

MIGRANTS' ACCESS TO JUSTICE: INTERNATIONAL STANDARDS AND HOW THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION HELPS PAVING THE WAY

SUMMARY

This paper presents an overview of the meaning and scope of the right to access justice for migrants, as enshrined in international law, regional law and jurisprudence, in relation to the framework of the Global Compact for Safe, Orderly, and Regular Migration (GCM). It explores the central elements of this right and relevant standards for its protection and guarantee in the context of migrants' effective access to justice, highlights some of the challenges in implementing this right, and provides some of the measures that States can take to respect, protect and fulfil the right of migrants to access justice, through the commitments in the GCM and the new opportunities that measures taken under these commitments entail.

I. INTRODUCTION

Adopted by the United Nations General Assembly in December 2018 and anchored in States' international law obligations to protect the human rights of migrants, the Global Compact for Safe, Orderly and Regular Migration (hereinafter, "the Compact" or "the GCM") is a significant step forward towards increased protection and for the operationalisation of the right of migrants to access justice, among other rights. The GCM, although not binding in nature, is the first UN global agreement on a common approach to international migration in all its dimensions. It was adopted at the Conference held under the auspices of the UN General Assembly, at which 162 countries took part in December 2018. Subsequently the General Assembly endorsed the GCM in Resolution 73/195. The GCM sets out 23 goals to better manage migration at the local, national, regional, and global levels and even though it's not an international treaty, it contains numerous and important commitments.

Access to justice is a fundamental right, including for migrants, and an essential prerequisite for the fulfilment of all other rights, quintessentially underlining the interdependence of all human rights. For example, the right to access to justice is often crucial to ensure respect of the labour rights of migrants, or the respect of the principle of non-refoulement. There is no effective protection of rights and real access thereto if migrants cannot access the legal system in the countries where they are. Migrants must be able to claim any right through the justice system within the countries where they are, regardless of their legal status. This is all the more important since migrants, as non-nationals, are not entitled to vote or elect, in most cases.

Nevertheless, as it is the case with other rights, there are numerous challenges when it comes to their implementation. Significant gaps exist between the formal recognition of migrants' rights in international instruments, and their translation into domestic laws, as well as their proper application at the local level. The Special Rapporteur on the Human Rights of Migrants has pointed out to a multitude of barriers that still restrict or impede migrants' effective access to justice, as well as State policies and practices focused on security and the criminalization of irregular migration with the same effect.¹ The Committee on Migrant Workers (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.²

Human rights, the rule of law, procedural guarantees, and access to justice are among the Compact's guiding principles. Key components of the right to access justice can be found throughout the Compact in various of its Objectives, which over 150 States have endorsed and committed to. Those Objectives and their relation to access to justice will be examined below,³ as well as the way these Objectives and commitments contribute towards the achievement of some targets of the Sustainable Development Goals, namely targets 10.7 and 16.3.⁴

As a policy tool grounded in international law, and human rights in particular, the Compact provides States with an opportunity to better implement their related obligations, including the right of migrants to access justice. In this regard, States committed in the Compact 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."⁵ To realize this commitment, States will have to take positive measures to reduce the obstacles that restrict or hinder migrants' access to justice, particularly migrants in vulnerable situations, such as migrants in an irregular situation, women workers, domestic or temporary workers, unaccompanied migrant children, indigenous and nomadic people, as well as victims of trafficking and other crimes.

II. THE RIGHT OF MIGRANTS TO ACCESS JUSTICE

i. International law

The right to access justice is recognised in international and regional human rights instruments,⁶ as well as by national constitutions and legislation worldwide, and it applies to everyone without discrimination, by virtue of their humanity – including migrants. The Compact contains further objectives and commitments to enable States to meet their duties towards migrant persons.

¹ United Nations General Assembly (UNGA), Report of the Special Rapporteur on the human rights of migrants, 2018, UN Doc. A/73/178/Rev.1.

² Committee on Migrant Workers, General comment No. 1, Migrant domestic workers, 2011, UN Doc. CMW/C/GC/1, para. 55.

³ UNGA, Global Compact for Safe, Orderly and Regular Migration (GCM), 19 December 2018, UN Doc. A/RES/73/195, Objectives 2(b), 3(d), 7(c)(g), 9(f), 10(e)(h), 13(d), and 21(h) outline various measures that a State can take to ensure, protect, and fulfil the right of migrants to access justice in line with their international obligations.

