



2010

International Migrants Bill of Rights

Georgetown University Law Center, International Migrants Bill of Rights Initiative

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Contributors, Georgetown University Law Center:

Andrea Alegrett, Maher Bitar, Brian Cooper, Katherine Fennell, Jonathan Ference, Julia Follick, Justin Fraterman, Rachel Gross, Ian Kysel, Lorinda Laryea, Kate Mitchell-Tombras, Randy Nahle, Eugenia Pyntikova, Jordan Sagalowsky, Bianca Santos, David Suozzi, Rachel Westropp, Tim Work, Jacob Zenn

Contributors, American University in Cairo:

Amanuel Abraham, Marise Habib, Rosa Navarro, Michael Oskin, Mallory Sutika, Mallory Wankel

Contributors, Hebrew University of Jerusalem:

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INTERNATIONAL MIGRANTS BILL OF RIGHTS

INTRODUCTION

The International Migrants Bill of Rights (hereinafter IMBR) is the result of a two-year collaboration between students at the American University in Cairo, Georgetown University Law Center, and Hebrew University in Jerusalem. The IMBR is a dynamic blueprint for the protection of the rights of migrants, drawing from all areas of international law, including treaty law, customary international law, areas of State practice and best practices. The IMBR posits a group of rights that are “universal, interdependent and interrelated,”¹ and that populate the continuum from hard to hortatory. Yet even as the result projects a framework for migrants’ rights that is as yet on the horizon, it is also a vision that does and will intersect with the sovereign prerogatives and needs of States.

The IMBR responds to gaps in existing law. There is no single legal framework that unequivocally—and effectively—protects the rights of all migrants.² Nor is there a single mechanism to coordinate global migration policy.³ And while protection of the rights of migrants is among the oldest areas of international law,⁴ increasingly the discourse of rights triggers

1. The IMBR thus adopts the formulation of the Vienna Declaration. See World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

2. See Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* 58, ¶ 24 (2005) (“There is an urgent need to fill the gap that currently exists between the principles found in the legal and normative framework affecting international migrants and the way in which legislation, policies and practices are interpreted and implemented at the national level”). For a discussion of the low ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, see Antoine Pecoud & Paul Guchteneire, *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers Convention*, GLOBAL MIGRATION PERSP. (Global Commission on Int’l Migration), Oct. 2004, at 9 et seq.

3. See, e.g., Anne-Grethe Nielsen, *Cooperation Mechanisms*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 405 (Ryszard Cholewinski et al. eds., 2007).

4. See generally Richard B. Lillich, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* (1984) (discussing the historical origins of the doctrines of State responsibility and diplomatic protection).

concerns about the subversion of sovereignty.⁵ In the vacuum perpetrated by this status quo, migrants remain exposed to widespread human rights abuses and with nothing to invoke in their defense.⁶ The IMBR takes up this challenge and presents, in a single document, the rights of all categories of migrants. The accompanying commentaries trace the development, content and consequences of each right.

As a dynamic blueprint, the IMBR and commentaries will serve as a tool for migrants and civil society as well as a resource for legislators, policymakers and courts as they seek to respect, protect and promote the rights of migrants. In blending aspiration and binding law, the IMBR is envisioned as a set of soft-law norms. However, the IMBR has been carefully drafted to include both exhortations and obligations such that it can be incorporated into law.⁷ Following publication, the drafters envision a program of advocacy directed at States, intergovernmental bodies and civil society. This effort will be facilitated by the Georgetown University Law Center, Hebrew University and the Migration Studies Unit at the London School of Economics. In contributing to both a conversation and a movement, the drafters hope that the IMBR will help secure a global legal architecture for all migrants, on the basis of their humanity and dignity.

5. Some commentators suggest that this is a false dichotomy, noting that in large part the historical development of the rights of migrants is a result of State practice, and has thus developed "from the ground up." T. Alexander Aleinikoff, *International Legal Norms and Migration: A Report*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS 1* (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

6. See, e.g., Office of the UN High Commissioner for Refugees, *The Rights of Non-Citizens 5*, HR/PUB/06/11 (2006).

7. In this regard, the IMBR draws from other areas of migration and international law. Similar to the Guiding Principles on Internal Displacement and the Cartagena Declaration, the IMBR is drafted to facilitate its incorporation, in whole or in part, into regional and national legal frameworks. UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (July 22, 1998); *Cartagena Declaration on Refugees*, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/IL.66/doc.10, rev. 1, at 190-93 (1984-85). The drafters are also inspired by the success of the International Campaign to Ban Landmines. See Jody Williams, *The International Campaign to Ban Landmines—A Model for Disarmament Initiatives?*, available at http://nobelprize.org/nobel_prizes/peace/laureates/1997/article.html.

IMBR CONTRIBUTORS*

American University in Cairo

Amanuel Abraham
Marise Habib
Rosa Navarro
Michael Oskin
Mallory Sutika
Mallory Wankel

Georgetown University Law Center

Andrea Alegrett
Maher Bitar
Brian Cooper
Katherine Fennell
Jonathan Ference
Julia Follick
Justin Fraterman
Rachel Gross
Ian Kysel
Lorinda Laryea
Kate Mitchell-Tombras
Randy Nahle
Eugenia Pyntikova
Jordan Sagalowsky
Bianca Santos
David Suozzi
Rachel Westropp
Tim Work
Jacob Zenn

Hebrew University of Jerusalem

Noa Alster
Avishai Azriel
Yfat Barak
Yonatan Berman
Zemer Blondheim
Aviv Cohen
Yael Cohen
Shiran Dadon
Michal Herzberg
Osnat Longman
Yifat Naftali
Royi Neron
Maayan Niezna
May Pundak
Eyal Rubinson
Vera Shikhelman
Oren Tamir
Sharon Wasserman
Noa Zakin

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INTERNATIONAL MIGRANTS BILL OF RIGHTS

DRAFT IN PROGRESS

PREAMBLE

RECALLING the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other widely accepted international and regional human rights instruments that recognize and protect the human rights and fundamental freedoms of all individuals;

EMPHASIZING the responsibilities of all States, in conformity with the United Nations Charter and the human rights instruments to which they are party, to respect, protect, and promote the human rights and fundamental freedoms of migrants under these various international and regional human rights instruments on an equal basis and without discrimination;

UNDERSCORING that all persons, including migrants, are entitled to due process, equal treatment, freedom from discrimination, and the protection of their human rights and fundamental freedoms, while acknowledging that differential treatment may at times be justified based on an individual's citizenship or immigration status;

AFFIRMING that, in accordance with the Universal Declaration of Human Rights, 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;

RECOGNIZING the legitimate interest of States in controlling their borders and further recognizing that the exercise of sovereignty entails responsibilities;

ACKNOWLEDGING the legitimate concerns of receiving and sending States regarding migrants, as well as the need to adopt appropriate and comprehensive migration policies;

RECOGNIZING that a balance should be struck between the interest of States in preserving the cultural heritage of their people and the interest of migrants in preserving their cultural identity, and acknowledging the importance of cultural pluralism and diversity;

RECOGNIZING that migrants have special needs that may require special accommodations in certain regards;

CONSIDERING that the ability to participate in and influence one's community is a significant part of human dignity and that States should accordingly provide avenues for civic participation for all people living within their borders; and

TAKING INTO ACCOUNT the importance of eliminating all forms of slavery, servitude, and forced labor:

ARTICLE 1

DEFINITION OF MIGRANT

(1) The term “migrant” in this Declaration means a person who has left a State of which he or she is a citizen, national, or habitual resident.

(2) Nothing in this Declaration should be interpreted as limiting or derogating from any rights recognized by or guaranteed under other applicable international instruments, or national legislation, nor shall it be invoked to invalidate claims to citizenship. Where rights are also recognized or guaranteed by other instruments, the migrant shall be guaranteed the relevant rights at the most favorable standard.

ARTICLE 2

EQUAL PROTECTION OF THE LAW

(1) All persons, including migrants, are equal before the law. Migrants are entitled to the equal protection of the law on the same basis as nationals of the State in which they reside. In this respect, the law shall prohibit any discrimination and guarantee to migrants equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

(2) 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.

ARTICLE 3

NON-REFOULEMENT

(1) No migrant shall be returned to a country where there are substantial grounds for believing he or she would be in danger of being subjected to a serious deprivation of human rights that would threaten the migrant’s life or freedom.

ARTICLE 4

DUE PROCESS

(1) Every migrant has the right to recognition everywhere as a person before the law and 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) In criminal and administrative proceedings, and in civil proceedings where the migrant is a defendant, a migrant shall be entitled to interpretation into a language the migrant can understand. The migrant shall be informed of the availability of an interpreter upon receiving the civil complaint, administrative summons, or upon arrest.

(3) A migrant shall be provided legal aid and representation in criminal proceedings and, as far as feasible, in administrative and civil proceedings. The migrant shall be informed of the availability of such aid and representation upon receiving the civil complaint, administrative summons, or upon arrest.

(4) Migrants shall be accorded 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.

ARTICLE 5

REMOVAL

(1) A migrant may be removed from the territory of a State, or refused entry at the borders of a State, only when justified by the specific facts relevant to the individual concerned and only pursuant to a decision reached in accordance with law. The individual concerned shall be allowed adequate opportunity to submit reasons why he or she should not be removed or refused entry, except where compelling reasons of national security otherwise require.

(2) Collective removal of migrants is prohibited.

(3) When seeking to remove a migrant whether or not lawfully within its territory, a State shall:

- a. state the grounds upon which removal is sought;
- b. show the migrant all evidence that the State will present in support of removal and grant the migrant a reasonable time to rebut such evidence, except where compelling reasons of national security otherwise require;
- c. inform the migrant of the right to obtain legal representation;
- d. permit the migrant to communicate with official representatives, including consular and diplomatic officials, of the migrant's home State;
- e. provide and inform the migrant of a process for appealing a removal order;
- f. establish a process for seeking a suspension of removal.

(4) Neither deportation nor voluntary departure shall deprive or cancel any legal claims possessed by a migrant before such removal or departure.

(5) No migrant shall be deported or refused entry at the border of a State for activities, beliefs, or conduct protected under this Declaration.

(6) States shall establish opportunities for relief from removal for migrants who have a substantial connection to the host country or for whom removal would impose serious harm, either due to family relationships or conditions in the State to which he or she would be removed.

(7) States shall ensure safe repatriation of vulnerable migrants, including victims of trafficking in persons, migrants with disabilities, and children.

ARTICLE 6

DETENTION

(1) States shall not detain a migrant, irrespective of the migrant's legal status, unless he or she is the subject of removal proceedings, there is a reasonable prospect of removal, and detention is reasonably necessary to prevent absconding, or otherwise, on the basis of equality of treatment with nationals. Detention in connection with removal proceedings shall be for as short a period as possible.

(2) Detention of migrants shall occur only in accordance with law and with the right of the migrant to appeal conditions, legality, and length of detention.

(3) States shall take all appropriate measures to ensure that detention of migrants in connection with removal proceedings takes place in specialized detention facilities, and in segregation from ordinary prisoners. Particular attention should be paid to the situation of vulnerable persons, including through provision of emergency medical care.

(4) States will undertake to ensure that detained family members remain together during detention in connection with removal. States shall facilitate communication and in-person meetings among detained and other family members if separation is necessary.

ARTICLE 7

ASYLUM SEEKERS

(1) Migrants have a right to seek and enjoy asylum. States shall establish effective procedures for determining any migrant's request for asylum within their territory, at their borders, or in their effective control. Migrants shall have a right to claim asylum at any time, including in removal proceedings.

(2) A trained official of the State shall determine whether the migrant (i) qualifies as a refugee under the 1951 Convention on the Status of Refugees or its 1967 Protocol (as appropriate), (ii) is entitled to protection under the Convention against Torture, or (iii) is eligible for any other form of relief from return established by international and domestic law. In such proceedings, migrants shall be entitled to interpretation and may be represented.

(3) A migrant denied asylum has the right to appeal the determination to an independent review body.

ARTICLE 8

VICTIMS OF TRAFFICKING

(1) States shall take all appropriate measures to prevent trafficking in persons; to criminalize trafficking; to investigate and ensure effective penalties for violations of anti-trafficking laws; and to inform victims of trafficking in persons of the means of seeking assistance and legal support.

(2) States should create avenues for temporary and permanent relief from removal for victims of trafficking in persons.

(3) States should provide assistance to ensure the physical, psychological, and social recovery of victims of trafficking in persons.

ARTICLE 9

CHILDREN

(1) States shall ensure that rights of children are enjoyed by migrant children on the basis of equality with citizens.

(2) The best interests of a child migrant shall be a primary consideration in all actions affecting the child migrant. The views of child migrants must be given due weight in accordance with their maturity and age.

(3) Detention of child migrants shall be a measure of last resort, and child migrants shall be accorded treatment appropriate to their age and particular vulnerabilities.

(4) States shall establish equitable and effective procedures for identifying and protecting unaccompanied minor migrants. States should create a process for ensuring that all unaccompanied minors have a caregiver or guardian. States should create avenues for temporary and permanent relief from removal for unaccompanied minor migrants.

ARTICLE 10

CIVIL AND POLITICAL RIGHTS

(1) States shall respect, protect, and promote all civil and political rights of migrants, including, but not limited to, the following:

- a. The rights to freedom of thought, conscience, and religion of migrants. These rights shall include freedom to have or to adopt a religion or belief of his or her choice and freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice, and teaching;
- b. The right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of national boundaries, either orally, in writing or in print, in the form of art, or through any other media of their choice;

- c. The rights of peaceful assembly and of association;
- d. The right to the security of person and protection by the State against violence, bodily harm, or expression inciting violence, whether inflicted by government officials or by any individual, group, or institution;
- e. The right to liberty of movement within the territory of the host State and free choice of residence, unless the host State initiates a formal removal proceeding in accordance with Article 5;
- f. Migrants have a right to identity documents. It shall be unlawful for anyone, other than a duly authorized public official, to confiscate, destroy, or damage identity documents, work permits, or documents authorizing entry, stay, residence, or establishment in the national territory.

(2) Migrants have the right to protection against national, racial, religious, or xenophobic hatred that constitutes incitement to discrimination, hostility, or violence against migrants. States shall take all appropriate measures to discourage the advocacy of such hatred and to modify social and cultural patterns of individual conduct in order to eliminate such hatred.

(3) States should facilitate migrants' participation in the civil and political life of their communities and in the conduct of public affairs.

ARTICLE 11

ECONOMIC AND SOCIAL RIGHTS

(1) Migrants shall be entitled to emergency medical care and to disaster relief.

(2) Mothers shall, on the basis of equality of treatment with nationals, be accorded special protection during a reasonable period before and after childbirth.

(3) Migrants shall be provided access to medical care, social security, and an adequate standard of living, including food, clothing, and housing.

(4) Migrants shall not, based solely on their status as migrants, be denied the benefits of any social welfare or insurance program to which they have contributed.

ARTICLE 12

CULTURAL RIGHTS

(1) Migrants have the right to enjoy their own cultures and to use their own languages, either individually or in community with others, and in public or private.

(2) Migrants' rights to manifest their religion or belief in worship, observance, practice, and teaching shall not be indirectly restricted through

regulation that places disproportionate administrative or disproportionate financial burdens on such activities.

(3) To ensure the religious, cultural, linguistic, and moral education of their children in conformity with their own convictions, the liberty of migrant parents to choose for their children schools other than those established by the public authorities shall be respected. Such schools shall conform to such non-arbitrary minimum educational standards as may be established by the State.

(4) 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 provision 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.

(5) 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.

ARTICLE 13

LABOR RIGHTS

(1) A migrant shall never be subject to servitude, slavery, or forced labor. A migrant's right to work and to free choice of employment shall only be restricted pursuant to a legitimate aim, when the restriction has an objective justification, and when reasonable proportionality exists between the means employed and the aims sought to be realized.

(2) A migrant has the right to be remunerated at a just and favorable level for his or her work. Migrants must be informed of working conditions, labor laws, and means of seeking assistance and legal support in the receiving State in a language they understand.

(3) States may not arbitrarily change or terminate a work permit.

(4) A migrant shall be protected by laws respecting, *inter alia*, minimum wages, minimum working age, maximum hours, safety and health standards, protection against dismissal, and the rights to join trade unions, to organize, or to take part in collective bargaining.

(5) States must take all appropriate measures to protect migrants from being compelled or induced to accept conditions of work below standards mandated by national law. States must prohibit employers or employees from privately contracting for worse conditions of work than those mandated by national law.

(6) States shall seek to identify, eliminate, and provide remedies for abusive labor conditions, with special attention to labor agreements that bind migrants to particular employers. States should establish effective penalties for violations of these rights and take appropriate measures to ensure that these rights are ensured.

(7) Migrants have the right to claim these rights and receive remedies regardless of their legal status.

ARTICLE 14

PROPERTY RIGHTS

Migrants have the right to own property alone as well as in association with others. No migrant shall be arbitrarily deprived of his or her property. Any lawful taking shall be accompanied by just compensation at a level equal to nationals and that is prompt, adequate, and effective.

ARTICLE 15

INTEGRATION

(1) Because prolonged irregular status often leads to abuse of migrants, States should take appropriate measures to ensure that such situations do not persist. When providing opportunities for regularization, States may require that the migrant must show a substantial connection to the host country.

(2) States shall take appropriate steps to support migrants in learning the majority, national, or official language(s) of the State.

ARTICLE 16

CITIZENSHIP

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

(2) Migrants who have not yet gained citizenship in their host country shall maintain the citizenship of their country of origin and should as far as possible enjoy all the rights and privileges of citizens of their country of origin.

(3) 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.

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

(5) States shall allow nationals to possess another nationality acquired automatically by marriage, and shall not remove the nationality of a citizen who marries a non-citizen unless the citizen takes affirmative steps to renounce his or her citizenship.

(6) 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.

ARTICLE 17

EDUCATION

On the basis of equality of treatment with nationals, children of migrants have the right to education. States should make primary education free and compulsory for children of migrants. States should encourage the development of secondary education and make it accessible to migrants and their children without discrimination.

ARTICLE 18

FAMILY RIGHTS

(1) Migrant families are entitled to protection by society and the State, irrespective of the citizenship status of any member of the family.

(2) For the purposes of this Declaration, the term “members of the family” refers to persons married to migrants or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as or are the substantial equivalent to members of the family according to applicable legislation or applicable agreements between the States concerned.

(3) States shall take all appropriate measures to facilitate the reunification of migrant family members with nationals or citizens. Children with no effective nationality have the right to return to their parents’ country of origin and to stay indefinitely with their parents regardless of the children’s citizenship.

(4) Dependent family members of migrants have a right to derivative immigration status and timely admission to the country in which a migrant is lawfully settled.

(5) States should consider extending derivative immigration status to non-dependent family members of lawfully settled migrants.

ARTICLE 19

ADDITIONAL CLAUSES

(1) Nothing in this Declaration shall be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act that limits, intrudes on, or interferes with the internationally recognized rights of others.

(2) Governmental, administrative, and other bodies charged with enforcement of human rights and fundamental freedoms should invoke this Declaration as appropriate in the recognition and development of principles, standards, and remedies.

TABLE OF ABBREVIATIONS

ACHPR	=	African Charter on Human and Peoples' Rights
ACHR	=	American Convention on Human Rights
CAT	=	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	=	Convention on the Elimination of All Forms of Discrimination against Women
CERD	=	Convention on the Elimination of All Forms of Racial Discrimination
CRC	=	Convention on the Rights of the Child
EU	=	European Union
ECHR	=	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	=	United Nations Economic and Social Council
ICCPR	=	International Covenant on Civil and Political Rights
ICESCR	=	International Covenant on Economic, Social and Cultural Rights
ICMW	=	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	=	International Labor Organization
IOM	=	International Organization for Migration
IMBR	=	International Migrants Bill of Rights
OAS	=	Organization of American States
OAU	=	Organization of African Unity
OHCHR	=	Office of the United Nations High Commissioner for Human Rights
Palermo Protocol	=	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime
UDHR	=	Universal Declaration of Human Rights
UNGA	=	United Nations General Assembly
UNHCR	=	Office of the United Nations High Commissioner for Refugees

INTERNATIONAL MIGRANTS BILL OF RIGHTS: A COMMENTARY^{7*}

DRAFT IN PROGRESS

PREAMBLE

RECALLING the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other widely accepted international and regional human rights instruments that recognize and protect the human rights and fundamental freedoms of all individuals;

EMPHASIZING the responsibilities of all States, in conformity with the United Nations Charter and the human rights instruments to which they are party, to respect, protect, and promote the human rights and fundamental freedoms of migrants under these various international and regional human rights instruments on an equal basis and without discrimination;

UNDERSCORING that all persons, including migrants, are entitled to due process, equal treatment, freedom from discrimination, and the protection of their human rights and fundamental freedoms, while acknowledging that differential treatment may at times be justified based on an individual's citizenship or immigration status;

AFFIRMING that, in accordance with the Universal Declaration of Human Rights, 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;

RECOGNIZING the legitimate interest of States in controlling their borders and further recognizing that the exercise of sovereignty entails responsibilities;

ACKNOWLEDGING the legitimate concerns of receiving and sending States regarding migrants, as well as the need to adopt appropriate and comprehensive migration policies;

RECOGNIZING that a balance should be struck between the interest of States in preserving the cultural heritage of their people and the interest of migrants in preserving their cultural identity, and acknowledging the importance of cultural pluralism and diversity;

RECOGNIZING that migrants have special needs that may require special accommodations in certain regards;

CONSIDERING that the ability to participate in and influence one's community is a significant part of human dignity and that States should accordingly provide avenues for civic participation for all people living

* An addendum is located at page 493 of this issue.

within their borders; and

TAKING INTO ACCOUNT the importance of eliminating all forms of slavery, servitude, and forced labor:

Commentary:

(1) *History and Purpose—Recalling:* This first paragraph is intended to solidify the linkage and connection of this Bill of Rights with former agreements and instruments that safeguard human rights and fundamental freedoms and to put the Bill in the appropriate legal context. These documents serve as the foundations of the human rights regime and are all derived from the notion that human dignity is shared equally by all.

(2) *History and Purpose—Emphasizing:* The main purpose of the second paragraph is to emphasize the need to respect, protect, and promote the human rights and fundamental freedoms of all human beings, including those of migrants. It also affirms the connection between the human rights regime and United Nations Charter, as well as the fundamental requirement of nondiscrimination, the cornerstone of the human rights regime.

(3) *History and Purpose—Underscoring:* Paragraph three is derived from the ICCPR,¹ entrusting States with the duty to respect and ensure the equality of the rights of all individuals, including migrants. This paragraph also recognizes that the content of certain rights may vary as a function of the sovereignty of States.

(4) *History and Purpose—Affirming:* Paragraph four reaffirms the understanding that human rights protections are only achieved as a community and that one cannot be free while others are denied fundamental freedoms. It also affirms that ideal freedom consists not only of physical freedom, but also the freedom to express and achieve social, cultural, economic, civil and political freedoms.

(5) *History and Purpose—Recognizing:* There is an inherent tension between the State's prerogative to control its borders and the international regime governing migrants' rights. This paragraph gestures towards a balance between the two that respects, protects and promotes sovereignty *and* migrants' rights.

(6) *History and Purpose—Acknowledging:* This paragraph acknowledges the importance and extent of global migration. Almost three percent of the global population are migrants.² This paragraph also stresses the importance of balancing the interests of receiving and sending states through comprehensive migration policies grounded in respect for human rights.

(7) *History and Purpose—Recognizing:* Paragraph seven acknowledges

1. International Covenant on Civil and Political Rights, Mar. 23, 1976, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. GLOBALIZING MIGRATION REGIMES: NEW CHALLENGES TO TRANSNATIONAL COOPERATION 4. (Kristof Tamas & Joakim Palme eds., Ashgate Publishing 2006).

the balance between preserving the culture and heritage of host States and the cultural rights of migrants.

(8) *History and Purpose—Recognizing*: Paragraph eight underscores that migrants, generally, have different characteristics that require the State to make special accommodations.

(9) *History and Purpose—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.

(10) *History and Purpose—Taking Into Account*: This paragraph is based on the Convention against Slavery³ and is intended to highlight that migrants are often subject to slavery or forced labor due to their inherent vulnerability.⁴

ARTICLE 1

DEFINITION OF MIGRANT

(1) The term “migrant” in this Declaration means a person who has left a State of which he or she is a citizen, national, or habitual resident.

(2) Nothing in this Declaration should be interpreted as limiting or derogating from any rights recognized by or guaranteed under other applicable international instruments, or national legislation, nor shall it be invoked to invalidate claims to citizenship. Where rights are also recognized or guaranteed by other instruments, the migrant shall be guaranteed the relevant rights at the most favorable standard.

Commentary:

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

(2) This definition does not include individuals who are present in the territory of a State where they hold secondary citizenship or nationality. It also does not apply to individuals who migrate—forcibly or voluntarily—within the borders of a State in which they are citizens, nationals or habitual

3. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

4. See H CJ 4542/02 Kav LaOved Worker's Hotline v. Gov't of Israel [2006] 1 Isr. L. Rep. 260.

residents.⁵ 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) Paragraph 2 clarifies the continued applicability of existing international, regional and national instruments to persons who fall within the purview of the IMBR. Paragraph 2 seeks to ensure that complementary rights found in other instruments are not undermined by potential interpretations of IMBR Articles. In addition, Paragraph 2 explicitly seeks to ensure that the IMBR cannot be invoked to invalidate claims to citizenship on any grounds, such as claims by stateless persons or members of indigenous groups to longstanding habitual residence—and thus effective nationality—in a territory in which they are not nationals or citizens. Hence, when other or multiple international or municipal legal instruments recognize or guarantee the same rights found in the IMBR, the “most favorable standard” arising from these instruments shall be accorded to migrants.

(4) *Problems Addressed:* Under current international law, there is no definitive, legal definition of who is considered a migrant for the purposes of human rights protection. Current international legal instruments related to the rights of migrants remain largely unconnected, while specific protections are limited to subcategories of migrants, such as refugees and asylum seekers or migrant workers.⁶ The term “migrant” advances the notion that all types of migrants are entitled to a unified set of basic protections regardless of their individual circumstances. The current categorizations do not articulate the protections that should apply to persons who have left their countries of origin or habitual residence. The IMBR bridges this gap in international human rights law.

(5) *Origins of 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 (ICMW);⁷ the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention);⁸ the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention);⁹ the Charter of Fundamental Rights of the European Union (EU Charter);¹⁰ the Organization of

5. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], *Guiding Principles on Internal Displacement*, 22 July 1998, E/CN.4/1998/53/Add.2 (defines and enumerates protections for internally displaced persons).

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 ICMW]; Convention Relating to the Status of Refugees art. 1A, July 28, 1951, 189 U.N.T.S. 150.

7. ICMW, *supra* note 6, arts. 2, 3, 6.

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

9. Convention Relating to the Status of Refugees, *supra* note 6.

10. Charter of Fundamental Rights of the European Union art. 18, Dec. 7, 2000, 2000 O.J. (C 364) 1.

American States' (OAS) Cartagena Declaration on Refugees (OAS Declaration);¹¹ the Organization of African Unity's (OAU) 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention);¹² and additional international instruments relating to non-citizens.¹³

(6) *History and Purpose—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” as mentioned in Article 1(2) of the IMBR. 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) *History and Purpose—Persons with Special Status under International Law*: Forced Migrants: The term “migrant” in Paragraph 1 includes forced migrants for whom international or municipal law accords special status, including refugees, asylum seekers and the temporarily displaced, as ascribed both in international and regional treaties, agreements and conventions.¹⁴ Migrants, therefore, include refugees and asylum seekers¹⁵ who qualify for refugee status under the criteria set forth in the 1951 Refugee Convention,¹⁶ regional instruments and agreements, and municipal legislation, as well as under any extended mandate¹⁷ of the United Nations High Commissioner for Refugees (UNHCR). Additionally, migrants include refu-

11. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama para. 5, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85), available at <http://www1.umn.edu/humanrts/instrtree/cartagena1984.html>.

