RESOLVED, That the American Bar Association urges States and entities working to implement the *Global Compact on Refugees (December 2018)* and the *Global Compact for Safe, Orderly and Regular Migration (December 2018)* (collectively, the “Compacts”) to fully implement the Compacts and also act to:

1) Address the root causes of internal displacement and forced migration, including by providing support to transitional justice mechanisms and justice institutions that address widespread repression, persecution and violence in fragile communities;

2) Develop policies that discourage the criminal prosecution of migrants and refugees, especially asylum seekers, for unauthorized entry, and further encourage the accountable use of prosecutorial discretion in the exercise of enforcement measures;

3) Support and promote the establishment of a system of robust and equitable global responsibility-sharing to foster solutions to protracted displacement;

4) Promote the dignity and self-reliance of displaced persons, and recognize and emphasize the protection of their rights, particularly those of internally displaced persons (IDPs);

5) Protect refugees, migrants, and IDPs from bias and discrimination, including by (a) promoting specific legislative or other measures to provide protections against discrimination on the basis of gender, race, ethnicity, national origin, religion, disability, age, sexual orientation, and gender identity; and (b) ensuring a right to protection from discrimination and pervasive bias, through the promotion of evidence-based and inclusive conversation and decision making around the issues of migration and displacement.
Approximately 68.5 million people are currently displaced within and across national borders.\(^1\) With the increase of global displacement as a result of conflict, persecution and human rights violations occurring for extended periods of time, and as more nations threaten to close their borders, it is clear that the magnitude and drawn-out nature of the global displacement crisis demands long-term solutions that go beyond isolated sectoral and State responses. The scope and scale of forced migration today requires a new approach that tackles the root causes of migration and displacement, ensures the safety and human dignity of those forced to flee, and provides sustainable solutions for migrants, refugees and internally displaced people (IDPs).

The United Nations has convened nation states to negotiate two global compacts – the Global Compact on Safe, Orderly and Regular Migration (Global Compact on Migration) and the Global Compact on Refugees (Global Refugee Compact). The Global Compact on Migration, which was adopted on December 10, 2018, covers all dimensions of international migration from a holistic point of view.\(^2\) The Global Refugee Compact, adopted on December 17, 2018, and it seeks to provide a comprehensive refugee response framework that acknowledges a shared international responsibility.\(^3\) While both global compacts represent a collaborative effort to address the global migration and displacement crisis, they are limited in scope and protection. Given the scale of the crisis and the fact that displacement has significant human rights and development ramifications at both the international and national levels, it is imperative that states and entities working to implement the global compacts create a more comprehensive and inclusive approach to the problem. Rule of law approaches to forced migration and sustainable development in countries of origin, transit and destination should be prioritized, and thus it is critical that this resolution be passed by the ABA House of Delegates in parallel with the finalization of these compacts and while there is global attention on these issues.

I. Addressing root causes of internal displacement and forced migration, including support to transitional justice mechanisms and justice institutions that address widespread repression, persecution and violence in fragile communities.

This resolution encourages states and parties working to implement the global compacts to address the root causes of displacement, including gaps in the rule of law.


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We, Heads of State and Government and High Representatives ... are determined to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy. We will address them also through the prevention and peaceful resolution of conflict, greater coordination of humanitarian, development and peacebuilding efforts, the promotion of the rule of law at the national and international levels and the protection of human rights.4

According to the U.N. High Commissioner for Refugees (UNHCR), conflict, systemic violence and persecution are three of the largest factors pushing people to flee from their home countries.5 For example, Guatemala, Honduras and El Salvador form one of the most dangerous regions in the world – commonly called the Northern Triangle – due to a high prevalence of organized crime and gang violence that goes without punishment or redress. Over 300,000 people fled the region in 2016, and reports show that asylum applications to United States, Belize, Costa Rica, Nicaragua, and Panama have increased by over 1000% from 2011 – 2017.6 Similarly, millions of people from countries like Syria (6.3 million), South Sudan (2.4 millions) and Myanmar (1.2 million) have fled their homes due to civil unrest and violence.7 The lack of effective and independent justice institutions in these countries makes it difficult to hold those responsible accountable for their actions, and undermines public trust in the system. Without that support, refugees, IDPs and migrants are left in limbo as their country lacks the protections to address their problems.8