⁴ UNGA, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, UN Doc. A/RES/70/1, Target 10.7: "Facilitate orderly, safe, regular and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies."; *See also* Target 16.3: "Promote the rule of law at the national and international levels and ensure equal access to justice for all."

⁵ GCM *supra* note 3, Objective 3, para.19.

⁶ Articles 7 and 8 of the Universal Declaration of Human Rights (UDHR); Articles 2(3)(a), 9(4), 14(1) of the International Covenant on Civil and Political Rights (ICCPR); Articles 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Articles 16(7-9), 18(3)(5)(7), and 24 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW); Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); Article 8 of the American Convention on Human Rights (ACHR); IOM, [Information Note on Access to Justice: A Migrant's Right](#), June 2019, p. 2.

“Access to justice” means that individuals have access to and can make effective use of existing judicial or quasi-judicial mechanisms to protect their rights and obtain redress in response to violations.⁷ This can include access to informal institutions, such as customary frameworks,⁸ and quasi-judicial alternative dispute mechanisms.⁹ The access to justice should not be hindered by anything, and certainly not by the irregular status in which some migrants find themselves. The total and complete access to the existing legal and judicial mechanisms should be ensured, to guarantee that right. Access to justice is therefore a crucial tool to address impunity and ensure the rule of law.

Particularly during a state of emergency such as the COVID-19 pandemic, access to justice remains paramount. The United Nations Special Rapporteur on the Independence of Judges and Lawyers warned that the pandemic’s socioeconomic impact and extended regulations have had a severe effect on the access to the judiciary, including on the right of people – notably migrants- to have access to an operative and independent judicial system.¹⁰

Beyond the legislation and the mechanisms that States must adopt and put in place, other positive measures are crucial for proper access, such as guarantee of translators and of legal aid if necessary. The legal awareness, information and representation of individuals, and the monitoring capacities of civil society organisations are fundamental to ensure effective access to justice, from a grievance to a remedy.¹¹ The Compact reaffirms this as States commit to “ensure that migrants have access to [...] legal assistance and representation in legal proceedings that affect them”, since they “are recognized as persons before the law and [...]” as States must warrant the delivery of impartial and non-discriminatory justice.¹² Effective access to justice encompasses all stages of the “justice chain”,¹³ from supporting access to information, rights awareness, and access to courts, to obtaining and enforcing appropriate decisions and remedies.¹⁴

ii. Regional Systems of human rights and access to justice of migrants

The Inter-American Human Rights System (IAHRS) provides extensive guarantees regarding the right to an effective remedy and to judicial protection.¹⁵ Article 18 of the American Declaration of the Rights and Duties of Man establishes that each person has the right to a fair trial and access to justice, while Article 8 of the American Convention on Human Rights (ACHR) expands on an effective access to justice by establishing judicial guarantees thereof. Furthermore, article 25 of the ACHR enshrines the right to judicial protection, under which States Parties committed to ensuring guarantees of due process, timely and effective redress, and compliance by the competent authorities.

⁷ UNDP, [Programming for Justice: Access for All - A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice](#), 2005, p. 5; F. Francioni. The Right to Access to Justice under Customary International Law. In: *Access to Justice as a Human Right* (F. Francioni, ed.). Oxford University Press, 2007, pp. 3-4.

⁸ *Ibid*, p. 5.

⁹ Council of Europe, Committee on Equality and Non-Discrimination, Equality and non-discrimination in the access to justice, 31 March 2015, Doc. 13740, para. 10.

¹⁰ Report of the United Nations Special Rapporteur on the Independence of Judges and Lawyers, The coronavirus disease (COVID-19) pandemic: impact and challenges for independent justice, 2021, UN Doc. A/HRC/47/35.

¹¹ UNDP, [Access to Justice: Practice Note](#), 9 March 2004, p. 6.

¹² See GCM *supra* note 3, Objective 7(g).

¹³ UN Women, [Progress of the World’s Women: In Pursuit of Justice](#), 2011, p. 11.

¹⁴ UNDP, *supra* note 7, p. 6; UNDP, *supra* note 11, p. 6; Jeremy McBride. *Access to Justice for Migrants and Asylum Seekers in Europe*. Council of Europe, 2009, p. 6.

¹⁵ Inter-American Commission on Human Rights (IACHR), Inter-American Principles on The Human Rights of All Migrants, Refugees, Stateless Persons And Victims Of Human Trafficking (“Inter-American Principles”), December 7, 2019, Resolution 04/19. This specifically encompasses migrants in line with Principles 4 and 12 of the Inter-American Principles.

