¹⁵⁴

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 the child's 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 of 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.¹⁵⁵ The right is enshrined in the UDHR, Article 16 of the ICCPR, and other relevant international instruments.¹⁵⁶

(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.¹⁵⁷ Regardless of

154. ICCPR, *supra* note 2, at art. 9(5); ECHR, *supra* note 8, at art. 5(5); Arab Charter, *supra* note 137, at art. 14.7.

155. ICCPR, *supra* note 2, at art. 4.

156. ICCPR, *supra* note 2, at art. 16; Guiding Principles on Internal Displacement, *supra* note 23, at Principle 20; Banjul Charter, *supra* note 9, at art. 5; CPRD, *supra* note 7, at art. 12.

157. Human Rights Council, Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law, U.N. Doc. A/HRC/19/L.24 (March 16, 2012); Human Rights Comm., *General Comment No. 17: Rights of the Child, Article. 24*, U.N. Doc. HRI/GEN/1/Rev.1 at 23, ¶ 7 (Apr. 7, 1989), at http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC17%29_en.pdf ("Under article 24, paragraph 2, every child has the right

nationality laws of individual countries, all children should be registered immediately after birth on the territory of the country of the child's birth.¹⁵⁸ Birth registration should be free of charge and should be performed without delay.¹⁵⁹ 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, *Yean and Bosico v. Dominican Republic*.¹⁶⁰ The right to registration immediately after birth is enshrined in the ICCPR, the CRC, and other relevant international instruments.¹⁶¹

(3) *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 Refugee Convention and its 1967 Protocol or the Guiding Principles on Internal Displacement, the authorities shall issue identity documents or facilitate the issuance of new documents.¹⁶² The protection for migrants against the destruction of such documents originates in the ICRMW.¹⁶³

to be registered immediately after birth and to have a name. In the Committee's opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality").

158. See G.A. Res. 65/197 ¶ 43(j), U.N. Doc. A/RES/65/197 (Mar. 30, 2011); H.R.C. Res. 16/12, U.N. Doc. A/HRC/16/L.13/Rev.1 (Mar. 22, 2011), at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/122/34/PDF/G112234.pdf?OpenElement>; Recommendation on the Nationality of Children CM/Rec(2009)13, ¶ 57 (Dec. 9, 2009), at <https://wcd.coe.int/ViewDoc.jsp?id=1563529> ("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 Ziemele, *Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents*, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, Vol. 7, p. 25 (2007) ("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.").

159. Recommendation on the Nationality of Children, *supra* note 158, ¶ 57.

160. *Yean and Bosico v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

161. ICCPR, *supra* note 2, at art. 24; CRC, *supra* note 6, at art. 7; ICRMW, *supra* note 16, at art. 29; African Charter on the Rights and Welfare of the Child, art. 6, July, 1990 OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter African Children's Charter]; Recommendation on the Nationality of Children, *supra* note 158.

162. 1951 Refugee Convention, *supra* note 16, at 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, *supra* note 23, at 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 . . .").

163. ICRMW, *supra* note 16, at 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, *supra* note 16, at 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
REMEDY

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.¹⁶⁴ 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.¹⁶⁵ 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 3 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.¹⁶⁶ 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.”¹⁶⁷

164. UDHR, *supra* note 1, at art. 8; ICCPR, *supra* note 2, at art. 2(3). *See also* ICRMW, *supra* note 16, at art. 83; ICERD, *supra* note 4, at art. 6; CAT, *supra* note 5, at art. 14; CPED, *supra* note 10, at art. 8(2); ECHR, *supra* note 8, at art. 13; ACHR, *supra* note 12, at art. 25; G.A. Res. 60/147 *supra* note 153.

165. These articles are UDHR, *supra* note 1, at arts. 8-11. *See* Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights,”* 16 *IND. J. GLOBAL LEGAL STUD.* 437, 481 (2009).

166. *See* Comm. on the Elimination of Discrim. Against Women, *General Recommendation No. 26*, *supra* note 108, ¶¶ 21-22; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 170 (Sept. 17, 2003); Comm. on the Elimination of Racial Discrim., *Concluding Observations on Republic of Korea*, ¶ 18, U.N. Doc. CERD/C/KOR/CO/14 (Aug. 17, 2007), at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.KOR.CO.1.pdf>; Comm. on Migrant Workers, *Concluding Observations on Mexico*, ¶¶ 30-31, U.N. Doc. CMW/C/MEX/CO/1.Add.1 (June 19, 2008), at <http://www2.ohchr.org/english/bodies/cmw/docs/CMW.C.MEX.CO.1.Add.1.pdf>.

167. INT’L COMM’N OF JURISTS, *MIGRATION AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE* No. 6, at 123.

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 a 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 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, a migrant's right to due process is subject to particularly pronounced abuses by governments.¹⁶⁸ 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.¹⁶⁹ Human rights law

168. See, e.g., *Orantes-Hernandez v. Gonzales*, 504 F.Supp.2d 825 (C.D.Cal. 2007); Karen Tumlin, *Immigration Detention Centers under the Microscope: Recent Reports Reveal Widespread Violations of the National Detention Standards*, 216 IMMIGRANTS' RIGHTS UPDATE 6 (2007) (reviewing U.S. government violations of its own standards regarding migrant detention).

169. UDHR, *supra* note 1, at arts. 6, 10, 11; ICCPR, *supra* note 2, at arts. 14, 16; ICERD, *supra* note 4, at art. 5(a); ICRMW, *supra* note 16, at arts. 17(1), 18(1); G.A. Res. 40/144, art. 5(1)(c), U.N. Doc. A/RES/40/144 (Dec. 13, 1985); CRC, *supra* note 6, at arts. 12(2), 40(1); ECHR, *supra* note 8, at art. 6(1).

establishes due process as 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, 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 a manner inferior to nationals with regard 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 the opportunity to be represented and heard before a competent decision maker. The IMBR, like the ICCPR, prohibits collective expulsion.¹⁷⁰ Importantly, the IMBR does not limit the right to due process to those with lawful status, but provides this right explicitly to all migrants.¹⁷¹

(6) *Paragraph 2*: Paragraph 2 recognizes the right of migrants to be provided free legal assistance and representation in criminal proceedings 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, 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 in all proceedings related to their status as a migrant.¹⁷² 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.¹⁷³

(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.¹⁷⁴ ICCPR Article 14 only expressly recognizes a right to free counsel

170. Joseph, et al., *supra* note 90, at 378.

171. See Joseph, et al., *supra* note 90, at 379.

172. Article 13 of the ICCPR and Article 1.1(c) of the ECHR Protocol 7 guarantee the right to representation before the authority competent to decide on an expulsion decision. ICCPR, *supra* note 2, at art. 13; ECHR, *supra* note 8, at 1.1(c).

173. Nolan v. Russia, App. No. 2512/04, 53 Eur. H.R. Rep. 29, 1006 (Feb. 12, 2009) (finding a violation of ECHR Protocol 7 when "the Government did not furnish any explanation as to why the decision on the applicant's exclusion had not been communicated to him for more than three months and why he had not been allowed to submit reasons against his expulsion and to have his case reviewed with the participation of his counsel." (emphasis added)).

174. Eileen Skinnider, *The Responsibility of States to Provide Legal Aid* (The Int'l Ctr. for Crim. Law Reform and Crim. Just. Pol'y, 1999), available at <http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf>.

in criminal cases.¹⁷⁵ However, the Human Rights Committee has emphasized that Article 14 applies to both criminal and civil cases.¹⁷⁶ 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 by a judicial or other authority in all cases where the interests of justice so require and without payment if the migrant does not have sufficient funds to pay.¹⁷⁷ 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.¹⁷⁸ 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 constitutional provisions providing for free civil counsel for those in need.¹⁷⁹ In 1979 the European Court of Human Rights ruled in *Airey v. Ireland* that free civil counsel to facilitate access to the courts was a basic right.¹⁸⁰ Thereafter, the Council of Europe requires 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.¹⁸¹ This principle is also grounded in treaty law: the OAS Charter explicitly recognizes a right to counsel,¹⁸² 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.¹⁸³

(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.¹⁸⁴ This right is not limited to criminal proceedings and should be expanded to include all proceedings related to a migrant's status to ensure that the IMBR's

175. ICCPR, *supra* note 2, at art. 14(3)(d).

176. Human Rights Comm., *General Comment No. 13, Article 14 (Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law)* ¶ 2, UN Doc. HRI/GEN/1/Rev.1 (Apr. 13, 1984), at http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC13%29_en.pdf.

177. G.A. Res 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

178. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, U.N. Doc. A/CONF.144/28/Rev.1, at <http://www.unhcr.org/refworld/docid/3ddb9f034.html>.

179. Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, 40 CLEARINGHOUSE REVIEW 288 (2006).

180. *Airey v. Ireland*, App. No. 6289/73, 2 Eur. H.R. Rep. 305 (Oct. 9, 1979).

181. Lidman, *supra* note 179, at 292.

182. Charter of the Organization of the American States, art. 45, Dec. 13, 1951, 119 U.N.T.S. 3 [hereinafter OAS Charter].

183. Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, Advisory Opinion, Inter-Am. Comm'n H.R., OEA/Ser.L.V/II.129 doc. 4 ¶ 182 (Sept. 7, 2007).

