IOM Capstone Final Report

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Introduction **4**
Literature Review **5**
What is IML? 5
Sources of IML 5
Methodology **7**
Global Compact for Migration (GCM) 9
Stakeholder Interviews 10
Results **11**
Quantitative Analysis 11
Case Law Analysis 13
Rights-Based Analysis **15**
Right to family unity and reunification 15
Right to leave any country 18
Right to return to own country 19
Right to access to justice 20
Right to work and right to enjoyment of just and favorable conditions of work 22
Principle of non-discrimination 25
Right to freedom from collective expulsions 29
Right to consular assistance 31
Conclusion and Further Questions **32**

Glossary of Acronyms

ACtHPR	African Court on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter)
ACHR	American Convention on Human Rights (Pact of San Jose)
CCJ	Caribbean Court of Justice
CAT	Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CIL	Customary international law
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECE	European Convention on Establishment
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
GCM	Global Compact for Safe, Orderly and Regular Migration
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IDP	Internally displaced persons
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICMW	International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons From Enforced Disappearances
IHRL	International Human Rights Law
IML	International Migration Law
IOM	International Organization for Migration
OAS	Organization of American States
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
OHCHR	United Nations Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
VCCR	Vienna Convention on Consular Relations

Introduction

Migration is an integral part of humanity. Rather than a problem to be solved, migration is a natural global phenomenon and one of the oldest. As migration patterns, laws, and policies shift in the global arena, International Migration Law (IML) plays an essential role in ensuring that the rights of migrants are protected and the obligations of States vis-à-vis migrants[1] are understood and implemented consistently. Unlike other branches of international law enacted through binding and specialized treaty law, IML is not a standalone branch of international law; rather, IML is a set of norms and rules from an array of applicable international legal frameworks, supported by both treaty law and instruments of soft law, including non-binding instruments, such as the 2018 Global Compact for Safe, Orderly and Regular Migration (GCM).

Many of the rights guaranteed to migrants – including the right to leave any country, the principle of non-discrimination, the right to family unity and reunification, among others, are found under international human rights law (IHRL), supported and reinforced by many other related branches of law. However, despite the legally-binding nature of IML norms, in practice, the adherence of States to its norms and rules is inconsistent and demands further investigation into the extent of de facto State implementation in the context of migration. This report analyzes contemporary implementation of IML and how States interpret and apply their obligations towards migrants under various international legal frameworks. It also explores the question of whether IML could already be recognized as its own body of international law as evidenced by case law and State practice.

To achieve this goal, this report analyzes the principal branch of international law with clear implications for the protection of migrants' rights: International Human Rights Law. Through an analysis of relevant case law in international, regional, and national courts, this report examines decisions by States to join and adhere to relevant treaties and non-binding instruments with respect to the rights of migrants. It also explores nascent efforts related to IML, as seen with the GCM and its application through case law. By demonstrating that both the existing norms of customary international law (CIL) and the rules from existing treaty law are both widely observed and practiced with respect to migrants, and done so out of a sense of obligation under the law, this report highlights the intention of States to protect migrant populations. The rights guaranteed to migrants under the entire IML framework – as found in treaty law and CIL – are legally binding for everyone regardless of nationality or migration status. Thus, it is imperative for the protection of migrants to understand the extent to which States accept, adhere to, and implement their obligations with respect to migrants under IML.

[1] The term 'migrant' is "an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students." (IOM, International Migration Law, Glossary on Migration, 2019)

Literature Review

What is IML?

International Migration Law (or IML) is a framework of international law, described by legal scholar Vincent Chetail in *International Migration Law* "as the set of international rules and principles governing the movement of persons between States and the legal status of migrants within host countries."[2] To properly assess States' adherence to existing international law and norms with respect to migrants, this report first outlines existing structures of IML and the existing legal scholarship toward this framework of international law. While IML is not a particular branch of law, it nonetheless guarantees inalienable rights to migrants while compelling State action vis-à-vis migrants through a set of rights, norms, principles and rules, including of a customary nature and evident through emerging case law.

Sources of IML

In international law, there is not a particular instrument listing which are the sources of international law. However, Article 38 of the Statute of the International Court of Justice (ICJ) annexed to the United Nations (UN) Charter explains on which basis the ICJ is to rule on a case under international law and is thus commonly regarded as providing a list of the sources of international law, which are:

1. "International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

No one legal instrument exists to amalgamate the various components of IML into a single treaty, nor does an international legal mechanism exist with a mandate to protect migrants.[3] The obligations of States vis-à-vis migrants and the rights guaranteed to migrants themselves are found within many bodies of international law, including international human rights law, international labor law, law of the sea, transnational criminal law, and even international humanitarian law, among others.[4]

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[2] Chetail, Vincent. *International Migration Law.* Oxford, Oxford Univ. Press, 2019, 7
[3] Grant, Stephanie. "International Migration and Human Rights." Global Commission on International Migration, September 2005, 17
[4] Ibid. 17

Because IHRL universally applies to every human,[5] and because all migrants are human beings, it follows that these rights apply to migrants in a universal manner. Chetail articulates the importance of existing human rights treaties in the formation of IML, noting that "when assessed as a whole, international law – as notably enshrined in human rights treaties – provides the common legal framework that applies to all migrants," further noting how these human rights norms are "further supplanted by more specialized conventional regimes focusing on specific categories of persons," including refugees, migrant workers, smuggled migrants, and other subcategories of people moving across international borders and within a given country.[6]

While many branches of international law touch upon the rights of migrants and migration, IHRL is the lens of analysis for this report, emphasizing the inherent humanity and the various situations of vulnerability of migrant persons and the need for universal implementation of these norms and rules. The nine core human rights treaties provide the backbone of IML, in addition to the 1948 Universal Declaration of Human Rights (UDHR).[7,8] Additionally, regional human rights treaties, such as the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples' Rights (ACHPR) provide further elaboration and the establishment in regional contexts of these norms and laws, reaffirming State commitment to universal human rights and their obligations therein.[9,10]

Additionally, IML stems not only from treaty law, but also from the norms of CIL, such as the principle of non-discrimination, which is enshrined in the UDHR and strengthened by subsequently adopted treaties consecrating this norm.[11]

Two constituent elements are needed to successfully identify a rule of CIL: demonstrated general State practice and that the "practice in question must be undertaken with a sense of legal right or obligation" (*opinio juris*).[12] State practice can be adequately demonstrated through a State's "exercise of its executive, legislative, judicial [functions]," while evidence of *opinio juris* can be

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[5] Office of the High Commissioner for Human Rights (OHCHR). 2014. "Improving human rights-based governance of international migration." Accessed April 15, 2024, 14 https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf

[6] Chetail, Vincent *International Migration Law*, 8

[7] Ibid., 15

[8] These nine core treaties include: International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Convention on the Rights of Persons with Disabilities (2006); and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

[9] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, https://www.refworld.org/legal/agreements/oas/1969/en/20081 [accessed 16 April 2024]

[10] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950, https://www.refworld.org/legal/agreements/coe/1950/en/18688 [accessed 16 April 2024]

[11] Chetail, Vincent *International Migration Law*, 13

[12] Report of the International Law Commission, 70th Session, April 30–June 1, July 10–Aug. 10, 2018, U.N. Doc. A/73/10; GAOR, 73rd Session, Supp. No. 10 (A/73/10), pg. 138

shown through many forms of State communication of intent, including legal decisions as well as diplomatic and governmental communications, among other examples.

Indeed, while the rules and principles of IML are mostly rooted in IHRL, among other branches of law, the interplay of treaty law and non-binding instruments of soft law reinforces the norms and rules of IML, with soft law "[fulfilling a variety of legal and paralegal functions to reinforce and supplement hard law."[13] Further, soft law "has become an influential catalyst of international customary law," supporting the codification of norms of CIL as binding rules.[14] Soft law is an integral part of the IML framework, providing both support for treaty law and hard law provisions, while strengthening norms of CIL.[15] For example, the New York Declaration for Refugees and Migrants was an unprecedented commitment by States to "reaffirm and [fully] protect the human rights of all refugees and migrants" as laid out in the UDHR.[16] Chetail argues that soft law instruments play a vital role, saying that "most soft law instruments usually contain a variety of provisions that may be viewed either as a codification or a progressive development of international law."[17]

Close to amalgamating many of the most important norms and branches of law that compose IML, the 2018 GCM was voted by a vast majority of the United Nations General Assembly (UNGA)[18] as a non-binding instrument or cooperation framework, which nevertheless has review mechanisms to monitor its implementation at various levels (national, regional and international). The GCM and its objectives are widely anchored in international law, notably IHRL, and its guiding principles include principles along those lines, such as human rights. Thus, it encourages States to meet the obligations they have committed to under international law.

While many sources of international law are not explicitly created for migrants, the manner in which they have been applied to migrants – as they move across international borders, sojourn within countries, and live within their countries of destination – is unassailable, regardless of legal status or classification.

Methodology

As CIL is determined by practices surrounding a right or norm, a rights-based approach (RBA) centers evidence around a specific right, analyzing a State's understanding and adherence to the right regardless of its source. Alternative approaches could include analyzing State practice and obligation to core human rights treaties towards migrant populations. However, this rights approach furthers the argument that fundamental human rights norms are CIL. In order to focus this report on the customary nature of human rights norms as applied to migrant populations, a

[13] Ibid., 283
[14] Ibid., 286
[15] Chetail, *International Migration Law*, 286
[16] UN General Assembly, New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly, A/RES/71/1, 3 October 2016, Accessed 16 April 20204, https://www.refworld.org/legal/resolution/unga/2016/en/112142
[17] Chetail, *International Migration Law*, 286
[18] On 19 December 2018, 152 States of the UN General Assembly voted in favor of Resolution 73/195.

rights-based discussion organizes evidence of State practice around each norm, setting up for future research on the customary nature of other IML norms.

Given this, the central research question for this report is: ***How do States understand and apply customary norms of international human rights law to migrant populations?***

In order to provide sufficient evidence to demonstrate State adherence to the customary nature of IHRL as applied to migrants, extensive desk research was carried out looking into international, regional, and national laws relevant to migration, research into applicable case law, as well as international legal mechanisms and other displays of States' sense of obligation to apply human rights norms to migrants. To begin, the rights and norms established in the nine core human rights instruments were identified, which are all relevant in the context of migration, but not exhaustive.[19] The rights and norms chosen include: (1) Right to family unity and reunification, (2) right to leave any country, (3) right to return to own country, (4) right to access to justice, (5) right to work and right to the enjoyment of just and favorable conditions of work, (6) principle of non-discrimination, (7) principle of non-refoulement, (8) right to freedom from collective expulsion, (9) right to consular assistance.