The Inter-American Court of Human Rights (IACtHR) has also emphasized the importance of adequate, effective, fair, and equitable remedies.¹⁶ The Court has clarified that access to justice, including the right to due process, shall be granted equally and without discrimination to all persons, regardless of their migration status, in line with the fundamental nature of this right.¹⁷

In the European Human Rights system, the right to access to justice is also established by the European Convention on Human Rights (ECHR).¹⁸ Article 13 of the ECHR establishes that everyone whose rights and freedoms are violated shall have an effective remedy before a national authority. Moreover, according to article 6 (1) of the ECHR, everyone is entitled to a fair trial “[...]within a reasonable time by an independent and impartial tribunal established by law”, inter alia. In this regard, the European Court of Human Rights (ECtHR) has pointed out that failing to guarantee the provisions of a fair trial enshrined in article 6 of the ECHR could amount to a “flagrant denial of justice”.¹⁹ In the context of migration, the ECtHR has also indicated that the right to an effective remedy includes having a remedy at a national level to deal with any “arguable complaint” under the ECHR.²⁰

Access to justice is also recognized as a right in the African Human Rights system. The African Charter on Human and Peoples’ Rights enshrines the right to equality before the law and equal protection of the law, as well as the right to fair trial in its articles 3 and 7, respectively. According to the Charter, these rights should be enjoyed by every individual without distinction of “any kind”, including migration status.²¹ In the same sense, the African Commission on Human and Peoples’ Rights (ACmHPR) has stated that States “have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind” and that “non-nationals are entitled to the enjoyment of this right just as do nationals”.²²

iii. Core elements of access to justice and obstacles faced by migrants

Although migrants’ rights have been formally recognised in international, regional and many national normative frameworks worldwide, migrants who are victims of violations still face obstacles in seeking remedies.²³ This is often due to structural, socio-economic and institutional factors,²⁴ discriminatory or inadequate social policies (in areas such as health, housing, education and social security), or specific laws and policies limiting or making access to justice difficult by putting excessive requirements on the way.

Yet States, as duty-bearers, are responsible to ensure that everyone can effectively access this right and exercise it. This supposes addressing vulnerabilities highlighted in Objective 10(e) of the Compact, for example exploitation, including trafficking. The Compact further establishes that all migrants, irrespective of their migration status, must have access to justice and be able to safely report without

¹⁶ *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights (IACtHR), 1988, para. 63; *Mejía Idrovo v. Ecuador*, IACtHR, 2011, para. 91; *Ivcher Bronstein v. Peru*, IACtHR, 2001, para. 137; *García and Family Members v. Guatemala*, IACtHR, 2012, para. 142; *Villagrán Morales et al. v. Guatemala*, IACtHR, 1999, para. 237; *Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR, 2010, para. 141; *Castillo-Petruzzi et al. v. Peru*, IACtHR, 1999, para. 35; *Castillo Paez v. Peru*, IACtHR, 1998, para. 106.

¹⁷ IACtHR, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 2003, paras. 105-109, 121.

¹⁸ European Union (EU), EU Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice*, Publications Office of the EU, 2016, p. 17.

¹⁹ *Harkins v. the United Kingdom*, European Court of Human Rights (ECtHR), 2017, para. 63.

²⁰ *M.S.S. v. Belgium and Greece*, ECtHR, 2011, para. 288; *Kudła v. Poland*, ECtHR, 2000, para. 157.

²¹ Article 2 of the African Charter on Human and Peoples’ Rights: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”

²² *Good v. Botswana*, African Commission on Human and Peoples’ Rights (ACmHPR), 2010, para. 163.

²³ IACtHR, *supra* note 17, para. 112; Inter-American Commission on Human Rights (IACHR), [Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights](#), 2007, paras. 10, 11, and 48.

²⁴ Report of the Special Rapporteur on Extreme Poverty and Human Rights on access to justice for people living in poverty, 2012, UN Doc. A/67/278, para. 18.

fear of detention, deportation or penalty.²⁵ It bears noting that the implementation of these objectives supposes legal and institutional firewalls,²⁶ or they will remain dead letter and access to this right will continue to be unattainable for big parts of the humanity.