184. For a discussion of the historical development of free legal aid and the priority of criminal cases see Skinnider, *supra* note 174.

right to due process 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 with free legal aid and representation in proceedings related to their status or the status of their family members.¹⁸⁵

(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.¹⁸⁶ The ICCPR also provides for defendants to enjoy the free assistance of an interpreter.¹⁸⁷ 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.¹⁸⁸ These documents all contain language on due process and fairness that underscore the importance of a defendant's awareness of charges and proceedings.¹⁸⁹ Although the grounds for this requirement are much stronger in criminal cases, the civil and administrative contexts (particularly those proceedings related to a migrant's status) 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 the defendant, whether in the criminal, civil, or administrative contexts, in order to properly prepare a defense. 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, 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 promises the "free assistance of an interpreter," the host government should

185. See *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 166, ¶ 126; *Velez Loo v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 146 (Nov. 23, 2010).

186. ICCPR, *supra* note 2, at art. 14(3)(a) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him").

187. ICCPR, *supra* note 2, at art. 14(3)(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.").

188. Compare *KATHY LASTER & VERONICA L. TAYLOR, INTERPRETERS AND THE LEGAL SYSTEM 73* (1994) with ECHR, *supra* note 8, at art. 6 (interpreted as not applying to immigration proceedings).

189. UDHR, *supra* note 1, at art. 10; ICCPR, *supra* note 2, at art. 9(2)-(5); CAT, *supra* note 5, at arts. 13, 14.

defray the costs of the interpretation service in order to ensure financial considerations do not interfere with migrant defendants' exercise of their rights.

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

(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.¹⁹⁰ Freedom from disproportionate penalties also builds on general due process and non-discrimination principles. States should particularly ensure that their detention and expulsion policies meet the appropriate proportionality standards.

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) States shall provide assistance to ensure the physical, psychological, and social recovery of victims of crimes, especially where such individuals are 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.

190. 1951 Refugee Convention, *supra* note 16, at 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.").

(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.¹⁹¹

(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,¹⁹² and often struggle to receive assistance even after they are discovered.¹⁹³

(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 U.N. Convention Against Organized Crime,¹⁹⁴ and the Council of Europe Convention on Action Against Trafficking in Human Beings.¹⁹⁵ The IMBR draws on these and other instruments contemplating State obligations towards victims of crime to establish a general right of migrant victims of crime to protection and assistance.¹⁹⁶

(5) Without an established right to protection and assistance irrespective of immigration status, migrant victims of crime may hesitate to come forward and may become susceptible to threats and intimidation by abusive partners, predatory employers, and other potential assailants.¹⁹⁷ 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

191. See, e.g., Fiona David, *Law Enforcement Responses to Trafficking in Persons: Challenges and Emerging Good Practice*, in *Trends and Issues in Crime and Criminal Justice* No. 347 (Toni Makkai ed., 2007).

192. The Global Problem of Trafficking in Persons: Breaking the Vicious Cycle on “Trafficking of Women and Children in the International Sex Trade,” Hearing before the H. Comm. on Int’l Relations, 106th Cong. 2 (1999) (statement of Harold Hongju Koh, Assistant Secretary of State).

193. See Ratna Kapur, *Migrant Women and the Legal Politics of Anti-Trafficking Interventions*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 111, 118-19 (Edward Newman & Sally Cameron eds., 2007).

194. Palermo Protocol, *supra* note 16.

195. Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197.

196. See Palermo Protocol, *supra* note 16, at art. 25(2); Recommendation on the Protection of Women Against Violence CM/Rec(2002)5 (Apr. 30, 2002). See also INT’L COMM’N OF JURISTS, *supra* note 167, at 83.

197. See, e.g., David, *supra* note 191.

crime actively cooperating with criminal prosecutions.¹⁹⁸ 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 may require 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 racist and xenophobic practices by law enforcement officials toward migrant victims of crime.¹⁹⁹ A State's 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."²⁰⁰

(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 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. The Palermo Protocol²⁰¹ and the Council of Europe Convention make special recognition of this fact.²⁰² 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.

198. See, e.g., Palermo Protocol, *supra* note 16, at art. 24(1) ("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 also INT'L COMM'N OF JURISTS, *supra* note 167, at 88.

199. See, e.g., INT'L COMM'N OF JURISTS, *supra* note 167, at 34.

200. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31-Sept. 8, 2001, *Declaration*, ¶¶ 12, 16, 38, 47-51, at <http://www.un.org/WCAR/durban.pdf>.

201. Palermo Protocol, *supra* note 16, 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 . . .").

202. Council of Europe Convention on Action against Trafficking in Human Beings, *supra* note 195, at art. 12(1) ("Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery.").

This is especially important when, as is often the case, migrants may not have an understanding of local laws and customs, may struggle to access institutions providing assistance, and lack access to informal support networks due to their status. Article 10 should be read in conjunction with the rights of vulnerable migrants in Article 4, 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) Non-governmental organizations often play a special role in providing assistance to migrant victims of crime, who may fear government authorities or require special expertise.²⁰³ States are encouraged to cooperate with non-governmental organizations and other elements of civil society in providing assistance to migrant victims of crime. This perspective reflects best practices among practitioners,²⁰⁴ as well as the language of instruments addressing the needs of victims of human trafficking.²⁰⁵

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 violation of human rights.

(3) Except where compelling reasons of national security otherwise require, a migrant shall be allowed to submit the reasons against expulsion and to have the migrant's case reviewed by, and be represented for the

203. See, e.g., Mark Lagon, *The Global Abolition of Human Trafficking: The Indispensable Role of the United States*, 12.1 GEO. J. INT'L AFFAIRS 89, 96 (2011).

204. See David, *supra* note 191.

205. See, e.g., Palermo Protocol, *supra* note 16, at art. 10(2) ("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.").

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. A migrant shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due 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.²⁰⁶ 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.²⁰⁷ The international law governing expulsion is evolving and States must take measures to ensure

206. See, e.g., HUMAN RIGHTS WATCH, NO REFUGE: MIGRANTS IN GREECE 3 (2009), available at <http://www.hrw.org/en/reports/2009/11/02/no-refugees>; HUMAN RIGHTS WATCH, PUSHED BACK, PUSHED AROUND: ITALY'S FORCED RETURN OF BOAT MIGRANTS AND ASYLUM SEEKERS, LIBYA'S MISTREATMENT OF MIGRANTS AND ASYLUM SEEKERS (2009), available at <http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around>.

207. See, e.g., HUMAN RIGHTS WATCH, DISCRIMINATION, DENIAL AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV (2009), available at <http://hrw.org/en/reports/2009/06/18/discrimination-denial-and-deportation-0>; HUMAN RIGHTS WATCH, PERILOUS PLIGHT: BURMA'S ROHINGYA TAKE TO THE SEAS (2009), available at <http://www.hrw.org/en/reports/2009/05/26/perilous-plaint-0>; HUMAN RIGHTS WATCH, IRAN: HALT MASS DEPORTATIONS OF AFGHANS (2007), available at <http://www.hrw.org/en/news/2007/06/17/iran-halt-mass-deportation-afghans>.

that they protect both substantive and procedural rights of migrants during expulsion.²⁰⁸

(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.²⁰⁹ 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.²¹⁰

(3) The prohibition on discriminatory or arbitrary expulsion includes collective expulsion, which is specifically prohibited in the ICRMW,²¹¹ and in several regional instruments governing human rights, such as the Fourth Protocol to the ECHR,²¹² the ACHR,²¹³ the African Charter on Human and People's Rights (the Banjul Charter),²¹⁴ and the Arab Charter on Human Rights (Arab Charter).²¹⁵ The Human Rights Committee has also affirmed that collective expulsion would be a violation of ICCPR Article 13.²¹⁶

(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.²¹⁷ However, there are limited procedural protections for migrants at entry.²¹⁸

(5) *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.²¹⁹ For example, States are obligated to provide opportunities for remedy when expulsion

208. See Int'l Law Comm'n, May 7-June 1, July 2-Aug. 3, 2012, Expulsion of Aliens, U.N. Doc. A/CN.4/L.797 GAOR, 64th Sess. (May 24, 2012).

209. ICCPR, *supra* note 2, at art. 13; ICRMW, *supra* note 16, at art. 22(2). See also ECHR, *supra* note 8, at Protocol 7, art. 1.

210. See T. Alexander Aleinikoff, *International Legal Norms and Migration: A Report, in* MIGRATION AND INTERNATIONAL LEGAL NORMS 1, 19 (T. Alexander Aleinikoff & Vincent Chetail, eds. 2003).

211. ICRMW, *supra* note 16, at art. 22(1).

212. ECHR, *supra* note 8, at Protocol 4.

213. ACHR, *supra* note 12, at art. 22(9).

214. Banjul Charter, *supra* note 9, at art. 12.

215. Arab Charter, *supra* note 137, at art. 26(2).

216. *General Comment No. 15*, *supra* note 66.