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

13. See, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS [OHCHR], 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).

14. See sources cited *supra* notes 6–13.

15. See *infra* Commentary to Art. 7.

16. Pursuant to Article 1D of the 1951 Refugee Convention, *supra* note 6, refugees include persons who are “at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance,” as well as refugees “*ipso facto* . . . entitled to the benefits” of the 1951 Refugee Convention because the “protection or assistance” they receive “from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees has ceased for any reason,” without their position “being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.” See, e.g., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REVISED UNHCR NOTE ON THE APPLICABILITY OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES TO PALESTINIAN REFUGEES (2009) (clarifying a long-standing inconsistency on the part of UNHCR with regard to the second clause of Article 1D).

17. UNHCR’s current extended mandate applies to individuals “outside their country of origin or habitual residence and unable or unwilling to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order,” including for example “foreign domination, intervention, occupation or colonialism.” UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEE STATUS DETERMINATION: IDENTIFYING WHO IS A REFUGEE 34 (2005).

gees 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 forcibly¹⁸ displaced to, or are compelled to, find refuge in the territory of another country.¹⁹ The term “migrant” equally refers to stateless persons who have left a State in which they are habitual residents or indigenous.²⁰ Due attention should be given to the special relevance of the IMBR for the protection of migrants who do not enjoy the privilege of having the support of their country of origin, regardless of whether it ceased to exist or refuses to offer support.

(9) *History and Purpose—Lawfully Settled Migrants*: The term migrant also encompasses persons who qualify for a durable legal status that entitles them to long-term residence, in compliance with host State immigration laws, as well as individuals who are *de facto* permitted to settle in spite of a specific residency status to the contrary.²¹ Paragraph 1 also applies to spouses who migrate for marriage. Migration for marriage primarily, but not exclusively, affects women. This phenomenon is noted in particular, because such migration arrangements have the potential to make persons “vulnerable, since their legal status is linked to that of” another person.²²

(10) *History and Purpose—Lawful Temporary Migrants*: Paragraph 1 does not distinguish between migrants based on length of stay. Therefore, the definition of migrant includes persons intending to lawfully remain in the territory of another state temporarily, because such persons are equally

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

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

20. 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 8, art. 1. It should be noted that stateless individuals who do not fall under the IMBR are nonetheless entitled to the full spectrum of human rights enshrined in the UDHR and outlined in international and national instruments, including the 1954 Statelessness Convention and the 1961 Convention on the Reduction of Statelessness.

21. 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.

22. Nicola Piper & Margaret Satterthwaite, *Migrant Women* 240, in *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES*, 49–51 (Ryszard Cholewinski, et al. eds., T.M.C. Asser Press 2008).

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;²³ students and trainees;²⁴ 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 Article 2(2), or Article 16 *infra*. 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) *History and Purpose—Migrant Workers*: Paragraph 1 applies fully to “migrant workers” and incorporates the definition of migrant worker in the ICMW.²⁵ The IMBR adopts a broad definition of migrant to ensure a uniform standard of treatment.

(12) *History and Purpose—Irregular Migrants*: Paragraph 1 encompasses migrants who are not lawfully present in a State of which they are nationals or citizens. Such persons include undocumented migrants; individuals with expired status; individuals “who enter without following required immigration procedures;”²⁶ individuals “who enter as non-immigrants and then remain beyond the limits of their permission to remain,”²⁷ or persons who otherwise lack the requisite documentation to remain. The term migrant also refers to irregular migrants who may be smuggled,²⁸ trafficked,²⁹ or other-

23. *But cf.* ICMW, *supra* note 6, 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).

24. *But cf. id.* The IMBR recognizes “students and trainees” as migrants, unlike ICMW art. 3(e), which excludes these two categories of migrants.

25. ICMW, *supra* note 6, 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 Convention, the migrant worker category explicitly includes frontier workers; seasonal workers; seafarers; workers on offshore installations “under the jurisdiction of a State of which [they] are not . . . national[s];” itinerant workers; project-tied workers; specified-employment workers; and self-employed workers.

26. 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).

27. *Id.*

28. The UN 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 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.

29. Trafficking “involves the transportation of human beings for illicit purposes, such as sexual exploitation, child labor, forced labor, sweatshop labor, and other illegal activities.” Weissbrodt, *supra* note 28, at 207. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime

wise irregularly entered into a State where they are not nationals or citizens. It is important to note that 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) *Issues Raised*: 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, legality or irregularity of their presence, or the temporary versus longstanding nature of their stay.

(14) *Scope of Protection*: Article 1 highlights important questions as to when an individual ceases to be a migrant. The designation of "migrant" ceases to apply when a migrant either returns to settle in their country of nationality, citizenship or habitual residence, or when he/she is naturalized in the State in which he/she is resident and thus no longer meets the definition of migrant.³⁰ Notably, then, temporary return to a country of nationality or citizenship does not extinguish all rights in the host country of imminent return. A migrant's acquired rights are not forfeited upon return to the country of nationality or citizenship. This provision is particularly relevant in the context of cyclical migration.

(15) *Origin of Paragraph 2*: The phrasing of this paragraph has its roots in the Universal Declaration of Human Rights ("UDHR").³¹ It has since been restated in various formulations to ensure that new human rights treaties do not explicitly or implicitly restrict or derogate any rights recognized by or guaranteed under existing international and national human rights laws. Similar safeguards are found in the International Covenant on Civil and Political Rights ("ICCPR"),³² the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),³³ the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on

art. 3, G.A. Res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol 1) (2001) [hereinafter Palermo Protocol].

30. The acquisition of foreign citizenship does not automatically or implicitly forfeit an individual's right to citizenship in his or her home country. *See infra* Commentary to Art. 16.6.

31. Universal Declaration of Human Rights art. 30, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] ("Nothing in this Declaration may 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 set forth herein.").

32. ICCPR, *supra* note 1, art. 5.

33. International Covenant on Economic, Social and Cultural Rights art. 5, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESCR].

Religion or Belief,³⁴ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),³⁵ among others.

(16) *History and Purpose—Paragraph 2*: This paragraph aims to ensure the complementarity of human rights standards and protections found in other international or national instruments. This paragraph re-emphasizes a central tenet of human rights law: human rights instruments, in whole or in part, cannot be applied selectively or in isolation from other human rights instruments. They function as a mutually enforcing collection of rights and protections that are “universal, indivisible and interdependent and interrelated.”³⁶ If provisions in two or more instruments provide for a discrepancy in recognition or protection, the “most favorable standard” should automatically apply to migrants. This paragraph thus firmly places the IMBR within established international human rights law.

ARTICLE 2

EQUAL PROTECTION OF THE LAW

(1) All persons, including migrants, are equal before the law. Migrants are entitled to the equal protection of the law on the same basis as nationals of the State in which they reside. In this respect, the law shall prohibit any discrimination and guarantee to migrants equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

(2) 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) *Purpose of Article 2*: Article 2 emphasizes two core and interrelated principles underlying the protection of the rights of migrants in the International Migrants Bill of Rights: non-discrimination and equality before the

34. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art. 8, Nov. 25, 1981, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (“Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.”).

35. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 53, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”).

36. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

law. The phrasing of Clause 1 of Paragraph 1 emphasizes that individual migrants are rights-bearers. The phrasing of the second clause of Paragraph 1 places both a negative and a positive obligation on States with regard to migrants. The standard for distinctions permitted among and between migrants in Paragraph 2 creates a presumption favoring the equal protection of migrants without unduly burdening States.

(2) *Problems Addressed*: Despite wide application of hard and soft norms mandating equal treatment and non-discrimination,³⁷ migrants frequently do not enjoy equal protection of the laws of host States and face widespread discrimination.³⁸ The denial of equal protection to migrants is widely acknowledged as a human rights issue and has been a subject of increasing concern.³⁹ In spite of this attention, human rights bodies have not presented a consistent standard for distinctions among and between migrants, deferring to the judgment of States.⁴⁰

(3) *Origins of Paragraph 1, Clause 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.⁴¹ The principle has been widely affirmed in

37. Indeed, the Inter-American Court has proclaimed them preemptory norms. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003): "Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *ius cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws." See also *C. v. Belgium*, 35/1995/541/627, Eur. Ct. H.R., para. 38 (1996).

38. See Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality*, 22 GEO. IMMIGR. L.J. 177, 194, 196 (2008); Weissbrodt, *supra* note 26, at 228 ("Xenophobia and racism—at times reflected in a country's legislation—prevail, and serve to deny non-citizens the rights they are guaranteed by international law, leaving them subject to harassment and abuse by political parties, officials, the media, and by society at large.").

39. See, e.g., HUMAN RIGHTS WATCH, SLOW MOVEMENT: PROTECTION OF MIGRANTS' RIGHTS IN 2009 1–3 (2009).

40. See, e.g., Office of U.N. High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, reported in 1 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 189 ¶¶ 1–2, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008). Compare with *The Position of Aliens under the ICESCR*, General Comment 30 to CERD, *Covenant*, reported in 1 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 189–90 ¶¶ 6–9, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008). Compare with U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, at ¶ 13, U.N. Doc. E/C.12/GC/20 (July 2, 2009); U.N. High Comm'r for Human Rights, Comm. on the Elimination of Racial Discrimination, *General Recommendation 28 to CEDAW.XXX on Discrimination Against Non-Citizens*, Reported in 2 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 303 ¶ 4, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008). The ICCPR committee, for example, uses merely a 'legitimate and reasonable' standard to evaluate state distinctions, leading to more deference to state conduct, while other experts interpret human rights law as imposing a proportionality requirement. See David A. Martin, *The Authority and Responsibility of States*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 35, (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser Press 2003) (citing Buergenthal study).

41. UDHR, *supra* note 31, art. 7. ("All are equal before the law and are entitled without any discrimination to equal protection of the law."); ICCPR, *supra* note 1, art. 26.

other human rights instruments and by human rights treaty bodies.⁴² The IMBR, however, adopts a slightly different phrasing for the right in order to emphasize that equal protection must at a minimum afford protection on the same basis as nationals and to focus on grounds which are considered *jus cogens* in international law.

(4) *Origins of Paragraph 2, Clause 2*: 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, and the IMBR adopts the enumerated grounds of the ICCPR.⁴³ In doing so, the IMBR impliedly includes grounds considered ‘other status’ under the ICCPR, such as gender identity and sexual orientation.⁴⁴ Thus the document allows for further development in the field of non-discrimination.⁴⁵ The document does not, however, include nationality as a *per se* ground of prohibited discrimination.

(5) *History and Purpose—Equality*: The right to equality, and specifically

42. ICMW, *supra* note 6, 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 [ECOSOC], 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.2/2002/25 (June 5, 2002) (“In general, international human rights law requires the equal treatment of citizens and noncitizens.”); 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.”); American Convention on Human Rights: “Pact of San Jose, Costa Rica” art. 24, Nov. 21, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 144; African Charter on Human and Peoples’ Rights art. 3, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR].

43. UDHR, *supra* note 31, art. 7 (“All are entitled to equal protection against any discrimination in violation of this Declaration.”); ICCPR, *supra* note 1, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . .”); ICCPR, *supra* note 1, art. 26 (“In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); U.N. High Comm’r for Human Rights, *General Comment No. 15*, *supra* note 40, at 189 ¶¶ 1–2; The position of Aliens under the Covenant, ¶¶ 1–2, 27th Sess., U.N. Doc. A/41/40 (Nov. 4, 1986) (“In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or 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.”).

44. See generally *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, available at http://www.yogyakartaprinciples.org/principles_en.htm; *Joslin v. N.Z.*, Human Rights Comm., Commc’n No. 902/1999, reported in 2 *Report of the Human Rights Committee*, at 223, U.N. Doc. A/57/40 (2002); *Jarvinen v. Fin.*, Human Rights Comm., Commc’n No. 295/1988, reported in 2 *Report of the Human Rights Committee*, at 104 ¶ 6.2, U.N. Doc. A/45/40 (Oct. 4, 1990); U.N. High Comm’r for Human Rights Comm’n, Human Rights Comm., *General Comment No. 15*, *supra* note 40, at 189 ¶ 3.

45. See, e.g., Human Rights Council Res. 12/27, at 4, U.N. Doc. A/HRC/RES/12/27 (Oct. 22, 2009) (“The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)” (noting serious impact of discrimination and HIV-related stigma on the lives of those infected by HIV)).

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.⁴⁶ It also follows that, as a general rule, equal factual situations involving migrants must be treated consistently with those involving citizens, as well as other migrants.⁴⁷ This applies broadly, for example in requiring equal access to criminal and civil complaint mechanisms; equal access to courts of law and administrative processes, including such things as birth registration; equal access to remedies and equality in the performance of civil and criminal judgments—all direct consequences of equality before the law.⁴⁸

(6) *History and Purpose—Equal Protection*: The right to ‘equal protection’ is a right to enjoy actual and effective protection of law. This is a right directed at those promulgating laws and regulations, mandating that States refrain from enacting discriminatory laws, as well as affirmatively promulgate measures that afford effective protection against discrimination for migrants (i.e. afford migrants substantive equality).⁴⁹ Thus there should be equal application of national legislation to migrants as well as citizens, and legislation itself should not be discriminatory.⁵⁰

(7) *History and Purpose—On the Same Basis as Citizens*: Qualifying the guarantee ‘on the same basis as citizens’ reaffirms the importance of ensuring

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

47. *Id.* at 467; U.N. High Comm’r for Human Rights, *General Comment No. 15*, *supra* note 40, para. 1–3, 7, 9; *Gueye v. France*, Human Rights Comm., Commc’n No. 196/1985, *reported in Report of the Human Rights Committee*, at 194 ¶ 9.4, U.N. Doc. A/44/40 (Sept. 29, 1989); CERD—Recommendation 30 on Discrimination Against Non-Citizens, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 189–90 ¶ 1, 3, 4, 6; U.N. Econ. & Soc. Council [ECOSOC], 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); CERD General Recommendation XIV (Forty-second session, 1993): On Article 1, Paragraph 1, of the Convention, 4, 7, 9, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008); Human Rights Committee, *General Comment 15* para. 4 (2004).

48. The contours of equal protection, while aided by the development of international human rights norms as providing various minimum standards of treatment, continues the long international legal tradition of recognizing the juridical capacity of aliens. *See, e.g.*, ANDREAS HANS ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS*, at 131, n.1 (La Haye 1949) (citing The Institute of International Law declaration of 1874 affirming that the juridical capacity of aliens “existe indépendamment, de toute stipulation des traites et de toute condition de reciprocite” (exists independent of any treaty stipulation and of any obligation of reciprocity [comity]; i.e. juridical capacity is absolute); U.N. Comm’r on Human Rights, Comment—The rights of Non-citizens; CERD—GENERAL RECOMMENDATION 30 ON DISCRIMINATION AGAINST NON-CITIZENS; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-citizens*, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003); 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*, at ¶ 469, U.N. Doc. A/59/18-24 (2004); Human Rights Comm., *General Comment 15* para. 7.

49. Nowak, *supra* note 46, at 468–69.

50. U.N. High Comm’r for Human Rights, Human Rights Committee, *General Comment No. 18: Non-discrimination*, *reported in 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 195, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008); RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 46 (Manchester Univ. Press 1984).

legal protection without regard to alienage. This does not mean that migrants bear all the same rights as nationals, but instead 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.⁵¹

(8) *History and Purpose—Enumerated Grounds*: Clause 2 of Paragraph 1 mandates that states refrain from discriminating against or between migrants on a number of enumerated bases.⁵² This should not be seen as an exhaustive list, however, and explicitly allows for breadth to encompass developments in customary international and human rights law. This wording echoes the affirmative obligation on States, noted above, to both enact non-discriminatory laws and to work to eliminate the discriminatory effect of all laws and policies.⁵³ As should be clear from the non-exhaustive nature of the enumerated grounds, this affirmative obligation is not limited to distinctions between migrants and nationals and citizens. It includes affirmative obligations with regard to all grounds recognized as constituting discrimination *per se*, for example, with regard to gender-based discrimination.⁵⁴

(9) *Origins of Paragraph 2*: The IMBR adds a specific legal test for making distinctions among and between migrants, selecting a standard that mandates legitimate action, objective justification, and reasonable proportionality. The standard thus distinguishes 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,⁵⁵ and explicitly rejects the more deferential standard articulated by the

51. This follows general human rights principles. See, e.g., UDHR, *supra* note 31, at pmb. ¶ 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”); see also Int’l Labor Org. [ILO], *ILO Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organisation*, ¶ II(a) (May 10, 1944) (“The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”).

52. See Nowak, *supra* note 46, 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 . . .”).

53. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 238–39 (Cambridge Univ. Press 2005); see also Nowak, *supra* note 46, at 476–79 (discussing ICCPR Committee commentaries discussing positive measures (affirmative action) to mitigated horizontally discriminatory effect, such as in the workplace).

54. See, e.g., U.N. High Comm’r for Human Rights, Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 21: Equality in marriage and family relations, reported in 2 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 337, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

55. 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).

UN Human Rights Committee in General Comment 18.⁵⁶ The standard flows directly from the principles of equality and non-discrimination, as was suggested by the Human Rights Committee in General Comment 15.

(10) *History and Purpose—Regulation of Admission and Exclusion*: The IMBR does not limit the sovereign power of States to control admission of aliens at their borders or formulate immigration policy,⁵⁷ as long as it is reasonable.⁵⁸ Thus, the standard both acknowledges and allows that States will make such distinctions, rejecting any notion that States require an explicit ‘margin of appreciation.’⁵⁹ 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.⁶⁰ The IMBR standard for distinctions between and among migrants strikes a balance between the needs and rights of States and the need to protect migrants.

(11) *History and Purpose—Legitimate Aim*: The IMBR allows only those distinctions based on a legitimate aim. This 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).⁶¹ The standard does not require that distinctions only be made pursuant to law, but the broader requirements of equal protection generally do. Thus, the IMBR constrains both discretionary and non-discretionary State action.

(12) *History and Purpose—Objectivity and Reasonable Proportionality*: The IMBR further requires States to act in a way that is objectively related to

56. General Comment 18 does not mention proportionality. U.N. High Comm’r for Human Rights, Human Rights Comm., *General Comment No. 18: Non-discrimination, reported in 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 198 ¶ 13, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008). See also Martin, *supra* note 40, at 35.

57. See, e.g., Martin, *supra* note 40, at 31 n.1 (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)).

58. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Human Rights, Sub-Comm’n on the Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-citizens*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003); *Mauritian Women v. Mauritius*, Human Rights Comm., Commc’n No. 35/1978, at ¶¶ 9.2(b)(ii)2–9.2(b)(ii)3 (Apr. 9, 1981); *Abdulaziz v. U.K.*, App. No. 9214/80, 9473/81, 9474/81, at ¶ 72 (1985).

59. *Gaygusuz v. Austria*, App. No. 17371/90, 23 Eur. H.R. Rep. 364, 381–82 (1996) (adopting same test as IMBR; 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 discriminatory in spite of States claim of special responsibility for citizens). See also U.N. High Comm’r for Human Rights, *General Comment No. 15*, *supra* note 40, at 189 ¶ 5; *Poirrez v. France*, App. No. 40892/98, at ¶¶ 12, 46, 49 (2003) (claim to disability benefits by a Cote d’Ivoire national resident in France, citing *Gaygusuz*); *Abdulaziz v. U.K.*, App. No. 9214/80, 9473/81, 9474/81, ¶ 72 (1985); Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, par. 62, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

60. See Martin, *supra* note 40, at 33 (discussing the traditional and historically fundamental sovereign function of regulating admission of aliens).

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

and reflects a reasonable proportionality between the means employed and the legitimate goal pursued. This test is intentionally context-specific.⁶² Fundamentally, the IMBR should be interpreted as creating a continuum or sliding scale of reasonable and proportional distinctions.⁶³ Most importantly, as a migrant's contact and connection with the host State increase, any distinctions made should tend towards more favorable treatment. Consequently, migrants with less contact or connection with the host State may receive less favorable treatment, as long as the treatment they receive complies with the provisions of this Bill and other human rights protections. Thus, a State may, for example, take into account the longstanding connection of particular classes of migrants (or of individual migrants) to the State when conferring benefits.⁶⁴ The standard 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.⁶⁵

(13) *Application of Article 2*: The IMBR makes clear that the prohibition on non-discrimination (both under the *per se* grounds of nondiscrimination and the test established in paragraph 2) includes (and protects) migrants. The IMBR follows the general convention of human right instruments in positing a general standard of non-discrimination as broadly applicable, while explicitly allowing for variation in other articles.⁶⁶ Thus, Article 2 shall be read as the rule of general application unless specifically displaced in the circumstances prescribed by a subsequent article.

(14) *Issues Raised—Paragraph 1*: Paragraph 1 reproduces current international law with respect to equal protection and non-discrimination. Its fundamental innovation is to reformulate this protection in order to make its application to migrants beyond question. In reproducing the enumerated grounds of the ICCPR, the IMBR forces 'other status' to carry all current and future innovation in the field of nondiscrimination. In doing so, however, the IMBR both promotes continued broadening of the norm, and seeks to reaffirm the notion that any such development must be equally applied to migrants.

(15) *Issues Raised—Paragraph 2*: Paragraph 2 codifies a standard for distinctions among and between migrants. In doing so, the IMBR explicitly selects a standard at the most protective end of current State practice and

62. Joseph et al., *supra* note 55, at 700.

63. See Martin, *supra* note 40, at 35.

64. See, e.g., Article 15 Integration, which explicitly provides that substantial connection be taken into account when States take measures to address the issue of prolonged irregular status, or Article 5 Removal, which envisions that States will take substantial connection into account when creating opportunities for relief from removal.

65. 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.

66. See, e.g., U.N. High Comm'r for Human Rights, *General Comment No. 15*, *supra* note 40, at 189 ¶ 2. This is clear in articles, such as Article 18 Family Rights, which posit a more specific standard. In such cases, the most specific standard displaces the general.

opinio juris. The test represents the optimal compromise between protecting sovereign functions and safeguarding the welfare of migrants. In selecting a test that hinges both on legitimacy and proportionality, the IMBR affirms that the rights of migrants derive both from their fundamental human dignity and status as persons before the law, as well as their ties to the community of the host State.

ARTICLE 3 NON-REFOULEMENT

(1) No migrant shall be returned to a country where there are substantial grounds for believing he or she would be in danger of being subjected to a serious deprivation of human rights that would threaten the migrant's life or freedom.

Commentary:

(1) *Origin of Article 3:* Non-refoulement is a cornerstone principle of international law protecting individuals, a *jus cogens* norm.⁶⁷ It was first defined in the 1951 Refugee Convention, article 33(1), which states that "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 or her race, religion, nationality, membership of a particular social group or political opinion."⁶⁸ Although Article 33(2) of the Refugee Convention lists two exceptions (one for public order and the other for national security),⁶⁹ these exceptions apply in extremely limited situations.⁷⁰ Non-refoulement is non-derogable and applies in all circumstances, including in the context of combating terrorism and during times of armed conflict.⁷¹

(2) The principle of non-refoulement is also recognized in a number of other international treaties. The UN Convention against Torture (CAT) states

67. See Jean Allain, *The jus cogens Nature of non-refoulement*, 13(4) Int'l J. Refugee L. 533, 538 (2001); GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 97 (Oxford Univ. Press 1983); United Nations High Comm'r for Refugees, *Opinion: The Scope and Content of the Principle of Non-refoulement*, ¶ 216 (June 20, 2001), available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b33574d1&query=non-refoulement>; Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18(3-4) Int'l J. Refugee L. 509, 523 (2006) (describing non-refoulement as "the most fundamental of all international refugee law obligations").

68. Convention Relating to the Status of Refugees, *supra* note 6, art. 33(1).

69. Convention Relating to the Status of Refugees, *supra* note 6, art. 33(2).

70. UN High Comm'r for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=438c6d972>.

71. UN High Comm'r for Refugees, *UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, para. 20, available at <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>.

that “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.”⁷² Although the ICCPR and the European Convention on Human Rights do not contain any explicit provisions on this topic, the UN Human Rights Committee and the European Court of Human Rights have interpreted the ban on refoulement as being inherent in Article 7 of the ICCPR⁷³ and Article 5 of the European Convention, respectively.⁷⁴

(3) *History and Purpose—Article 3*: Article 3 protects migrants from being returned to countries where their well-being may be seriously compromised. The Article sets forth a “substantial grounds” test for determining whether the condition of the State to which the migrant will be returned is adequate to trigger the protection. Under this test, evidence of harm or persecution in the State of return need not be certain and conclusive. It suffices that the evidence be reasonably credible and serious so as to establish a risk of harm to the migrants’ human rights and fundamental right to life and freedom. Article 3 establishes a protection that extends to all migrants, not only those within a State’s territory but also subject to its jurisdiction or control.⁷⁵ This “extraterritorial” understanding of non-refoulement is based on the overriding humanitarian purpose of the principle, and the intent of States party to the 1951 Refugees Convention not to place migrant persons at risk of serious harm or persecution.⁷⁶ It also derives from the nature of the IMBR as a set of norms derived from the fundamental dignity of all migrants, rather than their ties to any particular sovereign. The country of return in Article 3 is understood 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.⁷⁷

72. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, art. 3, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

73. See Human Rights Comm., *General Comment No. 20: art. 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.7, para. 9 (“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”); *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12.

74. See, e.g., *Soering v. United Kingdom*, Application No. 14038/88, 11 Eur. H.R. Rep. 439 (1989), and subsequent cases, including *Cruz Varas v. Sweden*, Application No. 15576/89, [1991] Eur. Ct. H.R. 26 (1991); *Vilvarajah et al. v. United Kingdom*, Application No. 13163/87, Eur. Ct. H.R. (ser. A) 215 (1991); *Chahal v. United Kingdom*, Application No. 22414/93, 21 Eur. H.R. Rep. 413 (1996); *Ahmed v. Austria*, Application No. 25964/94, 24 Eur. H.R. Rep. 62 (1996); *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), [2000] I.N.L.R. 211 (2000).

75. UN High Comm’r for Refugees, *UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, available at <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>.

76. *Id.*

77. *Id.*

ARTICLE 4
DUE PROCESS

(1) Every migrant has the right to recognition everywhere as a person before the law and 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) In criminal and administrative proceedings, and in civil proceedings where the migrant is a defendant, a migrant shall be entitled to interpretation into a language the migrant can understand. The migrant shall be informed of the availability of an interpreter upon receiving the civil complaint, administrative summons, or upon arrest.

(3) A migrant shall be provided legal aid and representation in criminal proceedings and, as far as feasible, in administrative and civil proceedings. The migrant shall be informed of the availability of such aid and representation upon receiving the civil complaint, administrative summons, or upon arrest.

(4) Migrants shall be accorded 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) *Purpose of Article 4:* The right to due process of law is a fundamental check on arbitrary treatment and the violation of other rights. Article 4 thus affirms a strong principle of customary international law grounded in comity and historical notions of equality and is 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) *Problems Addressed:* The international community has long realized the importance of due process of law as a check on rights abuses. Although implicitly applicable to migrants by virtue of their personhood, the right to due process is subject to particularly pronounced abuses by governments.⁷⁸ Of particular concern are administrative detention of migrants, the increasing use of criminal sanctions as a policy response to increases in migration, and State responses to terrorism.

(3) *Origins of Paragraph 1:* The importance of recognition before the law is a long-recognized principle in international law.⁷⁹ The first clause of

78. 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*, 21:6 IMMIGRANTS' RIGHTS UPDATE (July 20, 2007) (reviewing U.S. government violations of its own standards regarding migrant detention).

