



# INTERNATIONAL MIGRATION LAW INFORMATION NOTE

## IML INFORMATION NOTE ON

# ACCESS TO JUSTICE: A MIGRANT'S RIGHT

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*The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.*

Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada<sup>1</sup>

## Introduction

It is stating the obvious that migrants have rights<sup>2</sup> and that human rights are also migrants' rights. It is equally a truism that there exists nevertheless a dire gap between the rights migrants hold by virtue of law, and their practical implementation. The right to access to justice is therefore critical in such a context: the more precarious and difficult the situation of a migrant is, the more crucial it will be for this person to have a meaningful access to ways to claim his or her rights. Access to justice is at the heart of effective protection of human rights. It is also fundamental in addressing impunity, providing remedies and ensuring the rule of law.

The purpose of this Information Note is to provide a broad overview of the right to access justice and its specific content *for migrants*, regardless of their legal status, and in light of States' obligations laid down in international instruments and relevant jurisprudence. The right will first be dissected by its general elements, then discussed as applied to various particular legal categories of migrants, and through the different steps of the migration journey. The emphasis of the Note is on setting out why equal, effective and meaningful access to justice is particularly critical for international migrants.<sup>3</sup> The interpretation of *justice* taken is focussed on the accessibility of *rights* and the functioning of legal mechanisms, as opposed to social justice as a method of development or reliever of poverty.<sup>4</sup>

## I. Defining access to justice

“Access to justice” typically refers to the ability of persons to make full use of the existing legal processes designed, formally or informally, to protect their rights in accordance with substantive standards of fairness and justice.<sup>5</sup> This applies to every stage of the “justice chain,”<sup>6</sup> from rights awareness within civil society, to the conduct of law enforcement entities, or from having a case heard in a court of law, to seeking and obtaining an appropriate remedy.<sup>7</sup> In other words, it is the possibility to make use of the processes established to provide redress where rights may have

been violated.<sup>8</sup>

A general acceptance of the right to access to justice - albeit under differing terminologies - can be elicited from all relevant universal, international and regional human rights instruments: Article 8 of the 1948 Universal Declaration,<sup>9</sup> Articles 13 and 6(1) of the European Convention on Human Rights (ECHR)<sup>10</sup> and Article 25 of the American Convention,<sup>11</sup> as well as Article 7.1 of the African Charter on Human and Peoples' Rights,<sup>12</sup> Article 47 of the Charter of Fundamental Rights of the European Union<sup>13</sup> and Article 9 of the Arab Charter on Human Rights,<sup>14</sup> all make direct commitments to the protection of this right. Similarly, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) refers to the right to an effective remedy<sup>15</sup> for all the rights in the Covenant and for all individuals including “migrant workers [...] and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party.”<sup>16</sup> Further, Article 14.1 of the ICCPR provides that “all persons shall be equal before the courts and tribunals.”

The right to an effective remedy for everybody is furthermore recognized in many national constitutions.<sup>17</sup> For example, the access to justice is a constitutional right for all in the United Kingdom and the Supreme Court eloquently set out that for the Courts to be able to perform their duties and roles, such as ensuring that “the executive branch of government carries out its functions in accordance with the law [...] people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter.”

Access to justice can also be understood as ensuring that the legal and judicial process and outcomes are themselves “just and equitable.”<sup>18</sup> The right is not necessarily fully realised when only a system securing access to justice is put in place; instead, what is all-the-more critical is that the individual is enabled to practically access such system, including in view of their individual disadvantages and vulnerabilities. Access to justice is ultimately achieved when the decision made by the relevant justice institutions is enforced and implemented. For example, victims of trafficking might have access to existing mechanisms to initiate a process and seek remedies, but very frequently these remedies are not delivered because the victim of trafficking is repatriated and there are no predictable and systemic mechanisms for transferring remedies between countries.<sup>19</sup>

In other words, what counts is that such remedies are effective and that they provide fair and impartial justice, without discrimination.<sup>20</sup> Where relevant, for example, adequate information must be provided and financial barriers must be neutralised (e.g. prohibitive court fees), while non-

discriminatory, free legal assistance needs to be provided by the State if indispensable for the effective access to court of an individual or particular groups of persons.<sup>21</sup> As will be mentioned below, this is usually the case for the migrant populations. In the same way, judges, lawyers, and law enforcement personnel all have a critical role to play in ensuring that migrants have an effective access to justice.<sup>22</sup>

Alternative dispute settlement mechanisms, such as quasi-judicial procedures, can also provide access to justice “as long as their decisions may ultimately be supervised by a judicial body and conform to a general requirement of fairness.”<sup>23</sup> If not judicial, the competent body needs at least to guarantee a certain quality of decisions. As an example of non-judicial body, alternative dispute mechanisms can play an important role: such alternative dispute mechanisms are most frequently based on a consensus between stakeholders and it is the community of stakeholders who monitors and ensures compliance.

In essence, States have a legal obligation according to international law to ensure that all individuals, including migrants and irrespective of their status, are able to access competent, impartial judicial and adjudicatory mechanisms equally and without discrimination.<sup>24</sup>

## II. The right to access justice for migrants — relevance and challenges

Migrants in irregular situations, particularly, usually have no voice in the public and political fora.<sup>25</sup> Access to justice is all the more crucial for them because the vast majority do not have the right to vote and thus can only rely on the judiciary to claim their rights.<sup>26</sup> Thus, in addition to being a right in itself, meaningful access to justice is also a tool to ensure fulfilment of other rights. Moreover, providing migrants, regardless of their status, with a standing in the judicial system reduces risk of impunity for wrongdoings within the society in general. This contributes not only to migrants’ protection, but also to strengthening the rule of law, social cohesion and stability.<sup>27</sup> As put very eloquently by the UK Supreme Court:

*The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the “users” who appear before them, [...]. At the heart of the concept of the rule of law is the idea that society is governed by*

*law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law.*

*In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other. [...]*

*But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.”<sup>28</sup>*

The fundamental importance of access to justice for migrants and its positive impact on the society at large has also been recognised in the final draft of the Global Compact for Migration.<sup>29</sup> States notably committed to “[p]rovide newly arrived migrants with targeted, gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations, including on [...] access to justice to file complaints about rights violations.”<sup>30</sup>

Yet, the often precarious access to justice of migrants, particularly those who have no regular status, is due to both situational and institutional factors.<sup>31</sup> Mainly, discriminatory or inadequate social policies (e.g. in the areas of health, housing, education and social security), laws or decisions<sup>32</sup> may prevent migrants from seeking or obtaining redress in



cases of violations of their rights.<sup>33</sup> The effects of several different grounds for discrimination sometimes combine to impede access to this right.<sup>34</sup> Limiting factors include insufficient information about legal redress available to migrants; lack of awareness of equality legislation on the part of judges and lawyers; lack of protection for complainants and witnesses; and the inadequate application of burden-shifting provisions, which are particularly important in discrimination cases.<sup>35</sup> Even where the law is not directly discriminatory, the justice system may be too complex, expensive, under-resourced, overly centralized, or not appropriately sensitive to migrants' needs, making access to justice only a virtual right as opposed to an effective one.

### **III. Elements of the right to access justice**

#### **1. General Principles**

In essence, the core elements of the right to access justice are generally considered to be: 1) the recognition as a person before the law; 2) the equality before the courts and tribunal; 3) the right to a fair trial and due process guarantees and 4) the right to an effective remedy.<sup>36</sup> For remedies to be accessible to migrants, these general principles not only require that States ensure "access to justice and to effective remedies through national courts, tribunals and dispute-settlement mechanisms, regardless of their immigration status"<sup>37</sup> but also that States "ensure that they are not threatened with or subject to arrest, detention or deportation when reporting crimes, labour rights violations, and other forms of human rights violations."<sup>38</sup>

The following sections are an overview of how those elements translate for migrants.

##### **a. Non-discrimination in the access to justice**

The cross-cutting principle of non-discrimination, firmly established in international human rights law, requires States to grant access to justice to all individuals, including migrants, regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>39</sup> The Human Rights Committee (CCPR) set out clearly that States have the obligation to guarantee the rights found under the ICCPR without discrimination between citizens and migrants.<sup>40</sup> With regards to access to justice, the CCPR has clarified that "[a]liens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, inde-

pendent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit of law."<sup>41</sup> The CCPR has further established aliens' entitlement to equal protection by the law and the prohibition of discrimination in the application of the rights to which non-citizens are entitled.<sup>42</sup> The Inter-American Court of Human Rights has also stated that the right of access to justice is granted equally to irregular migrants.<sup>43</sup> It bears noting in addition that the Durban Declaration and Programme of Action (DDPA) on non-discrimination calls for the elimination of discrimination in many areas, including access to justice, and adds, regarding migrants, that States should promote and fully protect migrants' human rights and fundamental freedoms without regard to legal status.<sup>44</sup>

To enable the enjoyment of the right to access to justice without discrimination, adequate information (outreach) must be made available to migrants, in a language that they understand, as well as institutional support (including financial and legal assistance, when needed). Competent authorities need to be accessible geographically (decentralized). Positive obligations of States also include the adoption of non-discriminatory legislation, the removal of any legal, social or economic obstacle preventing migrants from the enjoyment of all elements of the right of access to justice, from the access to a judicial mechanism, through the right to a fair trial, to the right to an effective remedy, etc.<sup>45</sup>

##### **b. Equal and effective access to a tribunal**

A fundamental pre-requisite for achieving the access to justice of migrants is the possibility to have a case heard in a court of law. The ICCPR clearly states that "[e]veryone shall have the right to recognition everywhere as a person before the law,"<sup>46</sup> and the ICRMW refers explicitly to the right of migrant workers and members of their family to "recognition everywhere as a person before the law."<sup>47</sup> The European Court of Human Rights (ECtHR) has held that the right to a "fair and public hearing," established by Article 6 of the ECHR, not only guarantees the fairness of legal proceedings already pending, but also includes the "right of access to the courts" (i.e., the right to have one's claims brought before a court or tribunal).<sup>48</sup> Furthermore, according to the ECtHR, the remedy must be accessible in practice; for example, there must be effective notification procedures.<sup>49</sup>

Accordingly, States must ensure that migrants are granted the right to standing and recognition before the law.<sup>50</sup> This possibility is however often impaired for migrants by several factual and legal obstacles: excessively narrow concepts of legal standing, lack of legal representation or access to the

designated lawyer, particularly if a migrant is in detention. In other situations, migrants may lack identity and other documents required to start legal proceedings. In addition, the standard of proof can make it virtually impossible for a person whose documents have been lost or destroyed along the migratory path to obtain a decision – let alone a favourable one.<sup>51</sup> This is particularly relevant for status determination but can be an issue in other areas of litigation such as issues related to evidence of property or contractual rights. Furthermore, in the absence of “firewalls” between the judiciary or other justice system and the immigration legislation and law enforcement, migrants will fear to claim their rights, which effectively nullifies their access to a court of law.<sup>52</sup> The Inter-American Court ruled in this regards that, when fear of deportation or denial of free public legal services to immigrants prevents immigrants from asserting their rights, the right to judicial protection is violated.<sup>53</sup>

As regards the definition of “tribunal” or “court”, this notion has generally been interpreted as encompassing all bodies established by law to have a judicial function, possessing the power to give binding decisions, based on law and in accordance with procedures prescribed by law, as well as having a certain quality of independence and impartiality.<sup>54</sup> As regards impartiality, it encompasses both a subjective and an objective element, as the judges need to be subjectively free of bias, including deriving from racism or xenophobia, and the functioning of the Tribunal needs to offer sufficient guarantees to exclude any legitimate doubt on this regard.<sup>55</sup> The right to access justice can be facilitated through mechanisms such as national human rights institutions, equality bodies and ombudsman institutions, as well as community-based crisis centres, where migrants can report discriminatory treatments and other alleged violations of their rights.