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

218. See INT'L COMM'N OF JURISTS, *supra* note 167, at 45-46.

219. UDHR, *supra* note 1, at art. 8; ICCPR, *supra* note 2, at art. 2; CAT, *supra* note 5, at art. 14; ICERD, *supra* note 4, at art. 6; CRC, *supra* note 6, at art. 39. See also G.A. Res. 60/147, *supra* note 153 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.

would give rise to *refoulement*²²⁰ or a violation of the right to respect for family life.²²¹ According to the U.N. 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.²²²

(6) *Paragraph 3*: The IMBR extends to all migrants the procedural rights in Article 22(4) of the ICRMW, namely the rights to submit reasons against expulsion, to have the case reviewed by the competent authority, and to seek a stay of the decision of expulsion.²²³ While ICCPR Article 13 and Article 1 of Protocol No. 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.²²⁴ At the regional level, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights have granted additional procedural protections by finding that fair trial guarantees apply in expulsion proceedings.²²⁵ The Committee of Ministers of the Council of Europe recommended that "the removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative . . . [and] shall indicate the legal and factual grounds on which it is based [and] the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised."²²⁶

(7) *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.²²⁷

(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.²²⁸

(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

220. INT'L MIGRANTS BILL OF RIGHTS, art. 13, 28 GEO. IMMIGR. L.J. 18.

221. *See, e.g., C.G. v. Bulgaria*, App. No. 1365/07, 47 Eur. H.R. Rep. 51 (2008); *Keles v. Germany*, App. No. 32231/02, 44 Eur. H.R. Rep. 12 (2007).

222. G.A. Res. 60/147, *supra* note 153, at arts. 2-3.

223. ICRMW, *supra* note 16, at art. 22(4).

224. *See, e.g., NOWAK, supra* note 70, at 224; *General Comment No. 15, supra* note 66.

225. INT'L COMM'N OF JURISTS, *supra* note 167, at 134-136. *See also* Int'l Law Comm'n, *supra* note 208, at art. 26.

226. Twenty Guidelines on Forced Return, adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925th meeting of the Ministers' Deputies, guideline 4.1. *See also International Law Commission, A/CN.4/L.797*, 24 May 2012, Draft Article 26.

227. ICRMW, *supra* note 16, at art. 22(3).

228. ICRMW, *supra* note 16, arts. 22(6), (9).

obligation prohibits States from practicing unsafe repatriations and expulsions that violate the right to life or dignity or the prohibition on cruel, inhumane or degrading treatment.²²⁹

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 Refugee Convention and its 1967 Protocol, or of defining the term refugee more broadly.²³⁰ The "right to seek and to enjoy in other countries asylum from persecution" was originally enshrined in Article 14 of the UDHR²³¹ and reaffirmed in numerous General Assembly Resolutions.²³²

(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 safeguards that are absent from the 1951 Refugee Convention and 1967 Protocol.²³³ These procedures should extend to the frontier and extrater-

229. See also Int'l Law Comm'n, *supra* note 208, at art. 21.

230. 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.").

231. UDHR, *supra* note 1, at art. 14.

232. See, e.g., G.A. Res. 2312 (XXII), U.N. Doc. A/RES/2312(XII) (Dec. 14, 1967); G.A. Res. 50/152, U.N. Doc A/RES/50/152 (Dec. 21, 1995).

233. Refugee Convention, *supra* note 16; U.N. HIGH COMM'R FOR REFUGEES, FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS (2005), available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4aa76da49&query=refugee%20protection> ("[I]t is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention."). See also U.N. High Comm'r for Refugees, *Asylum Processes (Fair and Efficient Asylum Procedures)* ¶ 4-5, U.N. Doc. EC/GC/01/12 (May 31, 2001), at <http://www.refworld.org/docid/3b36f2fca.html>.

ritorially, including to migrants seeking asylum and interdicted on the high seas,²³⁴ in order to preserve the right of *non-refoulement*.²³⁵ Fair and efficient procedures²³⁶ 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.²³⁷ 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.²³⁸ A migrant should have the right to legal assistance and representation.²³⁹ 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.²⁴⁰

(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

234. See, e.g., *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 34th Session, Supp. No. 12A, at 16, ¶ (c), U.N. Doc. A/34/12/Add.1 (1980) (“[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.”); U.N. 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 [hereinafter UNHCR ADVISORY OPINION] (2007), available at <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156-57 (1997); Brief for U.N. High Comm’r for Refugees as Amicus Curiae Supporting Respondents, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344).

235. ELIHU LAUTERPACHT & DANIEL BETHLEHEM, THE SCOPE AND CONTENT OF THE PRINCIPLE OF *NON-REFOULEMENT*: OPINION, available at <http://www.unhcr.org/419c75ce4.html>.

236. See e.g. Cartagena Declaration, *supra* note 34, ¶ 4.

237. FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS, *supra* note 233; U.N. High Comm’r for Refugees, *Agenda for Protection*, U.N. GAOR, 53d Sess., 32, U.N. Doc. A/AC.96/965/Add.1 (2002), at <http://www.refworld.org/pdfid/3d4fd0266.pdf>. See also Cartagena Declaration, *supra* note 34, ¶ 4; G.A. Res. 51/75, ¶ 4, U.N. Doc. A/RES/51/75 (Dec. 12, 1996), at <http://www.un.org/documents/ga/res/51/ares51-75.htm>.

238. 1951 Refugee Convention, *supra* note 16, at art. 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)*, *supra* note 233, ¶ 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 its 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*, 29 Eur. H.R. Rep. CD178 (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.”).

239. FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS, *supra* note 233; *Agenda for Protection*, *supra* note 237, at 32.

240. Council Directive 2005/85/EC, art. 39, 2005 O.J. (L 326/13) (EC).

refugees.²⁴¹ The principle of *non-refoulement* was articulated in Article 33 of the 1951 Refugee Convention and its 1967 Protocol²⁴² and applies to persons “where there are substantial grounds for believing that [they] would be in danger of being subjected to torture” under the CAT.²⁴³ The principle of *non-refoulement* is non-derogable and is considered a cornerstone principle of international law protecting individuals.²⁴⁴ This Paragraph serves as a complementary articulation of the IMBR Article 13 principle of *non-refoulement*.

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 the migrant 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 the migrant’s life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

(4) No migrant shall be expelled or returned in any manner to another State where there are substantial grounds for believing that the migrant would be subjected to a serious deprivation of fundamental human rights.

(5) No migrant should be expelled or returned in any manner to another State where there are substantial grounds for believing that the migrant would be subjected to other serious deprivations of human rights.

(6) 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.²⁴⁵

241. See, e.g., U.N. HIGH COMM’R FOR REFUGEES, UNHCR NOTE ON THE PRINCIPLE OF *NON-REFOULEMENT* (1997), available at <http://www.unhcr.org/refworld/docid/438c6d972.html>.

242. Refugee Convention, *supra* note 16, at art. 33.

243. CAT, *supra* note 5, at art. 3.

244. See Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538 (2001); GOODWIN-GILL, *supra* note 138, at 97; Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT’L J. REFUGEE L. 509, 523 (2006) (describing *non-refoulement* as “the most fundamental of all international refugee law obligations”).

245. See Allain, *supra* note 244, at 538; GOODWIN-GILL, *supra* note 138, at 97; Feller, *supra* note 244, at 523 (describing *non-refoulement* as “the most fundamental of all international refugee law obligations”).

(2) *Paragraph 2*: Paragraph 2 is derived from Article 3 of the 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;”²⁴⁶ 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*.”²⁴⁷ 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 cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR²⁴⁸ and Article 3 of the ECHR,²⁴⁹ 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.²⁵⁰

(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.”²⁵¹ 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.²⁵² Although Article 33(2) of the 1951 Refugee Convention lists two exceptions for public order and for national

246. CAT, *supra* note 5, at art. 3.

247. Human Rights Comm., *General Comment No. 20: Article. 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* ¶ 9, U.N. Doc. HRI/GEN/1/Rev.9 (Mar. 10, 1992), at http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC20%29_en.pdf.

248. *See General Comment No. 20, supra* note 247, ¶ 9; Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), at http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add13_%28GC31%29_En.pdf.

249. *See, e.g., Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989); *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. H.R. Rep. 1 (1991); *Vilvarajah v. United Kingdom*, App. No. 13163/87, 14 Eur. H.R. Rep. 248 (1992); *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1997); *Ahmed v. Austria*, App. No. 25964/94, 24 Eur. H.R. Rep. 278 (1997); *T.I. v. United Kingdom*, App. No. 43844/98 (2000), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-5105>.

250. *See* UNHCR ADVISORY OPINION, *supra* note 234.

251. 1951 Refugee Convention, *supra* note 16, at art. 33(1).

252. *See* UNHCR ADVISORY OPINION, *supra* note 234.

security,²⁵³ these exceptions apply only in extreme and limited circumstances.²⁵⁴

(4) *Paragraph 4*: The purpose of Paragraph 4 is to affirm the principle of *non-refoulement* in human rights law, independent of the CAT and the 1951 Refugee Convention and Protocol. In cases of serious violations of fundamental human rights that do not fall under CAT or have a nexus to the five protected grounds in the 1951 Refugee Convention, human rights law provides robust protections against return.²⁵⁵

(5) The most fundamental of these rights is the right to life. Regional instruments,²⁵⁶ international human rights treaty bodies,²⁵⁷ and regional court systems²⁵⁸ have all explicitly found that potential violations of the right to life trigger *non-refoulement* protections. The right to life may be threatened in various ways, including the death penalty,²⁵⁹ extra-judicial execu-

253. 1951 Refugee Convention, *supra* note 16, at art. 33(2).

