

# **Analysis of Migrant Rights in the New York Declaration**

**The International Migrants Bill of Rights Initiative**

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## **Executive Summary**

As states move forward in negotiating the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees for adoption in 2018, the International Migrants Bill of Rights (IMBR) serves as a consolidated source of international law to ensure that the negotiations result in commitments that reflect the rights of all migrants, including refugees, at a level that, at a minimum, adheres to current international legal standards.

This briefing employs the IMBR to define the legal foundations of some of the key rights included in or implicated by the Declaration, and explains how states may respect, protect, and promote a set of existing rights in the negotiation of the Global Compact. The Compact presents an opportunity to assemble and more clearly formalize the protection of migrants' rights across borders. By analyzing a selection of rights, this briefing demonstrates how states may use the IMBR to support the codification of the rights already included in the New York Declaration as well as those not defined in the Declaration, but that exist under international law.

The Declaration currently highlights numerous rights of all migrants and of refugees; states must adopt undertakings in the Global Compact that continue to reflect these obligations under international law. They include the:

- Right to Be Free and Equal in Dignity and Rights
- Right to Due Process
- Labor Rights
- Rights of Vulnerable Migrants

The Declaration provides some meaningful references to various rights of migrants and refugees, but states should further elaborate these rights in the Global Compact to ensure compliance with established international law. Shortcomings are observable in the:

- Rights of Stateless Migrants
- Right to Family
- Right to Access Asylum
- Right against Expulsion and Nonrefoulement
- Right to Liberty and Security of Person
- Rights of Victims of Crime
- Rights of Freedom of Opinion, Expression, Assembly, and Association

We urge States to address these gaps and uphold these rights as they negotiate the Global Compact, utilizing the IMBR commentaries to support the inclusion of these rights in the work of states. Doing so will ensure that the UN Declaration and Compact corresponds fully to existing international law for the rights of migrants and refugees, and ensure that States continue to respect these extant rights in adopting migration and refugee policies in the future.

## Introduction

The New York Declaration for Refugees and Migrants garnered the support of 193 member states of the UN General Assembly and is a landmark statement on the rights of all migrants, including refugees.<sup>1</sup> While the rights of migrants and refugees are comprehensively protected under international law, these protections are codified in a diffuse body of treaty and customary international law. The International Migrants Bill of Rights (IMBR) provides a comprehensive and consolidated restatement of the international law that protects all migrants, including refugees and other vulnerable migrants.<sup>2</sup> As states move forward in negotiating the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees for adoption in 2018—commitments to shared responsibility for large movements of refugees and migrants—the IMBR serves as a source of international law to ensure that the negotiations result in undertakings that reflect the rights of all migrants, including refugees, at a level at or above the international law baseline.

### *Overview: Strengthening and Fulfilling the New York Declaration Commitments*

Part I of this briefing provides an overview of the New York Declaration and next steps for states as they negotiate the Global Compacts. Part II provides a summary of the IMBR and its utility for states as they act to protect the already-established rights of all migrants. Part III highlights some of the most essential rights included in the New York Declaration, using the IMBR to discuss the relevant international law obligations. This briefing is not meant to be comprehensive, as the New York Declaration's discussion of how states should respond to movements of migrants and refugees is extensive, addressing root causes, protection concerns, and the often protracted nature of such concerns.<sup>3</sup>

Part III has two sections. First, we discuss a few specific rights that are identified in the New York Declaration in the context of how states can ensure that these rights are protected to the fullest as they develop the Global Compacts. These include the rights to equal protection of the law, to due process of law, to be free from slavery, servitude or forced or compulsory labor, and specific rights that protect vulnerable migrants, including children. Second, we identify ways that the protection of other rights could be affirmed in the Global Compact to ensure compliance with existing international law. These rights include the right to nationality, the right of families

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<sup>1</sup> G.A. Res. 71/1, U.N. Doc. A/RES/71/1, (Sept. 19, 2016), available at [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/A\\_RES\\_71\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/A_RES_71_1_E.pdf) [hereinafter New York Declaration/NY Decl.].

<sup>2</sup> The IMBR Initiative considers a migrant to be any person who is outside of a State in which they are a citizen or national, or, in the case of a stateless migrant, their State of birth or habitual residence – and articulates the rights of all migrants regardless of the cause of their migration. Thus refugees and any other category of individuals compelled to cross an international border are considered to be migrants – despite the fact that there may be specific additional legal obligations binding states in respect of such individuals. The IMBR Initiative is based at Georgetown University Law Center. The purpose of the IMBR Initiative is to advocate for the protection of migrants' human rights by promoting the understanding and implementation of the International Migrants Bill of Rights. The Initiative pursues this purpose through research, education, and advocacy work and collaborations with the civil society IMBR Network. See Georgetown University Law Center, *International Migrants Bill of Rights: IMBR Initiative* (accessed 7 July 2016), available at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/>.

<sup>3</sup> New York Declaration, *supra* note 1, ¶¶ 1.7; 1.12; 2.16; 3.3; 4.1.

to protection by the state and society, the right to seek and enjoy asylum, the right to protection against arbitrary and discriminatory expulsion, the right against *refoulement*, the right to liberty and security of person, and the rights of migrant victims of crime.

