WHEN PEOPLE FLEE: RULE OF LAW AND FORCED MIGRATION

Final Report and Recommendations
American Bar Association Rule of Law Initiative
2018 Conference on Contemporary Rule of Law Issues
Acknowledgements

This report is based on a conference that was organized by the American Bar Association Rule of Law Initiative (ABA ROLI), and co-sponsored by the George Washington University Elliott School of International Affairs, the ABA Commission on Immigration, the ABA Section of Litigation, the ABA Center for Human Rights, and the ABA Section of Civil Rights and Social Justice.

On the day following the conference, an expert working group met to review the discussions and key themes of the conference panels and to identify a set of recommendations relevant for the negotiation and implementation of the two global compacts on refugees and on migration. The expert working group meeting consisted of Eleanor Acer, Linda Bishai, Elizabeth Ferris, Meredith Linsky, Neha Misra, Sana Mustafa, and Paulina Rudnicka. Special thanks to Geoff Gilbert and Jackie Keegan for their support from afar, and to Chaloka Beyani and Roberta Cohen for early participation in the group.

The conference planning working group consisted of: Sebastian Albuja, Chantal Aragarwal, Elisabeth Baraka, Linda Bishai, Jeffrey Borns, Duygu Cicek, Niki Dasarathy, Paul Fisher, Susan Goldman, Hana Hausnerova, April Hewko, Ashley Martin, Jay Monteverde, Paulina Rudnicka, Christopher Russell, Salome Stephens, Jennifer Tsai, Zlata Unverkova, and Rebecca Vernon. Particular thanks go to the ABA ROLI Outreach team: David Dettman, Lyndsey Raynor, Jeremy Purcell, and Hope Ann Roberts.

Extensive notes of the conference panels were taken by a troop of diligent rapporteurs: Rachel Abrego, George Acquah, Kerry Burgott, Duygu Cicek, Claudia Fess, Hayley Rose, Christopher Russell, Judith Stephens, Rebecca Vernon and Margaret Wiggins. These volunteers committed to editing and formatting their notes within a few hours after the conference ended so they could be shared with the expert working group meeting the next day.

We would like to thank the dozens of invited speakers and moderators who came to Washington, DC, and the more than 200 participants who engaged in a full day of discussions. Particular appreciation goes to the keynote speakers Anne C. Richard and Louise Arbour, and to Elizabeth Andersen, Hilarie Bass, Jennifer Brinkerhoff, and Judge Margaret McKeown for their introductory remarks.

This report was prepared by Linda Bishai, with thanks to the expert working group members and to Kristi Gaines and Thomas Susman of the ABA’s Governmental Affairs Office.
EXECUTIVE SUMMARY

The American Bar Association Rule of Law Initiative 2018 Conference on Contemporary Rule of Law Issues addressed the pressing issues surrounding recent record flows of refugees and migrants. While humanitarian and development organizations have been coordinating to more effectively address the challenges, there has not been enough participation by rule of law actors to contribute legal solutions and rule of law approaches to filling important gaps. On April 17, 2018, more than 200 government and international officials, non-governmental implementers, academic scholars, experts, and activists met to explore the critical issues around rule of law and forced migration and to share best practices and ideas for addressing the most pressing problems. Occurring in the shadow of the negotiation processes for the historic global compacts on refugees and migration, the conference drew attention to the plight of refugees and migrants by focusing on the specific circumstances faced in countries of origin, transit, and destination for three critical forced migration paths. Following the route of displaced people originating in Sub-Saharan Africa, Syria, and Central America, conference participants discussed the major drivers, risks, and challenges occurring along the way and highlighted legal mechanisms that would mitigate and address some of these problems.

Among the main issues discussed during the sessions were the rule of law problems that drive displacement and irregular migration and the need to ensure that states are both assisted in and accountable for addressing conditions such as lack of basic needs and access to justice that push people to flee. Additional legal challenges noted were the inability to access documentation and evidence of property, nationality, and marital status. People often flee with little notice or in circumstances where such documents pose a security risk, and the resulting legal difficulties in transit and destination countries continue to keep displaced individuals from access to services and the ability to build a safe and productive life. One of the common themes across the panels was the importance of non-governmental organizations in filling the major need of raising awareness of legal rights and providing representation for displaced people. With better information of what is available to them legally and what conditions they will likely face, many migrants and asylum seekers decide to return home or to a different country.

Occurring alongside the negotiation processes of the Global Compact on Refugees and the Global Compact on Safe, Orderly and Regular Migration, this conference was intended to highlight the contributions that lawyers and rule of law actors
can make to the global discussion on these problems. To support this goal, ABA ROLI hosted an expert working group meeting on the day following the conference to reflect on and extract key learning from the panel discussions. After reviewing the rapporteur notes and identifying important themes and issues, the expert working group issued a set of recommendations to the stakeholders of the global processes for consideration during the negotiation and implementation phases of the compacts. These recommendations are found at the end of this report.
INTRODUCTION

Conference Theme and Goals

The global migration and displacement crisis demands new, comprehensive, and long-term solutions. With a record 65 million people currently displaced within and across national borders, and displacement becoming increasingly prolonged, forced migration can no longer be addressed solely as a short-term humanitarian issue. Nor, in our interconnected, globalized world, can any country pretend to solve the problem alone by merely strengthening its borders. The scope and scale of forced migration today requires a new approach that can tackle its root causes, ensure the safety and human dignity of those forced to flee, and provide sustainable solutions for refugees and internally displaced people. To meet the challenge, over the course of 2018, the United Nations is convening member states to negotiate two new global compacts, one on migration, aiming to cover all dimensions of international migration in a holistic manner, and the other on refugees, providing a comprehensive refugee response framework that acknowledges shared international responsibility and is informed by practical experience.