79. Commentators trace its development to well before the Copernican revolution of international human rights law. Indeed, the necessity of recognition as a person before the law was the

paragraph 1 echoes the affirmation of legal personhood within human rights law.⁸⁰ The second part goes further and formally ties to this personhood a general right to due process before all adjudicatory institutions.

(4) *History and Purpose of Paragraph 1*: Human rights law establishes due process as an essential consequence of personhood in a fair legal regime. While personhood and due process are recognized in more than one international legal instrument as fundamental human rights, and migrants' due process and personhood rights fall under general human rights protections, the particularly heightened abuses affecting migrants require specific provisions aimed at enshrining migrants' rights to the same treatment as nationals of a State. Both classes are entitled to the respect of their personhood and due process under international human rights law. Article 4(1) achieves this by reiterating the human right to personhood and due process and applying it explicitly to migrants, thereby eliminating any misconception that migrants can be treated in an inferior way to nationals with regards to basic human rights.

(5) *Issues Concerning Paragraph 1—Due Process*: The right to due process is intended to include all of the procedural guarantees of Article 13 of the ICCPR (essentially an opportunity to be represented and heard before a competent decision maker). The IMBR, like the ICCPR, prohibits collective expulsion.⁸¹ Importantly, the IMBR does not limit the right to due process to those with lawful status, but provides this right to all migrants.⁸²

(6) *Origins of Paragraph 2*: The right of a defendant to an interpreter under Article 4(2) 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.⁸³ The ICCPR also provides for defendants to enjoy the free assistance of an interpreter.⁸⁴ In the civil context, there is no explicit international right to

predicate to the exhaustion aspect of the notion that injury to non-nationals was an injury to a State. Thus, non-nationals had to be persons before the law to seek redress in local courts in order to prove the grievance. *See generally* Lillich, *supra* note 50, at 8–21. With the increasing rise in vindication of substantive rights came a requirement of procedural protections, including free access to courts. *See* ANDREAS HANS ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 178–182 (A.W. Sijthoff 1949).

80. UDHR, *supra* note 31, arts. 6, 10, 11; ICCPR, *supra* note 1, arts. 14, 16; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(a), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; ICMW, *supra* note 6, arts. 17(1), 18(1); Declaration of Individuals Who Are Not Nationals art. 5(1-c), A/RES/40/144 (1985); Convention on the Rights of the Child arts. 12(2), 40(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; ECHR, *supra* note 35, art. 6(1).

81. Joseph, *supra* note 55, at 378 (citing General Comment 15).

82. *See id.* at 379 (citing General Comment 15).

83. ICCPR, *supra* note 1, art. 14(a) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”).

84. ICCPR, *supra* note 1, art. 14(e) (“In the determination of any criminal charge against him, everyone shall be entitled . . . to examine, or have examined, the witnesses against him and to obtain

interpretation but it can be inferred from the provisions of the ICCPR, the CAT and the UDHR.⁸⁵ These documents all contain language on due process and fairness that underscores the importance of a defendant's awareness of charges and proceedings.⁸⁶ Although the grounds for this requirement are much stronger in criminal cases, the civil and administrative contexts (particularly immigration proceedings) should also be considered important, due to the interests at stake and the importance of integrity and fairness in the legal process.

(7) *History and Purpose of Paragraph 2*: A defendant needs to be fully aware of the charges or details of the proceedings brought against him or her, whether in the criminal, civil, or administrative contexts, in order to properly defend himself or herself. This is especially relevant where the defendant is a migrant who may not sufficiently understand the language or legal culture of the host country. As noted in paragraph 6 of this Commentary above, while the defendant's right to an interpreter is explicit in the ICCPR for criminal matters, it is only an inferred right in the civil context. Article 4(2) of the IMBR 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. In order to prevent abuses and to ensure the full enjoyment of the rights secured under it, the IMBR also provides that migrant defendants be put on notice of their entitlement to an interpreter.

(8) *Issues Concerning Paragraph 2*: Although the IMBR did not adopt the language of the ICCPR, which promised the "free assistance of an interpreter," it is understood that the host government will defray the costs of the interpretation service in order to ensure that financial considerations do not interfere with migrant defendants' exercise of their rights.

(9) *Origins of Paragraph 3*: Paragraph 3 recognizes the right of migrants to be provided free legal assistance and representation where they cannot afford it. The State must provide free legal assistance and representation to low-income migrants in criminal cases where they are defendants. For non-criminal cases, this Paragraph establishes a sliding scale, governed by Article 2(2) of the IMBR. As far as possible, duly taking into account the circumstances of the individual case, the financial needs of the migrant, and the fundamental rights at stake, the State shall provide free legal assistance and representation to migrants in civil and administrative cases. Due to the

the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him").

85. Compare KATHY LASTER & VERONICA TAYLOR, *INTERPRETERS & THE LEGAL SYSTEM* 73 (Federation Press 1994) with ECHR, *supra* note 35, art. 6 (interpreted as not applying to immigration proceedings).

86. UDHR, *supra* note 31, art. 10; ICCPR, *supra* note 1, art. 9(2)–(5); CAT, *supra* note 72, art. 13, 14.

special and critical nature of administrative proceedings related to the legal status of migrants and their families, especially removal proceedings, the State has a duty to provide low-income migrants free legal assistance and representation in those cases wherever possible. Paragraph 3 also includes a provision on notification, making it mandatory that a migrant be duly informed of his or her right to free counsel promptly after receiving notice of the criminal, civil, or administrative proceedings to which he or she is a party.

(10) *History and Purpose of Paragraph 3*: 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.⁸⁷ ICCPR Article 14 expressly recognizes a right to free counsel in criminal but not civil cases.⁸⁸ However, the Human Rights Committee has emphasized that Article 14 applies to both criminal and civil cases.⁸⁹ The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that a detained person is entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he or she does not have sufficient funds to pay.⁹⁰ The *United Nations Basic Principles on the Role of Lawyers* state 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.⁹¹ The principle of providing legal representation at public expense to litigants who are unable to afford it is widely accepted and observed: Canada, Australia, New Zealand, Brazil, Madagascar and South Africa have statutes or a constitutional provision providing for free civil counsel for those in need.⁹² The European Court of Human Rights ruled in 1979 in *Airey v. Ireland* that free civil counsel to facilitate access to the courts was a basic right.⁹³ Thereafter, the Council of Europe required its members to provide free counsel. Each country has met this requirement, but with limits in the form of merit-based and need-based eligibility standards.⁹⁴

87. EILEEN SKINNIDER, *THE RESPONSIBILITY OF STATES TO PROVIDE LEGAL AID* (The International Center for Criminal Law Reform and Criminal Justice Policy 1999), <http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf>.

88. ICCPR, *supra* note 1, art. 14(3)(d).

89. United Nations, Int'l Human Rights Instruments, *Human Rights Comm. Gen. Comment 13*, art. 14 ¶ 2 (21st Sess., 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1, at 14 (1994).

90. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

91. UNITED NATIONS, *BASIC PRINCIPLES ON THE ROLE OF LAWYERS*, (1990), *available at* <http://www.unhcr.org/refworld/docid/3ddb9f034.html>.

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

93. *Airey v. Ireland*, 32 Eur. Ct. H.R. (1979).

94. Lidman, *supra* note 92, at 292.

This principle is also grounded in treaty law: The OAS Charter explicitly recognizes a right to counsel,⁹⁵ 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.⁹⁶ As a recognized human right, the right to state-funded legal assistance is essential in criminal proceedings due to the fundamental rights at stake.⁹⁷ This right, however, is not limited to criminal proceedings and should be expanded to include, wherever possible, civil and administrative proceedings to ensure that the right to due process under Article 4 of the IMBR is meaningfully secured. This right has special relevance in the context of immigration proceedings due to the fundamental rights at stake, and States should make every effort to provide migrants with free legal aid and representation in proceedings related to their status or the status of their family members.

(11) *Origins of Paragraph 4:* The remedy clause of Article 4 of the IMBR finds its roots in Article 8 of the UDHR and Article 2(3) of the ICCPR.⁹⁸ 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.⁹⁹ Article 8 specifically ensures that a migrant is given some form of judicial or administrative recourse in the event of a violation of national or international law, and IMBR Article 4(4) mirrors that. As the focus of the IMBR is on migrants, the IMBR's remedy clause specifically addresses these protections to them. ICCPR Article 2(3) provides a remedy to persons whose rights and freedoms found in the ICCPR itself have been violated. In that vein, IMBR Article 4(4) explicitly provides migrants with a remedy for any violations of the rights and freedoms mentioned in the IMBR. This seeks to give the IMBR's provisions added force and place it on an equal footing with national and international laws in order to ensure that migrants are sufficiently protected against abuses of their rights.

(12) *History and Purpose of Paragraph 4:* The remedy clause of the IMBR confirms that the rights and protections granted by the national laws of the receiving State and international law, as well as the IMBR itself, are enforceable by migrants. Coupled with the equality provisions found in Article 2 of the IMBR, this remedy clause provides migrants with the same ability to avail themselves of national and international law as any national of the receiving State, empowering them to seek recourse against violations of

95. OAS Charter, art. 45, Dec. 13, 1951, 119 U.N.T.S. 3.

96. Inter-Am. Comm'n on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-Am. System of Human Rights* 47 (2007) ¶ 182, OEA/Ser.L/V/II.129 doc. 4.

97. For a discussion of the historical development of free legal aid and the priority of criminal cases, see Skinnider, *supra* note 87.

98. UDHR, *supra* note 31, art. 8; ICCPR, *supra* note 1, art. 2(3).

99. These articles are UDHR, *supra* note 31, arts. 8–11. See Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the International Bill of Rights*, 16(2) IND. J. GLOBAL LEGAL STUD. 437–81 (2009).

their rights by the government or private parties, in accordance with governing national and international laws.

ARTICLE 5

REMOVAL

(1) A migrant may be removed from the territory of a State, or refused entry at the borders of a State, only when justified by the specific facts relevant to the individual concerned and only pursuant to a decision reached in accordance with law. The individual concerned shall be allowed adequate opportunity to submit reasons why he or she should not be removed or refused entry, except where compelling reasons of national security otherwise require.

(2) Collective removal of migrants is prohibited.

(3) When seeking to remove a migrant whether or not lawfully within its territory, a State shall:

- a. state the grounds upon which removal is sought;
- b. show the migrant all evidence that the State will present in support of removal and grant the migrant a reasonable time to rebut such evidence, except where compelling reasons of national security otherwise require;
- c. inform the migrant of the right to obtain legal representation;
- d. permit the migrant to communicate with official representatives, including consular and diplomatic officials, of the migrant's home State;
- e. provide and inform the migrant of a process for appealing a removal order;
- f. establish a process for seeking a suspension of removal.

(4) Neither deportation nor voluntary departure shall deprive or cancel any legal claims possessed by a migrant before such removal or departure.

(5) No migrant shall be deported or refused entry at the border of a State for activities, beliefs, or conduct protected under this Declaration.

(6) States shall establish opportunities for relief from removal for migrants who have a substantial connection to the host country or for whom removal would impose serious harm, either due to family relationships or conditions in the State to which he or she would be removed.

(7) States shall ensure safe repatriation of vulnerable migrants, including victims of trafficking in persons, migrants with disabilities, and children.

Commentary:

(1) *Purpose of Article 5:* Article 5 imposes a limitation on the ability of States to remove a migrant without process. While the IMBR respects the right of States to remove aliens from their territories, it codifies restrictions

on this right under international law. The protections afforded to migrants in this Article take into consideration the particular vulnerability of migrants regarding removal.

(2) *Problem Addressed*: Arbitrary and illegal 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.¹⁰⁰ States all too frequently 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.¹⁰¹

(3) *Origin of Paragraph 1*: Paragraph 1 is adapted from Article 13 of the ICCPR. It fundamentally expands the protections provided under the ICCPR, by asserting that all migrants, regardless of legal status, are rights-bearers.¹⁰²

(4) *History and Purpose—Paragraph 1*: This paragraph reaffirms the general right of States to remove migrants. In doing so, however, Paragraph 1 prohibits arbitrary removal. It has long been considered within the sovereign's discretion to remove and exclude migrants.¹⁰³ However, this discretion is not unconstrained. Historically, the development of the limitations on States' discretion arose as a consequence of the relationships among and between coequal sovereigns.¹⁰⁴ The IMBR extends these prohibitions because of the dignity and individual humanity of migrants, rather than as a result of an effective relationship with any State.

(5) In restricting removal to decisions made on the basis of specific facts and in accordance with law, Paragraph 1 echoes the prohibitions, pursuant to Articles 2 and 4, on discrimination and against arbitrariness.¹⁰⁵ Paragraph 1 also stresses that fundamental procedural protections are required in all circumstances, including at a border or point of entry. If a State seeks to remove, exclude or otherwise deny entry to a migrant, such a decision must be justified by an application of the facts of the particular migrant's

100. See, e.g., Human Rights Watch, *Introduction*, in NO REFUGE: MIGRANTS IN GREECE (2009), available at <http://www.hrw.org/en/reports/2009/11/02/no-refugees>; Human Rights Watch, *Summary*, in 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/en/node/85582/section/3>.

101. See, e.g., HUMAN RIGHTS WATCH, DISCRIMINATION, DENIAL AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV (2009), available at <http://www.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-plight-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>.

102. ICCPR, *supra* note 1, art. 13. See Nowak, *supra* note 46, at 224; U.N. High Comm'r for Human Rights, *General Comment No. 15*, *supra* note 40; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994); *infra* IV.A.1.

103. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 520–21 (2008).

104. Goodwin-Gill, *supra* note 55, at 307.

105. *Infra* art. 2, art. 4. See MIGRATION AND INTERNATIONAL LEGAL NORMS 19 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

circumstance and the applicable law. This restriction should be interpreted in conjunction with the test proposed in Article 2. Although national security concerns do not automatically justify the removal of a migrant, the article preserves the traditional margin of appreciation afforded states in regulating exclusion and removal in times of crisis.¹⁰⁶

(6) *Origins of Paragraph 2*: Prohibitions on collective expulsion are also found in the ICCPR¹⁰⁷ and in several regional instruments governing human rights, such as the Fourth Protocol to the European Convention on Human Rights,¹⁰⁸ the American Convention on Human Rights (“ACHR”),¹⁰⁹ and the African Charter on Human and People’s Rights (“ACHPR”).¹¹⁰

(7) *History and Purpose of Paragraph 2*: Mass expulsion is impermissible because it denies migrants the right to an individual status determination. This clause is necessary to address the increasing number of mass expulsions in the last half-century.¹¹¹ This paragraph thus affirms the individual nature of the procedural requirements granted in Paragraphs 1 and 3.

(8) *Origins of Paragraph 3*: Paragraph 3 draws from the basic procedural guarantees afforded to all persons in relation to criminal proceedings under the ICCPR, while highlighting and adding those guarantees particularly important in the context of removal.¹¹²

(9) *History and Purpose of Paragraph 3*: Paragraph 3 affirms the basic procedural limitations on the ability of States to remove migrants already within their territory. These provisions, unlike Paragraph 1, do not regulate exclusion or other decisions made at the border or outside the territory of States. In codifying these basic procedural protections, the IMBR extends the historical limitations on State discretion pertaining to exclusion or removal, because it implicates fundamental human rights, including liberty, freedom of movement, the prohibition on arbitrary detention, etc.¹¹³

(10) The purpose of Paragraph 3 is to ensure fair, non-arbitrary removal proceedings in which a migrant has access to the grounds upon which removal is sought, legal advice and assistance from counsel, as well as the

106. Goodwin-Gill, *supra* note 55, at 307–08.

107. ICCPR, *supra* note 1. See also U.N. High Comm’r for Human Rights, *General Comment No. 15*, *supra* note 40, at 189, ¶ 9.

108. Protocol No. 4 to the ECHR, *supra* note 35 (as amended by Protocol No. 11, Strasbourg, Sept. 16, 1963; Europ. T.S. No. 46), available at <http://conventions.coe.int/Treaty/en/Treaties/Word/046.doc>.

109. American Convention on Human Rights, art. 22(9), Nov. 22, 1969, 9 I.L.M. 673 (1970).

110. ACHPR, *supra* note 42, art. 12.

111. Examples of such expulsions include those in Egypt 1956, Iraq 1969, Uganda 1972, Benin 1978, Vietnam 1979, Rwanda 1982, Nigeria 1983, and Sudan 2006. See RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 460 (2d ed. 1988).

112. ICCPR, *supra* note 1, art. 14.

113. See, e.g., Juan Mendez et al., *International Standards of Due Process for Migrant Workers, Asylum Seekers and Refugees in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS* 460 (Anne Bayefsky ed., 2006).

protection of officials representing the migrant's State of origin.¹¹⁴ The use of evidence that is not disclosed to the public or the migrant is a denial of the migrant's fundamental right to a fair hearing. The implication of these procedural limitations on removal is that a State must reach an initial decision *prior* to the removal of the migrant. Thus, Paragraph 3 provides migrants with a right to appeal a removal order. Initial review, such as administrative appeal proceedings, should therefore have mandatory suspensive effect. States have the discretion to create procedures to accommodate the migrant's right to seek a suspension of removal during higher levels of appellate review, ever mindful of the obligations of non-refoulement enshrined in Article 3 of the IMBR. Notably, however, the requirement that States create a process for migrants to seek suspensive effect does not constitute a remedy or form of durable relief from removal.

(11) *Origin of Paragraph 4*: Paragraph 4 is a consequence of the legal personhood of migrants, of freedom of movement and of the right of migrants to own property.¹¹⁵

(12) *History and Purpose of Paragraph 4*: The freedom to depart is available to all migrants. Paragraph 4 thus guarantees that any pre-existing legal claims will not be cancelled if a migrant leaves. Migrants who return to their home country should be able to preserve pending claims to a legal status as well as pending civil claims, such as labor or contract disputes. This is particularly important in the context of circular migration.¹¹⁶

(13) *Origin of Paragraph 5*: Paragraph 5 affirms the specific content of the prohibition on nondiscrimination as well as migrants' civil, political, cultural and social rights in the context of exclusion and removal.

(14) *History and Purpose of Paragraph 5*: Paragraph 5 of the IMBR affirms that discriminatory motive cannot be a factor in a removal proceeding. This paragraph seeks to target arbitrary and politically motivated decisions in the context of removal. Thus, the exercise of any fundamental rights protected under the IMBR cannot be a ground for removal or exclusion.

ARTICLE 6

DETENTION

(1) States shall not detain a migrant, irrespective of the migrant's legal status, unless he or she is the subject of removal proceedings, there is a reasonable prospect of removal, and detention is reasonably necessary to

114. See INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, G.A. Res. 45/158, Adopted by the General Assembly at its 45th session on 18 December 1990 (U.N. Doc.A/RES/45/158 (Dec. 18, 1990)).

115. ICCPR, *supra* note 1, art. 12; UDHR, *supra* note 31, art. 13. See *infra* art. 14 Commentary on Property.

116. See *supra* art. 1 (discussion of cessation of migrant status).

prevent absconding, or otherwise, on the basis of equality of treatment with nationals. Detention in connection with removal proceedings shall be for as short a period as possible.

(2) Detention of migrants shall occur only in accordance with law and with the right of the migrant to appeal conditions, legality, and length of detention.

(3) States shall take all appropriate measures to ensure that detention of migrants in connection with removal proceedings takes place in specialized detention facilities, and in segregation from ordinary prisoners. Particular attention should be paid to the situation of vulnerable persons, including through provision of emergency medical care.

(4) States will undertake to ensure that detained family members remain together during detention in connection with removal. States shall facilitate communication and in-person meetings among detained and other family members if separation is necessary.

Commentary:

(1) *Purpose of Article 6:* Article 6 affirms a number of fundamental elements of the right to liberty and security of the person as it relates to detention of migrants. Paragraph 1 asserts a basic presumption of non-detention, explicitly conditioning the State's ability to detain migrants, regardless of their status. Paragraph 2 reproduces core procedural protections against arbitrary detention. Paragraph 3 promotes minimum obligations regarding conditions of detention. Paragraph 4 incorporates elements of the rights to family and privacy as they relate to detention in connection with removal.

(2) *Problem Addressed:* The right of migrants to liberty and security of the person is violated so frequently as to be increasingly honored only in the breach. States increasingly use detention at the border, criminal enforcement, and other forms of detention to punish irregular migrants.¹¹⁷ In some cases, including many involving those with no effective nationality, or where there are no diplomatic relations between the host State and the country of origin, a State's inability to remove migrants may render detention indefinite.¹¹⁸ Additionally, the use of criminal penalties in lieu of, or to reinforce, administrative enforcement violations of immigration law is of increasing concern.¹¹⁹ Article 6 thus attempts to codify those fundamental protections necessary to ensure adequate protection of the rights of migrants in detention.

117. See, e.g., Protection of Migrants, U.N. GAOR, 63d Sess., 70th plen. mtg., U.N. Doc. A/RES/63/184 (Mar. 17, 2009).

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

119. See, e.g., Navanethem Pillay, Opening Remarks at the Panel Discussion on Human Rights of Migrants in Detention Centres (Sept. 18, 2009) available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BBD29A58B74B878CC1257635005778E6?opendocument>.

(3) *Origins of Paragraph 1*: Paragraph 1 is rooted in the rights of liberty and security of the person,¹²⁰ as well as the prohibition on arbitrary detention, and applies regardless of legal status.¹²¹ The wording of the IMBR is adapted from the European Union Returns Directive Article 15, selecting those elements that affirm a general presumption of non-detention.¹²² While it focuses on detention in connection with removal, Paragraph 1 explicitly affirms the ability of States to detain migrants on the basis of equality with nationals in other circumstances, such as in connection with criminal prosecution. Notably, however, all forms of detention must be in conformity with human rights norms, including the prohibitions on cruel, inhumane and degrading treatment and torture.¹²³

(4) *History and Purpose—Presumption of Non-detention*: Detention of migrants in connection with removal is a widespread practice, and is increasingly used as a mechanism for controlling illegal migration.¹²⁴ However, illegal presence alone is an insufficient basis for detaining migrants; wrongful detention is incompatible with the principles of both the Charter of the United Nations and the Universal Declaration.¹²⁵ In order to safeguard the rights and autonomy of migrants, then, the IMBR affirms a presumption of non-detention, with limits carefully constrained to protect the interests of sovereign States.

(5) *Origin of Paragraph 2*: Paragraph 2 is a synthesis of Paragraphs 1 and 4 of ICCPR Article 9.¹²⁶ It thus includes both a requirement of non-arbitrariness and procedural fairness and a right to challenge detention.¹²⁷ Thus, it both places an obligation on States and provides a specific right to migrants. It also impliedly incorporates other commentary that has stressed the links between legal personhood (as a fundamental expression of liberty) and prohibitions on arbitrary detention and the common-law-derived right of habeas corpus.¹²⁸ This restriction applies to all forms of detention, including detention at the border, and not just detention in connection with removal.

(6) *History and Purpose—In Accordance with Law*: The prohibition

120. Shyla Vohra, *Detention of Irregular Migrants and Asylum Seekers*, in INTERNATIONAL MIGRATION LAW 49–51 (Ryszard Cholewinski, et al. eds., T.M.C. Asser Press 2008).

121. ICCPR, *supra* note 1, art. 9; UDHR, *supra* note 31, art. 9.

122. European Union Return Directive 2008/115/EC, art. 15, 2008 O.J. (L348) 51.

123. CAT, *supra* note 72, art. 10.

124. Vohra, *supra* note 120, at 49.

125. *Id.* at 53 (citing United States Diplomatic and Consular Staff in Tehran, ICJ Rep. (1980)).

126. ICCPR, *supra* note 1, arts. 9(1), 9(4).

127. Goodwin-Gill, *supra* note 55 (“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).

128. “To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (J. Scalia, dissenting) (quoting Blackstone) (emphasis added).

against arbitrary detention is a process right mandating that States define precisely the cases in which deprivation of liberty is permissible.¹²⁹ It places a legal obligation on both legislators and law enforcement officials.¹³⁰ The general standard for determining arbitrariness is that action must be reasonable and necessary in all the circumstances, and must not contravene national or international law, including the IMBR.¹³¹

(7) *History and Purpose—Right to Challenge Detention*: This section is meant to apply to all forms of detention, and with particular force to the administrative detention of migrants.¹³² The right to challenge detention should include judicial review, and is subject to the other requirements of the IMBR, including Articles 2 and 4.¹³³ The right to challenge detention obliges a State to respond to its invocation without delay and, consistent with prevailing interpretations of other human rights instruments, release the migrant following a successful challenge.¹³⁴

(8) *Origin of Paragraph 3*: Paragraph 3 draws from Article 16 of the European Union Returns Directive as well as the ICCPR Article 10 restriction on detaining accused migrants together with convicted prisoners.¹³⁵

(9) *History and Purpose—Specialized Detention Facilities*: Paragraph 3 affirms the right of migrants to be detained separately from ordinary prisoners. The requirement of specialized detention facilities also impliedly incorporates a general requirement of minimum and humane conditions for detained migrants.¹³⁶ Broadly, the identification of migrants as a special category of prisoners also highlights their uniquely vulnerable status as well as the pervasive abuse of migrants when combined with ordinary prisoners.¹³⁷

(10) *History and Purpose—Care for Vulnerable Individuals*: The explicit guarantee of emergency medical care for vulnerable migrants affirms the continued right of detained migrants to enjoy other fundamental human rights, such as the right to life. States cannot use migrants' status or situation

129. Nowak, *supra* note 46, 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).

130. *Id.* at 172.

131. *Id.* at 173 (citing *Van Alphen v. the Netherlands* (finding that although a particular detention was lawful it was not reasonable or necessary in all the circumstances, and was therefore arbitrary; weighing flight risk, interference with evidence, risk of further criminal conduct, etc.); notably, detention cannot be justified by a domestic law that violates binding international minimum standards). See Joseph et al., *supra* note 55, at 342 (citing *A v. Australia* (ICCPR Committee 560/93)).

132. For a discussion of the definition of detention, see Shyla Vohra, *supra* note 120, at 50–52.

133. This includes the elements of the IMBR governing due process, removal, and the protection of Asylum-seekers and victims of trafficking. See discussion *supra* arts. 2, 4.

134. Nowak, *supra* note 46, at 179–180 (commenting that under ICCPR art. 9(4), if a court finds an individual's liberty is deprived unlawfully, then the individual must be released); ICCPR, *supra* note 1, art. 9(4).

135. Council and Parliament Directive 2008/115, art. 16, 2008 J.O. (L 348) 98, 99 (EC); ICCPR, *supra* note 1, art. 10(2).

136. See, e.g., Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. Doc. E/3048 (July 31, 1957), amended by E.S.C. Res. 2076, U.N. Doc. E/5988 (May 13, 1977).

137. Vohra, *supra* note 120, at 60.

in detention to justify denial of the right to emergency medical care.¹³⁸

(11) *Origin of Paragraph 4*: This paragraph draws on language in the ICMW, as well as elements of the right against unlawful interference with family in the ICCPR.¹³⁹

(12) *History and Purpose—Family Unity*: The right to family unity is often brought in conflict with the limited right of States to detain migrants. This Paragraph affirms the basic right of family unity during detention in connection with removal. Like all elements of the rights of migrants in connection with such detention, it should be interpreted in the context of the presumption of non-detention contained in Paragraph 1 and reinforced with special force regarding the detention of children in Article 9. Thus, when detention is necessary, Paragraph 4 requires that, whenever possible, families be allowed to remain together. When detention is not necessary for all family members, or when family unity cannot be maintained in detention, Paragraph 4 places an obligation on States to ensure that detained and non-detained family members can meet and communicate with one another.

ARTICLE 7 ASYLUM SEEKERS

(1) Migrants have a right to seek and enjoy asylum. States shall establish effective procedures for determining any migrant's request for asylum within their territory, at their borders, or in their effective control. Migrants shall have a right to claim asylum at any time, including in removal proceedings.