In conclusion, this briefing provides recommendations for how states might strengthen and fulfill the commitments included in the New York Declaration in the preparation of the Global Compact, based on the existing law protecting the rights of migrants and refugees, as consolidated by the IMBR.

## **Part I: The New York Declaration and the Global Compact**

Unprecedented patterns and numbers of migrants, including those forcibly displaced or caught in crises, has drawn the attention of States and the United Nations in new ways in recent years.

### ***The New York Declaration Adopted at the UN Summit***

In September 2016, the former United Nations Secretary General (SG) convened a high-level plenary meeting on addressing large movements of refugees and migrants – the United Nations Summit Addressing Large Movements of Refugees and Migrants (“the Summit”). In advance of the Summit, the SG issued a Report that underscored that a fundamental tenet of State responses to large movements must include respect for the rights of migrants, “whatever their migratory status,” as well as recognizing the rights of refugees as protected in international law.<sup>4</sup>

The final text of the New York Declaration that resulted from the Summit likewise recognized that not just refugees, but all migrants, are holders of certain rights.<sup>5</sup> The New York Declaration – and this affirmation of the rights of all migrants, including refugees – had broad support, with 193 member states signing on. Critically, moving forward, States have committed to a process that will result in better management of large-scale movements of migrants through a rights-based approach.

The goals of New York Declaration included addressing the root cause of large movements of refugees and migrants through prevention and protection of human rights.<sup>6</sup> States agreed that for both migrants and refugees, they would “ensure full respect and protection for their human rights and fundamental freedoms”<sup>7</sup> “in transit and after arrival.”<sup>8</sup> States articulated their goal to “save lives” as they sought “long-term and sustainable solutions...” and “acknowledge[d] a shared responsibility to manage large movements of refugees and migrants in

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<sup>4</sup> United Nations Secretary General, *Report of the Secretary General: In safety and dignity: addressing large movements of refugees and migrants*, UN Doc A/70/59 (21 April 2016), ¶ 8. The day after the Summit, the United States of America, Canada, Ethiopia, Germany, Jordan, Mexico, Sweden and the Secretary-General hosted a high-level meeting on refugees. NY Decl. ¶ 4.24; see also *UN Summit for Refugees and Migrants 2016*, UN, <http://refugeesmigrants.un.org/summit>.

<sup>5</sup> *Id.* ¶ 26.

<sup>6</sup> NY Decl., *supra* note 1, ¶ 1.2.

<sup>7</sup> *Id.* ¶ 22.

<sup>8</sup> *Id.* ¶ 2.5

a humane, sensitive, compassionate and people-centered manner.”<sup>9</sup> In terms of responsibility-sharing, the Declaration recognized that “[n]o one State can manage such movements on its own. Neighboring or transit countries, mostly developing countries, are disproportionately affected.”<sup>10</sup> States further affirmed that the “Declaration and its appendices are to be implemented in a manner that is consistent with the rights and obligations of States under international law.”<sup>11</sup>

### ***Garnering State Commitments through a Global Compact***

While the Declaration did not result in specific legal undertakings by states, it was an important statement of intent as well as a recognition of existing and emerging norms on the rights of all migrants. The Declaration highlighted the need for cooperation and responsibility-sharing among states to manage migration. To solidify commitments, states agreed to a process to negotiate a Global Compact for Safe, Orderly, and Regular Migration.<sup>12</sup> The negotiations began in early 2017, and will culminate in the presentation of the Global Compact for adoption at an intergovernmental conference in 2018.

### ***Support for the Rights of all Migrants and Refugees***

The Summit and the Declaration demonstrate states’ recognition that migrants do have rights and that the protection of the human rights of all migrants, including refugees, is critical for any solution to large-scale migration and refugee movements. The New York Declaration acknowledges previous international and regional initiatives and treaties on migration, refugees, and the rights of migrants and refugees. These included the 1951 Refugee Convention and 1967 Optional Protocol (hereinafter collectively referred to as the Refugee Convention), which define the rights of refugees specifically. The rights of migrants have been recognized in a patchwork of other international and regional treaties specific to migrants.<sup>13</sup> The New York Declaration explicitly states that despite the different legal frameworks, both “refugees and migrants have the same universal human rights and fundamental freedoms.”<sup>14</sup> In fact, the rights of all migrants, including refugees, are protected by international law, although an additional, complementary body of law also protects the rights of refugees. The IMBR provides a helpful restatement of the

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<sup>9</sup> *Id.* ¶¶ 1.10, 1.11

<sup>10</sup> *Id.* ¶ 1.7

<sup>11</sup> *Id.* at Preamble, Commitments.

<sup>12</sup> NY Decl. ¶ 3.23, Annex II, ¶ 1.1

<sup>13</sup> Other frameworks and treaties on migration include: Sendai Framework for Disaster Risk Reduction, Paris Agreement on Climate Change, Ababa Action Agenda, 2030 SDG agenda, the World Humanitarian Summit (May 2016), the High Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees (March 2016), the London Conference on Supporting Syria and the Region (February 2016), and the Ministerial Pledging Conference on Somali Refugees (October 2015), and regional initiatives including the Bali Process, the EU-Horn of Africa Migration Route Initiative the Khartoum Process, the Rabat Process, the Valletta Action Plan, the Brazil Declaration and Plan of Action, the African Union Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants, Migrants in Countries in Crisis Initiative and the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative, 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, other relevant International Labour Organization conventions, and the role of the International Organization of Migration and the UN High Commissioner for Refugees. These last few aren’t regional, though they follow the “regional initiatives” description.