These core human rights and norms are largely considered CIL. The UDHR, though it did not impose legal obligations at the time of adoption, is largely considered to have been accepted as CIL,[20] due to its near-universal recognition and implementation by States as well as its influence in binding treaties and national legal systems. Over time, the consistent practice of States in upholding and promoting the principles of the UDHR, coupled with their acknowledgment of its normative force, has contributed to its formation as CIL.[21]

In order to understand the application of these customary norms to migrant populations, treaty ratification statuses of core human rights treaties and key soft law (primarily the GCM) were analyzed. Additionally, statements made upon the endorsement of the GCM provide evidence of State intentions, or lack thereof, to progressively realize the rights of migrants.

Moreover, case law provides evidence to the application of treaty obligations and the State's willingness to recognize obligations towards migrants. Recent regional and international case law indicates a State's current sense of obligation to apply human rights norms to migrants and accounts for push factors of migration, such as climate change. Each case was examined to identify fundamental principles of IML related to the aforementioned rights and norms, discern patterns of consistency, generality, and recognition of legal norms that suggest the customary nature of these principles and highlight convergences and divergences in the application of human rights law to migrant populations.

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[19] OHCHR, "International Standards Governing Migration Policy." Accessed April 17, 2024. https://www.ohchr.org/en/migration/international-standards-governing-migration-policy#:~:text=Respecting%20human%20rights%20means%20refraining,rights%20violations%20by%20other%20actors

[20] Hannum, Hurst. "The UDHR in National and International Law." Health and Human Rights Journal (2014): 145-158. Accessed April 21, 2024. https://www.hhrjournal.org/wp-content/uploads/sites/2469/2014/04/16-Hannum.pdf.

[21] Meron, Theodor. "Human Rights Instruments and Customary Law." In Human Rights and Humanitarian Norms as Customary Law (1991): 79-135 Oxford University Press.

Through treaty and case law analysis, this report demonstrates that these existing norms of CIL are both widely observed and practiced with respect to migrants and done so out of a sense of obligation under the law. In doing so, this report takes stock of how migrant populations and their rights are being protected and where opportunities for further implementation remain.

In defining the research question and corresponding methodology, several limitations have been identified. Firstly, the framework of IML encompasses various bodies of law, making it challenging to confine the analysis of migrant rights solely to IHRL. Recognizing this constraint, the research focused exclusively on IHRL, acknowledging that this approach may not encompass all relevant rights. Additionally, due to time constraints, the analysis could not comprehensively cover all human rights applicable to migrants,[22] nor the entirety of State practice and obligation, which might limit the depth of the team's findings. Although this Capstone project is for IOM, diverse resources were consulted, such as other institutional partners, academic experts and a non-profit organization, while a varied desk review of resources was analyzed, thereby enhancing the diversity and credibility of perspectives to enrich this study.

Despite these limitations, this research aims to provide valuable insights into how human rights law and customary norms and principles of international law, within the framework of IML, provide protection to migrant populations, contributing to a broader understanding of this complex and multifaceted issue. The conclusion will include further discussion of how these challenges present opportunities for further research.

Global Compact for Migration (GCM)

The GCM is a landmark framework of cooperation and the first intergovernmental instrument to exclusively address migration governance in all its phases. While the Global Compact is not a legally binding instrument, it is progressive in its outlined objectives grounded in international law and serves as a significant indicator demonstrating State commitment and intent towards prioritizing migration at the global level in line with international law and under a human rights based approach. Adopted by UNGA Member States in December 2018, the Compact received a high level of engagement throughout both the drafting and negotiation process, culminating in widespread endorsement of the finalized piece. As a result, 152 Member States voted in favor of the Compact, constituting a resounding majority; five States voted no, while twelve States abstained, and twenty-four States did not submit a vote.

Initiatives on migration are far from new to the UN agenda; however, the Compact elaborates on these prior works and discussions, culminating in a comprehensive framework which emphasizes cooperation and responsibility-sharing, while also upholding the value of State sovereignty and State obligations under international law. The GCM comprises twenty-three primary objectives in total, which respectively aim to mitigate the potential risks and challenges that migrants face throughout the various stages of migration. Crucially, the Compact addresses the legitimate concerns of destination States regarding their capabilities and capacities to accommodate

[22] Other relevant human rights include the right to life, freedom from slavery, peaceful assembly, vote, cultural practices, health, housing, education, freedom of expression, privacy, information, healthy environment, peace, etc. (International Migration Law Unit - IOM. *Relevant Rights and Principles in International Law*. 2021)

migrants, while also keeping the human rights of migrants at the forefront and promoting enhanced facilitation of safe, orderly, and regular migration overall.

After the successful adoption of the Compact, more than fifty delegations provided statements delineating the reasoning behind their votes. Having voted in favor, the Philippines emphasized that migration is a shared responsibility among countries, claiming "no one State can address it alone" and calling the Compact "a triumph of multilateralism." Also voting in favor, El Salvador's representative referred to such forms of mobility and migration as inherent to the human condition, "a phenomenon that will continue with or without the Global Compact"; importantly, the representative also underscored that this new agreement is based on already existing international law, such as the UDHR. On behalf of the Pacific Small Island Developing States, a representative of Fiji also affirmed the Compact, as it did not undermine national migration policies or national sovereignty, but rather encouraged States to adopt their own approach to this "growing global issue." Similarly voting in favor, the representative of Namibia, speaking on behalf of the African Group, stated "all Member States should defend the agreement, strive to ensure its best possible implementation and protect it from politicization." However, the response to the Global Compact was not unanimous, with a minority of States including Czechia, Hungary, Israel, Poland and the United States of America voting against the agreement and 12 Member States abstaining.

The GCM demonstrates that most States are committed to adopting and implementing a comprehensive global migration framework. Even as it is an exemplary piece of "soft law" or non-legally binding in nature, its significance should not be understated. The Compact's ability to gain mass support for this form of collective governance while maintaining individual State sovereignty is a promising model for future instruments. It will continue to be progressively realized and reviewed in the coming years and moreover, it has shown the commitment that the majority of States have to cooperate on global migration.

Most recently, the Progress Declaration of the International Migration Review Forum (IMRF) was adopted by the UNGA in 2022. The review process was intended to assess the progress and implementation status of the Compact thus far at the local, national, regional and global level, particularly as it relates to the upcoming benchmark of the 2030 Sustainable Development Goals Agenda.[23] Importantly, all participatory States who endorsed the original Compact reaffirmed their commitments as outlined in the original text, as well as the newer recommendations included in the Progress Declaration. The Progress Declaration was especially relevant in assessing the impacts of Covid-19 pandemic on migrants and migration as a whole, and highlighted considerations that must be made by States for human mobility to be continually enabled and supported, even in times of crisis and disaster.

Stakeholder Interviews

Given the focus and scope of this research, it was imperative to supplement the project's methodology with qualitative interviews engaging a variety of relevant experts, academics, and practitioners during the time of this research. The interviewees included experts from the

[23] United Nations General Assembly, "Progress Declaration of the International Migration Review Forum." June 2022.

academia, International Organization for Migration, Office of the High Commissioner for Human Rights, Office of the United Nations High Commissioner for Refugees, the European Union Agency for Fundamental Rights and SOS Méditerranée.

Results

Quantitative Analysis

A global analysis of State ratification of international human rights treaties was carried out in order to determine the extent to which States have agreed to be bound by rights that are applicable to migrants. To do this, the aforementioned migrant rights for analysis were identified within the nine core international human rights treaties, supplemented by regional human rights mechanisms. [24]

After identifying the treaties that cover core migrant rights, evidence of State practice of adherence to these rights was identified by the ratification data. In order to do this, a binary system was used ("1" for treaty ratification and "0" for signature and/or no ratification) to track ratification of the nine core international human rights treaties by 197 UN Member States. This includes 193 UN Member States as well as two UNGA observer States (the Holy See and the State of Palestine) as well as two eligible non-Member States (the Cook Islands and Niue). See Figure 1 below for the ratification data of the international human rights treaties.

These ratification numbers reveal widespread State adherence to most of the international human rights treaties. with the exception of two treaties.[25] When ratifying these treaties, many States made reservations and/or declarations to various treaty articles. These reservations were taken into account when further analyzing State practice data vis-à-vis migrant rights. In order to do this, each State's ratification data was collated and compared to the treaties listed for each migrant right. If a State was found to have ratified one treaty that contained that right, without having made a declaration or a reservation that applied to the treaty article within which that right was mentioned, the State was counted as being bound to respect that right for migrants. When a situation arose wherein a State had only ratified one treaty that contained a right and made a declaration and/or reservation at the time of ratification, the language of said declaration and/or reservation was cross-checked to determine if it applied to the treaty article relevant to the migrant's right. If a State did not specifically declare that they were not bound by an article containing that specific right at the time of ratification, they were granted a "1" for being bound (vs. a "0" for not being bound).

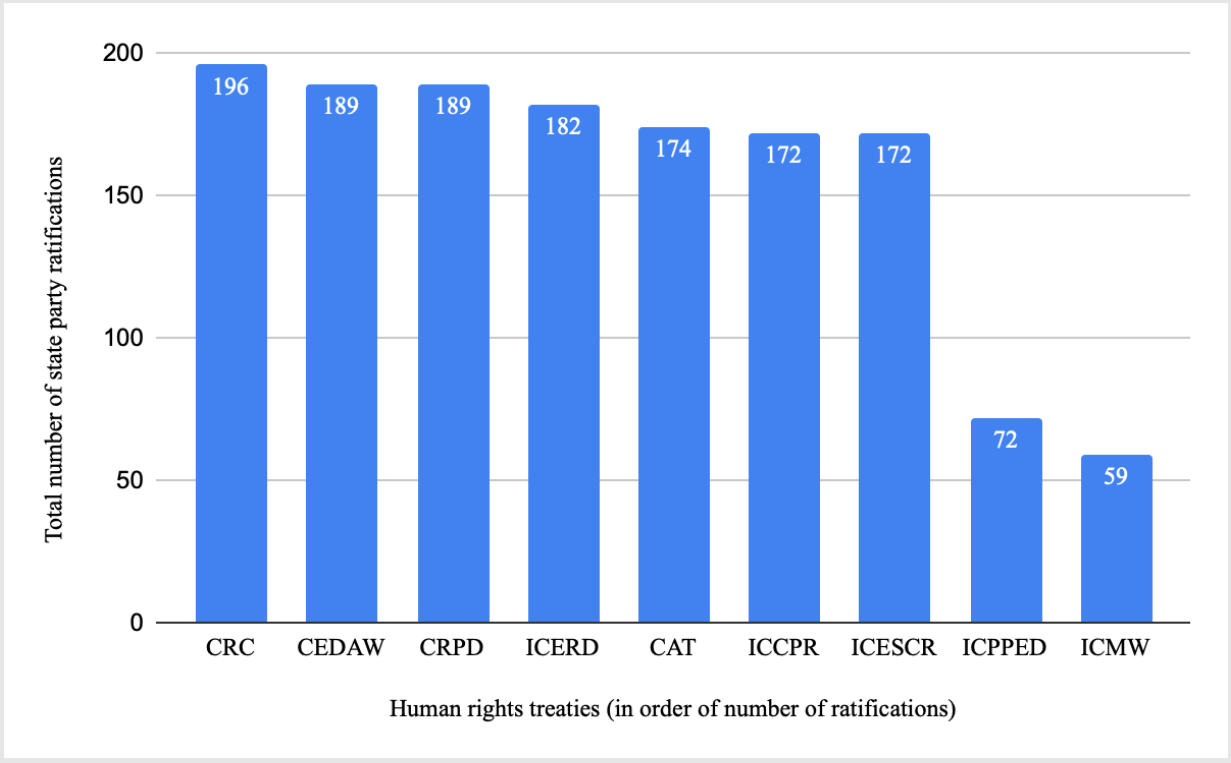
Moreover, to supplement the international human rights ratification data with international labor treaty ratification data to further strengthen proof of State agreement to be bound to respect migrants' rights. International labor law was selected as a supplement to take a closer look at

[24] See: Appendix A - Rights and their Corresponding Regional/International Treaties

[25] Of note is that this ratification data is up to date as of March 2024, which cannot be said for many treaty ratification databases as States have ratified these treaties as recently as October 2023. This work contributes to the larger body of work that analyzes States' legal adherence to core international human rights treaties.

economic rights for migrants.[26] Each one of these conventions were found to contain at least one of the identified migrant rights.