254. See UNHCR NOTE ON THE PRINCIPLE OF *NON-REFOULEMENT*, *supra* note 241.

255. See INT'L COMM'N OF JURISTS, *supra* note 167, at 95, 99; Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, in HUMAN RIGHTS AND IMMIGRATION 19, 34, 37 (Ruth Rubio-Marín ed., 2014) (“[M]ost general human rights treaties have been construed by their respective treaty bodies as inferring an implicit prohibition on *refoulement* . . . the human rights principle of *non-refoulement* stands out as a practical and powerful means for ensuring effective respect for fundamental rights.”); G.T. v. Australia, Comm. No. 706/1996 ¶¶ 8.1-8.2, U.N. Doc. CCPR/C/61/D/706/1996 (1997), at <http://www.refworld.org/docid/4ae9acbfd.html>.

256. See, e.g., Cartagena Declaration, *supra* note 34, ¶ 3 (“[T]he definition or concept of a refugee . . . includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”); Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 35; Council Directive 2011/95/EU, art. 15, 2011 O.J. (L 337) 9, 18 (Subsidiary protection of non-return includes risk of serious harm, defined as: “(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”).

257. See, e.g., *General Comment No. 6*, *supra* note 128 (“States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] . . . of the Convention.”); *General Comment No. 31*, *supra* note 248, ¶ 12 (“[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”); G.T. v. Australia, *supra* note 255, ¶ 8.1.

258. See *Bader v. Sweden*, App. No. 13284/04, 46 Eur. H.R. Rep. 13, 206 (2005) (finding that deportation of the applicant to face execution would violate the right to life). The European Court of Human Rights often deals with alleged violations of the right to life in the context of examining violations of the right to be free from torture, inhuman or degrading treatment or punishment. See, e.g., *Na v. United Kingdom*, App. No. 25904/07, 48 Eur. H.R. Rep. 15, 378 (2009); *Said v. the Netherlands*, App. No. 2345/02, 43 Eur. H.R. Rep. 14, 256 (2005). See also *Haitian Centre for Human Rights v. United States of America*, Decision, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. at 550 (1997).

259. *Kaboulov v. Ukraine*, App. No. 41015/04, 50 Eur. H.R. Rep. 39, 998 (2010).

tions,²⁶⁰ or lack of appropriate medical care.²⁶¹

(6) The right to be free from torture and other cruel, inhuman or degrading treatment or punishment is the most analyzed and discussed *non-refoulement* trigger in human rights law. The right is non-derogable.²⁶² States 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.”²⁶³ Most Human Rights Committee and European Court of Human Rights jurisprudence regarding *non-refoulement*, including cases that implicate other rights, falls under analysis of this rule.

(7) *Paragraph 5*: Paragraph 5 urges States to consider forgoing expulsion of a migrant where there are substantial grounds for believing that the migrant would be subjected to other serious deprivations of human rights.

(8) International human rights bodies and regional frameworks recognize *non-refoulement* protection for situations of generalized violence, which may implicate a broad range of rights.²⁶⁴ Certain States and regions use temporary protection regimes to ensure that migrants are not returned to areas of war or other crisis.²⁶⁵ Situations such as sudden natural disasters or slow-onset disasters may threaten migrants’ right to life, as well as other rights such as health, housing, food, and adequate standard of living.²⁶⁶ While cases that

260. See, e.g., *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156-57 (1997); *Ba-boeram v. Suriname*, Comm. Nos. 146/1983, 148-154/1983, CCPR/C/24/D/146/1983, (Apr. 4, 1985), at <http://www1.umn.edu/humanrts/undocs/session40/146-1983.htm>.

261. See *D. v. United Kingdom*, App. No. 30240/96, 24 Eur. H.R. Rep. 423, 436-38 (1997) (finding article 2 claims indissociable from article 3 claims).

262. *Saadi v. Italy*, App. No. 37201/06, 49 Eur. H.R. Rep. 30, 758-59 (2009) para. 127; *Chahal v. U.K.*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 437 (1997).

263. *General Comment No. 20*, *supra* note 247.

264. See, e.g. *Cartagena Declaration*, *supra* note 34, at 190-193 (“the definition or concept of a refugee . . . includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”); *Convention Governing the Specific Aspects of Refugee Problems in Africa*, *supra* note 230; *Council Directive 2011/95/EU*, *supra* note 256, at art. 15 (Subsidiary protection of non-return includes risk of serious harm, defined as: “(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”); *Na v. United Kingdom*, App. No. 25904/07, 48 Eur. H.R. Rep. 15, 356 (2009) (“The Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.”).

265. INT’L COMM’N OF JURISTS, *supra* note 167, at 67-73.

266. See *Vikram Kolmannskog & Lisetta Trebbi, Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps*, 92, no. 879 *International Review of the Red Cross* 713 (2010), available at <http://www.icrc.org/eng/assets/files/review/2010/irrc-879-kolmannskog-trebbi.pdf>.

implicate such rights as health²⁶⁷ and adequate standard of living²⁶⁸ have been evaluated by the European Court of Human Rights under humiliating and degrading treatment, both the Human Rights Committee and the European Court of Human Rights have held that potential violation of other rights could produce *non-refoulement* protections. For example, States should not return a migrant to a country where there are substantial grounds for believing that the migrant would be denied the right to a fair trial,²⁶⁹ be denied the right to hold and manifest religious beliefs,²⁷⁰ or be arbitrarily detained.²⁷¹ States should adjust their expulsion procedures to uphold all human rights of each individual within their jurisdictions.

(9) *Paragraph 6*: The purpose of Paragraph 6 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.²⁷² The scope of protection should include migrants seeking asylum or migrants interdicted on the high seas,²⁷³ 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.²⁷⁴ 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,²⁷⁵ and the nature of the IMBR as a set of norms derived from the fundamental dignity of all migrants, rather than from their ties to a particular sovereign.

267. *D. v. United Kingdom*, App. No. 30240/96, 24 Eur. H.R. Rep. 423, 436-38 (1997).

268. *M.S.S. v. Belgium*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, (2011) (taking into consideration the fact that the asylum-seeker was "living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs" for several months).

269. See *A.R.J. v. Australia*, ¶ 6.15, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997), at <http://www.refworld.org/docid/4028adfa7.html>.

270. See *Z and T v. United Kingdom*, App. No. 27034/05, Eur. H.R. Rep. (28 February 2006), at <http://www.refworld.org/docid/45ccab042.html>.

271. See *Z and T*, Eur. H.R. Rep.; *Tomic v. the United Kingdom*, App. No. 17387/03, Eur. H.R. Rep. (June 9 2003), at <http://echr.ketse.com/doc/17837.03-en-20031014/view/> (stating that there is the potential for flagrant arbitrary detention to raise *non-refoulement* issues).

272. UNHCR ADVISORY OPINION, *supra* note 234.

273. See e.g. *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, *supra* note 234, ¶ (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."); UNHCR ADVISORY OPINION, *supra* note 234; *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156-57 (1997 Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Respondents, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344); *Medvedyev v. France*, App. No. 3394/03, 51 Eur. H.R. Rep. 39, 919-21 (2010) (extending applicability of the ECHR to a French warship's interception and effective control of a boat on the high seas).

274. See *Hirsi Jamaa v. Italy*, App. No. 27765/09, 55 Eur. H.R. Rep. 21 (2012).

275. See UNHCR ADVISORY OPINION, *supra* note 234.

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 the person 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 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 nationality nor denied the right to change 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.²⁷⁶ 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,²⁷⁷ this Article also recognizes necessary

276. See UDHR, *supra* note 1, at 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.”).

277. 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 Law 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).

limits²⁷⁸ 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 the person was born is explicitly provided for in the ACHR,²⁷⁹ the European Convention on Nationality of 1997,²⁸⁰ the Convention on the Reduction of Statelessness,²⁸¹ and the Hague Convention on Certain Ques-

278. 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, *supra* note 277, at 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.

279. ACHR, *supra* note 12, at 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.")

280. European Convention on Nationality of 1997, *supra* note 278, at art. 7 ("Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality.")

281. Convention on the Reduction of Statelessness, *supra* note 43, at art. 1 ("A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.")

tions Relating to the Conflict of Nationality Laws,²⁸² and is implicit in the UDHR²⁸³ and the CRC.²⁸⁴ 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) *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.²⁸⁵ 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.²⁸⁶ 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

282. Convention on Certain Questions Relating to the Conflict of Nationality Laws, *supra* note 277, at 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.").

283. UDHR, *supra* note 1, at art. 15(1) ("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 the individual is born.

284. CRC, *supra* note 6, at art.7(1) ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality . . ."), art. 8(1) ("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.

285. See PHILLIP COLE, PHILOSOPHIES OF EXCLUSION 10 (2000).

286. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 553-56 (2007) (regarding the domestic and foreign workers' rights problems posed by the existence of a temporary worker system instead of one resulting in the naturalization and subsequent unionization of foreign workers).

analysis of individual naturalization claims. Under such an analysis, the absence of any one factor or set of factors is not *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.

(6) *Paragraph 4*: The right of expatriation is itself a norm of international law.²⁸⁷ 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.