<sup>14</sup> NY Decl., *supra* note 1, ¶ 1.6; 4.1 (“The promotion of human rights is also critical”).

international law baseline that protects all migrants, including refugees, and which applies to all migrants regardless of their legal status.<sup>15</sup>

## Part II: The International Migrants Bill of Rights

The IMBR recognizes that the rights of migrants are robustly and comprehensively protected under international law, deriving from the fundamental human dignity of migrants.<sup>16</sup> However, these rights are currently codified in a diffuse patchwork of treaty and customary international law, which does not sufficiently establish the rights for individuals crossing borders with clarity – nor is this law consistently respected by states. The 23 articles of the IMBR articulate the legal rights of all migrants, restating, in a single bill of rights, the key rights of migrants based on current international law and standards.<sup>17</sup> The existing source of each IMBR article is provided in Legal Commentaries and derives from existing instruments. In particular, the IMBR draws content and wording from the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and also reflects the language of other core UN human rights treaties. The IMBR further recognizes regional law and state practice as providing hortatory guidance for states, thereby promoting the progressive development of international law.

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<sup>15</sup> The IMBR’s Preamble states that “AFFIRMING that nothing in this Bill shall be interpreted as restricting, modifying, or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law” to emphasize that the fact that complementary bodies intersect in this area should not limit protections granted to migrants.

<sup>16</sup> The IMBR Initiative views the following as the most significant international treaties relevant to the rights of international migrants: The Universal Declaration of Human Rights [UDHR], the International Covenant on Civil and Political Rights [ICCPR], the International Covenant on Economic, Social and Cultural Rights [ICESCR], the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], the Convention on the Rights of the Child [CRC], the International Convention on the Rights of All Migrant Workers and Members of Their Families [ICRMW], the Convention on the Rights of Persons with Disabilities [CRPD], the International Convention for the Protection of All Persons from Enforced Disappearance, the 1951 Convention Relating to the Status of Refugees, and the Protocol thereto [Refugee Convention], International Labour Organization Conventions concerning Decent Work for Domestic Workers, concerning Migration for Employment, and concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, the Convention Against Transnational Organized Crime, and the Protocols thereto [CTOC], including the Palermo Protocol to Prevent Suppress and Punish Trafficking in Persons [Palermo Protocol], and other relevant international and regional instruments. *See* International Migrants Bill of Rights, 28 *GEO. IMM. L. J.* 9, 13 (2013) available at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/imbr-tools/upload/03-International-Migrants-Bill-of-Rights.pdf>; *see also* Office of the United Nations High Commissioner for Human Rights, Migration and Human Rights: Improving Human-Rights Based Governance of International Migration (2013) available at [http://www.ohchr.org/Documents/Issues/Migration/MigrationHR\\_improvingHR\\_Report.pdf](http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf) (identifying 30 instruments). As a result, the precise scope and content of the applicable international law can vary depending on the extent of any given States’ signature or ratification of each or all of these instruments.

<sup>17</sup> *See* Georgetown University Law Center, *International Migrants Bill of Rights: IMBR Initiative* (accessed 7 July 2016) available at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/>. The Initiative advocates for the protection of migrants’ human rights through research, education, and advocacy work and collaborations with the civil society IMBR Network.

## ***Who is a Migrant?***

The IMBR defines an international migrant as anyone outside of a State of which they are a citizen or national or, in the case of a stateless migrant, their State of birth or habitual residence.<sup>18</sup> Thus the restatement of internationally-defined and agreed-upon rights of migrants applies to temporary and longer-termed, settled, migrants as well as refugees, migrant workers, and other categories of international migrants.<sup>19</sup> The definition does not include internally-displaced persons who have not crossed an international border.<sup>20</sup>

## **Part III: Analysis**

States are now in negotiations to secure responsibility-sharing commitments that will advance the Declaration. At the heart of these negotiations is state cooperation on migration policies that respect the existing rights of migrants and refugees. States will subsequently design and adopt policies to implement their commitments. The Declaration cites and reaffirms many of the rights of all migrants and refugees under international law, including the rights to dignity and nondiscrimination, due process, labor, and other rights for vulnerable migrants. Still, the language of the Declaration could be strengthened to better reflect many commitments and norms that already exist. International law goes further than the New York Declaration in many respects, and negotiations limited by the Declaration may not ensure protections consistent with international law.

This briefing employs the IMBR to define the legal foundations of some of the key rights included in or implicated by the Declaration, and explains how states must respect, protect, and promote a set of existing rights in the negotiation of the Global Compact. These negotiations present an opportunity to assemble and more clearly formalize the protection of migrants' rights across borders. This briefing is not meant to be a comprehensive articulation all rights implicated

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<sup>18</sup> See *International Migrants Bill of Rights*, 28 GEO. IMM. L. J. 9, 14 (2013) available at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/imbr-tools/upload/03-International-Migrants-Bill-of-Rights.pdf>. While there is no general definition of a migrant contained in an international treaty, the IMBR definition has been accepted as a useful one. See, e.g., UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights at International Borders* 4 n. 2 (2014) available at [http://www.ohchr.org/Documents/Issues/Migration/OHCHR\\_Recommended\\_Principles\\_Guidelines.pdf](http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf) (noting that “this term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations”).