As put by the former Special Rapporteur on the rights of migrants, “the only way to ensure that a distinction between a national and a non-national (migrant) is not discriminatory is to ensure that courts and tribunals can effectively review the decisions affecting the rights of individuals, whatever their status is. This can only happen if, as required by international law, access to justice is available to all, regardless of migration status.”<sup>56</sup>

### **c. Fair proceedings and due process guarantees**

Access to courts alone is not sufficient to ensure access to justice. The proceedings must respect certain guarantees of fairness. This right applies equally to all parties. According

to the ICCPR, this applies for both criminal cases and civil suits, and for everyone, hence also non-nationals including migrants.<sup>57</sup>

Fair proceedings and due process guarantees are certainly crucial in criminal matters, but they are very important in civil and administrative cases as well. As the Special Rapporteur on the Human Rights of Migrants pointed out, “immigration administrative decisions can have consequences which are worse than criminal law decisions: an erroneous immigration decision can send someone to arbitrary detention, torture or even death. [...] Criminal law has evolved guarantees of fair trial and of the rights of the defence. Administrative law must provide similar guarantees when the consequences of the decision can be similar or worse. [...] Fast track processes [must] incorporate appropriate procedural safeguards, including the opportunity to be heard [for migrants].”<sup>58</sup> Any migrant detained should be informed of their rights, including the right to be represented by a lawyer. Adequate legal counselling and representation should be promptly available and free of charge when required including in border or transit zones and in detention or reception centres.<sup>59</sup> The information should be provided in a language well understood by the migrant, who should have access to an interpreter during all relevant proceedings when necessary.<sup>60</sup>

The right to a fair trial encompasses the right to timely resolution of disputes, but it may be limited to certain fields of application, depending on the system applicable. At the universal level, the ICCPR establishes the right to be tried without undue delay for any person subject to a criminal charge.<sup>61</sup> In criminal cases, the relevant time period goes from the formal charging of the accused to the final judgment of the appeal. At the regional level, the ECHR guarantees a hearing “within a reasonable time” in both civil and criminal cases.<sup>62</sup> The American Convention on Human Rights (ACHR) expands the material scope of application of this element of the right and provides for a hearing “within a reasonable time” in criminal proceedings and in cases of “a civil, labour, fiscal, or any other nature.”<sup>63</sup> What constitutes a “reasonable time” is a case by case assessment, which should, amongst others, take into consideration the complexity of the case, the behaviour of the accused or party, and the way the matter was handled by the administrative and judicial authorities, and what is at stake for the migrant concerned.<sup>64</sup>

Procedures need to guarantee a fair distribution of legal burdens and possibilities to present evidence between the parties.<sup>65</sup> The right to an effective appeal process is also an essential element of fair proceedings. The fact that access to the highest court is granted does not necessarily mean that the right to appeal has been fulfilled; the ECtHR has





held that there must be a realistic possibility of lodging an appeal within prescribed time limits,<sup>66</sup> and that the execution of the judgment must be suspended from the moment the appeal is filed.<sup>67</sup> Similarly, the CCPR has held that there must be an “opportunity for effective, independent review of the decision” and this review should take place before the execution of the decision.<sup>68</sup> This access to an effective appeal is of critical importance in migration law, as is the suspensive effect of such appeal: the Committee on the Elimination of Discrimination against Women has confirmed that the suspensive effect of lodging an appeal is especially important “in the area of asylum and migration law, where [otherwise] appellants may be deported before having the chance to have their cases heard.”<sup>69</sup>

Judges and attorneys have an important role to play in their application and practice of the law, to ensure the fairness of proceedings, in order to guarantee a concrete absence of discrimination of migrants by the judicial and other institutions.<sup>70</sup> The protection and assistance of the consular or diplomatic authorities, based on international law,<sup>71</sup> is also pivotal to ensure migrants’ access to due process guarantees in cases where their rights have not been fully respected by the destination state.<sup>72</sup>

#### **d. The right to an effective remedy**

The fulfilment of the right to have access to justice supposes the availability of a mechanism effectively allowing individuals, including non-nationals, to seek adequate redress for violations of their rights.<sup>73</sup> This right is enshrined notably in Article 2(3) of the ICCPR and Article 13 of the ECHR, as an accessory right, for which a violation can be established provided that a connection with the violation of another treaty right exists. In other words, the right to a remedy in both these instruments must be argued in connection with the alleged violation of another right guaranteed in the same treaty.<sup>74</sup> At the American and African level, a broader approach is taken, as Article 25 of the ACHR and Article 7(1) (a) of the ACHPR ensure the right to an effective remedy for all fundamental rights recognized by any human rights treaty, as well as domestic law of the relevant State. Both the ICCPR and the ECHR do not necessarily require the remedy to be decided by a judicial body, except for cases concerning violations of the right to life, prohibition of torture or inhuman treatment and enforced disappearances, which are intrinsically linked to the principle of non-refoulement in migration matters.<sup>75</sup> The ACHPR only requires a “competent national authority.”<sup>76</sup> Conversely, the IACtHR requires it to be a judicial remedy.<sup>77</sup>

The ECtHR jurisprudence establishes that a remedy is only effective if it is available and sufficiently certain, not only in theory but also in practice, and having regard to the individual circumstances of the case.<sup>78</sup> According to the CCPR, the effectivity requires that the remedy be adapted to special vulnerabilities, which is often relevant when migrants are victims of a right’s violation.<sup>79</sup>

The right to reparation or compensation also forms part of the rights to a remedy and therefore access to justice.<sup>80</sup> States need to ensure access to reparation, but have broad discretionary powers as regards the type of reparation. As a minimum standard however, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law stipulate that the reparation ought to be “proportional to the gravity of the violations and the harm suffered.”<sup>81</sup> According to the CCPR, “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>82</sup> While the right to an effective remedy including the right to reparations is applicable to all violations of human rights, reparations are of particular importance for gross human rights violations. This is also affirmed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which also gives further examples for satisfaction such as the public disclosure of truth and the restoration of the dignity of the victim.<sup>83</sup> For migrants specifically, reparation will have to be decided and provided notably when they have been arbitrarily or unlawfully detained or expelled.<sup>84</sup> In cases where reparations mechanisms are established as part of national transitional justice processes, states should consider the inclusion of migrants who have suffered human rights violations in the contexts covered by such transitional justice mechanisms.

## **2. Access to justice through the migration journey**

### **a. Access to justice at the border and upon entry**

While States have the sovereign prerogative to control the entry and presence of non-nationals within their territory,<sup>85</sup> they also have an obligation to respect the human rights of all migrants at the border in accordance with their obligations under regional and international law,<sup>86</sup> in application

of all human rights instruments.<sup>87</sup> States must indeed uphold the international human rights standards, including access to justice, for anyone over whom the State exercises jurisdiction - even when that jurisdiction is extraterritorial. The Human Rights Committee, the Committee on the Rights of the Child as well as the Inter-American Commission on Human Rights, all affirmed that borders are within the jurisdiction of a State and that migrants are entitled to their human rights at the border.<sup>88</sup> They all stressed that this covers also transit area, and that the responsibility is with the State that the migrants is seeking to enter.

Migrants can bring a cause of action against a border official – who can engage the responsibility of their respective State - before the national competent authorities first, and ultimately before regional or international instances, alleging a the violation at the border of rights outlined in the ACHR, ICCPR, CRC or the ECHR.<sup>89</sup> Migrants' rights at the border, including the right to access justice, are essential for migrants who may have suffered mistreatment while in border zones, as they are otherwise left without a means of redress if subsequently removed from the country where the abuse took place – which amounts to impunity.<sup>90</sup> Thus, ensuring that States respect migrants' right to access justice at the border is necessary for the protection of migrants' other rights.

Migrants are also entitled to a fair and effective process for determination of their status, upon or after their entry, under conditions that preserve human rights and the rule of law.<sup>91</sup> All those whose access to the territory or to procedures arguably engages rights guaranteed under human rights instruments, must have access to an effective remedy before a national authority.<sup>92</sup> In the emblematic *Hirsi Jamaa and Others v. Italy*, the ECtHR found that there was no such remedy because the migrants had been sent back to Libya without having been afforded the possibility to challenge this measure.<sup>93</sup> Article 47 of the EU Charter of Fundamental Rights provides for the guarantee for individuals alleging a violation of the rights guaranteed by EU law, to have automatically access to an effective remedy including effective “judicial protection against a refusal of access to the territory or access to the procedures involved.”<sup>94</sup> Furthermore, the ECtHR case law has established that under certain circumstances a State can be required to allow access to its territory to an individual upon arrival at the border if access is a pre-condition for the individual to exercise a right under the ECHR, for example the right to respect for family life and the right not to be subject to torture or inhuman and degrading treatment.<sup>95</sup> The Inter-American Court of Human Rights equally upheld the principle that migrants may access a territory in order to exercise an international right. It specifically emphasizes migrants' right to be heard in presenting an asylum claim at the border, even if that claim is

ultimately not granted.<sup>96</sup> The Court subsequently expanded this right to be heard by finding that even migrants on the high seas, who are not yet at the border, have the right to present their asylum claim in the destination country.<sup>97</sup>

The Committee on the Rights of the Child similarly stated that “State obligations under the [CRC] apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory [...] irrespective of their nationality, immigration status or statelessness.”<sup>98</sup>

In essence, States should establish mechanisms in the context of entry decisions to allow adequate time to assess the individual situation of all migrants, without discrimination, and with competent legal advice, representation, support, and access to all documents related to the case, including in order to properly identify individual protection needs and status and to arrange appropriate referral.<sup>99</sup> States must also prevent or suspend an expulsion until such an assessment has been done or an appeal against a negative decision has been examined and a decision rendered.<sup>100</sup> States must ensure that human rights violations at the border are promptly and properly investigated and that migrants have access to complaints mechanisms and redress.<sup>101</sup>

## **b. Employment: migrant workers and access to justice**

### *i. Structural problems and adverse employers' practices*

According to international standards, migrant workers enjoy the same rights as nationals in remuneration and conditions of employment.<sup>102</sup> This principle of equality of treatment also applies to irregular migrant workers.<sup>103</sup> However, structural gaps in the domestic implementation of this principle and legal protection generally, often create barriers to proper migrant workers' access to justice regarding rights deriving from their employment. National labour laws sometimes do not - or not sufficiently - consider certain categories of migrant workers, such as domestic workers or irregular migrant workers, or do not prescribe “firewalls” between labour law and immigration law enforcement. Further, some recruitment agencies operate from abroad so as to avoid being bound by the national labour laws, which works against the migrant workers and makes it virtually impossible to seize the justice system for lack of jurisdiction or other legalistic issues.<sup>104</sup> The same accounts for temporary migrant workers who “face hindrance in gaining access to justice given that the return to their countries of origin stipulated by the temporary labour migration programmes



creates a geographical barrier to claiming their rights.”<sup>105</sup>

This may result in making it virtually impossible for migrant workers to exercise the rights and freedoms granted by labour law to other workers, effectively resulting in discriminations.<sup>106</sup> Regular migrant workers are made vulnerable also to violations of their rights without them daring to access justice when migration laws condition their status on the continued sponsorship of their employer.<sup>107</sup> Due to their unfamiliarity with the legal system of the country of destination and their possible dependence on their employers coupled with sometimes uncertain legal status, migrant workers can also face a heightened risk of exploitation and abuse.<sup>108</sup> Those obstacles to a proper access to justice are harder to overcome when lack of information and legal and institutional discrimination is in place.

## *ii. Due process guarantees and mechanisms*

Migrant workers should have access to a competent body to bring work-related claims.<sup>109</sup> The Committee on Migrant Workers (CMW) has recommended that States designate an Ombudsperson to facilitate migrant workers' access to redress mechanisms, and particularly domestic workers.<sup>110</sup> The ILO also provides for the special protection of domestic workers, including migrants, by requiring States to ensure that domestic workers “have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.”<sup>111</sup> Another recommendation of the CMW is to ensure that migrant workers can obtain legal redress and remedies for violations of their rights by employers who enjoy diplomatic immunity under the Vienna Convention on Diplomatic Relations, particularly migrant domestic workers.<sup>112</sup> Further, the Committee considers that migrant workers should be able to access courts and other justice mechanisms without fear of being deported.<sup>113</sup> One way of carrying out this policy is to construct “firewalls” separating institutions and services, such as the judicial system, from the offices in charge of migration laws enforcement. The Committee additionally recommended time-bound or expedited proceedings to address complaints by migrant workers. It also encouraged States parties to enter into bilateral agreements for the sake of ensuring that their nationals maintain proper legal recourse – even after their return to their country of origin – “including to complain about abuse and to claim unpaid wages and benefits.”<sup>114</sup>

## *iii. Due process guarantees when employment contracts are terminated*

Article 7 of the International Labour Organization (ILO) Termination of Employment Convention, which applies to all employed persons including migrant workers,<sup>115</sup> guarantees workers the opportunity to respond to allegations concerning their conduct or performance where these allegations form the basis for terminating their employment.<sup>116</sup> Further, they are “entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.”<sup>117</sup> If the appeal shows the termination to be unjustified, the appellate body must be empowered to either declare the termination invalid or order payment of adequate compensation.<sup>118</sup> In any event, workers whose employment is to be terminated are entitled to a reasonable period of notice.<sup>119</sup> Thus, under the ILO relevant convention, a migrant whose employment is terminated has the right to respond to any allegations of wrongdoing on which their termination was based and to receive a fair and impartial adjudication of the employment action.

Article 49.2 of the ICRMW provides that migrant workers whose employment has been terminated prior to the expiry of their work permits, “shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence.”<sup>120</sup> Put simply, migrants and their families must be allowed time to seek alternative employment before being deprived of their authorization of residence.<sup>121</sup> This requirement also provides migrant workers the necessary time to file a potential claim against their employer.

## *iv. Right to wages owed even after returning to State of origin*

Article 22.6 of the ICRMW guarantees the person concerned by an expulsion decision a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to them.<sup>122</sup>

Article 9.1 of ILO Convention No. 143 guarantees for irregular migrants and their families, equal rights arising out of past employment as regards remuneration, social security and other benefits,<sup>123</sup> while Article 9.2 provides for the right to present one's case to a competent authority when these rights are violated.<sup>124</sup>

As with the other rights, the right to the opportunity to settle claims must be reasonable in practice, and not merely theoretical.<sup>125</sup> To this end, States should grant migrant workers a reasonable period prior to their expulsion to settle claims through the use of time-bound legal proceedings – indeed “migrant workers often encounter problems pursuing legal claims in the State of employment once they have returned [...] including high litigation costs or difficul-



ties providing evidence.”<sup>126</sup> The CMW has also recommended that States establish bilateral agreements to facilitate migrant workers who return to their State of origin accessing justice in the State of employment, even after their return.<sup>127</sup>

States must take measures to guarantee migrants full and effective access to their personal documents, also because the possession of identity documents obviously facilitates access to justice; in addition, States should establish a governmental mechanism to which migrant workers can report violations of their rights by their employers, such as illegal withholding of their personal documents.<sup>128</sup>

### **c. Right to property and access to justice**

Article 32 of the ICRMW provides migrant workers the right to, upon termination of their stay in the State of employment, transfer earnings, personal effects, and belongings. Article 15 of the same Convention stipulates that migrant workers (or members of their families) cannot be deprived of property, whether owned individually or in association with others. Article 15 further guarantees migrant workers and their families the right to fair and adequate compensation when all or some of their assets are expropriated. To claim those rights, migrants are entitled to access to justice and a fair trial. The Human Rights Committee has indeed clarified that “suit at law” in Article 14 of the ICCPR encompasses judicial procedures aimed at determining rights and obligations pertaining to property in private law and the taking of private property in administrative law.<sup>129</sup> Therefore, most property disputes are covered by the protections of Article 14 ICCPR, with claimants thus guaranteed a fair and public hearing by a competent, independent and impartial tribunal established by law. It bears recalling that migrants should not, obviously, be discriminated against in justice processes regarding expropriation, restitution or compensation, which means that the law can make possible distinctions only if they are reasonable and proportionate.<sup>130</sup>

Several factors may however impede a full and adequate access to justice for migrants with regard to property rights. Property transactions involving migrants are often organized informally and verbally. In other cases, the transaction documents that were in possession of the migrant may have been lost or destroyed. In cases of displacements, secondary occupation of homes may also complicate the matter and necessitate judicial consideration in order to establish original residency.<sup>131</sup> In absence of documents or other formal proof, the access to justice in property litigations becomes hazardous. One way to solve this is to have

legal systems who accept a lower standard of proof (such as credibility or witnesses) in certain situations strictly defined by the law.

### **d. Detention: access to justice for detained migrants and due process guarantees**

The international human rights law governing access to justice for detainees subject to deprivations of liberty in general, as well as that relating specifically to criminal detention,<sup>132</sup> applies equally to migrants, including irregular migrants. This section presents an overview of these procedural protections, with a focus on those of special importance for *detained migrants*. It also discusses due process standards specific to immigration detention (i.e., administrative detention for the purposes of immigration control), which raises specific issues, as it classically offers, in national legal systems, fewer guarantees with regard to access to justice as compared to criminal detention. An additional issue is that oftentimes, migrants will find themselves unable to access the proper channels of a state’s judiciary, precisely because they are detained or confined in some form of holding facility.

It bears noting that the rights set out in this section apply to all migrants, including irregular migrants, *who are deprived of their liberty*, regardless of the type of holding facility or label given to the detention.<sup>133</sup>

#### **i. Right to be informed of reasons for detention**

The detention of migrants either criminal or administrative has been defined as a “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.”<sup>134</sup> Deprivation of liberty can also be defined as: “The act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities.”<sup>135</sup> Article 9.2 of the ICCPR establishes that any person, detained for any reason, has the right to be informed promptly of the reasons for his arrest and detention.<sup>136</sup> Likewise, Article 16 (5) of the ICRMW requires that “[m]igrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand



of any charges against them.” The UNHCR Guidelines on Detention of Asylum-Seekers (which focus on detention on immigration-related grounds), provide that “the detention of asylum-seekers should be a measure of last resort, with liberty being the default position,”<sup>137</sup> but, if detained, asylum-seekers are entitled to receive prompt and full communication of the order of detention, the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand.<sup>138</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>139</sup> has a similar prescription (Principle 10) and sets out specifically that migrants subject to detention should have “an effective opportunity to be heard promptly by a judicial or other authority” as well as the right to “be assisted by counsel as prescribed by law.”<sup>140</sup>

## *ii. Right to litigate and access to a lawyer*

To warrant access to justice of detained migrants, States must ensure that implementing legislation for the right to litigate and the right to standing in front of a court and recognition before the law applies to non-nationals including those detained on immigration-related grounds.<sup>141</sup>

The Working Group on Arbitrary Detention (WGAD) has stated that all detainees have the right to access a lawyer and must be informed of this right.<sup>142</sup> Further, UNHCR instructs that “free legal assistance should be provided where it is also available to nationals similarly situated and should be available as soon as possible after arrest or detention to help the detainee understand their rights.”<sup>143</sup> The Inter-American Court of Human Rights (IACtHR) has equally affirmed this principle in relation to immigration detention, holding that “[where] the consequence of the immigration procedures could be the deprivation of liberty of a punitive nature, free legal representation is an imperative for the interests of justice.”<sup>144</sup>

The Special Rapporteur on the Human Rights of Migrants has stressed in this regard that “in detention centers, the explanation of a case manager under contract [from the State immigration authorities] is not sufficient, when they represent [the same authorities] that will ultimately take the decision of the migrant’s immigration status.”<sup>145</sup> Discretionary powers of administrative authorities must not undermine the fundamental role of the judiciary. States should assess the viability of providing on-site interpreters in all immigration detention facilities, at least for frequently spoken languages.<sup>146</sup> The International Commission of Jurists further recommends that competent lawyers should be “permanently posted at high-traffic international borders and all reception centers,” and that “[l]egal professional associations and States should work together to prepare

contingency plans for ensuring legal assistance wherever there is a risk of large movements of refugees and migrants.”<sup>147</sup>

States must thus warrant that migrants deprived of liberty have prompt access to independent lawyers, including to receive visits and communicate with such lawyers, both to make effective the right to challenge the lawfulness of detention, and as a safeguard against torture or other cruel, inhuman or degrading treatment.<sup>148</sup>

## *iii. Right to inform family members or others of detention*

Article 16.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, ensures that detained or imprisoned persons –including migrants detained – shall be entitled to notify or have the competent authority notify members of family or other appropriate persons of their choosing, of their arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.<sup>149</sup> This is paramount to prevent disappearance of detained migrants.<sup>150</sup>

## *iv. Right of access to external bodies*

Access to external bodies, such as an available national asylum mechanisms or other agencies, including ombudsman offices, human rights commissions, NGOs and International Organizations, should be available to detained migrants as appropriate.<sup>151</sup> Detained asylum-seekers or those faced with the prospect of detention have the right to contact and be contacted by UN agencies such as the IOM or the UNHCR. The right to communicate with these representatives in private, and the means to make such contact, should be made available.<sup>152</sup> Access of these organizations to detention centres should be facilitated, to help migrants choosing appropriate legal options among the variety of complex administrative proceedings. According to the Special Rapporteur on the Human Rights of Migrants, there is no effective access to justice without such support.<sup>153</sup>

## *v. Right to consular access*

Article 36 of the *Vienna Convention on Consular Relations* (VCCR) guarantees non-nationals the right to consular access while held in any form of detention.<sup>154</sup> It articulates the right of detainees notably to communicate freely and have access to consular officers;<sup>155</sup> and to have their detention or arrest communicated to the consular officers, if they so re-

quest.<sup>156</sup> While the VCCR deals with obligations between States, both the International Court of Justice (ICJ) and the IACtHR have held that the right to consular access is a right of the individual.<sup>157</sup> Article 16.2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also ensures that if a detained person is a foreigner, he shall be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the state of which he is a national.<sup>158</sup>

In short, consular services should respond effectively to the needs of migrants in detention regarding their access to justice and the protection of their rights, facilitating in particular the migrant's legal representation by a qualified (and independent) lawyer and promoting guarantees of due process.<sup>159</sup>

#### *vi. Right to effective judicial review and possible reparation*

Migrants deprived of their liberty have the right to take proceedings before a court to review the lawfulness of their detention, as enshrined in all core human rights instruments.<sup>160</sup> This review should be prompt and automatic, with guarantees of fair and effective process,<sup>161</sup> and consider both the "legal and factual basis asserted to justify the detention, as well as its necessity, reasonableness and proportionality."<sup>162</sup> Article 9.4 of the ICCPR requires the court to decide on the lawfulness of the detention "without delay," which tends to be interpreted as within several weeks.<sup>163</sup> Similarly, the International Commission of Jurists states that judicial review "should take place no later than 24 to 48 hours after the decision to detain the person."<sup>164</sup> However, where the case is complex, longer delays may be permissible.<sup>165</sup> After the conclusion of court proceedings, all detainees have a right to a speedy judicial decision concerning the lawfulness of their detention.<sup>166</sup>

Both the law authorizing detention and the procedures for review must be sufficiently certain and meet standards of due process.<sup>167</sup> The review of migration detention must be periodical, by an independent and impartial judicial body.<sup>168</sup> The requirement of impartiality is especially important in the adjudication of the rights of migrants due to the prevalence of societal prejudices against them. To ensure equality of arms, legal and language assistance must be provided to the detained migrant to the extent necessary.<sup>169</sup>

Judicial review of the lawfulness of detention must include the possibility of ordering a release if the detention is incompatible with the requirements of the applicable law and international standards.<sup>170</sup> When a judicial authority finds that a migrant has been unlawfully detained under national

or international law, it should promptly and effectively order the migrant's release.<sup>171</sup> Migrants unlawfully detained have an enforceable right to compensation.<sup>172</sup>

### **e. Return of migrants**

#### *i. Access to justice regarding decision of expulsion*

Access to justice in case of expulsion of a migrant from a State is quite complex and can vary under the various conventional or regional regimes: the ICCPR, ECHR, ACHR, and ICMRW all provide for some protection and procedural guarantees for migrants during expulsion proceedings, but with some nuances. In essence, while the ICCPR and the ECHR have a restrictive approach according to which the fair-trial guarantees do not apply to expulsion (since it is neither a criminal charge nor a civil right), migrants have a right to challenge their expulsion if the latter allegedly violates one or more of their human rights.<sup>173</sup> Under the ICCPR, in case of expulsion, it is the protection found in Article 13 of the Covenant that applies, and not the right to a fair trial.<sup>174</sup> Article 13 of the ICCPR prescribes that, for migrants *regularly* in the territory of the State, the expulsion must be "in pursuance of a decision reached in accordance with law". Regular migrants must be further "allowed to submit the reasons against [their] expulsion and to have [their] case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority" - except where "compelling reasons of national security" otherwise require.<sup>175</sup> As is apparent from this Article 13, only migrants in a regular situation can claim these guarantees. The ECHR puts in place a similar system where only regular migrants can claim the application of Article 1 of protocol 7 to the Convention. As a result only aliens "lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority." The expulsion can intervene before the exercise of these rights when it is necessary with regard to public order or for reasons of national security.<sup>176</sup>

On the other hand, irregular migrants can challenge an expulsion according to the ICCPR *if they claim a human rights violation in that context*. Indeed, the Human Rights Committee determined that when it is possible that a substantive human right has been violated during an individual expulsion, extra procedures are necessary to guarantee the



right to an effective remedy and a stricter scrutiny must be applied to the expulsion proceeding.<sup>177</sup> It is worth noting that these violations not only include the ones related to the right to life or the prohibition of cruel and inhumane treatment, but also the violation of all other rights guaranteed by the ICCPR, such as the right to property or to family life, which opens the possibilities to claim in the context of an expulsion.