(7) *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 regard to their own nationality in the act of marriage, and with respect to the nationality of their children as affirmed by CEDAW²⁸⁸ and the Convention on the Nationality of Married Women.²⁸⁹ 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.²⁹⁰ 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

287. See, e.g., UDHR, *supra* note 1, at art. 15(2) (noting that “no one shall be . . . denied the right to change his nationality”).

288. CEDAW, *supra* note 16, at art. 9(1), (2) (“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*, Court of Appeal, July 3, 1992, 1992 BLR 119 (CA) (Bots.) (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).

289. Convention on the Nationality of Married Women, art. 1, opened for signature Feb. 20, 1957, 309 U.N.T.S. 65 (“ . . . 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.”).

290. See CEDAW, *supra* note 16, at art. 9(1).

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.

(8) *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.²⁹¹ Exercise of this right must not nullify the enjoyment of other essential rights, such as those regarding nationality.

(9) Paragraph 6 is the clearest articulation of this Article's policy favoring the 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.

(10) *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.²⁹² The right to acquire a nationality necessarily includes the right to preserve that nationality.²⁹³ 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 children²⁹⁴ 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;²⁹⁵ however, there is a strong movement towards the recog-

291. See, e.g., UDHR, *supra* note 1, at art. 16(1), (2).

292. See, e.g., ICCPR, *supra* note 2, at art. 24(3); CRC, *supra* note 6, at art. 7(1).

293. See CRC, *supra* note 6, at art. 8(1).

294. See CEDAW, *supra* note 16, at art. 9(2).

295. See Convention on Certain Questions Relating to the Conflict of Nationality Law, *supra* note 277, at pmbl. ("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 the second paragraph of Article 12, the Convention provides "[t]he 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." The Convention seems more

dition of plural nationalities, and those States still formally rejecting the practice often acquiesce by failing to enforce internal laws requiring exclusive nationality.²⁹⁶ 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.

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.²⁹⁷ The most crucial and basic social grouping is the family. Families may be by biological ties, but may also include individuals with mutual dependencies.²⁹⁸ As migration can lead to extended periods of family separation and uncertainty, State treatment of the family can greatly impact

worried about children being able to renounce their dual nationality with respect to children of career diplomats. T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS 119, 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).

296. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1453-58 (1997). But see Karin Scherner-Kim, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—To Enforce, To Omit, or Maybe To Change?*, 88 GEO L.J. 329, 370 (2000) (arguing that States should enforce the laws refusing to allow for recognition of plural nationalities).

297. "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 (2010).

298. The definition of "family" should be construed broadly. *Id.* at 653-54 ("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."). See also Yogyakarta Principles, *supra* note 79, at 27 ("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.").

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."²⁹⁹ ICESCR Article 10(1) also establishes that "[t]he widest possible protection should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."³⁰⁰ Article 12 of the UDHR guards against "arbitrary interference" with the family, among other things, including "privacy . . . home or correspondence."³⁰¹ The CRC and CEDAW also protect the right to family relations as expressed through ensuring that the family is not separated from the child or retaining a family structure under law.³⁰² This extends the right of ICRMW Article 44(1), which establishes that "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."³⁰³

(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."³⁰⁴

(4) The conception of the family as the "fundamental group unit of society" is recognized in international law³⁰⁵ and is derived from social

299. ICCPR, *supra* note 2, at art. 23(1).

300. ICESCR, *supra* note 3, at art. 10(1).

301. UDHR, *supra* note 1, at art. 12.

302. CRC, *supra* note 6, at arts. 8-10, 16; CEDAW, *supra* note 16, at arts. 9, 16.

303. ICRMW, *supra* note 16, at art. 44(1).

304. ICCPR, *supra* note 2, at art. 17. *See also* Mrazik & Schoenholtz, *supra* note 297, at 683. Mrazik and Schoenholtz outline this protection, stating 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."

305. ICCPR, *supra* note 2, at art. 23(1); ICESCR, *supra* note 3, at art. 10(1); UDHR, *supra* note 1, at art. 16(3); CRC, *supra* note 6, at arts. 8-10, 16; ICRMW, *supra* note 16, at art. 44(1).

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.³⁰⁶ 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.”³⁰⁷

(5) *Paragraph 2*: The rights contained in this paragraph derive from the CRC’s right of a child to be raised by the child’s family.³⁰⁸ Children should not be separated from their parents against their will, and in cases where children are separated, family reunification should be pursued unless contrary to the best interests of the child.³⁰⁹ Children separated from their parents “face greater risks of, *inter alia*, sexual exploitation and abuse, military recruitment, child labor (including labor for their foster families) and detention.”³¹⁰ 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 *non-refoulement* provision.³¹¹

(6) Children are entitled to special protection and assistance by the State when they are temporarily or permanently deprived of their family.³¹² Under the CRC, discrimination based on national or social origin is impermissible and therefore 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.”³¹³ If the family cannot be found, then “the child shall be accorded

306. Human Rights Comm., *General Comment No. 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses)*, U.N. Doc. HRI/GEN/1/Rev.9 (July 27, 1990), at http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC19%29_en.pdf.

307. Mrazik & Schoenholtz, *supra* note 297, at 652.

308. CRC, *supra* note 6, at art. 9(1).

309. *General Comment No. 6*, *supra* note 128, ¶ 79 (“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.”).

310. *Id.* at ¶ 3.

311. INT’L MIGRANTS BILL OF RIGHTS, art. 13, 28 GEO. IMMIGR. L.J. 18. *See also General Comment No. 6*, *supra* note 128, ¶ 82 (“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.”).

312. CRC, *supra* note 6, at arts. 20(1), 22(2).

313. CRC, *supra* note 6, at art. 22(2).

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.”³¹⁴ This Paragraph also relates to State obligations to children under IMBR Article 3(2).³¹⁵

(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.”³¹⁶

(8) *Paragraph 3*: A child should grow up in a family environment³¹⁷ and should be raised by the child’s parents.³¹⁸ Understanding that the migration process can cause differences in 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.³¹⁹ The first portion of this Paragraph emphasizes the right to migrate for dependent family of lawfully 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.”³²⁰ 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.”³²¹ The European Court of Human Rights has upheld the right of a child (or of a substantial equivalent) to join the child’s lawfully resident parents under the ECHR right to family.³²²

(10) Distinctions among family members that follow the standard presented in Article 3(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.

314. CRC, *supra* note 6, at art. 22(2).

315. INT’L MIGRANTS BILL OF RIGHTS, art. 3(2), 28 GEO. IMMIGR. L.J. 15.

316. CRC, *supra* note 6, at art. 10(1).

317. CRC, *supra* note 6, at pmb1.

318. CRC, *supra* note 6, at art. 9; *see* OPEN SOCIETY JUSTICE INITIATIVE, EXPERT OPINION ON THE RIGHT TO FAMILY LIFE AND NON-DISCRIMINATION (2008).

319. *See General Comment No. 19, supra* note 306; ICCPR, *supra* note 2, at pmb1. ¶ 2.

320. CRC, *supra* note 6, at art. 10(1).

321. ICRMW, *supra* note 16, at art. 44(2).

322. *Sen v. Netherlands*, App. No. 31465/96, 36 Eur. H.R. Rep. 7 (2001).

(11) The second portion of this Paragraph encourages States to consider extending lawful 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.³²³ 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.

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 to their country of residence. Under Article 4(2) of the ICCPR, the right to freedom of thought, conscience and religion is non-derogable.³²⁴ The right to freedom of thought, conscience and religion was enshrined in Article 18 of the UDHR, Article 18 of the ICCPR and other international instruments.³²⁵ According to the Human Rights Committee General Comment 22, the rights

323. See ICCPR, *supra* note 2, at art. 23(1); ICESCR, *supra* note 3, at art. 10(1); UDHR, *supra* note 1, at arts. 12, 16(3) (protecting against “arbitrary interference with . . . privacy, family, home or correspondence); CRC, *supra* note 6, at arts. 8, 9, 10, 16; ICRMW, *supra* note 16, at art. 44.

324. ICCPR, *supra* note 2, at art. 4(2).

325. ICRMW, *supra* note 16, at art. 12; ECHR, *supra* note 8, at art. 9; Banjul Charter, *supra* note 9, at art. 8; ACHR, *supra* note 12, at art. 12; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 1(1), U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

protected in this Article are “far-reaching and profound.”³²⁶ 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.”³²⁷

(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.³²⁸ These rights encompass the right to worship or assemble in connection with a religion or belief, including through ritual or ceremonial acts.³²⁹ These rights are without limit.³³⁰ The second clause of this Paragraph 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 may try to convert or prevent the conversion of persons through unethical or forcible means.³³¹ The text of this Paragraph derives from Article 18 of the UDHR, Article 18 of the ICCPR, and other international instruments.³³²

(3) *Paragraph 3*: The purpose of Paragraph 3 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.³³³ 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.³³⁴

326. Human Rights Comm., *General Comment No.22: Article 18 (Freedom of Thought, Conscience or Religion)*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993), at http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add4_%28GC22%29_En.pdf.

327. *General Comment No. 15*, *supra* note 66, ¶¶ 1-2.

328. *General Comment No. 15*, *supra* note 66, ¶ 7; U.N. Secretary-General, *Implementation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶¶ 70-80, U.N. Doc. E/CN.4/1997/91 (Dec. 30, 1996).