<sup>19</sup> Recognizing the rights of all migrants should not mean lowering or eliminating the legal protections afforded to particular groups under specific bodies of international law. The IMBR, for example, affirms that none of its provisions shall be interpreted to restrict, modify or impair the provisions of any international law instrument, or rights granted under municipal law. *International Migrants Bill of Rights*, 28 GEO. IMM. L. J. 9, 14 (2013) available at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/imbr-tools/upload/03-International-Migrants-Bill-of-Rights.pdf>.

<sup>20</sup> This does not mean that internally displaced persons do not have fundamental rights, as they are protected by the full panoply of international human rights and humanitarian law obligations binding on States. These rights have not always been fully protected in practice. See, e.g., United Nations Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement* (2004) available at <http://www.unhcr.org/en-us/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>. While this publication focuses on the rights of international migrants, many states and UN agencies do significant work to protect the rights of and provide assistance to internally displaced persons.

by the Declaration or those rights migrants possess under international law. This is articulated in the IMBR. Rather, by analyzing selected rights, this briefing demonstrates how states can use the IMBR to support the codification of the rights already included in the Declaration as well as those not defined in the Declaration, but that exist under international law.

### ***Core Rights Recognized in the Declaration***

The Declaration currently highlights numerous rights of all migrants and of refugees; states must adopt undertakings in the Global Compact that continue to reflect these obligations under international law.

#### ***Right to Be Free and Equal in Dignity and Rights***

The Declaration provides a strong statement in support of the right of all migrants to be “free and equal in dignity and rights.” The Declaration further recalls the prohibition of “discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>21</sup> In light of growing racism and xenophobia against migrants, the Declaration “strongly condemn[s] acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief.” Diversity enriches every society and contributes to social cohesion, as seen as well in the former SG’s campaign to counter xenophobia through increased direct personal contact and a focus on the common humanity of migrants.<sup>22</sup>

International law, as articulated in the IMBR Article 2, articulates the right to human dignity, and the right to equal protection is affirmed in in IMBR Article 3.<sup>23</sup> Article 3(2)-(4) supports the Declaration’s strong statement against discrimination and the right of all migrants to be free and equal,<sup>24</sup> recognizing that all of the rights enshrined in international law owed to migrants apply “without distinction of any kind, such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, disability, birth, gender, sexual orientation or gender identity or other status.”<sup>25</sup> The IMBR Article 3(4) provides an articulation of the legal standard against discrimination, adapted from European Court of Human Rights jurisprudence: “Distinctions in the treatment of migrants are permissible, including in the regulation of admission and exclusion, only where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized.”<sup>26</sup>

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<sup>21</sup> NY Decl. ¶ 1.13.

<sup>22</sup> NY Decl. ¶ 1.14.

<sup>23</sup> IMBR art. 2 (Every migrant has the right to dignity, including physical, mental, and moral integrity). The right to dignity comes from UDHR preamble arts. 1, 22, 23; and recognized for migrants in ICRMW art. 70; art 3(1) (All persons, including migrants, are equal before the law. Every migrant has the right, without any discrimination, to the equal protection of the law on the same basis as nationals of any State in which the migrant is present.); UDHR art. 7; ICCPR a 26; ICRMW art. 18.

<sup>24</sup> IMBR art 3(2)-(4); ICCPR art. 2(1), 26; ICESCR art. 2, ACHR art. 1(1), 24; ECHR art. 14; UDHR art. 7.

<sup>25</sup> IMBR art 3(2). The enumerated grounds come from the ICRMW art. 7, with some additions from ICERD art. 1, ACHPR art. 2, CEDAW art. 1, CRPD art. 5(2), CRC art. 2(1).

<sup>26</sup> IMBR Commentaries, Art 3(4); GUY S. GOODWIN GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 78 (Oxford Univ. Press 1978) (citing Judge Tanaka’s dissent in *The South West African Cases*



In addition, international law provides for the explicit right to freedom of thought, conscience, and religion or belief,<sup>27</sup> and the right to enjoy the migrant's own cultures, including use of the migrant's own languages, either individually or in community with others, in public or private.<sup>28</sup>

### *Right to Due Process*

The Declaration articulates the right of all migrants to due process “in the assessment of their legal status, entry and stay...”<sup>29</sup> International law ensures the right of all migrants to due process in all contexts, as it is one of the core human rights.