Similarly, under the European regional system, “*irregular migrants* [...] need to be able to point to a possible *human rights violation as a consequence of their removal* in order to be able to challenge it.”<sup>178</sup> Article 13 of the ECHR guarantees the right to an effective remedy, which is also applicable to expulsions. Article 13 imposes therefore an obligation on States to examine whether an expulsion is compatible with the rights protected under the ECHR before executing the expulsion decision.<sup>179</sup> As such a migrant should be able to appeal the decision on expulsion if they have an arguable claim that their Convention rights would be violated in case of expulsion.<sup>180</sup> The appeal however will only have suspensive effect if the migrant alleges that his expulsion would have effects that are contrary to the rights protected in the ECHR and or irreversible effect (especially violations of the right to life and the prohibition of torture and ill-treatment).<sup>181</sup>

Unlike the ICCPR, other human rights treaties provide protection against expulsion for all migrants, regardless of their status. Article 22 of the ICRMW prescribes explicitly due process guarantees to *all* migrants who are facing expulsion. Article 22.2 of the Convention requires the State to issue “a decision taken by the competent authority in accordance with law.” It thus confirms the principle of legality when it comes to expulsion, including of an irregular migrant. The decision should contain the reasons for the expulsion and should be communicated to the migrant in writing in a language they understand.<sup>182</sup> Furthermore, a migrant shall have the right to appeal the decision of expulsion and have a review by a competent authority.<sup>183</sup> The appeal shall have suspensive effect, meaning that a migrant may not be expelled as long as their appeal is pending.<sup>184</sup> The Committee on the Protection of the Rights of All Migrant Workers clarified that such a suspensive effect does not have an effect on the status of the migrant and therefore does not equate to the regularisation of the status of an irregular migrant.<sup>185</sup> Article 22.5 of the ICRMW further provides for the right to seek compensation if an executed expulsion decision is later annulled.<sup>186</sup> Finally, Article 22.8 of the ICRMW stipulates that migrant workers are not required to pay the costs of the legal proceedings leading to their expulsion or the costs of their administrative detention, although they may be required to pay their own travel costs.<sup>187</sup> It remains to be seen how these provisions of the

ICRMW may have an impact on the interpretation of the guarantees provided by the ICCPR regarding expulsions of irregular migrants. In the interest of the principle of legality, it would be desirable that the CPR eventually take inspiration from the ICRMW standards.

The Inter-American Court of Human Rights and the Inter-American Commission of Human Rights also advance a less restrictive approach by affirming due process guarantees for all migrants facing expulsion. The IACtHR has held that due process guarantees must be accorded to every person regardless of immigration status, as due process is not only guaranteed *ratione materiae* but also *ratione personae*.<sup>188</sup> This general principle also applies regarding expulsions of migrants. The IACtHR established certain minimum guarantees for migrants facing expulsion, which are comparable to the guarantees of the ICRMW. These include the formal notification of the expulsion order. Such an order should be reasoned and also contain information on the rights of the migrant to oppose the order and to have access to consular assistance, legal representation and interpretation. Furthermore, a migrant must be able to submit the decision to a competent body for revision.<sup>189</sup>

Such an approach to the protection against expulsion is also supported by the Committee against torture, which proclaims that in cases of expulsion “essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and of a suspensive effect of the appeal” should apply.<sup>190</sup>

The International Commission of Jurists, in its “Principles on the role of judges and lawyers in relation to refugees and migrants,” recommends that the right to a fair trial also apply to expulsion proceedings.<sup>191</sup> These Principles indeed set out that “[j]udges and lawyers must ensure that fair and legal process is respected in *any proceeding or other procedure* that could affect the rights or status of a refugee or migrant.”<sup>192</sup> This principle seems to assert that expulsion should be treated as “any proceeding or other procedure” that requires a fair and legal process. The International Commission of Jurists further indicates in those principles that “[j]udges should consider the individual circumstances of every individual with due diligence and good faith and ensure that adequate justification has been presented, and that the removal is not prohibited under international human rights and refugee law and standards.”<sup>193</sup> Finally, it recommends that judges and attorneys “ensure that any removal orders are provided in writing, in a language the person understands, with the reasons for expulsion and information on how to challenge the removal order.”<sup>194</sup>

In view of all the above, expulsion procedure ought to trigger rights of due process in any event, similar to what is



prescribed by the jurisprudence of Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights on the application of due process rights during the expulsion of migrants.<sup>195</sup> Indeed, excluding expulsions/deportations and other removal decisions and orders from access to justice seems to be a convoluted legal construction with no real merit.<sup>196</sup>

## *ii. Access to justice during and after return*

In his report from 4 May 2018,<sup>197</sup> the Special Rapporteur on the rights of migrants focused on the return and deportation/expulsion of migrants, and found that States should provide access to justice to migrants also to be returned,<sup>198</sup> and held that "migrants should have access to complaint mechanisms to report misconduct, violence or ill-treatment prior, during and after return."<sup>199</sup> Finally the report states that "[a]ccess to justice after return should also be ensured for any human rights violations suffered by labour migrants, who should be certain that claims for unpaid wages, social security benefits or overtime compensation, or for complaints filed against exploitative employers are followed up, event beyond their return."<sup>200</sup>

## **IV. Access to justice for specific groups**

### **1. Migrant children**

Children represent a significant part of international migrants. They migrate themselves, alone or with their families, are born to migrant parents in countries of destination or "left behind" by migrant parents in their country of origin. As children in the context of international migration are often at risk of having their rights violated, it is crucial that their right to access justice is guaranteed. Access to justice is not only a right in itself but also a tool to ensure that the other rights are upheld for children. For children in context of migration this could often be an efficient tool to ensure the right to protection, care and access to basic services, such as education and health.

The right to have access to legal and judicial systems (for example asylum system) and to litigate, to file applications (including emergency applications) to courts, as well as the right to have access to all the fair trial guarantees provided notably in the ICCPR, all extend evidently to migrant children. The Convention on the Rights of the Child (CRC) explicitly lists several fundamental guarantees. Article 12.2 of the CRC enshrines the right of the child to be heard "in any judicial or administrative proceedings affecting them, either directly, or through a representative or an appropriate

body."<sup>201</sup> It results from children's right to be heard that States need to ensure that children have the possibility to bring legal claims and complaints when their rights are being violated. Other provisions ensure the rights to information of children (Article 17), the right to prompt access to legal assistance and to prompt decisions by the court (Article 37(d)), as well as the right to expeditious decisions (Article 10). The Committee on the Rights of the Child (CRC) underlined that the Convention implicitly requires the access to the right to an effective remedy for children. It stated that in case of violations of rights, "there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by Article 39 [of the Convention]."

In practice however, few of the children in context of migration seek justice. They are often in a situation of double vulnerability, as children and as persons affected by migration. Because of their age but also due to language barriers and lack of knowledge of the foreign system, migrant children might not be fully aware of their rights and might not recognise violations that entitle them to remedy. Even if children had the information they need, as children and foreigners, they would struggle to navigate their way through the justice system without specialized support. In some cases, their right to take part in legal decisions that affect them is undermined by age restrictions, with for example only adults entitled to file cases. In other case, for children residing irregularly in the country, the fear of being identified as irregular migrants and its consequences, would prevent them from contacting the authorities and claiming justice. As result, many cases of abuse and exploitation of migrant children remain hidden and the system fails in offering the protection and assistance needed to the children concerned.

### **a. A child-friendly justice system**

Much more can be done to ensure that justice systems are age and gender responsive. According to the Committee on the Rights of the Child, a child-friendly approach necessitates in particular that proceedings be transparent and informative, respectful, inclusive, safe, with accountability and conducted by adults trained in dealing with children.<sup>202</sup>

This means working with States in improving laws, policies and court procedures to children's rights and needs, including the establishment of specialized police units/officers and interviewing rooms, the setting up of specialized procedures in administrative, civil and criminal courts and building the capacity of the police, judges and other professionals working with children, with a focus on multidisciplinary





practices.

### **b. Equal access as national children**

The right to equality and its corollary, the prohibition of discrimination, obliges States to eradicate discriminatory policies, laws and practices, and to take affirmative measures when necessary to ensure that all individuals, including migrant children who often are particularly vulnerable and socially marginalized, are entitled to equal access to judicial mechanisms and justice in general. Accordingly, States have to amend legislation, policies and change attitudes, ensuring that children have equal access to justice regardless to migration status.<sup>203</sup>

### **c. The right to information, counselling and legal representation**

As children are usually at a disadvantage when engaging with the legal system, they have a particularly acute need to receive child friendly information on processes and their rights as well as legal counselling and assistance. For migrant children, this information and legal assistance might be needed from the very entry point, when the child comes in contact with the authorities in order to understand procedures such as those related to registration, international protection, family reunification, age assessment, etc.

The Joint General Comment emphasizes that children in the context of international migration should be provided with all relevant information, inter alia, on their rights, the services available, means of communication, complaint mechanisms, the immigration and asylum processes and their outcomes.<sup>204</sup> Information can also be provided through child rights education, counselling and support from knowledgeable adults.<sup>205</sup> Information should be provided in the child's own language in a timely manner, in a child sensitive and age-appropriate manner, in order to make the child's voice heard and to be given due weight in the proceedings.

States should ensure that free legal assistance of adequate quality is promptly available, including to migrant children and their families. If children are represented by a parent, guardian or any other person, these persons should be required to always act in the best interests of the child. Moreover, even when children are represented by a guardian or their parents, legal aid might still be needed to ensure an adequate representation in administrative and judicial proceedings and in reviewing migration, asylum and child pro-

tection decision taken by the authorities.

### **d. Best Interests Determination**

Article 3 of the CRC places an obligation on the public and the private spheres, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. The right of the child to have their best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group. The best interest of the child is a flexible concept to adapt to the different needs of children and their stage of development.<sup>206</sup> This flexibility requires that those responsible for ensuring the respect of the best interests of the child (e.g., judges, guardians, legal representatives, etc.) evaluate this interests on a case-by-case basis.<sup>207</sup>

To ensure the respect of the best interest of migrant children, access to justice for the children and their representatives is indispensable and should be ensured "through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status."<sup>208</sup>

The UN Committee on the Rights of the Child has further described the content and scope of application of the best interest principle both in general and in specific for children in context of migration.

The views of the child should be taken into account as part of the best interest's determination process. Access to justice for migrant children requires taking into account children's evolving maturity and their understanding of their rights.<sup>209</sup> The Committee on the Rights of the Child has cautioned States to ensure that the right to be heard and access to justice for children is not only a "token" and that children are not only heard but that their views are also given due weight.<sup>210</sup>

## **2. Migrant women**

### **a. General access to rights**

Access to justice is necessary to prevent and correct potential intersecting discriminations, exploitation and abuses, based both on gender and migration status. Migration, like

any societal phenomenon, is not gender-neutral:<sup>211</sup> women's migration experience is distinct from men and migrant women can bring specific contributions as well as face particular challenges and vulnerabilities.<sup>212</sup> Migrant women who may have experienced marginalization in their country of origin, sometimes continue to be marginalized in their countries of destination.<sup>213</sup> Some of the specific hazardous situations migrant women face, include employment in the informal and domestic sector, which often offers less legal recognition and protection, as well as lack of access to services, such as health care (including reproductive and maternal care). Migrant women often are faced with discriminatory access to family reunification schemes or discriminatory access to nationality. In addition, women too often are prey to sexual abuses and harassment, and/or sexual and physical violence.<sup>214</sup> Oftentimes migrant women face dilemmas when trying to secure access to justice as their immigration status depends on abusive spouses or employers.<sup>215</sup> Migrant women can also face intersectional discriminations due to their particular situations, such as their migratory status, their activity (e.g., women forced into prostitution), their detention or other factors.

## **b. Gender-sensitive access to justice**

Women's right to access justice is not only guaranteed in general human rights law, but there are provisions ensuring access to justice specifically for women. A State may not discriminate against women and must ensure the "legal protection of the rights of women on an equal basis with men."<sup>216</sup> The prohibition of discrimination against women not only confers women equal legal protection but also equal legal capacity and the opportunity to exercise that capacity.<sup>217</sup> The equal standing before the law, translates to an all-encompassing access to justice for women. States have "treaty-based obligations to ensure that all women have access to education and information about their rights and remedies available, and how to access these, and to competent, gender-sensitive dispute resolution systems, as well as equal access to effective and timely remedies."<sup>218</sup>

Despite the equal access to justice of women *de jure* by application of international law, women often face practical barriers. To render to the right to access to justice effective for women, "the differential impact of measures on women according to their race, class, ethnicity, religion, disability, culture, indigenous or migrant status, legal status, age or sexual orientation" should be taken into account.<sup>219</sup> A gender-sensitive approach to access to justice should also recognize how negative attitudes of justice actors can create

obstacles for women's access to justice.<sup>220</sup> To then implement a truly gender-sensitive approach to justice, as well as a non-discriminatory approach towards migrants in general, requires extensive training and capacity-building of justice actors, including judges, prosecutors, investigators, public defenders and law enforcement officers, notably to combat bias and prejudices.<sup>221</sup>

A crucial step to enable migrant women to benefit from their right to access to justice is to ensure their emancipation by ensuring that the law confers them an independent legal status, regardless of marital or other civil status, or employee status - or absence of such status. This is particularly critical for survivors of sexual and gender-based violence,<sup>222</sup> as well those who are victims of abusive spouses or employers.<sup>223</sup>

In the Global Compact for Migration, States have committed to address this to "develop gender-responsive migration policies to address the particular needs and vulnerabilities of migrant women, girls and boys, which may include assistance, health care, psychological and other counselling services, as well as *access to justice and effective remedies, especially in cases of sexual and gender-based violence, abuse and exploitation.*"<sup>224</sup>

As example of good practices, the Special Rapporteur on violence against women highlighted the "[c]reation of services, in cooperation with civil society organizations as appropriate, in the following areas: access to justice, including free legal aid when necessary; provision of a safe and confidential environment for women to report violence against women; [...] linguistically and culturally accessible services for women requiring such services."<sup>225</sup> The CEDAW recommends that States "[e]stablish justice access centers [...], which include a range of legal and social services, in order to reduce the number of steps that a woman has to take to gain access to justice. Such centers could provide legal advice and aid, begin the legal proceedings and coordinate support services for women in areas such as violence against women, family matters, health, social security, employment, property and immigration. Such centers must be accessible to all women, including those living in poverty and/or in rural and remote areas."<sup>226</sup>

Such a gender-sensitive approach to the access to justice of migrant women should empower them and recognize them as "agents of change" and move away from addressing female migrants primarily as victims, which is also a guiding principle and declared objective of the Global Compact for Migration.<sup>227</sup>

## **3. LGBTI migrants**



Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons migrate around the world for various reasons. Like many migrants, they leave their countries of origin to improve their economic or social situations and some may migrate to join members of their families in another country. Others, however, leave their countries as a result of push factors like explicit persecution, criminalization of same-sex activity or non-conforming gender identity, and various forms of discrimination based on sex, sexual orientation or gender identity. LGBTI individuals often face multiple forms of discrimination and challenges with respect to access to justice. At the time of writing, over 70 countries around the world have laws criminalizing, or in other ways targeting, people of diverse sex, sexual orientation and gender identity. However, even in countries where no such laws exist, LGBTI individuals are frequently subject to violence, hate speech and discrimination in the community. All too often, due to widespread homo- and transphobia among state officials, often fueled by political rhetoric, LGBTI individuals who fall victim to hate crimes or experience forms of discrimination, will not be able to report these offences or they refrain from doing so because of mistrust in the authorities and the justice system. For the same reasons, many LGBTI migrants cannot report, or fear reporting discrimination or mistreatment in the context of asylum claims, family reunification, or treatment at the work place.

With respect to State obligations, LGBTI migrants' access to justice is protected by the general principles and rights provided by international law without discrimination based on sex, sexual orientation, and gender identity.<sup>228</sup> In addition, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity,<sup>229</sup> includes several principles which are essential for access to justice, such as the right to recognition everywhere as a person before the law (Principle 3); right to effective remedies and redress (Principle 28); no impunity for perpetrators of human rights violations (Principle 29). Moreover, the Human Rights Committee has stated that State Parties must "ensure that LGBT persons have access to justice, and that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated."<sup>230</sup>

#### 4. Victims of crimes

Migrants can be victims of crimes, violent or not, including those deriving from xenophobia, racism and hate speech. Migrants are often vulnerable to human trafficking, forced labour or other types of crimes linked to exploitation. All the rules and principles set out in the sections above evi-

dently also apply to victims of crimes. These victims must in particular have the right to equal access to justice and equal treatment with nationals in the process of investigation, prosecution of crimes, as well as in any procedures for compensation or other forms of reparation.<sup>231</sup> Migrants who are victims of crimes should indeed "in law and practice have access to all necessary remedies before the domestic courts, on an equivalent basis to nationals of the State."<sup>232</sup>

The Palermo Protocol on Human Trafficking<sup>233</sup> provides for the protection of victims of this crime, who oftentimes, are migrants. The Protocol contains various prescriptions on the access to justice that must be provided to victims of human trafficking. It prescribes notably that legal proceedings be confidential<sup>234</sup> and that the victims receive information concerning relevant proceedings<sup>235</sup> and "[a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders."<sup>236</sup> In actuality, trafficked persons often lack the information on the possibilities and processes for obtaining remedies, including compensation.<sup>237</sup> The Protocol also requires States parties to consider providing "[c]ounselling and information, in particular as regards their legal rights, in a language that the victims can understand."<sup>238</sup> It also puts an obligation on States to have in their domestic judicial system, some mechanisms allowing victims of trafficking the possibility to obtain compensation for the damage suffered.<sup>239</sup> Moreover, it calls on each State Party to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, also to enable them to participate in said proceedings."<sup>240</sup>

The Council of Europe Convention on Action against Trafficking in Human Beings similarly requires that States adopt "legislative or other measures as may be necessary" to ensure that victims of trafficking receive, in legal proceedings, "translation and interpretation services, when appropriate," "counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand," and "assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders."<sup>241</sup> The Convention also expands upon the requirements of the Palermo Protocol by requiring that State parties adopt legislative or other measures necessary to ensure that assistance to victims of trafficking is not made conditional upon their willingness to participate to the criminal proceedings, as witness.<sup>242</sup> Indeed, it is of paramount importance to grant victims of trafficking "legal and other material assistance [...] to enable them to realize their right to adequate and appropriate remedies."<sup>243</sup> In spite of all the legal and judicial arsenal, more often than not, it is difficult for victims of trafficking to have access to justice:

first, the crime must be detected, the victims identified, and they must have physically the possibility to access the police or other law enforcement authorities. Second, NGOs report that they often face challenges in convincing the victims that they have experienced a violation of a human right and are entitled to redress.<sup>244</sup> Thirdly, it is important to guarantee criminal proceedings free of charge and in a reasonable period of time to victims of trafficking.<sup>245</sup> Furthermore, victims of trafficking can have troubles obtaining redress and reparation when the author of the crime has no assets that are seized and the State has no readily reparation fund.<sup>246</sup> Finally, victims are too often sent back to their country of origin before having had the time to claim and obtain redress.<sup>247</sup> Due to the difficulties of investigation in such transnational criminal cases and the insufficient support provided to victims of trafficking throughout the process, very few of them have obtained reparation.<sup>248</sup>

## Conclusion

An effective access to justice is an essential prerequisite for a good human rights protection, for migrants as for any individual. It is also critical to counter impunity and foster social cohesion based on actual and apparent fairness. In short, it is an essential condition for the respect of the rule of law. The possibility of a claim being brought by a migrant or any individual whose rights are infringed must exist, if social relationships, including employment or housing, are to be based on respect for those rights.<sup>249</sup>

International and regional human rights norms and standards provide for an extensive legal framework to provide and guarantee access to justice for migrants, which is a necessary precondition to the protection, respect and fulfilment of the other rights of migrants. However, due to their – often – precarious status and situations, many migrants are still facing numerous and grave obstacles in accessing and obtaining justice. To address these difficulties, laws, policies and procedures must be in conformity with international standards and must be properly implemented. National legislations should decriminalize irregular migration and put in place adequate legal firewalls in order to protect migrants' rights and make their access to justice a reality, as opposed to a mere possibility on paper.

Independent, safe, effective and accessible mechanisms should be established to ensure access to justice for migrants. This accessibility should by definition be non-discriminatory and result in a just outcome, which may imply that States must take specific measures to ensure accessibility to migrants or particular groups of migrants to justice and specific trainings for actors of the justice systems. As rightly pointed by the Special Rapporteur on the situa-

tion of human rights defender: “in the face of the increasingly strident anti-immigration sentiment in political discourse, it is often the judiciary that can best protect migrants' rights. Access to justice becomes a key factor in imposing sanctions for human rights violations and reducing migrants' vulnerability.”<sup>250</sup>



## Endnotes

1. Rt. Hon. B. McLachlin, "Justice in our courts and the challenges we face", address to the Empire Club Canada, 8 March 2007, p. 3. Available from <http://www.fccj-fcjc.org/sites/default/files/docs/2007/mclachlin-empireclub-en.pdf> (accessed 15 February 2018).
2. The UN Human Rights Committee (CCPR) has clarified that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party." CCPR, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10.
3. This Information Note focuses only on access to justice for international migrants, for example, persons who have crossed international borders. The reason for migrating is not relevant in this Information Note. The fact that this Information Note does not refer to individuals who have migrated internally or who are internally displaced does not exclude that some of the principles discussed in this Note also apply to those persons.
4. United Nations Security Council (UNSC), *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc. S/2004/616 (23 August 2004), para. 7 ("For the United Nations, 'justice' is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.").
5. United Nations Development Programme (UNDP), *Programming for Justice: Access for All* (2005), p. 5. See also F. Francioni, *The Right to Access to Justice under Customary International Law*. In: *Access to Justice as a Human Right* (F. Francioni (ed.), 2007), pp. 3-4.
6. The "justice chain" is "the series of steps that a woman has to take to access the formal justice system, or to claim her rights." UN Women, *Progress of the World's Women: In Pursuit of Justice* (2011), p. 11.
7. UNDP, *Programming for Justice: Access for All* (n. 5), p. 5.
8. J. McBride, *Access to Justice for Migrants and Asylum Seekers in Europe* (report prepared for the Council of Europe) (2009), para. 6.
9. United Nations General Assembly (UNGA), Universal Declaration of Human Rights, UN Doc. A/810 (1948), Article 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").
10. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 6(1) (right to a fair trial) and 13 (right to an effective remedy) ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").
11. American Convention on Human Rights (ACHR), OAS Treaty Series No. 36 (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123, 9 ILM 99, Article 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.").
12. Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter") (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58.
13. European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 (2012).
14. Arab Charter on Human Rights (adopted 15 September 1994).
15. International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2(3)(a) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."). See also ICCPR, Articles 9(4) and 14 (1).
16. CCPR, General Comment No. 31 (n. 2), para. 10.
17. E.g., Constitution of Canada, section 24; Constitution of the Republic of South Africa, section 38; Constitution of the Republic of Estonia, Article 15; Spanish Constitution, section 241.



18. McBride (n. 8), para. 9 (“The broader view of access to justice can be seen as being particularly concerned with the substantive aspect of justice - notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives. It may thus be concerned as much with the ability to seek and exercise influence on law-making as with ensuring access to law-implementing processes and institutions.”).
19. See UNGA, *Report of the Special Rapporteur on the human rights of migrants*, UN Doc. A/73/178/Rev. 1 (25 September 2018), para. 56.
20. Francioni (n. 5), p. 4.
21. *Airey v Ireland*, App. No. 6289/73 (ECtHR, Judgment of 9 October 1979), paras. 25-27. Without legal aid victims of human rights violations “might, for instance, have to choose between paying court fees and sending their children to school.” UN Habitat, *The Right to Adequate Housing*, Human Rights Fact Sheet No. 21 (Rev 1), p. 40.
22. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (May 2017), Principle 2.
23. Council of Europe (CoE), Committee on Equality and Nondiscrimination, *Report on Equality and non-discrimination on the access to justice*, Doc. No. 13740 (15 March 2015), para. 10 (citing *Peck v United Kingdom*, App. No. 44647/98 (ECtHR, Judgment of 28 January 2003)).
24. UNGA, *Report by the Special Rapporteur on extreme poverty and human rights*, UN Doc A/67/278 (9 August 2012), para. 91.
25. UN, Human Rights Council (UNHRC), *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/HRC/37/51 (16 January 2018), para. 58.
26. Moreover, the invisibility of migrants in legislative processes reinforces the growing divide between the rights of the migrants and the legal prescriptions and channels in the justice systems that are practically available to them. See UNDP (n. 5) p. 58.
27. UN, Issues Brief No. 1, *Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance* (8 May 2017), p. 4. Available from [https://refugeesmigrants.un.org/sites/default/files/issue\\_brief\\_for\\_first\\_thematic\\_session.pdf](https://refugeesmigrants.un.org/sites/default/files/issue_brief_for_first_thematic_session.pdf) (accessed 24 October 2018). Target 16.3 of the 2030 Agenda for Sustainable Development also refers to promoting the rule of law and ensuring equal access to justice for all which includes migrants. UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 74.
28. *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. See also Gexall, “*The Constitutional Right of Access to the Courts is Inherent in the Rule of Law*”: *The Judgment of the Supreme Court: Edited Highlights* (30 July 2017) (summarizing the whole decision of *R (on the application of UNISON)*). Available from <http://www.civillitigationbrief.com/2017/07/30/the-constitutional-right-of-access-to-the-courts-is-inherent-in-the-rule-of-law-the-judgment-of-the-supreme-court-edited-highlights/> (accessed 08 March 2019).
29. Global Compact for Safe, Orderly and Regular Migration (GCM), intergovernmentally negotiated and agreed outcome (13 July 2018), para. 15. (“*Rule of law and due process*: The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international law.”).
30. GCM (n. 29), Objective 3, para. 19, lit. d (emphasis added).
31. UNGA, *Report of the Special Rapporteur on extreme poverty and human rights* (n. 24), para. 18.
32. For example, administrative decisions relating to welfare benefits or asylum proceedings.
33. UNGA, *Report of the Special Rapporteur on extreme poverty and human rights* (n. 24), para. 31. See also Inter-American Court of Human Rights (IACHR) Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants, OC-18/03 (2003), para. 112.
34. Council of Europe (CoE), *Equality and non-discrimination in the access to justice*, Doc. 13740 (31 March 2015), para. 49.
35. EU Agency for Fundamental Rights (FRA), *Access to justice in cases of discrimination in the EU – Steps to further equality* (2012), p. 8.
36. EU Charter of Fundamental Rights (n. 13), Article 47; ICCPR (n. 15), Articles 2(3), 14, 16; ECHR (n. 10), Articles 6, 13; ACHR (n. 11), Articles 3, 8, 25; OAU, ACHPR (n. 12), Articles 3, 7.
37. UN, HRC, *Report of the Special Rapporteur on the situation of human rights defenders*, (n. 25) para. 66(i).
38. Ibid.
39. ICCPR (n. 15), Article 2(1); ECHR (n. 10), Article 14; ACHR (n. 11), Article 1; ACHPR (n. 12), Article 2. See also UNGA *Report of the Special Rapporteur on the Human Rights of Migrants* (n. 19), para. 7.
40. CCPR, General Comment No. 15, *The Position of Aliens Under the Covenant* (1986), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), p. 189, para. 2.



41. Ibid., para. 7.
42. Ibid.
43. IACHR, *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, OC-18/03 (2003), para. 109 (“[The] general obligation to respect and ensure the exercise of rights [...] is imposed on States to benefit the persons under their respective jurisdictions, irrespective of [their] migratory status [...] This obligation encompasses all the rights included in the American Convention and the International Covenant on Civil and Political Rights, including the right to judicial guarantees. In this way, the right of access to justice for all persons is preserved, understood as the right to effective jurisdictional protection.”).
44. UN, *The Durban Programme of Action on Non-discrimination* (April 2009), para. 26.
45. UNGA, *Report by the Special Rapporteur on extreme poverty and human rights* (n. 24), paras. 6-7.
46. ICCPR (n. 15), Article 16.
47. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158, Article 24. For the right to non-discrimination of migrant workers and their families see Article 18.1.
48. *Golder v. the United Kingdom*, App. No. 4451/70 (ECtHR, Judgment of 21 February 1975), paras. 35-36.
49. *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR, Judgment of 21 January 2011), para. 318. See also CCPR, *Ernesto Benítez Gamarra v. Paraguay*, Communication No. 1829/2008 (30 May 2012), para. 7.5; CCPR, *Tahar Mohamed Aboufaied v. Lybia*, Communication No. 1782/2008 (19 June 2012), para. 7.11.
50. ICRMW (n. 47), Article 18(1). According to the same provision, “in the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
51. UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998), para. 10.
52. OHCHR, *Statement on the International Migrants’ Day* (15 December 2015). Available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16886&LangID=E> (accessed 24 October 2018). See also UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19) para. 39 (“Laws and practices that clearly prohibit the transfer of information and abolish the obligation to report the irregular migration status of individuals allow public employees to have legal certainty when exercising their functions and help to reduce the fear that migrants have concerning access to public services.”).
53. IACHR, *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, OC-18/03 (2003), para. 126. (“The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal. The rights derived from the employment relation subsist, despite the measures adopted.”).
54. See CCPR, General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32 (23 August 2007), paras. 18-21. (“The concept of independence entails a full separation between the judiciary and the executive powers. The judges must be free from interference and pressure from members of the Government [...] Finally, there needs to be an “appearance of independence”, meaning that if there are grounds for a reasonable observer to suspect the independence of a judge, this circumstance can suffice to question the independence of the Body.”). See also *Belilos v. Switzerland*, App. No. 10328/83 (ECtHR, Judgment of 9 June 1980), para. 64 (“a “tribunal” is characterised in the substantive sense of the term by its judicial function [...] [i]t must also satisfy a series of further requirements - independence, in particular of the executive; [and] impartiality.”); *Findlay v UK*, App. No. 22107/93 (ECtHR, Judgment of 25 February 1997), paras. 73, 77 (noting that there is a “well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of “tribunal” and can also be seen as a component of the “independence” required by Article 6 para. 1 [of the Convention for the Protection of Human Rights and Fundamental Freedoms].”); African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247 (2003), Sections A(4)(g)-(i), A(5) (establishing guidelines for maintaining and independent and impartial tribunal); Inter-American Commission on Human Rights, *Ascencios Lindo and others v Peru*, Report No. 49/00 (13 April 2000), paras. 127-28 (finding that the lack of impartiality on behalf of police officers, prosecutors and judges, among other characteristics of terrorism trials in the Republic of Peru, constituted a violation of the “right of every person to a hearing, with due guarantees”). Furthermore, if the administrative decision is reviewed by authorities attached to the executive branch, such as the Ministry of Interior, which is directly involved in matters of security and order and, thus, criminalization, an effective remedy is endangered. UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 28), para. 25.

55. CCPR, General Comment No. 32 (n. 54), para. 21. *See also Findlay v UK* (n. 54), para. 73.
56. OHCHR, *End Mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia* (1-18 November 2016). Available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E#sthash.M0Meq6Fv.dpuf> (accessed 24 October 2018).
57. ICCPR (n. 15), Article 14.1.
58. OHCHR, *End Mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia* (n. 56).
59. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 7.
60. *Ibid.*, Principle 12.
61. ICCPR (n. 15), Article 14(3)(c).
62. ECHR (n. 10), Article 6.1. *See also H. v. France*, App. No. 10073/82 (ECtHR, Judgment of 24 October 1989), para. 58.
63. ACHR (n. 11), Article 8.1.
64. CCPR, General Comment No. 32 (n. 54), para. 35. *See also Sürmeli v. Germany*, App. No. 75529/01 (ECtHR, Judgment of 8 June 2006), para. 128. Due to the fact that a “reasonable time” should be considered in the context of each individual case, no fixed time limit is established in international law. However, in their domestic law, European States have established time limits ranging from 8 days to 6 months for rendering a decision on an asylum application. *See, e.g., Asylum Information Database & European Council on Refugees and Exiles, The length of asylum procedures in Europe* (October 2016), p. 3. This can serve as a guideline for a “reasonable time” in other migration decisions. *See, e.g., Aristimuño Mendizabal v. France*, App. No. 51431/99 (ECtHR, Judgment of 17 January 2006), and *B.A.C v. Greece*, App. No. 11981/15 (ECtHR, Judgment of 13 January 2017) for case law on unreasonable times in delivering decisions on migration status.
65. *See, e.g., Ruiz-Mateos v. Spain*, App. No. 12952/87 (ECtHR, Judgment of 23 June 1993), para. 63; *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (ECtHR, Judgment of 24 February 1997).
66. *Bahaddar v. Netherlands*, App. No. 25894/94 (ECtHR, Judgment of 19 February 1998), para. 45.
67. *Jabari v. Turkey*, App. No. 40035/98 (ECtHR, Judgment of 11 July 2000), para. 50. *See also Conka v. Belgium*, App. No. 51564/99 (ECtHR, Judgment of 5 February 2002), paras. 81-85 (finding that a system in which stays of expulsion are merely discretionary and not required does not meet the requirement of a right to an effective remedy).
68. CCPR, *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005 (10 November 2006), para. 11.8. *See also CCPR, Zhakhongir Maksudov and Others v. Kyrgyzstan*, UN Doc. CCPR/C/93/D/1461/2006, 1462/2006, 1476/2006, 1477/2006 (31 July 2008), para. 12.7.
69. Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 33, *Women’s Access to Justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 53(b). *See also UNGA, Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 46.
70. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 13.
71. *See, e.g., UN Vienna Convention on Consular Relations*, 596 UNTS 261 (1963), Article 36; ICRMW (n. 48), Article 16(7); EU Charter of Fundamental Rights (n. 13), Article 46.
72. Article 23 of the ICRMW provides that migrant workers and members of their families have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.
73. *See UNGA, Universal Declaration of Human Rights* (n. 9), Article 8; ICCPR (n. 15) Article 2.3(a); ACHR (n. 11), Article 25; ECHR (n. 10), Article 13.
74. *See, e.g., CCPR, Horvath v. Australia*, Comm. No. 1885/2009, U.N. Doc. CCPR/C/110/D/1885/2009 (5 June 2014), Appendix 1 (Individual opinion by Committee member Anja Seibert-Fohr, joined by Committee members Yuji Iwasawa and Walter Kälin (partly dissenting)), para. 1; The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary (A. Zimmermann (ed.), J. Dörschner, F. Machts, (asst. eds.)), p. 1105; CCPR, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 15; CoE, *Guide to good practice in respect of domestic remedies* (18 September 2013), p. 12.
75. CCPR, General Comment No. 31 (n. 2), para. 15. *See also Klaas v Germany*, App. No. 15473/89 (ECtHR, Judgment of 22 September 1993); CCPR, *Bautista de Arellana v Colombia* (1995) UN Doc. CCPR/C/55/D/563/1993, para. 10; *Chahal v UK*, App. No. 22414/93 (ECtHR, Judgment of 15 November 1996).
76. *But see ACHPR, Kenneth Good v Botswana*, Comm. No. 313/05, 47th ACHPR (2010), para. 173.



77. IACtHR, *Advisory Opinion on Judicial Guarantees in States of Emergency*, OC-9/87 (1987).
78. Council of Europe, *Guide to good practice in respect of domestic remedies* (18 September 2013), p. 12.
79. CCPR, General Comment No. 31 (n. 2), para. 15.
80. See *Godinez-Cruz v. Honduras*, IACtHR, Ser. C, No. 10 (1990) (Merits, Reparations and Costs), para. 140; UNGA, *Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/Res/60/147 (16 December 2005), para. 11. The CCPR has indeed stated that reparations to victims of rights violations are a necessary component of an effective remedy.
81. *Ibid.*, para. 15.
82. CCPR, General Comment No. 31 (n. 2), para. 16. For a fuller explanation of the various types of redress, see OHCHR, Fact Sheet No. 36, *Human Rights and Human Trafficking* (2014), p. 29. The UN General Assembly has stated that “[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious violations of International Humanitarian Law.” UNGA, *Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (n. 80), para. 15.
83. UNGA, *Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (n. 80), paras. 22(b), 22(d).
84. Article 9(5) of the ICCPR and Article 5(5) of the ECHR stipulate the right to compensation in cases of unlawful detention. Article 63(1) of the ACHR grants a general right to compensation for violations of the rights and freedoms enshrined in the Convention, which subsequently also applies to unlawful detention or expulsion. Specifically related to the rights of migrants, Article 16(9) of the ICRMW grants the right to compensation for unlawful arrest or detention and Article 22(5) provides for the right to compensation if a migrant is expelled and the expulsion decision is subsequently annulled.
85. European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (2011), p. 39.
86. The OHCHR defines “international border” to include “the high seas and so-called ‘no-man’s land’ between border posts” and asserts that “States shall respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially.” UNGA, *Recommended Principles and Guidelines on Human Rights at International Borders – Conference Room Paper*, UN Doc. A/69/CRP.1 (23 July 2014), para. B(10)(b).
87. CCPR, General Comment No. 31 (n. 2), para. 10. At the regional level, according to Article 1 of the European Convention on Human Rights (ECHR), the rights outlined within the Convention apply to all individuals that come within the jurisdiction of a State who is a member to the ECHR. The European Court of Human Rights (ECtHR) clarified the reach of States’ jurisdiction from Article 1 of the ECHR in *Hirsi Jamaa and Others v. Italy*. In that case, the ECtHR held that an Italian ship that intercepted migrants on the high seas and returned them to Libyan authorities had exercised extraterritorial jurisdiction over the migrants – and therefore had been obligated to respect the migrants’ human rights – because the Italians took on board the migrants and exercised “de jure and de facto control” over them. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (ECtHR, Judgment of 23 February 2012), paras. 81-82. The Court further clarified that under the ECHR, all those whose access to the territory or to procedures arguably engages rights guaranteed under the ECHR must, under Article 13 of the ECHR, have access to an effective remedy before a national authority. *Hirsi Jamaa and Others v. Italy*, paras. 201-207. In a concurring opinion, one of the judges stated that “all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of which personnel are used to perform the operations and the place where they take place.” *Hirsi Jamaa and Others v. Italy* (concurring opinion of Judge Pinto de Albuquerque), pp. 76-77. See also C. Cerna, *The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law*, Center for Human Rights and Global Justice Working Paper (New York University School of Law, 2006).
88. In a 2015 publication on the human rights of migrants, the Inter-American Commission on Human Rights maintains that “while states have the right to control their borders, define the requirements for admission, stay and expulsion of aliens in its territory and, in general, to establish their immigration policies; policies, laws and practices implemented on migration must respect and ensure the human rights of all migrants.” IACHR, *Human Mobility Inter-American Standards*, OEA/Ser.L/V/II, Doc. 46/15 (31 December 2015), para. 6. Likewise, the ICCPR stated in a General Comment that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party [and] regardless of nationality or statelessness.” CCPR, General Comment No. 31 (n. 2), para. 10.
89. The International Commission of Jurists also asserts that a State’s human rights obligations should extend extraterritorially.



- International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 1.
90. Centro de Estudios Legales y Sociales and Iniciativa Frontera Norte de Mexico, *Challenges and Best Practices in Promoting and Protecting the Human Rights of all Migrants at International Borders* (June 2014), pp. 1-2. Available from [http://www.ohchr.org/Documents/Issues/Migration/GA69thSession/CELS\\_PDBI.pdf](http://www.ohchr.org/Documents/Issues/Migration/GA69thSession/CELS_PDBI.pdf) (accessed 24 October 2018).
  91. E.g., International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 3.
  92. ECHR (n. 10), Article 13.
  93. FRA and CoE, *Handbook on European law relating to asylum, borders and immigration* (2014), p. 39. See also *Hirsi Jamaa and Others v. Italy* (n. 87), paras. 205-207.
  94. *Handbook on European law relating to asylum, borders and immigration* (n. 93), p. 39.
  95. See *Abdulaziz, Cabales and Balkandali v the United Kingdom*, App. No. 9214/80; 9473/81; 9474/81 (ECtHR, Judgment of 24 April 1985), paras. 82-83.
  96. OAS, *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 40 rev (28 February 2000), para. 60.
  97. *Haitian Centre for Human Rights v. United States of America*, Report No. 51/96 (IACtHR, 1997), paras. 156-157, 163.
  98. Committee on the Rights of the Child (CRC), General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/GC/2005/6 (1 September 2005), para. 12; see also International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principles 3, 7.
  99. UNGA, *Report by the Special Rapporteur for the Human Rights of Migrants*, UN Doc. A/71/40767 (20 July 2016), paras. 88, 101; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (22 October 2014), pp. 7-9.
  100. ICCPR (n. 15), Article 13; ICRMW (n. 47), Article 22; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General Comment No. 2, *The rights of migrant workers in an irregular situation and members of their families*, UN Doc. CMW/C/GC/2 (28 August 2013), paras. 49-59. See also CCPR General Comment No. 15 (n. 40), para. 10; Committee on the Elimination of Racial Discrimination, General Recommendation 30, *Discrimination against non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3 (2004), paras. 25-28; CEDAW, General recommendation No. 32, *The gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, UN Doc. CEDAW/C/GC/32 (14 November 2004), paras. 45-46; UNGA Resolution 66/172, UN Doc. A/RES/66/172 (19 December 2011), para. 5 (h); UNGA Resolution 71/1 ("New York Declaration"), UN Doc. A/RES/71/1 (13 September 2016), paras. 24, 58; UNHRC, *Trafficking in persons, especially women and children: protecting victims of trafficking and people at risk of trafficking, especially women and children in conflict and post-conflict situations*, UN Doc. A/HRC/32/L.6 (29 June 2016), para. 2(f); UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 99), paras. 88, 101; UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* (2007), point 3; ECOSOC, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/Add.1 (20 May 2002), Guideline 2; UNGA, *Recommended Principles and Guidelines on Human Rights at International Borders – Conference Room Paper* (n. 86), Guidelines 7, 9; OHCHR, "Human rights are for all, even for migrants" – Rights experts remind participants to upcoming UN Summit (16 September 2016), Available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20518&LangID=E> (accessed 24 October 2018).
  101. E.g., OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (n. 99), p. 9.
  102. ICRMW (n. 47), Article 25.
  103. Ibid., Article 25(3).
  104. UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 48.
  105. Ibid.
  106. CMW, General comment No. 1, *Migrant domestic workers* CMW/C/GC/1 (23 February 2011), paras. 19, 21.
  107. Ibid. See also UN, HRC, *Report of the Special Rapporteur on the situation of human rights defenders* (n. 25), para. 28.
  108. CMW, General Comment No. 1 (n. 106), para. 7.
  109. ILO Convention No. 143 (1975), Article 9(2).
  110. CMW, General Comment No. 1 (n. 106), para. 49.
  111. ILO Convention No. 189 (2011), Article 16.
  112. CMW, General Comment No. 1 (n. 106), para. 49.
  113. Ibid., para. 50.
  114. CMW, General Comment No. 1 (n. 106), para. 50. See also UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19) para. 69.





115. Article 2(1) of the Convention states that “[t]his Convention applies to all branches of economic activity and to all employed persons.”
116. See ILO, Termination of Employment Convention (C158), 22 June 1982, Article 7.
117. *Ibid.*, Article 8(1). See also *ibid.*, Article 9 (detailing the powers of the deciding bodies).
118. *Ibid.*, Article 10.
119. *Ibid.*, Article 11.
120. Likewise, under Article 20(2) of the ICRMW, migrants and their family members shall not be “imprisoned...[or] deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfill an obligation arising out of a work contract, unless fulfillment of that obligation constitutes a condition for [the residence] authorization or [work] permit.”
121. See ILO, Migrant Workers (Supplementary Provisions) Convention (C143), 9 December 1978, Article 8(1).
122. See also ICRMW, (n. 47), Articles 22(9), 25(3) (requiring States to take all appropriate measures to ensure that migrants are not deprived of their acquired rights, which include wages and other entitlements due them); CMW, General comment No. 2 (n. 100), para. 58.
123. ILO, Migrant Workers (Supplementary Provisions) Convention (C143) (n. 122), Article 9(1).
124. *Ibid.*, Article 9(2).
125. CMW, General comment No. 2 (n. 100) para. 55.
126. *Ibid.*
127. *Ibid.*; CMW, General comment No. 1 (n. 106), para. 50.
128. CCPR, *Concluding Observations on Thailand*, UN Doc. CCPR/CO/84/THA (8 July 2005), para. 23. Article 21 of the ICRMW also prescribes that no authorized confiscation of personal documents may take place without the delivery of a detailed receipt.
129. CCPR, General Comment No. 32 (n. 54), para. 16.
130. CCPR, *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, UN Doc. CCPR/C/54/D/516/1992 (views of 17 September 1991), paras. 2.4, 11.5-11.6.
131. ECOSOC, *Housing and property restitution in the context of the return of refugees and internally displaced persons*, UN Doc. E/CN.4/Suc.2/2003/11 (16 June 2003), para. 46.
132. ICCPR (n. 47), Article 9(3); ECHR (n. 10), Article 5; ACHR (n. 11), Articles 7-8; ACHPR (n. 12), Article 6.
133. See UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173 (9 December 1988).
134. UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to detention of Asylum Seekers* (February 1999), Guideline 1.
135. This definition was adopted by the United Nations Working Group on Arbitrary Detention (WGAD) in 2012. Because international instruments do not always use the same terminology to refer to detention, the former United Nations Commission on Human Rights, in Resolution 1997/50, encouraged use of the term “deprivation of liberty” in order to eliminate any differences in interpretation between the various terms. The WGAD has made clear that all forms of deprivation of liberty are “detention” for the purposes of determining whether someone is being arbitrarily detained. United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/22/44 (24 December 2012), para. 55. See also IOM Glossary on Migration, 3<sup>rd</sup> edition.
136. See also ECHR (n. 10), Article 5(2); ACHR (n. 11), Articles 7(4), 8(2)(b).
137. UNHCR, *Guidelines on Applicable Criteria and Standards Relating to detention of Asylum Seekers and Alternatives to Detention* (2012), Guideline 2, para. 14.
138. *Ibid.*, Guideline 7, para. 47.
139. General Assembly Resolution 43/173, UN Doc. A/Res/43/173 (9 December 1988).
140. Either the detainee or their counsel have the right to “receive prompt and full communication of any order of detention, together with the reasons therefore.” *Ibid.*, Principle 11. The reasons and time of the arrest must be recorded and communicated to the detainee or the counsel, as well as precise information on the place of custody. *Ibid.*, Principle 12.
141. OHCHR, *End of Mission Statement* (n. 58). See e.g., ICCPR (n. 15), Article 16; ACHR (n. 11), Article 3; ACHPR (n. 12), Article 5; ICRMW (n. 47), Article 24.
142. UNGA, *Report of Working Group on Arbitrary Detention*, UN Doc. A/HRC/13/30 (18 January 2010), para. 61.
143. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (n. 137), Guideline 7, para. 47(ii).
144. *Vélez Loor v. Panama*, Series C No. 218 (IACtHR, 23 November 2010), para. 146. Likewise, the International Commission of Jurists proposes that detainees have the “right to a qualified, independent and competent lawyer to assist in [detainment]

- proceedings.” International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 8.
- 145.OHCHR, *End of Mission Statement* (n. 58).
- 146.Ibid.
- 147.International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 7.
- 148.OHCHR/GMG, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, UN Doc. A/HRC/37/34/Add.1 (7 February 2018), Principle 8, para. 5; CCPR, General Comment No. 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35 (16 December 2014), para. 46; Committee against Torture (CAT), General Comment No. 2, *Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2 (24 January 2008), para. 13; UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (n. 133), Principles 17-18.
- 149.UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (n. 133), Principle 16(1).
- 150.Article 18(1) of the International Convention for the Protection of All Persons from Enforced Disappearance provides that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall be guaranteed access to information regarding the detention; OHCHR, Working Group on Arbitrary Detention (WGAD), Annual Report 1999, UN Doc. E/CN.4/1999/63 (18 December 1998), para. 69, Guarantee 6; OHCHR, WGAD, Annual Report 2000, UN Doc. E/CN.4/2000/4 (28 December 1999), Annex II, Deliberation No. 5, Principle 2.
- 151.UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (n. 137), Guideline 7, para. 47(vii).
- 152.Ibid.
- 153.OHCHR, *End of the Mission Statement* (n. 58).
- 154.*See also* ICRMW, Articles 16.7, 23 (reinforcing the right for migrant workers and their families).
- 155.Vienna Convention on Consular Relations (n. 71), Article 36(1)(a).
- 156.Ibid., Article 36(1)(b). This consent is paramount in order not to put in danger the non-national, particularly irregular migrants, refugees, or LGBTI persons.
- 157.*Germany v. United States of America* (International Court of Justice, 27 June 2001), para. 77; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99 (Inter-American Court of Human Rights, 1 October 1999), para. 84. *See also* Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (ensuring that if a detained person is a foreigner, he shall be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the state of which he is a national); UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (n. 133), Principle 16(2); UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 22 (“The right to consular assistance is primarily a right of migrants and only a conditional right of the State of origin because migrants may prefer not to contact their State out of fear of persecution or other reasons.”).
- 158.UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (n. 133), Principle 16(2).
- 159.Vienna Convention on Consular Relations (n. 71), Article 36(1)(c). Besides the procedural guarantees, especially in cases of deprivation of liberty, consular assistance plays a crucial rule in the area of employment, as migrants are often victims of workplace abuses. *E.g.*, UNGA, *Report of the Special Rapporteur* (n. 24), para. 21.
- 160.*See* ICCPR (n. 15), Article 9(4); ECHR (n. 10), Article 5(4); ACHR (n. 11), Article 7(5); ACHPR (n. 12), Article 7(1)(a).
- 161.International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 8.
- 162.Ibid.
- 163.M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> revised edition (2005), Article 9, para. 51.
- 164.International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 8.
- 165.*See* CCPR, *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (views 15 June 2004), para. 10.4 (finding that a delay of 120 days was permissible). *But see* *ZNS v. Turkey*, ECtHR Application No. 21896/08 (19 January 2010), paras. 61-63 (holding that a delay of two months and ten days, in a case that was not complex, was not permissible).
- 166.For examples of the ECtHR’s interpretation of this clause, *see* *Sarban v. Moldova*, App. No. 3456/05 (ECtHR, Judgement of 4 October 2005), para. 120; *Kadem v. Malta*, App. No. 55263/00 (ECtHR, Judgement of 9 January 2003), paras. 44-45, 54;



- and, *Rehbock v. Slovenia*, App. No. 29462/95 (ECtHR, Judgement of 28 November 2000), paras. 86-88, in which the court concluded respectively that time periods of twenty-one, seventeen, and twenty-three days were excessive. *See also* ECHR (n. 10), Article 5(4).
167. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principles 5-6; *Z.N.S. v. Turkey*, App. No. 21896/08 (ECtHR, Judgement of 19 January 2010), para. 60. For the requirement of due process to be met, proceedings must be adversarial and ensure “equality of arms” between the parties (i.e., all parties are to be provided the same procedural rights unless distinctions are based on law and can be justified on objective and reasonable grounds). CCPR, General Comment No. 32 (n. 54), para. 13.
168. *See* ICCPR, Articles 9.4-9.5 (asserting that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge,” and that “anyone who is deprived of liberty [...] shall be entitled to take proceedings before a court”); International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants*, (n. XX), p. 12 (“National legal systems should provide for automatic periodic judicial review of the lawfulness, necessity and proportionality of any ongoing detention.”). Courts have enforced the limitations on detention in varying scenarios. *E.g.*, CCPR, *Gonzalez del Rio v. Peru*, Communication No. 263/1987, UN Doc. CCPR/C/46/D/263/1987 (28 October 1992), para. 5.2 (holding that when judicial proceedings are unduly delayed, a constraint upon the right to leave the country is not justified); CCPR, *A v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (11 April 1997), para. 9.4 (“The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.”); CCPR, *Baban et al. v. Australia*, Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001 (18 September 2003), para. 7.2 (finding that the rights of two detainees had been violated when they were held in immigration detention for almost two years without individual justification or any chance of substantive judicial review of their continued detention).
169. *Bouamar v. Belgium*, App. No. 9106/80 (ECtHR, Judgment of 29 February 1988), para. 60. *See also* ICMRW (n. 47), Article 16(8) (“Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court [...] When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter.”); International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 7 (“Where the person cannot afford to pay for legal advice and representation, independent legal advice and representation should be made available free of charge.”); International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 12 (“Judges and lawyers should ensure that refugees and migrants have access to a qualified and independent interpreter.”).
170. Both the CCPR and the IACtHR have emphasized that judicial review must be real rather than merely formal and carried out by a body with the power to, where appropriate, issue legally binding judgments. CCPR, *Baban et al. v. Australia*, Communication No. 1014/2001, UN Doc. CCPR/C/78/D (views 18 September 2003), para. 7.2. *See also* ICCPR (n. 15), Article 9.4.
171. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principles 5-6.
172. ICCPR (n. 15), Article 9.5; ECHR (n. 10), Article 5.5; ICMRW (n. 47), Article 16.9. Further, the ECtHR has held that compensation awards must also be legally binding. Thus, *ex gratia* payments are not sufficient. *Brogan and Others v. United Kingdom*, App. No. 11209/84, 11234/84, 11266/84, 11386/85 (ECtHR, judgment of 29 November 1988), para. 67.
173. It must first be noted that the provisions on the right to fair trial do not seem to be applicable to expulsion procedures. It has been the consistent jurisprudence of the European Court of Human Rights that “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of article 6(1) of the Convention.” *Maaouia v. France*, App. No. 39652/98 (ECtHR, Judgment of 5 October 2000), para. 40. As for the Human Rights Committee, it has not applied Article 14 of the International Covenant on Civil and Political Rights to expulsion proceedings, although it does not seem to have excluded this possibility entirely. The apparent refusal to apply general provisions on fair trial to expulsion proceedings may be explained by the fact that there are some specific provisions in international and regional human rights instruments dealing with the procedural standards to be applied in the case of expulsions. All these human rights instruments enumerate different ways migrants can effectively identify and claim human rights violations in legal proceedings.
174. The CCPR has interpreted Article 14, para. 1 of the ICCPR, which guarantees the right to a fair trial “[i]n the determination of any criminal charge [...] or of [...] rights and obligations in a suit at law”, to exclude expulsion proceedings. CCPR, *Zundel v. Canada*, Comm. No. 1341/2005, UN Doc. CCPR/C/89/D/1341/2005 (views of 20 March 2007), paras. 6.7-6.8. *See also* CCPR, General Comment No. 32 (n. 54), para. 17, which states that Article 14, para. 1 “does not apply to extradition, expulsion and deportation procedures.” In *Adu v. Canada*, the CCPR entertained a Ghanaian national's assertion that bias during his expulsion hearing had violated Article 14 of the ICCPR, which requires a “fair and public hearing” for any “criminal

- charge...[or] rights and obligations in a suit at law.” Because the Committee ultimately elected not to rule on the question of whether the expulsion hearing qualified as a determination of “rights and obligations in a suit at law” under Article 14 of the ICCPR, its consideration of the case as an Article 14 question left open the possibility that expulsion hearings require the same rights of fairness as any civil or criminal case. CCPR, *Adu v. Canada*, Comm. No. 654/1995, UN Doc. CCPR/C/60/D/654/1995 (18 July 1997).
175. ICCPR (n. 15), Article 13.
176. ECHR (n. 10), Protocol 7, Article 1.2. Similar to CCPR, the ECtHR has held that “decisions regarding the entry, stay, and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him.” *Maaouia v. France*, App. No. 39652/98 (ECtHR, Judgment of 5 October 2000), para. 40.
177. International Justice Resource Center’s publication on Immigration and Migrants’ Rights. Available from [http://www.ijrcenter.org/thematic-research-guides/immigration-migrants-rights/#Procedural\\_Safeguards\\_in\\_Individual\\_Expulsion\\_Proceedings](http://www.ijrcenter.org/thematic-research-guides/immigration-migrants-rights/#Procedural_Safeguards_in_Individual_Expulsion_Proceedings). See also *Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (Views of 15 June 2004), paras. 10.6-10.8.
178. McBride (n. 8) 466. For example, access to justice should be ensured so that parents who are being deported from a State are able to claim their right to family unity. See FRA, *Fundamental rights of migrants in an irregular situation in the European Union* (2011), p. 29; International Center of Human Rights and the Rights of Peoples of the University of Padua, *Protecting the human rights of irregular migrants: the role of national human rights structures* (2008), pp. 27-28.
179. *Čonka v. Belgium* (n. 68), para. 79.
180. *Ibid.*, paras. 75-76.
181. *Khalifia and others v. Italy*, App. No. 16483/12 (ECtHR, Judgement of 15 December 2016), para. 279. See also *De Souza Ribeiro v. France*, App. No. 22689/07 (ECtHR, Judgement of 13 December 2012), para. 82.
182. ICRMW (n. 47), Article 22(3).
183. *Ibid.*, Article 22(4).
184. CMW, General Comment No. 2 (n. 100), para. 53.
185. *Ibid.*, para. 54.
186. ICRMW (n. 47), Article 22.8.
187. See also ICRMW (n. 47), Article 17.8 (“If a migrant worker [...] is detained for the purpose of verifying an infraction of provision related to migration, he or she shall not bear any costs arising therefrom.”); CMW, General comment No. 2 (n. 100), para. 57 (“[T]he Committee notes that migrant workers who are in an irregular situation not of their own making, for example, redundancy before expiry of a contract or where an employer failed to complete the necessary formalities, should not be responsible for the costs of expulsion, including travel costs.”).
188. *Caso de Personas Dominicanas y Haitianas vs. República Dominicana*, Series C No. 282 (IACtHR, Judgement of 24 August 2014), para. 351.
189. *Ibid.*, para. 356.
190. CAT, General Comment No. 4 (2017), *The implementation of article 3 of the Convention in the context of article 22*, UN Doc CAT/C/GC/4 (4 September 2018), para. 13.
191. International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 9.
192. *Ibid.*, Principle 3 (emphasis added).
193. *Ibid.*, Principle 9.
194. *Ibid.*
195. IACtHR, *Juridical Condition and Rights of Undocumented Migrants* (17 September 2003), para. 119 (“[M]echanisms to control the entry into and departure from [States’] territory [...] must always be applied with strict regard for the guarantees of due process and respect for human dignity.”); ACHPR, Comm. No. 159/96 (11 November 1997), para. 20.
196. IACtHR, *Juridical Condition and Rights of Undocumented Migrants* (n. 195), para. 119.
197. UN, HRC, *Report of the Special Rapporteur on human rights of migrants*, UN Doc. A/HRC/38/41 (4 May 2018).
198. See *ibid.*, para. 47.
199. *Ibid.*, para. 84.
200. *Ibid.*, para. 85. In the conclusion, the Special Rapporteur includes as a priority providing “accessible complaint mechanisms for migrants [...] to ensure their access to justice and remedies for human rights violations.” *Ibid.*, para. 92(g).
201. UN, HRC, *Report of the United Nations High Commissioner for Human Rights on Access to Justice for Children*, UN Doc. A/HRC/25/35 (16 December 2013), para. 12.
202. CRC, General Comment No. 12, *The right of the child to be heard*, UN Doc. CRC/C/GC/12 (1 July 2009), paras. 132, 134. See also CoE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (17 November 2010).





- The CRC also proposes “special units within the police the judiciary, the court system, the prosecutor’s office, as well as specialized defenders or other representatives who provide legal ... assistance to the child.” CRC, General Comment No. 10, *Children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10 (25 April 2007), para. 92.
203. CRC, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child*, UN Doc. CRC/C/GC/10 (25 April, 2007), para. 24; UN, HRC, *Report of the United Nations High Commissioner for Human Rights on Access to Justice for Children* (n. 201), para. 60 (“States should address additional barriers for and adopt special protective measures that enable them to participate in proceedings and feel empowered, when needed and appropriate, to provide their informed consent to decisions affecting them.”).
204. CMW and CRC, Joint general comment No. 3 of the CMW and No. 22 of the CRC, *The general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC3-CRC/C/GC/22 (16 November 2017), para. 35.
205. UN, HRC, *Report of the United Nations High Commissioner for Human Rights on Access to Justice for Children* (n. 201), para. 5.
206. CRC, General Comment No. 14, *The right of the child to have his or her best interests taken as a primary consideration*, UN Doc. CRC/C/GC/14 (29 May 2013), para. 32.
207. *Ibid.*, para. 32.
208. CMW and CRC, Joint General Comment No. 3 of the CMW and No. 22 of the CRC (n. 204), para. 30.
209. UN, HRC, *Report of the United Nations High Commissioner for Human Rights on Access to Justice for Children* (n. 201), para. 5.
210. CRC, General Comment No. 12 (n. 202), paras. 132, 134.
211. CEDAW, General Recommendation No. 26, *Women migrant workers*, UN Doc. CEDAW/C/2009/WP.1/R (5 December 2008), para. 5.
212. “[T]he position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof.” *Ibid.*
213. *Ibid.*, para. 9.
214. CEDAW, General Recommendation No. 26 (n. 211), paras. 13-20.
215. International Commission of Jurists, *Women’s Access to Justice for Gender-Based Violence: A Practitioners’ Guide* (February 2016), p. 26.
216. UN GA, *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS13, Article 2(c).
217. *Ibid.*, Article 15(2).
218. CEDAW, General Recommendation No. 33 (n. 69), para. 11.
219. UNGA, *Report of the Secretary-General: In-depth study on all forms of violence against women*, UN Doc. A/61/122/Add.1 (6 July 2006), para. 293.
220. See CEDAW, General recommendation No. 33 (n. 69), para. 26 (“Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women’s voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. [...] In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.”). See also UN Women and UNDP, *Improving Women’s Access to Justice - During and After Conflict: Mapping UN Rule of Law Engagement* (2 July 2014), p. 11.
221. CEDAW, General recommendation No. 33 (n. 69), para. 29.
222. UNDESA, *Handbook for Legislation on Violence against Women*, UN Doc. ST/ESA/329 (2010), Recommendation 3.7.1.
223. International Commission of Jurists, *Women’s Access to Justice for Gender-Based Violence* (n. 215), p. 26.
224. GCM (n. 29), Objective 7, para. 23, lit. (c) (emphasis added).
225. UNGA, *Report of the Secretary-General: In-depth study on all forms of violence against women* (n. 219), para. 284.
226. CEDAW, General Recommendation No. 33 (n. 69), para. 17(f).
227. GCM (n. 29), para. 15.
228. See e.g., *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994), para. 8.7.
229. In 2007, these were adopted as the Yogyakarta Principles and although the principles are considered as “soft law” they are based on so-called “hard law” - binding international legal standards - with which all States must comply. In 2017, the principles were supplemented by YP+10, which were additional principles that expanded on gender expression and sex characteristics.
230. CCPR, *Concluding Observations on Mongolia*, UN Doc. CCPR/C/MNG/CO/5 (25 March 2011), para. 9.



- 231.OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/Add. 1 (20 May 2002), Guideline 9.
- 232.International Commission of Jurists, *Principles on the role of judges and lawyers in relation to refugees and migrants* (n. 22), Principle 10.
- 233.A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Palermo Protocol on Human Trafficking”), UN Doc. A/55/383 (2 November 2000).
- 234.Ibid., Article 6.1.
- 235.Ibid., Article 6.2(a).
- 236.Ibid., Article 6.2(b).
- 237.OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (n. 231), Guideline 9.
- 238.Palermo Protocol on Human Trafficking (n. 233), Article 6.3(b).
- 239.Ibid., Article 6.6.
- 240.Ibid., Article 7.1.
- 241.CoE, *Convention on Action against Trafficking in Human Beings*, Treaty No. 97, Warsaw (16 May 2005), Article 12.
- 242.Ibid., Article 12(6). See also GCM, (n. 29) objective 10, para. 26 lit. (g).
- 243.OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (n. 231), Guideline 9.
- 244.UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 68.
- 245.Ibid., para. 54.
- 246.UN, HRC, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/17/35 (13 April 2011), para. 35.
- 247.Ibid., para. 49.
- 248.UNGA, *Report of the Special Rapporteur on the human rights of migrants* (n. 19), para. 56.
- 249.*R (on the application of UNISON) v Lord Chancellor* (n. 28) (“When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. [...] [T]he possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.”).
- 250.UN, HRC, *Report of the Special Rapporteur on the situation of human rights defenders* (n. 25), para. 58.



### The following IML Information Notes are currently available:

- The protection of unaccompanied migrant children
- International standards on immigration detention and non-custodial measures
- The principle of *non-refoulement*

**The International Organization for Migration (IOM)** is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental body, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration, advance understanding of migration issues, encourage social and economic development through migration, and work towards effective respect of the human dignity and well-being of migrants.

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