(2) A trained official of the State shall determine whether the migrant (i) qualifies as a refugee under the 1951 Convention on the Status of Refugees or its 1967 Protocol (as appropriate), (ii) is entitled to protection under the Convention against Torture, or (iii) is eligible for any other form of relief from return established by international and domestic law. In such proceedings, migrants shall be entitled to interpretation and may be represented.

(3) A migrant denied asylum has the right to appeal the determination to an independent review body.

Commentary:

(1) *Purpose of Article 7*: The right to seek and enjoy asylum—as a way of allowing migrants to escape persecution in another State—has been infor-

138. See *infra* art. 11, discussion of the right to emergency health care.

139. ICMW, *supra* note 6, art. 17(5) (“During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.”); ICCPR, *supra* note 1, art. 17.

mally accepted and exercised throughout history.¹⁴⁰ Article 7 bestows a positive right on migrants to seek and enjoy asylum in an environment cognizant of due process. The right to asylum is supported both from the perspective of necessity and that of internationally recognized human rights.¹⁴¹ Thus, the protection of a migrant's right to seek and enjoy asylum via a just and effective asylum process enables the protection of the human rights of those fleeing rights abuses that occurred elsewhere.¹⁴² A migrant's right to seek asylum in this article thus goes beyond the broad language of the UDHR and is made more robust by procedural safeguards outlined in Paragraphs 1–3. The article also explicitly recognizes the right to seek various forms of asylum, including national-level protection. Significantly, the article enumerates only minimum standards for the treatment of asylum seekers, without prejudice to the granting by States of more favorable treatment.

(2) *Problem Addressed*: The UDHR, in establishing the right to seek asylum, stopped short of establishing the right to *receive* asylum, instead defining it as a right of States¹⁴³ and thereby creating the idea of an asylum applicant without establishing further protections once an application is placed. The human rights of migrants are—almost by definition—at particular risk, because they require surrogate protection and generally do not enjoy the protection of their State of citizenship.¹⁴⁴ This article aims to recognize and begin to fill that gap by promoting the protection of specific due process rights for asylum seekers during the application process.

(3) *Origins of Article 7*: The foundation for asylum was concisely presented in UDHR's Article 14, while the right itself was elaborated by further UN instruments,¹⁴⁵ regional agreements such as the EU Convention Relating to the Status of Refugees (Geneva Convention on Refugees, GCR),¹⁴⁶ and national commitments.¹⁴⁷ Finally, Article 3 of the Convention Against Torture, in upholding the principle of *non-refoulement*, strongly implies that there should be an appropriate process for determining the

140. See, e.g., PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS: A HEALTH PROFESSIONAL'S GUIDE TO MEDICAL AND PSYCHOLOGICAL EVALUATIONS OF TORTURE vii (2001) (noting that assuring the right of asylum is "a crucial component of the ongoing campaign to abolish torture").

141. See generally Niraj Nathwani, *The Purpose of Asylum*, 12 INT'L J. REFUGEE L. 354 (2000) (arguing that the doctrine of necessity explains the purpose of asylum).

142. *Id.* at 364.

143. See, e.g., Jane McAdam, *Asylum and the Universal Declaration of Human Rights*, 27 REFUGEE SURV. Q., 3, 5 (2008).

144. Joan Fitzpatrick, *Introduction*, in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS 6–15 (Joan Fitzpatrick ed. 2002).

145. See Declaration on Territorial Asylum, G.A./RES/2312(XXII), Res. 2312, U.N. GAOR, 22nd Sess., Supp. No. 16, U.N. Doc. A/6716 (Dec. 14, 1967).

146. See U.N. High Comm'r for Refugees, *The 1954 Convention Relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, (October 2003), available at <http://www.unhcr.org/refworld/docid/415c3cfb4.html>.

147. See, e.g., GRUNDGEZETS [GG] [Constitution] art. 16a (F.R.G.); Law no. 122/2006 on Asylum in Romania (2006) (Romania); Immigration and Asylum Act, 1999, c.33 (Gr. Brit.).

grounds for this (and other) form(s) of asylum.¹⁴⁸

(4) *Origins of Paragraph 1*: The right to seek and enjoy asylum is derived from the UDHR.¹⁴⁹ An appropriate interviewing process is suggested in a number of instruments, such as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, the 2005 Procedural Standards for Refugee Status Determination under UNHCR's Mandate,¹⁵⁰ as well as a number of UNHCR Executive Committee Conclusions released to date.¹⁵¹

(5) *Purpose and History—Paragraph 1*: Paragraph 1 requires States to create effective procedures for determining applications for asylum. The description of procedures as “effective” also implies that States should strive to prevent and minimize the population of asylum seekers in temporary detention, to shorten the duration of such detention to the extent reasonably possible, to improve the conditions of such detention when appropriate, and to monitor and document the conditions at detention facilities and detention-related procedures faced by asylum seekers.¹⁵²

(6) Paragraph 1 does not intend to imply that an asylum application cannot be granted without individual interviews or cannot be otherwise expedited. A State may elect to apply procedures that are more permissive than the minimal protections suggested in this article—such as the consideration of grouped asylum applications from persons fleeing a known conflict or disaster zone or categories of migrants for whom the additional time spent

148. “For the purpose of determining whether there are . . . [substantial grounds for believing a person would be subjected to torture upon return], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT, *supra* note 72, art. 3(2).

149. UDHR, *supra* note 31, art. 14.

150. U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html>; U.N. HIGH COMMISSIONER FOR REFUGEES, PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR'S MANDATE (2005), available at <http://www.unhcr.org/4316f0c02.html>.

151. See Executive Committee Conclusions No. 8 (XXVIII)—1977 on Determination of Refugee Status, No. 15 (XXX)—1979 on Refugees Without an Asylum Country, No. 30 (XXXIV)—1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, and No. 58 (XL)—1989 on Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, in U.N. HIGH COMMISSIONER FOR REFUGEES, CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES: 1975–2004 (2005) <http://www.unhcr.org/41b041534.pdf>. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV)—1983; No. 55 (XL)—1989; No. 65 (XLII)—1991; No. 68 (XLIII)—1992; No. 71 (XLIV)—1993; No. 74 (XLV)—1994; No. 81 (XLVIII)—1997; No. 82 (XLVIII)—1997; No. 85 (XLIX)—1998; No. 92 (LIII)—2002.

152. For problems associated with lengthy or burdensome detention policies, see generally, WOMEN'S REFUGEE COMMISSION, DETENTION AND ASYLUM AT A GLANCE (2009), http://www.womensrefugeecommission.org/docs/wrc_detention_asylum.pdf (noting the high number of refugee status applicants in detention in US alone, with particularly disproportionate effects on abused women and unaccompanied children); ELEANOR ACER AND JESSICA CHICCO, “HUMAN RIGHTS FIRST, US ASYLUM SEEKERS AND DETENTION: SEEKING PROTECTION, FINDING PRISON” Human Rights First (2009) (noting escalation of detention and its negative impact on asylum seekers).

as an asylum seeker would present a harmful burden (e.g. children, persons with mental health disabilities).¹⁵³

(7) The process of seeking asylum should afford applicants protection from the initiation of removal proceedings, a temporary work permit, and rights to other migrant services described in later Articles of this Bill. Removal proceedings should also be suspended in such cases of “defensive” asylum applications.¹⁵⁴

(8) *Origins of Paragraph 2:* Paragraph 2 defines asylum as a general term that encompasses at least three independent forms of protection: (i) refugee status under the 1951 Convention or equivalent, (ii) protection of migrants from return to torture,¹⁵⁵ and (iii) other (i.e. trafficking, or protection of migrants fleeing conflict zones, etc).

(9) *History and Purpose—Paragraph 2:* Paragraph 2 defines the various types of protections that forced migrants may seek from host States. The paragraph further elaborates on the “effective procedure” requirement set in Paragraph 1 by noting that the asylum application shall be reviewed by a “trained official,” with the exact extent and nature of such training being subject to a more detailed definition by individual States. The provision of representation and interpretation resources represents the effort to protect an applicant’s right to due process, outlined in additional detail in Article 4. Adequate representation and interpretation should also be available to asylum seekers with special needs (e.g., unaccompanied children, victims of torture, asylum seekers suffering from mental illness) who generally require additional legal, as well as other, assistance. The separation of Paragraphs 1 and 2 in the present Article do not imply a two-step process or suggest that States are able to reject asylum seekers at the border without granting them the process provided in Article 2.

(10) *Purpose and History—Paragraph 3:* A right to appeal the first rejection of an asylum application to an “independent review body” ensures that asylum seekers have a chance to present their case at a second impartial hearing. This key procedural safeguard (that the appeal be considered by an authority different from and independent of that making the initial decision)

153. See, e.g., Signe S. Nielsen et al., *Mental health among Children Seeking Asylum in Denmark—The Effect of Length of Stay and Number of Relocations: a Cross-sectional Study*, 8 BMC PUB. HEALTH 293 (2008) (finding that children who had been asylum-seeking for more than one year in Denmark had an increased risk of having mental difficulties; concluding that protracted stays at asylum centres and multiple relocations within the asylum system appear to have an adverse effect on asylum-seeking children’s mental health; proposing a limit to the duration of the children’s stay in the asylum system).

154. An asylum application is considered defensive when it is initiated in response to a deportation proceeding.

155. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (1984); CAT, *supra* note 72.

derives from general administrative law.¹⁵⁶ The right to a timely (and therefore somewhat limited) appeal balances the asylum seeker's right of due process with the administrative costs of a longer procedure.¹⁵⁷

ARTICLE 8

VICTIMS OF TRAFFICKING

(1) States shall take all appropriate measures to prevent trafficking in persons; to criminalize trafficking; to investigate and ensure effective penalties for violations of anti-trafficking laws; and to inform victims of trafficking in persons of the means of seeking assistance and legal support.

(2) States should create avenues for temporary and permanent relief from removal for victims of trafficking in persons.

(3) States should provide assistance to ensure the physical, psychological, and social recovery of victims of trafficking in persons.

Commentary:

(1) *Purpose of Article 8:* This Article seeks to ensure protection and support for victims of human trafficking, as well as criminalization and State action against those involved in trafficking activities. Because the IMBR is focused on the protection of individual migrants, the emphasis of this Article is on the human rights of trafficked individuals. Inspiration is drawn from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) attached to the UN Convention Against Organized Crime, as well as the Council of Europe Convention on Action against Trafficking in Human Beings.¹⁵⁸ This Article does not, however, deal with the issue of smuggling, as smuggling is largely a crime against the State with the involvement of migrants typically being voluntary in nature. However, this distinction is not intended to deny the commonalities between the two practices or the fact that many migrants are also victimized by the practice of smuggling.¹⁵⁹

(2) *Problems Addressed:* Slavery has long been prohibited by international law and is today one of the few uncontroverted *jus cogens* norms.¹⁶⁰ However, certain forms of servitude, including involuntary prostitution,

156. U.N. HIGH COMMISSIONER FOR REFUGEES, FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS (2005), available at <http://www.unhcr.org/refworld/docid/432ae9204.html>.

157. *But see* VVD, *CDA Oppose Appeal Right for Asylum Seekers*, NIS NEWS BULLETIN (Dutch News), Sept. 13, 1996, http://www.nisnews.nl/dossiers/immigration/130996_127.htm.

158. Palermo Protocol, *supra* note 29, at 60; Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197.

159. SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 68-69 (2008); UNITED NATIONS OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 4-5 (2008), available at http://www.uodc.org/documents/human-trafficking/HT_ToolKit08_English.pdf.

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

forced industrial and domestic labor, and child labor persist to this day. These exploitative activities are often facilitated and reinforced by the practice of human trafficking. According to the U.S. Department of State, between 600,000 and 800,000 human beings are trafficked internationally each year.¹⁶¹ Eighty percent of the victims of trafficking are women and girls, while up to fifty percent are children.¹⁶² Trafficking represents a major threat to both the human rights of victims and to the security of States.¹⁶³ Victims of trafficking are denied many fundamental rights, including the right to freedom of movement, freedom of association, freedom from servitude, the right to bodily integrity, and in the case of children, the right to a childhood. The practices employed by traffickers often amount to arbitrary detention, slavery, rape, or cruel, inhuman and degrading treatment.¹⁶⁴

(3) Victims of trafficking are recruited in their native countries via deceptive, fraudulent or coercive practices. Such coercion may be physical, emotional, social or economic in nature and often relies on the exploitation of vulnerable victims seeking better prospects either at home or abroad. Trafficking is often carried out by sophisticated trans-national networks, many of which have links to organized crime.¹⁶⁵ Having arrived in destination States, victims of trafficking may languish in a state of servitude. Even once their predicament is discovered, trafficking victims are all too often left to their own devices, granted limited legal and social protection and may even be subject to criminal sanctions for their “participation” in trafficking activities.¹⁶⁶

(4) *Origins of Paragraph 1:* The elements of this paragraph are drawn from the Palermo Protocol. Article 9 of the Protocol calls upon signatories to “establish comprehensive policies, programs and other measures” to prevent trafficking. Article 5 of the Protocol requires States to criminalize the practice of trafficking, and Article 6 mandates the provision of legal and administrative information to victims. Accordingly, the content of this Paragraph should be interpreted in conformance with the Protocol, its commentaries and legislative guide. Articles 5, 12, and 18–22 of the Council of Europe Convention similarly mandate, respectively, prevention, assistance

161. Edward Newman & Sally Cameron, *Introduction: Understanding Human Trafficking*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 1, 5 (Edward Newman & Sally Cameron eds., 2008).

162. *Id.*

163. *Id.* at 4.

164. *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 House Comm. on Int’l Relations*, 106th Cong. 2 (1999) (testimony statement of Harold Hongju Koh, Assistant Secretary of State).

165. See Saltanat Sulaimanova, *Trafficking in Women from the Former Soviet Union for the Purposes of Sexual Exploitation*, in *TRAFFICKING AND THE GLOBAL SEX INDUSTRY* 61 (Karen Beeks & Delila Amir eds., 2006); Phil Williams, *Trafficking in Women: The Role of Transnational Organized Crime*, in *TRAFFICKING IN HUMANS*, *supra* note 161, at 126.

166. Ratna Kapur, *Migrant Women and the Legal Politics of Anti-Trafficking Interventions*, in *TRAFFICKING IN HUMANS*, *supra* note 161, at 118–19.

and criminalization. This instrument may also be used as an interpretive guide.

(5) For definitional purposes the IMBR also relies on the Palermo Protocol. The Protocol defines trafficking in human beings as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁶⁷

(6) *Purpose of Paragraph 1:* This paragraph recognizes the need for States to take active measures to prevent, criminalize and actively investigate trafficking activities. It also recognizes the need for victims to have vital access to assistance and legal support while dealing with the consequences of being trafficked. The Paragraph thus recognizes the dual impact of trafficking on both the receiving State and the individual migrant.

(7) *Issues Raised by Paragraph 1:* While it is important for States to take measures to prevent and criminalize trafficking activities, they must take care not to criminalize or stigmatize victims. To this effect, law enforcement agents and prosecutors must thoroughly investigate the structure of trafficking operations, carefully examining the relationships between all involved, in order to distinguish between victims and perpetrators. States must also ensure that victims' identities remain secret and that their privacy is respected.

(8) Simple criminalization and interdiction efforts, however, are not sufficient to stem the tide of trafficking operations. Instead, root causes, both structural (including economic, social, ideological and geopolitical factors) and proximate (including legal and policy aspects, rule of law issues, and civil society-state relations), must be effectively addressed in order to solve the problem of trafficking.¹⁶⁸

(9) *Origin of Paragraph 2:* This paragraph is based on Article 7 of the Palermo Protocol. The Protocol requires signatories to consider the adoption of legislative or other measures to allow victims of trafficking to remain, either temporarily or permanently, in the receiving state. The adoption of such measures is to be based on the consideration of humanitarian and

167. Palermo Protocol, *supra* note 29, art. 3.

168. Newman & Cameron, *Understanding Human Trafficking*, *supra* note 161, at 3.

compassionate factors.¹⁶⁹

(10) *Purpose of Paragraph 2:* The purpose of this paragraph is to recognize that victims of trafficking have often suffered greatly due to their ordeal and that, as a result, they should be considered for lawful resident status on compassionate or humanitarian grounds. Victims may face reprisals, stigmatization, social marginalization or, in rare cases, even criminal prosecution upon return to their countries of origin.

(11) *Issues Raised by Paragraph 2:* States should pay particular attention to the unique needs and perilous situation of trafficking victims in order to consider granting them asylum, refugee status or some other temporary or permanent protective status.¹⁷⁰

(12) *Origin of Paragraph 3:* The language of Paragraph 3 is based on Article 6.3 of the Palermo Protocol, which calls upon States to consider providing for the physical, psychological and social recovery of trafficking victims.

(13) *Purpose of Paragraph 3:* Paragraph 3 is designed to ensure that trafficking victims are amply supported and protected during the period of vulnerability which follows their arrival in the receiving State. Victims may potentially suffer from social dislocation, emotional or physical trauma, and heightened stress levels.

(14) *Issues Raised by Paragraph 3:* As part of the assistance indicated in Paragraph 3, receiving States should consider the provision of: 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. Regard should be had for the age, gender and special needs of trafficking victims. In the case of children, particular attention should be paid to the provision of housing, education and other care. Because the provision of such services is costly, States should also consider providing victims with the ability to pursue legal action and recover damages from those responsible for their trafficking, particularly any business entities that have knowingly profited from the labor of trafficked persons. In this regard, Article 8 should be read in conjunction with the rights contained in Article 4, Due Process, and Article 11, Economic and Social Rights.

169. Article 13 of the Council of Europe Convention goes a step further: it mandates that States observe a thirty day “recovery and reflection” period during which trafficking victims may escape the influence of the traffickers and make a measured decision regarding their cooperation with the authorities.

170. See, e.g., Isabel Crowhurst, *The Provision of Protective and Settlement Services for Migrant Women Trafficked for Sexual Purposes: The Case of Italy*, in *TRAFFICKING AND THE GLOBAL SEX INDUSTRY* 217, *supra* note 165, at 217.

ARTICLE 9

CHILDREN

(1) States shall ensure that rights of children are enjoyed by migrant children on the basis of equality with citizens.

(2) The best interests of a child migrant shall be a primary consideration in all actions affecting the child migrant. The views of child migrants must be given due weight in accordance with their maturity and age.

(3) Detention of child migrants shall be a measure of last resort, and child migrants shall be accorded treatment appropriate to their age and particular vulnerabilities.

(4) States shall establish equitable and effective procedures for identifying and protecting unaccompanied minor migrants. States should create a process for ensuring that all unaccompanied minors have a caregiver or guardian. States should create avenues for temporary and permanent relief from removal for unaccompanied minor migrants.

Commentary:

(1) *Purpose of Article 7:* This article serves a dual purpose. First, the article affirms the fundamental principle that children are people before the law, and all fundamental human rights must be respected in the treatment of children.¹⁷¹ Second, this article recognizes that in furtherance of this principle, special measures must be taken in many instances to ensure the full realization of the rights of the child. This article articulates some special protections for children to ensure that, despite their inherent vulnerabilities, children enjoy all of their rights. The article is not, however, exhaustive in this respect. Rather, the rights asserted elsewhere in the IMBR on behalf of all migrants should be understood to be incorporated for and directly applicable to children.

(2) This article thus complements the broad assertion of the rights of the child by specifically addressing some situations where the inherent vulnerability of the migrant child is exacerbated by a separation from the family unit or by legal and administrative proceedings, which may confuse and intimidate a migrant who lacks maturity. In addition to the need for special protections for children against social and administrative abuses, this article suggests affirmative measures to be taken by States in recognition of the duty under international law to provide specially for the well-being of children.¹⁷²

(3) *Problems Addressed:* Children face particular impediments to their enjoyment of fundamental rights. Children often lack financial indepen-

171. This is a natural and necessary extension of art. 1 of the UDHR: "All human beings are born free and equal in dignity and rights." UDHR, *supra* note 31, art. 1.

172. That childhood is entitled to special care and assistance receives support from, *inter alia*, the UDHR, *supra* note 31, art. 25.2; the ICCPR, *supra* note 1, art. 24.1; the Geneva Declaration of the Rights of the Child of 1924, Sept. 26, 1924; the ICESCR, *supra* note 33, art. 10.

dence, they frequently lack the education and experience necessary to fully articulate their ideas and beliefs, and they often do not exercise control over their own movement between States. Migrant children may face additional hardships by virtue of separation from the family unit and legal proceedings brought against the child to challenge the child's legal status. This article addresses affirmative measures which should be taken to protect the migrant child's access to a supportive home and to ensure that legal and other administrative proceedings against the child do not interfere with the child's fundamental rights.

(4) In addressing these challenges, the Drafting Committee respects that migrant children disproportionately represent children displaced by poverty and war; furthermore, migrant children are frequently separated from their families. These deprivations, in addition to the inherent vulnerabilities of the child, make migrant children particularly prone to abuses of the labor, citizenship, education, and family rights declared in this Document.¹⁷³

(5) *History and Purpose—Paragraph 1:* This paragraph recognizes that children often, necessarily, are subject to special provisions and protections under domestic laws on account of the particular vulnerabilities of persons of minor age. The principle of equal protection—a principle specifically codified in Article 2 of this Document—must apply with equal force to children. Moreover, while status distinctions made under domestic laws may sometimes be valid, such is not the case for abrogations of the fundamental rights of the child—such protections must be afforded regardless of the child's legal status.¹⁷⁴ The realization of this principle further requires the existence of an effective remedy for violations of the principle.¹⁷⁵ Accessing such a remedy and subsequently enjoying the equal protection demanded by this article may require that special assistance be available to children.¹⁷⁶

(6) This paragraph requires that States *shall* ensure that migrant children enjoy their rights on a basis of equality with citizens. The article does not, however, describe specific measures which must be taken to achieve this equality. Rather, it is left to the sovereign discretion of States to properly address any domestic problems of unequal access to children's rights. Necessary steps to ensuring equality *might* include the availability of qualified translators and the existence of a social services administration with special expertise in the problems confronting migrant children in that State. The creation of an Ombudsman or similar official speaker for children, making professional child welfare advocates publicly available, and establish-

173. See *infra* arts. 11, 14, 15, 16.

174. CRC, *supra* note 80, art. 2. See also LAWRENCE LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING AND HUMAN RIGHTS 98 (1995).

175. See, e.g., UDHR, *supra* note 31, art. 8.

176. In this respect, the article fully embraces the proclamation of the International Covenant on Economic, Social and Cultural Rights, art. 10.3, that "special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." ICESCR, *supra* note 33, art. 10.3.

ing thorough data collection services whose function it is to track the presence and condition of minor children within the State are all measures which may advance the guarantees States pledge under this paragraph.

(7) This paragraph defers to the sound discretion of States to develop standards of best practices, as the Drafting Committee recognizes a paucity of data concerning the exact numbers and living conditions of migrant children to be a primary, present obstacle to the full protection of the rights of the migrant child.¹⁷⁷ States shall undertake in good faith to identify the problems confronting minor children in their territories, and subsequent action shall be taken in light of those findings to ensure equal protection for migrant children.

(8) *History and Purpose—Paragraph 2:* The first sentence of this paragraph affirms the internationally established position that the “best interests” of the child must play a central role in all actions concerning the child.¹⁷⁸ In considering the child’s best interests, it is the opinion of the Drafting Committee that certain principles should be honored. First, with respect to legal and administrative proceedings, any undue delay in proceedings involving a child shall constitute a harm to the welfare of the child.¹⁷⁹ Second, children are entitled to express themselves freely,¹⁸⁰ and (as explicitly observed in the following sentence in this paragraph) children capable of expressing themselves must be permitted to do so in official proceedings against or otherwise involving them.¹⁸¹ These statements should influence the determination of what constitutes the best interests of the child. Honoring the child’s best interests may also involve procedural accommodations on account of the child’s maturity and vulnerability. Many States employ “child-friendly” procedural rules and tribunals to mitigate any oppressive element in the bureaucracy and to encourage the child to fully express personal opinions and priorities.¹⁸² It is the opinion of the Drafting Committee that such purposefully age-appropriate proceedings represent best prac-

177. See Sarah Maloney, *Transatlantic Workshop on ‘Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe’*, held at Georgetown University, 18–19 June, 2001, 15 J. REFUGEE STUD. 102, 118 (2002).

178. See CRC, *supra* note 80, art. 3.

179. This position echoes the duty of States to act speedily in proceedings involving the welfare of a child which has been previously articulated in, *inter alia*, art. 7 of the European Convention on the Exercise of Children’s Rights and in § 1(2) of the Children Act under English law. European Convention on the Exercise of Children’s Rights art. 7, Jan. 25, 1996, Europ. T.S. 160, *available at* <http://www.unhcr.org/refworld/docid/3de78d964.htm>; Children Act, 1989, c. 41, § 1(2), *available at* http://www.opsi.gov.uk/acts/acts1989/ukpga_19890041_en_1.

180. CRC *supra* note 80, art. 13.

181. *Id.*, art. 12.

182. See, Maloney, *supra* 177, at 107, 113 (summarizing the procedural and evidentiary rules for proceedings involving children in the United States and Canada, which aim to be non-adversarial and to take account of the child’s emotional experience of persecution; explaining the similarly non-adversarial procedures adopted for children in the United Kingdom).

tices.¹⁸³ Finally, any infringement of the rights guaranteed to the migrant child in this Document or in other relevant international conventions shall be contrary to the best interests of the child.

(9) The second sentence of this paragraph unambiguously affirms the right of the migrant child to be heard in any proceedings involving the child.¹⁸⁴ This sentence also recognizes that, in respecting the child's expression, due consideration must be given to the context of the child's statements, which are provided by the child's age and manifest level of maturity. The Drafting Committee embraces the idea that a child's capacity for self-expression and mature judgment are "evolving capacities," and adults should speak for the child only to the extent that the child lacks the experience and judgment to effect such expression personally.¹⁸⁵ Fulfilling the obligations of this paragraph may require that States appoint a representative to speak on behalf of the child; as with Paragraph 1, however, the Drafting Committee has not articulated specific means by which States must provide such representatives.¹⁸⁶

(10) *History and Purpose—Paragraph 3*: This paragraph offers a natural extension of the consideration of the child's best interests already articulated in Paragraph 2. Detention of child migrants is explicitly disfavored for several reasons. Detention almost necessarily entails a separation from the family unit and other nurturing features of an ordinary childhood, and in this respect detention may violate the priority due to the family unit in society. Detention further interferes with the child's access to education and free expression and association, thereby frustrating the exercise of numerous rights due to the child under this and other international human rights instruments. Furthermore, as has been observed of proceedings involving children generally, any delay in the final disposition of the child's legal case may constitute a harm to the child's ultimate development as a person; detention of the child may be understood to be a *per se* delay in this respect.

(11) In those situations where detention may be appropriate, however, care must be exercised in ensuring that the circumstances of the detention appropriately accommodate the particular vulnerabilities of the child. Deten-

183. See SAVE THE CHILDREN, SEPARATED CHILDREN IN EUROPE PROGRAMME: STATEMENT OF GOOD PRACTICE 2 (3rd ed., 2004).

184. The Universal Declaration of Human Rights art. 6 guarantees the right of *everyone* to recognition as a person before the law. Moreover, the Convention on the Rights of the Child art. 12.2 guarantees that children shall be granted an opportunity to be heard in proceedings affecting them. UDHR, *supra* note 31, art. 6; CRC, *supra* note 80, art. 12.2. The second sentence of paragraph 2, art. 7 of this document fully embraces these positions.

185. See GERALDINE VAN BUEREN, CHILD RIGHTS IN EUROPE 30–37 (Council of Europe Publishing 2007) (expressing in greater detail the proper role of the adult speaking as a representative for the child's own views in proceedings concerning the child's welfare and legal status).