This law, as stated in the IMBR, outlines specific due process rights in Article 9, but goes further than articulating due process rights only in regard to legal status determinations. It reflects international law protections of due process rights in the context of criminal prosecution, including for migrants,<sup>30</sup> and specifies the right to interpretation,<sup>31</sup> and to be informed of this right as a consequence.<sup>32</sup>

The Declaration does not include a commitment by states not to criminalize entry, despite the recognition of this right in international law protecting some migrants, though it does provide this right to children based on their parents' migration status.<sup>33</sup> The Declaration only “consider[s] reviewing policies that criminalize cross-border movements”<sup>34</sup> and “ensure[s] that public officials and law enforcement officers . . . are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders.”<sup>35</sup> In line with progressive developments regarding the rights of all migrants (not only children), the IMBR states “[m]igrants should be free from disproportionate penalties on account of entry, presence or status, or on account of any other offense which can only be committed by migrants.”<sup>36</sup> Fundamentally, the act of crossing a border *per se* should not be criminalized, as has been recognized in the Refugee Convention.<sup>37</sup>

### *Labor Rights*

The Declaration further recognizes the rights, needs, and contributions of all migrants in the world of work. It commits to employment opportunities, particularly for young people, in

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and the ECHR decision in the Belgian Linguistics cases). *See also* Joan Fitzpatrick, *The Human Rights of Migrants*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 172, 176 (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser Press 2003); SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL AND COMMENTARY* 700-28 (2d ed., Oxford Univ. Press 2004).

<sup>27</sup> IMBR Art 16; ICCPR Art. 4.2, 18; UDHR Art. 18.

<sup>28</sup> IMBR Art 23(1); UDHR Art. 27, ICCPR Art. 27.

<sup>29</sup> NY Decl. ¶ 2.12.

<sup>30</sup> IMBR Art. 9(2); ICCPR art. 13; ECHR Protocol 7; OAS Charter art. 45; Inter-Am. Comm'n on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-Am. System of Human Rights* 47 (2007) ¶ 182, OEA/Ser.L./V/II.129 doc. 4.

<sup>31</sup> IMBR art. 9(3); ICCPR art. 14(a)(f).

<sup>32</sup> IMBR art 9(4).

<sup>33</sup> NY Decl. ¶3.16.

<sup>34</sup> NY Decl. ¶2.12.

<sup>35</sup> NY Decl. ¶ 2.3.

<sup>36</sup> IMBR 9(5).

<sup>37</sup> Refugee Convention, Art. 31, (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”)

countries of origin,<sup>38</sup> but does not ensure labor rights for migrants in host countries. It simultaneously recognizes that “[m]igrants can make positive and profound contributions to economic and social development in their host societies and to global wealth creation. They can help to respond to demographic trends, labour shortages and other challenges in host societies, and add fresh skills and dynamism to the latter's economies.”<sup>39</sup> The Declaration only “encourage[s] host governments to consider opening their labour markets to refugees,”<sup>40</sup> rather than calling for this commitment, or expanding opportunities for all migrants.

However, international law provides additional guidance on labor rights, which are enshrined in human rights law and labor law, not refugee law, and derive from the core right to be free from slavery, servitude or forced or compulsory labor.<sup>41</sup> This law specifically ensures, for example, the right of all migrants to work<sup>42</sup> without discrimination in respect of occupation,<sup>43</sup> and ensures specific labor protections for migrants, including a range of just and favorable conditions of work.<sup>44</sup>

### *Rights of Vulnerable Migrants*

The Declaration calls for specific protections of vulnerable migrants, including “women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.”<sup>45</sup>

International law provides a robust recognition of the legal rights of vulnerable migrants. The IMBR summarizes these rights in Article 4(1): “Every vulnerable migrant has the right to protection and assistance required by the migrant’s condition and status and to treatment which takes into account the migrant’s special needs.”<sup>46</sup> These rights derive from existing international instruments such as the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and, the United Nations Convention of the Rights of Persons with Disabilities (CRPD).<sup>47</sup>

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<sup>38</sup> NY Decl. ¶3.4.

<sup>39</sup> NY Decl. 3.6; 3.8 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. We call also on States that have not done so to consider acceding to relevant International Labour Organization conventions.

<sup>40</sup> NY Decl. 4.21; It is unclear why a similar commitment cannot be made with respect to the labour rights of migrants, given that a robust set of labour rights, deriving from the right to be free from slavery and involuntary servitude as well as other fundamental rights related to the right to work are provided by human rights law.

<sup>41</sup> IMBR art. 20; ICESCR art. 7; ICERD art. 5; ACHPR art. 15; *see also* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sep. 17, 2003).

<sup>42</sup> IMBR art 20(2); UDHR Art. 23; ICERD Art. 5(e)(i); CEDAW Art. 11; CRC Art. 32; ICRMW Art. 11; ADRMD Art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art. 6.

<sup>43</sup> IMBR Article 20(5); *See* CESCR, General Comment No. 18, para. 18; CESCR; CESCR, General Comment No. 20, para. 30.

<sup>44</sup> IMBR Art 20(3), (5), (7); ICRMW art. 25.

<sup>45</sup> NY Decl. ¶ 2.2.

<sup>46</sup> IMBR Art 4(1). This article is adapted from Principle 4(2) of the Guiding Principles on Internal Displacement. Walter Kalin, *Guiding Principles on Internal Displacement Annotations* 22, The American Society of International Law and the Brookings Institution, 2008.

<sup>47</sup> IMBR art 4(4); Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, U.N. Doc. A/RES/61/106. The Declaration specifies other protections for women, girls and boys, migrants with HIV and other health needs,

## ***Core Rights States Should Strengthen in the Global Compact***

The Declaration provides some meaningful references to various rights of migrants and refugees, but states should further elaborate these rights in the Global Compact to ensure compliance with established international law.