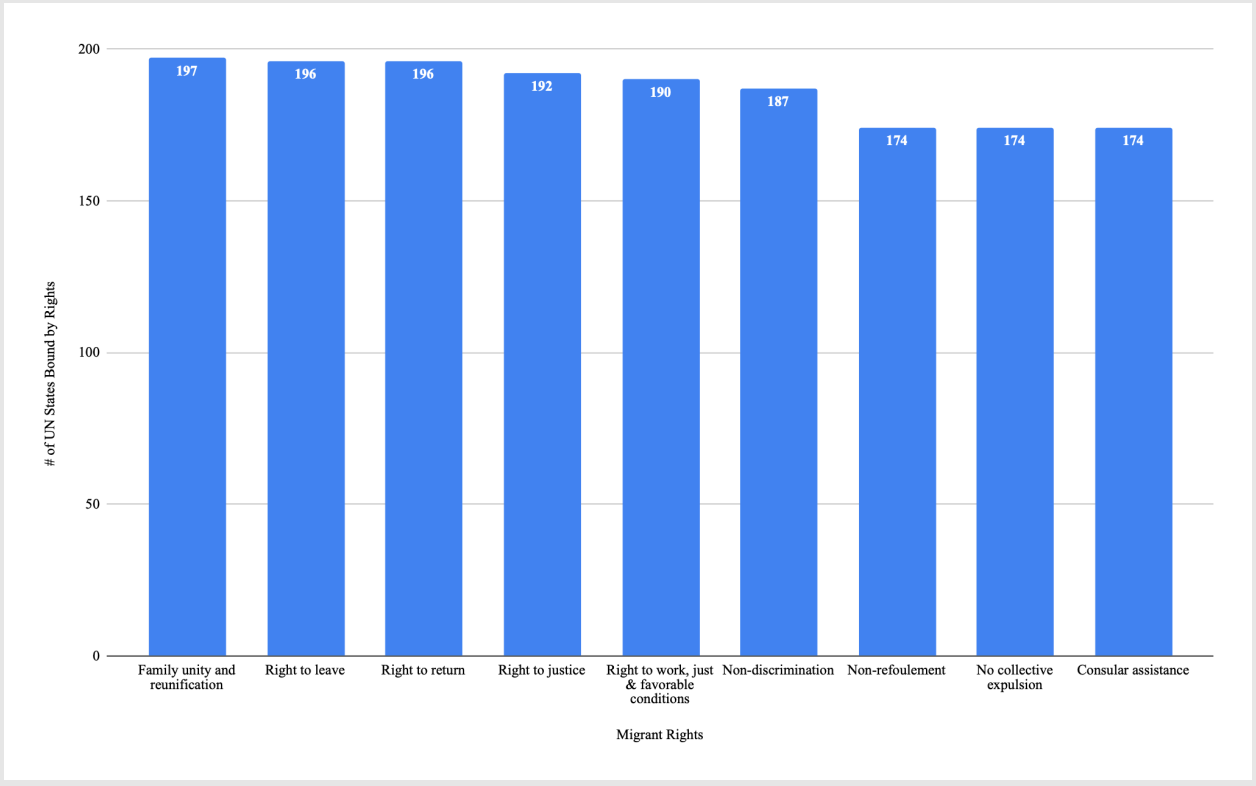
Figure 1: Ratification Status of Core International Human Rights Treaties



As evidenced in Figure 2, at the international level, States are overwhelmingly bound to adhere to migrant rights as enshrined in human rights treaties as well as CIL. While this points to legal protection of migrants' human rights, much more work needs to be done to ensure that States are abiding by their treaty obligations due to the fact that in practice being bound to respect the human rights of migrants does not mean a State will actually apply/implement it de facto.

[26] This included ILO Convention 097 (Migration for Employment Convention, 1949); 143 (Migrant Workers Convention, 1978); C29 (Forced Labor Convention, 1930) and its 2014 Protocol; C110 (Plantations Convention, 1958); C189 (Domestic Workers Convention, 2013); C181 (Private Employment Agencies Convention, 1997); C105 (Abolition of Forced Labor Convention, 1957); C019 (Equality of Treatment Convention (Accident Compensation) Convention, 1925); C088 (Employment Service Convention, 1948); C102 (Social Security (Minimum Standards) Convention, 1952; C118 (Equality of Treatment (Social Security) Convention, 1962); and C157 (Maintenance of Social Security Rights Convention, 1982).

Figure 2: United Nations States[27] Bound by Migrant Rights/Principles



Case Law Analysis

The cases included in this study were selected based on their relevance to IML and their potential to demonstrate the customary nature of human rights in the context of migration. A total of twenty-one cases from international and regional courts, as well as several pivotal national cases, were analyzed. Of the twenty-one international and regional cases,[28] twelve are from regional human rights systems. Key migration-related decisions are often created at the regional level, as there is no one international legal mechanism or treaty with jurisdiction over IML. With such absence, regional human rights law provides another avenue for individuals seeking accountability for their rights. Regional systems are able to include region-specific commitments to migration, including the establishment of regular migration pathways between member States.[29]

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[27] "United Nations States" refers to all States able to interact with international treaties, including the 193 UN Member States as well as two UN General Assembly observer States, the Holy See and the State of Palestine, as well as two eligible non-Member States, the Cook Islands and Niue.

[28] Although regional human rights systems are often considered part of the international legal framework, for the purposes of this report, there will be a distinction made between UN bodies (international) and regional frameworks from the Americas, Europe and Africa.

[29] Bruno, Palombin, Di Stefano (Eds.), Migration Issues before International Courts and Tribunals, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 45-90.

Eight cases were selected from the European system, encompassing decisions from both the European Committee on Social Rights (ECSC) and the European Court of Human Rights (ECtHR).[30] These cases were chosen for their significant insights into migration issues within European jurisdictions and their influence on migration law practices in other regions. Despite accountability in the European system, the cases do not only represent migrants from within Europe, but also include migrant populations and other engagement from States from the Middle East, Africa and Asia. Within the Americas, one case from the Inter-American Court of Human Rights (IACtHR) was selected for its pivotal rulings on migration-related human rights issues in the Americas region. Three cases from the African Court on Human and Peoples' Rights (ACtHPR) represent the African perspective on migration-related issues and contributions to the development of migration law.

At the international level, two key cases in the ICJ and three decisions by the UN Human Rights Committee (UNHRC)[31] were analyzed due to their highly influential contribution to the interpretation of human rights law in the context of migration.

At the national level, four cases were chosen based on their international relevance and demonstration of how domestic courts interpret and apply principles of international migration law, indicating the customary nature of these norms. Two bilateral agreements were also included for their regional relevance in establishing migration pathways. Cases were selected from a diverse group[32] of States, representing top destination countries for migrants.[33] These include the United States, New Zealand, Italy, and France.

The findings from this analysis are intended to contribute to the understanding of how judicial decisions at international, regional, and national levels interact to form and confirm the application of customary norms of IML in the area of migration. This approach ensures a robust examination of the judicial landscape, offering a detailed picture of how migration law is universally being interpreted, shaped and applied, even if relying mostly on human rights law.

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[30] Cases include the European Court of Human Rights (ECHR) and the European Committee on Social Rights (ECSC). While ECHR is the main body of concern for the application of regional human rights law, this body only has jurisdiction against member States party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Committee of Social Rights is the monitoring body of the European Social Charter and judges compliance by State parties to the Social Charter (Defeis, Elizabeth F. "Human Rights and the European Court of Justice: An Appraisal." Fordham International Law Journal 31, no. 5 (2007): 1104-1117)

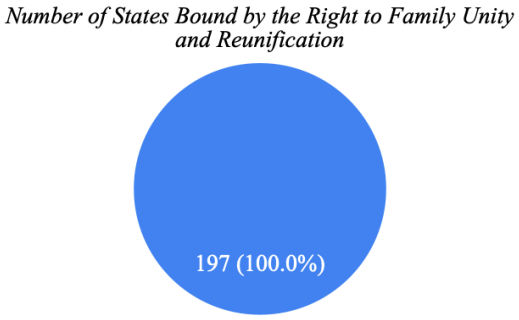
[31] The UN Human Rights Committee (HRC) is the treaty body for the ICCPR Member States to the ICCPR and individuals or groups from these States are able to bring cases against member States to the HRC over alleged violations of the ICCPR. While the body does not produce legally binding decisions, the body is able to hear the grossest violations of civil and political rights.

[32] Diverse in terms of geography, including destination and origin countries, influence in international law, and history of migration-related policies.