Rule of law development should form a key component of these new holistic approaches, as gaps in the rule of law are both drivers of forced migration and obstacles to sustainable solutions. Very often, at the roots of forced displacement are rule of law problems in countries of origin – lax and discriminatory laws, weak governance and justice systems, crime, corruption, statelessness, persecution and other gross violations of human rights, violence and conflict. In transit and destination countries, refugees and internally displaced people face rule of law challenges again in the form of criminal exploitation by smugglers and traffickers; prolonged detention in substandard conditions; immigration and refugee status determination procedures that fall short of international standards; hurdles to obtaining legal identity documents, residency registration, work authorization and access to basic services; xenophobia and discrimination. Women and children, particularly those unaccompanied, are among those in the most vulnerable situations and require special attention.

To contribute to the international response to the refugee and migration crisis, the American Bar Association Rule of Law Initiative (ABA ROLI), the leading U.S.-based non-profit rule of law development organization, devoted its 2018 Annual Conference on Contemporary Rule of Law Issues to elaborating the relationship between rule of law and forced migration and identifying effective rule of law responses. The daylong con-
Conference was organized to track the paths of people who have been displaced – from their countries of origin, through transit countries, to destination countries – with break-out sessions to facilitate in-depth review of country case studies, analyze the rule of law dimensions of the problem, highlight legal responses proven to be effective, and develop recommendations that shape a rule of law approach to the forced migration crisis.

**Conference Participants and Stakeholders**

"When People Flee: Rule of Law and Forced Migration" was convened by ABA ROLI in collaboration with The George Washington University Elliot School of International Affairs, and with support from relevant ABA entities and partner organizations. The conference convened a diversity of stakeholders in the refugee and migration policy arena, connecting the legal and rule of law development communities with humanitarian organizations, donor agencies, international officials, and the private sector for cross-sectoral discussions aimed at exchanging lessons learned and articulating a shared agenda for addressing the rule of law dimensions of migration and displacement.

**Conference Outcomes**

In preparation for the conference, ABA ROLI prepared a background paper in its Rule of Law Issues paper series, surveying academic and policy literature on the relationship between rule of law and forced migration, highlighting lessons learned from ABA ROLI’s work about potential rule of law programmatic responses, and identifying key questions to be addressed at the conference. Rapporteurs summarized each of the case studies addressed in the conference, and an expert working group met following the conference to identify key takeaways and policy recommendations, to be published together with the final conference report. These conference proceedings and recommendations are intended to assist policy-makers in the U.S. government, other governments, and international organizations, and to inform the negotiation process and implementation phase of the global compacts.
Anne Richard, former Assistant Secretary of State for Population, Refugees and Migration, and current Professor at Georgetown University’s Institute for the Study of International Migration, set the stage for the conference by providing an overview of the current situation stemming from a dramatic increase in the movement and uprooting of people due to persecution, conflict, or intolerable living conditions. Continuous war in Syria provided dramatic images of internally displaced people and refugees trying to reach Europe and claim asylum. In the summer of 2015 large numbers of drowning migrants and refugees in the Mediterranean focused global attention on the issue and created momentum for a global response. The 2016 New York Declaration reaffirmed international human rights’ core principles for migrant rights and refugee protection and stipulated the process for two global compacts to be negotiated: one on refugees and one on safe, orderly and regular migration. Richard highlighted the two opposing views resulting from the increased attention: that refugees and migrants should be protected and helped, and that refugees and migrants are security and economic threats to states and should be kept out.

It was quickly clear that doing nothing was not an option as desperate people were driven to flee to safety despite the dangers of the path. In 2016, under U.S. leadership, there was an initiative to discuss global solutions that focused on three approaches: first, wealthy countries should commit to increase humanitarian aid for refugees and displaced people; second, more countries should commit to increase the number of refugees they would resettle; and third, the countries currently hosting refugees (many low and middle-income) should receive assistance to help expand opportunities for refugees and forced migrants. The New York Declaration and Leader's Summit gained world attention and set processes in motion. However, the change in U.S. administrations has had a significant impact on not only U.S. policy but on global momentum. Funds for UN agencies that deal with refugees and migrants have been slashed, commitments to accept refugees have been reduced, support for resettlement offices and non-governmental organizations (NGOs) that provide assistance has been diminished. The U.S. has withdrawn from deliberations on the migration compact arguing that it undermines U.S. sovereignty.