Despite the global compacts’ failure to reflect this emphasis on tackling the root causes of forced migration, it is imperative that States address these issues. Merely trying to fix the problem after the fact has not worked in the past, and it will not ameliorate the situation in the future. Furthermore, without this approach, an even heavier burden is placed on States to keep taking refugees and migrants in the hopes that the situation will resolve itself. Proactive resolutions that strengthen justice and governance systems and build the capacity of the legal profession are necessary to tackle the violence, and provide adequate support to people coming in. People need to know that their problems can be

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7 World Vision, Forced to Flee: Top Countries Refugees are Coming From (June 26, 2018), https://www.worldvision.org/refugees-news-stories/forced-to-flee-top-countries-refugees-coming-from
8 Mathema, supra note 6; Rocio CaraLabrador and Danielle Renwick, Central America’s Violent Northern Triangle, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle.
resolved through the courts. Strengthening rule of law systems and tackling the underlying issues of corruption, weak accountability mechanisms, poor governance and inequality will eventually give them that ability and will ensure that state and non-state actors face consequences for violating human rights.

II. **Develop policies that discourage the criminal prosecution of migrants and refugees, especially asylum seekers, for unauthorized entry, and further encourage the accountable use of prosecutorial discretion in the exercise of enforcement measures.**

This resolution encourages State actors and parties to the global compact to treat migrants and refugees as people in need of protection rather than criminals. Specifically, the recommendation calls for policies to be developed that discourage the criminal prosecution of those who seek asylum in other countries.

By the end of 2017, about 3.1 million people were awaiting a decision on their application for asylum, about half in developing regions, as they seek protection from the violence, conflict and persecution in their home countries. While it is a fundamental human right to leave one’s country and to seek asylum, efforts to exercise those rights are gradually being criminalized. The U.S., for example, which has stood as a beacon of hope for immigrants and refugees from around the world for centuries, is issuing bans on refugee admissions and ending programs aimed at protecting particularly vulnerable groups of migrants, such as the Temporary Protected Status (TPS) for Salvadoran, Haitian, Sudanese, and Nicaraguan nationals or the Deferred Action for Childhood Arrivals (DACA) program. In the E.U., member states are entering into bilateral migration agreements with third countries (e.g., E.U.-Turkey and Italy-Libya deals), aimed to deter arrivals and minimize a backlog of asylum applications. These agreements undermine fundamental principles of international refugee law and human rights, including the principle of non-refoulement.

Furthermore, a comprehensive response framework should seriously examine if not limit any practices involving the prosecution of individuals solely for technical “entry-related offenses,” when no other criminal activity is present, and especially for failing to distinguish between initial entries versus re-entries. ABA’s Criminal Justice Standards for the Prosecution Function note that a prosecutor should exercise sound discretion and independent judgment in the performance of the prosecution function, and further notes that the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The Standard goes on to state that the prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety, both by pursuing appropriate criminal charges of appropriate severity, and by exercising

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9 *Global Trends, supra* note 1, at 2.

12 *Id.* at Standard 3-1.2 (b).
discretion to refrain from pursuing criminal charges in appropriate circumstances. Prosecutions that fail to do this are arguably not furthering public safety or the public interest and fail to address the root causes of such illegal entries.

While recognizing a nation’s sovereign rights, this resolution encourages states and entities supporting the implementation of the global compacts to refrain from criminalizing refugees and migrants. Under international law, they have a right to flee from dangerous and volatile situations and prosecuting them would contradict the efforts of the compacts. In enforcing national immigration laws, states are also encouraged to employ prosecutorial discretion when dealing with the unique needs of refugees and migrants, especially asylum seekers.