Furthermore, to guarantee an effective access to justice, the core elements set out below must be present in the national legislation and system.²⁷

*a) Equal Recognition before the Law and equality before the Courts*²⁸

This right grants every individual the ability to bear rights and duties under the law.²⁹ This is reiterated at Objective 7(g) of the Compact, where States commit to recognise migrants before the law without discrimination.³⁰ The IACtHR has stated explicitly that equality before the law is a right belonging to all irrespective of migration status, and has recognised the principles of equal protection before the law and non-discrimination as *jus cogens* norms.³¹

The equality of all persons before the law set out in the UDHR and the ICCPR³² implies equality before the courts and tribunals, as laid out in Article 10 of the UDHR and Article 14 of the ICCPR.

Yet, some national laws nevertheless do not extend legal capacity before the courts to migrants in irregular situations. Other obstacles impeding this right include the requirement for documents to initiate judicial proceedings, and the difficulty of presenting evidence in proceedings.³³ One solution to achieve Objective 7(g) of the Compact is to introduce alternative means of proof and documentation requirement based on credibility criteria.³⁴

The IACtHR has also specified that the right to judicial protection is violated when a migrant is unable to exercise it due to fear of deportation.³⁵ It is therefore necessary for States to adopt firewalls³⁶ measures between the judicial and migration control authorities to address migrants' fear and encourage and facilitate access to their rights.³⁷

In the Compact, States also committed to facilitate access to justice for victims of trafficking and to enable them to report without fear of arrest, deportation or punishment.³⁸ This is crucial for such victims and survivors, particularly when they are migrants in irregular situations, as they often distrust the judicial system due to fears over their status, corruption,³⁹ the complexity of the legal process,⁴⁰ or fear of being arrested and detained.⁴¹ This facilitation of access to justice without fear of adverse

²⁵ GCM *supra* note 3, Objective 10(e).

²⁶ UNGA, *supra* note 1, para. 33: "Firewalls establish a strict and real separation between immigration enforcement and public services".

²⁷ See Articles 3, 8, and 25 of the American Convention on Human Rights (ACHR).

²⁸ Human Rights Committee, General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para. 2.

²⁹ Article 6 of the UDHR; Article 16 of the ICCPR; Article 17 of the Bogotá Declaration; Article 24 of the ICRMW.

³⁰ GCM *supra* note 3, Objective 7(g).

³¹ IACtHR, *supra* note 17, para. 101; Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 2007 UN Doc. CCPR/C/GC/32, para. 9.

³² Article 7 of the UDHR; Article 26 of the ICCPR.

³³ UNHCR, [Note on Burden and Standard of Proof in Refugee Claims](#), 1998, para. 10.

³⁴ GCM *supra* note 3, Objective 7(g).

³⁵ IACtHR, *supra* note 17.

³⁶ UNGA, *supra* note 1, para. 33: "Firewalls establish a strict and real separation between immigration enforcement and public services".

³⁷ OHCHR, [Statement on International Migrants' Day](#), 18 December 2015; UNGA, *supra* note 1, para. 39.

³⁸ GCM *supra* note 3, Objective 10(e).

³⁹ Global Alliance Against Traffic in Women (GAATW), [Submission to the UN Special Rapporteur on the human rights of migrants](#), 2018, p. 2.

⁴⁰ *Ibid*, p. 5; [Migrant Forum in Asia, Written Contribution to the Special Rapporteur on the Human Rights of Migrants on the issue of Access to Justice and Remedies for Migrants](#), 2018.

⁴¹ IACtHR, *supra* note 17, para. 126.

repercussions, according to international norms and standards, should be extended in national laws to all migrants, regardless of their legal and migratory status.

To further guarantee equality before the law and before the courts, migrants must have a reasonable opportunity to bring their case forth, and judicial systems should take account of their circumstantial vulnerabilities,⁴² including financial obstacles, for example, by eliminating high court fees when they are prohibitive.⁴³ In addition, migrants in custody must be informed of their right to consular assistance⁴⁴ and legal counsel⁴⁵ in the same manner as nationals.⁴⁶ In the Compact, States committed in this regard to enhance consular assistance and protection throughout the migration cycle.⁴⁷

b) An individualized approach

For an equal access to justice of all migrants to be guaranteed, individual specificities and vulnerabilities need to be taken into account, for example vulnerabilities highlighted in Objective 10(e) of the Compact, including - but not limited to - exploitation and trafficking. To that effect, States committed in Objective 7(c) of the GCM to develop gender-responsive and child-sensitive migration policies to address migrants' vulnerabilities, notably by promoting access to justice and effective remedies, especially in cases of sexual and gender-based violence, abuse and exploitation.