186. The Drafting Committee recognizes that translators and attorneys must often be made available for this purpose. For greater guarantees of children's access to necessary representatives, some may favor permanent, institutional establishments with specially qualified representatives. See Malfrid Grude Flekkøy, *The Ombudsman for Children: Conception and Developments*, in THE NEW HANDBOOK OF CHILDREN'S RIGHTS 404, 404–419 (Bob Franklin ed., 2002).

tion may be intimidating, humiliating, and socially disorienting—all of which may be particularly harmful to the physically and emotionally vulnerable condition of the child. On this subject, the Drafting Committee is aware that many child migrants in detention were originally displaced by wars and extreme economic hardships; many of these children arrive in detention already presenting symptoms of traumatic stress disorders and other acute psychological disruptions. Detention must not advance these unhealthy conditions, and States must recognize their obligation to specially protect children—particularly those children whose freedoms have been curtailed by commitment to State detention facilities.

(12) *Origins of Paragraph 4*: This paragraph encourages the personal development and social integration of the child migrant by proceeding in three parts. First, a State *shall* effectively and equitably identify the presence of unaccompanied minor-age migrants in its territory; these children shall then receive necessary protection from the State. Second, States *should* provide formal, reliable means by which unaccompanied minors may be assigned an appropriate caregiver or guardian. Finally, States *should* provide official avenues by which temporary and permanent relief from removal may be sought by the migrant child.¹⁸⁷

(13) As to the first, mandatory measure, this paragraph recognizes that the duty of States to specially protect the condition of the child *requires* that States make themselves aware of the existence of particularly vulnerable children within their territories. The reference to *equitable* procedure refers to medical tests often employed in order to determine the age of young migrants, who are often close to the age of majority, and to the margin of error employed in the determination process. In doing so, States must employ methods that are safe and respect the dignity of migrant children.¹⁸⁸ In this respect, equitable procedures should not *force* migrants to undergo medical examinations, should not rely on only one indicator in determining age, and will err on the side of considering a migrant a child when medical tests are within the margins of statistical error.¹⁸⁹

(14) Enormous personal costs to the child may result from a want of any adult custodian, and similarly great social costs to the State may attach to the presence of unsupported and unguided children within the State's territory. Upon the recognition of an unaccompanied minor child's presence, the State must also take steps to protect the child's rights and future development.

187. See, e.g., CRC, *supra* note 80.

188. See Statement of Erika Feller, Address at the EU Seminar on Children Affected by Armed Conflict and Displacement (Norrköping 1 March 2001), available at <http://www.unhcr.org/42b970b22.html>.

189. See INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM)—VIENNA, RESOURCE BOOK FOR LAW ENFORCEMENT OFFICERS ON GOOD PRACTICES IN COMBATING CHILD TRAFFICKING 35–72 (2006); Lucy Kralj & David Goldberg, *UK Government Policy and Unaccompanied Adolescents Seeking Asylum*, 10(4) CHILD & ADOLESCENT MENTAL HEALTH 202, 203–204 (2005). But cf. Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. § 105(b) (2005).

Particular steps to be taken have not been itemized, but the Drafting Committee considers the fullest social integration and custodial support of the child to be paramount priorities; formal structures which offer broad access to health, education, familial support, and—upon attaining an appropriate age—employment may be considered best practices.¹⁹⁰

(15) The second point made in this paragraph stems from the fundamental importance of the family in the full development of the child as a person. Where migrant children have been irreparably or necessarily separated from their parents, this paragraph adopts the position that it is in the best interests of all parties for the child to be given access to an appropriate caregiver. Specific institutions or criteria to be applied in assigning such a caregiver to an unaccompanied child are not mandated here; instead, States are to determine in good faith and with appropriate respect for the best interests of the child how a caregiver should be provided. A formal *process* should exist, however, and use of this process must respect all applicable norms of equal protection, due process, and self-expression which children are due.

(16) Finally, this paragraph suggests that States *should* provide formal avenues through which unaccompanied migrant children may seek temporary or permanent relief from removal. This point must necessarily be read in concert with the removal rights expressed elsewhere in this Document. A proper respect for the views of the child embodied in the rights to self-expression and self-determination would also require, at a minimum, that the child be heard in respect to a protest against removal. Thus, this paragraph should be read in conjunction with Paragraph 2, which enshrines the paramount notion of the best interests of the child. While this point does not place an affirmative obligation upon States to provide avenues for relief, this last clause must also *not* be interpreted as negating the broad asylum provisions and strict non-refoulement principle contained in the IMBR.

ARTICLE 10

CIVIL AND POLITICAL RIGHTS

(1) States shall respect, protect, and promote all civil and political rights of migrants, including, but not limited to, the following:

- a. The rights to freedom of thought, conscience, and religion of migrants. These rights shall include freedom to have or to adopt a religion or belief of his or her choice and freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice, and teaching;

190. See, *Life Projects for Unaccompanied Migrant Minors*, Recommendation Rec(2007)9 adopted by the Committee of Ministers of the Council of Europe on 12 July 2007 and explanatory memorandum, Council of Europe Publishing (2008).

- b. The right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of national boundaries, either orally, in writing or in print, in the form of art, or through any other media of their choice;
- c. The rights of peaceful assembly and of association;
- d. The right to the security of person and protection by the State against violence, bodily harm, or expression inciting violence, whether inflicted by government officials or by any individual, group, or institution;
- e. The right to liberty of movement within the territory of the host State and free choice of residence, unless the host State initiates a formal removal proceeding in accordance with Article 5;
- f. Migrants have a right to identity documents. It shall be unlawful for anyone, other than a duly authorized public official, to confiscate, destroy, or damage identity documents, work permits, or documents authorizing entry, stay, residence, or establishment in the national territory.

(2) Migrants have the right to protection against national, racial, religious, or xenophobic hatred that constitutes incitement to discrimination, hostility, or violence against migrants. States shall take all appropriate measures to discourage the advocacy of such hatred and to modify social and cultural patterns of individual conduct in order to eliminate such hatred.

(3) States should facilitate migrants' participation in the civil and political life of their communities and in the conduct of public affairs.

Commentary:

(1) *Purpose of Article 10:* This Article incorporates and emphasizes vital civil and political rights guaranteed to all people under various human rights treaties such as the ICCPR, the Universal Declaration of Human Rights, the Banjul Charter on Human and Peoples' Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹¹ Article 10 thus highlights the issues that are particularly pertinent to migrants on account of their minority status, non-majority culture, and often disadvantaged position in host countries. By restating the key provisions of existing documents in a migrant-specific context, this document serves as a basis for addressing, or reexamining, the serious rights violations that are still being visited upon migrants and for reminding States that their human rights

191. U.N. Human Rights Comm., ICCPR *General Comment 15: Position of Aliens Under the Covenant*, para. 2, Nov. 4, 1986 (expressly stating a general rule extending protections of the ICCPR to aliens and emphasizing the universal applicability of these rights to all people without regard to citizenship).

responsibilities are not limited to their own citizens.¹⁹²

(2) *Problems Addressed*: Even though all States are bound by international law to provide extensive civil and political rights to all people within their territories, migrants in many countries face severe difficulties in claiming and accessing these rights.¹⁹³ As one commentator has observed, “[S]tates have improperly deployed the concept of citizenship to carve out significant exceptions to the universality of human rights protection.”¹⁹⁴

(3) *Origins of Paragraph 1*: The language of subparagraph (a) is taken directly from Article 18 of the ICCPR and is also found in many subsequent human rights documents.¹⁹⁵ The idea of freedom of religion is expressed slightly differently in the Universal Declaration¹⁹⁶ and with entirely different language in the Banjul Charter,¹⁹⁷ but the concept is the same throughout human rights law. Human Rights Committee General Comment 15 to the ICCPR explicitly extends these freedoms to aliens.¹⁹⁸

(4) In the ICCPR, the language relating to religious freedom is followed by three complementary paragraphs that are not reproduced here. The omission of ICCPR Article 18 Paragraph 2 prohibiting government coercion is not meant to imply that migrants, unlike citizens, may be subject to coercion. It is not included because it is not a problem specific to migrants; rather, States that tend to coerce people within their borders usually do so regardless of immigration status. Similarly, the omission of ICCPR Article 18 Paragraph 3 does not give migrants freedom to manifest religion in situations when a state legitimately denies this freedom to citizens. However, only legitimate, narrow objectives can limit migrants’ rights, which do not exceed

192. See Sandra Bart, Office of the General Counsel of the Caribbean Community (CARICOM), Address at the Special Meeting on Implementation of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families (Feb. 13, 2007), available at http://scm.oas.org/doc_public/ENGLISH/HIST_07/CP18400E13.doc (emphasizing the need for increased education and public awareness).

193. See U.N. Comm. on Migrant Workers and Jorge A. Bustamante, Special Rapporteur on the Human Rights of Migrants, Statement at the U.N. Migrant Workers Convention (Dec. 17, 2009), available at <http://www.december18.net/article/statement-un-committee-migrant-workers-and-special-rapporteur-bustamante> (“Despite the increased efforts of the international community . . . migrants continue being exposed to commoditization and human rights violations.”); Jorge A. Bustamante, Special Rapporteur on the Human Rights of Migrants, Statement to the 11th Session of the Human Rights Council (June 2, 2009) (outlining 12 allegations of violations of the basic human rights of migrants in 19 Member States), available at <http://www.un.org/webcast/unhrc/archive.asp?go=011>.

194. James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20(3) ETHICS & INT’L AFFAIRS. 321, 323 (2006).

195. ICCPR, *supra* note 1, art. 18. See also ECHR, *supra* note 35, art. 9; CRC, *supra* note 174, art. 14; ICMW, *supra* note 5, art. 12.

196. UDHR, *supra* note 31, art. 18 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”).

197. African Charter on Human and Peoples’ Rights, art. 8, June 27, 1981, 1520 U.N.T.S. 217, 245; 21 I.L.M. 58 (1982) [(hereinafter Banjul Charter)] (“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”).

198. ICCPR *General Comment* 15, *supra* note 191, para. 7.

those lawfully granted to citizens. Language similar to the ICCPR's paragraph 4 is found in Article 10 of this document.¹⁹⁹

(5) Subparagraph (b) is based on Article 19 of the ICCPR.²⁰⁰ As with Article 18, only the parts of Article 19 of the ICCPR with specific relevance to migrants are included in this document. While migrants are more likely to express themselves in different ways from the majority culture, there is nothing about the right to hold opinions that justifies greater scrutiny or persecution of migrants. The rights to freedom of expression granted by this document are not more or less expansive than those granted by the ICCPR.

(6) Subparagraph (c) is taken from the ECHR, which contains a more concise version of Articles 21 and 22 of the ICCPR.²⁰¹ The ability to form unions, often addressed in the context of freedom of association, is dealt with in more depth in Article 13 of Paragraph 4 of this document and is omitted here to avoid repetition. Yet, it should be emphasized in this context that in order to secure this right effectively, no migrants shall be removed or detained solely due to their attempt to secure labor, political or social rights for themselves or others. States retain the ability to abridge these rights for migrants as well as citizens in certain extreme circumstances provided for by international law.²⁰²

(7) Subparagraph (d) derives from the International Convention on the Elimination of All Forms of Racial Discrimination.²⁰³ Furthermore, the basic right to liberty and security of one's person is protected by Paragraph 1 of Article 16 of the Migrant Workers Convention.²⁰⁴ The exclusion of the following 9 paragraphs is in the interest of brevity and to avoid repetition of Articles 4 and 6 of this document; the rights guaranteed to migrant workers and their families under Article 16 of the ICMW are all intended to apply under the more general statements found herein.

(8) The language of subparagraph (e) is based on Article 12 of the ICCPR.²⁰⁵ These rights, and similar rights guaranteed in the ICMW, are

199. See art. 10, para. 2 *infra*.

200. ICCPR, *supra* note 1, art. 19, para. 2; see also ICMW, *supra* note 6, art. 13, para. 2; ECHR, *supra* note 35, art. 10. Compare Banjul Charter, *supra* note 197, art. 9, paras. 1–2 (“Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.”).

201. ECHR, *supra* note 35, art. 11; ICCPR, *supra* note 1, arts. 21–22. See also UDHR, *supra* note 31, art. 20, para. 1; CRC, *supra* note 174, art. 15; Banjul Charter, *supra* note 197, art. 10.

202. See ICCPR, *supra* note 1, art. 21 (recognizing the right of States to restrict freedom of assembly “in conformity with the law . . . [as] necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”).

203. CERD, *supra* note 80, art. 5(b). The rights included in the other subparagraphs of Art. 6, para. 1, are found in CERD, art. 5(d) (though expressly abrogable on the basis of citizenship and not cited individually above).

204. ICMW, *supra* note 6, art. 16, para. 1.

205. *Id.* at art. 12, para. 1.

explicitly granted only to migrants legally within a State.²⁰⁶ This document confirms that documented migrants should be accorded freedom of movement and residence within the host country. “Free choice of residence” refers to the freedom of a migrant to choose the location of his or her residence; like the ICCPR, this document does not recognize the right of aliens to reside in the territory of a host State.²⁰⁷

(9) The situation of undocumented migrants is more complicated than that of documented migrants. States may remove an undocumented migrant from their territory, even if this infringes upon the migrant’s freedom of movement and residence, so long as the process complies with the rights provided in this document and other fundamental human rights protections. If a State is unwilling or unable to initiate lawful removal proceedings, it may not then resort to restricting the migrant’s freedom of movement or residence.

(10) Subparagraph (f) is inspired by the nearly identical language found in ICMW Article 21. This responds to a practice among employers and traffickers of rendering migrants subservient and dependent through abuse of their positions of power and temporary control of migrants’ identity documents.

(11) *Origins of Paragraph 2*: This language builds on ideas found in Article 20 of the ICCPR.²⁰⁸ Xenophobia has been added to the standard language in this document, as hatred along these lines is of particular concern to migrants. Beyond this, the language in this document has been modified from that of the ICCPR in appreciation of the value of free speech, as discussed below. The second sentence is taken largely from CEDAW.²⁰⁹

(12) CERD goes even further by condemning the dissemination of ideas based on racial hatred or incitement to racial discrimination, prohibiting organizations that promote or incite these ideas, and forbidding public institutions from promoting or inciting racial discrimination.²¹⁰ While an ideal world would not include dissemination of ideas, organizations or public institutions promoting hatred or discrimination against migrants, the Drafting Committee favors the shorter, less specific and more practical language of the ICCPR for this document.

(13) *History and Purpose of Paragraph 2*: Discrimination, hostility, and

206. *Id.* at art. 39, para. 1. *But cf.* Banjul Charter, *supra* note 197, art. 12, para. 1 (qualifying these rights based not on migration status specifically but “provided he abides by the law”).

207. ICCPR, *General Comment 15*, *supra* note 191, para. 5.

208. ICCPR, *supra* note 1, art. 20, para. 2 (“Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

209. Convention on the Elimination of All Forms of Discrimination against Women, art. 5(a), Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980) [hereinafter CEDAW] (“States Parties shall take all appropriate measures . . . [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”).

210. CERD, *supra* note 80, arts. 4(a)–(c).

violence against migrants represent major problems in many countries.²¹¹ States should take affirmative steps to stop this phenomenon by discouraging such behavior. Where possible, States should prohibit the advocacy of such hatred by law, as required by the ICCPR.²¹² However, the ICCPR formulation “prohibited by law” has led to a number of reservations, most notably by the United States. This document seeks to strike a better balance by recognizing this problem and the myriad ways States can counter it without explicitly prohibiting certain speech. Hate crimes legislation is one example, as is the “comprehensive framework for challenging the various forces that have created and sustained discrimination,” including changing textbooks, school programs, and teaching methods, envisioned by CEDAW.²¹³

(14) *Origins of Paragraph 3*: This language, related to participation in civil and political life, builds on ideas in the ICCPR and the CERD.²¹⁴ Though these documents explicitly 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. This document is the first to extend these rights to migrants, and the language was chosen with appreciation for the difficulties described below.

(15) *History and Purpose of Paragraph 3*: Most important is that States shall recognize the basic right and interest of all people to have a voice in the policies that affect them. This document creates a duty for States to provide at least some avenues for these voices to be heard, but stops short of requiring direct electoral participation at any level. Alien suffrage is a growing trend, currently available on some level in more than 40 countries.²¹⁵ This reflects a number of strong 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 in the host country.²¹⁶

211. Durban Declaration and Programme of Action, para. 16, adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001 (stating “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism”); see also Amnesty Int’l, *Living in the Shadows: A Primer on the Human Rights of Migrants*, AI Index POL 33/006/2006, Sept. 2006, available at <http://www.amnesty.org/en/library/asset/POL33/006/2006/en/f8aa4dfe-d3fd-11dd-8743-d305bea2b2c7/pol330062006en.html#1.3.Discrimination,%20racism%20and%20xenophobiaoutline>.

212. ICCPR, *supra* note 1, art. 20, para. 2; See also ICCPR, *General Comment 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred* (Art. 20), para. 2, July 29, 1983.

213. CEDAW, *supra* note 209, Introduction.

214. ICCPR, *supra* note 1, art. 25 (“Every citizen shall have the right . . . to take part in the conduct of public affairs.”); CERD, *supra* note 80, 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.”).

215. Immigrant Voting Project, <http://www.immigrantvoting.org> (last visited June 30, 2010) (updated list of all countries that provide such rights, as well as extensive discussion of the topic).

216. 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 favor of non-citizen voting rights in America).

(16) The language “participation in civil and political life” is intended to allow a range of interpretations. In practice, this paragraph can, and perhaps should, include voting rights in local elections, but it could also be satisfied by soliciting comments on pertinent proposed laws or policies, soliciting migrants’ opinions, through a representative on deliberative or advisory bodies or otherwise, and providing full information about civic rights and duties.²¹⁷ Alternatively, it could also be realized in part by permitting or facilitating association and assembly, whether on community or trade-group grounds.

(17) The term “direct conduct of public affairs” has been interpreted by the U.N. Human Rights Committee as “exercis[ing] power as members of legislative bodies or by holding executive office . . . [or] taking part in popular assemblies which have the power to make decisions about local issues.”²¹⁸ The rights secured by this document are much more limited, and States preserve the ability to limit these activities to citizens. The meaning of the term intended here is more akin to the interpretation in Paragraph 8 of General Comment 25 to the ICCPR, describing those taking part in the conduct of public affairs as “exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”²¹⁹ Those rights of direct participation reserved to citizens in Article 25 of the ICCPR²²⁰ may be denied to non-citizens in accordance with Article 2 of the IMBR, although the Drafters encourage States to consider the arguments in favor of greater suffrage for migrants mentioned above.

(18) Participation in civil and political life will necessarily be limited by the extent to which a State does not provide meaningful avenues for participation to its own citizens. This section is primarily directed towards promoting non-voting participation for migrants. For instance, in States where all or most local issues are decided by democratic vote, migrants should be included in this process. European countries, and the European Union as a whole, provide successful models of non-citizen participation in civil and political life, including local elections.²²¹

ARTICLE 11

ECONOMIC AND SOCIAL RIGHTS

(1) Migrants shall be entitled to emergency medical care and to disaster relief.

217. See Convention on the Participation of Foreigners in Public Life at Local Level, Explanatory Report, para. 6, Feb. 5, 1992.

218. ICCPR, *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (Art. 25), para. 7, July 12, 1996.

219. *Id.* at para. 8.

220. ICCPR, *supra* note 1, art. 25.

221. See, e.g., European Convention on the Participation of Foreigners in Public Life at the Local Level, Strasbourg, Feb. 5, 1992, Europ. T.S. No. 144.

(2) Mothers shall, on the basis of equality of treatment with nationals, be accorded special protection during a reasonable period before and after childbirth.

(3) Migrants shall be provided access to medical care, social security, and an adequate standard of living, including food, clothing, and housing.

(4) Migrants shall not, based solely on their status as migrants, be denied the benefits of any social welfare or insurance program to which they have contributed.

Commentary:

(1) *Purpose of Article 11:* Economic and social rights are addressed to the basic needs of an individual to survive, participate in society, and take advantage of other protected human rights. Economic and social rights granted to both citizens and migrants vary according to State welfare systems; these rights are often positive human rights highly associated with citizenship, but may also entail negative obligations to provide services without discrimination. State obligations created by these rights are often costly (e.g. health services, social security), and States may balk at spending funds on those non-citizens who are not juridical members of the community. The purpose of this Article is to highlight existing international law on social and economic rights, ensure that migrants are not marginalized by States purely on account of their status as migrants, and emphasize economic and social rights that have the most impact on migrants—health and benefits from programs to which migrants have contributed.

(2) The bulk of international law on economic and social rights stems from the UDHR and the ICESCR. General Comment 3 to the ICESCR interprets the instrument to apply the principle of progressive realization, defining it as “recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”²²² While the IMBR does not utilize the principle of progressive realization, the principles in this article match the core obligations under the ICESCR regime, which, despite the progressive realization principle, set a minimum standard of core rights for States: “a State party in which any significant number of individuals is deprived of . . . essential primary health care, of basic shelter and housing . . . is, prima facie, failing to discharge its obligations under the [ICESCR]. If the [ICESCR] were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.”²²³ Therefore, the rights in this

222. CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations*, para. 9, U.N. Doc. E/1991/23, annex III at 86 (Dec. 14, 1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 9 (2003).

223. *Id.* at para. 10.

article align with core international law obligations.

(3) *Origins of Paragraph 1*: The rights to emergency medical care and disaster relief are assured in the UDHR and the ICESCR.²²⁴ The right to emergency medical care is explicitly stated in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²²⁵ Furthermore, the Convention on the Rights of the Child requires member States to “ensure the provision of necessary medical assistance and health care to all children.”²²⁶ CERD and CEDAW also aim to protect the right to health.²²⁷ The right to health is additionally protected in several regional treaties²²⁸ and soft law instruments.²²⁹

(4) *History and Purpose of Paragraph 1*: Health is an issue of critical concern to migrants, who often suffer poorer health than the rest of the population. This provision regarding emergency medical care and disaster relief balances the breadth of the right against the narrow population endowed with it (i.e. an entitlement to care regardless of ability to pay, but only to migrants in emergency situations). The term “disaster relief” encompasses more than medical care in that it is intended to secure wider relief in times of disaster including temporary housing, clothing and food.

(5) *Origins of Paragraph 2*: Special care for mothers before, during and after childbirth has been identified as a right in the UDHR, the CRC, the ICESCR, and the CEDAW.²³⁰ In particular, the CEDAW explicitly states the need for free services for women before, during, and after childbirth. The CEDAW Committee’s General Recommendation No. 24 highlights the special attention needed by vulnerable and disadvantaged groups of women, such as migrants and refugees.²³¹

(6) *History and Purpose of Paragraph 2*: Although improving maternal health was one of the UN General Assembly’s goals adopted in the Millen-

224. UDHR, *supra* note 31, art. 25; ICESCR, *supra* note 27, art. 12 (“The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . . (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”).

225. ICMW, *supra* note 6, art. 28.

226. CRC, *supra* note 80, art. 24.

227. See CERD, *supra* note 80, art. 5(e)(iv); CEDAW, *supra* note 209, art. 11.1(f).

228. See e.g., African Charter on Human and Peoples’ Rights, *supra* note 110, art. 16; African Charter on the Rights and Welfare of the Child art. 14(2)(b), Jul. 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); European Social Charter art. 11, Oct. 18, 1961, revised May 3, 1996, Europ. T.S. 163 (entered into force Feb. 26, 1965); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art. 10, Nov. 17, 1988, O.A.S.T.S. 69 (entered into force Nov. 16, 1999).

229. C.H.R. Res. 2002/31, U.N. Doc. E/CN.4/RES/2002/31 (Apr. 22, 2002); Vienna Declaration and Programme of Action, *supra* note 36, at ¶¶ I.18, I.24, I.31, II.41.

230. UDHR, *supra* note 31, art. 25; ICCPR, *supra* note 1, art. 10(2); CRC, *supra* note 80, art. 24(2); CEDAW, *supra* note 209, art. 12.

231. Comm. on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health (Article 12), U.N. Doc. A/54/38/ Rev.1 (1999).

nium Declaration,²³² the reality remains that many migrant mothers receive inferior care. Marginalized women, including ethnic minorities and those in poverty, are particularly vulnerable to maternal mortality.²³³ Undocumented pregnant women are more likely to receive delayed pre-natal care and be victims of violence than legally resident pregnant women.²³⁴ The right of mothers to protection before, during and after childbirth is a broad right, but for a narrow and often vulnerable population. The purpose of the right is to ensure that women receive reproductive health care that is adequate to meet demand, accessible physically and economically, without discrimination, and of good quality.²³⁵

(7) *Origins of Paragraph 3*: An adequate standard of living—including food, clothing, housing, medical care and social security—stems from the core social rights articulated in the UDHR and the ICESCR.²³⁶ Additionally, the CRC binds State Parties to “strive to ensure that *no child* is deprived of his or her right of access to [the highest attainable standard of health],”²³⁷ (emphasis added) and to recognize the right for every child to “benefit from social security.”²³⁸ Health and social security rights are also guaranteed in the Refugee Convention and in the CERD.²³⁹

(8) *History and Purpose of Paragraph 3*: This paragraph grants equality in *access* to social and economic rights to migrants. Apart from legal status, “availability, accessibility, acceptability and quality of services depend on various other influences, including social, cultural, structural, linguistic, gender, financial and geographical factors.”²⁴⁰ In many countries, migrants do not take advantage of the health care to which they are entitled because of knowledge gaps and cultural differences. For example, studies have shown

232. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

233. The Special Rapporteur, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 10, delivered to the General Assembly, U.N. Doc. A/61/338 (Sept. 13, 2006).

234. Int’l Org. for Migration [IOM], *Migration: A Social Determinant of the Health of Migrants*, at 12, Background Paper for the Assisting Migrants and Communities (AMAC): Analysis of Social Determinants of Health and Health Inequalities project (2006) (prepared by Anita A. Davies, Anna Basten, Chiara Frattini).

235. See, e.g., ICESCR, *General Comment No. 14: The right to the highest attainable standard of health*, ¶ 12, U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 12 (2003); The Special Rapporteur, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, *supra* note 233, at ¶ 17.

236. UDHR, *supra* note 31, art. 25; ICESCR, *supra* note 33, arts. 9, 11(1), 12.

237. CRC, *supra* note 5, art. 24(1); See also CRC, *supra* note 5, arts. 2(4)-(2).

238. CRC, *supra* note 5, art. 26(1).

239. Convention relating to the Status of Refugees, *supra* note 9, art. 24(1)(b); CERD, *supra* note 80, art. 5(e).

240. IOM, *Migration: A Social Determinant of the Health of Migrants*, *supra* note 234, at 11; ICESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 235.

that migrant women underutilize reproductive health services.²⁴¹ Therefore, countries may be able to improve migrants' access to health care by meeting the accessibility and quality requirements of the right to health.

(9) Although the ICESCR applies the progressive realization principle to the right to health, the ICESCR sets a minimum standard of core obligations for States Parties.²⁴² The purpose of this article is to apply this non-discrimination rationale to migrants and ensure that States do not arbitrarily deny migrants access to health care based on their migrant status. Access must convey different content in different circumstances. Particularly, States may distinguish between offering paid and free access to economic and social services as long as the distinction follows Article 2(2) of the IMBR, i.e. is pursuant to a legitimate aim, has an objective justification, and is reasonably proportional. As noted in the commentary to Article 2 above, reasonable proportionality should be seen as a continuum. In making such distinctions, States should take into consideration, among other factors, the degree of a migrant's connection to the host State, as well as the degree of the development of the right in that society.