III. Support and Promote the Establishment of a System of Robust and Equitable Global Responsibility-Sharing to Foster Solutions to Protracted Displacement

This resolution encourages states to support and promote a system of burden sharing among all states in order to better assist host communities and refugees. The Global Compact intends to give states a “predictable and equitable burden- and responsibility-sharing” for hosting communities, refugees, and all stakeholders and to ensure the “full realization of the principles of international solidarity and cooperation.” Currently, the burden of caring for and supporting refugees has fallen to fragile and developing states. Twenty percent of the world’s refugee population is hosted by low income countries. Middle-income countries host 68% of the world’s refugee population and do not have the infrastructure to properly deliver services for their refugee populations. No single approach can adequately assist states currently hosting refugees, instead, all relevant stakeholders, including NGOs and IGOs, must look to a new approach in burden-sharing to assist refugee populations.

Under the system proposed by the Global Compact, the UNHCR will coordinate meetings with all relevant stakeholders to pledge their support in assisting in the goals of the Global Compact. In pledging their support for assisting host countries, states should seek to fill current gaps in support identified and recommended in the 2019 report conducted by technical experts on the impact of hosting refugees and gaps in international cooperation to further responsibility-sharing. The Compacts have identified areas for states to further their current engagements in responsibility-sharing through situation specific

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13 Id.
17 Id.
18 Id. at 3.
19 Id. at ¶ 48.
programming and assistance. For example, states can financially and technically support host countries and communities by providing quality humanitarian assistance and long-term assistance to both the host communities and refugee communities through bilateral partnerships. States can also assist host countries and communities by energizing their private sectors to invest and assist in infrastructure strengthening in the host community. Additionally, states can fill gaps by welcoming refugees for resettlement and providing pathways for admission into third party countries. States should also work with all relevant stakeholders to effectively implement and create a strong network of support for host communities. While assisting in sharing the burden of hosting refugees, states and all relevant stakeholders should seek to ensure that “the arrangements [to assist the host community are] efficient, effective, and practicable.” States implementing the Compacts should also take part in the Support Platform to provide context-specific support to states calling upon the international community.

IV. Extending rights and protections to people considered to be Internally Displaced Persons (IDPs)

Ensuring that the root causes of displacement are addressed and asylum seekers are protected, this resolution urges States to extend rights and protections for people considered to be IDPs. The New York Declaration recognized that around 40 million people were displaced within national borders, and that there was a need for effective strategies ensuring that they were protected, and that their displacement was prevented or reduced. The UNHCR has noted that many IDPs “remain at high risk of physical attack, sexual assault and abduction, and frequently are deprived of adequate shelter, food and health services.” For example, if IDPs flee without basic identity documents, they may have no recourse but to return to their home communities to access pensions or register to vote. This exposes them to grave dangers. Furthermore, IDPs often become refugees when they leave their countries; in order to reduce the number of refugees countries should also protect IDPs.

Currently the only protection for IDPs is through international legal guidance that encourages States to develop humane approaches to internal displacement. These guidelines, the Guiding Principles on Internal Displacement, were initially introduced by the Representative of the Secretary-General, Mr. Francis M. Deng to the UN Commission on Human Rights in 1998. These principles identified rights and outlined how the

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22 Id. at ¶ 16.
24 New York Declaration, supra note 4, at ¶ 20.
international community could “contribute to enhancing the protection of IDPs in conflict and crisis situations.” Presently, over 40 states have developed laws and policies on IDPs.

National mechanisms are stronger to protect IDPs because there is no single organization that handles the protection of IDPs. By extending rights and protections to IDPs from a state level, IDPs gain rights guaranteed under international humanitarian standards. They are free to defend their rights - including the freedom of movement, freedom from prejudice, freedom from physical violence, and rights to pursue economic interests. In addition, states should also extend other international human rights laws pertaining to nationality, statelessness, gender-based violence, smuggling, human trafficking, corruption, and detention to IDPs as they are aimed at preventing forced migration and reducing the negative effects of displacement.

V. Adopt inclusive laws protecting LGBTQI refugees and migrants

Refugees and migrants who identify as lesbian, gay, bisexual, transgender, queer, or intersex (LGBTQI) people often face discrimination, isolation, marginalization and bias-motivated violence due to their gender identity or sexual orientation. In nearly 80 countries, repressive laws criminalizing same-sex relations expose individuals to imprisonment and mistreatment. Many of these issues go unnoticed and legal frameworks fail to hold aggressors accountable for homophobic and other hate crimes. Furthermore, despite reports of persecution and abuse taking place during transit and in host countries, accurate information is hard to gather as LGBTQI refugees and migrants make attempts to hide their sexual orientation or gender identities from aid organizations out of fear.