329. *General Comment No. 22*, *supra* note 326, ¶ 4; G.A. Res. 36/55, *supra* note 325, at art. 6(a)-(c).

330. Special Rapporteur of the Comm’n on Human Rights on Freedom of Religion or Belief, *Elimination of all Forms of Religious Intolerance*, transmitted by Note of the Secretary-General, ¶¶ 49-53, U.N. Doc. A/60/399 (Sept. 30, 2005).

331. *Elimination of all Forms of Religious Intolerance*, *supra* note 330, ¶¶ 40-68; see ICCPR, *supra* note 2, at art. 27; Human Rights Comm., *General Comment No. 23: Article 27 (Rights of Minorities)*, ¶ 5.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr.26, 1994), at http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add5_%28GC23%29_En.pdf.

332. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 325, at art. 1(1).

333. CRC, *supra* note 6, at art. 14(2).

334. CRC, *supra* note 6, at art. 14(2); ICCPR, *supra* note 2, at art. 18 (4); ICRMW, *supra* note 16, at art. 12 (4); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 325, at art. 5.

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 the migrant's 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.³³⁵ Paragraph 1 tracks the language from Article 19 of the ICCPR and Article 13 of the ICRMW.³³⁶ The 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.³³⁷ The Human Rights Committee has also stated that no individual may be subjected to an impairment of the individual's human rights based on actual, perceived or supposed opinions.³³⁸ There are no exceptions or reservations to the right to freedom of opinion,³³⁹ 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.³⁴⁰

(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."³⁴¹ 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.³⁴² The "right to freedom of expression" was originally enshrined in

335. UDHR, *supra* note 1.

336. ICCPR, *supra* note 2, at art. 19; ICRMW, *supra* note 16, at art. 13.

337. Human Rights Comm., *General Comment No. 34: Article 19 (Freedom of Opinion and Expression)* ¶¶ 9-10, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), at <http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR-C-GC-34.pdf>.

338. *General Comment No. 34*, *supra* note 337, ¶ 9.

339. Toby Mendel, *Restricting Freedom of Expression: Standards and Principles; Background Paper for Meetings Hosted by the UN Special Rapporteur for Freedom of Opinion and Expression*, CENTRE FOR LAW AND DEMOCRACY 2010, at 3.

340. *General Comment 34*, *supra* note 337, ¶ 5.

341. Calling of an International Conference on Freedom of Information, G.A. Res. 59/1, U.N. Doc. A/RES/59 (Dec. 14, 1946).

342. Mendel, *supra* note 339, at 4-5; Mavlonov v. Uzbekistan, Comm. No. 1334/2004, ¶ 8.4, U.N. Doc. CCPR/C/95/D/1334/2004 (Apr. 27, 2009), at <http://www.refworld.org/docid/4ac9aaa22.html>

Article 19 of the UDHR. Paragraph 2 tracks the language from Article 19 of the ICCPR and Article 13 of the ICRMW.³⁴³

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,³⁴⁴ the ICCPR,³⁴⁵ the CRC,³⁴⁶ the ICERD,³⁴⁷ the ECHR,³⁴⁸ the Banjul Charter,³⁴⁹ and the ACHR.³⁵⁰ 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.”³⁵¹ The UN Human Rights Council has highlighted the importance of these rights and reiterated that the rights apply to migrants.³⁵² The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association was even more explicit in stating that

(holding 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).

343. ECHR, *supra* note 8, at art. 10; ACHR, *supra* note 12, at art. 9; Banjul Charter, *supra* note 9, at art. 13.

344. UDHR, *supra* note 1, at art. 20(1) (“Everyone has the right to freedom of peaceful assembly and association.”).

345. ICCPR, *supra* note 2, at art. 21 (“The right of peaceful assembly shall be recognized.”), art. 22(1) (“Everyone shall have the right to freedom of association with others . . .”).

346. CRC, *supra* note 6, at art. 15(1) (“States parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.”).

347. ICERD, *supra* note 4, at 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 . . .”).

348. ECHR, *supra* note 8, at 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.”).

349. Banjul Charter, at 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.”).

350. ACHR, at 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.”).

351. *General Comment No. 15*, *supra* note 66, ¶ 7.

352. G.A. Res. 15/21, ¶ 1, U.N. Doc. A/HRC/RES/15/21 (Oct. 6, 2010).

the rights of assembly and association in the ICCPR apply to non-nationals, including stateless persons, refugees, and migrants.³⁵³

(2) The right to peacefully assemble and associate facilitates the exercise of many other rights and is essential to a functioning democracy. The right allows 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.”³⁵⁴ For migrants, who often 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.³⁵⁵

(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,³⁵⁶ the ICCPR,³⁵⁷ the ICESCR,³⁵⁸ the ICERD,³⁵⁹ the ICRMW,³⁶⁰ and the ECHR.³⁶¹ The right to form and join trade unions is also protected by the International Labour Organization in ILO Convention No. 87.³⁶² Additionally, the ILO Congress declared in 1998 that all members of the ILO have the obligation to respect, promote, and realize certain

353. Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 13, U.N. Doc. A/HRC/20/27 (May 21, 2012).

354. G.A. Res. 15/21, *supra* note 352, at pmb1.

355. Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *supra* note 353, ¶ 12.

356. UDHR, *supra* note 1, at art. 23(4) (“Everyone has the right to form and to join trade unions for the protection of his interests.”).

357. ICCPR, *supra* note 2, at 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.”).

358. ICESCR, *supra* note 3, at art. 8(1) (“The States Parties to the present Covenant undertake to ensure . . . 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.”).

359. ICERD, *supra* note 4, at 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.”).

360. ICRMW, *supra* note 16, at 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 . . .”).

361. ECHR, *supra* note 8, at 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.”).

362. Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), art. 2, July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention 87] (“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)).

fundamental rights, including freedom of association.³⁶³ 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 subject to unlawful termination.³⁶⁴ The freedom to join trade unions applies to workers, not only regardless of citizenship, but also “irrespective of their migratory status.”³⁶⁵ This right should be read in concert with the labor rights protected by this Bill in Article 20.

ARTICLE 19 CIVIL AND POLITICAL LIFE

(1) Every migrant has the right to participate in the civil and political life of the migrant’s 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

363. International Labour Conference, Geneva, Switz., June 1998, *ILO Declaration on Fundamental Principles and Rights at Work*, art. 3 (June 18, 1998), at <http://www.ilo.org/declaration/textdeclaration/lang—en/index.htm> [hereinafter ILO 1998 Declaration].

364. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *supra* note 353, ¶¶ 53-76.

365. Advisory Opinion on Undocumented Migrants, *supra* note 166, ¶ 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.’”)

bodies, and providing full information about civic rights and duties.³⁶⁶ The right may also be realized in part by facilitating association and assembly, whether on community or trade-group grounds.³⁶⁷ 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.”³⁶⁸

(3) The right to participate in the civil and political life of the community builds on ideas in the ICCPR and the ICERD.³⁶⁹ Though these documents limit civic rights on the basis of citizenship, they serve as evidence of the importance of these concepts to the full 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.”³⁷⁰ 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.³⁷¹ In addition, immigrant suffrage is a growing trend and currently available on some level in more than forty countries.³⁷² 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.³⁷³

366. See European Convention on the Participation of Foreigners in Public Life at the Local Level, Explanatory Report, Feb. 5, 1992, C.E.T.S. No. 144.

367. See, e.g., European Convention on the Participation of Foreigners in Public Life at the Local Level, *supra* note 366.

368. Human Rights Comm., *General Comment No. 25: Article 25 (The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service)* ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), at http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add7_%28GC25%29_En.pdf (describing one way in which citizens may take part in the conduct of public affairs).

369. ICCPR, *supra* note 2, at art. 25 (“Every citizen shall have the right . . . to take part in the conduct of public affairs.”); ICERD, *supra* note 4, at 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.”).

370. *General Comment No. 25, supra* note 368, ¶ 3.

371. See, e.g., European Convention on the Participation of Foreigners in Public Life at the Local Level, *supra* note 366 (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); Maastricht Treaty, art. 8b, Feb. 7, 1992, 1992 O.J. (C 191) 1 (“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.”).

372. IMMIGRANT VOTING PROJECT, <http://ronhayduk.com/immigrant-voting/around-the-world/> (last visited May 10, 2014) (updated list of all countries that provide such rights, as well as extensive discussion of the topic).

373. See Gabriela Evia, *Consent by All the Governed: Reenfranchising Noncitizens as Partners in America’s Democracy*, 77 S. CAL. L. REV. 151 (2002); Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L & POL’Y 403 (2000) (arguing in

(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.³⁷⁴ 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.³⁷⁵ The ICCPR and various regional instruments grant citizens the right to vote and to stand for election without unreasonable restrictions;³⁷⁶ however, the Human Rights Committee and the European Commission on Human Rights have stated that residency requirements are generally considered reasonable requirements for voting.³⁷⁷ 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,³⁷⁸ over 100 countries expressly allow their citizens to vote from abroad.³⁷⁹ The trend in State practice to enable and encourage external voting is particularly prominent for elections in post-conflict States.³⁸⁰

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.

favor of non-citizen voting rights in America); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

374. ICRMW, *supra* note 16, at 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").

375. UDHR, *supra* note 1, at art. 21.

376. ICCPR, *supra* note 2, at 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 Banjul Charter, *supra* note 9, at art. 13; ACHR, *supra* note 12, at art. 23; ECHR, *supra* note 8, at art. 3.