### *Rights of Stateless Migrants*

The Declaration recognizes the needs and vulnerabilities of stateless migrants, and encourages States “to consider actions they could take to reduce the incidence of statelessness,” while encouraging “those States who have not yet acceded to the two conventions for the prevention and reduction of statelessness to consider doing so.”<sup>48</sup> The Declaration fails to recognize the rights, enshrined in international law, to legal personhood<sup>49</sup> and to nationality,<sup>50</sup> to which stateless migrants are particularly vulnerable. The IMBR details the right to nationality and several steps States should take to protect the rights of stateless migrants—and migrants vulnerable to statelessness—in its Article 14.<sup>51</sup>

### *Right to Family*

The Declaration affirms the right to family reunification for refugees, but not for all migrants.<sup>52</sup> This derogates from international law that affirmatively provides the right to family<sup>53</sup> and provides the protection of all migrant families to protection by society and the State.<sup>54</sup>

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and those at risk for trafficking and forced labour, The Declaration specifically calls for addressing vulnerabilities of women and children, including to “discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery.” (NY Decl. 2.8) It also calls for mainstreaming a gender perspective, and to “promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls,” and to “take into consideration the different needs, vulnerabilities and capacities of women, girls, boys and men.” (NY Decl. 2.10). There are specific protections for migrants regardless of HIV status “with a view to eliminating such restrictions and the return of people on the basis of their HIV status, and to support their access to HIV prevention, treatment, care and support” and for “specific health-care needs experienced by migrant and mobile populations.” (NY Decl. ¶2.9 ) Commitments to refugees allow for a broader right to health, although this right is enshrined in human rights law and should be provided for all migrants, regardless of status. (IMBR art. 21, UDHR art. 25, ICESCR art. 12(1), CRC art. 24, CEDAW art. 12, ICERD art. 5). The Declaration encourages ratification of, accession to and implementation of relevant international instruments on preventing and combating trafficking in persons and the smuggling of migrants (NY Decl. ¶2.13 ) while recognizing that refugees and migrants in large movements are at greater risk of being trafficked and of being subjected to forced labour, and commits to measures to identify victims of human trafficking or those at risk of trafficking (NY Decl. 2.14). The Declaration does not specifically call for protections of victims of these crimes. *See infra*, notes 82-84 and accompanying text. Finally, the Declaration is “committed to providing humanitarian assistance to refugees so as to ensure essential support in key life-saving sectors, e.g. health care, shelter, food, water and sanitation,” (NY Decl. 4.17), though the Declaration also seems to call for support for all vulnerable migrants, regardless of refugee status. *See supra* note 35 (highlighting the vulnerabilities of migrants forced from their homes due to climate change and political instability).

<sup>48</sup> NY Decl. ¶4.9.

<sup>49</sup> IMBR Art 7; ICCPR art. 4, 16; ACHPR art. 5, CRPD art. 12.

<sup>50</sup> IMBR Art 14(1); UDHR art. 15; ACHR art. 20; CRC art. 7.

<sup>51</sup> *Id.*

<sup>52</sup> NY Decl. ¶4.16.

<sup>53</sup> IMBR Art. 15(2); CRC art. 9(1).

<sup>54</sup> IMBR Art 15(1); ICCPR art. 23(1); ICES CR art. 10(1); UDHR art. 12; CRC arts. 8, 9, 10, 16; CEDAW arts. 9, 16.

International law provides for the prioritization of reunification of migrant family members with nationals or citizens.<sup>55</sup>

### *Right to Access Asylum*

States stated a willingness to “address unsafe movements of refugees and migrants, with particular reference to irregular movements of refugees and migrants . . . without prejudice to the right to seek asylum”<sup>56</sup> in the Declaration and in doing so, articulated the principle of *nonrefoulement*.<sup>57</sup> The Declaration also recognizes that “refugees’ ability to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere.”<sup>58</sup>

International refugee and human rights law recognize the State’s obligation to provide access to asylum procedures for all migrants: “States shall ensure access, consistent with relevant international and regional instruments, to fair and efficient status-determination procedures for migrants seeking asylum within their effective control, whether or not they are within the State’s territory.”<sup>59</sup>

### *Right against Expulsion and Nonrefoulement*

The Declaration articulates the right against *refoulement*,<sup>60</sup> though could more explicitly ensure compliance with this right in light of the right to access asylum and in accordance with international law. The right to *nonrefoulement* protects all migrants and should also ensure that “[n]o migrant shall be expelled or returned in any manner to another State where there are substantial grounds for believing that the migrant would be subjected to torture or cruel, inhuman or degrading treatment or punishment”<sup>61</sup> and where there would be a serious or other deprivation of human rights.<sup>62</sup> Importantly, international legal norms ensure the right against *refoulement* of all migrants within a state’s effective control – regardless of presence in a state’s territory.<sup>63</sup>

Likewise, it would be useful to recall State obligations against expulsion. The IMBR articulates this right in terms of access to asylum,<sup>64</sup> *nonrefoulement*,<sup>65</sup> and as a stand-alone right

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<sup>55</sup> IMBR Art. 15(2); CRC art. 9(1).

<sup>56</sup> NY Decl. ¶¶2.6; 4.4.

<sup>57</sup> NY Decl. ¶¶ 2.3; 4.4.

<sup>58</sup> NY Decl. ¶4.7.