Despite these challenges, the compacts processes continue to generate important and sustained discussions at the national...
tional and global levels, and the conversation has shifted to acknowledge that states cannot address these problems by themselves. Richard expressed concern for the lack of complementarity in the dueling processes, saying "having two compacts reinforces the binary division between refugees and migrants, not looking at their needs in a holistic way, and ignoring IDPs who make up most of those forcibly displaced." Some state negotiators want to restrict the compacts to a discussion of regular migration and not address refugee issues or irregular migration at all. It is important to underscore the different ways in which the compacts are being negotiated. The refugee process is being led by the Office of the U.N. High Commissioner for Refugees (UNHCR), an authorized and experienced U.N. agency with a legal mandate to provide refugee protection and an interest in maintaining that mandate. The migration compact is multi-stakeholder and features negotiations among state and NGO representatives, along with the International Organization for Migration (IOM), which has recently become affiliated with the U.N. but is not mandated to oversee the negotiation of the Global Compact on Migration. The separate processes have led to different types of draft compacts, and differing language, and have made it more difficult to see the issues in a holistic way.

During questions from the audience, Richard expressed her opinion that Americans have a special responsibility to combat the idea that migrants are a "bad thing." Given that most Americans are descended from immigrants and refugees, we can make the connection between being open to migration and becoming a superpower through the energy and resilience of those who are courageous and dare to try new things. The conversation needs to shift from fear of terrorism to protecting people who are in need. Ultimately, the international community must commit to addressing the needs of refugees, IDPs, and migrants because they will continue to flee as long as the conditions in their home countries remain intolerable and unsafe. Protecting them while they are moving or displaced, and addressing the drivers that make them flee, are the long-term ways to change the situation. While the New York Declaration that began the process did emphasize shifting attention to the root causes of flight in order to address the increasing numbers of displaced people, that attention has been diluted by the negotiation process as states are reluctant to commit to the rule of law solutions of accountability and fair justice systems that will begin to mitigate the causes of forcible displacement. Richard applauded the timeliness of the conference, as it remains critical to keep rule of law approaches in the conversation along with development and humanitarian responses.

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The three panel sessions on the Africa track focused on the trends driving migrants and refugees from sub-Saharan Africa to Libya with a goal of getting to Europe. At each stage of the trail, migrants and refugees face different sets of risks and threats. A combination of protracted conflict, corruption, and natural disasters has caused large-scale mixed migration flows throughout sub-Saharan Africa. Many of these migrants and refugees head to Libya, a state in political turmoil and little capacity to implement the rule of law, where they hope to obtain passage across the Mediterranean to Europe. Thousands become trapped in Libya, falling prey to violence, extortion, enslavement, arbitrary detention and other abuses. As European countries attempt to reduce the numbers reaching their shores by closing borders and intercepting boats, the lack of protection and weak governing structures in Libya have made it the most dangerous transit route in the world. Those who manage to reach Europe find that the gateway countries of Italy and Greece have strained human and financial resources to provide for their needs. Bilateral migration agreements have attempted to deter arrivals and reduce the backlog of asylum applications. But without a more comprehensive continent-wide policy approach to the displacement crisis, the entry point countries in Europe have a limited ability to address the problems and human rights protections, especially the principle of non-refoulment, are at risk.

In the opening session, panelists discussed the contexts of various African countries that led people to attempt the trip to Europe. Manal Taha, an independent researcher, pointed out that many young people want to copy friends and peers who have made the journey, but that those who reach Europe and live in squalid conditions also paint a happy picture in social media to avoid the shame of failure. At some point as well, she noted, people prefer to take risks and live in reduced circumstances in order to experience political and social freedom. Good governance and justice systems are a powerful pull, as illustrated by the story of a taxi driver who wanted to go to Europe even though he knew his living standards would fall because he was tired of living in an oppressive environment. This session also highlighted the magnitude of the internal displacement problem in Africa (which contains 40% of the world’s IDPs) and the lack of binding rights or protections for people who have fled their homes without crossing an international border. While lauding the peace agreement for the Great Lakes Region and the Kampala Convention as good examples of best practice for IDPs, Courtney Blake, of USAID,
During the second session on Libya as a transit country, panelists addressed Libya’s internal struggles and the shocking conditions for migrants, many of whom are unaccompanied minors. Brian Kelly of the IOM described how many migrants become victims to unscrupulous smugglers and end up in arbitrary informal detention or enslaved. Conditions for migrants and refugees in Libya are harrowing, making it imperative that the international community act in concert to address the situation – both with immediate protection for vulnerable displaced people and by addressing Libya’s problems long term. The response from Europe so far, according to Izza Leghtas of Refugees International, has been an agreement with Turkey to reduce migration flows towards Europe, which has only put more pressure on the mixed migration route through Libya. The European Union’s (EU) policy on Libya, she explained, has focused on four main pillars: 1) funding to UN agencies (IOM and UNHCR) to provide assistance in and around detention centers; 2) a voluntary returns program run by IOM that returned 19,000 people to their countries of origin last year; 3) support to the UNHCR evacuation program to remove people to a more stable host country (but Niger is the only country agreeing to host evacuees from Libya); and 4) support to the Libyan Coast Guard to intercept or rescue migrants at sea and take them to a safe port. Unfortunately, many of those picked

also highlighted the lack of a single international agency with authority to deal with IDPs, producing an “accountability conundrum.” But since all refugees start their paths as internally displaced, it is critical to consider IDPs in addressing root causes and preventing displacement.