377. *General Comment No. 25*, *supra* note 368, ¶ 11 (e.g. residence requirements that exclude homeless from voting are not reasonable). See *X v. United Kingdom*, App. No. 7566/76 Eur. H.R. Rep. (1976), available at <http://echr.ketse.com/doc/7566.76-en-19761211/view/> ("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.").

378. JEREMY GRACE, CHALLENGING THE NORMS AND STANDARDS OF ELECTION ADMINISTRATION 35-38 (IFES, 2007), available at <http://www.ifes.org/~media/Files/Publications/White%20Paper%20Report/2007/593/IFES%20Challenging%20Election%20Norms%20and%20Standards%20WP.pdf>. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 51 (2006); NYU Law School.

379. Barry, *supra* note 378.

380. Barry, *supra* note 378; INTERNATIONAL IDEA, A PREVIEW OF THE FORTHCOMING INTERNATIONAL IDEA HANDBOOK ON EXTERNAL VOTING (International IDEA, 2006) available at http://www.idea.int/elections/upload/External_voting_Preview_withlayout_07june06_final.pdf. See also Caroline Carter, *The Right to Vote for Non-Resident Citizens: Considered through the Example of East Timor*, 46 TEX. INT'L. L. J. 655, 673 (2011).

(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 workers who are recruited in one country for 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 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.³⁸¹ 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, 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 occupation. The ILO has eight fundamental conventions that cover these four principles.³⁸² The four principles are addressed in this IMBR labor article.

381. ICESCR, *supra* note 3, at art. 6(1).

382. ILO Convention No. 29 concerning Forced or Compulsory Labor, June 10, 1930, 39 U.N.T.S. 55 [hereinafter ILO Convention 29]; Abolition of Forced Labour Convention (No. 105), Jan. 17, 1959, 320 U.N.T.S. 291 [hereinafter ILO Convention 105]; Discrimination (Employment and Occupation) Convention (No. 111), June 15, 1960, 362 U.N.T.S. 31 [hereinafter ILO Convention 111]; Equal Remuneration Convention (No. 100), May 23, 1953, 165 U.N.T.S. 303 [hereinafter ILO Convention 100]; ILO Convention 87, *supra* note 362; Right to Organise and Collective Bargaining Convention (No. 98), July 18, 1951, 96 U.N.T.S. 257 [hereinafter ILO Convention 98]; Convention Concerning Minimum Age for Admission to Employment (No. 138), June 19, 1976, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> [hereinafter ILO Convention 138]; Convention

(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 a receiving State. 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.³⁸³

(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.³⁸⁴

Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182), Nov. 19, 2000, 2133 U.N.T.S. 161 [hereinafter ILO Convention 182].

383. See J.M. RAMIREZ-MACHADO, DOMESTIC WORK, CONDITIONS OF WORK AND EMPLOYMENT: A LEGAL PERSPECTIVE (ILO 2003), available at http://www.ilo.int/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_7.pdf; U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur: Ms. Gabriela Rodríguez Pizarro on Specific Groups and Individuals: Migrant Workers, Submitted Pursuant to Commission on Human Rights Resolution 2003/46*, U.N. Doc. E/CN.4/2004/76 (Jan. 12, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/102/37/PDF/G0410237.pdf>.

384. JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR LAW, 226-27 (2005).

(7) *Paragraph 1*: The prohibition of servitude, slavery, and forced labor has long been recognized in international law as one of the first peremptory norms.³⁸⁵ 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.³⁸⁶ Forced labor is defined by ILO Convention No. 29 as “all work or service for which the said person has not offered himself voluntarily.”³⁸⁷ Forced labor is banned in the ICCPR, ICESCR, ICRMW, ECHR, ACHR, ACHPR, as well as in ILO Conventions Nos. 29 and 105.³⁸⁸

(8) *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.³⁸⁹ The core elements of the right to work are the rights to freely choose employment and to not be unfairly deprived of employment.³⁹⁰ The right to work also entails a range of rights in the workplace.

(9) *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 Banjul Charter Article 15, which asserts the right to work under equitable and satisfactory conditions.³⁹¹

(10) 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.³⁹² 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.³⁹³ Article 25 of the ICRMW provides that migrant

385. See, e.g., M. Cherif Bassiouni, *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes,”* 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

386. See UDHR, *supra* note 1, at art. 4; ICCPR, *supra* note 2, at art. 8; ECHR, *supra* note 8, at art. 4; ACHR, *supra* note 12, at art. 6; Banjul Charter, *supra* note 9, at art. 5; ICRMW, *supra* note 16, at art. 11.

387. ILO Convention 29, *supra* note 382.

388. ICCPR, *supra* note 2, at art. 8; ICESCR, *supra* note 3, at art. 6; ICRMW, *supra* note 16, at art. 11; ECHR, *supra* note 8, at art. 8; ACHR, *supra* note 12, at art. 6; Banjul Charter, *supra* note 9, at art. 10; ILO Convention 29, *supra* note 382; ILO Convention 105, *supra* note 382.

389. See UDHR, *supra* note 1, at art. 23; ICERD, *supra* note 4, at art. 5(e)(i); CEDAW, *supra* note 16, at art. 11; CRC, *supra* note 6, at art. 32; ICRMW, *supra* note 16, at art. 11; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, art. 24, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); ACHR, *supra* note 12, Protocol in the Area of Economic, Social and Cultural Rights, art. 6.

390. ICESCR, *supra* note 3, at art. 6(1).

391. See also Convention concerning Termination of Employment at the Initiative of the Employer (No. 158), June 22, 1982, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C158.

392. See UDHR, *supra* note 1, at art. 23.

393. See also Convention concerning the Protection of Wages (No. 95), Sept. 24, 1952, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C095; ILO Convention 100, *supra* note 382; Equality of Treatment (Social Security) Convention, Apr. 25, 1964, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312263:NO.

workers should enjoy treatment not less favorable than that received by nationals with regard to remuneration.

(11) 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 Articles 15 and 16 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 Nos. 87 and 98, 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 No. 154, is part of the ILO's Philadelphia Declaration, and is implicit in the ILO Constitution.³⁹⁴

(12) States should also follow the standards set in ILO Convention No. 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.³⁹⁵ 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."³⁹⁶

(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.³⁹⁷ IMBR Article 3 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

394. Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in 29 HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22 (Lance A. Compa and Stephen F. Diamond, eds., 1996).

395. See ICESCR, *supra* note 3, at art. 10.

396. See CRC, *supra* note 6, at art. 32(1).

397. See Comm. on Econ. Soc. & Cult. Rights, *General Comment No. 18: The Right to Work* ¶ 18, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); Comm. on Econ. Soc. & Cult. Rights, *General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights* ¶ 30, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (stating that 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 1998 Declaration, *supra* note 363.

may condition jobs upon a work permit, labor and employment rights attach when an employment relationship is established.³⁹⁸ ILO Conventions Nos. 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.³⁹⁹

(16) *Paragraph 6*: Paragraph 6 is derived from Article 25 of the ICRMW. Article 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, hours of work, rest, safety, health, termination of employment, and minimum working age. The Paragraph is also supported by ILO Convention No. 97 and Articles 10 and 12(g) of ILO Convention No. 143.⁴⁰⁰

(17) *Paragraph 7*: Paragraph 7 is based on Article 8 of ILO Convention No. 189 Concerning Decent Work for Domestic Workers, and is supported by the ILO Multilateral Framework for Labour Migration.⁴⁰¹ 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.⁴⁰²

398. See Comm. on Elimination of Racial Discrim., *General Recommendation No. 30: Discrimination Against Non-Citizens* ¶ 33, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004). See also Juridical Condition and Rights of the Undocumented Migrants, *supra* note 166 (“[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.”)

399. See Comm. on the Elimination of Discrim. Against Women, *General Comment No. 26 on Migrant Women Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

400. ILO Convention 97, *supra* note 16, at 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.]”)

401. ILO Convention 189, *supra* note 16, at art. 8; INTERNATIONAL LABOUR ORGANIZATION, ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION: NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION 13.3 (2006), available at: http://www.ilo.org/migrant/information-resources/publications/WCMS_178672/lang--en/index.htm (“[Governments should give due consideration to licensing and supervising recruitment by] ensuring that migrant workers receive understandable and enforceable employment contracts”).

402. See ILO Convention 189, *supra* note 16, at arts. 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.⁴⁰³ Beyond the importance of health to individual and societal flourishing, it is strongly linked to and necessary to the provision of many other human rights, such as the right to human dignity and the right to life.⁴⁰⁴ It was first enunciated in the Constitution of the World Health Organization,⁴⁰⁵ and later enumerated in the UDHR,⁴⁰⁶ the ICESCR,⁴⁰⁷ and many other international and regional human rights treaties.⁴⁰⁸ It is understood as the right to health care that is available, accessible, acceptable, and of appropriate and good quality.⁴⁰⁹ Additionally, mothers are accorded special protection during a reasonable period before and after childbirth.⁴¹⁰ 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 information about sexual and reproductive health.⁴¹¹ States are obligated to respect the right to health, meaning they cannot limit access for any persons regardless of immigration status.⁴¹² Legal measures securing access to health care for migrants,

403. Comm. on Econ., Soc. & Cult. Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health* ¶ 1, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

404. See *General Comment 14*, *supra* note 403 ¶ 3; see also Purohit and Moore v. Gambia, African Comm'n on Human and People's Rights, Comm. No. 241/2001, ¶ 84, Sixteenth Activity Report 2002-2003, Annex VII. ("enjoyment of the human right to health . . . is crucial to the realization of all the other fundamental human rights and freedoms").