<sup>59</sup> IMBR Art 12(2); *See e.g.* Cartagena Declaration at 190-93; G.A. Res. 47/105, ¶ 4, U.N. Doc A/RES/48/116 (Dec. 20, 1993).

<sup>60</sup> NY Decl. ¶¶2.3; 4.4.

<sup>61</sup> IMBR Art 13(2); CAT art. 3; Human Rights Comm., *General Comment No. 20: art. 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.7, para. 9.

<sup>62</sup> IMBR Art 13(3)-(4); Refugee Convention art. 33.

<sup>63</sup> IMBR Art 13(6); Article 13 of the IMBR understands the country of return to designate not only the country to which removal is to be affected directly, but also any other country to which the migrant may be removed afterwards.” Therefore, regulations on a refugee’s choice of where to seek asylum must guard against chain removals that may result in return to a country where the individual has a well-founded fear of persecution. *See* UN High Comm’r for Refugees, *UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, available at <http://www.unhcr.org/refworld/pdfid/45fl7a1a4.pdf>.

<sup>64</sup> IMBR Art 12(3); Refugee Convention art. 33.

<sup>65</sup> IMBR Art 13(4)-(5); CAT art. 3; Refugee Convention art. 33.

against expulsion.<sup>66</sup> The right against expulsion includes against collective expulsion or any kind of discriminatory or arbitrary expulsion or deportation.<sup>67</sup> Importantly, if expulsion occurs and violates human rights, migrants have a right to a remedy,<sup>68</sup> and to have their case reviewed before a competent authority.<sup>69</sup> Any expulsion determination must be justified by specific facts relevant to the individual migrant and must be communicated in a language the migrant understands, and without violating any right to wages and entitlements due to the migrant.<sup>70</sup>

### *Right to Liberty and Security of Person*

The Declaration provides that states should deprive migrant children of liberty only as a measure of last resort, in the least restrictive setting, and for the shortest period of time possible, but does not affirm the same protections for adult migrants; this falls short of the requirements of international law.<sup>71</sup>

International law protects the right of all migrants to liberty and security of person,<sup>72</sup> and against arbitrary arrest and detention.<sup>73</sup> Any detention may only occur if necessary, as a measure of last resort, for as short a time as possible, and be proportionate.<sup>74</sup> All migrants deprived of liberty shall be treated with humanity and respect for the dignity of the human person, and shall have an enforceable right to compensation where an unlawful arrest or detention occurs.<sup>75</sup> Furthermore, there is a growing international consensus that the deprivation of liberty of children on the basis of their or their family's immigration status is never in their best interest and can readily constitute cruel, inhuman, or degrading treatment or punishment in violation of the prohibition against torture.<sup>76</sup>

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<sup>66</sup> IMBR Art 11; ICCPR art. 13; ICRMW art. 22(2) (allowing expulsion only according to law and with due process considerations).

<sup>67</sup> IMBR Art 11(1); ICRMW art. 22(1); Protocol No. 4 to the ECHR; ACHR art. 22(9); ACHPR art. 12.

<sup>68</sup> IMBR Art 11(2); UDHR, *supra* note 1, art. 8; ICCPR, *supra* note 2, art. 2; CAT, *supra* note 5, art. 14; ICERD, *supra* note 4, art. 6; CRC, *supra* note 6, art. 39. *See also* UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violation.

<sup>69</sup> IMBR Art 11(3); ICRMW art. 22(4).

<sup>70</sup> IMBR Art 11(4)-(5); ICRMW art. 22(3)(6)(9).

<sup>71</sup> NY Decl. ¶2.12.

<sup>72</sup> IMBR Art 6; ICCPR art. 9; UDHR art. 9

<sup>73</sup> *Id.*

<sup>74</sup> IMBR Art 6(2)-(3); ICCPR art. 9(1)(4).

<sup>75</sup> IMBR Art 6(4)-(5); ICCPR art. 9(5); ECHR art. 5(5); ACHR art. 14.7.

<sup>76</sup> *See* Special Rapporteur on the Human Rights of Migrants, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, U.N. Doc. A/HRC/11/7 (May 14, 2009), available at <http://www.refworld.org/pdfid/4a3b51702.pdf>; U.N. Secretary-General, Note to the General Assembly, transmitting Human Rights of Migrants Report of the Special Rapporteur, U.N. Doc. A/64/213 (Aug. 3, 2009); UNHCR, Children on the Run 12 (Mar. 12, 2014), available at <http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>; *see also* AMERICAN IMMIGRATION COUNCIL, *Divided by Detention* (Aug. 2016), available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/divided\\_by\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf); NO CHILD IN DETENTION COALITION, "Dad, have we done something wrong": Children and parents in immigration detention (Jan. 2014), available at [http://endchilddetention.org/wp-content/uploads/2014/11/20140627\\_DC\\_NoChildInDetention-3.pdf](http://endchilddetention.org/wp-content/uploads/2014/11/20140627_DC_NoChildInDetention-3.pdf); INT'L DETENTION COAL., CAPTURED CHILDHOOD ch. 6 (2012), available at <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>.

### *Rights of Victims of Crime*

Although the Declaration recognizes that migrants may be “compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking” and that “even if they reach their destination, they face an uncertain reception and a precarious future,”<sup>77</sup> it does not reflect protections for migrant victims of crime during their journeys and in the host country, as codified in international law.