[33] Top destination countries are based on the number of non-nationals received annually. In addition, these immigration/emigration numbers as a percentage of total population indicates the impact of migration patterns. In 2021, the United States received approximately 51.5 million immigrants, France received 9.2 million, Italy received 6.3 million and New Zealand received 1.3 million, over 28% of the country's total population ("Bilateral Migration Matrix." KNOMAD. https://www.knomad.org/data/migration/emigration)

Rights-Based Analysis [34]

Right to family unity and reunification



The right to family unity and reunification is an integral component of the right to respect family life, establishing that no one shall be subjected to arbitrary interference in their family (duty of the State to respect and protect), and the State must take all possible steps to protect the family unit (duty to protect and fulfill).[35] This is widely thought of as a customary norm of international law and is enshrined in multiple international human rights treaties including the Convention on the Rights of the Child (CRC),[36] the ICMW,[37] and the International Covenant on Civil and Political Rights (ICCPR).[38] [39] According to Prof. Vincent Chetail, the customary nature of the right to family life presumes that the same should apply to the "positive obligations inherent in the effective respect for this fundamental right, including the correlative duty of family reunification when there is no other alternative for exercising the right to family life elsewhere." [40]

However, there remain debates among States regarding the interpretation of the right to family life and family reunification as enshrined in international human rights treaties. For example, Article 9 of the CRC establishes a right to family reunification for all children, which many States stipulate is applicable only within State borders. This differs from Article 10, which is widely applied to migrants given its mention of the right to family reunification should a child or their parents need to enter or leave a State party. Some legal scholars maintain that Article 9 stipulates that States must allow entry into the territory of a State for the purposes of family unity, which includes those seeking international protection.[41] The extent to which family reunification is applied to migrants and their families in an international context depends on States. This also includes States' consideration of regular and irregular migrants, which is shown via key cases, such as *Beharry v. Reno* in the United States of America.

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[34] A State is bound by a right if it has ratified at least one international treaty containing that right and has not submitted a reservation indicating the State will not be bound by that right. The treaties encompassing each right can be found in Appendix A and ratification status is represented in Figure 2.
[35] Chetail, *International Migration Law*, 125
[36] United Nations General Assembly, *Convention on the Rights of the Child,* art. 6, 10, and 16, November 20, 1989.
[37] United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* art. 14 and 44, December 18, 1990.
[38]IOM. "IML Information Note: Children." Accessed April 25, 2024. https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ICP/IML/iml-information-note-children.pdf
[39] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 17, December 16, 1966.
[40] Chetail, *International Migration Law*, 126
[41] Ioffe, Yulia. "The Right to Family Reunification of Children Seeking International Protection under the Convention on the Rights of the Child: Misplaced Reliance on Travaux?" *International Journal of Refugee Law* 34, no. 2 (June 2022): 215–240. https://doi.org/10.1093/ijrl/eeac034

Though States generally acknowledge their obligation to the right to family unity and reunification, the case for family reunification becomes strongest when considering the widely accepted customary law principle of the best interests of the child. As stated by the IOM, "a larger weight must be attached to what serves the child best."[42] This concept is enshrined in Article 3 of the CRC.[43] It is expanded upon in two general comments by the Committee on the Rights of the Child. General Comment No. 14 emphasizes the right of the child to have his or her best interests taken as a primary consideration.[44] Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families/No. 23 of the Committee on the Rights of the Child emphasizes the legal obligation of States to protect the rights of children in the context of international migration in their territory, including countries of origin, transit, destination, and return.[45] The reunification of a child with their family in a foreign country is the duty of States when there is no reasonable alternative for exercising family life elsewhere.[46]

Several courts in countries that receive a relatively high level of migrants have confirmed this principle, including the French *Conseil d'Etat* which ruled that the right of documented migrants to be reunited with their children and spouses is a general rule of law, and a United States Federal District Court which ruled that the best interests of the child must be considered as CIL in the field of immigration. Though the *Conseil d'Etat* ruled on the right of *documented* migrants to be reunited with their children, other bodies maintain that States must ensure the right to family unity and reunification when it is in the best interests of the child regardless of the migration status of the child or their parents.[47]

Several cases at the international and regional levels show evidence of State adherence to these rights. In the first case *Good v. Botswana,* Mr. Kenneth Good was a university lecturer in Botswana who taught for over a decade before being expelled from the country after writing an article critical of the presidential succession. Holding an Australian passport, Mr. Good was given only fifty-six hours' deportation notice to Botswana on the grounds of "national security," separating him from his 17-year-old daughter for whom he was the sole provider. Botswana's High Court initially rejected Good's constitutional challenge of his expulsion, after which the case was elevated to the ACtHPR. The Court found that, among others, Botswana had violated Article 18 of the African Charter, which includes the right to family unity and reunification. In its ruling the Court cited, "The sudden deportation of the victim with no justification, knowing fully well he will be separated from his minor daughter who was living with him runs counter to the protection that States are required to give to the family under Article 18."[48] This case

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[42]IOM. "IML Information Note: Children." Accessed April 25, 2024. https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ICP/IML/iml-information-note-children.pdf

[43] United Nations General Assembly, *Convention on the Rights of the Child*, art. 3, November 20, 1989.

[44] UN Committee on the Rights of the Child, *General Comment No. 14*, 2013.

[45] UN Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families/No. 23 of the Committee on the Rights of the Child. Submitted 2017.

[46] Chetail, *International Migration Law*, 127

[47] UN, Human Rights Council. "Human Rights Council Holds Panel Discussion on Family Reunification in Context." Accessed April 25, 2024. https://www.ohchr.org/en/press-releases/2022/03/human-rights-council-holds-panel-discussion-family-reunification-context

[48] Kenneth Good v. Republic of Botswana, Communication 313/05, African Commission on Human and Peoples' Rights, (May 26, 2010).

displayed both a regional commitment to the right to family unity and reunification and the best interests of the child, as well as the fact that African States must uphold their commitments to uphold these rights in the case of migrants.

Another key case regarding States' adherence to the right to family unity and reunification at the national level is *Beharry v. Reno*. Mr. Don Beharry was a lawful permanent resident of Trinidad origin, who lived in the United States since 1982. In 1996, he was convicted of robbery in the second degree. While Mr. Beharry was incarcerated, the United States Immigration and Naturalization Service commenced deportation proceedings for the defendant as an aggravated felony. The defendant requested relief from deportation under principles of international law, claiming that his deportation would negatively impact his family which included his mother, a lawful permanent resident, his sister, a United States citizen, and his 6-year-old daughter, a United States citizen. In the decision, the court cited the ICCPR, stating that deportation of Mr. Beharry violated the Covenant's guarantee against arbitrary interference with one's family.[49]

The court also cited provisions of the CRC as CIL, stating that the best interests of the child must be a primary consideration. Though the Court acknowledged that the United States is the only country in the world that has not signed the Convention, the court does acknowledge its customary nature. In conclusion, the Court ordered the United States Immigration and Naturalization Service to conduct a hearing to determine if Mr. Beharry could stay in the United States instead of deporting him. In doing so, the Court acknowledged evidence that deportation could cause "extreme hardship" to Mr. Beharry's family members, in addition to potential violation of the United States' treaty obligations and CIL.

This ruling is especially interesting in the context of the United States vote against the 2018 GCM. In its remarks to the UN at the time of its vote, the United States expressed reticence to vote for a UN resolution that it viewed as advancing global governance at the expense of State sovereignty. The United States stated, "the United States also is concerned that Compact supporters, recognizing the lack of widespread support for a legally-binding international migration convention, seek to use the Compact and its outcomes and objectives as a long-term means of building customary international law or so-called "soft law" in the area of migration."[50] This is despite the fact that in cases like *Beharry v. Reno*, the United States has acknowledged that it must take CIL into account when making court decisions regarding migrants.

It is important to note that the United States often emphasizes distinction between "legal" migrants and "illegal" migrants, or "foreign nationals who reside illegally" (or more appropriately, documented/regular vs. undocumented/irregular). Though many scholars, including those at IOM, and judicial bodies emphasize the customary nature of the right to family unity and reunification and the best interests of the child regardless of migration status, status remains a point of contention when it comes to State adherence to the CIL nature of this right in particular, and others, especially in the political context.

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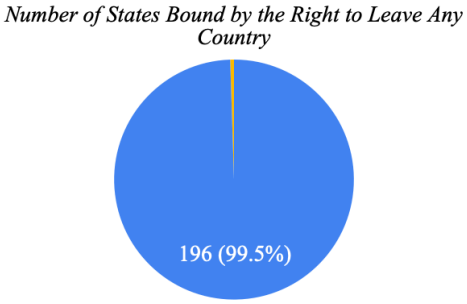
[49] Beharry v. Reno, United States District Court for the Eastern District of New York 98 CV 5381 (JBW) (2002).
[50] "National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration." United States Mission to the United Nations. Accessed April 25, 2024. https://www.govinfo.gov/content/pkg/CPRT-116SPRT41888/html/CPRT-116SPRT41888.htm

In the case of *Ozdil and Others v. The Republic of Moldova*, five Turkish nationals were living and working in the Republic of Moldova as school teachers when the Turkish ambassador to the Republic of Moldova accused them of subversion following the 2015/2016 attempted military coup in Türkiye. Though the individuals applied for asylum in Moldova, they were later arrested in a secret joint operation by the Moldovan and Turkish authorities and put on a plane to Türkiye without notifying their families for several weeks. Later, their families received notice of their asylum applications, which were rejected.[51] These individuals appealed their case to the ECtHR, which ruled that there had been two major violations of the ECHR: Article 5 (right to liberty) as well as Article 8 (right to respect for private and family life). In the court's ruling, "As the applicants had not enjoyed the minimum degree of enjoyment of protection against arbitrariness on the part of the authorities, the Court concluded that the interference with their private and family lives had not been in accordance with the law." This reflects that the enforcement of the right of respect to family life, and thus by default the right to family unity and reunification, a customary norm embodied in the ECHR, was solidified at the regional European level.

Right to leave any country



The right to leave any country is "an element of the right to freedom of movement that entitles everyone to be free to leave any country, including one's own."[52] The right to leave any country is established in human rights instruments to ensure that migrants can leave a country freely without arbitrary interference. This right includes migrants leaving their country of origin without unjustified obstacles and also applies to non-citizens of the States. However, there is no corollary right to enter the territory of another country under international law, due to State sovereignty in overall immigration.

Article 13(2) of the UDHR establishes that "everyone has the right to leave any country, including his own, and to return to his country."[53] In accordance with Article 12(2) of the ICCPR, "Everyone shall be free to leave any country, including its own."[54] These rights may not be made dependent on a specific purpose or on the period of time an individual chooses to stay outside the country. [55] The right to leave any country is also enshrined in the 1966 UN Convention on the Elimination of All forms of Racial Discrimination (ICERD) in Article 5: "In compliance with the fundamental obligations laid down in Article 2 of the Convention, State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the

[51] Ozdil and Others v. Moldova App. No. 42305/18 European Court of Human Rights (2011).
[52] Ibid 66
[53] United Nations General Assembly, *Universal Declaration of Human Rights*, art. 13(2), December 10, 1948.
[54] United Nations General Assembly, *International Covenant on Civil and Political Rights*, art. 12(2), December 16, 1966.
[55] UN Human Rights Committee, *General Comment No. 27*, para. 8, 1999.