405. World Health Organization Constitution pmbl, Apr. 7, 1948, 14 U.N.T.S. 185.

406. UDHR, *supra* note 1, at art. 25.

407. ICESCR, *supra* note 3, at art. 12(1).

408. CRC, *supra* note 6, at art. 24; CEDAW, *supra* note 16, at art. 12; ICERD, *supra* note 4, at art. 5; Banjul Charter, *supra* note 9, at art. 16; African Charter on the Rights and Welfare of the Child, *supra* note 161, at art. 14; European Social Charter, art. 11, *opened for signature* March 5, 1996, C.E.T.S. 163 (entered into force Jan. 7, 1999).

409. *General Comment 14*, *supra* note 403, ¶ 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. ICRMW, *supra* note 16, at art. 81(1).

410. CRC, *supra* note 6, at art. 24(2); CEDAW, *supra* note 16, at art. 12(2); ICCPR, *supra* note 2, at art. 10(2); UDHR, *supra* note 1, at art. 25.

411. *General Comment No. 14*, *supra* note 403, ¶ 11.

412. *General Comment No. 14*, *supra* note 403, ¶ 34; see also Eur. Comm. Soc. Rights, Int'l Fed. of Human Rights League v. France, Complaint No. 14/2003 ¶ 32 (Nov. 3, 2004) (stating "legislation

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.⁴¹³ Administrative, financial and linguistic barriers exacerbate this lack of access, as does a fear of being reported to police or immigration authorities.⁴¹⁴ Due to these widespread difficulties in accessing health care, many migrant populations are particularly at risk of violations of their rights to health.

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.

or practice which denies entitlement to medical assistance to 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*: <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-056en.html> (finding that German Asylum Seekers Benefit Act violates human right to a minimum existence because the benefits had not been updated in 19 years).

413. U.N. High Comm'r for Human Rights, *Right to Health Fact Sheet No. 31*, at 19 (June 2008), *available at* <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

414. *Right to Health Fact Sheet No. 31*, *supra* note 413, at 18; WORLD HEALTH ORG., INTER-NATIONAL MIGRATION, HEALTH AND HUMAN RIGHTS, 21-23 (2003), *available at* http://www.who.int/hhr/activities/en/intl_migration_hhr.pdf.

(2) *Paragraph 1*: The right to education is well established in international and regional human rights instruments.⁴¹⁵ 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 for 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,⁴¹⁶ the ICESCR,⁴¹⁷ the CEDAW,⁴¹⁸ and the CRC.⁴¹⁹ This right to education has also been incorporated into regional organizations such as the Charter of the OAS and the ECHR.⁴²⁰ 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.”⁴²¹

(4) This Article 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.⁴²² Because

415. ICESCR, *supra* note 3, at art. 13; ICERD, *supra* note 4, at art. 5(e)(v); CEDAW, *supra* note 16, at art. 10; CRC, *supra* note 6, at arts. 28, 29; ICRMW, *supra* note 16, at arts 12(4), 30, 43(1)(a), 45(1)(a), 45(4); CRPD, *supra* note 7, at art. 24; Banjul Charter, *supra* note 9, at art. 17; ECHR, *supra* note 8, at art. 2; African Charter on the Rights and Welfare of the Child, *supra* note 161, at art. 11.

416. UDHR, *supra* note 1, at 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).

417. ICESCR, *supra* note 3, at 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.”).

418. CEDAW, *supra* note 16, at 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 . . .”).

419. CRC, *supra* note 6, at 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.”).

420. Charter of the Organization of American States, *supra* note 182, at art. 49 (“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.”); ECHR, *supra* note 8, at Protocol 1, art. 2 (“[n]o person shall be denied the right to education”). Unlike the OAS Charter that creates an affirmative obligation to provide compulsory elementary education, ECHR, Protocol 1 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.

421. Comm. on Econ., Soc., & Cult. Rights, *The Right to Education*, ¶ 34, E/C.12/1999/10 (Dec. 8, 1999).

422. While the language from the various treaties does not specify that primary education shall be granted on a basis of equality of treatment, the greater requirement is that it be not only free, but compulsory. 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.

linguistic barriers can further disadvantage migrants and their children, the IMBR incorporates the right to preschool education from the ICRMW.⁴²³ 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,⁴²⁴ the ICESCR,⁴²⁵ the CEDAW,⁴²⁶ and the CRC provide for the right to secondary education.⁴²⁷ The human rights bodies that monitor and interpret these treaties reaffirm that the principle of non-discrimination applies to all migrants, regardless of status.⁴²⁸ 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.⁴²⁹ 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 within equal protection principles.⁴³⁰

(6) *Paragraph 4*: International law instruments also protect the right to access to higher education. The UDHR,⁴³¹ the ICESCR,⁴³² and the

423. ICRMW, *supra* note 16, at 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 . . .”.

424. UDHR, *supra* note 1, at art. 26(1) (implying that the right to education is not limited to elementary education).

425. ICESCR, *supra* note 3, at 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.”).

426. CEDAW, *supra* note 16, at 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 . . .”).

427. CRC, *supra* note 6, at 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 . . . Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need . . .”).

428. Comm. on the Rights of the Child, *General Comment No. 1: The Aims of Education* ¶ 10, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001); *General Comment No. 6*, *supra* note 128, ¶¶ 12, 18; Comm. on Econ., Soc. & Cult. Rights, *General Comment 13: The Right to Education*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); *General Comment 30*, *supra* note 398, ¶¶ 30-31.

429. 1946 Constitution Oct. 27, 1946, pmb. (Fr.).

430. For example, although the United States Constitution does not discuss the right to education, the Supreme Court of the United States in *Plyler v. Doe* held that States could not use the legal status of migrants as grounds for denying migrant children the educational resources that are available to citizens. *Plyer v. Doe*, 457 U.S. 202, 205 (1982).

431. UDHR, *supra* note 1, at art. 26(1) (“Everyone has the right to education . . . higher education shall be equally accessible to all on the basis of merit.”).

432. ICESCR, *supra* note 3, at art. 13(2) (“The States Parties to the present Covenant recognize the right of everyone to education . . . Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”).

CRC⁴³³ all guarantee the absolute right to access higher education on the basis of merit. This right to education has also been incorporated into the CEDAW⁴³⁴ and the charters of regional organizations such as the OAS and the ECHR.⁴³⁵

ARTICLE 23
CULTURE

(1) Every migrant has the right to enjoy the migrant's own cultures and to use the migrant's own languages, either individually or in community with others, 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."⁴³⁶ The UDHR also protects cultural

433. CRC, *supra* note 6, at 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 higher education accessible to all on the basis of capacity by every appropriate means.")

434. CEDAW, *supra* note 16, at 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 . . .").

435. OAS Charter, *supra* note 182, at art. 49; ECHR, *supra* note 8, at art. 2, note 7.

436. UDHR, *supra* note 1, at art. 27.

rights that may be “indispensable for [a person’s] dignity and the free development of [the person’s] personality.”⁴³⁷ The ICCPR recognizes the right of migrants, as “ethnic, religious, or linguistic minorities . . . to enjoy their own culture . . . or to use their own language.”⁴³⁸ Article 27 of the ICCPR also recognizes minorities’ right to “practice their own religion.”⁴³⁹ 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.⁴⁴⁰ Consequently, this Article 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 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 the 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.⁴⁴¹ The ICESCR recognizes that the right derives from “respect for the liberty of parents.”⁴⁴² 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

437. UDHR, *supra* note 1, at art. 22.

438. ICCPR, *supra* note 2, at art. 27.

439. *Id.*

440. ICCPR, *supra* note 2, at art. 2(1).

441. ICCPR, *supra* note 2, at art. 18(4); UDHR, *supra* note 1, at art. 2(3); ECHR, *supra* note 8, at Protocol 1, art. 2; ICESCR, *supra* note 3, at art. 13(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, ART. 5(1), U.N. Doc. A/RES/36/55 (Nov. 25, 1981); ICRMW, *supra* note 16, at 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).

442. ICESCR, *supra* note 3, at art. 13(3).

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.⁴⁴³ 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, 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]."⁴⁴⁴

(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."⁴⁴⁵ 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 because tolerance and respect for migrants will depend in part on knowledge of minority cultures. 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."⁴⁴⁶ 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.

443. See ICRMW, *supra* note 16, at art. 45(4).

444. Folgerø v. Norway, App. No. 15472/02, 46 Eur. H.R. Rep. 47, 1187 (2007).

445. UDHR, *supra* note 1, at pmb1.; see also ICCPR, *supra* note 2, at art. 27; ICERD, *supra* note 4, at art. 7.

446. ICRMW, *supra* note 16, at art. 31.