At minimum, international law provides that “[e]very migrant victim of crime has the right to assistance and protection, including access to compensation and restitution.”<sup>78</sup> International law separately provides for the right of all migrants to “an effective remedy for acts violating the rights guaranteed under international law . . . including those herein recognized.”<sup>79</sup>

### *Other Rights from which the Declaration Derogates*

There are a number of other important rights of migrants that are not explicitly recognized in the New York Declaration, but which should be incorporated in the Global Compact to strengthen the comprehensive potential for protection of the rights of migrants. The IMBR provides a comprehensive restatement of core rights that protect all migrants, including refugees, and should be a tool for states to ensure that rights are set at the level of international law when implicated.<sup>80</sup>

We urge States to address these gaps and uphold these rights as they negotiate the Global Compact, utilizing the IMBR commentaries to support the inclusion of these rights in the work of states. Doing so will ensure that the UN Declaration and Compact corresponds fully to existing international law for the rights of migrants and refugees, and ensure that States continue to respect these extant rights in adopting migration and refugee policies in the future.

## **Part IV: Recommendations**

As states begin negotiating the Global Compact and review, design, and implement their own migration policies, they can draw upon the IMBR as a comprehensive source of international law on the rights of all migrants and refugees. In negotiating the Global Compact, we urge states to include commitments that clarify and define the rights both included and not yet articulated in the New York Declaration, as discussed above. Doing so would ensure that the Compact is in compliance with existing international law.

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<sup>77</sup> NY Decl. ¶1.9.

<sup>78</sup> IMBR art. 10(1). his right is most strongly recognized in instruments addressing trafficking in persons, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) attached to the UN Convention Against Organized Crime, and the Council of Europe Convention on Action Against Trafficking in Human Beings. Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197.

<sup>79</sup> IMBR Art 8; UDHR art. 8; ICCPR art. 2(3).

<sup>80</sup> These include rights that are vital to ensure migrant participation in the protection of their own rights as well as the development of migration law and policy. These include the rights to freedom of opinion and expression (IMBR art. 17; UDHR art. 19; ICCPR art. 19; ICMRW art. 13) and to peaceful assembly and association (IMBR art. 18; UDHR 20(1); ICCPR art. 22; CRC art. 15; ICERD art. 5(d)(ix); ECHR art. 11(1); ACHPR art. 10(1); ACHR art. 15).

In reviewing their own migration policies, states should ensure that their policies comply with international law and their human rights obligations therein. This is in line with the New York Declaration's recognition that State migration policy must be "consistent with States' obligations under international law...to fully respect [migrants'] human rights and fundamental freedoms, and...stress their need to live their lives in safety and dignity."<sup>81</sup>

As States develop policies consistent with the aforementioned rights, they can also ensure that their respect for these rights extend to migrants in transit by land and sea, particularly as they design search and rescue mechanisms.<sup>82</sup> It is important to emphasize that these rights also apply on land in transit countries, particularly recognizing the rights of migrants and refugees on dangerous or isolated routes. Furthermore, States have responsibilities when engaging in activities that undermine the rights of migrants in other States, or in efforts to stop migration flows prior to arrival at their own borders.<sup>83</sup>

In addition, in light of the progressive understanding of forced migration in the New York Declaration, States should fully recognize the rights of migrants fleeing countries experiencing conflicts or natural disasters,<sup>84</sup> and introduce mechanisms to provide temporary protection against return to migrants who do not qualify for refugee status but who are unable to return home due to conditions in their countries of origin.<sup>85</sup>

International organizations and civil society can utilize the IMBR for a clear restatement of relevant international law as they promote the recognition of a common baseline of rights shared among all migrants, and restated in the IMBR. Given the broad mandate of the IOM and the relationship between its actions and the human rights obligations protecting migrants, the non-binding IMBR could be a useful mechanism to assert and reinforce the obligations of the IOM to promote protection of the rights of all migrants and also to recall the obligations reflected in existing law (and the mandates of existing UN agencies).<sup>86</sup>

Likewise, international organizations and States might draw upon the IMBR's set of compliance indicators as States seek to "collect accurate information regarding large movements of refugees and migrants."<sup>87</sup> States recognize that "improved data collection, particularly by national authorities, will enhance international cooperation"<sup>88</sup> and have committed to incorporate such mechanisms in their national policies as well. The IMBR's migrant rights database, which currently includes pilot countries Germany, Mexico, Russia, South Africa, and Turkey, employs a questionnaire that evaluates the extent to which supranational law reflect supranational standards and norms. The questionnaire may be applied to any State to ensure against derogation and trace trends across space and over time.

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<sup>81</sup> NY Decl. ¶1.11.

<sup>82</sup> NY Decl. ¶2.7.

<sup>83</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 17, U.N. Doc. A/56/10, chp.IV.E.1 (November 2001), available at <http://www.un.org/documents/ga/docs/56/a5610.pdf> ("A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.").

<sup>84</sup> NY Decl. ¶3.10.

<sup>85</sup> NY Decl. ¶3.13.

<sup>86</sup> NY Decl. ¶¶3.9; 4.2

<sup>87</sup> NY Decl. ¶2.4.

<sup>88</sup> NY Decl. ¶2.19.