The right to access to justice of children is guaranteed by the Convention on the Rights of the Child (CRC) and implies several rights, such as children's right to express their views and to be heard in any judicial or administrative proceedings affecting them, the right to bring legal claims and complaints when their rights are violated, the right to information in their language and in a timely, child-sensitive and age-appropriate manner, the right to prompt access to legal assistance and to prompt decisions by the court, as well as the right to expeditious decisions.⁴⁸ According to a report of the High Commissioner for Human Rights, access to justice for children requires taking into account their "evolving maturity and understanding when exercising their rights".⁴⁹

Throughout the GCM, specific references are made to the protection of children at different stages of their migration journey, be it during their crossing of international borders, at their arrival in countries of transit and destination and during return and readmission processes.⁵⁰ These protections seek to also ensure an effective access to justice of migrant children by basing every decision concerning them on a prior consideration of their best interest.⁵¹

⁴² *Ibid*, para. 48.

⁴³ UN-Habitat, [The Right to Adequate Housing, Human Rights Fact Sheet No.21 \(Rev.1\)](#), p.40.

⁴⁴ IACtHR, Advisory Opinion OC-16/99, The right to information on consular assistance in the framework of the guarantees of the due process of law, 1 October 1999, paras. 78-80.

⁴⁵ Report of the Working Group on Arbitrary Detention, 2010, UN Doc. A/HRC/13/30, para. 61.

⁴⁶ UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#), 2012, Guideline 7, para. 47(ii).

⁴⁷ GCM *supra* note 3, Objective 14.

⁴⁸ Articles 12, 17 and 37(d) of the Convention on the Rights of the Child (CRC); UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, UN Doc. CMW/C/GC/3-CRC/C/GC/22, para 35.

⁴⁹ Report of the United Nations High Commissioner for Human Rights, Access to justice for children, 2013, UN Doc. A/HRC/25/35, para. 5

⁵⁰ See GCM *supra* note 3, Objectives 11(e), 12(d), 13(h) and 21(g).

⁵¹ Article 3 (1) of the CRC, which provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" See for example GCM *supra* note 3, Objective 11 (e).

A right to access to justice is also specifically guaranteed for women in Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵² Furthermore, with regard to migrants with diverse SOGIESC, the Yogyakarta Principles affirm their right to an effective remedy and redress, as well as their right to see a person responsible for a human rights violation to be held accountable in a manner that is proportionate to the seriousness of the violation.⁵³

In addition, States committed in Objective 10(e) and (h) of the GCM to facilitate access to justice of migrant victims of crimes, such as trafficking in persons. Article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime furthermore entails the obligation of States to provide victims of human trafficking with information on relevant court and administrative proceedings, as well as with assistance to enable them to present their views and concerns at appropriate stages of criminal proceedings.⁵⁴

c) Access to information and legal assistance including at the border, in detention and before deportation

Although States have sovereignty over the criteria of entry and stay of non-nationals on their territory, they also have human rights obligations towards individuals under their jurisdiction (i.e. on their territory or under their effective control) at all times, including at borders and transit zones.⁵⁵ In the Compact, States committed to “provide newly arrived migrants with [...] comprehensive information and legal guidance on their rights and obligations”, including information on “access to justice to file complaints for rights violations”.⁵⁶ Migrants must thus have access to mechanisms that allow them to file requests, motions or complaints with national authorities, and then, after the exhaustion of domestic procedures, also with regional and/or international mechanisms for rights violations.⁵⁷ The same applies to the ability for migrant to challenge immigration detention.⁵⁸

In that context, States committed in Objective 13(d) and (e) of the Compact to facilitate the access of detained migrants to free or affordable legal advice and assistance of a qualified and independent lawyer, the right to regular review of a detention order, access to information on the reasons for their detention in a language they understand, as well as communication with consular or diplomatic missions and legal representatives.

In addition, the right to appropriate assistance and counselling and to have access to referral mechanisms is specifically recognized for migrants in situations of vulnerability, including children and victims of crimes in Objective 12(b) and (c) of the Compact.

However, many obstacles can stand on the way of the migrants’ effective access to justice. Such impediments relate notably to the general lack of knowledge, information and capacities among migrants, migration officers, judges and lawyers concerning the rights, redress avenues, and legal

⁵² See also Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women’s access to justice, 2015, UN Doc. CEDAW/C/GC/33, para. 11.

⁵³ [Yogyakarta Principles](#) 28 and 29; See also CCPR, Concluding Observations on Mongolia, 25 March 2011, UN Doc. CCPR/C/MNG/CO/5, para. 9.