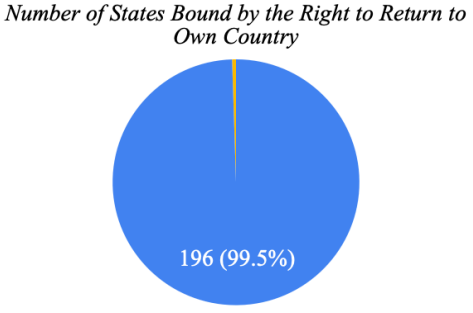
law, notably in the enjoyment of the prohibition on racial discrimination in the exercise of the right to leave any country."[56]

In *Timishev v. Russia*, Mr. Timishev, originally from the Chechen Republic and working in the Russian Federation, sought to move between the two Republics of the Russian Federation. While traveling, he was stopped at a checkpoint on the administrative border and refused entry per the instructions from the Republic's Ministry of the Interior, which stated not to admit anyone of Chechen ethnic origin. The ECtHR ruled that Mr. Timishev's right to liberty of movement had been restricted solely on the grounds of his ethnic origin and that difference in treatment constituted racial discrimination within Article 14 of ECHR.[57]

In *Stamose v. Bulgaria*, the applicant entered the U.S. on a student visa, but then discontinued his studies and accepted paid employment in breach of student visa conditions. Consequently, he was expelled from the U.S. and forced to return to Bulgaria. On his arrival, Bulgarian authorities imposed a two-year travel ban on the applicant and confiscated his passport in response to a letter from the U.S. Embassy that detailed the case. The ECtHR ruled that under Article 2(2) of Protocol No. 4, prohibiting the applicant from traveling outside of Bulgaria and the seizure of his passport constituted interference with the applicant's right to leave.[58] The travel ban could not be considered proportionate because it prohibited the applicant from traveling to any foreign country.

In both *Stamose* and *Timisheve*, the courts ruled in favor of the applicants because their right to leave a country had been restricted. The interpretation of the human rights convention on the right to leave any country highlights States' obligations to protect this right of individuals. Even though States have national sovereignty to determine who is allowed to enter the country, the refusal of nationals of a country should not be impeded. Individual circumstances should be taken into consideration and the right to leave must also be proportionate to the law.

Right to return to own country



All migrants who leave their country have the right to return to their own country. In certain situations, migrants may request or decide to return voluntarily to their country, and in other circumstances, individuals are forcibly returned to their country before being allowed to seek asylum, access justice or be individually assessed for protection needs, in potential breach of the principle of non-refoulement, although it depends on each case. To ensure that migrants are protected upon returning to their country, States have agreed to facilitate a safe and dignified return and a sustainable reintegration of

[56] United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, art. 5, December 21, 1965.
[57] Timishev v. Russia, App. No. 55762/00 European Court of Human Rights (2006).
[58] Stamose v. Bulgaria, App. No. 29713/05 European Court of Human Rights (2013).

migrants return to their country.[59] Forced returns (e.g. deportation), is within the sovereignty of the State, however, forced returns must nevertheless ensure the safeguards to avoid breaching non-refoulement when carried out, for example.

The right to return is "an element of the right to freedom of movement entailing that everyone shall be free to return to one's own country".[60] The right to return was adopted from the UDHR, Article 13(2)[61]. The right is also contained in the ICCPR Article 12(4), "No one shall be arbitrarily deprived of the right to enter his own country."[62] It is important to note that Article 12(4) does not distinguish whether the individual is a national or non-national of a State.

At the national level, in *Sale v. Haitian Centers Council*, the United States coast guard intercepted a ship carrying Haitian nationals, who claimed to be fleeing their State due to a well-founded fear of persecution. President Bush ordered the coastguard to return all persons on board the ship to Haiti. The applicants claimed that President Bush's decision violated the 1951 Refugee Convention, and the 1967 Protocol Relating to the Status of Refugees, both of which the United States has signed. The United States Supreme Court upheld President Bush's decision, stating that section 243(h)(1) of the Immigration and Nationality Act of 1952, the 1951 Convention, and the 1967 Protocol Relating to Status of Refugees were not intended to apply beyond United States territory.[63]

In the case of *The Haitian Centre for Human Rights, et. al. v. United States*, the Inter-American Commission on Human Rights (IACHR) took a different direction. The Commission contended that by intercepting and returning Haitian refugees without adequately assessing their refugee status, the United States had violated Article 27 of the ACHR. Additionally, the Commission determined that the United States had breached Article 1 of the ACHR, which guarantees every individual's right to life, liberty, and security.[64] Despite the potential mistreatment of Haitian repatriates reported by petitioners, the Commission maintained that forcibly returning the refugees put them at grave risk of death. Therefore, the policy of interdiction and repatriation pursued by the United States constitutes a clear violation of Article 1, the right to life.[65]

As already mentioned, it is crucial to ensure the protection of individuals when a forced return occurs. In this case, the United States did not conduct appropriate due diligence to assess the situation of each individual on the ship. Although a State has the right to deny entry to anyone on its territory, such sovereignty should not be exercised at the expense of violating the fundamental rights of individuals, including the right to life, liberty, and security.

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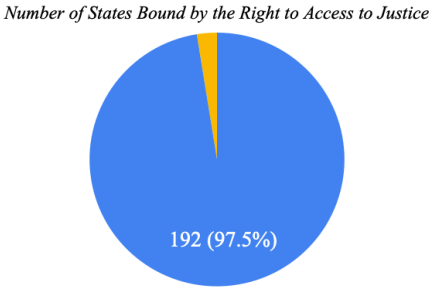
[59] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, December 18, 2018.
[60] Ibid 69 IOM Glossary
[61] United Nations General Assembly, *Universal Declaration of Human Rights*, art. 13(2), December 10, 1948.
[62] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 12(4), December 16, 1966.
[63] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
[64] Organization of American States, *American Convention on Human Rights*, art. 1, November 22, 1969.
[65] The Haitian Centre for Human Rights et al. v. United States, Case No. 10.675 Inter-Am.C.H.R. (1997).

Right to access to justice

Migrants who move from their country of origin to another destination country may face human rights violations en route, e.g. inhumane treatment, arbitrary detention, without access to legal representation. There are instances of migrants being detained at airports or border checkpoints and then placed in detention centers and criminalized without due process. Inadequate practices and issues of governance at borders have also resulted in other human rights violations for migrants. The right to access to justice "typically refer[s] to the ability of persons to make full use of the existing legal processes designed, formally or informally, to protect their right by substantive standards of fairness and justice." [66]



Article 8 of the UDHR establishes that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[67] Article 13 of the ECHR sets that "Everyone whose rights and freedoms as outlined in [the] Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity." [68] Article 6(1) of the ECHR enshrines that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."[69] Additionally, Article 2 of the ICCPR establishes that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law." [70]

The right to a fair trial is a key component of the rule of law. According to the ECtHR, migrants regardless of their status can apply to the court if they are issued a removal order. In *Hirsi Jamaa and others v. Italy*, eleven Somali nationals and thirteen Eritrean nationals were among 200 individuals that fled Libya aboard a vessel that was bound for the Italian coast. The vessel was intercepted while en route by the Italian coastguard in the Maltese Search and Rescue Region. The applicants stated that during the voyage the Italian authorities did not inform them of their intended/final destination and they did not review their travel documents. The migrants spent ten hours detained on the vessel and upon returning to the Port of Tripoli in Libya, the migrants were handed over to the authorities. The court argued that Article 13 guarantees any person who is subject to a removal measure the right to obtain sufficient information so as to allow them to gain effective access to the relevant procedures and sustain their complaints.[71] This requirement as outlined in Article 13 was not met in this particular case.

Moreover, in *Conka v. Belgium* the applicants were Slovakian nationals who had been subjected to threats and physical abuse after leaving Slovakia and seeking asylum in Belgium. Their asylum application was denied on the basis of refusal of entry and was then endorsed with an

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[66] IOM, Glossary on Migration, 2019
[67] United Nations General Assembly, *Universal Declaration of Human Rights*, art. 8, December 10, 1948.
[68] Council of Europe, *European Convention on Human Rights*, art. 13, September 3, 1953.
[69] Ibid, art. 6(1)
[70] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 2, December 16, 1966.
[71] Hirsi Jamaa et al v. Italy, App. No. 27765/09 European Court of Human Rights (2012).

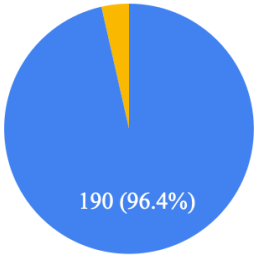
order to leave Belgium within five days. The ECtHR stated that Article 13 requires States to provide domestic remedies that can address the substance of the applicant's complaint as established in the Convention. The ECtHR stated that the remedy must also be effective in the practice of the law.[72]

Providing migrants access to justice regardless of their status reduces their risk of impunity for rights' violations. Furthermore, it ensures that migrants receive the protection guaranteed to them, strengthening the rule of law. In the GCM under Objective 3, States listed, among other actions, 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." [73]

Right to work and right to enjoyment of just and favorable conditions of work

The right to work and the right to the enjoyment of just and favorable conditions of work are rights enshrined in several international human rights law instruments, particularly the ICMW, the International Covenant on Economic, Social and Cultural Rights (ICESCR), ICERD, ICCPR and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In regional law, it is enshrined in the ECHR, the European Convention on Establishment (No. 019) (ECE), ACHPR, Arab Charter on Human Rights, and ACHR.

Number of States Bound by the Right to Work and Enjoyment of Just and Favorable Conditions of Work



While the ICMW explicitly enshrines the right of migrants to work and the enjoyment of just and favorable working conditions, the convention is the lowest ratified of the core international human rights treaties.[74] Therefore, international and regional instruments containing these rights are even more important to supplement protections for migrant workers in origin, transit and destination countries not party to the ICMW.

The ICESCR, ECHR,[75] ECE,[76] and ACPHR[77] define the right to work as a right of everyone to seek gainful employment without discrimination. The right imposes positive obligations on States to "achieve the full realization of this right"[78] through training, economic policy, social and cultural development, etc. It is important to note that these instruments do not oblige States to ensure employment but to increase access to employment in a non-discriminatory way and

[72] Čonka v. Belgium, App. No. 51564/02 European Court of Human Rights (2002).
[73] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, Objective 3 (d), A/RES/73/195, December 18, 2018.
[74] As of April 2024, 58 States are party to CMW through ratification and ascension and 11 are signatories.
[75] Council of Europe, *European Convention on Human Rights*, art. 15(2), September 3, 1953.
[76] Council of Europe, *European Convention on Establishment (No. 019)*, art. 10, December 13, 1955.
[77] Organization of African Unity, *African Charter on Human and Peoples' Rights*, art. 15, June 27, 1981.
[78] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, art. 6(2), December 16, 1966.

ensure just, and fair working conditions for all without discrimination through policy and regulation.