(10) *Issues Raised by Paragraph 3:* Many countries do not link social rights to citizenship, but rather entitle permanent residents and other legal immigrants to certain social rights. Access varies according to immigration status, type of social benefit and country. This paragraph is at the forefront of State practice by guaranteeing a form of non-discrimination to all migrants.

(11) *Origins of Paragraph 4:* This Paragraph is analogous to Article 27 of the ICMW²⁴³ and Article 9 of the ICESCR.²⁴⁴

(12) *History and Purpose of Paragraph 4:* In some States, migrants contribute to social or health insurance programs, or to income and other taxes, on the same basis as nationals. In such cases, contributions should ensure enjoyment of the benefits. Thus, payment of taxes for the purpose of health insurance, pensions or social security should ensure access to these benefits, regardless of legal status. As a result, States may tax migrants earning a salary in accordance with national laws and on the basis of equality of treatment with nationals. Conversely, States that make distinctions among and between migrants that conform to both Article 2 of the IMBR and the present article cannot then tax migrants and also deny eligibility for benefits derived from their contribution.

241. IOM, *Migration: A Social Determinant of the Health of Migrants*, *supra* note 234, at 11.

242. CESCR, *General Comment No. 3: The Nature of States Parties' Obligations*, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

243. ICMW, *supra* note 6, art. 27(1).

244. ICESCR, *supra* note 33, art. 9 ("The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.").

ARTICLE 12
CULTURAL RIGHTS

(1) Migrants have the right to enjoy their own cultures and to use their own languages, either individually or in community with others, and in public or private.

(2) Migrants' rights to manifest their religion or belief in worship, observance, practice, and teaching shall not be indirectly restricted through regulation that places disproportionate administrative or disproportionate financial burdens on such activities.

(3) To ensure the religious, cultural, linguistic, and moral education of their children in conformity with their own convictions, the liberty of migrant parents to choose for their children schools other than those established by the public authorities shall be respected. Such schools shall conform to such non-arbitrary minimum educational standards as may be established by the State.

(4) 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 provision 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.

(5) 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) *Purpose of Article 12:* Article 12 asserts the fundamental right of migrants to enjoy their own cultures. Thus, 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.

(2) *Origin of Article 12:* The Universal Declaration of Human Rights states that "[e]veryone has the right to freely participate in the cultural life of the community."²⁴⁵ The UDHR also protects cultural rights that may be "indispensable for [a person's] dignity and the free development of [the person's] personality."²⁴⁶ The ICCPR recognizes the right of migrants, as "ethnic, religious, or linguistic minorities . . . to enjoy their own culture . . . or to use their own language."²⁴⁷ Article 27 of the ICCPR also

245. UDHR, *supra* note 31, art. 27.

246. *Id.* at art. 22.

247. ICCPR, *supra* note 1, art. 27.

recognizes minorities' right "to practice their own religion." This document recognizes religion as an individual right, and not one that is necessarily determined by one's culture. Yet the IMBR promotes a framework that also respects the communal nature of cultural development and practice. This document, following the ICCPR, applies to all persons, without regard to nationality or status.²⁴⁸ This article thus reaffirms States' obligation to provide equal protection of the cultural rights of all people, including migrants. Drawing from both the ICCPR and the UDHR, this Article affirms that migrants may participate and contribute to both their national culture and the minority culture of a migrant community or communities.

(3) *History and Purpose of Paragraph 1:* A migrant's right to a cultural identity includes his or her right to reject—as well as accept—in whole or in part, association with a particular group identity, as emphasized in the phrase "individually or in community" in Article 12(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. The Drafting Committee emphasized that protecting cultural rights should be seen as opening doors and never as coercive.

(4) *History and Purpose of Paragraph 2:* This article promotes parents' rights to educate their children in conformity with their beliefs as a universal human right with special bearing on migrants. Education affects one's cultural identity and beliefs. Human rights instruments recognize a parental right to direct the moral upbringing of one's children.²⁴⁹ This right takes on additional practical importance when considered in the context of migration. This paragraph should be construed to permit the education of temporary migrant workers' children in the language of the migrants' State of origin and, as far as possible, in accordance with the educational standards of that State of origin. In the case of settled migrants, migrant children's interest in preserving their culture and maintaining a culturally-based support network may be in competition with their interest in successful integration in the host State. States should take measures to ensure that such balancing decisions are left to the discretion of migrant parents. States with an objective of educating all children within the State system should pursue this objective not through compulsion, but through compromises, such as providing meaningful alternatives to elements that infringe on the rights contained herein.

248. *Id.* at art. 2(1).

249. *Id.* at art. 18.4; UDHR, *supra* note 31, art. 2(3); ECHR, *supra* note 35, Protocol 1, art. 2; ICESCR, *supra* note 33, art. 13(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 34, art. 5(1); UNESCO Convention against Discrimination in Education art.2(b), Dec. 14, 1960, 429 U.N.T.S. 93 (*entered into force* May 22, 1962).

(5) *History and Purpose of Paragraph 3*: Religion is a key aspect of cultural identity. This paragraph builds on the ideas about freedom of religion discussed above and in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, as well as the ICCPR framework, and applies them to a context with particular salience for migrants. Many migrants practice a religion that is not familiar to the host country and therefore not established in it. Thus, these migrants are often in a disadvantaged position in their ability to freely practice their religion as compared with nationals and adherents to established faiths. When States impose or allow hurdles such as high fees, denials of applications or unequal tax burdens to prevent the development of a religion (e.g. the construction of places of worship or religious schools), this can constitute an impermissible burden on the ability of the religion's adherents to freely practice that religion. Positive assistance to migrants regarding freedom of worship is recognized in the European Union.²⁵⁰ Paragraph 3 of Article 12 of the IMBR does not mandate providing religions practiced predominantly by migrants with more benefits than religions practiced by citizens or nationals. Rather, it suggests that signatory States provide the same level of assistance to migrant religions as is available to nationals and prevent obstacles that are discriminatory. Thus, states with one or more officially recognized religions could theoretically give preferential administrative and financial treatment to those religions without contradicting the provisions of the IMBR. Such circumstances shall be evaluated under Article 2 of this Document. Any burdens placed by the State on the establishment or practice of certain religions must be non-arbitrary and proportionate to the legitimate goal served by the burden.

(6) *History and Purpose of Paragraph 4*: States are asked to recognize their obligations regarding language and cultural preservation, duties that primarily take the form of non-interference. Under Paragraph 4, States are not obligated to allocate resources to language and cultural preservation, but such a practice is encouraged and resources that are available should be distributed on a non-discriminatory basis. Official support for such activities should complement the activities of stakeholders from within relevant migrant communities. Paragraph 4 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 ECHR has suggested that, "pursu[ing] an aim of indoctrination . . . might be considered as not respecting . . . [the]

250. European Convention on the Legal Status of Migrant Workers art. 10(3), Nov. 24, 1977, Europ. T.S. 93.

religious and philosophical convictions [of migrants].”²⁵¹

(7) *History and Purpose of Paragraph 5*: According to the Universal Declaration of Human Rights, “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.”²⁵² Because tolerance and respect for migrants will depend in part on knowledge of minority cultures, States’ obligation to respect, protect and promote the human rights of migrants requires States to encourage understanding and tolerance of migrants’ culture through appropriate cultural activities. These efforts may include, *inter alia*, incorporating the study of the migrants’ culture or history in public education, providing funding for museums, teaching the minority language as a second language in public school systems, facilitating the organization of cultural fairs or support for public broadcasting in minority languages.

ARTICLE 13

LABOR RIGHTS

(1) A migrant shall never be subject to servitude, slavery, or forced labor. A migrant’s right to work and to free choice of employment shall only be restricted pursuant to a legitimate aim, when the restriction has an objective justification, and when reasonable proportionality exists between the means employed and the aims sought to be realized.

(2) A migrant has the right to be remunerated at a just and favorable level for his or her work. Migrants must be informed of working conditions, labor laws, and means of seeking assistance and legal support in the receiving State in a language they understand.

(3) States may not arbitrarily change or terminate a work permit.

(4) A migrant shall be protected by laws respecting, *inter alia*, minimum wages, minimum working age, maximum hours, safety and health standards, protection against dismissal, and the rights to join trade unions, to organize, or to take part in collective bargaining.

(5) States must take all appropriate measures to protect migrants from being compelled or induced to accept conditions of work below standards mandated by national law. States must prohibit employers or employees from privately contracting for worse conditions of work than those mandated by national law.

(6) States shall seek to identify, eliminate, and provide remedies for abusive labor conditions, with special attention to labor agreements that bind

251. Folgerø v. Norway, No. 15472/02, para. 84(h) (Eur. Ct. H.R. Jun. 29, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=819532&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

252. Universal Declaration of Human Rights Preamble, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948); *see also* ICCPR, *supra* note 1, art. 27; CERD, *supra* note 80, art. 7.

migrants to particular employers. States should establish effective penalties for violations of these rights and take appropriate measures to ensure that these rights are ensured.

(7) Migrants have the right to claim these rights and receive remedies regardless of their legal status.

Commentary:

(1) *Purpose of Article 13:* This Article reaffirms a number of existing labor rights found in key international human rights instruments. It also seeks to underscore the need for vigilance and diligence on the part of States in providing access to accurate information on labor laws and working conditions, ensuring domestic enforcement of labor rights, protecting vulnerable migrants from abusive working conditions and prosecuting those who abuse migrant labor. Finally, the Article reinforces the right of migrants, regardless of legal status, to claim labor rights and receive appropriate remedies.

(2) *Problems Addressed:* Many migrants leave their native countries in search of better economic prospects. Even those motivated by other factors such as persecution, discrimination or armed conflict must earn a livelihood upon settling in receiving States. Migrants often must overcome significant obstacles in finding employment, including language barriers, lack of knowledge of the local job market, non-recognition of qualifications from the State of origin and poor understanding of local employment laws. As a result, they are particularly susceptible to victimization through exploitative hiring practices.²⁵³

(3) Upon securing employment, migrants face additional challenges, including discrimination, harassment, poor and unsafe working conditions, abusive and illegal contractual terms, 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. Migrants also may not be aware of their rights and available remedies and, even if they are aware, often lack access to

253. See U.N. Secretary General, *Note by the Secretary General on Human Rights of Migrants*, ¶¶ 35–36, delivered to the General Assembly, U.N. Doc. A/57/292 (Aug. 9, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/518/32/PDF/N0251832.pdf?OpenElement>; Global Migration Group, *International Migration and Human Rights* (Oct. 2008), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/partnerships/docs/int_migration_human_rights.pdf; U.N. Comm. on Migrant Workers, *Report of the Committee on the Rights of All Migrant Workers and Members of Their Families*, U.N. GAOR, 63rd Sess., Supp. No. 48, U.N. Doc. A/63/48 (2008), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/427/31/PDF/G0842731.pdf?OpenElement>; ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy*, Int'l Labour Conf., 92nd Sess., 2004 (Geneva, 2004) [hereinafter *Towards a Fair Deal*], available at <http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/meetingdocument/kd00096.pdf>.

resources needed to claim and vindicate such rights.²⁵⁴

(4) Many 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 prostitution 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.²⁵⁵

(5) 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, as indicated above, such measures may facilitate exploitative or discriminatory practices on the part of employers.²⁵⁶

(6) *Origins of Paragraph 1:* The right to work derives from UDHR Article 23, as well as Article 6 of the ICECSR and Article 15 of the ACHPR. The prohibition against servitude, slavery and forced labor has long been recognized in international law. Slavery was first abolished by Great Britain in 1807 and its prohibition has subsequently become enshrined in customary international law as one of the few recognized *jus cogens* norms.²⁵⁷ Slavery is outlawed by the 1926 Slavery Convention, and paragraphs outlawing slavery and servitude can be found in UDHR Article 4, ICCPR Article 8, ECHR Article 4, ACHR Article 6, ACHPR Article 5 and ICMW Article 11. Forced labor is defined by International Labor Organization (“ILO”) Convention 29 as “all work or service for which the said person has not offered himself voluntarily”.²⁵⁸ Forced labor is banned in ICCPR Article 8, ECHR Article 8, ACHR Article 6 and ICMW Article 11, as well as in ILO Conventions No. 29 and 105 (174 and 169 ratifications respectively).

254. See *Towards a Fair Deal*, *supra* note 253; *Report of The Committee on the Rights of All Migrant Workers and their Families*, *supra* note 253; *International Migration and Human Rights*, *supra* note 253; *Human Rights of Migrants*, *supra* note 253.

255. See J.M. RAMIREZ-MACHADO, DOMESTIC WORK, CONDITIONS OF WORK AND EMPLOYMENT: A LEGAL PERSPECTIVE (ILO 2003), available at <http://www.ilo.org/public/english/protection/condtrav/pdf/7cws.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://www.unhcr.ch/huridocda/huridoca.nsf/0/0032d58d2667f0b9c1256e700050f77f?OpenDocument>.

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

257. See, e.g., M. Cherif Bassiouni, *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”*, 59 LAW AND CONTEMPORARY PROBLEMS 63, 68 (1996).

258. ILO Convention No. 29 concerning Forced or Compulsory Labor, June 10, 1930, 39 U.N.T.S. 55.

(7) *History and Purpose—Paragraph 1*: The right to work does not place a burden on the State to employ migrants or to specifically create private or public sector jobs for them. Moreover, migrants may be precluded from seeking or taking employment as per Article 2(2), which allows for certain distinctions in the treatment of migrants. Similarly, access to any employment assistance, for example, could be limited by application of Article 2(2) if appropriate. Nevertheless, those States party to ILO Convention 97 (49 ratifications) remain bound to provide such assistance (see *infra* para. 11).

(8) The prohibition against slavery is an absolute, non-derogable *jus cogens* norm. However, with regard to forced labor, many human rights instruments contain a list of exceptions under which such labor is permissible. These include the imposition of compulsory labor as a criminal sanction for the commission of a crime as pronounced by a competent court, military service, emergency civil service, and any work or service comprising normal civic obligations. The IMBR's prohibition on forced labor implicitly includes these same exceptions so as to avoid privileging migrants over citizens.

(9) *Origins of Paragraph 2*: The right to "just and favorable" remuneration is enshrined in UDHR Article 23. The Declaration links this right to the ability of the individual to provide an "existence worthy of human dignity" for himself and his family.²⁵⁹ This right is echoed in the American Declaration of the Rights and Duties of Man Article XIV, ICESCR Article 7, CERD Article 5 and the ILO Philadelphia Declaration. Article 25 of the ICMW provides that migrant workers should enjoy treatment not less favorable than that received by nationals with regard to remuneration.

(10) *History and Purpose of Paragraph 2*: The right to just and favorable remuneration is essentially a right to a fair and decent wage. It should not be confused with the right to "equal remuneration for equal work," which is captured in Paragraph 4 and is an equality/anti-discrimination provision. It also does not *per se* impose an obligation on States to ensure remuneration of migrants at a level above nationals.

(11) The obligation to inform individuals of working conditions, labor laws and means of seeking assistance and legal support can be found in several instruments. Article 6 of the ICESCR obliges States Parties to provide technical and vocational guidance, while Article 2 of ILO Convention 97 requires States to provide migrants with an "adequate and free service to assist migrants for employment . . . in particular to provide them with accurate information."²⁶⁰ Article 7 of the same convention requires ILO Members to ensure that any public employment services provided to mi-

259. UDHR, *supra* note 31, art. 23.

260. ILO Convention No. 97 concerning Migration for Employment (Revised), July 1, 1949, 1616 U.N.T.S. 120.

grants are rendered free of charge.²⁶¹ The IMBR's obligation to inform migrants, as per the commentary to Article 2 above, includes the responsibility of States to legislate or otherwise ensure that employers inform their migrant employees as required by this Article. Every migrant worker should be informed, when beginning employment, in a language he or she understands, of his or her labor rights in the receiving state.

(12) *Issues Raised by Paragraph 2:* In addition to "fair and just remuneration," many international instruments (ICMW Article 25, ICESCR Article 7, ACHPR Article 15, ILO Convention No. 97 Article 6, CEDAW Article 11) speak of "equal remuneration for equal work." This principle can mean both equal remuneration between categories of migrants (e.g. between women and men, or migrants of different ages and ethnicities) and between migrants and non-migrants. The principal is thus important to preventing both inter-migrant discrimination and discrimination between migrants and citizens. Therefore IMBR embraces both such interpretations.

(13) *Origins and Purpose of Paragraph 3:* This paragraph is inspired by the nearly identical language found in ICMW Article 21. Article 8 of ILO Convention 143 (23 ratifications) prohibits States from expelling legally present migrants on the basis of loss of employment. Similarly, Article 8 of ILO Convention 97 prohibits the expulsion of migrants whose employment is terminated on the basis of illness contracted or injury sustained subsequent to the migrant's arrival. The IMBR's wording implies that the only legitimate way to change or terminate a migrant's work permit will be as a result of a legally enacted process, and after ensuring the migrant's right of due process.

(14) *Origins of Paragraph 4:* The protections found in Paragraph 4 most closely echo Articles 25 and 54 of the ICMW and Article 6 of ILO Convention 97. Similar language can be found in ICESCR Article 7, which provides for fair wages and safe and healthy working conditions; ACHPR Article 15, which asserts the right to work under equitable and satisfactory conditions; Articles 10 and 12(g) of ILO Convention 143; and Article 5 of CERD.

(15) *History and Purpose of Paragraph 4:* This paragraph asserts that migrants shall be protected by laws protecting laborers. The itemized list of labor laws provided in this paragraph is inclusive and non-exhaustive. Where such laws do not already exist, such as in unregulated sectors of the economy that disproportionately employ migrants, this paragraph imposes an obligation on States to create such laws, thereby ensuring a basic minimum standard for migrants.

(16) The right to form trade unions is a more specific application of the right to freedom of association indicated in Article 10. The explicit right to form and join trade unions is found in UDHR Article 23, CERD Article 5,

261. *Id.*

ICCPR Article 22 and ECHR Article 11. ACHR Article 16 and ACHR Article 15 do not mention union organization, but do recognize the right to freedom of association, a right that has commonly been interpreted to encompass the right to join unions. However, it must be noted that none of these treaties explicitly recognizes the right to collective bargaining. In mandating this right, the IMBR draws inspiration from ILO Conventions 87 and 98 (150 and 160 ratifications respectively), which both provide for the right to union organization as well as the right to collective bargaining. The collective bargaining right is further guaranteed by ILO Convention 154 (40 ratifications), is part of the ILO's Philadelphia Declaration, and is implicit in the ILO Constitution.²⁶²

(17) *Origins and Purpose of Paragraph 5*: This paragraph is intended to ensure that migrants receive the full benefit of national laws regulating conditions of employment. Its wording is borrowed substantially from Article 25 of the ICMW, which prohibits any "derogation in private contracts from the principle of equality of treatment" for migrants with regard to conditions of employment.²⁶³

(18) *Origins and Purpose of Paragraph 6*: This paragraph specifically aims to eliminate the practice of 'binding,' whereby a migrant's continued stay in the receiving State is conditioned upon continued employment by the same (often sponsoring) employer. In Israel, a 2006 High Court of Justice ruling held that binding was no longer permissible in the Israeli agriculture, light industry and care-giving sectors.²⁶⁴ The practice does, however, remain lawful in the construction sector. In many other States, binding is commonplace and remains a major contributing factor in the creation of coercive and exploitative labor conditions, as bound employees are typically loath to report such conditions for fear of removal. The IMBR thus seeks to prohibit this practice.

(19) *Origins and Purpose of Paragraph 7*: ICMW Articles 54 and 83 guarantee migrant workers effective remedies against violations of the Convention, as well as the right to address complaints regarding violations of work contracts to a competent judicial, administrative or legislative authority. ICMW Article 25(3) requires States Parties to take all appropriate measures to protect the rights of migrant workers. ICMW Articles 54 and 83 guarantee migrant workers effective remedies against violations of the Convention, as well as the right to address complaints regarding violations of work contracts to a competent judicial, administrative or legislative authority.

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

263. ICMW, *supra* note 6, art. 25.

264. See *Kav LaOved Worker's Hotline v. Gov't of Israel*, [2006] (1) IsrLR (1) 260.

ARTICLE 14
PROPERTY RIGHTS

Migrants have the right to own property alone as well as in association with others. No migrant shall be arbitrarily deprived of his or her property. Any lawful taking shall be accompanied by just compensation at a level equal to nationals and that is prompt, adequate, and effective.

Commentary:

(1) *Purpose of Article 14:* Article 14 addresses an important civil and political right that directly impacts the livelihoods of migrants and their families residing in the migrant's host country, the migrant's country of origin or in a third country. The right to own property necessarily includes corollary rights to purchase, or otherwise lawfully acquire, manage, enjoy, administer, sell, transfer, remit or dispose of such property, whether free of charge or with compensation. The term "alone" denotes a migrant's right to own property solely and indivisibly in his or her personal capacity. The phrase "in association with others" denotes a migrant's right to own a single or multiple stakes in property interests that are owned by more than one individual, regardless of whether such other individuals reside in or are nationals of the migrant's host state, country of origin or a third state.

(2) *Problem Addressed:* As non-citizens, often with unregulated status, migrants are particularly susceptible to intimidation, discrimination and confiscation measures that may arbitrarily deprive them of their property. Article 14 therefore recognizes the central economic reality of property ownership among migrants and prohibits States from taking migrants' property without legal justification and compensation. The ability to own property, and have this property safeguarded against unlawful confiscation, is central to ensuring the economic safety, stability and prosperity of migrants and their families. As a tool of economic prosperity, property ownership can facilitate other related rights, including civil, social, health, education and other rights delineated in the IMBR. Moreover, migrants will, often by necessity, engage in economic transactions that involve purchasing, selling, transferring, remitting or otherwise disposing of various forms of property across, between and within State boundaries.

(3) *Origins of Article 14:* The right to own property and the concomitant right against the arbitrary deprivation of property have long been recognized in the Universal Declaration of Human Rights (UDHR).²⁶⁵ These interrelated principles, including the right to just compensation, have also been affirmed

265. UDHR, *supra* note 31, art. 17 ("(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.").

in other international²⁶⁶ and regional²⁶⁷ human rights and refugee instruments. Article 14 purposefully does not draw a distinction based on the migrant's legal status with regard to rights associated with property ownership.

(4) Article 14 places a legal obligation on States to ensure that all takings of property owned by migrants must be carried out in accordance with law. Property cannot be seized arbitrarily, without reasonable cause or just compensation, or pursuant to discriminatory policies. If a taking is carried out in accordance with national law, it must, by necessity, be compensated for under international law.²⁶⁸ Article 14 thus requires States to provide compensation to migrants and their families that reflects a just remedy for losses caused by a lawful taking.

(5) *History and Purpose—Definition:* The scope of Article 14 is inspired primarily by the 1951 Refugee Convention, the 1954 Statelessness Convention²⁶⁹ and the ICMW. The definition therefore covers all private possessions and assets that migrants may have acquired in their country of origin prior to entering the host country, in a third country *en route* to their present host country or in their host country.²⁷⁰ Furthermore, similar to the property rights set forth in the ICMW for migrant workers,²⁷¹ the IMBR guarantees this right for all migrants and their families regardless of their nationality, or their immigration or asylum status.²⁷²

(6) *Origins—Arbitrary Deprivation:* International,²⁷³ regional²⁷⁴ and mu-

266. ICMW, *supra* note 6, art. 15; CEDAW, *supra* note 209, arts. 15(2), 16(1)(h); CERD, *supra* note 80, art. 5(d)(v); Convention Relating to the Status of Stateless Persons arts. 13–14, Sept. 28, 1954, 360 U.N.T.S. 117; Convention relating to the Status of Refugees, *supra* note 9, arts. 13–14.

267. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217 (1982); American Convention on Human Rights art. 21(1), Nov. 21, 1969, 1144 U.N.T.S. 143, 9 I.L.M. 99 (1969); ECHR, *supra* note 35, art. 1; American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30–May 2, 1948, at 38, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003).

268. A.R. Albrecht, *Taxation of Aliens in International Law*, 29 B.Y.I.L. 145 (1952).

269. Convention relating to the Status of Refugees, *supra* note 9, art. 13; *see also* Convention Relating to the Status of Stateless Persons art. 13, Sept. 28, 1954, 360 U.N.T.S. 117.

270. Although Article 12's compensatory scope is restricted to lawful takings within migrants' host countries, the same human rights instruments that protect migrant property regardless of citizenship also protect against unlawful property expropriation in their countries of origin.

271. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 15, Dec. 18, 1990, 2220 U.N.T.S. 93.

272. Article 12 mirrors the detailed provisions of Articles 13 and 14 of the 1951 Refugee Convention. As such, the property rights elaborated in this Article are applicable to refugees as well as asylum seekers, regardless of their status. *See* Commentary to Article 1 defining who qualifies as a "migrant," Convention relating to the Status of Refugees, *supra* note 9, art. 1. As migrants, their status, whether regulated or not, does not impinge on their right to own property and not have it arbitrarily confiscated. As noted above, this right is limited by the legitimate public interests of and lawful provisions enacted by host states, as stipulated in particular IMBR Articles.

273. UDHR, *supra* note 31, art. 17(2); *see also* ICMW, *supra* note 6, art. 15.

274. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217 (1982); Council of Europe, ECHR, *supra* note 35, art. 1.

nicipal law²⁷⁵ have long prohibited arbitrary deprivation of property. The term “arbitrary” restricts the State’s ability to take, destroy, or otherwise render unusable, private property owned, in whole or in part, by migrants and their families. A State can only expropriate private property with reasonable justification, in accordance with laws of general application and subsequent to clearly defined, non-discriminatory procedures. As such, the State may not deprive a migrant of his or her property absent due consideration of the interests and legitimate expectations of the individual migrant and his or her family, which are required to be weighed against the legitimate public interests of the State. Correspondingly, the State may not take a migrant’s private property pursuant to a law that permits arbitrary deprivation of property.

(7) Although Article 14 prohibits arbitrary deprivation of property, it implicitly recognizes that States may have legitimate peacetime and wartime interests in taking or managing property to serve legitimate public ends. These include, but are not restricted to, regulating the purchase, use, distribution, transfer, remittance or disposal of various types of property and assets, in whole or in part, as well as securing “payment of taxes or other contributions or penalties.”²⁷⁶

(8) *History and Purpose—Compensation*: In circumstances of lawful taking by the State, Article 14 seeks to ensure migrants and their families receive just compensation for their losses. Hewing close to the language of Article 15 of the ICMW,²⁷⁷ the IMBR provides a more detailed compensation blueprint for States Parties engaged in lawful takings. If a taking, either in whole or in part, is carried out in accordance with law, the IMBR requires States to (1) provide compensation equal to, or exceeding, compensation levels accorded to nationals of the host state that represents full indemnity for the loss or damage sustained by the owner of the property and (2) this compensation must be delivered in a manner and speed that allows for the owner to be adequately compensated in a reasonable amount of time.

(9) *History and Purpose—Corollary Rights*: Implied in Article 14 are corollary rights and prohibitions implied by the right to property, such as: (1) the right of migrants to transfer property, including goods and assets, which they have brought into or acquired in the host state to another country or back to their countries of origin (including remittances);²⁷⁸ and (2) the

275. See, e.g., IR. CONST., 1937, art. 43; GRUNDGESETZ [GG] [Constitution] art. 14 (F.R.G.); S. AFR. CONST. sec. 25 (1996); Canadian Bill of Rights Act sec. 1 (1960); Act for the Recognition and Protection of Human Rights and Fundamental Freedoms S.C. 1960, ch. 44 (Can.).