⁵⁴ See also International Commission of Jurists, [Principles on the role of judges and lawyers in relation to refugees and migrants](#), 2017, Principle 10; Article 12 of the Council of Europe Convention on Action against Trafficking.

⁵⁵ IACHR, [Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System](#), 2015, p. 6; Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 10.

⁵⁶ See GCM *supra* note 3, Objective 3(d).

⁵⁷ OHCHR, [Recommended Principles and Guidelines on Human Rights at International Borders](#), 2014.

⁵⁸ Report of the Special Rapporteur on the human rights of migrants, Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, 2015 UN Doc. A/HRC/29/36, p.48.

assistance options that are available.⁵⁹ One of the main hurdles to proper access justice is often a lack of well-functioning legal aid systems, which is necessary to warrant an effective legal assistance and representation. Such legal representation should be available immediately and free of charge for people who cannot afford it, including at border and transit areas, as well as in detention and reception centres, especially in cases of deportation or detention.⁶⁰ The IACtHR has stated that the absence of legal aid mechanisms constitutes a violation of due process.⁶¹

Yet, too often, migrants are only able to have access to the case workers that are employed by the State. However, these do not provide adequate protection, for lack of independency.⁶² Conversely, offering migrants, notably in detention, the assistance of an independent lawyer gives them the opportunity to challenge the legality of their detention and safeguards them against torture and other cruel, inhumane, or degrading treatment and punishment.⁶³ The same applies to migrants who face a decision of expulsion.

It is essential for migrants, and especially migrants in detention and/or facing expulsion, to have access to information in a language that they can understand and to translators and/or interpreters during proceedings⁶⁴ so that they are able to understand and play an active role in their case. However, the lack of legal aid and legal assistance is often compounded by lack of interpretation and translation, which leads to the impossibility for a migrant to effectively use the legal mechanisms available – and thus to effective deprivation of access to justice.

Legal aid and interpretation are therefore essential positive measures to be taken to guarantee proper access to justice for migrants as well. The Compact recognizes and addresses that by prescribing that States commit to “ensure that migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administrative hearing, in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory”.⁶⁵

d) The right to due process and to an effective remedy

In Objective 11(c) and (f) of the Compact, States committed to ensure due process at international borders by reviewing and revising national procedures for border screening, individual assessment, interview processes, as well as laws and regulations to determine whether sanctions are appropriate to address irregular entry or stay. Migrants must be able to access adequate procedures at all stages of the migration journey, including access to asylum hearings at the border, in accordance with the principle of non-refoulement⁶⁶ and as laid out in Objective 11(c) of the GCM.⁶⁷

In cases related to deportation proceedings, the ACmHPR has ruled that States should offer persons the opportunity to seek protection of their rights before the courts through an effective remedy prior to

⁵⁹ GAATW, *supra* note 39, p.5.

⁶⁰ *Vélez Loor v. Panama*, IACtHR, 2010, para. 146.

⁶¹ IACtHR, *supra* note 17, para. 126.

⁶² IACtHR, *supra* note 44, paras. 78-80.

⁶³ Report of the United Nations High Commissioner for Human Rights, Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, 2017, UN Doc. A/HRC/34/31, Principle 8; Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), 2014 UN Doc. CCPR/C/GC/35, para. 46; UNGA, Resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, Principles 17-18.

⁶⁴ *Bouamar v. Belgium*, ECtHR, 1988, para. 60; Article 16(8) of the ICRMW.

⁶⁵ GCM *supra* note 3, Objective 7(g).

⁶⁶ IACHR, [Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System](#), 2000, para. 60.

⁶⁷ See GCM *supra* note 3, Objective 11: States commit to “Review and revise relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders and that all migrants are treated in accordance with international human rights law”.

deportation.⁶⁸ The ACmHPR has also pointed out that States are required to give everyone the possibility to plead their case before the competent national courts before deportation, in accordance with the letter of the Charter and international law.⁶⁹ International law furthermore prescribes that States must delay any decision on removal until the migrant person has exercised their right of appeal and a decision has been issued.⁷⁰

In addition, to ensure that rights and due process are effectively guaranteed, violations of such rights, including at the border, shall be promptly and properly investigated by the competent authorities.⁷¹ This is particularly important for migrants about to be removed from the country where the violation took place, as they are otherwise often left without means of redress, which contributes to a culture of impunity.⁷² When migrants involved in judicial or administrative proceedings are returned to their countries of origin, it becomes more difficult to conduct those proceedings due to the distance between the parties.⁷³ This is why the Compact reiterates the importance of enforcement avenues, especially for cases where victims of trafficking have been repatriated, taking special account of the lack of mechanisms for transferring resources between countries.⁷⁴