The ICESCR,[79] ICERD[80] and ECHR[81] define the enjoyment of just and favorable working conditions as including the prohibition of forced labor and social and economic exploitation of children and young persons;[82,83,84] freedom from violence and harassment, including sexual harassment; and paid maternity, paternity and parental leave.[85,86]

Migrants' right to work is also closely linked to the non-discrimination and family reunification principles. Employment non-discrimination is enshrined in CEDAW,[87] ICERD,[88] and ICMW[89] as these instruments define the obligation of States to apply the right to work and enjoyment of just and favorable conditions of work without discrimination based on "sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status." Including national, ethnic or social origin and nationality are key to applying this right to migrant populations.

The ECHR,[90] ACHPR,[91] ACHR[92] and ICMW[93] define freedom from employment discrimination as including the rights of third-party nationals to access employment opportunities on equal footing with a State's own nationals, although the State may impose restrictions for "economic or social reasons."[94] In some cases, nationals from within a region are provided extra protection, such as in the European Union, where State parties are required to provide nationals of other State parties legally residing in their territory with the same access to employment opportunities as their nationals without being subjected to any restrictions placed on third-party nationals.[95]

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[79] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, art. 7, December 16, 1966.
[80] United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(e)(i), December 21, 1965.
[81] Council of Europe, *European Convention on Human Rights*, art. 4, September 3, 1953.
[82] Organization of American States, *American Convention on Human Rights*, art. 6 & 34, November 22, 1969.
[83] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 8(3), December 16, 1966.
[84] United Nations General Assembly, *Convention on the Rights of the Child*, art. 32(1), November 20, 1989.
[85] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, art. 11(2), December 18, 1979.
[86] United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 2016.
[87] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, art. 11(1), December 18, 1979.
[88] United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(e)(i), December 21, 1965.
[89] United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 6, December 18, 1990.
[90] Council of Europe, *European Convention on Human Rights*, art. 14, September 3, 1953.
[91] Organization of African Unity, *African Charter on Human and Peoples' Rights*, art. 15, June 27, 1981.
[92] Organization of American States, *American Convention on Human Rights*, art. 34(1), November 22, 1969.
[93] United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 70, December 18, 1990.
[94] Council of Europe, *European Convention on Establishment (No. 019)*, art. 10, December 13, 1955.
[95] Ibid., art. 12

To provide another example of State practice, the 2007 Recognised Seasonal Employer (RSE) Scheme in New Zealand[96] marked a significant milestone in the country's approach to addressing seasonal labor shortages in the horticulture and viticulture industries. By allowing employers to recruit workers from Pacific Island nations for temporary employment, the scheme aimed to meet the labor demands while fostering economic development in the Pacific region.

Also in the Pacific region, the recent Fiji-Australia Vuvale Partnership established in 2019 presents another significant development in the realm of migrant workers' rights. Similar to the RSE Scheme in New Zealand, the Vuvale Partnership offers employment opportunities for migrants from Fiji and addresses labor shortages in Australia's agriculture sector under the Seasonal Worker Program (SWP) and Pacific Labor Scheme (PLS).[97]

However, the impact on migrant workers' rights has been a subject of scrutiny. While the programs in Australia and New Zealand offer employment opportunities for migrants, concerns have been raised about the vulnerability of these workers to exploitation and abuse, including issues such as underpayment, poor working conditions, and inadequate access to grievance mechanisms.[98] Efforts have been made to strengthen protections for workers, but ongoing vigilance and reforms are necessary to ensure that their rights are fully safeguarded, especially as this policy approach is replicated beyond the Pacific region.

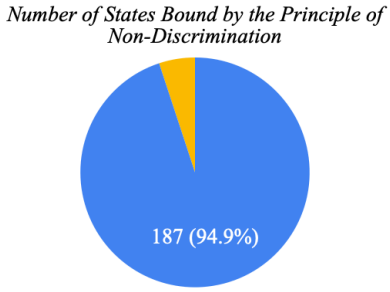
Case law offers opportunity for accountability while strengthening legal frameworks established to protect migrant workers' rights. The case of *Siliadin v. France*[99] is significant in its application of legal frameworks to specifically address forced labor and unfavorable working conditions for migrants. A Togolese national was brought to France at the age of fifteen under the pretense that she would be attending school. Instead, she was forced into domestic servitude, working for several families in succession without pay, from early morning until late at night, seven days a week. Her passport was taken by her employers, and she was not allowed to attend school. She lived in continuous fear and was told that if she attempted to leave, she could be arrested for being in France illegally. The ECtHR found that France had violated Article 4 of the ECHR, which prohibits slavery, servitude, and forced or compulsory labor.

The *Siliadin v. France* decision was significant in clarifying the scope of Article 4 of the Convention. It was one of the first cases where the ECHR found a violation of the prohibition against servitude, not just forced labor. The court criticized France for not having specific legislation that provided practical and effective protection against the treatment that Siliadin and other migrant workers experienced. Consequently, the ruling emphasized the obligation of States under the ECHR to enact legislation that effectively penalizes and prevents modern forms of slavery and labor exploitation. It also highlighted the specific vulnerabilities to forced labor faced by migrant workers. Case law, particularly *Siliadin v. France*, remains crucial in holding

[96] New Zealand Immigration. "Recognised Seasonal Employer (RSE) Policy." Immigration New Zealand. Accessed 18 Apr. 2024.
[97] Department of Foreign Affairs and Trade (Australia). "Fiji-Australia Vuvale Partnership." Accessed on 5 May 2024.
[98] OECD. "Addressing Policy Trade-offs: New Zealand's Pacific Regional Labour Mobility Scheme." OECD Development Co-operation Working Papers, No. 45, OECD Publishing, 2021.
[99] Siliadin v. France, App. No. 73316/01 European Court of Human Rights (2005).

States accountable and ensuring the effective enforcement of labor standards in the context of migration.

Principle of non-discrimination



The principle of non-discrimination is a foundational norm of human rights law, as firstly outlined in the UDHR, Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[100] The right to non-discrimination also provides support to many other adjacent human rights and is codified in several international legal instruments, namely the ICERD, ICCPR, ICESCR, CRC, CEDAW, ICMW, CRPD. This foundational principle is similarly well-established in many regional instruments, including the ACHPR and the ECHR.

There are a number of cases particularly in regional courts that demonstrate States' acknowledgment and adherence to the principle of non-discrimination in the context of migration and migrants' rights. For example, in *Good v. Botswana* brought before the ACtHPR, Mr. Good's complaint included a claim of discrimination as his identity compelled the State to expel him from the country on the grounds of "national security."[101] The case cited the right to freedom from non-discrimination under Article 2 of the ACHPR, which asserts the following:

> "States Parties to the African Charter thus have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind such as discrimination based on race, color, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. Thus, non-nationals are entitled to the enjoyment of this right just as do nationals."[102]

The Commission concluded that in the case of Mr. Good, there was no viable or founded security threat present and that the actions of Botswana in response to Mr. Good were "unnecessary, disproportionate and incompatible" with international human rights norms and the African Charter. Furthermore, the Commission emphasized the importance of due process, stating, "Where a government has reason to believe that a citizen or a non-national legally within its territory poses a threat to national security, it should bring evidence before the courts against the person. Not doing so may lead to the possibility of abuse where individuals can be detained or expelled on mere suspicion of being security threats..."[103]

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[100]United Nations General Assembly, *Universal Declaration of Human Rights*, art. 7, December 10, 1948.

[101] Kenneth Good v. Republic of Botswana, Communication 313/05, African Commission on Human and Peoples' Rights (May 26, 2010).

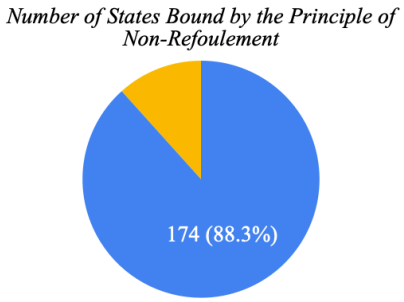
[102] Organization of African Unity, *African Charter on Human and Peoples' Rights*, art. 2, June 27, 1981.

[103] Kenneth Good v. Republic of Botswana, Communication 313/05, African Commission on Human and Peoples' Rights (May 26, 2010).

Another case submitted to the ACtHPR, was *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*. Article 2 of the aforementioned Charter was invoked as this particular case addressed the targeted, mass expulsions of 517 West Africans who were expelled from Zambia. The court concluded that, "The Zambian State has the right to bring legal action against all persons illegally residing in Zambia, and to deport them if the results of such legal action justify it. However, the mass deportation of the individuals in question here, including their arbitrary detention and deprivation of the right to have their cause heard, constitute a flagrant violation of the Charter."[104] The manner in which these migrants were expelled and the discriminatory practices they were shown throughout the process were at the basis for the court's findings and exemplary violations of these corresponding rights.

Moreover, the case of *FIDH v. France*, submitted to the European Committee of Social Rights (ECSR), petitioned that France had violated the right to medical assistance, as outlined in Article 13 of the Revised European Social Charter, by "ending the exemption of illegal migrants, with very low incomes, from charges for medical and hospital treatment."[105] Although the rights defined in the Charter only apply to foreigners "who are nationals of other Contracting Parties to the Charter, and who are lawfully resident or work regularly within the State, the Committee emphasized that the Charter must be interpreted consistent with the principles of individual human dignity and that any restrictions should consequently be read narrowly." Therefore, the Committee concluded that any "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter," while also acknowledging that not every right in the Charter may be applied and extended to migrants in irregular situations. The case did not explicitly cite an Article delineating non-discrimination, however the discriminatory practices shown to migrants were present throughout the case and the principle of non-discrimination informed the decision of the court.

Principle of non-refoulement



The principle of non-refoulement is one of the most important customary international norms for the protection of migrants in certain circumstances, and it is widely accepted as a core principle of international human rights law and international refugee law, among other branches of law.

This principle prohibits States from expelling an individual from their jurisdiction when there is reason to believe that the person may face a well-founded fear of persecution if returned to their country of origin.[106] Under human rights law, this principle is included in the Convention Against Torture (CAT) Article 3 with the stipulation

[104]Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia, 71/92, African Commission on Human and Peoples' Rights (October 1996).
[105] International Federation of Human Rights Leagues (FIDH) v. France (decision on the merits), Complaint No. 14/200, Council of Europe: European Committee of Social Rights (September 8, 2004).
[106] *The Principle of Non-Refoulement Under International Human Rights Law*. Office of the United Nations High Commissioner for Human Rights. Accessed April 25, 2024.

that a person cannot be extradited if they fear being subjected to torture.[107] This principle of freedom from torture is the backbone of non-refoulement as it applies to all people, including migrants, and is widely regarded as CIL. As Human Rights Watch writes, "the prohibition against torture is well established under customary international law as *jus cogens*…it is so fundamental as to supersede all other treaties and customary laws." [108] Freedom from torture is also included in the UDHR, as well as being fundamental to international humanitarian law through the Geneva Conventions.