The opening panel also addressed approaches to move from fragility to resilience in countries that are the main sources of refugees and migrants. George Washington University professor Ky Luu explained a resilience measurement framework that focuses on the capacity of people and systems to mitigate, adapt, and learn from stresses. Each situation must be contextualized and addressed according to the challenges in the particular region. For example, one of the key issues in East Africa is climate variability and drought while West Africa faces challenges from rapid urbanization. In Southern Africa, a critical stressor is disease. When attempting to determine successful intervention measures, Ky Luu explained, resilience researchers focused on the intended outcome (such as food security in Somalia) and then looked for capacities that were linked to addressing that outcome (such as training women in nutrition and empowering them to make choices). Research found a direct correlation with food security and women’s training and empowerment.

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The final panel of the Africa track focused on the response from the destination countries of Europe and the significance of the challenge posed by mixed migration from Africa. Christopher Hein, of the Italian Refugee Council, noted that the number of immigrants arriving in Europe from Libya has been reduced dramatically in 2018, partly due to the deal between Italy and Libya to intercept migrants. The number of people dying in the sea en route has also been reduced, though the priority objective of the EU rescue operations is not to save lives. Migration continues to be a top policy concern of the EU, declared Ulrich Mans of the European External Action Service. Mans described three central pillars of EU policy: saving and protecting the lives of migrants; breaking up business associations with illegal immigration; and providing legal pathways for migration. On the last point, he noted that the EU is working on special migrant visas and blue cards for migrants and supporting countries that are hosting large numbers of people. The EU still has a way to go, according to Pia Oberoi of the Office of the U.N. High Commissioner for Human Rights. She described a mission to identify protection gaps for migrants in the EU and its findings that migrants across Europe and its neighboring countries were facing detention, lack of due process, lack of access to services and adequate protection. Mischa Thompson of the U.S. Helsinki Commission pointed out that there are demographic changes in the U.S. and Europe that mean that today’s migrant and refugee populations are the future workforce and should be treated as such. The pan-

up by the Libyan Coast Guard are taken to detention centers and terrible conditions. Providing a view from the other side, Libyan lawyer Azza Maghrur, argued that the international response has shifted responsibility for a global phenomenon to Libya. Libya has many problems and no legal infrastructure to deal with migrants and refugees. International human rights treaties have not been integrated into Libyan law, so this country is not the place for migrants and should not be pressured to make agreements about intercepting and protecting them that it cannot implement. Libya needs to have its own problems fixed, and legal mechanisms established, before it can absorb migrants. David Wood, an independent peace practitioner, confirmed that view by describing the current conflict dynamics in Libya as complex and prohibitive of helpful action by the Libyan government. Law itself, as well as the legitimacy of the executive and legislature, is contested in Libya and political and security institutions are very weak, often being informal or fought over by local groups. That said, Wood also pointed out that there is a need for regulated work in Libya. Migrants who do not have documentation need to acquire it and some municipalities in Libya have started their own documentation processes because there are none at the national level.

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elists also addressed the need for support from civil society organizations that can help address forced migration problems. For example, faith-based organizations in Italy coordinate with the Ministry of Foreign Affairs to issue humanitarian visas for entry into Italy. But they must also be involved in the challenges of resettlement, which is not currently the case. Another challenge identified was the need to protect the human rights of vulnerable groups, many of whom have been traumatized by the transit journey and arrive in need of healthcare and psychosocial support. The panelists also emphasized the need for strong transatlantic alliances because migration is a global problem, and that the divide between protection for refugees and protections for migrants in the global compacts is creating problems for human rights.
The three panels on Syria addressed the violence and brutality of the civil war and security vacuum precipitating a massive internal and external displacement of Syrians. The rule of law breakdown in Syria has also had disproportionate effects on women and minority groups and placed serious strains on neighboring countries. More than 5 million Syrians have fled to these neighboring states believing they would remain only temporarily, but after seven years of conflict, and aggressive property confiscation by the Syrian government, it is unclear that they will ever return to their homes. The vast majority of Syrians in neighboring or transit countries are living in urban communities rather than camps. While this is now recognized as a more productive model, they still struggle for basic rights such as the right to work, obtain marriage and birth certificates, rent housing, and access education for their children. Jordan, Lebanon, and Turkey now have temporary protection regimes that cover certain rights and responsibilities of Syrians. Nonetheless, Syrians continue to face difficulties in understanding and gaining these rights.

As refugees, fleeing violent conflict, Syrians follow different legal paths, and face different challenges than others who flee. Three years after the large initial influx, divisions between Syrian asylum seekers and European host communities continue to grow as countries argue over how to best manage and strengthen borders, combat extremism, and integrate these new populations into European society. With populist anti-immigration parties on the rise, the need for practical safeguards to protect vulnerable groups, including women heads of households, unaccompanied minors, victims of trafficking, and those who have suffered physical and mental abuse, is now greater than ever. As the global community continues to grapple with the continuing conflict inside Syria, attention to the problems of Syrian asylum seekers at each step of their journey to safety needs to be sustained and dealt with collectively.