Procedural justice is a crucial component of access to justice,⁷⁵ since “an erroneous immigration decision can send someone to arbitrary detention, torture or even death”⁷⁶ according to the Special Rapporteur on the human rights of migrants. Furthermore, a competent, independent, and impartial judiciary is an essential tool to prevent governments and political parties from having any bearing on the determination of rights,⁷⁷ and to ensure that decisions are free of social, racial and xenophobic prejudices.⁷⁸ The Compact confirms that in one of its guiding principles, at the outset, by stating that it “recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance”.⁷⁹

Some examples of due process guarantees include: trial within a reasonable period,⁸⁰ a reasonable length of time to prepare and produce evidence,⁸¹ and a reasoned decision.⁸² According to the ECtHR, a “flagrant denial of justice” includes the following flaws, that can be relevant in migration cases: detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed; a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country; the use in criminal proceedings of statements obtained as a result of

⁶⁸ *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, ACmHPR, 2009, paras. 102, 107 and 108.

⁶⁹ ACmHPR, *supra* note 22, para. 205 ; *Union Inter Africaine des Droits de l'Homme and Others v Angola*, ACmHPR, 1997, para. 20.

⁷⁰ Article 13 of the ICCPR; Article 22 of the ICRMW; CCPR General Comment No. 15, *supra* note 28, para. 10; IOM Information Note, *supra* note 6, pp. 11-13.

⁷¹ OHCHR, *supra* note 57, Guideline 1(10).

⁷² CELS, *Iniciativa Frontera Norte de México, Contributions - Challenges and Best Practices in Promoting and Protecting the Human Rights of all Migrants at International Borders*, 2014, pp. 1-2.

⁷³ Sarah Paoletti. *Transnational Responses to Transnational Exploitation: A Proposal for Bi-National Migrant Rights Clinics*. In: *Penn Law: Legal Scholarship Repository*, 2009, pp.1179-1180.

⁷⁴ UNGA, *supra* note 1, para. 56.

⁷⁵ Article 18(1) of the ICRMW.

⁷⁶ [End mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia](#), November 2016.

⁷⁷ CCPR General Comment No. 32, *supra* note 31, para. 19; *Gonzalez del Rio v. Peru*, Human Rights Committee, 1991, Communication 263/1987; IACTHR, *supra* note 17, para.48.

⁷⁸ CCPR General Comment No. 32, *supra* note 31, para. 21.

⁷⁹ GCM *supra* note 3, para. 15.

⁸⁰ IACTHR, *supra* note 17, para. 22.

⁸¹ *Ibid.*, para. 173.

⁸² *Ibid.*, pp. 40, 54.

torture of the accused or a third person; or the conviction *in absentia* with “no subsequent possibility of a fresh determination of the merits of the charge”.⁸³

Fair proceedings and due process guarantees are not only crucial in criminal matters, but also in civil and administrative cases. As expressed by the Special Rapporteur on the human rights of migrants, “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].”⁸⁴

The importance of migrants’ access to affordable independent legal assistance and representation in legal proceedings that affect them, including in administrative hearings is underlined in Objective 7(g) of the GCM. In addition, Objective 7(e) and (f) of the Compact protect migrant children and their right to be heard in administrative proceedings.

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.”⁸⁵ 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. It can be for example, dispute mechanism to examine and solve conflicts between employers and employees.

e) Access to justice for migrant workers

Access to justice for migrant workers is a complex and multi-dimensional matter. In addition to guarantees of access to justice, individualized approach and taking specific measures that are needed to ensure rights of vulnerable categories such as women migrant workers, agricultural or domestic workers, issues related to right to due process and effective remedy, there is also a need to guarantee respect and protection of specific labour related rights.

To ensure this, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families affirms in its Article 18 the right to equal treatment of migrant workers and members of their families by courts and tribunals and establishes necessary safeguards. Particular attention is paid by the Convention to protection which may be extended by consular or diplomatic authorities of the State of origin as well as recognition of a migrant worker or a member of a family as a person before the law. This notably does not depend on the immigration or other status of a migrant worker or a family member.

Moreover, the Convention specifically prohibits, in Article 20, imprisonment on the basis of failure to fulfil a contractual obligation. Article 25 establishes equality of treatment with nationals in the area of employment and particular measures which are needed to protect those rights for migrant workers with irregular status. Importantly the Convention sets mechanisms to protect employment related rights through the right to join and take part in the trade unions as well as being assisted by the trade unions. Finally, an important aspect related to the protection of rights arising from past employment is also established in the document.

⁸³ ECtHR *supra* note 19.

⁸⁴ *Supra* note 76.

⁸⁵ 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)).

International and regional instruments stipulate the right for migrant workers to access a competent body to bring work-related claims.⁸⁶ They shall have the possibility to appear in front of a court, labour tribunal, arbitration committee or arbitrator to receive a fair and impartial adjudication of the employment action.⁸⁷ In this context, States committed in Objective 6(d) of the Compact to protect migrant workers against all forms of exploitation and abuse by making them aware of how to access effective complaint and redress mechanisms.

The Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW) has recommended that States designate an Ombudsperson to facilitate migrant workers' access to redress mechanisms, and particularly domestic workers.⁸⁸ 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."⁸⁹

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."⁹⁰

However, gaps in the domestic implementation of the principle of access to justice 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.⁹¹ 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.⁹² 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.⁹³ Therefore Objective 6(d) of the Compact, where State commit to improve the access of migrant workers to effective complaint and redress mechanisms, is of the essence and its proper implementation by States will be paramount.

III. CONCLUSION

Effective access to justice is a fundamental right and a precondition for the respect, protection, and fulfilment of all the human rights of all, including migrants. At the same time, it contributes to the reduction of impunity and the reinforcement of the rule of law, thereby strengthening social justice and cohesion.⁹⁴ As with all human rights, the right to access to justice is also intertwined with the respect,

⁸⁶ International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention (C143), 24 June 1975, Article 9(2).

⁸⁷ ILO, Termination of Employment Convention (C158), 22 June 1982, Articles 8(1) and 9.

⁸⁸ CMW, *supra* note 2, para. 49.

⁸⁹ ILO, Convention Concerning Decent Work for Domestic Workers (PRNo.15A), 16 June 2011, Article 16.

⁹⁰ Committee on Migrant Workers, *supra* note 2, para. 50.

⁹¹ IOM, *supra* note 6, p. 8; See also Special Rapporteur on the human rights of migrants, UN Doc. A/73/178/Rev.1, September 2018, para. 40.

⁹² UNGA, Report of the Special Rapporteur on the human rights of migrants, 2018, UN Doc. A/73/178/Rev. 1, para. 48.

⁹³ Committee on Migrant Workers, *supra* note 2, paras. 19, 21; See also UN, Report of the Special Rapporteur on the situation of human rights defenders, 2018, UN Doc. A/HRC/37/51, para. 28.

⁹⁴ United Nations, Human rights of all migrants, social inclusion, cohesion, and all forms of discrimination, including racism, xenophobia, and intolerance, 2017, p. 4.

protection and realization of other rights. Seen within a larger prism, access to justice is a fundamental tool by which all other rights can be potentially protected and guaranteed.

The right to access to justice has been explicitly and extensively recognized for migrants as well, regardless of their legal status, at the international and regional levels as established in various legally binding instruments, as well as by jurisprudence of regional courts, with the aims of protecting the human rights of everyone without discrimination, taking into account specific vulnerabilities and gender perspectives.

Although non-binding, the Global Compact for Safe, Orderly and Regular Migration is a fundamental international instrument that serves as a policy roadmap based on international law and human rights, containing specific measures to uphold and implement State duties related to the realization of the right to access to justice for migrants. The Compact reiterates and makes it abundantly clear that access to justice is a right to be guaranteed for migrants, regardless of their status, which will necessitate that “firewalls” be put in place by States whenever necessary. The Compact also identifies access to justice as one right that can “accelerate States’ fulfilment of the Sustainable Development Goals with the aim of eliminating the adverse drivers and structural factors that compel people to leave their country of origin”.⁹⁵

Nevertheless, there are still obstacles that leave migrants stripped of their rights, stranded in precarious situations, vulnerable to exploitation, and excluded from the judicial system without access to resources and redress. Moreover, severe measures adopted by States during the COVID-19 pandemic, including strict entry requirements and restrictions on mobility have accentuated and exacerbated situations of vulnerability, making it even more difficult for victims to exercise and enjoy their rights, including their right to access to justice.

The Global Compact for Safe, Orderly and Regular Migration serves as an effective and comprehensive guidance to overcome obstacles in practice, in accordance with international law norms adopted by States, national legislation, policies and procedures at the national level and put them diligently and promptly into practice.

⁹⁵ GCM *supra* note 3, Objective 2, para. 18, lit. 2.