276. ECHR, *supra* note 35, art. 1.

277. ICMW, *supra* note 6, art. 15. (“Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.”).

278. Migrants often need to transfer assets, including remittances, between countries, by virtue of migration patterns to and from countries of origin, host states or third countries. Article 12 therefore implicitly provides for a right to transfer assets within and outside the borders of the host

prohibition of racial and gender discrimination with respect to the rights of migrants to own property alone as well as in association with others.²⁷⁹

(10) Article 14 is particularly important in contexts of war and occupation and incorporates the protections afforded to protected persons under international humanitarian law and the laws of war. Prohibitions against the destruction and seizure of property of protected persons, inclusive of migrants,²⁸⁰ are long established in international law.²⁸¹ Finally, existing humanitarian law protections also extend to the property rights of migrants and their families in situations of internment or assignment of residence during war.²⁸²

state. This right is articulated in the 1951 Refugee Convention for refugees undergoing resettlement. *See* Convention relating to the Status of Refugees, *supra* note 9, art. 30. This right is of particular significance in the contexts of individual or mass removals, expulsions or deportations. *See id.* at art. 4. Article 12 also implicitly permits migrants and their families to transfer assets following lawful removal proceedings. At the same time, it prohibits States from confiscating and thus arbitrarily depriving migrants and their families of property through deportation, expulsion or other forms of removal. The right to transfer property, however, is not absolute. The transfer of goods and assets, in whole or in part, across state boundaries falls within the legitimate purview of host states. Transfers may be subject to State customs and taxation regulations and may be scrutinized and regulated to conform to legitimate national security policies.

279. As stated in Article 2 (Equal Protection of the Law), Article 12 is to be applied in a non-discriminatory fashion. It prohibits racial and gender discrimination vis-à-vis the rights of migrants to own property alone as well as in association with others, in accordance with the CERD (Art. 5(d)(v)) and the CEDAW (Art. 15(2) and 16(1)(h)), respectively. CERD, *supra* note 80, art. 5(d)(v); CEDAW, *supra* note 209, arts. 15(2) & 16(1)(h). In particular, Article 12 incorporates the detailed discrimination prohibitions elaborated in Articles 15 and 16 of the CEDAW. CEDAW, *supra* note 209, arts. 15 & 16. These include the obligation of State Parties to “give women equal rights to conclude contracts and to administer property and to treat them equally in all stages of procedure in courts and tribunals,” CEDAW, Art. 15(2), as well as to ensure “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration,” CEDAW, Art. 16(1)(h).

280. In particular, Article 73 of Protocol I “extends the full protection of the Fourth Geneva Convention to refugees and stateless persons ‘in all circumstances and without any adverse distinction.’” Weissbrodt, *supra* note 28, at 234.

281. In contexts of military occupation, moreover, the Fourth Geneva Convention prohibits “any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons . . . except where such destruction is rendered absolutely necessary by military operations.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 75 U.N.T.S. 287. In such contexts, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is considered a “grave breach” of the Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287.

282. If located within a belligerent state’s territory, “the civil capacity of internees in the territory of a belligerent will often be limited by war legislation, especially with regard to property.” Migrant internees, as with other civilian internees “will be justifiably limited in their ability to manage their property.” Weissbrodt, *supra* note 28, at 227. However, occupying powers cannot, with justification, limit the property rights of migrants and their families who are located within occupied territory to the same extent, “since their property cannot properly be considered ‘enemy property.’” *Id.* The Fourth Geneva Convention also stipulates in particular detail the property rights available to internees, including their right to retain articles of personal use, the necessity for States to establish procedures for taking internee possessions, as well as the creation of procedures for returning possessions upon the release or repatriation of internees. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 97, Aug. 12, 1949, 75 U.N.T.S. 287. In addition, the Fourth Geneva Convention requires Detaining Powers to “afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment

ARTICLE 15
INTEGRATION

(1) Because prolonged irregular status often leads to abuse of migrants, States should take appropriate measures to ensure that such situations do not persist. When providing opportunities for regularization, States may require that the migrant must show a substantial connection to the host country.

(2) States shall take appropriate steps to support migrants in learning the majority, national, or official language(s) of the State.

Commentary:

(1) *Purpose of Article 15:* States should respond to the issues associated with the integration of migrants in conformity with their duties to prohibit discrimination and respect migrants' economic, social, cultural, civil, and political rights.²⁸³ Failure to integrate migrants can create vastly different circumstances for migrants and nationals and thus become discriminatory.

(2) *Problems Addressed:* The dangers posed by irregular status extend beyond the area of employment, and affect migrants' rights to housing, education, social security, health, and social services.²⁸⁴ Furthermore, when migrants' irregular status is used coercively, migrants avoid interaction with law enforcement officials and other channels of legal protection.²⁸⁵ For these reasons, the IMBR takes the position that regularization promotes the human rights of migrants.

(3) *Origins and Purpose of Paragraph 1:* This paragraph requires States with large populations of migrants in irregular status to acknowledge all migrants and take appropriate action.²⁸⁶ In accordance with the sovereign right of States, such action could include effective and fair removal, on an individual basis and in accordance with other provisions of this document. However, Paragraph 1 implicitly acknowledges that migration creates mutually beneficial relationships and thus urges States to take steps to legally recognize the residency of all migrants. In providing such opportunities, States might consider the duration of residence; economic, social and family ties; community and linguistic integration; legal status; the best interest of the

and the law which is applicable." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 114, Aug. 12, 1949, 75 U.N.T.S. 287.

283. See Walter Kälin, *Human Rights and the Integration of Migrants*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 271, 273–274 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

284. RYSZARD CHOLEWINSKI, STUDY ON OBSTACLES TO EFFECTIVE ACCESS OF IRREGULAR MIGRANTS TO MINIMUM SOCIAL RIGHTS 73 (2005).

285. See *Living in the Shadows: A Primer on the Human Rights of Migrants*, *supra* note 207, at 9–10.

286. Cf. ICMW, *supra* note 6, art. 69(1) ("States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.").

child; and humanitarian grounds.²⁸⁷ Such factors are non-exhaustive.

(4) *Origins and Purpose of Paragraph 2*: This document recognizes that integration is a two-way process, and that States and migrants benefit from integration.²⁸⁸ Language acquisition is the most important mechanism for facilitating the integration of migrants.²⁸⁹ In most circumstances, proficiency in the majority language is crucial to meaningful employment opportunities, an understanding of one's legal rights, participation in civil society, and socioeconomic mobility.

ARTICLE 16

CITIZENSHIP

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

(2) Migrants who have not yet gained citizenship in their host country shall maintain the citizenship of their country of origin and should as far as possible enjoy all the rights and privileges of citizens of their country of origin.

(3) 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.

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

(5) States shall allow nationals to possess another nationality acquired automatically by marriage, and shall not remove the nationality of a citizen who marries a non-citizen unless the citizen takes affirmative steps to renounce his or her citizenship.

287. For instance, States might consider time within the country, criminal record, family ties, children born in the host country, as well as many other factors that evidence a migrant's positive social contributions as a "resident-in-fact." The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires that "[w]henever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation." ICMW, *supra* note 6, art. 69(2). See also *supra* Article 5 for a list of factors to be considered for relief from removal.

288. EUR. PARL. ASS., *State of Democracy in Europe: Measures to Improve the Democratic Participation of Migrants*, Res. No. 1618, art. 3 (2008) ("Integration is the key to the democratic participation of migrants and such participation favours integration. It not only facilitates participation but also leads to a better understanding of shared values and respect for cultural differences, both of which are essential for democratic development. It should always be regarded as a two-way process involving migrants and the majority population.").

289. EUR. PARL. ASS., *European Social Charter (revised)*, art. 19(11), ETS No. 163 (1999).

(6) 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.

Commentary:

(1) *Purpose of Article 16:* 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.²⁹⁰ States should also take reasonable measures to combat statelessness, and should not behave 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, in order for migrants to achieve full enjoyment of the social, political, cultural, labor, and other rights within this Declaration, it is necessary for States to 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,²⁹¹ this article also recognizes necessary limits²⁹² 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 which conflicts with international law norms. A non-exhaustive listing of such norms is directly invoked by this article's references to 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, of course, a migrant who gains citizenship in a host State ceases to be a migrant.

(2) *Problems addressed:* Migrants frequently encounter problems of legal

290. See UDHR, *supra* note 31, art. 15.

291. International law has long recognized citizenship and nationality laws as falling within the sovereign powers of States. See Convention on Certain Questions Relating to the Conflict of Nationality Laws arts. 1 & 2, Apr. 12, 1930, 179 L.N.T.S. 89; see also MICHAEL WALZER, SPHERES OF JUSTICE 39 (1983) (arguing that the survival of democratic communities depends upon their exercise of some control over membership status within their own national communities).

292. 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 291, 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.

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 the aforementioned circumstances, 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 very strongly encourages naturalization in the State of residence as a minimum protection of the migrant's nationality rights.

(3) *Origins and Purpose of Paragraph 1:* 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.²⁹³ 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.²⁹⁴ 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.

(4) The list of factors provided by this article for evaluating the strength of a naturalization claim is *non-exhaustive*, and these factors must be applied via a case-by-case analysis of 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 “illegal” status of one's entry into a State shall not absolutely bar one's ultimate naturalization in that State.

(5) *Origins and Purpose of Paragraph 2:* This paragraph presents a necessary elaboration on the right to a nationality and the right to be free

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

294. See generally 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).

from arbitrary deprivation of one's nationality elaborated in Article 15 of the UDHR.²⁹⁵ Where a migrant has not obtained a new citizenship, that migrant must not be rendered stateless or otherwise be deprived of any of the rights and privileges of a citizen of the State of origin merely because he or she may seek citizenship abroad and may no longer be present within the State of origin.

(6) *Origins and Purpose of Paragraph 3*: The right of expatriation is itself a norm of international law.²⁹⁶ 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 refusal to allow one's citizens to expatriate, more abstract concerns regarding the long-term preservation of State resources will not justify refusing expatriation.

(7) *Origins and Purpose of Paragraph 4*: 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.²⁹⁷ The right to acquire a nationality necessarily includes the right to preserve that nationality.²⁹⁸ Paragraph 4 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 children²⁹⁹ requires the acceptance of plural nationality under this paragraph. Traditionally, there has been some resistance in international law to allowance for dual or plural nationalities.³⁰⁰ However, there is a very strong movement towards the recognition of plural nationalities, and those States still formally rejecting the practice often acquiesce by failing to enforce internal laws requiring exclusive nationality.³⁰¹ The Drafting Committee 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.

295. See, e.g., UDHR, *supra* note 31, art. 15.

296. See, e.g., UDHR, *supra* note 31, art. 15 (noting that "no one shall be . . . denied the right to change his nationality").

297. See, e.g., ICCPR, *supra* note 1, art. 24.3; CRC, *supra* note 80, art. 7.1.

298. See CRC, *supra* note 80, art. 8.1.

299. See CEDAW, *supra* note 209, art. 9.2.

300. See T. Alexander Aleinikoff, *Between Principles and Politics: The Direction of U.S. Citizenship*, in FROM MIGRANTS TO CITIZENS 137–41 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000), reprinted in THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 90–91 (2008).

301. 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).

(8) *Origins and Purpose of Paragraph 5*: This paragraph 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.³⁰² Exercise of this right must not nullify the enjoyment of other essential rights, such as those regarding nationality. 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.³⁰³ Second, this paragraph further incorporates important considerations of gender equality as, in the case of illegal forced marriages, this paragraph prevents further harm from being visited upon forced migrants by ensuring that nationality in the involuntary spouse’s State of origin is not simultaneously and involuntarily surrendered upon marriage.

(9) *Origins and Purpose of Paragraph 6*: This paragraph is the clearest articulation of this article’s policy favoring the recognition of plural citizenship, as well as 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 this paragraph continues to respect States’ authority to draft domestic citizenship laws by not requiring any particular recognition of a (plural) citizenship right, this paragraph does suggest that 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. It must be read to complement Paragraph 5, 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.

ARTICLE 17

EDUCATION

On the basis of equality of treatment with nationals, children of migrants have the right to education. States should make primary education free and compulsory for children of migrants. States should encourage the development of secondary education and make it accessible to migrants and their children without discrimination.

302. See, e.g., UDHR, *supra* note 31, art. 16.

303. See CEDAW, *supra* note 209, art. 9(1).

Commentary:

(1) *General Purpose of Article 17:* This Article clarifies that the well-established right to education applies to children of migrants regardless of their legal status. The “equality of treatment” clause mandates that States provide educational opportunities for migrant children on par with nationals. The second clause of the Article gives practical effect to the “right to basic education” by creating a universal free and compulsory primary education regime. The third clause recognizes the value that host countries stand to gain by developing secondary educational opportunities and encourages States to grant migrants access to those opportunities.

(2) 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 children of migrants. The inaccessibility of education is particularly acute for the children of migrants whose parents are not lawfully settled in the host state. This situation violates international conventions that guarantee the right to education without discrimination of any kind. This Article both highlights the non-discrimination principle and provides a universal floor by guaranteeing primary education for all children.

(3) *Origins of Clauses 1 and 2:* The right to education and specifically the right to free and compulsory primary education was formally recognized in the UDHR,³⁰⁴ the ICESCR,³⁰⁵ the CEDAW³⁰⁶ and the CRC.³⁰⁷ This right to education has also been incorporated into regional organizations such as the Charter of the OAS and the ECHR.³⁰⁸ However, few national constitutions recognize the right to education. Article 13 of the French Constitution says

304. UDHR, *supra* note 31, 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.”).

305. ICESCR, *supra* note 33, 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.”).

306. CEDAW, *supra* note 209, 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”).

307. CRC, *supra* note 80, 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.”).

308. Charter of the Organization of American States art. 49, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (“The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge.”); 1st Protocol of ECHR, *supra* note 35, 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, the EU protocol, the 1st Protocol of European Convention on Human Rights and Fundamental Freedom, creates a “negative” right under which States may not deprive people of educational opportunities. Publicists have interpreted this negative construction of the right as deriving from the fact that the EU Member States did not think about the necessity of establishing a public education system, since each of the Member States already had a system in place. Further, since the adoption of Article 28 of the CRC all signatories have an affirmative obligation to provide free primary education to all children. CRC, *supra* note 80, art. 28.

that the organization of free and secular public education at all levels is a duty of the state.³⁰⁹ France, however, is an exception. In other countries such as Canada, the United States, and Germany, the right to education is not a recognized social right. Nevertheless, courts in these countries have effectuated a right to education for all classes of people by incorporating other principles such as equal rights. For example, although the United States Constitution does not discuss the right to education, the Supreme Court of the United States in *Plyer 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.³¹⁰ However, some States do not recognize the right to education in their constitutional laws. In Israel, for example, the right to education has not been included in the Basic Laws, which possess a constitutional character, though there are laws that establish the State's obligation to provide free education for all and require that all children complete twelve years of primary and secondary schooling.

(4) *History and Purpose of Clauses 1 and 2*: Education is a critical part of a person's autonomy because it "creates the 'voice' through which [other] rights can be claimed and protected."³¹¹ Thus, a lack of education limits a person's ability "to achieve valuable functionings [sic] as part of the living."³¹² This is especially true for migrant children who are disenfranchised because of their inability to speak the language or understand the social and political framework of the host country. Access to education will empower the children of migrants, and in turn their parents, by helping them develop: an understanding of their rights; information about the government mechanisms created to protect those rights; and the capacity and confidence necessary to access and secure other rights. Thus, a right to education furthers the legal, social, and political rights declared in the preceding Articles of this document.

(5) The "compulsory primary education" requirement affirms the universal floor for education. States must, at a minimum, require that all children complete primary education and provide funding for that education. The "equality of treatment" phrase emphasizes that children of migrants must have access to primary education that is the same or on par with the primary education provided to the children of nationals. Thus, for example, children of migrants also have the right to all services provided by a school to the student community, such as counseling, meals, and extracurricular activities including sports and arts programs. A migrant child's legal status cannot be

309. 1946 Const. pmbl. (Fr.).

310. *Plyer v. Doe*, 457 U.S. 202, 205 (1982).

311. United Nations Educational, Scientific and Cultural Organization, Right to Education Project Launches Website, <http://www.unescobkk.org/education/efa/efanews/news-details/article/right-to-education-project-launches-website> (last visited Feb. 11, 2010).

312. Right to Education Project, Defining the Right to Education, <http://www.right-to-education.org/node/233> (last visited Feb. 11, 2010).

used to disqualify him or her from access to services strictly limited to the classroom because of the special vulnerability of children, their lack of choice on how they came to live in the host State and their legal status. The “equality of treatment” phrase also requires States to “integrate” migrants’ children in the entire primary school system. States cannot segregate children of migrants into different schools because of their migrant or legal status.

(6) *Origins of Clause 3—Legal Status*: Article 13 of the ICESCR and Article 28 of the CRC support the right to education for children regardless of legal status.³¹³ This article states that the rights enumerated in these Conventions, including the right to primary education, will apply without discrimination of any kind. This parallels the language in the UDHR, which also emphasizes that all people are entitled to the rights enumerated in the Declaration.³¹⁴ That the right to education is not affected by legal status has also been recognized in national jurisprudence.³¹⁵

(7) *History and Purpose of Clause 3—Legal Status*: The guarantee of the right to education for all migrant children including those whose parents entered the host country illegally means that States cannot deny primary education to children of migrants based on legal status. Thus, resource-based distinctions are not justified at the primary school level. A State can argue that it cannot afford to provide secondary education to children of illegal migrants without limiting education services for everyone. However, the same argument cannot be used as a reason to deny primary education to children of illegal migrants.³¹⁶ States should also refrain from using school lists as a way to find and remove illegal migrants. Such a practice would force migrant parents to not send their children to school because of the threat of deportation—rendering the right to education a nullity for migrant children lacking sufficient legal status.

(8) Educating migrant children regardless of their legal status also serves a utilitarian purpose.³¹⁷ Education increases the country’s prosperity and development. Primary education is generally the way in which States teach children about the foundational principles of the society and the rules of acceptable behavior. States must recognize the probability that many migrants, regardless of legal status (excluding, perhaps, temporary migrants), have children who stay in the host country for long periods of time. As such,

313. ICESCR, *supra* note 33, art. 2; CRC, *supra* note 80, art. 2.

314. UDHR, *supra* note 31, pmbl.

315. *Plyler*, 457 U.S. at 205 (stating that a State may not “deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted to aliens”).

316. *Id.* at 220 (distinguishing between illegal immigrants who are responsible for the criminal act of living in the U.S. without authorization, and their children, who are not responsible for their situation and therefore cannot be punished or discriminated against).

317. *Id.* at 221 (noting that education was a matter of “supreme importance” and emphasizing the significant social costs the nation will bear if some groups would be denied “the means to absorb the values and skills upon which [the] social order rests.”).

host States have an interest in educating the children of those migrants while they remain within their territory in an effort to ensure their positive contribution to society.³¹⁸

(9) *History and Purpose of Clause 3—Development of Educational Opportunities*: The hope that States will develop secondary educational opportunities has been mentioned in numerous international legal sources, such as the UDHR,³¹⁹ ICESCR,³²⁰ and CRC.³²¹ This article, in fact, adopts the wording of Article 28 of the CRC. However, it does not specifically include the elaborations mentioned in CRC, Article 28(c)–(e).³²² This article does not include these specific requirements because the “equality of treatment” phrase is an overarching theme throughout the article that captures the essence of the three sub-sections.

ARTICLE 18

FAMILY RIGHTS

(1) Migrant families are entitled to protection by society and the State, irrespective of the citizenship status of any member of the family.

(2) For the purposes of this Declaration, the term “members of the family” refers to persons married to migrants or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as or are the substantial equivalent to members of the family according to applicable legislation or applicable agreements between the States concerned.

(3) States shall take all appropriate measures to facilitate the reunification of migrant family members with nationals or citizens. Children with no effective nationality have the right to return to their parents’ country of origin and to stay indefinitely with their parents regardless of the children’s citizenship.

(4) Dependent family members of migrants have a right to derivative immigration status and timely admission to the country in which a migrant is lawfully settled.

318. *Id.*

319. UDHR, *supra* note 31, art. 26(1) (“Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”).

320. ICESCR, *supra* note 33, 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, and in particular by the progressive introduction of free education.”).

321. CRC, *supra* note 80, art. 28 (States “[e]ncourage 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.”).

322. CRC, *supra* note 80, art. 28 (“(c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.”).

(5) States should consider extending derivative immigration status to non-dependent family members of lawfully settled migrants.

Commentary:

(1) *Purpose of Article 18:* This article establishes the importance of the family and addresses family rights that are especially pertinent to migrants. The most crucial and basic social grouping is the family, fulfilling a host of functions in human life. This grouping is generally characterized by biological ties, but also by mutual dependencies. As migration can lead to extended periods of family separation and uncertainty, State treatment of the family can greatly impact the protection families receive in regard to other rights. The right to family is important to migrants, because migrants are particularly vulnerable when separated from their family. For migrants, the family's right to be together and the family's right to reunify once separated are of utmost importance.

(2) *Origins of Paragraph 1:* This paragraph defines the protection given by society and the State to the family grouping. A State is responsible for protecting families, with no discrimination between citizens and non-citizens. This right to protection stems from several international conventions: namely, the ICCPR,³²³ ICESCR,³²⁴ UDHR,³²⁵ CRC,³²⁶ Refugee Convention,³²⁷ CEDAW,³²⁸ and ICMW.³²⁹ By mentioning society in this paragraph, the social importance of the family is emphasized.

(3) *History and Purpose of Paragraph 1:* The conception of the family as the fundamental group unit of society is derived from social needs, biological connections, and dependency relationships between the individuals in the family unit. The right to protection of the family implies the right of family members to live together.³³⁰

(4) *Origins of Paragraph 2:* This paragraph broadens the definition of 'members of a family' in the ICRMW.³³¹ This broadening intends to protect alternate family arrangements common to migrants, especially refugees, such as *de facto* adoptions of nieces and nephews whose parents are casualties of war.

323. ICCPR, *supra* note 1, art. 23(1).

324. ICESCR, *supra* note 33, art. 10(1).

325. UDHR, *supra* note 31, arts. 12, 16(3).

326. CRC, *supra* note 80, arts. 8, 9, 10, 16.

327. Convention relating to the Status of Refugees, *supra* note 9, art. 12.

328. CEDAW, *supra* note 209, arts. 9, 16.

329. ICMW, *supra* note 6, art. 44.

330. U.N. Human Rights Comm., ICCPR *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses* (Art. 23) (July 27, 1990), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003).

331. ICMW, *supra* note 6, art. 4 ("For the purposes of the present Convention the term 'members of the family' refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.").

(5) *History and Purpose of Paragraph 2*: This paragraph defines what constitutes “members of the family.” The broad definition encompasses the diverse conceptions of the family and the desire to provide protection equal to existing human rights instruments. ‘Members of the family’ is defined to include different family structures according to the varying social, cultural, and religious characteristics of different societies, as well as family structures which are more common among migrants, especially refugees.

(6) *Issues Raised by Paragraph 2*: “Applicable law” should apply to the country of origin as well as international and human rights law, understanding that family ties are created in a particular cultural framework. Given the desire to protect familial relationships not necessarily recognized by applicable law, the phrase “equivalent” should be interpreted broadly in order to support less common family ties (e.g. de facto adoption, LGBT marriages).³³²

(7) *Origins of Paragraph 3*: The rights contained in this paragraph derive from the CRC’s right of a child to be raised by his or her family.³³³ 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.³³⁴ Therefore, understanding that the migration process can cause differences in citizenship and effective nationality between children and their parents, this paragraph ensures that citizenship will not prevent children from joining their parents, should they return to the State of origin.

(8) *History and Purpose of Paragraph 3*: A child should grow up in a family environment³³⁵ and should be raised by his or her parents.³³⁶ Children separated from their parents “face greater risks of, *inter alia*, sexual exploitation and abuse, military recruitment, child labour (including labour for their foster families) and detention.”³³⁷ 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.

332. See, e.g., Yogyakarta Principles, <http://www.yogyakartaprinciples.org> (last visited Feb. 19, 2010).

333. CRC, *supra* note 80, art. 9(1).

334. U.N. Comm. on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

335. CRC, *supra* note 80, pmbl.

336. See Adalah, Expert Opinion on the Right to Family Life and Non-discrimination, Open Society Justice Initiative (2008), available at [www.adalah.org/.../ECD-0822-Adalah-5-Expert_Opinion-RS-11.24.08\(ENG\)%5B1%5D.doc](http://www.adalah.org/.../ECD-0822-Adalah-5-Expert_Opinion-RS-11.24.08(ENG)%5B1%5D.doc); CRC, *supra* note 80, art 9.

337. See *General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, *supra* note 334.

(9) *Origins of Paragraph 4*: This paragraph builds on the foundation of the family as the fundamental group unit of society. More specifically, 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.” Additionally, the ICMW 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.”³³⁸

(10) *History and Purpose of Paragraph 4*: Building on Paragraphs 1 and 2, the right to protection of the family implies the ability of family members to live together.³³⁹ The European Court of Human Rights has upheld the right of a child (or of a substantial equivalent) to join her/his legal resident parents under the European Convention on Human Rights’ right to family.³⁴⁰ This paragraph applies only to lawfully settled migrants, and to dependent members, emphasizing the social importance of unity among dependent members of the family. Furthermore, distinctions among family members that follow the standard presented in Article 2, Paragraph 2 of this Document (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 Article 2, Paragraph 2 of this Document.

(11) *Issues Raised by Paragraph 4*: Given the broad definition of family members, this paragraph limits the right to migrate only to dependent family members of legally settled migrants.

(12) *Origins of Paragraph 5*: This paragraph is aspirational, but it follows from several human rights instruments that establish the family as the “fundamental group unit of society,”³⁴¹ deserving of State protection.

(13) *History and Purpose of Paragraph 5*: This paragraph encourages States to consider extending legal status to non-dependent family members of lawfully settled migrants. The phrase ‘States should consider’ provides a recommendation, rather than a binding statement, because of the aspirational nature of the paragraph, as well as the potential for abuse of such rights. Therefore, this paragraph leaves the right to reunify non-dependent family members to the consideration of the State.

338. CRC, *supra* note 80, art. 10(1); ICMW, ¶ 3, *supra* note 6, art. 44(2).

339. See ICCPR General Comment No. 19: *Protection of the Family, the Right to Marriage and Equality of the Spouses*, ¶ 5, *supra* note 330.

340. Sen v. The Netherlands, No. 31465/96, Eur. Ct. H.R. (2001).

341. See ICCPR, *supra* note 1, art. 23(1); ICESCR, *supra* note 33, art. 10(1); UDHR, *supra* note 31, arts. 12, 16(3); CRC, *supra* note 80, arts. 8, 9, 10, 16; ICMW, *supra* note 6, art. 44.

ARTICLE 19
ADDITIONAL CLAUSES

(1) Nothing in this Declaration shall be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act that limits, intrudes on, or interferes with the internationally recognized rights of others.

(2) Governmental, administrative, and other bodies charged with enforcement of human rights and fundamental freedoms should invoke this Declaration as appropriate in the recognition and development of principles, standards, and remedies.

Commentary:

(1) *Purpose of Article 19:* This article enumerates two fundamental principles of documents protecting and promoting human rights: the prohibition of the abuse of rights principle and the self-executing or directly applicable nature of the Declaration. The prohibition of abuse of rights clause prevents any entity or person from using the rights enumerated in this Declaration to deprive or hamper another person's ability to access and enjoy rights guaranteed elsewhere in the Declaration or in any other human rights document. The second clause encourages States to implement and enforce this Declaration and apply its development of international human rights norms.

(2) *Origins of Paragraph 1:* A clause prohibiting the abuse of rights is traditional in instruments that protect and promote human rights and freedoms. Such a clause was included as Article 30 of the 1948 UDHR,³⁴² Articles 5 of the ICCPR and ICESCR,³⁴³ and Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³⁴⁴ Further, national governments also adhere to this principle in domestic law: Article 4 of Charter of Fundamental Rights and Freedoms of the Czech Republic, Article 18 of the Basic Law of the Federal Republic of Germany, Article 10 of the Constitution of the Republic of Estonia, Article 25 of the Constitution of the Hellenic Republic (Greece), Article 34 of the Constitution of the Republic of Cyprus, Article 12 of the Constitution of the Slovak Republic and Article 17 of the Human Rights Act (United Kingdom).³⁴⁵

(3) *History and Purpose of Paragraph 1:* The general purpose of the

342. UDHR, *supra* note 31, art. 30 ("Nothing in this Declaration may 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 set forth herein.").