In the first panel on the drivers of flight in the origin country, attention focused on the actions of the regime as a main cause of displacement. Violations of human rights, repression, detention, destruction of documentation and non-cooperation on refugee issues characterize the regime’s role in the crisis. The breakdown of basic governance in opposition- and ISIS-controlled areas has led to a rejection of the rule of law and distrust in governing institutions. Sana Mustafa, of the Network for Refugee Voices, described her own experience as a Syrian who was detained in 2011 for participating in peaceful protest.
Mustafa then described how she was seized, detained, and aggressively interrogated and beaten by military security intelligence agents. After she was released and fled Syria, she faced difficulty, as many Syrians do, in filing for asylum or making any claims for rights because she had no proof of what happened to her. In fact, it would not have been safe for her to carry proof with her if she did have it. Documentation, evidence, and proof of identity are critical problems for those who flee oppressive regimes, as they largely determine how they will be treated at every stop along the way. Mustafa ultimately was able to provide evidence of her detention because it was documented by a civil society group in Syria and this unofficial documentation was accepted as evidence in her application for asylum in the U.S.

The breakdown of governance and rule of law in Syria harms not only IDPs and refugees. Phil Walker, of the Access to Justice and Community Security Project, described the partial collapse of the civil registry system due to the war. The system resembles many of those in Europe and contains centralized records of personal identity: birth, death, and marriage certificates, national identity documents, estate transfers, etc. The breakdown of this registry will have a long-term impact on reconstruction after the war as well as affecting access to services for those currently displaced. Civil registries tend to be overlooked in conflicts, but they are a critical strategic priority for UNHCR and the UN peace talks for Syria. Some projects are supporting the maintenance of civil registries in opposition-held areas, but those under ISIS control are inaccessible to these efforts. Walker urged attention to the dull but important services and institutions that are damaged in conflict but which makeup the “DNA of governance,” and will be necessary for easing the transition to peace and reconstruction in the future.

Adrienne Fricke, of the Harvard Humanitarian Initiative, described three underappreciated aspects of the rule of law in Syria that served as drivers of the crisis. At its core, Fricke asserted, the Syrian conflict is a human rights crisis. The state
had perpetrated violence against its citizens for decades until finally – after two young boys were murdered by the state for political graffiti – citizens were unwilling to tolerate this violence any further and revolution spread across the country. Secondly, the state mis-used material support laws to prosecute physicians who were treating injured protestors – generating disgust among many who had maintained support for the regime until that point. Finally, the laws around state service provided incentives for young men to flee the country because they would be conscripted into the Syrian army once they graduated from university. This resulted in many young male refugees with high education just short of a degree, meaning they have significant barriers to settlement in host countries.

Discussions during this session acknowledged that the lack of coherent and effective international responses to the conflict has prolonged the time horizons for recovery and left the Syrian people and diaspora largely to mobilize for themselves. Panelists also agreed that rebuilding a positive sense of the rule of law in Syria after the war will be difficult. Mustafa referred to oppressed people’s strong aversion to law as “post-oppression disorder.” One of the ways to address this disorder is to support members of the diaspora who are mobilizing for themselves to hold significant roles in rebuilding Syria and constructing social and political cohesion post-conflict.

The second panel on transit countries with large numbers of Syrian refugees featured a discussion of the conditions in Jordan and Turkey. These countries have not ratified the 1951 Refugee Convention, meaning that they arguably do not have legal obligations to recognize Syrian refugees. However, in practice these countries have implemented specific regulations and have taken on over 3 and a half million refugees from Syria. Syrians in neighboring countries face significant legal concerns, including high living expenses, restrictions on freedom of movement, exploitative labor and housing practices, and difficulties registering births or deaths in their communities. Anna Crowe, of the Harvard International Human Rights Law Clinic, described the situation for Syrian refugees in Jordan. The Ministry of Interior has issued biometric cards that allow their holders to live outside the refugee camps. These cards are very challenging to get, however, and proof of identity, address, and an asylum certificate from UNHCR are required. Without these cards, Syrians have restricted access to health, education, humanitarian assistance, and freedom of movement.

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The situation in Turkey is starker: there are 3.5 million Syrian refugees in Turkey, with only about 20,000 of them holding permits to work in Turkey. Work permits are very complicated and expensive for employers to file, so many employers underpay Syrians and do not provide the required health insurance, social security, and minimum wage.

About 50,000 Syrian refugees have obtained citizenship in Turkey because of their professional qualifications, but once they have citizenship, they do not qualify for housing and other assistance, which many of them still need. On civil documentation, Turkey is actually fairly helpful; it allows for marriages, births, and deaths to be registered in Turkey, but getting that information to the refugee community is “hit or miss” and many do not realize what services are available. Daryl Grisgraber, of Refugees International, noted that surprisingly many Syrians are starting to say that they do not want to return to Syria. This makes documentation of their identities and status more critical as they may never get access to the Syrian civil registry.
As with the Africa track, the discussion emphasized an important role for civil society organizations, to spread awareness of rights and services, and to provide humanitarian assistance.

The World Bank’s Paul Prettitore described how reaching Syrians with development aid was especially difficult because they were suspicious of public sector actors. But by teaming up with civil society organizations, they were able to get information to Syrian refugees about their rights. NGOs can also assist with updating information about the legal framework for refugees in transit countries as it frequently changes and can be difficult to understand. Finally, the panelists agreed, there is a real need for all the actors on the Syria crisis to think ahead for assistance to Syrian recovery in the long term.