Aside from the CAT, the principle of non-refoulement can also be derived from provisions in the ICCPR as well as the ICMW.[109] Although our data found that only 174 countries are bound by non-refoulement according to international human rights treaty ratification data, the customary nature of this principle shows that no State has actively objected to this principle *de juris*, albeit *de facto* actions by States have been found to violate non-refoulement in connection with the prohibition of torture and the right to life.

The principle of non-refoulement with respect to the right to life was exemplified in *A.S., D.I., O.I., and G.D. v. Italy* in which asylum seekers submitted a claim on behalf of their relatives who died after the vessel they were on capsized in the Mediterranean, even though the vessel was in the national territories of both Italy and Malta and the authorities could have intervened.[110] The plaintiffs claimed that their rights under Article 7 of the ICCPR had been violated, which states that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[111] Though it does not mention non-refoulement explicitly, this Article is commonly interpreted as a prohibition on the return of persons to their country of origin or another country where they could be subjected to such treatment.[112] The plaintiffs claimed that by not launching an investigation into the shipwreck to hold individuals responsible, they were being subjected to cruel, inhuman, or degrading treatment or punishment. They also claimed violation of ICCPR Article 6, right to life, which also invokes the principle of non-refoulement in that States have an obligation to protect migrants' right to life who are at risk of refoulement.[113] The Human Rights Committee ultimately ruled that Italy was obligated to conduct an independent investigation and to try and prosecute those responsible for the death of the plaintiffs' relatives, citing violations of ICCPR Articles 6 and 2(3).[114]

One of the core principles of the 1951 Refugee Convention is Article 33 which prohibits refoulement of refugees by States.[115] Refugees and asylum seekers retain this added degree of

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[107] United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 3, December 10, 1984.
[108] Human Rights Watch. "Legal Prohibition against Torture." *Human Rights Watch,* March 11, 2003, https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture.
[109] *2023 Updated IML Information Note on Non-Refoulement*. International Organization for Migration. Accessed April 25, 2024.
[110] A.S., D.I., O.I. and G.D. v. Italy, No. 3042/2017 Human Rights Committee (2020).
[111] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 7, December 16, 1966.
[112] Asylum Insight. "Human Rights Instruments." *Asylum Insight.* Published November 2017.
[113] United Nations General Assembly, *International Covenant on Civil and Political Rights,* art. 6, December 16, 1966.
[114] *CCPR Centre Decision 17161.*
[115]UN, *Convention Relating to the Status of Refugees*, art. 33, July 28, 1951.

international protection when it comes to claiming a well-founded fear of persecution, as States are required to assess whether an individual fits the refugee definition and must stay in the State.

Several international and regional cases point to States' widespread adherence to non-refoulement for migrants. For example, *Hirsi Jamaa and Others v. Italy* demonstrates the implications of the principle of non-refoulement in relation to the right to justice.[116] In its decision, the ECtHR invoked Article 3 of the ECHR, which prohibits torture and invokes the principle of non-refoulement as derived from International Refugee Law.[117] The court maintained that the Italian navy had made no distinction between irregular migrants and asylum seekers, perhaps inferring that those who had requested asylum would have the principle of non-refoulement applied with special consideration. In the ECtHR's final ruling, however, the court found that there was evidence the applicants could face widespread danger and potential human rights abuses if returned to Libya, and thus the navy's actions were a breach of the principle of non-refoulement. Similarly, in *M.K. and Others v. Poland*, the ECtHR ruled that the Polish authorities were in violation of non-refoulement after attempting to return thirteen Russian nationals to Belarus despite their claims that they needed protection and feared potential danger.[118] In this case, the court invoked Article 19 of the Charter of the Fundamental Rights of the EU which contained the principle of non-refoulement, showing its further entrenchment in European legal systems.

Yet another case, this time in the Americas, was *The Haitian Centre for Human Rights et al. v. United States*. In this case the IACtHR found that President Ronald Reagan's 1981 Haitian Migrant Interdiction Program was in violation of multiple articles of the American Declaration of the Rights and Duties of Man, including the principle of non-refoulement.[119] Reagan's program allowed for the systematic intervention in the journeys of "Haitian boat people" to the United States, who were fleeing the Duvalier regime and fearing persecution, and facilitated their return to the country. This case is interesting because although the American Declaration is not legally binding, the IACtHR considers it to be a source of binding obligations for Member States of the Organization of American States (OAS). The Commission determined that the United States repatriated Haitians to Haiti "without making an adequate determination of their status."

Finally, the case of *Teitiota v. New Zealand* displays that there remains room for the principle of non-refoulement to be further expanded. In this case, a Kiribati national and his family were deported from New Zealand despite their claims that returning to Kiribati would be environmentally dangerous for them. The UNHRC determined that although there had not been a violation of the principle of non-refoulement as derived from the ICCPR, "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights…thereby triggering the non-refoulement obligations of sending States."[120] Thus, in the future individuals may be able to claim fear of persecution or

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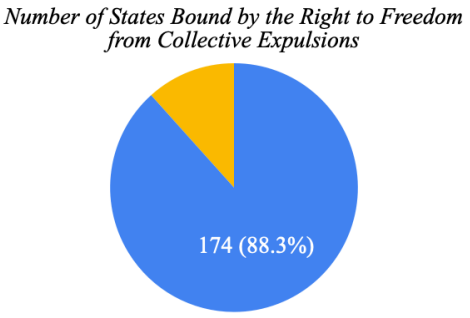
[116] Hirsi Jamaa et al v. Italy, App No. 27765/09 European Court of Human Rights (2012).
[117] Council of Europe, *European Convention on Human Rights*, art. 3, September 3, 1953.
[118] Case of M.K. and Others v. Poland, App. No. 40503/17, 42902/17 and 43643/17 Council of Europe: European Court of Human Rights (July 23, 2020).
[119] The Haitian Centre for Human Rights et al. v. United States, Case No. 10.675 Inter-Am.C.H.R. (1998).
[120] Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (January 7, 2020).

threat to self on the basis of environmental degradation.[121] Case in point, the Committee found that "given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized." [122]

Right to freedom from collective expulsions



The right to freedom from collective expulsions is enshrined in both the ICMW[123] and the CAT,[124] the second of which stipulates specifically that any extradition must be backed by an extradition treaty between State parties. The IOM, in using language adapted from the ECtHR, defines it as "Any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual of the group."[125] In other words, States are not allowed to expel migrants without first assessing and verifying the reasons to expel them. It is also embodied in several regional human rights treaties, including the ACHR,[126] the ECHR,[127] the Arab Charter on Human Rights,[128] and the ACHPR.[129]

The prohibition of collective expulsions under international law is thus often related to the principle of non-refoulement due to the fact that reason to expel migrants must be verified prior to expulsion, including verifying claims of probable danger of persecution upon expulsion.[130] When considering the CIL nature of the prohibition of collective expulsions, widespread debate exists over which migrants are included in the prohibition. For example, though Article 13 of the ICCPR entitles non-nationals to have their case heard to remain in a country, in principle the article only applies to migrants lawfully present on the territory of the State party. However, the UNHRC also states that discrimination may not be made between types of non-nationals in the application of this article.[131] Much debate amongst States has to do with the procedures that take place before expulsion occurs, so that States can avoid accusations of arbitrary collective expulsions.

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[121] Though the HRC is a treaty body whose decisions are not legally binding, this case had serious implications for migrants' right to life and the principle of non-refoulement.
[122] *"UN Human Rights Committee Views Adopted on Teitiota Communication."* Accessed May 5 2024. https://climatecasechart.com/non-us-case/un-human-rights-committee-views-adopted-on-teitiota-communication/ .
[123] United Nations General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 22, December 18, 1990.
[124] United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 8, December 10, 1984.
[125] IOM. "Key Migration Terms." Accessed April 25, 2024. https://www.iom.int/key-migration-terms
[126] Organization of American States, *American Convention on Human Rights*, art. 22, November 22, 1969.
[127] Council of Europe, *European Convention on Human Rights*, *Protocol 4.* art. 4, September 16, 1963.
[128] League of Arab States, *Arab Charter on Human Rights*, art. 26, May 22, 2004.
[129] Organization of African Unity, *African Charter on Human and Peoples' Rights*, art. 12, June 27, 1981.
[130] IOM, *2023*, *IML Information Note on Non-Refoulement*. Accessed April 25, 2024.
[131] Ibid., 18

The customary nature of the principle of limitations on collective expulsions is strengthened by the research findings that 174 UN Member States are bound to respect this migrant right according to their international treaty ratifications. Several cases at the international and regional levels also show evidence of the widespread, and customary nature of this right. One example is in *Hirsi Jamaa and Others v. Italy*, previously mentioned under the principle of non-refoulement. In this case, the ECtHR found that the blatant violation of the right to justice enshrined in Article 4, Protocol 4 of the ECHR and subsequent forced emigration amounted to collective expulsion.[132] As such, Italy was found to have engaged in collective expulsion by exercising extraterritorial jurisdiction outside of Italian territory.

A similar national case involving Italy and Libya, *Cassation Court (Italy) v. Asso 28*, highlights the connection between the limitation on collective expulsions and non-refoulement. In this case, Italy intercepted a boat of more than one hundred migrants coming from Libya and took the migrants directly to Tripoli without informing the migrants or hearing from them regarding potential asylum status. The Italian navy was found guilty of abandoning migrants to a dangerous situation, thereby engaging in collective expulsion from Italy and ignoring all protests by the migrants of risk of persecution in Libya.[133] The Italian navy's actions seem to reflect the State's political position, also given that Italy abstained from voting pro the GCM in 2018. However, regardless of politics, the national court decision also reflects the judicial system's commitment to holding Italy accountable to international law as it applies to migrants. Case in point, the ECHR wrote in its assessment that "The Court dismisses the government's objection as to the applicant's alleged lack of victim status and concludes that the applicant was subjected to inhuman and degrading treatment during his stay in the hotspot at Lampedusa, in violation of Article 3 of the [European Convention on Human Rights]."

Another case testament to the State's implementation of the prohibition of collective expulsions is *Good v. Botswana*, earlier mentioned regarding the right to family reunification. In this case, the court ruled that Botswana violated Article 12(5), prohibition of mass expulsion of non-nationals, of the Banjul Charter, the ACtHPR determined that a government may expel non-nationals that pose a threat to national security only if the national court determines that it may do so. Otherwise, it "may lead to the possibility of abuse where individuals can be detained or expelled on mere suspicion of benign security threats."[134] This reiterates the point that limitations on collective expulsions are widely accepted by legal bodies and that States do not have the right to collectively expel a group.