343. ICCPR, *supra* note 1, art. 5; ICESCR, *supra* note 33, art. 5.

344. ECHR, *supra* note 35, art. 17.

345. Charter of Fundamental Rights of the European Union art. 54, Dec. 7, 2000, *available at* http://www.europarl.europa.eu/comparl/libe/elsj/charter/art54/default_en.htm (last visited June 30, 2010).

prohibition of abuse principle is to prevent groups or individuals from deriving a right from the present document that allows them to “engage in any activity or perform any act aimed at destroying any of the rights and freedoms” recognized in this Declaration or any other human rights instrument.³⁴⁶ However, “this provision which is negative in scope cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed” by any human rights document.³⁴⁷ A State cannot rely on this provision to deny a right guaranteed in this Declaration unless it shows that (1) the group or person targeted attempted to use the right in question to deprive or hamper another person’s access to or exercise of a human right and (2) allowing the person or group to exercise the denied right would in fact facilitate the person or group’s ability to deny another of his or her rights.³⁴⁸

(4) *Origins, History and Purpose of Paragraph 2*: This Declaration is both a compilation of existing human rights norms and a statement of the continuing evolving standards of human rights. In this respect, the second clause encourages all institutions charged with the implementation and protection of human rights to apply the rights, standards and remedies enumerated in this document as appropriate. In applying any remedies enumerated in this Declaration, if more favorable remedies exist on the national level or in other human rights documents, those more favorable remedies should be applied.

346. See *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A), 1 Eur. H.R. Rep. 15 (1961).

347. *Id.*

348. See *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1 (1998).

INTERNATIONAL MIGRANTS BILL OF RIGHTS

ADDENDUM

On April 9, 2010, the Georgetown Immigration Law Journal, in partnership with the Global Law Scholars program at Georgetown University Law Center, the Minerva Center for Human Rights at Hebrew University of Jerusalem, and the Migration Studies Unit at the London School of Economics, hosted an expert symposium to discuss the International Migrants Bill of Rights (IMBR) and its accompanying commentaries. Divided into four thematic panels, the symposium sought to elicit expert feedback and to spur debate on the IMBR and crucial legal questions facing human rights protections for migrants.

This addendum highlights specific revision suggestions and unresolved questions, raised by panelists and participants during the symposium, which warrant more research and debate as the IMBR and commentaries are further refined during the 2010/2011 academic year.

Immediately following the symposium, the IMBR drafting team incorporated a small number of changes to the IMBR and its accompanying commentaries, three of which are elaborated below, in response to suggestions provided by invited participants. These modifications are reflected in the published version of the IMBR and commentaries in this issue of the Georgetown Immigration Law Journal.

First, during the Symposium's first panel, "Defining and Protecting Migrants in International Human Rights Law," participants noted that the draft definition¹ provided in Article 1(1) inadvertently excluded stateless migrants. Bill Frelick (Human Rights Watch), in particular, noted three problems with the draft definition: "(1) It would exclude stateless people who are not nationals or citizens of any state. (2) It does not convey the meaning at the root of the word migrant—which involves migration/movement. (3) The definition doesn't, but should, exclude dual nationals."² The current definition³ and its accompanying commentary seek to respond to and eliminate these definitional and protection gaps.

Second, Dr. Ryszard Cholewinski (International Organization for Migration), along with several participants, stressed that the commentary to Article 1(1) should more clearly delineate categories of migrants that are to be

1. The original definition of Article 1(1) read: "The term 'migrant' in this Declaration means a person outside of a State of which he or she is a citizen or national."

2. E-mail from Bill Frelick, Director, Refugee Policy Program, Human Rights Watch, to Ian Kysel, Georgetown University Law Center (Apr. 20, 2010, 13:01 EST) (on file with author).

3. Article 1(1) currently reads: "The term 'migrant' in this Declaration means a person who has left a State of which he or she is a citizen, national, or habitual resident."

included or excluded, including refugees, stateless persons, non-working tourists, diplomats, and international organization employees, among others. As a result, Paragraph 7 of the commentary to Article 1 has been expanded to more robustly address specific categories of forced migrants, regardless of whether they qualify for special status under international law.

Third, several participants asked whether the IMBR should also encompass internally displaced persons (IDPs).⁴ Following a vigorous debate, the IMBR Drafting Committee decided to exclude IDPs from the IMBR, because the rights delineated in the IMBR are specifically triggered once an individual leaves the internationally-recognized borders of their country of origin. As such, Paragraph 2 of the commentary to Article 1 states that the definition in Article 1(1) “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.”

Participants also highlighted areas in need of further debate and revision, both with respect to the document as a whole as well as with regard to specific Articles. Looking at the entire document, participants first stressed that the IMBR must guard against promoting retrograde protections, including with regard to family reunification and labor rights. Dr. Cholewinski emphasized that subsequent revisions of the IMBR should pay particular attention to the latest developments in human rights protections for specific migrant categories, including migrant workers and refugees. Advances in human rights protection for particular migrant groups should be reflected in the IMBR and, as far as possible, these rights should be applied to migrants across the board.

Second, participants proposed that the IMBR incorporate innovative protections for specific vulnerable groups and categories. Professor Andrew Schoenholtz (Deputy Director, Georgetown University Institute for the Study of International Migration) argued that the IMBR should recognize protections relating to gender and physical and mental disability. Maria Teresa Rojas (Open Society Institute) and other participants also flagged the potential need to specifically recognize the rights of lesbian, gay, bisexual and transgender (LGBT) migrants, migrant domestic workers, particularly women, as well as migrants belonging to indigenous populations.

Finally, several participants argued that the IMBR should make a persuasive argument as to why States should look positively upon the IMBR and view protecting migrant rights as beneficial and in their self-interest. To do so, the final IMBR draft could include a persuasive note, perhaps as a separate introductory section, introducing the IMBR and its value for and benefit to States and migrants alike. This note, moreover, could incorporate

4. See U. N. Comm. on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

cutting-edge quantitative and qualitative social science research on the economic, social, and legal effects, among others, of international migration.

With regard to specific articles, participants provided concrete suggestions and raised important questions that will be addressed in the IMBR's subsequent revision process. For Article 1 (Definition of Migrant), two areas in particular need to be further explored: The migration life cycle and the status of war criminals and other excludable persons.

Article 1(1) does not capture all elements and stages of the 'migration life cycle.' Several symposium participants argued that the IMBR definition, or at least the accompanying commentary, should reflect a more holistic view of the migration life cycle, where relevant human rights protections are afforded to migrants prior to their departure, or attempted departure, as well as upon their return to their country of origin. Although the current definition in Article 1(1) uses the descriptive term "left" (to leave) rather than "outside" their home country to specify at what point an individual becomes a migrant, it still does not address the need for human rights protections during these two potentially vulnerable stages: pre-departure and post-return. Therefore, subsequent IMBR consultations and revisions should address the following two questions: (a) What protections do migrants need *before* leaving their home country and (b) what protections do migrants need *after* returning to their home country?

Should Article 1 of the IMBR exclude from its human rights protections individuals who have committed war crimes or other internationally recognized crimes, as delineated in the Rome Statute of the International Criminal Court?⁵ For instance, should individuals who fall within the refugee definition of the 1951 Convention relating to the Status of Refugees, and therefore who fall within the definition of Article 1(1) of the IMBR, be excluded from the protections of the IMBR if UNHCR or any State party deems the individual ineligible for refugee status, and in extension refugee protection, under the provisions of Article 1F⁶ of the 1951 Convention relating to the Status of Refugees? Former child soldiers present particularly challenging cases. Should former child soldier migrants who have committed internationally recognized crimes be excluded from the protections of the IMBR?

With respect to Article 2 (Equal Protection of the Law), panelists and participants debated whether the IMBR should incorporate a robust equality

5. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

6. Convention relating to the Status of Refugees art. 1F, July 28, 1951, 189 U.N.T.S. 150 ("The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.").

provision. Professor Gerald Neuman (J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School) cautioned that the application of the equal protection clause did not seem consistent across all provisions. Moreover, the IMBR does not adequately clarify how each article applies to different categories of migrants, especially given the diverse set of migrant categories covered by the Bill, including tourists, long-standing immigrants and irregular migrants, among others.

Article 3 (Non-Refoulement) and its commentary should consider the potential ramifications of safe third country agreements, as well as “chain refoulement.” In this context, the IMBR must clearly define the obligations of sending states, including the possibility of individual assessments of third countries. Additionally, is the emphasis on threats to a migrant’s “life or freedom” too narrow vis-à-vis other international conventions relating to State non-refoulement obligations? Participants suggested that the IMBR drafting team look to Article 3 of the European Convention, which pushes beyond the Convention against Torture to include inhuman treatment or punishment.

Due process rights in Article 4 (Due Process), according to several participants, should include an affirmative obligation to facilitate access to representation, especially since lack of representation is a leading cause of unnecessary and disproportionate migrant detention.

In the context of removal, numerous participants questioned whether Article 5 (Removal) unduly restricts due process rights at the border, particularly in relation to terminally ill or otherwise sick migrants. Moreover, in Article 5(1), the term “national security” must be clearly defined so as to preclude unnecessarily expansive interpretations, such as to justify deterrence measures. Mark Fleming (Rapporteurship on the Rights of Migrant Workers and their Families, Inter-American Commission on Human Rights) proposed that, in addition to collective removal, Article 5(2) may want to consider class-based removal, such as for individuals convicted of certain crimes or considered undesirable for other State-sponsored reasons.

Article 6 (Detention) also elicited lively debate. Numerous participants stressed that Article 6 did not provide a sufficiently clear presumption of non-detention. Detention should only be justified as a last resort and, when necessary, detention conditions must be humane. Additionally, several participants stressed that all legal proceedings and determinations must be individualized, so as to guard against potentially arbitrary removals, and to safeguard migrant rights to appeal conditions, legality and length of detention. Participants also suggested that the accompanying commentary should include a brief discussion of State accountability in cases where detention facilities are run exclusively or for the most part by private entities not subject to State guidelines and legal accountability mechanisms.

With regard to the rights of migrant children in Article 9, several participants questioned whether the IMBR extends these rights far enough by

setting children's rights on the basis of equality of citizens. Should the IMBR go further and provide for increased protection? Moreover, is there a right to a guardian or to counsel under international law for unaccompanied children?

At the concluding panel of the symposium, panelists and participants discussed the overall purpose and structure of the IMBR and commentaries. In particular, disagreement rested on whether the IMBR should solely reflect hard law, whether it should incorporate and clearly delineate both hard and soft law, or whether the document should be an exercise in norm promotion and implementation through a soft law framework. Professor Schoenholtz, in particular, identified the IMBR as an important step in articulating and establishing a set of international norms relating to migrant rights. As the concluding discussion made clear, such a project has the potential to establish important benchmarks in the area of migrant rights. The international community has only one chance to shape a migrants' bill of rights, and it is therefore imperative to fashion a comprehensive, holistic and far-reaching document.

HISTORY OF THE INTERNATIONAL MIGRANTS BILL OF RIGHTS PROJECT

The International Migrants Bill of Rights (IMBR) project began in 2008 as a part of Georgetown Law's Global Law Scholars program. Since then, students, academics, and practitioners with interest and expertise in migration issues and international human rights have discussed, commented on, and contributed to the project. As part of the ongoing effort to improve and publicize the IMBR, the Global Law Scholars collaborated with the Georgetown Immigration Law Journal to hold the IMBR Symposium on April 9, 2010, at Georgetown University Law Center. This history lays out the path this project has taken and the people who have worked along the way to make it the success it has been.

I. THE GLS PROGRAM

The Global Law Scholars program began in 2000 as part of Georgetown Law's response to the increasing internationalization of the legal field. The school's administration recognized that even practice areas that were previously domestic now often have an international component, and that lawyers with skills and training in these areas will be called on to address the increasing transnational component of all areas of legal practice. Furthermore, the administration sought a way to increase networking and connections among students with mutual interests and similar experiences.

The program seeks to connect internationally-minded students with previous exposure to and interest in issues raised by work across borders and cultures. Each year, approximately 15 students from the entering class of roughly 600 are selected through a competitive application process. Selection is based on international experience and career goals in international fields; proficiency in a language other than English is also required.

Throughout their three years in the program, GLS students are involved in international activities and coursework. Guest speakers active in various areas of international law address the group during their first year. During their second year, students participate in a special seminar focused on an international law topic chosen by the group. Students must complete an introductory course in public international law and a course focused on international trade. They must also complete Georgetown's upper-class writing requirement in a class with an international theme. Upon starting in the program, each new student is assigned an upper-class mentor. Upon completion of the program, GLS students graduate with special honors.

The program is largely student-run, with leaders chosen by the group to plan social events, facilitate the mentor program, and arrange all necessary

logistics. In addition, a faculty sponsor is responsible for overseeing the academic aspects of the program, including selecting guest speakers and selecting readings once students have chosen a topic for their second year seminar. The faculty sponsor for the beginning years of the program was Professor Julie O'Sullivan. Though she remains involved with the program, stewardship of the program passed to Professor David Stewart in 2009.

II. 2008–2009

The IMBR project began with the 2007 GLS entering class. At the end of their first year, the students brainstormed interesting international law topics around which to focus their 2L seminar. From among a diverse list of suggestions, from law of the sea to international water sharing agreements, the students chose to focus on the human rights of international migrants. This project had the advantages of drawing on Georgetown's rich resources in the field of migration law and policy, and dealing with a relevant, interesting topic that has not been fully addressed in international law. Also particularly appealing to the students was the idea of centering their academic work on a concrete long-term project, namely a document framing the international legal norms protecting migrants that could be promoted by states and civil society alike.

The idea of a migrants bill of rights also found strong support with T. Alexander Aleinikoff, then Dean of Georgetown Law, who had been calling for such a document in his own scholarship for years. Dean Aleinikoff took the lead on directing the seminar, assembling a reading list of important books and articles on human rights, migrant and refugee issues, and relevant international law. Drawing on his extensive contacts in the migration world, Dean Aleinikoff also put together an impressive list of speakers to discuss migration issues with the group during the fall semester, including President of the Migration Policy Institute Demetrios Papademetriou, Executive Director of the Institute for the Study of International Migration Susan Martin, migration law expert Andrew Schoenholtz, and others. The students also divided into groups to conduct research and give presentations on specific topics in migrants' rights.

As the Georgetown Law students spent the fall of 2008 exploring international migration and human rights issues, similar studies were taking place at schools around the world. As the project took shape, the GLS students reached out to partner schools and found willing and able collaborators. At Hebrew University in Jerusalem, Avinoam Cohen led a seminar of third and fourth year students in the undergraduate law program. The Hebrew University students were selected based on international coursework and interest, and many of them had participated in international moot court competitions and completed substantial coursework in the discipline. Basic courses in public international law and human rights law were prerequisite for participa-

tion, and the group conducted research and met with experts in the fields of migration and human rights to prepare for collaboration on the bill. The project was supported by the HU law faculty and the Minerva Center for Human Rights, headed by Professor Yuval Shany. In Cairo, Michael Kagan carried out a similar process of selecting students from his refugee law program at the American University. He led a diverse group, including students from Kenya and Canada, in researching issues related to refugees and forced migrants.

In early 2009, the Georgetown Law and Hebrew University students divided up into groups, each focusing on a specific theme. Topics included economic, social, cultural, and family rights. Meanwhile, the American University in Cairo students focused on refugee issues. Students researched gaps in the current international instruments and considered provisions to include in a draft bill. They also familiarized themselves with some of the political issues that could prevent provisions from gaining acceptance among states and in the international community.

New technologies greatly facilitated the students' global collaboration. Within each small group, students discussed their topics extensively via email, chat programs, and Skype. Students also reported on their progress and discussed planning and strategy issues at internet meetings attended by the entire group from all three schools, which was made possible by Georgetown's state-of-the-art classrooms and video conference technology. Time differences, of course, caused some problems, as did language differences and divergent collaborative styles, but students were able to work through these issues and learn valuable lessons about international legal work.

The culmination of a year of academic work on these topics was a four-day meeting in London in April, 2009. The first two days were spent drafting language for the bill, followed by two days of discussion and editing. The meeting was hosted by Georgetown's Center for Transnational Legal Studies. The Georgetown Law delegation was led by second-year students Randy Nahle and Lorinda Laryea and advised by David Stewart, a long-time veteran of the State Department's Office of the Legal Adviser and visiting professor at Georgetown Law. The group from Hebrew University was led by Avinoam Cohen and included nine students. The six students from American University in Cairo were led by Michael Kagan. Dean Aleinikoff was able to join the group for a debriefing session at the end of the weekend.

Upon arrival in London, the students met their international partners for the first time. The groups that had been working together virtually worked together during the first two days to draft the language of the articles pertaining to their subject areas. The students often used the phrasing of existing human rights instruments, such as the UDHR, ICCPR, and ICESCR, but they also brought to the table their own research over the last nine months and their perspectives on the strengths and weaknesses of the existing documents.

As a group, all of the students from all three schools went through article by article and voted on the provisions drafted by their peers. Discussions surrounding the language of the bill were vigorous and thorough, and students honed their negotiating skills by wrestling with a number of complex issues. Not only did the three delegations see the issues through the differing lenses shaped by the migration situations in their own countries, but they also came face to face with the differences in customs and negotiating styles that make international transactions interesting and challenging. The resulting document represented a number of compromises, but left some particularly intractable questions open for further consideration. Due to time constraints, the participants agreed to think more about these open questions in the following weeks and votes were held over email to arrive at a final first draft.

In addition to long days of active discussion, the participants also had some time to get to know each other and the city. At the end of the weekend, the students agreed to not only reconsider the open issues, and to continue researching and refining the bill, but also to stay in touch as they went their separate ways.

Directly following the meeting in London, Hebrew University students prepared preliminary commentaries explaining the initial drafting choices. These commentaries described the influence of existing international human rights instruments, various policy considerations, and the actual drafting process of the students in London. In May 2009, on the occasion of an international conference on Human Rights and Justice in Immigration held by the Minerva Center at Hebrew University, the Hebrew University group discussed the bill with Dean Aleinikoff. The students highlighted a number of particular provisions of the bill for reconsideration, setting the stage for the continuation of the project.

III. 2009–2010

With the new academic year, the group of students working on the IMBR project changed. Of the 11 Georgetown Law students who helped craft the original draft of the bill in London, only Brian Cooper, Julia Follick, Lorinda Laryea, and Randy Nahle remained substantially involved with the project in the fall. These four were joined by seven Global Law Scholars from the class of 2011. The student leadership also shifted, as previous leaders Laryea and Nahle studied abroad for a semester and a year, respectively. Though they remained involved with the project, Laryea and Nahle passed major organizing responsibility to second year student Ian Kysel. At Hebrew University, Avinoam Cohen selected a new cohort of students to continue the collaboration and work more closely on the commentaries.¹ Please see the attached

1. For a complete list of all students who have participated in the project to date, see the IMBR Contributors on page 397.

appendix for a complete list of all students who have participated in the project to date.

A. Revising the Bill and Writing the Commentaries

While the draft of the IMBR that came out of the London conference represented the hard work and negotiating of many engaged students from around the world, it was not a polished document ready to be shared and promoted amongst the international community. Over the summer of 2009, Dean Aleinikoff carefully read and edited the bill, making both minor stylistic changes and suggestions for larger structural changes. David Stewart, Avinoam Cohen, and Michael Kagan also provided extensive comments on the draft based on their experience and expertise with international human rights instruments.

Throughout most of the fall semester, the students met bi-weekly to discuss any changes suggested by Dean Aleinikoff, Professor Stewart, or their own continuing research and reflection. To focus this reflection, the students divided themselves into five groups covering various topical areas: equality and due process; removal and asylum; civil and political rights and citizenship; property and labor rights; and integration, education, family, and social and cultural rights. A sixth group examined the preamble and a definition of “migrant.” Each group was comprised of three to five students, including at least one student from Georgetown Law and at least one student from Hebrew University. These groups conducted further research on their assigned topics, discussed the existing language and potential changes using Skype or email, and started work on the commentaries.

Drawing from the papers prepared by the Hebrew University students as part of their 2008–2009 seminar and from discussions with their counterparts in the topical groups, the Georgetown Law students wrote commentaries in an agreed-upon format similar to that used in existing instruments. Of the eleven Georgetown Law students involved with the project during the 2009–2010 academic year, each student was responsible for the commentaries attached to one or two articles.

In writing the commentaries, students drew heavily upon the major instruments of human rights law. In addition, the students used all other forms of international law looked to by the International Court of Justice, including treaties, customary international law, the writings of publicists, and state practice. Though each did their own research, students used Google’s online forum to share particularly interesting or helpful articles, treatises, and websites. In addition, a shelf in Georgetown’s International Law Library was devoted to the project so that the students could share books as well. When they came across open questions or particularly tricky provisions, the Georgetown Law students again engaged their counterparts at Hebrew University in discussion and debate.

A polished draft of the bill was finished in late October, and the commentaries were completed over the winter holidays. Georgetown second-year Jordan Sagalowsky compiled the commentaries written by eleven different authors into one uniformly formatted and footnoted document. The bill was ready to be shared more widely.

B. *Expert Consultations*

This second draft of the bill was shared with local experts in human rights and migration issues in late October, 2009. Many of these experts were able to join the student authors for a productive three-hour session on November 16, 2009 on the Georgetown Law campus. Those experts present included Jeanne Butterfield (National Immigration Forum), Jesse Bernstein and Anne Sovcik (Human Rights First), Bill Frelick (Human Rights Watch), Juan Mendez (American University College of Law), and Debi Sanders (Catholic Charities). Dean Aleinikoff and Professor Stewart also attended and contributed to the discussions.

In addition to those in Washington, D.C., who were able to attend physically, project participants abroad were able to attend the meeting virtually. This was the group's first experience with WebEx, an internet-based platform that allows video and audio participation and document sharing during meetings. As is often the case, this technology did not function flawlessly, but those abroad were able to listen in to the discussions, if not participate fully. This experience served as a valuable introduction to this powerful technology, which has since been used for a number of international meetings to discuss the IMBR project.

The November meeting touched on many different aspects of the bill, but the session began with a discussion of the purpose and scope of the bill. The experts pushed the students to take a firm stance with regard to whether the document is aspirational or merely restating existing law, which led to important reflection on the goals and future of the project. The majority of the time was spent discussing the problems of defining migrants, equal protection, detention, and vulnerable migrants. The result was a major reworking of the due process and equal protection provisions, and the addition of separate articles focusing on detention, trafficking, and children. As the students continued their revisions after the meeting, these helpful discussions were referenced for various minor changes.

On December 4, 2009, Georgetown Law IMBR drafting team members Randy Nahle, Lorinda Laryea and Maher Bitar were joined in London by Justin Gest and Carolyn Armstrong of the Migration Studies Unit at the London School of Economics (LSE) for the second in a series of expert consultations. The outside experts present were: Professor Chris Brown (LSE Department of International Relations), Professor Paul Kelley (LSE Department of Government), Dr. Alexander Betts (Oxford University Department of Politics and International Relations), Dr. Eiko Thielemann (Academic

Chair, LSE Migration Studies Unit), Stephen Shashoua (Director, Three Faiths Forum), Juan Cock (Migrants Rights Network, on behalf of the Network's Director Don Flynn) and Peter Sutherland (UN Special Representative for Migration), who attended the final session of the Consultation. Students at Georgetown Law followed along via WebEx or listened later to a recording of the session.

At the meeting's outset, each expert provided a brief overview of his or her general impressions of the IMBR and accompanying legal commentary, as well as specific concerns and suggestions regarding specific articles. In comparison to the consultation in Washington, D.C., in November, most attending experts approached the IMBR draft from a political science and public policy vantage point, rather than from a legal perspective. From the beginning, the participants focused on how the IMBR could move forward and on the political hurdles that may consequently arise, as well as the advantages and disadvantages of a soft law approach as compared to a hard law approach. The participants then turned to discussing whether the IMBR should incorporate an international minimum standard or an equal protection/treatment of nationals standard. The experts also analyzed various options for enforcement of the bill and proposed additional articles in areas of the bill with less coverage.

The London consultation represented another step in the increasingly close working relationship between Georgetown Law and LSE's Migration Studies Unit (MSU). The MSU hosted the London meeting and also contributed to the April symposium. MSU's Justin Gest wrote an article on the bill for the Georgetown Immigration Law Journal and attended the symposium. Both schools agreed that future collaboration on the project would be fruitful and mutually beneficial.

Finally, on December 23rd, a third round of consultation was held in Jerusalem. The meeting was attended by all Hebrew University student-authors from both years, as well as by immigration experts, including: Dr. Yuval Livnat (Refugee Clinic, Tel Aviv University, formerly the Hotline for Migrant Workers and Physicians for Human Rights); Adv. Anat Ben Dor (Refugee Clinic, Tel Aviv University); Adv. Oded Feller (Association for Civil Rights in Israel); Adv. Reut Michaeli (Aid Center for Immigrants—Israel Reform Action Center); Adv. Nicole Maor (Israel Reform Action Center), Dr. Einat Albin (Tel Aviv University); and Dr. Tomer Broude (Hebrew University). Additionally, Dr. Adriana Kemp (Tel Aviv University) and key government officials who were unable to attend the meeting contributed comments. The group scrutinized and discussed the bill for over three hours, considering broad theoretical questions, including personal scope; the merits of hard law compared to soft law mechanisms; the appropriate balance of social, civil, and political rights; and the specific, nuanced wording from the perspective of practitioners.

Following the expert consultations, the students set out incorporating the

helpful comments and criticisms proffered by experts in three corners of the world into the bill. Georgetown Law and Hebrew University students discussed substantive changes and open questions until a third draft was finalized in March. This draft was circulated in advance of the symposium.

C. The April 9, 2010 Symposium

The April symposium was hosted by the Georgetown Immigration Law Journal. Much of the planning and organization for the event was done by Editor in Chief Jessica Schau and Special Events Editor and IMBR author Julia Follick. Two issues of the journal were devoted to printing the bill, the commentaries, and articles from leading academics dealing with the bill and the issues raised by it.

The journal invited potential authors in December, 2009 and January, 2010. The response was overwhelmingly positive, as experts from around the world expressed interest in the project and agreed to devote time to writing an article reflecting on the bill and the rights of migrants. Having solidified an illustrious list of authors, the organizers turned to inviting discussants to bring added expertise to the discussions on April 9th. The journal reached out to human rights organizations, the U.S. federal government, and the major players in the field of migration law and policy to assure that a wide range of perspectives were represented.

Funding for the symposium was provided largely through generous assistance from Georgetown Law. The Minerva Center for Human Rights at Hebrew University and the Migration Studies Unit at the London School of Economics also made essential contributions, making the event a truly global collaboration.

IV. NEXT STEPS

In the 2010–2011 academic year, new cohorts of students will be integrated into the project at both Georgetown Law and Hebrew University. The MSU is also looking for ways to select and support a group of students who can eventually join the collaboration. Students will focus on revising the bill in light of the wealth of comments generated by the April symposium and ongoing meetings with experts. In addition, a new phase of the project will begin, focusing on advocating the bill in the international human rights field. This undertaking will include the study of successful and less-successful efforts at creating international human rights norms, discussions with practitioners, and potential participation in conferences such as the Global Forum on Migration and Development. Students, primarily those at Hebrew University, will also begin compliance studies to determine the degree to which sample countries have already implemented the provisions called for by the IMBR.



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