The final Syria panel discussed the difficulties faced by refugees once they reach Europe where integration is a huge challenge. Alex Silberman, of Seefar, shared the results of a study of the Syrian refugee integration experience in Europe. There are short-term and long-term problems, he explained. In the short-term, refugees have difficulty accessing livelihoods and basic services; while in the long-term, facing work permit restrictions and language barriers, they cannot find skilled employment and often end up in the informal job market. Many say their "life has not gotten any better in Europe." Timo Toniassi, of the German Marshall Fund, described the situation for refugees in Germany, identifying family reunification as one of the most problematic issues. Asylum processing has recently been sped up, but the number of approvals for family reunification has been reduced.

A more pessimistic view was offered by Demetrios Papademetriou, of the Migration Policy Institute. According to Papademetriou, the story of Syrian refugees is a legacy of continuing failure of integration in Europe. Although Germany has been trying to follow the rule of law and make determinations on a case by case basis, other countries have had different approaches and there is no coherent response at the EU level. He urged EU states to anticipate problems and responses better, and also to be vigilant against exploitation of the system by refugees and migrants who challenge every court decision. The panel agreed that the lack of common policy and practice in the EU was exacerbating the problem and that rising hostility among host countries in Europe was going to remain a challenge. Recommended responses included the participation of Syrian refugees in discussions of the solution, a comprehensive approach that is nevertheless not one-size-fits-all, and a real response that addresses problems of employment and family reunification.
Fleeing the Northern Triangle, Facing the Dangers of Organized Crime, and Yearning to Breathe Free

El Salvador, Guatemala, and Honduras consistently rank among the most violent countries in the world. Weak, underfunded institutions, and corruption, have undermined efforts to address threats posed by organized crime and gang violence. Low tax revenues, inequality, and strained public services have undercut efforts to improve the well-being of citizens and communities. Consequently, the number of people fleeing the Northern Triangle has surged in recent years. As they travel north by way of clandestine channels in remote Mexican territory, migrants face violence, trafficking and murder from organized crime and drug cartels. Mexico has instituted the “Southern Border Program” to regulate Central American migration, but critics express concern that this program emphasizes control and national security rather than protection for migrants. This is particularly problematic given widespread impunity for crimes against migrants in Mexico. If those fleeing the Northern Triangle succeed in reaching the U.S. border, they should have access to asylum protection under the Refugee Convention and U.S. immigration laws. However, the U.S. has become a much less welcoming place to asylum seekers, often not distinguishing them from irregular migrants and providing cursory consideration of asylum claims and the right of non-refoulement.

The panels in this track examined the violent drivers of forced migration from the Northern Triangle and the serious threats and obstacles facing those who attempt to flee north to Mexico and the U.S. Among the most vulnerable groups fleeing, according to Julio Guity-Guevara (D.C. Mayor’s Office of Latino Affairs), are indigenous peoples of the region, including the Garifuna.

Originally runaway slaves that settled on the coast of Honduras in the 1600s, the Garifuna have been persecuted and massacred by the government of Guatemala. Climate change and rising water levels have destroyed Garifuna communities on the coast, forcing them from their homes. While the numbers fleeing are historically high, they are also a repeat, panelists agreed, of the patterns from the Cold War and conflicts of the 1980s that saw hundreds of thousands of Central Americans traveling to the U.S. Since then, there have been extensive efforts to provide development assistance (40 billion over the decades) in order to promote the growth and stability that will keep people safe at home. These strategies were disconnected from economic reality, argued Manual Orozco of the Inter-American Dialogue, since they stressed work in the agri-
The panel on transit in Mexico noted that Mexican legal and security institutions to address violence and crime against migrants are insufficient. Migrants have difficulty accessing justice and their rights are exacerbated by the lack of documentation. They are increasingly traveling on illicit and dangerous routes and are vulnerable to exploitation. Additionally, many crimes are not reported because government officials are the perpetrators. The panel also pointed out an interesting connection between kidnapping cases of migrants who are targeted because they have family in the U.S. and illegal wire transfers from the U.S. to Mexico. Mexican authorities often don’t respond effectively when notified by U.S. banks of suspicious transfers. There is an opportunity here for bilateral cooperation on the issue.

The institutions Mexico has created to address crimes against migrants are not effective because they don’t account for the fact that migrants do not want to stay in the location to testify, so crimes are difficult to prosecute. Reformed rules of evidence might be able to take this into account. There is also a lack of procedure for migrants held in detention centers making them unavailable to attend hearings. Prosecutors are inadequately trained on migrant issues and legal protections and generally lack sufficient resources to carry out their work effectively. As with the other migration tracks, civil society organizations help fill in the gaps, but they cannot provide...

“...they do not want to stay in the location to testify, so crimes are difficult to prosecute.”
enough support to address bigger needs such as education and health care.

The final panel on Central Americans reaching the U.S. explored the question of whether the United States continues to be a place of safety and security for refugees and migrants. Panelists questioned whether the U.S. even observes its legal obligations. Eleanor Acer of Human Rights First explained her view that the U.S. is violating article 31 of the Refugee Convention which prohibits the penalization of illegal entry by refugees. She highlighted the recent news attention on the Central American “caravan” of asylum seekers that prompted a deployment of the National Guard to the border and instructions to federal prosecutors to criminally prosecute peaceful migrants and asylum seekers.

Attorney Laura Tuell of Jones Day described her pro bono work in a detention facility in Laredo, Texas, housing mostly women. Before Jones Day started a project in this facility, these detainees, who have mostly fear-based claims for asylum, had virtually no legal services or resources to learn of their rights. With the agreement of Immigration and Customs Enforcement (ICE) officials, Tuell and her colleagues provide “Know Your Rights” presentations in the facility, as well as individual screenings and pro bono representation in the area where the client relocates. Many women decide to return to their home country when they learn that there are no legal options for them to remain. Because of this increased understanding and access to services, the women in the detention center are much less anxious and unrest has decreased significantly.

According to Abel Nuñez (CARECEN), an ideological narrative driving fear of immigrants as “bad hombres” is taking over the country. There is a feeling of cultural loss and demographic shift, but immigrant labor remains critical to many sectors of the U.S. economy. Changes in immigration policy have affected children disproportionately because there is no right to a publicly funded attorney for a child. Most children appear alone in immigration court in adversarial proceedings without an attorney. Too often, the criminal justice system is used to penalize migrants and asylum-seekers instead of focusing on civil proceedings and potential immigration relief. Further, the use of privately operated prisons has created a profit motive for the detention of migrants and asylum seekers. The panelists asserted that these practices violate the rule of law and should transcend partisan political concerns. Although the narrative has become one of national security, immigration is a transnational issue which requires a rights-based approach, and it should not be separated from foreign policy.

“Although the narrative has become one of national security, immigration is a transnational issue and should not be separated from foreign policy.”

The final panel of the Central America track describing US responses to immigrants seeking asylum.
Louise Arbour, UN Special Representative for International Migration, delivered pointed and thoughtful remarks based on her experiences leading the advocacy, policy and coordination efforts on international migration among all UN entities. She began by noting that at the start of the compact negotiation process she had been drawn to exploring the distinction between forced and voluntary migration, believing that the delineation would bring clarity to a complicated issue. At first it seems useful, she noted, because it evokes an expansion of the fundamental principles underpinning the Refugee Convention. But ambiguity of the categories makes them an unhelpful conceptual basis for managing international migration today. "I no longer believe that forced migration is a useful concept," she noted. The alternative is less anchored in the rule of law, according to Arbour, but offers a better approach.

Explaining that there would be no international appetite for basing a migration regime on the same foundations as the refugee protection regime (people being forced to move and people who deserve protection), Arbour suggested that there is a need to reimagine and challenge the concept of migration by choice rather than necessity. Her answer: "We need to redefine the definition from the migrant’s rather than the state’s point of view." This leads us to suggest the need to design a fair, safe, orderly system to regulate human mobility, with the freedom of choice of migrants being the primary consideration. Many people have no choice but to leave their country of birth – in circumstances that are practically indistinguishable from refugees while such people may not qualify for the legal protections offered to refugees. The more a decision to move is based in free choice, Arbour asserted, the more likely it is to happen through legal channels. People attempt illegal entry when they are excluded from protection through regular pathways.

There is a perverse link, she continued, between legal movement and protection in a non-refugee context. The more irregular the migration is, the greater the vulnerability of the migrant (and thus the greater the need for protection and assistance). Yet irregular migrants are afforded less rather than more protection. On the other hand, there are positive links between labor issues and voluntary movement. The more voluntary the movement, the more likely it is to meet labor market needs in the receiving country. And, conversely, when a country is required to take in refugees, the incoming popu-
A more useful approach than our current one would be to shift attention from the reasons why people migrate and instead focus on their experience in transit and destination countries. We need to design policies responsive to their vulnerabilities. This does not mean abandoning efforts to reduce the drivers of migration, but it is absurd to suggest stopping all drivers of migration since well-managed migration has proven highly beneficial to all parties. We need new frameworks to tackle forced displacement, and to expand safe, legal channels for migration so that people do not fall victim to predatory practices of smugglers and traffickers. To make migration a tool for reducing inequalities between countries, hard choices will have to be made about maximizing entitlements for a few or increasing protection options for larger numbers.

Although this new compact will not be legally binding, Arbour concluded, there is still reason to hope in its potential. The expression "safe, orderly migration" aims to reduce unsafe, irregular migration. It must rest on a proper understanding of the rule of law. That understanding repudiates rule by law and the dangers of using law as a tool of injustice. Rather, this compact should reflect that the purpose of law is to liberate rather than to restrain. As Pére Lacordaire said, "Between the rich and poor, master and servant, strong and weak – it is freedom that oppresses and law that sets free." Increased international cooperation reflects this vision of the rule of law. In the future, the task may be to further clarify these complicated categories, but for today, the task at hand is to help set people free.

"A more useful approach than our current one would be to shift attention from the reasons why people migrate and instead focus on their experience in transit and destination countries."
SUMMARY OF THE EXPERT WORKING GROUP SESSION

On April 18, 2018, the day following the conference, members of the expert working group met to review the panel discussions and key takeaways and to put forward recommendations for the consideration of negotiators of the global compacts and for implementation of the agreed compacts thereafter. Several themes emerged during the course of the day, including the scarcity of the mentioning of the term "rule of law" in the draft compacts, and differing interpretations of the meaning among the UN actors, the World Bank, and civil society groups in the process. There is an opportunity here for the ABA to participate in the conversation about an interoperable definition on the rule of law. The group also raised the point that rule of law approaches fill a gap that human rights law and refugee law cannot provide on their own as rule of law work strengthens state institutions and capacity, thereby changing the underlying dynamics of forced migration.

Working group members expressed concern about US commitment to the process given its withdrawal from the migration compact (GCM), and the fact that what happens in the U.S. has consequences globally. Additionally, there was some concern about the overemphasis in the GCR on needs rather than rights, suggesting that humanitarian rather than rule of law approaches are much stronger in the document. In order to strengthen the more preventive, root causes approach, it might be strategic to consider aligning ABA ROLI’s work in this area with the World Refugee Council – which will focus on the responsibility to prevent displacement.

The group discussed how to respond to the institutionalized dichotomy between refugees and migrants as evidenced by the fact that there are two compacts rather than a single one. There were arguments on both sides and the group ultimately agreed that the compacts should be complementary and that recommendations should stress the importance of upholding rights for all. The response should be to clarify the rights for all. The group also considered whether to recommend specific language to be included in the compacts, acknowledging that to do so would mean balancing between articulating strong progressive fundamental principles and introducing pragmatic words or phrases that are more likely to be adopted.

After spending much of the day highlighting important issues and discussing what might be worth placing in recommendations, the working group suggested that the recommendations be divided into different categories depending on who the target audience would be. These categories and recom-
mendations are found below. These recommendations should be read together with the call to action noted in the companion issue paper, When People Flee: Rule of Law and Forced Migration, published by ABA ROLI in conjunction with this conference. The issue paper highlights four overarching themes that need further attention in order to integrate rule of law approaches to the global displacement response. These themes include: breaking down siloes; developing stronger normative standards; implementing existing laws; and deepening research, analysis, and reflection.

1 Note that there is a discussion of this term and its meaning in the When People Flee: Rule of Law and Forced Migration Issue Paper.
RECOMMENDATIONS FOR THE GLOBAL COMPACTS PROCESSES

The Global Compact on Refugees and the Global Compact on Migration should:

- insert or retain language about the separation between provision of public services and the enforcement of immigration laws;
- include specific protection language for lesbian, gay, bisexual, transgender, and intersex (LGBTI) people;
- forbid the use of census data for immigration enforcement;
- recognize and emphasize the protection and rights of IDPs;
- promote measures aimed at tackling root causes as the only long-term solution to displacement and irregular migration;
- provide for access to justice, including high quality legal aid and information, and a right to legal representation;
- reaffirm and insist on the right of non-refoulement;
- reaffirm the right to seek asylum;
- assert the rights of refugees and migrants to regular work and protection from exploitation;
- ensure the right of protection from xenophobia, discrimination, and pervasive bias.
- establish transit rights that include safe and orderly passage to protection in the destination country;
- eliminate conditions that promote statelessness (especially provisions that restrict women's rights to confer citizenship status on their children and spouses);
- acknowledge and protect the right to privacy, which includes the protection of data shared as part of legal registration and documentation;
- consider stipulating a legal definition of “vulnerability” and define the protections and remedies this status confers;
- maintain and emphasize the contributions of the body of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to the foundations of both compacts;
- recognize the autonomy of displaced persons to determine their own movements, noting that voluntary repatriation and return should require the restoration of human rights guarantees and the rule of law.
RECOMMENDATIONS FOR US ENGAGEMENT ON REFUGEES AND MIGRATION

The U.S. government should:

• publicly delink refugees and migration from the national security discussion about responses to terrorism;

• promote the non-criminalization of migrants and refugees who arrive in irregular ways and wish to find legal paths to remain;

• apply prosecutorial discretion as a key law enforcement mechanism;

• refrain from criminally prosecuting asylum-seekers;

• regard the detention of migrants as a last resort and separate immigration processes and facilities from those of the criminal justice system;

• ensure that families are not separated and that children receive appropriate protection and care;

• work diligently to repair the deferred action for childhood arrivals (DACA) program and exercise due process with temporary protection status termination;

• address gang violence as a root cause of migration by providing alternative opportunities for those who may be pressured to join gang;

• support transitional justice mechanisms, when possible, and to help Central American communities address the violence caused by organized crime and cartels;

• take the lead on promoting evidence-based conversation and decision making around refugees and migrants;

• ensure the right of protection from xenophobia, discrimination, and pervasive bias
ABA ROLI should:
• incorporate forced migration indicators in rule law and development monitoring and evaluation practices;
• invest in data collection to help inform assumptions, practices, and strategies around rule of law approaches to forced migration;
• develop and promote standards for the acceptance of civil society documentation as evidence for asylum and citizenship status;
• promote the use of migration sensitive impact assessments and design in rule of law and development programs;
• look for opportunities to share expertise and efforts with humanitarian and development actors who work with refugees and migrants.

Members of the When People Flee:
Rule of Law and Forced Migration Expert Working Group

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Note: These views represent the personal views of the members of the expert working group. Organizational affiliation is provided for informational purposes and should not be taken as an endorsement by those organizations.
ANNEX 1: When People Flee: Rule of Law and Forced Migration Conference Agenda