Even though UNHCR Guidelines on International Protection and the Yogykarta Principles on Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (SOGI) affirm that people fleeing persecution on the grounds of SOGI can qualify as refugees, neither global compact speaks to the need for protection of

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30 U.S. Department of State, supra note 24.
LGBTQI people within migrant and refugee populations. Instead, protection is sometimes granted within a limited framework because refugee claims grounded in SOGI are categorized as issues under the ‘membership of a particular social group’ category, and often no need for protection is recognized at all.33

This resolution encourages nation states active in implementing the global compacts to specifically recognize LGBTQI refugees’ and migrants’ unique needs. As with any other vulnerable group within the migrant and refugee communities, they are at risk of exploitation and they deserve to be protected from abuse and mistreatment. Specific laws encouraging their protection would close the gap between some protection and comprehensive protection.

VI. Establish a right to protection from xenophobia, discrimination and pervasive bias, and counter any associated stigma through evidence-based conversation and decision making around migration and displacement issues.

This resolution urges states to positively influence public discourse surrounding migrants and refugees. With the rise of extremism and elevated levels of violent discourse around migrants and refugees becoming a cause for concern, xenophobic rhetoric has shaped many of the conversations, policies and debates on whether states should or should not take in refugees and migrants. States should not only condemn violence against refugees and migrants, but laws regarding hate crimes should also be implemented and enforced. States should counter any stigma and discrimination that arises through evidence-based public conversation and decision making.

Several key international treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1951 Refugee Convention and the Outcome Document of the Durban Review Conference, outline specific obligations and commitments of states to protect refugees, asylum seekers, migrants, and other persons of concern from discrimination and bias-motivated violent acts.34 In the Global Compact for Safe, Orderly and Regular Migration, member states reaffirmed their commitment to eliminating all forms of discrimination, including xenophobia.35 However, the commitments in these compacts are non-binding, and states choose voluntarily to honor the stipulated protections for refugees and migrants.

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33 Guidelines on International Protection No. 9: , supra note 39.
Conclusion

States have the primary obligation to protect migrants and refugees from discrimination and bias. Even with international laws providing guidance on the issue, their direct actions and policies will influence how much effective implementation will take place. Refugee and migrant populations are particularly vulnerable to discrimination and bias-motivated violence because they are seen as outsiders in their host countries. Xenophobia and bias-motivated violence can result in deaths, serious injuries, mass displacement, and a range of other protection challenges. The lack of formal, permanent, or even temporary legal status for migrants and refugees negatively affects their ability to defend and access basic human rights. States should take active steps to promote protection of refugees and migrants, including laws regarding hate crimes. They should also work to counter any stigma and discrimination by engaging in evidence-based and respectful public conversation and decision making.

Respectfully submitted,

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January 2019

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36 Combatting Xenophobic and Bias-Motivated Violence, supra note 24; U.N. High Commissioner for Refugees, UNHCR’s contribution to the Secretary-General’s report with recommendations on global trends in the fight against racism, racial discrimination, xenophobia, and related intolerance to the General Assembly for its 66th session pursuant to A/RES/64/148, (June 2011), http://www.unhcr.org/refworld/pdfid/4e02d33f2.pdf.
37 Combatting Xenophobic and Bias-Motivated Violence, supra note 24.
General Information Form

1. Summary of Resolution

This resolution encourages states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration to take additional steps to address root causes of displacement and forced migration, develop policies that discourage the criminal prosecution of migrants and refugees, encourage the accountable use of prosecutorial discretion, and protect migrants and refugees from bias and discrimination regardless of gender, race, sexual orientation, sexual identity, national origin, and religion.

2. Approval by Submitting Entity

This Resolution was approved by the Rule of Law Initiative Board through a vote of its members on November 12, 2018.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No. A previous version of this Resolution and Report was withdrawn before submission to the House (August 2018).

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This resolution is consistent with, and expands upon, several policies previously adopted by the ABA on issues relating to immigration, human rights, and antidiscrimination.

Supports multinational cooperation and consultation in the formulation of national laws and policies relating to migration and urges the United States government to enter into regional and international discussions and agreements governing the flow of workers. 06A123B

Opposes legislation creating a crime based merely on an alien’s undocumented presence (e.g., entering the country without documents or inspection or overstaying a lawful visa). 04M105

Reaffirms support for the establishment of laws, policies, and practices that ensure access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. Opposes the use of religion or nationality as a basis for barring an otherwise eligible individual from entry to the United States 17M10B
Supports adherence to the United States’ international law obligations, including the 1967 Protocol Relating to the Status of Refugees of the 1951 Convention, the International Covenant on Civil and Political Rights, and international bilateral agreements and treaties. Facilitate a transparent, accessible, fair, and efficient system of administering the immigration laws and policies of the United States, including the adjudication of visa applications, applications for immigration benefits, and applications for entry to the United States. 17M10C

Supports the enactment of legislation and the implementation of public policy to enable a United States citizen or lawful permanent resident who shares a mutual, interdependent, committed relationship with a non-citizen of the same sex to sponsor that person for permanent residence in the United States. 09M108

Recognizes the rights of individuals who are lesbian, gay, bisexual or transgender (LGBT) as basic human rights and condemns laws, regulations, rules and practices that discriminate against them on the basis of their LGBT status. 14A114B

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A


N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

ABA ROLI will post the text of the resolution and continue outreach efforts on social media to publicize and support awareness of the issues the resolution addresses.

8. Cost to the Association (both indirect and direct costs).

No ABA funds are necessary for the implementation of this Resolution.


No conflicts of interest are known.
10. Referrals.

An earlier draft of this Resolution was referred to the following ABA entities in September 2018: Commission on Immigration, Section on International Law, Center for Human Rights, Civil Rights and Social Justice, and Commission on Sexual Orientation and Gender Identity. ABA ROLI reached out to the Commission on Women in the Profession and the Commission on Racial and Ethnic Diversity in the Profession for their feedback. They were supportive of the resolution.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Paulette Brown, ABA ROLI Board
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Executive Summary

1. Summary of Resolution.

This resolution encourages states and entities working to implement the Global Compact on Refugees and the Global Compact for Migration to address root causes of displacement and forced migration, develop policies that discourage the criminal prosecution of migrants and refugees but encourage the accountable use of prosecutorial discretion, and protect migrants and refugees from bias and discrimination on the basis of gender, race, sexual orientation, sexual identity, national origin, and religion.

2. Summary of the issue which the Resolution addresses.

Although more public policy attention has been given to migrants and refugees through the Global Compacts and other international law standards, many individuals who are forced to leave their homes due to conflict, persecution and human rights violations still endure harsh and inhumane treatment in country of origin, in transit, and in countries of destination. Those forced to flee are often victims of xenophobic hate crimes, and many countries do not recognize rights and protections for LGBTI and internally displaced persons. In addition, asylum seekers are still being persecuted while seeking safety. Given the scale of the crisis and the implications these policies would have on migration and refugee policies, it is imperative that states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration support and encourage reforms that protect all refugees and migrants.

3. An explanation of how the proposed policy position will address the issue.

This resolution would have the ABA encourage states and entities working to implement the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration to better protect refugees and migrants. Specifically, the recommendation calls for states to address the root causes of displacement and forced migration by supporting transitional justice mechanisms which would address the drivers of violence in fragile communities. Policies should be developed to discourage the criminal prosecution of asylum seekers, and prosecutorial discretion should be encouraged as an enforcement tool. This policy also seeks to ensure that internally displaced persons and LGBTI people are given rights and protections consistent with internationally recognized human rights treaties. Finally, this policy would help call attention to xenophobic rhetoric that has surrounded conversation concerning migrants and refugees. Evidence-based conversation and decision making should be promoted to counter hateful rhetoric.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

We are unaware of any minority views or opposition to this Resolution.