In a similar case in *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*, the expulsion of over 500 individuals of West African origin constituted, among other things, a violation of Article 12(5) of the Banjul Charter, according to ACtHPR.[135] Although the African Human Rights system honors a State's right to bring legal proceedings against non-nationals residing illegally in its territory, it does not have the right to engage in mass

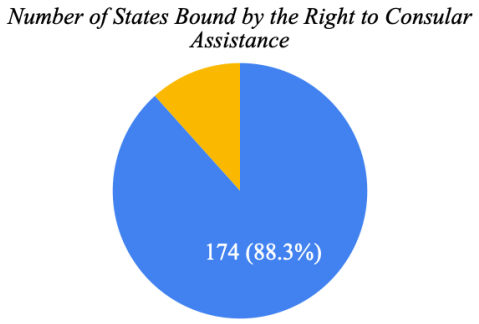
[132] Hirsi Jamaa et al v. Italy, App No. 27765/09 European Court of Human Rights (2012).
[133] Asso28, Libia non è porto sicuro (Cass. 4557/24) (2024).
[134] Kenneth Good v. Republic of Botswana, Communication No. 313/05, African Commission on Human and Peoples' Rights (May 26, 2010).
[135] Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia, Communication No. 71/92 African Commission on Human and Peoples' Rights (1996).

deportation of those individuals without sharing information and allowing them a chance to file their case for residence. In essence, Zambia did not honor any kind of procedure before the expulsion of these non-nationals occurred.

The court would go one step further with its decision in *Union InterAfricaine des Droits de l'Homme and Others v. Angola*, again a violation of Article 12(5) of the African Charter. In its decision, the court stated, "Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial, or other considerations constitute a special violation of human rights."[136] The court's decision highlights the connection between prohibition of collective expulsion and the principle of non-discrimination in that mass expulsions cannot happen, regardless of prior procedure, if they are discriminatory toward a particular group. Of note is that both Zambia and Angola voted for the GCM, whose objective 21 focuses on the safe return of migrants by "upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk…"[137] This once again highlights the conflict between States' concerns over control of non-nationals in their territory and their obligations, or even expressed desire, to abide by CIL norms (or other instruments) that afford some type of rights' protection to migrants.

Right to consular assistance

The right to consular assistance is understood "as the right to provide adequate consular and other services necessary to meet the social, cultural, and other needs of nationals abroad or to protect their rights against any infringements by the receiving State." [138] This also applies to non-nationals residing in a given country. States have an obligation to protect the human rights of their foreign nationals as delineated in their national legislation.



Article 5 of the Vienna Convention on Consular Relations (VCCR) and also in Article 36 of the VCCR "officials have the freedom to communicate with the sending States' nationals to notify their nationals of arrest or detention, at the detained person's request, and to visit their nationals in detention.[139]

In the case of *Avena and other Mexican Nationals v. U.S.A,* Mexico filed a lawsuit against the United States in the ICJ for criminalizing fifty-four Mexican nationals and sentencing them to death without notifying Mexico, which violates Article 5 of the VCCR. By failing to notify Mexico, the United States deprived Mexico of its right to assist its own nationals. The United States also violated Article 36(2) of the VCCR as it did not allow Mexico to review and reconsider the convictions and sentencing of four specific nationals. The decision by the ICJ

[136] Union InterAfricaine des Droits de l'Homme and Others v. Angola, Communication No. 159/96 African Court on Human and Peoples' Rights (1997).
[137]UNGA, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, December 18, 2018.
[138] Ibid 47
[139]UN, *Vienna Convention on Consular Relations*, arts. 35 and 36, March 19, 1967.

states that "[t]he crucial point in the case is that, by the operation of the procedural default rules as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution." The United States was ordered to review and reconsider the sentencing of the four Mexican nationals.[140]

The right to consular assistance establishes that States have an obligation to ensure that a migrant or a national of a receiving State is protected while in the receiving State. As outlined in Article 36 of VCCR, a foreigner's right to consular assistance is protected within CIL. Since the United States is a party to the VCCR, the United States must notify Mexico or allow nationals under their jurisdiction to communicate with Mexico's legal consular. Consular notification is universally accepted as the State's fundamental obligation[141] given the widespread ratification of VCCR.

In *Germany v. United States*, Germany filed an application initiating proceedings against the United States, stating that two German nationals, Karl and Walter LaGrand, were tried and sentenced to death without having been informed of their rights, as outlined in Article 36(1)(b) of the Vienna Convention. Germany claimed that the United States failed to provide Germany with communications regarding the two German nationals which precluded Germany from protecting its national interests, as stated in Articles 5 and 36. Germany's application stated, "Applying the municipal law doctrine of 'procedural default' decided that, because the individuals in question had not asserted them in the previous legal proceedings at the State level, they could not assert them in the federal proceedings." The ICJ concluding order "was not a mere exhortation" but "created a legal obligation for the United States." The ICJ also concluded that the United States did not comply with its obligation as stated in the Vienna Convention.[142]

In both of these cases, the United States was in violation of the Vienna Convention. This case set a precedent for further cases regarding nationals from receiving States. Many nationals from receiving States are not given the opportunity to seek legal representation and at times, these individuals are sentenced or imprisoned because their rights have been violated.

Conclusion and Further Questions

Migrants are human and migrant rights are human rights. Thus, IHRL, through the nine core human rights treaties and the UDHR, provides the legal foundation for migrants' human rights and is the most robust branch of law under IML for the protection of migrants' rights. These widely ratified treaties outline the core human rights that are applicable to all humans without discrimination, including migrants. The rights outlined in the international human rights treaties, including the rights highlighted in this report, are afforded to migrants regardless of migration status or nationality. By taking a rights-based analytical approach, this report shows the universality of many human rights to migrants, with a large majority of States ratifying at least

[140] Avena and Other Mexican Nationals (Mexico v. United States of America), International Court of Justice (ICJ) (March 31, 2004).
[141] Ibid 107
[142] LaGrand Case (Germany v. United States of America), International Court of Justice (ICJ) (June 27, 2001).

one treaty containing each right. However, despite the near-universal recognition of these rights by States through the lattice of ratification of the human rights treaties and other supporting treaties, understanding how the norms and rules are interpreted and implemented by courts in the context of migration through case law analysis is essential to assessing the robustness of these protections for migrants.

The broad array of case law that interprets and implements existing norms and rules of IML contributes to strengthening the protection of migrants' rights and solidifies the customary nature of many of the rights as applied to migrants. The case law also provides evidence of an increased adherence and understanding by States of their obligations as stipulated by the foundational human rights treaties as well as by customary international law. By analyzing landmark migration case law in international, regional, and national courts through a rights-based approach, while highlighting nascent efforts to develop a single international framework for migration, this report provides evidence that points to the norms and rules of IML being widely understood to be legally binding, compelling State behavior with respect to migrants and their inalienable rights.

This report takes a rights-based approach, and the rewards of this approach are clear. Analyzing the extent to which each right is supported by treaty law, as well as how these rights are interpreted and implemented to protect migrants by regional and international courts, reaffirms the customary nature of these rights and the universality of their rights' protection. As demonstrated in this report, national, regional, and international case law clearly demonstrates the potency of customary international law to compel State action, even in the absence of formally binding treaty ratification.

The binding nature of customary law is displayed, for example, in *Beharry v. Reno*, where a United States district court held that, despite not having ratified the CRC, the United States was still bound by the customary international norm requiring State action to ensure the best interests of the child, notwithstanding an explicit act of Congress to the contrary. The court stated that "overwhelming acceptance [of the CRC] is strong reason to hold that some CRC provisions have attained the status of customary international law."[143] *Beharry* and many of the other cases cited in this report are demonstrations of *opinio juris,* demonstrating that courts acknowledged obligations required by customary international law. The acknowledgement of CIL in the *Beharry* case is especially important, since the United States did not ratify the CRC yet. Finally, the cases analyzed serve to reinforce the very customary norms they cite, further building a compelling case to recognize IML as CIL.

However, this report provides an illustrative example of such evidence. There exist future opportunities for further research into how the sources of IML affect the strength of protection for migrants. Research to further quantify the relationship between treaty law and protection levels for migrants under the wider umbrella of IML instruments could further help in building the case for IML as its own branch of law. Moreover, at the time of this research, the GCM had existed for only five years (adopted in 2018). Thus, it was impossible to quantify the extent of implementation and adherence by States to the GCM throughout time. Future research on the GCM as it is applied by State consistently throughout time over the years to come will provide

[143] Beharry v. Reno, United States District Court for the Eastern District of New York 98 CV 5381 (JBW) (2002).

future scholars an opportunity to assess the extent to which the GCM helped to reinforce IML as CIL or contribute to IML being recognized as its own body of law, similarly to other branches of law.

Migration is a phenomenon that is not aberrant nor a problem to be solved; rather, it is inseparable from the human experience. The unique legal questions that arise from the interaction of migration with State sovereignty support the idea that the legal mechanisms that govern this integral part of the human experience should be broadly understood, interpreted, and adhered to, and implemented consistently to ensure that the rights of migrants are upheld and protected.

APPENDIX A - Rights and their Corresponding Regional/International Treaties

Right to family unity and reunification	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	International Covenant on Civil and Political Rights
	Convention on the Rights of the Child
Right to leave any country	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	International Covenant on Civil and Political Rights
	Convention on the Rights of the Child
	International Convention on the Elimination of All Forms of Racial Discrimination
	Convention on the Rights of Persons with Disabilities
	Protocol 4 to the European Convention on Human Rights
	American Convention on Human Rights
	African Charter on Human and People's Rights
Right to return to own country	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	International Covenant on Civil and Political Rights
	Convention on the Rights of the Child
	International Convention on the Elimination of All Forms of Racial Discrimination
	Protocol 4 to the European Convention on Human Rights
	American Convention on Human Rights
	African Charter on Human and People's Rights
Right to access to justice	International Covenant on Economic, Social and Cultural Rights
	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	Convention on the Rights of the Child
	International Convention on the Elimination of All Forms of Racial Discrimination
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
	Convention on the Rights of Persons with Disabilities
	International Covenant on Civil and Political Rights

	International Convention for the Protection of All Persons from Enforced Disappearance
	European Convention on Human Rights
	American Convention on Human Rights
	African Charter on Human and People's Rights
Right to work and right to just and favorable conditions of work	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	International Covenant on Economic, Social and Cultural Rights
	Convention on the Elimination of All Forms of Discrimination Against Women
	Convention on the Rights of Persons with Disabilities
	African Charter on Human and People's Rights
Principle of non-discrimination	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	International Covenant on Civil and Political Rights
	International Covenant on Economic, Social and Cultural Rights
	Convention on the Rights of the Child
	Convention on the Elimination of All Forms of Discrimination Against Women
	International Convention on the Elimination of All Forms of Racial Discrimination
	Convention on the Rights of Persons with Disabilities
Principle of non-refoulement	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
	International Covenant on Civil and Political Rights
	European Convention on Human Rights
	American Convention on Human Rights
	African Charter on Human and People's Rights
Right to freedom from collective expulsion	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
	International Covenant on Civil and Political Rights
	Protocol 4 to the European Convention on Human Rights
	American Convention on Human Rights

	African Charter on Human and People's Rights
Right to consular assistance	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment