



ABA RULE OF LAW INITIATIVE

WHEN PEOPLE FLEE: RULE OF LAW AND FORCED MIGRATION

APRIL 2018

American Bar Association Rule of Law Initiative Issue Paper
Paula Rudnicka and Elizabeth Ferris



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ISBN (print): 978-1-64105-239-9

ISBN (e-book): 978-1-64105-240-5

Printed in the United States of America

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1050 Connecticut Ave., N.W., Suite 450, Washington, D.C. 20036



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For more than 25 years, and through our work in more than 100 countries, the American Bar Association Rule of Law Initiative (ABA ROLI) and our partners have sought to strengthen legal institutions, to support legal professionals, to foster respect for human rights and to advance public understanding of the law and of citizen rights.

In collaboration with our in-country partners—including judges, lawyers, bar associations, law schools, court administrators, legislatures, ministries of justice, and human rights and civil society organizations—we design programs that are responsive to local needs and that prioritize sustainable solutions to pressing rule of law challenges. We employ rigorous and innovative monitoring and evaluation approaches in assessing the quality and effectiveness of our programs.

ABA ROLI has roughly 500 professional staff working in the U.S. and abroad, including a cadre of short- and long-term legal specialists, volunteers, interns and third-party contributors, who in fiscal year 2017 alone contributed \$1.8 million in pro bono legal assistance.



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FOREWORD

The ABA Rule of Law Initiative (ABA ROLI) commissioned this study in its Paper Series to highlight the rule of law dimensions of the current displacement crisis. With more than 65 million people fleeing conflict, persecution, and violations of human rights, we need new approaches to meet this challenge. As the authors so ably illustrate, strengthening the rule of law is a critical piece of the puzzle’s solution—in countries of origin, transit and destination. This paper reviews the relevant legal frameworks, highlights rule of law gaps that exacerbate the problem of forced migration, and identifies concrete steps that stakeholders can take to develop sustainable solutions.

This study serves as the backdrop for ABA ROLI’s 2018 Annual Conference on Contemporary Rule of Law Issues, “When People Flee: Rule of Law and Forced Migration,” convened on April 17, 2018 in Washington, D.C. in collaboration with George Washington University’s Elliott School of International Affairs, the ABA Commission on Immigration, the ABA Center for Human Rights, the ABA Section on Litigation, and the ABA Section on Civil Rights and Social Justice. The conference brings together a diversity of experts, drawn from the development, humanitarian, academic, and legal communities, to dig deep into this complex problem, mine our collective experience, and inform policy development. As a follow-up to the conference, an Expert Working Group will distill key take-aways into a conference report and recommendations that will feed into the development and implementation of the U.N. Global Compact on Refugees and the U.N. Global Compact for Safe, Orderly and Regular Migration. Videos of the keynote speeches will be available on the ABA ROLI website at ambar.org/whenpeopleflee.

ABA ROLI is pleased to lead this effort as part of our commitment to sharing insights garnered from over 25 years’ experience in developing the rule of law. Our mission is to promote justice, economic opportunity, and human dignity through the rule of law. As this mission suggests, we see the rule of law as a means to an end, a critical tool for solving global problems, and today’s global displacement crisis certainly fits the bill.

We are grateful to the authors for their contribution to this effort and look forward to on-going learning through our 2018 conference and beyond. For more information about this work, please contact ABA ROLI Director of Research, Evaluation and Learning Linda Bishai at linda.bishai@americanbar.org.

Sincerely,



M. Margaret Mckeown
Chair, ABA ROLI Board of Directors



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Director, ABA ROLI

ACKNOWLEDGMENTS

The paper was co-authored by Paulina (Paula) Rudnicka, Advisor at the ABA Rule of Law Initiative (ABA ROLI), Research, Evaluation, and Learning Division and Dr. Elizabeth Ferris, Research Professor at Georgetown University, Institute for the Study of International Migration. The authors wish to cordially thank the ABA ROLI Board of Directors, the ABA ROLI Program Committee, ABA ROLI staff and interns, and members of the Expert Working Group for their invaluable support during the research, writing, and editing of this paper.

The authors are extremely grateful for the time and assistance rendered by content contributors and peer reviewers, including Eleanor Acer, Chantal Agarwal, Sebastian Albuja, Elizabeth Andersen, Nerea Aparicio, Elisabeth Baraka, Rick Bartoldus, Michelle Brady, Duygu Cicek, Roberta Cohen, Niki Dasarathy, Geoff Gilbert, Mary Greer, Susan Goldman, Hasmik Hakobyan, April Hewko, Jackie Keegan, Catherine Kelly, Meredith Linsky, Hon. M. Margaret McKeown, Jay Monteverde, Amanda Rawls, Katrien Ringele, Christopher Russell, James R. Silkenat, Rebecca Vernon, Hon. James A. Wynn, Jr., and Genan Zilkha. Special thanks are extended to Linda Bishai for her ongoing mentorship and constructive critique of ideas and content. The authors also acknowledge Hana Hausnerova and Lyndsey (Lynds) Raynor for outreach and logistical support.

EXECUTIVE SUMMARY

The global displacement crisis demands new, comprehensive solutions. With a record 65 million people currently displaced within and across national borders, and displacement becoming increasingly prolonged, forced migration cannot be addressed solely as a short-term humanitarian problem. Nor, in our interconnected world, can any country pretend to solve the problem by merely tightening its borders. Because large movements of refugees and internally displaced persons (IDPs) have significant human rights and development ramifications, humanitarian interventions must be integrated with initiatives promoting sustainable development in countries of origin, transit, and destination. A new approach to displacement must tackle its root causes, ensure the safety and human dignity of those forced to flee, and provide sustainable solutions for displaced persons, migrants in vulnerable situations, and their host communities. Rule of law development is central to these efforts because very often, at the roots of displacement are rule of law problems in countries of origin, such as ineffective laws, poor governance, and weak accountability mechanisms. Weaknesses in the rule of law are also impediments to the realization of the rights of people who flee, in particular women, children, and other vulnerable populations.

ABA ROLI's Rule of Law Issue Paper "When People Flee: Rule of Law and Forced Migration" explores the complex relationship between the rule of law and forced migration. It highlights the ways in which rule of law development can strengthen—and potentially transform—the response to the global displacement crisis. The paper focuses on the people who are compelled to leave their communities—within or across international borders—because of conflict, persecution, or violations of human rights. The paper begins by examining what the rule of law is and why it is important in the context of forced migration. It subsequently identifies four broad rule of law approaches to forced migration that can be applied in countries of origin, transit, and destination: building just legal systems, promoting good governance, strengthening accountability mechanisms, and ensuring empowered protection. Each approach maps concrete entry points for rule of law programming and includes a series of case studies illustrating a wide range of rule of law interventions in the context of displacement. The paper ends with a set of recommendations aimed at shaping a holistic, people-centered, and gender-sensitive rule of law response to forced migration.

Key Conclusions

- Strengthening the rule of law is central to the prevention, response, and resolution of forced migration because gaps in the rule of law are both drivers of displacement and obstacles to sustainable solutions.
- Integrating rule of law solutions into the new approach to forced migration will require breaking down siloes and ensuring a close collaboration between humanitarian and development actors, national and local authorities, international and civil society organizations, bar associations, justice system actors, and the affected populations.
- Rule of law development is a powerful tool for creating strong normative frameworks for the prevention of forced migration and the protection of people who flee. It is also a powerful tool for enhancing the capacity of local institutions responsible for the implementation of these normative frameworks in practice.
- There is a dire need for better data on the relationship between the rule of law and forced migration in order to prioritize investments and design adequate interventions.

I. INTRODUCTION

According to global estimates, more than 65 million people are currently displaced by conflict, persecution, and violations of human rights.¹ Around 17 million are recognized as refugees under the United Nations (U.N.) Convention Relating to the Status of Refugees (1951 Refugee Convention) and receive some degree of protection and assistance from host governments and the U.N. High Commissioner for Refugees (UNHCR). An additional 2 million are asylum seekers—those who are seeking refugee status in other countries but whose status has not been formally recognised. Further, around 5 million Palestinian refugees come under the mandate of the U.N. Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). A far larger number of people—over 40 million—flee within the borders of their country and are internally displaced persons (IDPs).²

A “**refugee**” is defined in the 1951 Refugee Convention as a “person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country.”³ Several international treaties and declarations expand this definition to those who flee their homelands because of external aggression, occupation, foreign domination or events seriously disturbing public order.⁴ An individual does not have to be recognized as a refugee by any country or organization to meet this definition.

“**Asylum seekers**” are persons who are seeking sanctuary in a country other than their own and are awaiting a decision about their status.⁵

“**Internally displaced persons (IDPs)**” are defined in the U.N. Guiding Principles on Internal Displacement as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”⁶

There is no single definition of a “**migrant**.” While the essence of migration is being away from the place of habitual residence, at least temporarily, some definitions require movement across an international border and some include movement within a territory of one state. The International Organization for Migration’s (IOM) definition of a migrant includes people who move involuntarily, but this approach is not universal.⁷

This issue paper focuses on those who are compelled to leave their communities—within or across international borders—because of conflict, persecution, and human rights violations. However, the paper recognizes that people are forced to move for a variety of reasons and further work is needed to understand and respond to their needs. Although they may not qualify as refugees under international or domestic laws, they may have serious protection needs because they often lack a legal status and move in an irregular fashion. Scholars refer to these groups as crisis migrants,⁸ survival migrants,⁹ and migrants in vulnerable situations.¹⁰ There is, as yet, no clear guidance as to how they should be treated.¹¹ For example, according to the Internal Displacement Monitoring Centre, in 2016 alone, over 24 million people were newly displaced within the borders of their countries by disasters. The Centre estimates that in the future, an average of 14 million people will be forced to flee every year by sudden-onset disasters.¹² Estimates further show that at least 15 million

people are internally displaced every year by development projects, such as the construction of dams, large-scale natural resource extraction, or urban renewal.¹³ Extreme poverty and acute food insecurity are also among the core drivers of displacement.¹⁴ The paper also acknowledges the phenomenon of mixed migration flows, defined as complex population movements of a combination of refugees, asylum seekers, economic and environmental migrants, unaccompanied minors, smuggled persons, and victims of human trafficking.¹⁵ The UNHCR has developed a ten-point action plan for responding to mixed migration flows.¹⁶

This paper uses the terms “**forced migration**” and “**displacement**” interchangeably, recognizing that there is no uniform agreement regarding this terminology. Experts who work with refugees and IDPs tend to use the term “displacement.” Migration experts use the term “forced migration” usually in reference to people who move to another country, often in an irregular fashion, for a range of reasons, including poverty. Some experts use the term “**forced displacement**,” which is redundant because displacement includes the notion of compulsion and is never voluntary.

Undoubtedly, humanitarian actors have improved their ability to respond quickly to emergency situations, but their ability to prevent and manage prolonged displacement is less sure. Too often, their solutions are long-term care and maintenance operations; they act as surrogates, replacing state responsibility and letting governments off the hook.¹⁷ For years, humanitarian actors have called for the earlier and more extensive involvement of development actors, but only in the past few years have development agencies, such as the World Bank, begun to think of displacement as a development issue and increased their interventions in this context.

The magnitude and drawn-out nature of the global displacement crisis clearly demonstrate that solutions to large movements of people should no longer be focused on isolated sectoral responses.¹⁸ Because displacement has significant human rights and development ramifications at the national and local levels, humanitarian interventions must be integrated with initiatives promoting sustainable development in countries of origin, transit, and destination. This new, integrated approach to forced migration must tackle its root causes, ensure the safety and dignity of those forced to flee, and build environments that provide lasting solutions for displaced populations, their host communities, and returnees.

Rule of law development should form a key component of the comprehensive approach to forced migration because gaps in the rule of law are both drivers of displacement and obstacles to sustainable solutions. Very often, at the roots of displacement are rule of law problems in countries of origin, such as ineffective and discriminatory laws, poor governance, and weak accountability mechanisms. Weaknesses in the rule of law are also impediments to the realization of the rights of people who flee. While *en route*, many face criminal exploitation and arbitrary detention. Those who arrive at their destinations are often met with xenophobia, discrimination, and flawed policies aimed at deterring their entry rather than protection. As a result, many are left in a state of legal limbo, sometimes for decades. Women and children, particularly those traveling on their own, as well as lesbian, gay, bisexual, transgender, and intersex (LGBTI) people are among the most vulnerable. Just laws, properly functioning state institutions, and a strong civil society can be powerful allies in the global response to forced migration. Lawyers, justice system actors, and rule of law experts have a critical role to play in curbing forced migration and preserving the fundamental rights of displaced persons.¹⁹

II. FRAMING THE RULE OF LAW IN THE CONTEXT OF FORCED MIGRATION

The New York Declaration for Refugees and Migrants (New York Declaration) calls on U.N. member states to promote and ensure respect for the rule of law as the means to address the root causes of large movements of refugees and migrants. It makes several references to concepts intrinsically associated with the rule of law, such as equality, good governance, and human rights.²⁰ As such, it aligns with Sustainable Development Goal 16, “the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.”²¹ While the New York Declaration rightfully elevates the rule of law discourse in the context of forced migration, it neither defines it nor offers concrete strategies for its implementation by states.

In her article “The ABA Rule of Law Initiative: Celebrating 25 Years of Global Initiatives,” Judge Margaret McKeown notes, “The rule of law matters because it serves as a foundation for justice, economic opportunity, and human dignity.”²² She also observes that there is no uniform definition of the rule of law.²³ In its most basic sense, “the rule of law means that government officials and citizens are bound by and abide by the law.”²⁴ This procedural or formalistic approach to the rule of law has significant policy implications for people who flee.²⁵ It may, for example, lead states to adopt laws that exclude certain categories of refugees from protection or crack down on displaced persons because they are viewed purely as outsiders subverting the law rather than as people in need of protection.²⁶

Based on definitions developed by the U.N. and the World Justice Project (WJP), this paper adopts a substantive approach of the rule of law and defines it as a nuanced concept consisting of four fundamental principles: just laws, good governance, accountability, and access to justice.²⁷ This concept embraces an indivisibility of all human rights, a focus on outcomes rather than institutions,²⁸ and an understanding that the rule of law is not only a highly desirable result, but also an important enabler of global development.

Just laws. The laws are clear, publicized, stable, and based on the universal principles of equality and non-discrimination. They protect human rights and fundamental freedoms, including the right to an effective legal remedy. They are applied evenly and consistently, and they lay out the mechanisms for solving common justice problems.

Good governance. The process by which the laws are enacted and enforced is accessible, fair, transparent, and efficient. Government institutions are equipped with checks and balances. Public institutions adhere to the principles of open government.²⁹

Accountability. Government as well as private actors are accountable under the law.

Access to justice. People are able to use justice institutions to obtain fair solutions to their common justice problems. The six key elements of access to justice include legal framework, legal knowledge, legal advice and representation, access to a justice institution, fair procedure, and enforceable solution.³⁰

The focus of this paper is on the nexus between the rule of law and forced migration at the national level. The paper also outlines international systems for the management of displacement as they have a significant impact on domestic legal frameworks.

1. RULE OF LAW AND FORCED MIGRATION AT THE GLOBAL AND REGIONAL LEVELS

The **international refugee system**, constructed after World War II, is grounded in the 1951 Refugee Convention, its 1967 Protocol, decades of conclusions of the UNHCR's Executive Committee, and resolutions adopted by the U.N. General Assembly.³¹ The Refugee Convention sets out a clear definition of "refugees" and the obligations of state parties towards them. 148 states have ratified either the Refugee Convention, the Protocol or both, and an impressive number of countries have incorporated these provisions into national laws and policies.³² Since 1950, a single U.N. agency—the UNHCR—has been mandated to protect and assist refugees.³³ UNHCR has also been called on to assist other "persons of concern," including people in refugee-like situations, IDPs, returnees, and stateless persons. The key international conventions addressing statelessness are the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.³⁴

At the regional level, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa not only broadened the definition of refugees to include those fleeing serious disruption of public order, but also envisioned a collective regional response to large movements of refugees.³⁵ In Latin America, the Cartagena Declaration on Refugees, adopted in 1984, also expanded the definition of refugees to include those fleeing generalized violence and conflict.³⁶ In addition, regional institutions and agreements have been used to manage the arrival of large numbers of asylum seekers. Examples include the 2015-17 European Union (E.U.) Relocation Scheme³⁷ and the Turkey-E.U. deal.³⁸

The system governing **international migration** is very different.³⁹ Rather than a single convention on migration, there are nine basic human rights treaties that provide broad protections to migrants, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁴⁰ Governance of migration issues is complicated by the lack of an agreed-upon definition of a "migrant" and the fact that there is no single U.N. agency handling migration issues.⁴¹

The ICCPR explicitly extends its provisions to all individuals within the territory of each state party and subject to its jurisdiction. This includes the right to liberty of movement and freedom to choose residence, which must be afforded to everyone lawfully within the territory of a given state.⁴² Under ICESCR, developing countries may determine the extent to which they would guarantee economic rights to non-nationals. However, they must do so "with due regard to human rights and their national economy."⁴³ With the exception of ICMW,⁴⁴ basic international human treaties adopted under the auspices of the U.N. also apply to refugees and stateless persons. Finally, a series of international and regional treaties prohibit arbitrary displacement or expulsion.⁴⁵ Notably, CAT proscribes expulsion, return or extradition of persons to a country where they may face torture.⁴⁶ The principle of *non-refoulement* is further defined in the Refugee Convention.⁴⁷

The U.N. Guiding Principles on Internal Displacement (U.N. Guiding Principles), which were drawn from existing international law, serve as a global **normative framework for IDPs**. Although non-binding, they are considered an authoritative document and were endorsed by 193 heads of state at the World Summit of 2005.⁴⁸ Presently, over 40 states have developed laws and policies on IDPs. In Africa, 27 states have ratified or acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention)—a binding regional instrument that provides even wider protections than the U.N. Guiding Principles.⁴⁹

Compliance with international law, including the aforementioned treaties and principles, is a critical component of the rule of law. It is essential not only for protecting those who flee, but also for ensuring stability and security at the global and national levels.

Toward Global Compacts

Many observers argue that the global refugee system is over-stretched and in dire need of reform. They point out, for example, that unlike other international human rights treaties, the Refugee Convention does not envision an enforcement mechanism, such as a treaty-based monitoring body or a reporting requirement. In addition, while its preamble refers to the importance of international cooperation, the Convention does not establish a mechanism for responsibility-sharing. Others contend that the lack of resources and political commitment is the problem rather than the system itself. As U.N. Secretary-General António Guterres put it, the system isn't broken—it's broke.⁵⁰ While 84 percent of the world's refugees are hosted by developing countries,⁵¹ the arrival of large numbers of refugees in Europe in 2015 led to a sense of alarm that the system was no longer functioning. The large-scale arrivals also resulted in increasingly restrictive policies by western governments, evident in violent interceptions of those who flee, arbitrary detention, and blockage of family unification. 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 growing number of IDPs is, at least partially, the result of closing borders.

In late 2015, the U.N. General Assembly called for a High-Level Plenary on Addressing Large Movements of Refugees and Migrants, which was held in New York on September 19, 2016. That meeting led to the adoption by acclamation of the New York Declaration, which reaffirmed the core principles of migrants' rights and refugee protection. UNHCR, in association with other relevant stakeholders, was tasked with implementing a Comprehensive Refugee Response Framework—which envisions a more holistic response to refugees at every phase of displacement—and with proposing a Global Compact on Refugees in 2018. At the same time, a state-led process was set in motion to negotiate a new Global Compact for Safe, Orderly, and Regular Migration. Although the terminology of “global compacts” is the same, these are two very different processes.⁵² The fact that there are two global compacts reinforces the binary division between refugees and migrants.⁵³ While it is likely that the Global Compact for Refugees will refer to IDPs, its focus will be on strengthening collective response to refugees rather than addressing the specific needs of IDPs. Both compacts will be non-binding. Without accountability mechanisms, a key challenge will be implementing the compacts at the national level.

2. RULE OF LAW AND FORCED MIGRATION AT THE NATIONAL AND LOCAL LEVELS

A lack of the rule of law in **countries of origin** often contributes to state fragility, which can perpetuate forced migration. The primary drivers of displacement, such as persecution, conflict, and systemic violence, are frequently rooted in unjust laws, weak governance structures, and dysfunctional accountability mechanisms. Extreme poverty, weak response to disasters, and unsustainable land management—often linked to corruption and governance gaps—only exacerbate this fragility.

Syria, Afghanistan, and South Sudan, which are among the top 10 countries on the Fragile States Index (FSI),⁵⁴ produce more than half (55 percent) of the world’s refugees under UNHCR’s mandate.⁵⁵ In South Sudan, which is currently ranked as the most fragile state in the world, the struggle for power between two political leaders has resulted in the displacement of 2.5 million refugees and almost 2 million IDPs. In 2016, the country had the fastest-growing refugee population. Today, 7.6 million people are in need of humanitarian assistance,⁵⁶ including over a million at risk of starvation.⁵⁷ Afghanistan, ranked 9th on the FSI, also has the third to lowest score on the World Justice Project’s Rule of Law Index (WJP Index).⁵⁸ The lowest score on the WJP Index belongs to Venezuela (ranked 58th on the FSI), whose residents made more than a threefold increase of asylum claims between 2015 and 2016.⁵⁹ The IOM estimates that in the past two years nearly a million people have fled Venezuela, resulting in one of the biggest migration crises in Latin American history.⁶⁰ In Myanmar, decades-long persecution and internal displacement of the Rohingyas intensified in August 2017, and led hundreds of thousands to flee to Bangladesh. In all of these countries, fragility and conflict have led to skyrocketing numbers of IDPs.

Reducing fragility in countries of origin is certainly a critical component of a long-lasting, solution-based response to mass displacement. As Elizabeth Andersen and Sebastián Albuja of ABA ROLI note in their article “The Rule of Law Dimensions of the Refugee Crisis,” any effective response to forced migration must comprise efforts to “eliminate the extreme conditions that drive people to uproot themselves *en masse*.” This includes “assuring that checks on government power are in place; that civil society can organize and voice its views without facing repression; that minorities are not discriminated against or excluded from political [or economic] participation; that corruption does not destroy institutions; that the streets are safe; and that investment finds conditions that lead to economic growth.”

In countries of origin, addressing the needs of returnees is also crucial. Those who make their journey back home often experience serious hardships, including difficulty reclaiming fixed and portable assets that were lost. In Colombia, for example, “83 percent of IDPs had their land confiscated or were forced to abandon it when they left.”⁶¹ When refugees return to their countries of origin, but cannot find security or access to justice, they are at greater risk for becoming IDPs.⁶²

In **transit countries**, refugees face rule of law challenges in the form of arbitrary detention and criminal exploitation by smugglers and traffickers. Many flee through clandestine channels and remote routes, which are breeding grounds for organized crime. This exposes them to serious dangers, such as robbery, extortion, and enslavement. Libya has come to signify this dimension of the global displacement crisis according to reports exposing slave auctions, violent interceptions, and mass detention of refugees transiting to Europe. Italy and

other European countries have been criticized for being complicit in these abuses by shutting their borders and striking controversial deals with Libyan authorities.⁶³ Similar challenges exist in Mexico, which is plagued by violence associated with the war on drugs and the militarization of certain areas of the country. As a major transit hub for Salvadorans, Guatemalans, and Hondurans *en route* to the U.S., Mexico has instituted the Southern Border Program to regulate migration and refugee flows from Central America. Civil society organizations have expressed concern about the program's emphasis on national security rather than on the protection of those who flee.⁶⁴ There is also concern about Mexican government's practices that may violate the principle of *non-refoulement*. Experts warn that "[r]efugees face grave risks in Mexico," in part due to widespread impunity for crimes against non-nationals and "alarming deficiencies in Mexico's migration system."⁶⁵

In **countries of destination**, rule of law challenges are also significant. Many states lack an adequate legal framework to handle a large influx of people, but even where just laws do exist on paper, their implementation usually lags, leaving the displaced in a state of legal limbo. Refugees routinely face status determination procedures that fall short of international standards. Moreover, they are frequently met with xenophobia, discrimination, and a tide of anti-immigrant sentiments spreading across the Global North. Both refugees and IDPs experience difficulties in obtaining legal identity documents, residency registration, and work authorization, and they have limited access to justice, housing, land, and property. In turn, political leaders are unaccountable when they close borders or social services, condemning those in search of refuge to suffering and death. 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., which lacks coherent displacement policies, 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*.

Although over 40 states have adopted laws or policies addressing some aspects of internal displacement, many governments lack the technical capacity and resources to ensure the rights of IDPs in practice.

III. TRANSFORMING THE GLOBAL RESPONSE TO FORCED MIGRATION THROUGH THE RULE OF LAW

A wide range of rule of law strategies can be employed to prevent forced migration and ensure adequate legal and institutional frameworks for the protection of people who flee and their host communities. Rule of law implementers can design targeted strategies to address forced migration within a particular context or mainstream displacement issues into their broader rule of law program design. Similarly, humanitarian actors can incorporate rule of law approaches into crisis response. For example, in a notable collaborative effort, the UNHCR is exploring the feasibility of leveraging the U.N. Development Programme's (UNDP) parliament support projects to advance the Comprehensive Refugee Response Framework at the national level. In addition, the UNHCR, UNDP, U.N. International Children's Emergency Fund (UNICEF), U.N. Police (UNPOL), and U.N. Entity for Gender Equality and the Empowerment of Women (U.N. Women) are collaborating on a community policing and justice project in Gambela, Ethiopia to help national institutions to address inter-ethnic tensions between displaced and host populations. UNHCR has also partnered with the Inter-Parliamentary Union to provide practical guidance to parliamentarians on how to use the legislative process to respond to internal displacement.⁶⁶

This issue paper considers the complex relationship between the rule of law and forced migration through the prism of four types of programmatic approaches: building just legal systems; promoting good governance; strengthening accountability mechanisms; and ensuring empowered protection. These four approaches can be applied to countries of origin, transit, and destination.

1. BUILDING JUST LEGAL SYSTEMS

The rule of law is grounded in a set of laws and norms that delineates the rights and duties of state and non-state actors in the territory of a given state. These laws must be clear, publicized, stable, and based on the universal principles of equality and non-discrimination. They must protect human rights, including the right to an effective legal remedy. They must be applied evenly and consistently, and they must establish independent and impartial mechanisms through which individuals, including non-nationals, can seek solutions to their justice problems.⁶⁷ Just legal systems are indispensable both in preventing displacement and ensuring protection for people who flee.

Despite the plethora of international legal standards compelling states to develop humane approaches to displacement, many national legal frameworks fail to adequately address the needs of displaced populations. For example, much of the national-level policy discourse on asylum revolves around the concepts of sovereignty and national security, rather than protection and responsibility-sharing as they apply to refugees. As Catherine Dauvergne notes, many states interpret control over migration “as being somehow intrinsic to what it is to be a nation, to ‘stateness’ and to the core of (...) national identity.”⁶⁸ As a result, even the most prosperous countries that have signed onto the 1951 Refugee Convention are backing away from its provisions by adopting laws that include more stringent exclusions or reasons for expulsion than those allowed under international law. The sovereignty argument was also behind the U.S. government's withdrawal from global talks on the Global Compact for Safe, Orderly, and Regular Migration.⁶⁹

Exclusionary sentiments also motivate certain host countries to enact laws and policies to deter arrivals and deny refugees their basic rights, including the freedom of movement. The impact of these policies is debilitating. James Hathaway stresses that most refugees today are not allowed to live independent lives. Unable to return home or integrate locally, they become burdens on their hosts and the international community, which impedes development and undermines good governance objectives. Hathaway concludes that national mechanisms for implementing state obligations under the Refugee Convention “are flawed in ways that too often lead states to act against their own values and interests—and which produce needless suffering amongst refugees.”⁷⁰ IDPs also face unique challenges stemming from inadequate legal systems. For example, if they 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. The national mechanisms for dealing with refugees and IDPs must be reformed. A global solution to displacement is simply unattainable if states fail to change the way they implement international human rights law in their domestic legal systems.⁷¹

Creating strong, human rights-based national systems for the protection of people who flee is paramount. Ideally, the right to asylum should be firmly established in state constitutions.⁷² Similarly, it is a good constitutional practice to prohibit *refoulement*, forced displacement, expulsion of citizens, and collective expulsion. Expulsion of non-citizens should only be allowed on the basis of a lawful decision and due process. The legal statutes, regulations, and court decisions that collectively shape states’ immigration and asylum systems should comply with international law and offer sound legal protections of human rights. Strong legal frameworks are also essential in the context of internal displacement.⁷³ All these laws should be enforceable through local justice and human rights mechanisms. It is also imperative to reform laws that are not refugee- or IDP-specific, but that are relevant to efforts aimed at preventing forced migration and reducing the negative effects of displacement. This includes laws pertaining to nationality, statelessness, gender-based violence, smuggling, human trafficking, corruption, and detention.

Entry Points for Rule of Law Programming

Rule of law implementers are well-positioned to assist states in improving their legal systems by providing high-impact legal reform assistance to national parliaments, pertinent government agencies, civil society organizations (CSOs), the legal profession, and the justice system. The primary entry points for programming in this context include:

- Legal research and analysis, which set the foundation for identifying important elements of the reform process.
- Promoting accession to, and strict compliance with, international and regional human rights treaties.
- Provision of technical assistance to parliamentarians and government officials charged with drafting legislation and policies related to displacement.
- Empowering local leaders and CSOs to influence policy change through legal advocacy, lobbying, education, training, awareness raising, and direct engagement with lawmakers and law-enforcers.
- Promoting collective legal advocacy, including by building and supporting local, pan-regional, and international networks of lawyers, advocates, experts, and CSOs.

- Building political will for change and promoting participatory democracy through the meaningful inclusion of affected populations in legal reform processes.

Case Study: Legal and Advocacy Tools for Evidence-Based Reforms

Legal reform efforts yield the best results when they address a country’s particular challenges and capitalize on the country’s strengths and available resources. To ensure that reforms are tailored to a country’s specific needs, they should begin with a *de jure* (textual) and *de facto* (contextual) analysis of the existing national legal framework. There are several tools that may aid states and technical assistance providers in the analysis of relevant data.

ABA ROLI has developed 14 **rule of law assessment methodologies**, which are used to measure countries’ compliance with international law, identify effective approaches to legal development, and incorporate them into evidence-based program design. These tools cover a variety of rule of law topics relevant to forced migration, such as access to justice, judicial reform, trafficking in persons, and detention procedures. For example, the Status of Women Assessment Tool includes a section examining the correlation between discriminatory nationality laws and statelessness.

Stakeholders who intend to design rule of law programs targeting displaced populations could benefit from the analytical tools produced by the UNHCR.

In 2017, the UNHCR developed and piloted an electronic, survey-style **Rights Mapping Tool**. The tool is designed to map and analyze the legal and protection environment in a country of operation in order to determine how this environment affects the ability of persons of concern to enjoy their rights in practice. The assessments based on the tool are intended to identify areas where the UNHCR will seek law and policy changes. They will also inform the design of comprehensive strategies that take advantage of structural opportunities to address the obstacles to protection. The UNHCR has also produced a **tool to assess national refugee status determination (RSD) systems**. The tool was piloted in Malawi, generating a set of recommendations for the Malawian government to improve its RSD procedures. The UNHCR plans to provide technical assistance to the government of Malawi in the design of a pertinent action plan.⁷⁴

In addition, several organizations maintain online databases on displacement-related laws and policies in particular regions or thematic areas.

The **Asylum Information Database (AIDA)**, managed by the European Council on Refugees and Exiles (ECRE), contains information on asylum procedures, reception conditions, detention, and content of international protection across 23 countries. The tool provides relevant actors with concrete information to support their advocacy and litigation efforts at both the national and European levels.⁷⁵ Asylum Access maintains the **Global Refugee Work Rights Scorecard**—an interactive online resource that provides information on how countries are implementing refugee work rights. The scorecard is accompanied by the Guide to Promoting Refugee Work Rights and the Refugee Rights Toolkit—an online platform that identifies, mentors, and supports refugee rights leaders in major refugee-receiving countries.⁷⁶ Similarly, the **Global Protection Cluster** has created a database of existing laws and policies on internal displacement.⁷⁷

Training local stakeholders on international legal standards pertaining to forced migration is another way to facilitate pertinent legal and policy reform.

For many years, the Institute for International Humanitarian Law in San Remo, Italy has offered **courses** for national officials on **Refugee Law and the Law of Internal Displacement**. Initiated by Walter Kälin and delivered by UNHCR and the Representatives of the U.N. Secretary-General (or Special Rapporteurs) on the Human Rights of IDPs, these courses have had tangible results. In 2012, for example, the Mexican state of Chiapas adopted a new law on internal displacement as a direct consequence of the participation of state representatives in a training course on IDP law.⁷⁸ In 2015, the **Global Protection Cluster’s Task Team on Law and Policy (TTLP)** was established as a technical entity to coordinate global efforts on law and policy-making on internal displacement. Led by the UNHCR, TTLP organizes learning activities to strengthen governments’ capacity to develop and implement national IDP laws and policies.⁷⁹

Case Study: The Power of Strategic Litigation

Strategic litigation is a powerful tool for “securing a more definitive, progressive, and consistent interpretation and application of the law.”⁸⁰ This strategy has been vital both in shaping policies that enable displaced people to access their rights⁸¹ and in addressing violations of human rights that are at the roots of displacement. In common law, civil law, and hybrid legal systems, influential and exemplary precedents can lead to broader systemic changes when key actors identify legal lacunae and champion legal reform.⁸²

The ruling in the *Matter of Kasinga*⁸³—establishing for the first time in the U.S. refugee system that women fleeing gender-based persecution (in this case female genital mutilation/cutting or FGM/C) are eligible for asylum—illustrates how strategic litigation can reverse a regressive application of refugee law.⁸⁴ This landmark case, which is routinely cited as authority in gender asylum cases across the world, led the U.S. Congress to criminalize FGM/C under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁸⁵ The ruling inspired the lead attorney Karen Musalo to establish the Center for Gender & Refugee Studies (CGRS) at the University of California, which continues to work for the recognition of gender-based asylum claims through impact litigation and legal advocacy.⁸⁶ In 2014, CGRS’s support for the lead attorney in the *Matter of A-R-C-G-* was instrumental in securing a ground-breaking ruling recognizing domestic violence as a basis for asylum.⁸⁷

Strategic litigation that leads to fundamental reform requires trained attorneys with the resources, knowledge, and skills to develop successful cases. It also requires independent justice institutions that encourage landmark decisions to become the basis for further legislative and judicial action.

Case Study: Reducing Statelessness through Legal Reform and Advocacy

The UNHCR estimates that there are at least 10 million stateless people around the world.⁸⁸ Statelessness constitutes a significant rule of law challenge: it essentially erases an individual’s political existence, resulting in the denial of access to basic rights and services.⁸⁹ Studies demonstrate that “stateless communities are often at increased risk of forced displacement.”⁹⁰ This is evident in the situation of the Rohingya who have suffered repeated internal displacements and since August 2017, have fled *en masse* to neighbouring

Bangladesh. At the same time, “displacement itself may contribute to increased risks of statelessness.”⁹¹ For example, if a single or widowed refugee mother is unable to pass nationality to her child and the child is born in a state that does not recognize the principle of *jus soli* (birthright citizenship), the child might be stateless unless the mother can provide legal proof of paternity, which is difficult in displacement settings.⁹² Statelessness also makes solutions for IDPs and refugees more difficult. The case of the Rohingya illustrates the difficulties of returning refugees to a country where their citizenship is not recognized. In such contexts, legal reforms to end statelessness should be multifaceted: they must address both the root causes of statelessness and its impact on affected populations.

Two of the primary causes of statelessness are gender gaps and discrimination in nationality laws. In 25 countries, these laws prevent mothers from passing their citizenship to their children on an equal basis with fathers. In over 50 countries, female citizens do not have equal rights to acquire, change, and retain their nationality, or to confer nationality to foreign spouses. Over the last decade, more than 12 countries have reformed their nationality laws, often as a result of high-impact technical assistance to governments and sophisticated legal advocacy by broad coalitions of women’s rights organizations.⁹³

The **Global Campaign for Equal Nationality Rights** is at the forefront of international efforts to achieve legal reform in the states that discriminate against women in their nationality laws. Its core activities include global- and national-level advocacy, research, and capacity building for civil society groups and government leaders.⁹⁴ The work of the **Arab Women’s Right to Nationality Campaign** is also notable.⁹⁵ A unique opening for a reform exists in countries that are undergoing a constitutional process. In Libya, for example, ABA ROLI examined nationality laws in its comprehensive **Status of Women Assessment Report**; conducted a gender analysis of the proposed constitution; and facilitated workshops that generated recommendations for Libyan authorities to explicitly include a gender equality clause in the constitutional provisions on nationality.

Providing stateless people with a clear path to citizenship is another legal strategy that can contribute to the reduction of statelessness.

In November 2017, **Brazil** became the first country to offer a **simplified and expedited naturalization process for stateless persons**, which sets a powerful example of a dignified approach to statelessness. Brazil’s new Migration Law No. 13445 contains a novel provision allowing stateless persons to receive permanent residency and apply for a citizenship if they possess civil capacity, have lived in Brazil for at least four years, and speak Portuguese.⁹⁶ The new bill also offers a legal path to citizenship to migrant children who resided in Brazil before the age of ten, and removes government discretion in approving the naturalization process.⁹⁷ In addition to the automatic granting of unrestricted *jus soli* citizenship to all children born in Brazil, the government has supported a civil society campaign to expand *jus sanguinis* provisions for stateless children born outside of the territory to Brazilian parents.⁹⁸ Three years earlier, the **Dominican Republic**—which hosts an estimated 250,000 stateless people, mostly of Haitian decent—undertook similar, though much narrower, reform efforts through the Naturalization Act (Law 169-14) of 2014. Although initially the law benefited merely 10 percent of stateless individuals, it was an important step forward. Seizing the momentum, ABA ROLI partnered with a local organization *Centro de Formación y Acción Social y Agraria* to educate stateless people about their rights under the new law and expand their access to legal aid. Between 2014 and 2015, the program’s mobile legal clinic conducted 28 visits serving stateless persons in the northern Cibao region of the island. The program was funded by U.S. Department of State’s Bureau of Population, Refugees, and Migration (PRM).

Case Study: Just Laws Make a Difference in the Lives of IDPs

The U.N. Guiding Principles encourage states to adopt laws and policies that respond to the particular needs of IDPs. Presently, laws and national action plans in over 40 states address some aspects of internal displacement.⁹⁹ Some of these laws regulate a specific cause or stage of displacement, others seek to protect a specific right of the displaced, and some outline rules for a comprehensive treatment of internal displacement caused by conflict.¹⁰⁰

Colombia has a long and well-developed normative and institutional framework for addressing the needs of the country's more than 7 million IDPs. In 1997, Colombia adopted **Law 387 on the prevention of forced displacement and protection of IDPs**. Since then, the pertinent legal framework has expanded even more and Colombian courts have begun to use the U.N. Guiding Principles as criteria for interpreting the scope of IDP rights. Most notably, in 2004, the Constitutional Court issued declaration T-025, which stated that the internal displacement situation in Colombia amounted to an unconstitutional state of affairs. The decision led to a series of measures by the government, including a substantial increase in financial allocations for IDPs. T-025 also established a permanent monitoring group to oversee progress in the realization of the rights of the displaced. Since the T-025 decision, the Colombian Constitutional Court has continued to press governmental institutions to comply with pertinent legislation. More recently, a significant shift has occurred as Colombia recognized IDPs, together with other groups, as victims of the armed conflict. **Law 975 on Justice and Peace**, adopted in 2005, facilitates the individual and collective reincorporation of members of armed groups into civil society, and guarantees the victims, including many IDPs, the rights to truth, justice, and reparations. The law does not explicitly refer to IDPs, but almost all displaced persons are eligible for reparations under this law. Further, the **2011 Victims and Land Restitution Law** addresses the needs of some 8 million Colombian people affected by conflict and violence, which includes IDPs. Finally, in recognition of the country's transformation into a post-conflict society, the 2012-2016 negotiations between the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia* included representatives of victims and IDPs. Resolving internal displacement is a central component of the peace process.¹⁰¹

2. PROMOTING GOOD GOVERNANCE

The links between governance and forced migration are complicated and understudied. On the one hand, poor governance and a lack of transparency are among the chief drivers of displacement. When public institutions are weak, corrupt, and unresponsive to people's needs, the government loses its legitimacy and risks of instability, conflict, and displacement rise.¹⁰² Venezuela is a perfect example. When the country reached its breaking point with political oppression and economic mismanagement, leading to the world's highest inflation rate and spiralling indices of poverty, it was subject to one of the largest exoduses of people in Latin American history.¹⁰³ Another example is poor land acquisition management and natural resource oversight, particularly in the context of large-scale extraction projects—from logging in the Central African Republic to palm oil cultivation in Colombia.¹⁰⁴ When governments hand over land to investors with little or no regard for the social, environmental, and economic impacts on local communities, people lose their livelihoods and are forced to relocate without rehabilitation and resettlement assistance.

On the other hand, refugee and IDP flows pose a complex set of challenges for the local governance structures in countries of transit and destination. Inevitably, an influx of refugees puts unique pressures on public finance and national institutions, which are primarily responsible for handling admissions and refugee determination procedures. But ultimately, municipalities bear the “burden” of new arrivals. If they lack contingency funding, flexible public procurement systems, and crisis governance mechanisms, they become quickly overstretched by ballooning needs for housing, social welfare, sanitation, and water resource management services. The resulting depreciation of municipal assets limits their capacity to handle the crisis, which leads to discontent and increased tensions between the displaced and host communities.¹⁰⁵ Municipal authorities are also challenged to respond to IDPs arriving in areas under their jurisdiction. Even in countries with strong national legislation on IDPs, municipalities may have the responsibility, but not the resources, to provide services to IDPs.¹⁰⁶

An effective displacement response requires strong, transparent, and accountable institutions at the national and local levels. In an ideal scenario, the decision-makers should have the knowledge and resources to ensure protection to displaced people; consider and address their personal needs and preferences in a human rights-based and gender-sensitive manner; engage them in decisions affecting their lives; and refrain from coercing them to leave, stay, return, or reside in a particular location.¹⁰⁷

Entry Points for Rule of Law Programming

Rule of law implementers are well-positioned to assist states in strengthening their governance systems in order to prevent displacement and ensure the protection of people who flee. The primary entry points for programming in this context include:

- Strengthening institutions across all branches of the government.
- Improving public trust in governance structures.
- Building political will and overall capacity of national and local governance structures to generate effective, human rights-based responses to displacement through trainings and stakeholder engagement with local leaders.
- Promoting public integrity and transparency.
- Improving land, environmental, and natural resource governance.

Case Study: Strengthening Institutions and Improving Public Trust in Governance Structures

Strengthening local institutions and improving public trust in governance structures can help to prevent displacement. If the government has the capacity to respond to people’s needs and protect their rights, and if the courts can resolve disputes before they escalate into violent conflict, the reasons behind people’s decision to flee will eventually diminish.

In 2012-2013, **Mali** suffered a coup d'état and takeover of large swaths of the northern part of the country by extremists, due in part to the northerners' sense that state institutions were failing them. The violence resulted in over 100,000 people fleeing to neighboring countries and over 60,000 IDPs. Once the Malian government regained control over the territory, ABA ROLI initiated a justice system strengthening program aimed at ensuring that future disputes in the region are resolved in a non-violent manner through the court system. The program, funded by the U.S. Department of State's Bureau of Democracy, Human Rights, and Labor (DRL), employed a dual-pronged approach: it trained justice sector actors on the application of international human rights law to cases arising from the crisis and supported local lawyers in bringing 38 test cases to the local courts. Malian lawyers pursued these cases not only to secure reparations for the victims of conflict, but also to demonstrate to the local population that the courts were operational and could serve their best interests, thereby staving off future violence and displacement. Another example of ABA ROLI's programming in this area comes from **Morocco**, which—in the wake of the Arab Spring in 2011—amended its constitution and adopted laws aimed at decentralization and enhanced transparency. Seizing this momentum, ABA ROLI designed two rule of law programs that promote participatory governance, citizen engagement, and transparency in Morocco. The first program, funded by the U.S.-Middle East Partnership Initiative (MEPI), educates citizens about the new legal framework and increases their opportunities to play more active roles in local governance. The second program, funded by the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL), raises citizens' awareness about corruption and provides legal advice to individuals with specific corruption problems. Beneficiaries of the program have reported an increased confidence in the Moroccan judiciary.

Case Study: Improving Local Governance for Displacement Response

In the modern era, displacement is markedly an urban phenomenon. An estimated “60 percent of refugees and at least half of [IDPs] reside in urban environments.”¹⁰⁸ Because “local authorities and public servants are at the frontlines of refugee and migrant reception and integration,”¹⁰⁹ the global displacement crisis necessitates sustainable local solutions. Concrete interventions could include establishment of targeted institutions (such as the Municipal Coordination Office for Migrant Policies in Sao Paulo, Brazil), risk mapping, and the development of contingency operating procedures or public engagement mechanisms.¹¹⁰ It is also critical to include municipal authorities in efforts aimed at addressing migration and displacement, such as the global compacts processes.¹¹¹

In the New Urban Agenda, adopted by the U.N. Conference on Housing and Sustainable Urban Development (Habitat III) in December 2016, states pledged to support host cities receiving refugees, IDPs, and migrants regardless of their status.¹¹² However, national-level responses to displacement have been marred by deterrence and austerity policies, budget cuts for local governments, and anti-migrant backlash.¹¹³ In response, many cities “have shown great dynamism and have multiplied innovative approaches” to displacement.¹¹⁴ In the U.S., for example, “sanctuary cities” have developed local migration strategies that are more rights-based than the country's federal laws. This phenomenon is known as decoupling.

To promote effective, inclusive, and accountable urban governance in the context of displacement, the U.N. Educational, Scientific and Cultural Organisation (UNESCO) and the Marianna V. Vardinoyannis Foundation, in partnership with the European Coalition of Cities against Racism (ECCAR), designed an initiative entitled “**Welcoming Cities for Refugees: Promoting Inclusion and Protecting Rights.**”¹¹⁵ Launched in May 2016, the initiative enhances local governments’ capacities within their fields of competence (e.g., in the areas of housing or healthcare) and equips city authorities with the knowledge and skills to address the abuses to which refugees and migrants, especially women and girls, are vulnerable. The initiative has developed a framework checklist, highlighting the main features of the city governance agenda on welcoming refugees and drafted an operational handbook for city administrations and practitioners.¹¹⁶

3. STRENGTHENING ACCOUNTABILITY MECHANISMS

Under international human rights law, states have the duty to respect, protect, promote, and fulfill human rights of all individuals within their territory and subject to their jurisdiction, including refugees, migrants, stateless persons, and IDPs.¹¹⁷ The duty to respect means that states cannot interfere with or curtail the enjoyment of human rights. The duty to protect requires states to prevent violations of human rights and provide effective legal remedies to those whose rights have been violated. The duty to promote and fulfill requires states to actively facilitate the enjoyment of human rights through a range of legislative, judicial, and administrative measures. The notion of accountability stems from the obligations of duty-bearers towards rights-holders and demands that states are answerable for the fulfilment of their human rights obligations.¹¹⁸ Crime, violations of human rights, impunity, and perceptions of injustice are often at the heart of displacement. Therefore, accountability under the law is indispensable both in preventing displacement and ensuring that state and non-state actors face consequences for violating the rights of those who flee.

Entry Points for Rule of Law Programming

Rule of law implementers are well-positioned to assist states in establishing and strengthening their accountability mechanisms in order to curb and respond to displacement. The primary entry points for programming in this context include:

- Building the capacity of the legal profession and justice systems to prevent displacement, protect people who flee, and ensure effective, victim-centered investigation, prosecution, and adjudication of related cases.
- Strengthening national human rights institutions (e.g., ombudspersons and human rights commissions) to document, investigate, and remedy human rights abuses.
- Facilitating mobile courts and alternative dispute resolution mechanisms that bring justice institutions or mediators to displaced people in camps and remote settlements.
- Building the will and capacity of criminal justice actors to ensure strategic, pragmatic, and rights-based responses to crimes and unlawful acts linked to displacement, such

as unauthorized entry or stay, human smuggling, trafficking in persons, and corruption.

- Ensuring that justice and security sector reforms address the particular needs of displaced populations.¹¹⁹
- Promoting alternatives to detention and encampment for displaced people.
- Enhancing response to sexual and gender-based violence (SGBV) in humanitarian settings through prevention, protection, and accountability initiatives.
- Supporting transitional justice mechanisms and accountability for gross violations of human rights, including through human rights documentation projects.

Case Study: Strengthening the Legal Profession and Justice Systems

Ensuring accountability in the context of forced migration requires a highly competent, ethical, and culturally-sensitive legal profession with a deep commitment to social justice. Equally important is the existence of independent accountability mechanisms that deliver justice in a timely and fair manner. These mechanisms may include formal justice institutions, quasi-judicial bodies, informal justice forums, alternative dispute resolution, and national human rights bodies. Forums administering justice must be accessible, affordable, and transparent; have adequate resources; and reflect the makeup of the communities they serve. Solutions to justice problems must be enforceable.

For more than 25 years, ABA ROLI has been a leader in **promoting an effective and independent legal profession** around the world. ABA ROLI's work in this area centers on strengthening bar associations; supporting the adoption of ethics standards and codes of conduct for lawyers; and modernizing continuing legal education regimes. In addition, ABA ROLI mobilizes, connects, and builds the capacity of local attorneys to pursue pioneering cases in such areas as trafficking in persons and advancing the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people. ABA ROLI equips local attorneys with legal advocacy tools and pertinent research; offers trainings, mentoring, and case support; and facilitates peer network and coalition building. **Building strong and credible justice systems** is also one of the hallmarks of ABA ROLI's work. Some of the most prominent programmatic examples in this area include trainings for judges, prosecutors, and law enforcement officers on how to protect victims of SGBV and hate crimes, and how to investigate, prosecute, and adjudicate related cases in an effective and victim-centered manner. These programs have been successful in addressing rule of law gaps that drive displacement. For example, in the last seven years, ABA ROLI has trained over 6,708 police officers, crime scene technicians, forensic scientists, prosecutors, and judges in Central America in an effort to reduce impunity for widespread crime, including gang violence, femicide, and trafficking in persons. In addition, ABA ROLI's Central America Regional Forensics Program promotes coordination between forensics laboratories and law enforcement agencies in El Salvador and Guatemala, and seeks national-level, inter-agency cooperation aimed at streamlining efforts to combat transnational crime.

Through strategic partnerships with humanitarian actors as well as local bar associations, justice actors, and CSOs, these strategies can be replicated in the context of forced migration. Regardless of the jurisdiction, lawyers and judges who handle related cases benefit from specialized courses on legal topics related to displacement, including asylum, immigration, and IDP laws; refugee status determination procedures; access to civil documentation;

housing, land, and property rights; family and personal status matters; SGBV; workers' rights; and detention procedures.

Case Study: Responding to Sexual and Gender-Based Violence in Humanitarian Settings

SGBV, which constitutes one of the most systematic and widespread human rights violations around the world, is often exacerbated in humanitarian settings. In conflict-affected countries, SGBV is frequently used as a weapon of war. From Afghanistan and Myanmar to Yemen and South Sudan, conflict-related sexual violence¹²⁰ terrorizes civilian populations and often forces them to surrender their land and property. SGBV, especially when combined with impunity, is also a root cause of displacement. Women and girls who have been uprooted from their homes are targeted *en route*, at checkpoints, in detention centres, in and around refugee camps, and in their host communities. Displacement increases the risk of SGBV due to crowded living conditions, the loss of social networks, and the breakdown of norms that may have inhibited such violence in the home community. When people flee, gender relations within the family often change. Women may unexpectedly become heads of households while men may experience a loss of self-esteem when they are unable to provide for their families. This may cause increased levels of domestic violence in displaced families. Because SGBV in humanitarian settings permeates communities across borders, an effective response must take place at multiple levels of governance.

At the global level, the U.N. Security Council adopted eight landmark **resolutions on women, peace, and security**, which have addressed the disproportionate impact of armed conflict on women and children, including those displaced. Further, the U.N. has established the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict and the U.N. Secretary General issues annual reports on conflict-related sexual violence. In 2015, the Inter-Agency Standing Committee¹²¹ (IASC) revised and endorsed the **Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action**.¹²² The **Call to Action on Protection from Gender-Based Violence in Emergencies—Action Plan 2016-2020** is also notable. Formally launched in 2013 by the United Kingdom and Sweden, the Call to Action is a multi-stakeholder initiative supported by governments, international organizations, and CSOs to fundamentally transform the way GBV is addressed in humanitarian operations. There are various ways in which the Call to Action is implemented in practice. For example, PRM issues annual funding to support global innovation programs that promote the initiative.¹²³ Among others, this mechanism has allowed the Women's Refugee Commission to test a series of pilot interventions to improve GBV prevention and response in urban humanitarian contexts. One of these interventions brought together Lebanese and refugee transwomen from Syria, Palestine, and Iraq to strengthen protective peer networks and engage in skill-building sessions for activism and risk reduction.¹²⁴

At the local level, ABA ROLI's multi-year programs aimed at eliminating systematic sexual violence used as a tactic of war in Africa are noteworthy. These interventions rest on three pillars: prevention, protection, and accountability.

In the eastern provinces of the **Democratic Republic of Congo**, widespread conflict-related sexual violence has had a devastating impact on individuals and communities. Hundreds of thousands of women have been affected by SGBV. In this context, ABA ROLI and its partners operate 22 legal clinics for SGBV survivors. These clinics have provided legal and psychosocial services to over 25,000 individuals and helped to file over 11,000 cases with local authorities, resulting in nearly 2,000 concluded trials and over 1,000 convictions. In a recent survey of affected populations, respondents credited the program with helping to change local norms and reduce the prevalence of SGBV.¹²⁵ ABA ROLI has also established an early warning system to prevent mass sexual violence in specific locations and deployed mobile investigation teams, clinics, and courts to address SGBV in hard-to-reach villages.

Case Study: Crime and Displacement—A Need for a Pragmatic Response

Crime and displacement are intertwined in many different ways. In the Northern Triangle of Central America, systemic gang violence, femicide, and rape have produced an epidemic of displacement. Across the world, “[t]hose making the journey are assisted by an increasingly violent and opportunistic smuggling industry.”¹²⁶ Many refugees and IDPs fall prey to human traffickers who exploit their vulnerability and force them into slavery.¹²⁷ They are also targeted by hate crimes and bias-motivated violence in countries of transit and destination. Their ability to come forward is marred by the risk of deportation, but even if these crimes are reported, many states fail to prosecute them. Corruption is one of the primary facilitators of human smuggling and trafficking, and can act both as a direct and indirect push factor for people who flee.¹²⁸ In addition, corruption has enabled organized criminal networks to profit from an influx of refugees to a particular area.¹²⁹ For example, the notorious Sicilian mafia, Cosa Nostra, has bribed and coerced local officials to secure lucrative refugee camp management contracts and offer tenders to mafia-run companies providing goods and services to refugee camps.¹³⁰

Evidence demonstrates that a lack of nuance and pragmatism in examining and responding to many of these crimes can be detrimental not only to the safe and orderly movement of people, but also to promoting the rule of law and development.¹³¹ While development actors have an important role to play in building the capacity of local criminal justice systems to ensure accountability for these crimes, pertinent programs need a strategic approach—one that addresses the demand to move across borders and minimizes negative consequences for displaced populations and border communities.¹³²

The **Global Initiative against Transnational Organized Crime** has issued a series of studies on the multibillion-dollar smuggling industry. The studies find that anti-smuggling efforts that do not reflect the complexity of the problem risk trading one crisis for another. The studies explore various forms of human smuggling and note that “those working in it range from altruistic actors who offer a critical lifeline (...) where legitimate alternatives are absent or restricted” to extremely dangerous and sometimes militarized criminal syndicates.¹³³ The studies demonstrate that flawed policies, predicated on migration deterrence and purely punitive law enforcement action, increase the demand for smuggler services, harden their criminality, and increase extortion and violence. They also risk destabilizing border communities that derive their livelihoods from facilitating the movement of goods and people. Further, the studies acknowledge that the U.N. Protocol against the Smuggling of Migrants by Land, Sea, and Air reinforces the proclivity of policymakers “to respond to human smuggling with the full weight of the criminal

justice arsenal.” They caution against targeting low-level, community-based operatives (who are easily replaceable) and propose focusing on the most damaging and sophisticated transnational organized criminal groups.¹³⁴ Finally, the studies warn against policies that conflate human smuggling and trafficking.¹³⁵ In its **2016 policy brief “Understanding and Responding to the Role of Human Smugglers in Migration,”** the Global Initiative against Transnational Organized Crime recommends a new policy approach to human smuggling, including, *inter alia*, focused law enforcement action on high levels and high profit routes and traffickers, and targeted strategies to provide incentives and alternative livelihoods for the smuggling communities. The policy brief concludes that a response to human smuggling should follow the “do not harm” principle to avoid further victimization of displaced populations and border communities.¹³⁶

Similarly, rule of law implementers should take a critical look at countries’ efforts to criminalize refugees, for example by prosecuting them for illegal entry or creating new classes of felonies that render them deportable for committing minor offences. These practices may violate the law, harm the public, and ascribe a damaging stigma of “criminality” to people who flee.¹³⁷ In addition, migration-related detention should always comply with international human rights law. Notably, the Refugee Convention strictly prohibits the imposition of penalties on refugees for illegal entry or presence in a country as long as they present themselves to authorities and show good cause. States are also barred from prolonged or arbitrary detention and other undue restrictions on refugees’ freedom of movement.¹³⁸

Human Rights First (HRF) urges states to revise their immigration **detention policies** in four areas: conducting individualized assessments of detention; considering alternatives to detention; respecting the requirement of prompt and independent court review; and prohibiting detention in penal or punitive conditions.¹³⁹

Case Study: Holding Governments Accountable before International and Domestic Courts

Across the globe, lawyers and their clients have used the power of strategic litigation to hold governments accountable for their failure to uphold human rights. Markedly, the European Court of Human Rights (ECHR) and the Inter-American System for the Protection of Human Rights have well-developed jurisprudence on the protection of the rights of refugees, IDPs, and stateless persons.¹⁴⁰ For example, in the case *Doğan and Others v. Turkey*,¹⁴¹ concluded in June 2004, the ECHR considered a claim lodged by a group of IDPs alleging that the Turkish security forces had destroyed their homes and property and forced them to leave a region under a state of emergency. The court ruled that the denial of access to the applicants’ village constituted interference with their right to the peaceful enjoyment of their possessions. The Inter-American Commission on Human Rights has monitored a number of displacement situations since its creation in 1959,¹⁴² and the Inter-American Court of Human Rights has developed a significant body of case law on the issue. For example, in the 2013 case *Pacheco Tineo Family v. Bolivia*, the court found that Bolivia had violated the American Convention on Human Rights by forcibly returning the asylum-seeking Pacheco Tineo family to Peru.¹⁴³ A series of cases also challenge developed countries’ non-entrée practices, including the Italian government’s efforts to deter Mediterranean migration flows.¹⁴⁴

In the case *Hirsi Jamaa and Others v. Italy*,¹⁴⁵ decided in 2012, the ECHR found Italy in breach of its human rights obligations, including the duty of *non-refoulement*, for intercepting 24 people from Somalia and Eritrea at sea and forcibly returning them to Libya. Citing risks of human rights abuses in Libya and the threat of persecution in the applicants' countries of origin, the court held that a destination country's bilateral removal agreement with a country of origin or transit, even when implemented outside of that country's national territory, did not shield the destination country from its responsibilities under the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴⁶ On February 2, 2017, five years after the ECHR's historic judgment, the Italian government entered into a bilateral Memorandum of Understanding (MOU) with Libya's Government of National Accord. The agreement has allowed the Libyan Coast Guard "to intercept increasing numbers of people at sea and take them back to Libya," where they face unlawful detention, enslavement, labour exploitation, and other serious human rights abuses.¹⁴⁷ On February 8, 2017, six Libyan nationals challenged the legality of the MOU in the Administrative Circuit of the **Tripoli Court of Appeals**, which temporarily suspended the effects of the MOU. Although the Libyan Supreme Court overturned the temporary ruling of the Tripoli court, the case demonstrates a valuable rule of law strategy for addressing the refugee crisis.¹⁴⁸

4. ENSURING EMPOWERED PROTECTION

"Empowered protection" means that displaced people and returnees are not only protected under the law, but also have the knowledge and resources to assert and meaningfully exercise their rights in practice. The ultimate goal of empowered protection for displaced people is their security, resilience, self-reliance, and reduced dependence on humanitarian aid. This occurs when they can make autonomous choices about where and how to live; when they feel safe and welcome in their communities; and when they can generate and control income, assets, and other resources.¹⁴⁹ Empowered protection also entails peaceful, safe, and productive co-existence between the displaced and local populations. Accordingly, ensuring empowered protection necessitates support to displaced populations and their host communities.

Empowering People Who Flee

When people become displaced, their safety nets disappear, rendering them highly vulnerable.¹⁵⁰ Refugees can no longer avail themselves of the protection of their home countries. To boot, they are often unwelcome in the countries of transit and destination. In the process leading to the adoption of the 1951 Refugee Convention, Trygve Lie, the first U.N. Secretary General, envisioned a scheme in which refugees would lead an independent, equitable, and stable life, after being rapidly assimilated in the community which had given them shelter.¹⁵¹ Today, this vision is hardly a reality. Many refugees are refused admission without ever being able to apply for asylum. Others face detention, confinement to camps, protracted asylum procedures, and expulsion. Even those who become officially recognized as refugees are frequently perceived by their host communities as outsiders, competitors for natural and economic resources, and threats to national security. Consequently, they face intolerance, violent attacks, and significant integration challenges. Refugees frequently lack access to information, socio-economic protections, and an effective legal remedy.¹⁵² Births go unregistered, disputes over property and evictions are commonplace, and the lack of civil documentation compounds their vulnerability.¹⁵³ All of these factors lead to the

marginalization of refugees and deprives them of the ability to provide for themselves and their families. Systemic disenfranchisement makes refugees burdens on their host communities rather than contributing members of society. This only exacerbates tensions with local populations.

In 2014, Asylum Access examined **refugee work rights** in 15 countries hosting 30 percent of the global refugee population. The study found that 45 percent of these countries had a complete legal bar to employment for refugees. Even in countries where the right to work was guaranteed under the law, refugees faced significant *de facto* barriers to employment, including strict encampment, exorbitant permit fees, and a lack of legal recourse for violations of labor rights.¹⁵⁴ In its 2016 Guiding Principles on the Access of Refugees and other Forcibly Displaced Persons to the Labor Market, the International Labor Organization (ILO) stressed the importance of providing “decent work opportunities for all, including nationals, refugees and other forcibly displaced persons.”¹⁵⁵ These principles were reinforced in 2017 with the adoption of ILO’s Employment and Decent Work for Peace and Resilience Recommendation.¹⁵⁶ Labor and employment rights are also enshrined in the 1951 Refugee Convention.¹⁵⁷ As Jennifer Gordon notes, the Global Compact on Refugees should emphasize that whenever refugees are to be treated as laborers, they must be entitled to social protections and full workplace rights, including mobility between employers and freedom of association.”¹⁵⁸

While IDPs are usually citizens of the countries in which they are displaced, they too face major difficulties in exercising their rights. In many situations, they are stigmatized on ethnic, religious or racial grounds, or simply because they come from conflict zones. Host communities may perceive IDPs to be a threat to their livelihoods and blame them for increasing prices, decreasing wages, and straining social services. The loss of social networks increases IDPs’ vulnerabilities. In ongoing conflicts, the lack of local knowledge about areas that are safe and unsafe also puts their lives at risk. Administrative and bureaucratic obstacles further limit their access to justice, particularly if they have lost documentation attesting to their citizenship. In some countries, such as Myanmar, IDPs are forced to live in government-run camps and lack freedom of movement.

Disempowerment of displaced people and their lack of access to justice are among the core impediments to implementing protection guarantees in practice. Faced with unknown contexts, unfamiliar or foreign institutions, and different sets of legal rules and customs, many refugees and IDPs are not aware of the benefits to which they are entitled and how to access them. Even if they are able to reach adequate institutions to claim their legal entitlements, these institutions often fail them. Linguistic and cultural difficulties, institutional bias, and procedural and infrastructural barriers that inhibit the equitable delivery of services put displaced people at a disadvantage in government institutions. These barriers are exacerbated in conflict and post-conflict settings, where institutions are significantly weakened, slow to build, and difficult to trust. Accessing justice and essential services can be particularly challenging for victims of abuse, including SGBV survivors and the displaced who experience multiple layers of vulnerability due to their gender, gender identity or expression, sexual orientation, age, race, or other status.

Multiple conditions must be in place to ensure access to justice. On the supply side, justice institutions must be available, accessible, independent, and accountable. They must function effectively, be sensitive to the needs of the displaced, refrain from discrimination and bias,

and offer enforceable solutions. On the demand side, displaced people must have meaningful access to legal protections;¹⁵⁹ understand and exercise their rights and duties under the law; have recourse to quality legal advice and representation; and feel empowered to use justice institutions to assert their rights.

Supporting Host Communities

The empowered protection of displaced populations is not feasible without due attention to the needs of host communities. Regardless of the relative size of the displaced population and the type of settlement, relationships between the newcomers and the locals are always very complex.¹⁶⁰ On the positive side, the displaced can be a boon to the host community by spurring long-term public investment (including donor funding), increasing labour supply and consumer base, and triggering local economic activity.¹⁶¹ On the negative side, the displaced can be a burden to the host country by exacerbating pre-existing economic and labor market challenges.¹⁶² An influx of people to a particular community can also cause physical and economic overcrowding and put strain on resources, services, infrastructure, and the environment. In fact, “[a] common source of discontent for a local population, especially one that is poor, is to see refugees receiving services or entitlements which are not available to them.”¹⁶³ This dynamic is also apparent in many IDP situations, particularly when IDPs receive cash assistance that is not available to poor local residents.¹⁶⁴ This increases the potential for societal strife, exclusionary practices, and hate crimes.¹⁶⁵ Hosting displaced people also has significant political, cultural, and ethnographic dimensions.¹⁶⁶ For example, the displacement of significant numbers of Arab IDPs into Kurdish regions in northern Iraq is changing the sectarian balance of the region and fostering political tensions in receiving communities. To ease these tensions, it is crucial to invest in host communities by increasing their capacity for service delivery, economic development, social cohesion, and conflict mitigation. Some governments, such as Jordan, require international assistance to refugees to include support for host communities.

Entry Points for Rule of Law Programming

Rule of law practitioners can implement programs fostering the empowered protection of displaced people and their host communities. By putting the power of the law in the hands of the affected populations, these programs can strengthen the capacity of affected populations to exercise their individual rights and equip them with tools they need to become self-reliant. The primary entry points for programming in this context include:

- Enhancing displaced people’s access to justice through legal empowerment programs.¹⁶⁷
- Strengthening the capacity of local legal aid providers to offer legal services to displaced people.
- Supporting local actors, including lawyers and CSOs, in dismantling legal and practical barriers that displaced people face in accessing their rights.
- Addressing the unique needs of women, children, and other vulnerable populations through targeted interventions and mainstreaming strategies.
- Building social cohesion in host communities through civic education, public awareness raising, community dialogues, mediation, and other forms of peaceful dispute resolution.

Legal empowerment interventions, which can range from legal information workshops to individual consultations, aim at equipping displaced people with the knowledge and resources they need to assert their legal rights and have a meaningful voice in local affairs. **Individual-level empowerment** is critical to ensuring that displaced people are effectively protected from discrimination and violence, and enjoy access to civic documentation, safe and legal employment, housing, land, property, and essential services. **Community-level empowerment** is grounded in the principle of participatory development: people who flee cannot be seen as passive recipients of aid but rather, as active participants in the design of solutions to their problems.

Case Study: Expanding Access to Legal Aid for Refugees and IDPs

Access to high-quality legal aid is vital to ensuring empowered protection for refugees and IDPs at every stage of displacement.¹⁶⁸ In the U.S., for example, asylum seekers with legal representation are almost five times more likely to receive asylum than those without access to legal aid.¹⁶⁹ Some of the core rule of law strategies aimed at expanding access to legal aid include trainings for local lawyers; promoting *pro bono* culture in the legal profession; building the capacity of CSOs, grassroots advocates, and community-based paralegals to offer affordable legal advice; and supporting legal aid clinics and travelling lawyer programs to bring cost-free legal aid to refugees and IDPs in remote areas.

Since 2014, ABA ROLI has operated a multi-pronged **legal awareness program in Turkey** serving primarily the Syrian refugee population living outside refugee camps. The program is based on strong partnerships with Turkish Bar Associations and trained more than 200 Turkish lawyers on the country's Temporary Protection Regime and other pertinent legal issues. As of March 2018, the network of ABA ROLI-trained lawyers has conducted over 500 legal awareness sessions for over 19,800 Syrians. More than 175 of these sessions were held for women and youth, and addressed such issues as personal status laws, domestic violence, forced and early marriage, child labor, access to employment and housing, citizenship, and family reunification. Turkish lawyers have also provided private legal information to over 5,350 individuals, mostly through a text message (SMS) helpline, which fields approximately 100 requests for legal information a month. Further, ABA ROLI has conducted a robust media campaign delivered via Facebook, a mobile app, popular websites, YouTube, and radio, reaching over 250,000 Syrians. Out of the nearly 700 program beneficiaries surveyed in September 2017, more than 80 percent responded that as a result of the legal information received from ABA ROLI's project, they took, or had immediate plans to take steps to resolve their legal issues. ABA ROLI also operates a holistic **legal aid program for refugees in Armenia** funded by PRM. Its Refugee Legal Assistance Center (RLAC) helps displaced and conflict-affected persons (including Syrian refugees and displaced Azerbaijani Armenians) meet their most immediate resettlement needs and build successful livelihoods in the new country. The assistance offered by RLAC focuses on access to housing, land, property, education, healthcare, employment, credit, identification documents, and social benefits. It also covers Armenia's complex business and tax laws. RLAC has pursued several strategic litigation cases, resulting, for example, in refugees having their work credentials and certifications reinstated for the purposes of obtaining pensions. Finally, RLAC educates refugee children about their rights and responsibilities.

Successful legal aid models for refugee and migrant protection in the U.S. and Europe include those established by the ABA, HRF, the Immigrant Justice Corps (IJC), the European Lawyers in Lesvos, and the Norwegian Refugee Council (NRC).

The ABA supports three border programs that provide legal information, *pro se* assistance, direct representation, and technical assistance to lawyers and accredited representatives. These include **ProBAR** (the South Texas Pro Bono Asylum Representation Project in Harlingen, Texas),¹⁷⁰ the **Immigration Justice Project** in San Diego, California,¹⁷¹ and the **Children’s Immigration Law Academy** housed in the South Texas College of Law Houston.¹⁷² The ABA also maintains a free hotline from all detention centers operated by U.S. Immigration and Customs Enforcement. HRF’s **Refugee Representation Program** matches asylum seekers with U.S. lawyers who are willing to represent them on a *pro bono* basis. The lawyers receive mentoring and training throughout the representation process.¹⁷³ IJC is the first **immigration legal fellowship program** in the U.S. The program seeks to expand access to counsel for asylum seekers, immigrants, and individuals in deportation proceedings, and raise the quality of the U.S. immigration bar. Inspired by Judge Robert Katzmann, IJC recruits lawyers (Justice Fellows) and college graduates (Community Fellows), trains them in the provision of high-quality legal aid to vulnerable populations, and pairs them with leading non-profit legal service providers and community-based organizations.¹⁷⁴ The **European Lawyers in Lesvos**, founded by the Council of Bars and Law Societies of Europe and the German Bar Association, sends volunteer European asylum lawyers to the island of Lesvos (Lesbos) to support Greek lawyers in the provision of legal assistance to individuals applying for international protection.¹⁷⁵ All consultations are provided in Moria, a home to the island’s largest camp, which has been dubbed the “island prison” for thousands of refugees.¹⁷⁶ The NRC’s **Information, Counselling and Legal Assistance** program provides a range of legal services to hundreds of thousands refugees and IDPs in 20 countries.¹⁷⁷

Case Study: Addressing the Unique Needs of Women, Children, and Other Vulnerable Populations

According to the U.N., women make up approximately half of the 244 million international migrants, half of 65.6 million displaced people worldwide, and 73.4 percent of international migrant domestic workers.¹⁷⁸ Regardless of the setting in which they find themselves, refugee and internally displaced women face unique vulnerabilities and have specialized protection needs.¹⁷⁹

Although the principles of gender equality and women’s empowerment are embedded in international and many national legal frameworks, women face persistent discrimination and violence in their homes, communities, and workplaces. Conflict, instability, and displacement only exacerbate these pre-existing patterns of discrimination, particularly when they interact with intersecting factors like age, disability, HIV status, pregnancy, ethnicity, religion, or non-conforming sexual orientation. Women who become separated from their husbands and families experience additional difficulties. Many unexpectedly become heads of households and yet they tend to have less access to socio-economic rights than men in similar situations.¹⁸⁰ Some face harassment and intimidation by moving alone, particularly in countries that prohibit or discourage women from travelling without a male companion. Most are acutely vulnerable to SGBV, trafficking in persons, and other forms of exploitation. A lack of adequate assistance means that they might be forced to engage in sex work to support themselves and their children.¹⁸¹

In host countries, women and girls also encounter unique challenges associated with often vastly different socio-cultural norms and legal regimes governing nationality, personal status, and family matters. This is evident in the context of the Syrian refugee crisis.

In Syria, religious and polygamous marriages are legal, and children as young as 15 (boys) and 13 (girls) can marry with the consent of a guardian and a judge. In Turkey, which hosts more than 3.5 million registered Syrian refugees, polygamy is a criminal offence, only civil marriages are allowed, and no one can marry under the age of 18. These differences have dire practical consequences for Syrian women residing in Turkey. For example, if a Syrian wife is underage, or if she is her husband's second wife, she may choose not to give birth in a hospital or register her newborn for fear of being prosecuted by the Turkish government. These difficulties are compounded by the fact that many Syrian women enter into underage, religious, and polygamous marriages with Turkish men to meet their basic needs. These marriages are never registered and fall outside of the Turkish laws governing women's rights during marriage and after its dissolution. If a Turkish father does not officially recognize a child born of such marriage (e.g., because of the fear of criminal sanctions), the child will be stateless because under Syrian law, women are not allowed to pass nationality to their children.¹⁸²

Regardless of gender, displaced children and youth are also particularly vulnerable.¹⁸³ Their harrowing journeys are frequently marked by fear and exploitation.¹⁸⁴ Trauma experienced back home and during flight can have long-term effects. A 2015 study of Syrian refugee children in Turkey found that a staggering 79 percent of children had experienced a death in their family.¹⁸⁵ When they finally arrive in an area where they hope to find safety, they often encounter unsympathetic reception policies and even detention. For example, the U.S. has been widely criticized for its treatment of unaccompanied children and families with children from Central America. When the U.S. experienced a dramatic surge in the arrivals of these two populations in 2014, the federal government expanded its practice of family detention, locking parents and children in prison-like facilities as a deterrence measure.¹⁸⁶ "Children on the Run," a study published the same year by the UNHCR, found that as many as 58 percent of unaccompanied and separated children travelling from the Northern Triangle and Mexico to the U.S. had actual or potential international protection needs, largely due to gang-related violence and abuse at home.¹⁸⁷

Rule of law challenges facing LGBTI communities are also significant. LGBTI people, including those displaced, have historically endured severe and persistent forms of discrimination, exclusion, and bias-motivated violence. In the vast majority of cases, attacks against them go unnoticed and many are perpetrated, or starkly overlooked, by justice system actors. Some of these violations are deeply entrenched in national legal frameworks. For example, over 70 countries still have laws that criminalize private, consensual same-sex relationships, exposing millions of individuals to the risks of repressive policing practices, imprisonment, and—in some countries—the death penalty. Many LGBTI individuals flee these repressive regimes only to find themselves in countries that either have similar laws or refuse to grant refugee protections based on sexual orientation or gender identity (SOGI). As Human Rights First notes, the intersection of identities among LGBTI refugees and IDPs "produces a 'double marginality,' which can lead to profound isolation and marginalization."¹⁸⁸

In the **New York Declaration**, states made powerful commitments to integrate a gender perspective into their national responses to large movements of refugees and migrants; promote gender equality and the empowerment of all women and girls; combat SGBV; provide access to sexual and reproductive health-care services; tackle the multiple and intersecting forms of discrimination against refugee and migrant women and girls; and ensure their full, equal, and meaningful participation in the development of local solutions and opportunities.¹⁸⁹ States have also committed to addressing the special needs of all people in vulnerable situations, including children, minorities, victims of violence, older persons, and persons with disabilities.¹⁹⁰ The New York Declaration does not explicitly mention LGBTI people. Nonetheless, **UNHCR's Guidelines on International Protection** and the **Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity** affirm that people fleeing persecution on the grounds of SOGI can qualify as refugees under the Refugee Convention. According to UNHCR, refugee claims based on SOGI “are most commonly recognized under the ‘membership of a particular social group’ ground.” Other grounds may also be relevant dependent on the context.¹⁹¹

It is imperative that states receive the rule of law assistance they need to meet these commitments and implement these guidelines in practice.

Case Study: Ensuring Access to Civil Documentation

Over 100 developing countries do not have well-functioning civil registration and vital systems.¹⁹² In addition to physical and economic barriers to civil registration (e.g., administrative fees and travel costs), many communities either lack awareness about its importance or exhibit a reliance on spoken words rather than written documents. In conflict-ridden and fragile states, this is exacerbated by the breakdown of government functions and insecurity, which pose unique challenges to IDPs. Many displaced people travel without any identity documents because those documents have been left behind, lost, destroyed, or confiscated by smugglers or traffickers. In transit and destination countries, refugees face additional difficulties, including the absence of laws that allow civil registration for non-nationals; misinformation about civil registration; and a fear of detention and deportation that makes them reluctant to approach authorities.¹⁹³ These limitations can be devastating for those who flee, particularly if compounded by high levels of xenophobia and discrimination in host communities. The lack of access to civil documentation hinders their access to humanitarian aid and practically all socio-economic rights. In addition, undocumented births increase the risk of statelessness, while a failure to prove age of girls exposes them to greater risks of early marriage and exploitation.¹⁹⁴ It is imperative for the development community to support local actors, including CSOs, in expanding access to civil registration for stateless and displaced people.

Between May and October 2017, the city of Marawi in Mindanao, the **Philippines**, experienced armed conflict between Philippine security forces and extremist groups. In five short months, over 400,000 people were internally displaced and the city was left in ruins. Prior to the siege, Marawi had one of the lowest rates of birth registration in the country. During the conflict, pertinent government infrastructure was destroyed and civilians who had possessed legal identity documents lost them along with their livelihoods.

This created an acute civil documentation crisis for the **Marawian IDPs**, who became unable to access basic government assistance. To address the problem, a Filipino organization Initiatives for Dialogue and Empowerment through Alternative Legal Services (IDEALS), issued temporary identification documents (IDs) to displaced Marawians through the use of legal identity caravans in Cagayan de Oro—a city in Northern Mindanao. As of October 25, 2017, IDEALS caravans issued temporary IDs to 2,521 families (5,070 individuals), making up 48 percent of IDP families registered with the Department of Social Welfare and Development or other local government units. ABA ROLI, which is currently re-equipping the court of Marawi with funding from the U.S. Agency for International Development (USAID), is exploring further opportunities to support IDPs on the island in partnership with IDEALS.

Case Study: Building Social Cohesion in Host Communities

An influx of refugees or IDPs constitutes an economic and social shock to the host community. If not addressed appropriately, this shock may result in increased social tensions and—potentially—violence between the displaced and local populations. In some cases, these tensions may lead to further instability and conflict in the country of destination, fuelling the global displacement crisis.¹⁹⁵ There are many potential entry points for alleviating and diffusing social tensions. Interventions in this area tend to center on building social cohesion, conflict management, and community stabilization.

In 2013, Search for Common Ground, which works to transform the way individuals and societies deal with conflict, initiated a **“Social Cohesion Program in Lebanon”** to mitigate tensions between Syrian refugees and 11 different host communities. The program began with a conflict assessment, which revealed that Syrians and Lebanese “prefer avoidance and mediation rather than confrontational methods [of dispute resolution].”¹⁹⁶ The assessment informed Search’s collaborative, community-led solutions, which included a series of roundtable discussions that created a safe space for Lebanese and Syrians to engage in dialogue and sustainable relationship building. In addition, Search offered trainings on non-violent communication and created committees responsible for the implementation of joint community activities, such as the garbage collection and recycling initiative in Sarafand (South Lebanon). The organization concluded that working toward social cohesion requires breaking the physical and mental barriers between the two communities by creating opportunities for positive interaction and non-confrontational conflict resolution.¹⁹⁷

Notable initiatives aimed at building social cohesion are also underway in Libya, which has experienced ongoing conflict and instability.

In 2015, ABA ROLI initiated a program to support constitutional reform and build a culture of participatory governance in Libya. The program’s signature activities include **community dialogues**, facilitated by trained community liaisons. Some of these sessions focus exclusively on migration and internal displacement, generating important conversations about immigration laws, the impact of displacement on local communities, the rights of IDPs, and the role of various actors in addressing forced migration. The participants range from community members, legal professionals, and CSOs, to mayors and local council representatives. In parallel, IOM is executing a **community stabilization program “Together We Rebuild”** to promote peace and stability for IDPs, migrants, and local host communities in southern Libya. The initiative involves outreach, trainings, and support for inter- and intra- community dialogue.¹⁹⁸

IV. CONCLUSIONS AND CALL TO ACTION

This paper sought to demonstrate the benefits of exploring the relationship between the rule of law and forced migration. It framed the rule of law in the context of global displacement; outlined four broad rule of law approaches to forced migration; and included a series of case studies to illustrate good practices that have the potential of being scaled up or replicated in other contexts. In so doing, it also provided evidence that strengthening the rule of law is central to preventing and responding to forced migration. This concluding section will highlight four overarching themes that need further attention in an effort to integrate rule of law approaches to the global displacement response. They include: breaking down siloes; developing stronger normative standards; implementing existing laws; and deepening research, analysis, and reflection.

Breaking down Siloes

Presently, experts in forced migration tend to be the ones who support the development and implementation of legal norms related to displacement. We suggest that rule of law implementers identify avenues for mainstreaming displacement issues into their programming. Correspondingly, humanitarian actors should consider rule of law interventions as an important part of their work. Our specific recommendations in this area include:

- Raise awareness about the critical importance of including rule of law solutions in the response to the global displacement crisis among donors, technical assistance providers, local stakeholders, and the media.
- Facilitate regular interactions between rule of law and forced migration experts. Encourage local bar associations to organize related briefings and discussions.
- Encourage rule of law development and humanitarian actors to design and implement joint initiatives for sustainable solutions.
- Ensure that rule of law programming on forced migration is inclusive and participatory. This includes meaningful inclusion of affected populations in the design, implementation, monitoring, and evaluation of related programs and engaging a wide range of stakeholders, including groups and experts that work on gender issues, children's rights, and the rights of vulnerable populations.
- Educate relevant stakeholders on the links between the rule of law and forced migration, whether by including relevant courses in law school curricula or continuing legal education programs; delivering tailored training modules for judges, lawyers, prosecutors, law enforcement officers, and border officials; or developing online courses for the legal and humanitarian communities.

Developing Stronger Normative Standards

Just legal frameworks are key to preventing and responding to displacement. The rule of law community is uniquely positioned to support local parliamentarians, government officials, and civil society in developing strong normative standards in the context of forced migration. Our specific recommendations in this area include:

- Examine compliance of existing national legal frameworks with pertinent international legal standards and recommend adequate reform measures.
- Perform political economy and attitudinal analyses to identify opportunities and barriers to legal and policy reform efforts.
- Analyze how the Global Compact on Refugees relates to the rule of law and how rule of law development programs can contribute to the implementation of the compact. Disseminate this analysis through regional and national legal networks.
- Leverage the Global Compact on Refugees to stimulate legal and policy reform at the national levels through legal research, advocacy, trainings, stakeholder engagement, and programs promoting participatory democracy.
- Encourage regional meetings and regional organizations to consider the relationship between the rule of law and forced migration. Analyse existing regional instruments in terms of their applicability to forced migration and encourage states to adopt further regional legal frameworks on the protection of displaced people.

Implementing Existing Laws

Strong and just normative frameworks are not sufficient to prevent forced migration and protect people who flee if laws merely stay on the books. We suggest that rule of law implementers provide local stakeholders with the resources and technical assistance they need to implement relevant laws and policies in practice. Our specific recommendations in this area include:

- Promote the vigorous implementation of pertinent international standards, including the forthcoming global compacts, at the national levels and help to hold states accountable for their failures to respect human rights and fundamental freedoms.
- Help strengthen governance structures and accountability mechanisms through trainings and other capacity building activities.
- Enhance the capacity of local bar associations, CSOs, community paralegals, and human rights activists to respond to the legal needs of displaced people.
- Raise public awareness about the rights and responsibilities of displaced people under the law. Help combat stigma and discrimination against them, including the perception of non-nationals as “criminal aliens.”

Research, Analysis, and Reflection

There is great need for more research and better data on the relationship between the rule of law and forced migration in order to prioritize investments and design adequate interventions. For example, studies demonstrate that having legal representation significantly increases the chances of getting an asylum status in the U.S. Otherwise, evidence on the impact of just laws and rule of law interventions in the area of forced migration is hard to come by. Our specific recommendations in this area include:

- Conduct needs assessments to ensure that rule of law programs addressing displacement are tailored to a particular country context and the needs of affected populations.
- Underwrite or conduct impact evaluations measuring the effectiveness of rule of law programming aimed at preventing forced migration, protecting displaced populations, and supporting host communities. Disseminate findings among the development and humanitarian actors.
- Support collaborative research and information sharing between rule of law and forced migration experts. Ensure that journals and conferences dedicated to forced migration feature articles and panels on the rule of law. By the same token, ensure that journals and conferences dedicated to the rule of law feature articles and panels on forced migration.
- Seek out opportunities for interdisciplinary research on forced migration with lawyers, economists, sociologists, political scientists, and experts from other fields.

LIST OF ACRONYMS

ABA	American Bar Association
ABA ROLI	ABA Rule of Law Initiative
AIDA	Asylum Information Database
CAT	Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CGRS	Center for Gender & Refugee Studies
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organizations
DACA	Deferred Action for Childhood Arrivals
DRL	U.S. Department of State's Bureau of Democracy, Human Rights, and Labor
ECCAR	European Coalition of Cities Against Racism
ECHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
E.U.	European Union
FGM/C	Female Genital Mutilation/Cutting
FSI	Fragile States Index
HRF	Human Rights First
IASC	Interagency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDEALS	Initiatives for Dialogue and Empowerment through Alternative Legal Services
IDs	Identification Documents
IDPs	Internally Displaced People
IJC	Immigrant Justice Corps
ILO	International Labor Organization
INL	U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs
IOM	International Organization for Migration
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
MEPI	U.S.-Middle East Partnership Initiative
MOU	Memorandum of Understanding
NRC	Norwegian Refugee Council
OHCHR	Office of the U.N. High Commissioner for Human Rights
PRM	U.S. Department of State's Bureau of Population, Refugees, and Migration
RLAC	Refugee Legal Assistance Center
RSD	Refugee Status Determination
SGBV	Sexual and Gender-Based Violence

SMS	Short Message Service
SOGI	Sexual Orientation and/or Gender Identity
TPS	Temporary Protected Status
TTLP	Global Protection Cluster's Task Team on Law and Policy
U.N.	United Nations
UNDP	U.N. Development Programme
UNESCO	U.N. Educational, Scientific, and Cultural Organization
UNHCR	U.N. High Commissioner for Refugees
UNICEF	U.N. International Children's Emergency Fund
UNPOL	U.N. Police
UNRWA	U.N. Relief and Works Agency for Palestine Refugees in the Near East
U.N. Women	U.N. Entity for Gender Equality and the Empowerment of Women
U.S.	United States of America
USAID	U.S. Agency for International Development
WJP	World Justice Project

ENDNOTES

¹ UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 at 2 (2017).

² *Id.*

³ CONVENTION RELATING TO THE STATUS OF REFUGEES art. 1 (*adopted* July 25, 1951 by U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; U.N. Doc. A/CONF.2/108/Rev.1) [hereinafter REFUGEE CONVENTION or 1951 REFUGEE CONVENTION].

⁴ The 1969 Refugee Convention adopted by the Organization of African Unity expands the definition of a “**refugee**” to include not only those fleeing persecution, but also those who flee their homelands “owing to external aggression, occupation, foreign domination or events seriously disturbing public order.” CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA art. 1(2) (*adopted* Sept. 10, 1969 by Organization of African Unity) [hereinafter OAU REFUGEE CONVENTION]. Similarly the Cartagena Declaration on Refugees expands international protection to a broader set of beneficiaries. CARTAGENA DECLARATION ON REFUGEES (*adopted* Nov. 22, 1984 by Colloquium on the International Protection of Refugees in Central America) [hereinafter CARTAGENA DECLARATION].

⁵ UNHCR, *supra* note 1.

⁶ U.N. GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (*published* 1998, U.N. Doc. E/CN.4/1998/53/Add; *endorsed* Oct. 24, 2015 by U.N. G.A. Res. A/RES/60/1) [hereinafter U.N. GUIDING PRINCIPLES]. This definition was incorporated into the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which further defines “**internal displacement**” as “the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders.” AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA (KAMPALA CONVENTION) art. 1 (k-1) (*adopted* Oct. 23, 2009 by African Union) [hereinafter KAMPALA CONVENTION].

⁷ A “**migrant**” is defined by the U.N. Department of Economic and Social Affairs (DESA) as “any person who changes his or her country of usual residence.” See U.N. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, STATISTICS DIVISION, RECOMMENDATION ON STATISTICS OF INTERNATIONAL MIGRATION: REVISION 1 (1998, U.N. Doc. ST/ESA/STAT/SER.M/58/Rev.1). This definition includes refugees but excludes migrants in transit situations. Other U.N. agencies define migrants differently. The International Organization for Migration (IOM) defines a migrant “as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is. See *Who is a Migrant*, IOM, <https://www.iom.int/who-is-a-migrant>. The Office of the U.N. High Commissioner for Human Rights (OHCHR) defines an international migrant as “any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations.” See OHCHR, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AT INTERNATIONAL BORDERS para. 10 (*issued* July 23, 2014; U.N. Doc. A/69/CRP.1, 23).

⁸ HUMANITARIAN CRISES AND MIGRATION: CAUSES, CONSEQUENCES AND RESPONSES (Susan Martin & Sanjula Weerasinghe, eds., Routledge, 2014).

⁹ ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT (Cornell University Press, 2013).

¹⁰ NEW YORK DECLARATION ON REFUGEES AND MIGRANTS (*adopted* Sept. 19, 2016 by U.N. G.A., U.N. Doc. A/RES/71/1) [hereinafter NEW YORK DECLARATION].

¹¹ The New York Declaration called for a state-led process to develop guidance for responding to migrants in vulnerable situations, but as of this writing, this recommendation has not been taken up. NEW YORK DECLARATION para 52. The Global Migration Group Working Group on Human Rights and Gender Equality, under the leadership of OHCHR, has developed guidelines for this group of people but they have not yet been considered by states. OHCHR, PRINCIPLES AND PRACTICAL GUIDANCE ON THE PROTECTION OF THE HUMAN RIGHTS OF MIGRANTS IN VULNERABLE SITUATIONS (*submitted to* U.N. Human Rights Council on Feb. 7, 2018, U.N. Docs. A/HRC/37/34 and A/HRC/37/34/Add.1).

¹² *Global Displacement Risk Model*, INTERNAL DISPLACEMENT MONITORING CENTRE (IDMC) (2017), <http://www.internal-displacement.org/database/global-displacement-risk-model/?source=mailchimp>; see also *Climate Change and Disasters*, UNHCR, <http://www.unhcr.org/en-us/climate-change-and-disasters.html>.

¹³ IDMC, GLOBAL REPORT ON INTERNAL DISPLACEMENT 61-62 (2017).

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- ¹⁴ U.N., ISSUE BRIEF NO. 2: ADDRESSING DRIVERS OF MIGRATION, INCLUDING ADVERSE EFFECTS OF CLIMATE CHANGE, NATURAL DISASTERS AND HUMAN-MADE CRISES, THROUGH PROTECTION AND ASSISTANCE, SUSTAINABLE DEVELOPMENT, POVERTY ERADICATION, CONFLICT PREVENTION AND RESOLUTION, https://refugeesmigrants.un.org/sites/default/files/issue_brief_ts2_final.pdf
- ¹⁵ IOM, MIXED MIGRATION BROCHURE, <https://www.iom.int/files/live/sites/iom/files/Country/docs/Mixed-Migration-HOA.pdf>
- ¹⁶ UNHCR, MIXED MIGRATION: A 10-POINT PLAN OF ACTION (2007).
- ¹⁷ JEFF CRISP & AMY SLAUGHTER, A SURROGATE STATE? THE ROLE OF UNHCR IN PROTRACTED REFUGEE SITUATIONS (UNHCR, New Issues in Refugee Research, Paper No. 168, 2009).
- ¹⁸ The international community has made several attempts at comprehensive and cross-sectoral responses to forced migration, from the cluster system and early recovery to “the new way of working.” However, integrated and comprehensive responses have remained elusive.
- ¹⁹ Presentation, Volker Türk, Rule of Law and Protection of Refugees (June 2, 2017).
- ²⁰ NEW YORK DECLARATION paras. 12, 43, 64.
- ²¹ *Goal 16: Promote Just, Peaceful and Inclusive Societies*, U.N.: SUSTAINABLE DEVELOPMENT GOALS, <https://www.un.org/sustainabledevelopment/peace-justice/>.
- ²² M. Margaret McKeown, *The ABA Rule of Law Initiative Celebrating 25 Years of Global Initiatives*, 39 Mich. J. Int'l L. 117 (2018).
- ²³ *Id.*
- ²⁴ Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J.L.S. 233 (2012).
- ²⁵ Some experts label these this approach as the “rule by law” rather than “rule of law” (emphasis added). McKeown *supra* note 23 at 118.
- ²⁶ Book Review, Michelle Foster (2011) [SUSAN KNEEBONE (ED.), REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW (Cambridge University Press, 2009)].
- ²⁷ *What is the Rule of Law?*, WORLD JUSTICE PROJECT (WJP), <https://worldjusticeproject.org/about-us/overview/what-rule-law>; *What is the Rule of Law?*, U.N., <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.
- ²⁸ GEOFF GILBERT & ANNA MAGDALENA RÜSCH, RULE OF LAW AND UNITED NATIONS INTEROPERABILITY 23 (2018).
- ²⁹ There is no standard definition of an “**open government**.” According to the Organization for Economic Cooperation and Development (OECD), “a government is open when it follows the principles of transparency, accountability, and participation.” OECD, OPEN GOVERNMENT: THE GLOBAL CONTEXT AND THE WAY FORWARD 1 (2016). The U.S.’s Open Government Directive instructs all federal agencies to actively open their operations to the public. At the heart of the directive are three principles: transparency, participation, and collaboration. *See Open Government Directive*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/general/open-government-directive>.
- ³⁰ ABA ROLI, ACCESS TO JUSTICE ASSESSMENT TOOL (2012).
- ³¹ PROTOCOL RELATING TO THE STATUS OF REFUGEES (*adopted* Jan. 31, 1967, U.N. Doc. A/RES/2198) [hereinafter 1967 REFUGEE PROTOCOL or 1967 PROTOCOL].
- ³² *See Refworld*, UNHCR, <http://www.refworld.org>.
- ³³ STATUTE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (*adopted* Dec. 14, 1950 by U.N. G.A. Res. N 428 (V)).
- ³⁴ CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS (*adopted* Sept. 28, 1954 by U.N. Conference on the Status of Stateless Persons); CONVENTION ON THE REDUCTION OF STATELESSNESS (*adopted* Aug. 30, 1961 by U.N. Conference on the Elimination or Reduction of Future Statelessness).
- ³⁵ CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA art. 1 (*adopted* Sept. 10, 1969 by the Assembly of Heads of State and Government of the Organization of African Unity).
- ³⁶ The Cartagena Declaration, reaffirmed at regional meetings in Mexico in 2004 and in Brazil in 2014, has been incorporated into the national laws of 14 countries.
- ³⁷ The 2015-17 European Union (E.U.) Relocation Scheme was intended to transfer asylum seekers who are in clear need of international protection from one E.U. member state to another in order to relieve the pressure on states experiencing mass arrivals, such as Italy and Greece. By the time the two-year program ended in September 2017, European countries had relocated less than a third of the projected number with major opposition to the program expressed by several countries in Central and Eastern Europe. Poland and Hungary refused to accept any asylum seekers. Slovakia accepted only 16 of the 902 asylum seekers it was assigned and the Czech Republic only 12 of 2,691. *See EU: Countries have fulfilled less than a third of their asylum relocation promises*, AMNESTY INTERNATIONAL (Sept. 25, 2017), <https://www.amnesty.org/en/latest/news/2017/09/eu-countries-have-fulfilled-less-than-a-third-of-their-asylum-relocation-promises/>.

³⁸ In March 2016, the E.U. agreed that asylum seekers arriving in Greece would be returned to Turkey and that Turkey would receive EUR 6 billion to assist refugees in the country. The deal envisioned that once irregular arrivals had decreased, refugees would be transferred from government-run camps in Turkey to Europe. A month after the deal was signed, irregular arrivals in Greece had indeed dropped by 90 percent, as migration patterns shifted to the central Mediterranean. Since then, however, tens of thousands of irregular arrivals have been recorded in Greece. See Kondylia Gogou, *The EU-Turkey Deal: Europe's Year of Shame*, AMNESTY INTERNATIONAL (March 20, 2017), <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>; Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (March 2017), <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>; Aamna Mohdin, *The EU-Turkey Deal Returned Just 4% of Migrants Who Undertook the Dangerous Journey to Greece*, QUARTZ (Oct. 31, 2017), <https://qz.com/1116082/the-eu-turkey-deal-has-returned-just-3-of-thousands-of-migrants-stranded-in-greece/>.

³⁹ There are clear points of convergence between the international refugee and migration governance systems, particularly around the question of migrants who may not qualify as refugees but have serious protection needs. This is also evident in the growing prevalence of mixed migration flows.

⁴⁰ The **nine core human rights instruments** include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Convention for the Protection of All Persons from Enforced Disappearance (CPED), Convention on the Rights of Persons with Disabilities (CRPD), and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). Notably, ICMW has not yet been ratified by states that receive large numbers of migrant workers.

⁴¹ IOM is the only inter-governmental entity exclusively dedicated to migration and in 2016, it was recognized as a U.N.-related agency. However, there are over 20 other U.N. agencies and intergovernmental organizations which are working on migration.

⁴² INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS arts. 2, 12 (*adopted* December 16, 1966 by U.N. G.A. Res. 2200A/XXI, *entered into force* March 23, 1976, U.N. Doc. A/6316) [hereinafter ICCPR].

⁴³ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS art. 2 (*adopted* December 16, 1966 by U.N. G.A. Res. 2200A/XXI, *entered into force* January 3, 1976, U.N. Doc. A/6316) [hereinafter ICESCR].

⁴⁴ INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES art. 3 (*adopted* Dec. 18, 1990 by U.N. G.A. Res. 45/158) [hereinafter ICMW].

⁴⁵ Under ICCPR, an alien lawfully in the territory of a State Party may be expelled only in accordance with a lawful decision, which is appealable. ICCPR art. 3. The American Convention on Human Rights (ACHR) and Protocol 4 to the European Convention on Human Rights (ECHR) prohibit “collective expulsion of aliens.” AMERICAN CONVENTION ON HUMAN RIGHTS art. 22(9) (*adopted* Nov. 22, 1969 by Inter-American Specialized Conference on Human Rights); PROTOCOL NO. 4 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 4 (*adopted* Sept. 16, 1963 by Council of Europe). Similarly, the African Charter on Human and Peoples’ Rights (Banjul Charter) proscribes “mass expulsion of non-nationals” where such expulsion “is aimed at national, racial, ethnic or religious groups.” AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS art. 12(5) (*adopted* June 27, 1981 by the Organization of African Unity, *entered into force* October 21, 1986, O.A.U. Doc. CAB/LEG/67/3 rev. 5) [hereinafter BANJUL CHARTER]. The Kampala Convention provides that States Parties shall “[r]efrain from, prohibit and prevent arbitrary displacement of populations.” KAMPALA CONVENTION art. 3(1)(a). “Individual or mass forcible transfers” are also prohibited under humanitarian law. GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR arts. 49, 147 (*adopted* Aug. 12, 1949 by Plenipotentiaries of the Governments Represented at the Diplomatic Conference in Geneva); *see also* PROTOCOL I ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS art. 85(4)(a) (*adopted* June 8, 1977); PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS art. 17 (*adopted* June 8, 1977) (which deals with displacement of civilian populations). Finally, the Rome Statute of the International Criminal Court delineates conditions under which deportation or forcible transfer of people, constitutes a war crime, a crime against humanity, or genocide. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT arts. 6(e); 7(1)(d); 8(2)(a)(vii); 8(2)(b)(viii); 8(2)(e)(viii) (*adopted* July 17, 1998 by U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court).

⁴⁶ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT art. 3 (*adopted* Dec. 10, 1984 by U.N. G.A. Res. 39/46) [hereinafter CAT].

⁴⁷ The “**principle of non-refoulement**” is defined in a number of international treaties. According to the Refugee Convention, “[no] Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” REFUGEE CONVENTION art. 33(1). In line with CAT, “[no] State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” CAT art. 3.

⁴⁸ U.N. GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (*published* July 22, 1998, U.N. Doc. E/CN.4/1998/53/Add.2) [hereinafter U.N. GUIDING PRINCIPLES].

⁴⁹ Africa has taken the lead in developing binding sub-regional and later regional conventions on IDPs, starting with the Great Lakes Protocol on the Protection and Assistance of Internally Displaced Persons in 2008, which set the stage for the adoption of the Kampala Convention in 2009. The Kampala Convention entered into force in 2012, but the momentum seems to have slowed in recent years. Most states which have ratified it, have yet to take the necessary steps to domesticate it into national legislation. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, TRANSLATING THE KAMPALA CONVENTION INTO PRACTICE (2017).

⁵⁰ *UN Agencies Broke and Failing in Face of Ever-Growing Refugee Crisis*, THE GUARDIAN (Sept. 6, 2015), <https://www.theguardian.com/world/2015/sep/06/refugee-crisis-un-agencies-broke-failing>.

⁵¹ UNHCR *supra* note 1.

⁵² Presentation, Elizabeth Ferris, *Negotiating Two New Global Compacts: Processes, Politics and Problems* (Kaldor Centre, UNSW, November 2017).

⁵³ Jørgen Carling, *Three Reasons for Rejecting a ‘Global Compact for Most Migration’* (March 2018), <https://jorgencarling.org/2018/03/11/three-reasons-for-rejecting-a-global-compact-for-most-migration/>.

⁵⁴ THE FUND FOR PEACE, FRAGILE STATES INDEX (FSI) (2017), <http://fundforpeace.org/fsi/>.

⁵⁵ UNHCR *supra* note 1.

⁵⁶ *South Sudan Regional Refugee Response Plan, January-December 2018*, UNHCR (Dec. 31, 2017), <https://reliefweb.int/report/south-sudan/south-sudan-regional-refugee-response-plan-january-december-2018>.

⁵⁷ Sam Medinick, *More Than a Million People in South Sudan Are on the Brink of Starvation*, TIME (Nov. 7, 2017), <http://time.com/5012793/south-sudan-starvation-famine-conflict/>.

⁵⁸ The WJP Rule of Law Index measures rule of law adherence in 113 countries and jurisdictions worldwide. The FSI ranks 178 countries. It is important to note that many countries determined by the FSI to be among the most fragile (e.g., South Sudan, Somalia, and Syria) are not featured in the WJP Rule of Law Index. *See* WJP, RULE OF LAW INDEX 2017-18, <http://data.worldjusticeproject.org/#>; *Fragile States Index (FSI)*, THE FUND FOR PEACE (2017), <http://fundforpeace.org/fsi/data/>.

⁵⁹ UNHCR, *supra* note 1 at 43.

⁶⁰ Anthony Faiola, *The Crisis Next Door: Mass Exodus of Desperate Venezuelans is Overwhelming Neighboring Countries*, WASHINGTON POST (March 2, 2018), https://www.washingtonpost.com/news/world/wp/2018/03/02/feature/i-cant-go-back-venezuelans-are-fleeing-their-crisis-torn-country-en-masse/?utm_term=.9fd01d91f8a1.

⁶¹ WORLD BANK, FORCIBLY DISPLACED: TOWARD A DEVELOPMENT APPROACH SUPPORTING REFUGEES, THE INTERNALLY DISPLACED, AND THEIR HOSTS 84 (2017).

⁶² INTERNAL DISPLACEMENT MONITORING CENTRE (IDMC), THE DISPLACEMENT CONTINUUM (2017); *Escaping War: Where to Next?*, IDMC (Jan. 2018), <http://www.internal-displacement.org/library/publications/2018/escaping-war-where-to-next>.

⁶³ *See, e.g.*, AMNESTY INTERNATIONAL, LIBYA’S DARK WEB OF COLLUSION: ABUSES AGAINST EUROPE-BOUND REFUGEES AND MIGRANTS (2017).

⁶⁴ ADAM ISACSON ET AL., WASHINGTON OFFICE ON LATIN AMERICA (WOLA), MEXICO’S SOUTHERN BORDER: SECURITY, CENTRAL AMERICAN MIGRATION, AND U.S. POLICY (2017).

⁶⁵ *New Report Demonstrates that Mexico is Not a Safe Third Country for Refugees*, HUMAN RIGHTS FIRST (July 18, 2017), <https://www.humanrightsfirst.org/press-release/new-report-demonstrates-mexico-not-safe-third-country-refugees>.

⁶⁶ INTER-PARLIAMENTARY UNION, HANDBOOK: INTERNAL DISPLACEMENT: RESPONSIBILITY AND ACTION (2013).

⁶⁷ ABA ROLI *supra* note 30 at 4.

⁶⁸ CATHERINE DAUVERGNE, CHALLENGES TO SOVEREIGNTY: MIGRATION LAWS FOR THE 21ST CENTURY (UNHCR, New Issues in Refugee Research, Working Paper No. 92, 2003).

⁶⁹ SUSAN MARTIN & ELIZABETH FERRIS, IOM, BORDER SECURITY, MIGRATION GOVERNANCE AND SOVEREIGNTY (2017).

⁷⁰ James Hathaway, *A Global Solution to a Global Refugee Crisis*, OPEN GLOBAL RIGHTS (Feb. 29, 2016), <https://www.openglobalrights.org/global-solution-to-global-refugee-crisis/>.

⁷¹ *Id.*

⁷² At least 83 of the world's constitutions reference asylum. Some explicitly recognize the right to asylum, some state that related matters shall be regulated by law, and some prohibit expulsion or extradition to a state if a person is in danger of death, torture, or other inhuman treatment or punishment. The U.S. Constitution does not mention asylum.

⁷³ Walter Kälin, *The Law of Internal Displacement*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 171 (Elena Fiddian-Qasmiyeh et al. eds., Oxford University Press, 2014).

⁷⁴ UNHCR, Rule of Law and Governance Update (Jan. 2018) (unpublished).

⁷⁵ *Asylum Information Database (AIDA)*, EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) (2018), <http://www.asylumineurope.org/>.

⁷⁶ *Global Refugee Work Rights Scorecard*, ASYLUM ACCESS, <http://www.refugeeworkrights.org/>; *Refugee Rights Toolkit: A Leader's Guide to Making Refugee Rights a Reality*, ASYLUM ACCESS, <https://refugeerightstoolkit.org/>.

⁷⁷ *IDP Laws and Policies: A Mapping Tool*, GLOBAL PROTECTION CLUSTER, <http://www.internal-displacement.org/law-and-policy>. The Brookings Project on Internal Displacement, the Global Protection Cluster, the Internal Displacement Monitoring Centre, UNHCR, and the Inter-Parliamentary Union have also developed a number of tools to assist governments in establishing appropriate laws and policies for the protection of the rights of IDPs. See, e.g., BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, PROTECTING INTERNALLY DISPLACED PERSONS: A MANUAL FOR LAW AND POLICY-MAKERS (2008); INTER-PARLIAMENTARY UNION, HANDBOOK: INTERNAL DISPLACEMENT: RESPONSIBILITY AND ACTION (2013).

⁷⁸ Elizabeth Ferris, *Good News from Chiapas – But a Larger Challenge for Mexico*, BROOKINGS INSTITUTION (Feb. 17, 2012), <https://www.brookings.edu/blog/up-front/2012/02/17/good-news-from-chiapas-but-a-larger-challenge-for-mexico/>.

⁷⁹ *Law and Policy on Internal Displacement*, GLOBAL PROTECTION CLUSTER (2018), <http://www.globalprotectioncluster.org/en/areas-of-responsibility/law-and-policy-on-internal-displacement.html>.

⁸⁰ Türk *supra* note 19.

⁸¹ *Strategic Litigation for Refugee Rights Empowerment: An Update from the UN Annual Consultations with NGOs*, ASYLUM ACCESS, <http://asylumaccess.org/strategic-litigation-refugee-rights-empowerment/>.

⁸² *Engage in Strategic Litigation*, VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN AND GIRLS, <http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html>.

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⁸⁴ *Matter of Kasinga*, CENTER FOR GENDER & REFUGEE STUDIES (CGRS), <https://cgrs.uchastings.edu/our-work/matter-kasinga-1996>.

⁸⁵ CENTER FOR REPRODUCTIVE RIGHTS, LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES (2004).

⁸⁶ CGRS *supra* note 84.

⁸⁷ *Groundbreaking Ruling Recognizes Domestic Violence as Basis for Asylum*, CGRS, <https://cgrs.uchastings.edu/our-work/domestic-violence>; CGRS, DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: CGRS PRACTICE ADVISORY (2014).

⁸⁸ *What is Statelessness?*, UNHCR (2018), <http://www.refworld.org/docid/5829c3514.html>.

⁸⁹ ZAHRA ALBARAZI & DR. LAURA VAN WAAS, NORWEGIAN REFUGEE COUNCIL, STATELESSNESS AND DISPLACEMENT: SCOPING PAPER 7 (2016).

⁹⁰ *Id.* at 5.

⁹¹ *Id.*

⁹² *Id.* at 17; SARNATA REYNOLDS & DARYL GRISGRABER, REFUGEES INTERNATIONAL, BIRTH REGISTRATION IN TURKEY: PROTECTING THE FUTURE FOR SYRIAN CHILDREN (2015).

⁹³ The Global Campaign for Equal Nationality Rights, <http://equalnationalityrights.org>; *Ending Gender Discrimination in Nationality Laws*, UNHCR (June 18, 2014), <http://www.unhcr.org/en-us/news/press/2014/6/53a15cc56/ending-gender-discrimination-nationality-laws.html>.

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¹¹⁴ According to a U.N. study on the topic, these initiatives can be classified into three categories: **proactive targeted approaches** (i.e., a cohort of local policies and interventions aimed at inclusive migration governance); **networked approaches** (i.e., creation of inter-city networks aimed at strengthening urban migration governance); and **institutional approaches** (e.g., establishment of separate offices or task forces on migrant- and refugee-related issues). U.N. DESA *supra* note 108.

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¹²⁶ TUESDAY REITANO & PETER TINTI, SURVIVE AND ADVANCE: THE ECONOMICS OF SMUGGLING REFUGEES AND MIGRANTS INTO EUROPE (2015).

¹²⁷ Jennifer Rankin, *Human Traffickers 'Using Migration Crisis' to Force More People into Slavery*, THE GUARDIAN (May 19, 2016), <https://www.theguardian.com/world/2016/may/19/human-traffickers-using-migration-crisis-to-force-more-people-into-slavery>; Ben Quinn, *UN Says More Children and Men Falling Prey to Traffickers Amid Migration Crisis*, THE GUARDIAN (Dec. 21, 2016), <https://www.theguardian.com/global-development/2016/dec/21/un-more-children-and-men-falling-prey-human-trafficking-migration-crisis>.

¹²⁸ ORTRUN MERKLE ET AL., DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH, A STUDY ON THE LINK BETWEEN CORRUPTION AND THE CAUSES OF MIGRATION AND FORCED DISPLACEMENT (2017).

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¹³³ GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME *supra* note 131.

¹³⁴ *Id.*; PETER TINTI & TUESDAY REITANO, MIGRANT, REFUGEE, SMUGGLER, SAVIOUR (2016); Tinti *supra* note 132; PETER TINTI & TUESDAY REITANO, SURVIVE AND ADVANCE: THE ECONOMICS OF SMUGGLING REFUGEES AND MIGRANTS INTO EUROPE (ISS Paper 289, 2015).

¹³⁵ The U.N. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organized Crime (UNTOC), defines “**smuggling of migrants**” as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME art. 3 (*adopted* Nov. 15, 2000 by U.N. G.A. Res. A/RES/55/25). The corresponding U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, also supplementing UNTOC, defines “**trafficking in persons**” as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME art. 3 (*adopted* Nov. 15, 2000 by U.N. G.A. Res. A/RES/55/25, annex II). One of the most fundamental distinctions between these two crimes is their purpose. The purpose of trafficking in persons is exploitation. The purpose of human smuggling is an illegal entry to a territory of a different state. Notably, states have been generally eager to incorporate provisions of the U.N. Trafficking Protocol into their domestic laws, which is not the case for the U.N. Smuggling Protocol. See ANNE GALLAGHER, IOM, WHATEVER HAPPENED TO THE MIGRANT SMUGGLING PROTOCOL? (2017).

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- ¹⁶⁶ ALIX-GARCIA *supra* note 160.
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