

# Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants



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# **Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants**

## **BACKGROUND TO THE PRINCIPLES**

These Principles were developed by the International Commission of Jurists (ICJ) based on consultations, including the 2016 ICJ Geneva Forum of Judges and Lawyers and at the March 2016 session of the UN Human Rights Council, as well as the ICJ's global research, experience and expertise. A draft of the Principles (without the commentary) was made available to the public and circulated to stakeholders for comment. While the ICJ aims for the Principles to reflect the broadest level of support among those consulted, they do not necessarily reflect the views of every individual participant in the consultations.

The Principles primarily address the role of judges and lawyers, including prosecutors and government lawyers. However, the ICJ urges legislators, executive officials, and all other persons exercising legal or de facto authority (whether as a public official or under a delegation of state authority or by contract), also to implement, uphold and respect the role of judges and lawyers in protecting the rights of refugees and migrants, including as set out below.

The Principles should be further secured by a broader framework of laws, policies, and practices that guarantee and implement human rights and the rule of law within States and at the regional and international level.

In these Principles the term "refugees and migrants" is to be given a broad interpretation and taken as a whole. It includes, without limitation, asylum seekers, stateless persons, victims of human trafficking, unaccompanied or separated children, and other persons in the context of migration. It applies irrespective of whether a person's entry, presence or stay is considered by national law to be regular or irregular.

The Principles are intended to complement and provide guidance for the implementation of existing international instruments relevant to protection of refugees and migrants, including without limitation: the Universal Declaration of Human Rights; the Convention relating to the Status of Refugees and its Protocol; the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the New York Declaration for Refugees and Migrants; as well as relevant regional treaties and standards.





## **GENERAL PRINCIPLES**

- 1. Every State must respect, protect and fulfil the human rights of every person on its territory or otherwise within its jurisdiction, without discrimination.**

**All refugees and migrants are entitled to the full range of internationally-recognized human rights, excepting any particular rights that international law explicitly recognizes only in relation to citizens or nationals.**

*Commentary:*

- Under international human rights law, the obligations of States towards individuals do not depend on the particular status or recognition of status of such persons under domestic or international law, except for a limited number of provisions explicitly applicable to special categories. For instance, all the rights recognized by the International Covenant on Civil and Political Rights (ICCPR) apply to everyone, with the sole exception of the rights under Article 25 (participation in public life, voting and election, access to serve in the public service), which the ICCPR expressly guarantees only to citizens.
- The question whether a person is within the jurisdiction of a State while outside that State's ordinary territory falls to be determined by general international law as well as any specific treaty provisions by which a State is bound. For instance, a person on a vessel under the State's jurisdiction, including when the vessel is in international waters (or another State's territorial waters), is within the jurisdiction of the vessel's State.

- 2. Judges and lawyers have a particularly important role to play in ensuring that all persons, including refugees and migrants, are treated as equal before the law and receive equal protection of the law without discrimination.**

*Commentary:*

- Prohibited grounds of discrimination include, without limitation, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See for example article 2 of the Universal Declaration of Human Rights (UDHR), and articles 2(1) and 26 of the ICCPR as interpreted and applied by the Human Rights Committee.
- The role of an independent judiciary and legal profession in the effective protection of human rights and maintenance of the rule of law, without discrimination, has more generally been recognized in, for instance, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors.

**3. Refugees and migrants are entitled to a fair and effective process for determination of their status, under conditions that preserve human dignity, human rights, and the rule of law. This includes the right to an individual examination, and the right to an effective legal remedy, including the right to appeal to a separate, competent and independent judicial authority.**

*Commentary:*

- In these Principles, “determination of status” includes determinations of refugee status or other entitlement to international protection, as well as determinations of statelessness. See also commentary to Principle 5.
- Judges and lawyers must approach all claims in a manner that respects each claimant’s personal dignity and recognizes the seriousness of the task being undertaken. In interpreting legal provisions, judges should wherever possible give generous interpretation to those provisions that are protective of human rights, and strict interpretation to those that limit rights. In cases where several interpretations or provisions are available and equally applicable, judges should apply those that offer the most protection for refugees and migrants.
- Judges and lawyers must ensure that fair and legal process is respected in any proceeding or other procedure that could affect the rights or status of a refugee or migrant.
- Judges should not reject any individual’s claim based solely on the fact that the individual shares a common characteristic with members of a group, e.g., ethnicity, nationality, or political opinion. However, judges may make decisions granting protection based on membership of a specific group.
- Judges and lawyers active in proceedings relating to status determination, removals, detention or other aspects relevant to the situation of refugees and migrants, should have adequate knowledge of refugee, human rights, and humanitarian protection law and practice, and be familiar with the use of interpreters and cross-cultural interviewing techniques.
- Judges and lawyers should be sensitive to the circumstances of affected individuals, their particular needs, and the risks to which removal from the state jurisdiction may expose them. At all times the confidentiality of a status determination application should be respected; in any judicial review or appeal the identity of the person should be protected from disclosure.
- Judges should proactively seek to apply any accelerated procedures that allow for swift positive decisions, particularly in cases that are prima facie well-founded. Conversely, however, accelerated procedures should not be applied in any case where the acceleration could lead to rejection of a well-founded claim.
- In addition to its essential role in safeguarding human rights and the rule of law, involvement of the judiciary in asylum procedures improves consistency of decision-making, brings greater certainty to the legal framework through interpreting and applying legal definitions and provisions, and helps to establish and maintain procedural fairness.
- The requirement for an individual assessment of the situation of each person, capable of determining whether the involuntary transfer of that person will violate the State’s international obligations, is in line with

the prohibition of collective expulsions, and the right to an effective remedy for violations of the *refoulement* prohibition under international law.

- In some circumstances, persons who arrive at but have not yet crossed a border may be entitled to protection against *refoulement* under international law, and the refusal to admit the person onto the State's territory may itself violate the State's international obligations. Persons whose rights have been violated in this manner should, like others, have access to an effective remedy as contemplated by Principle 10.
- In relation to appeals, see also Principles 5 and 6 regarding status determinations.

**4. The obligations of States to respect, protect and fulfil the human rights of migrants and refugees apply regardless of whether the individuals concerned are part of a large movement.**

**The existence of a large movement does not justify limiting or circumventing the essential role of judges and lawyers in upholding the human rights of migrants and refugee and the rule of law.**

*Commentary:*

- Whether a movement is considered to be "large" depends on the rate of arrival, the geographical context, the capacity of the receiving State to respond, and the impact on the receiving State caused by the sudden or prolonged nature of the movement, rather than on the absolute number of people moving. Such movements often involve a mixed flow of refugees and migrants.
- Principle 4 does not preclude States from developing procedures designed to address the practical challenges of large movements, such as "prima facie" recognition, or instituting mobile facilities for hearing and adjudicating claims. Any such measures must not, however, have the purpose or effect of limiting the individuals' rights or diminishing the State's respect for those rights, or otherwise reducing the quality and fairness of decision-making.
- For instance, if, in the context of a large movement, timely individual status determinations prove impractical, impossible, or unnecessary, authorities may use "group determination" procedures pursuant to which all individuals who meet certain criteria are prima facie regarded as refugees without detailed individualized assessment. Judges should similarly apply any presumptions of inclusion available under national law. On the other hand, even in the context of large movements, no decision that would adversely affect the individual should be taken without a detailed, individualized assessment with due procedural safeguards.
- Any executive, legislative, or administrative measures adopted to address large movements must be subject to substantive judicial review capable of ensuring the conformity of such measures with the rule of law, human rights, fundamental fairness, and procedural guarantees.
- Large movements of refugees and migrants do not generally, in themselves, constitute grounds for States to invoke provisions in

international human rights instruments allowing for derogation from rights in situations of exception.

- In their application to refugees and migrants (as for others), including in the context of large movements, any measures of derogation adopted for any reason must fully comply with the requirements of international human rights law. These include non-discrimination, demonstrable necessity, proportionality, and time-limitedness. Measures must be limited to the extent strictly required by the particular situation, including as regards their duration, geographical coverage and material scope. Measures must not adversely impact those rights recognized as non-derogable by treaties, or as peremptory norms of customary international law. Further, article 4(1) of the ICCPR for instance explicitly prohibits derogations that would be inconsistent with the State's other obligations under international law; this would include, for instance, international humanitarian law and international refugee law.

## **DETERMINATIONS OF ENTITLEMENT TO INTERNATIONAL PROTECTION**

- 5. Determination of a person's entitlement to international protection must guarantee and respect safeguards of procedural fairness and be subject to an effective appeal before, or other substantive review by, a competent, independent and impartial judicial authority.**

*Commentary:*

- "International protection" throughout these Principles includes protection based on refugee or statelessness status, subsidiary, complementary, temporary protection or stay arrangements, or other humanitarian status, and any additional forms of protection otherwise based on international human rights law.
- Principle 5 does not preclude a State from entrusting the initial determination of entitlement to international protection to a judicial, rather than administrative, authority. If a State decides to structure its system in this way, that judicial authority must itself meet international standards of competence, independence and impartiality of the judiciary.
- Judges and lawyers should ensure that, throughout the status determination process, including at any appeal or review, the necessary procedural safeguards are respected to ensure a fair and thorough examination of each individual case. Procedural safeguards must not be denied – summarily or otherwise – on the grounds that a prima facie risk of harm has not been made out. Important procedural safeguards include, without limitation:
  - Access to the procedure must be effective in practice. For example, fees may not be imposed on those unable to pay. Time limits must be reasonable and subject to extension in appropriate cases. Access to the procedure should not be conditional on submission of documentation, such as official identity documents, in respect of which there may be a reasonable explanation for its absence.
  - Persons must from the outset be informed of the nature and stages of the process, as well as about their rights.
  - Persons should have access to legal advice and representation, as further elaborated under Principle 7.
  - Persons and their lawyer must be given due notice of procedural steps and hearings.
  - Persons and their lawyer must have sufficient time to gather, present and evaluate relevant evidence:
    - They must be informed of, and given reasonable opportunity to consider and respond to, the evidence to be used in the procedure, as well as access more generally to relevant information within the possession of the authorities.
    - They must have the opportunity to present evidence, including particularly about the person's individual circumstances, country of origin, and to refute or mitigate any grounds for exclusion, and to make submissions on the merits as well as any procedural questions.

- Government authorities and lawyers have a duty to present evidence in their possession that would be relevant to assessing the truth, particularly when it is to the benefit of the person.
  - The judge or other decision-maker has a duty, shared with lawyers representing the government and the person, to proactively inquire in search of the truth about the entitlement of the person to international protection.
  - In relation to evidentiary gaps, the person should be given the benefit of the doubt where necessary and appropriate.
- The person must receive a face-to-face interview or hearing, in a reasonably conducive environment and accompanied by their lawyer, before the person who will decide on their entitlement to international protection. At the interview or hearing the person must be able to enter into the substance of their claim and personal circumstances.
  - Where necessary, competent and qualified interpretation and translation services must be made available, including without charge if the person cannot pay, before any decision capable of adversely affecting the individual is taken.
  - Procedures should be adapted in light of any vulnerabilities or risk factors in the case, such as for example for survivors of torture, victims of trafficking, survivors of gender-based violence, children, and disabled persons.
  - Persons and their lawyers should in all cases be provided in timely fashion with a written reasoned decision. Any decision adversely affecting the individual concerned, including in particular if the claim is rejected or declared inadmissible, should contain both the factual and legal reasoning on which it is based.
  - Persons should have an effective right to appeal against any determination that the person is not entitled to international protection, whether arising from ordinary or accelerated procedures. (See also Principle 6).
  - A negative decision should be accompanied by notification of the right to appeal and a detailed explanation of the appeal procedure, including and any applicable time limits (which must be of reasonable length and subject to extension in appropriate cases).

**6. On appeal or review, courts must not be limited to assessing only whether the appropriate procedures were legally followed.**

**The judge must be enabled to examine fully the merits of the case, including the determination of status, and to make any order the judge deems necessary to ensure international protection of an individual entitled to it, or to otherwise remedy aspects of the decision found to have been made in error.**

*Commentary:*

- Appeals proceedings should guarantee rigorous scrutiny of both the facts and the law, including as regards the merits of the person's claim to international protection, based on up-to-date information.
- If examination of the merits is not automatic in all reviews or appeals under a given national system, the judge must at minimum examine the merits of the case whenever requested to do so by or on behalf of the person seeking protection (when such request is not manifestly unfounded), or the judge is aware of other reasons to believe the initial decision may have been incorrect.
- Judges should seek for appellate review to provide oversight, monitor quality, promote consistency, and provide guidance to improve the reasoning of future decisions.
- To ensure that the right to a remedy is both practical and effective, and that the rule of law is respected, judges must be able to play a meaningful and effective role on appeal or review. To this end, appeals should have a suspensive effect on the removal of the applicants from the jurisdiction pending the final decision.
- As with other factual and legal questions relevant to the case, the judge must be enabled to inquire into whether a deemed "safe" country of origin or third country is actually safe in the case of the individual circumstances of the person, and to set aside any presumption in this regard.

**7. From the moment that a person indicates an intention to apply for international protection, or there is otherwise reason to believe that the person may be entitled to such protection, the person has the right to effective and confidential access to competent legal advice and representation, including by an independent lawyer of his or her own choosing.**

**The State has a positive obligation to inform the person of this right.**

**Where the person cannot afford to pay for legal advice and representation, independent legal advice and representation should be made available free of charge.**

*Commentary:*

- A person need not explicitly reference any form of international protection status to be, in effect, claiming a need for international protection. If there is any reasonable doubt whether a person is entitled to international protection, they should (including particularly for the purposes of application of these Principles) be presumed to be

so entitled until such time as the doubt is resolved. States must provide all information needed for persons to be aware of and access international protection procedures, and where circumstances suggest the person may be entitled to protection, must assess potential entitlement on their own initiative even if the person has not made an express request for such protection.

- Legal professional associations and States should cooperate to ensure competent independent legal assistance for those persons who cannot afford to pay for it. Costs of such assistance, to the extent not borne by the legal profession, individual lawyers, or civil society, are ultimately the responsibility of the State.
- Effective access to legal assistance should be available at the earliest opportunity, including in border zones, transit zones and reception centers, even before status determination proceedings begin, in order to facilitate access to fair and efficient proceedings. States should facilitate effective face-to-face communication, including where necessary through interpretation and translation services (see Principle 12).
- Legal counsel should ensure that the person understands his or her rights and responsibilities, the nature and purpose of the procedure, the status and steps of his or her application or process, the possible avenues and opportunities for international protection, and the elements and evidence necessary to establish entitlement to protection.
- Lawyers should provide their clients with quality, confidential legal and procedural advice, ensure the person's interests are fully and accurately presented, and seek to ensure that the person's rights are protected and respected throughout the process, including by accompanying the applicant to interviews and hearings, preparing submissions, collecting evidence, and developing and presenting legal arguments.
- General safeguards for the role of lawyers, such as the UN Basic Principles on the Role of Lawyers, must equally be respected in relation to refugees and migrants, including among others:
  - the right of lawyers to meet and communicate in private with their clients;
  - the obligation for State and non-State actors to respect the confidentiality of lawyer-client communications;
  - protection of lawyers from intimidation, hindrance, harassment or improper interference;
  - ensuring lawyers are able to travel and to consult with their clients freely both within their own country and abroad;
  - ensuring lawyers are not subjected to or threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;
  - ensuring that where the security of lawyers is threatened as a result of discharging their functions, they are adequately safeguarded by the authorities;
  - ensuring that lawyers are not identified with their clients or their clients' causes as a result of discharging their functions;
  - ensuring that lawyers have access to appropriate information, files and documents in the State's possession or control at the



earliest possible time and in all cases in sufficient time to enable lawyers to provide effective legal assistance to their clients.

- Judges and lawyers should work to ensure that processing timelines and interview and proceeding scheduling provide applicants with enough time to retain and effectively consult with a lawyer. This is especially important when the lawyer and client are only able to communicate through an interpreter. To the extent permitted, judges should consider extending the time for legal consultation based on the circumstances of the individual case in order to ensure fairness and effectiveness of the procedures.
- Legal professional associations and States should work together to prepare contingency plans for ensuring legal assistance wherever there is a risk of large movements of refugees and migrants.
- When advising and representing a person in respect of potential claims to international protection, lawyers should consider and identify all of the relevant grounds, and seek and receive informed instructions from the person.
- Given the particular challenges children face in interactions with the legal system, children have a particularly acute need for specialized legal assistance, free of charge, in all matters affecting them.
- Judges, lawyers, and legal professional associations should strive to ensure that an applicant is assisted by the same lawyer from the initial reception through the end of the proceedings and, if that is not possible, that the new lawyer is familiarized with the case before transfer.
- States and legal professional associations should work together to ensure that qualified and competent legal personnel are permanently posted at or near to high traffic international borders and all reception centers and that an up-to-date list of such persons is available at all international borders and reception centers.
- While all applicants should ideally have access to a fully qualified and competent lawyer, temporary recourse to alternative legal assistance such as paralegals and law students under the effective supervision of a lawyer may be considered when strictly necessary to deal with insufficient capacity.
- If there is insufficient capacity in the legal profession in the country, among other things, the legal profession and the State should consider whether it is possible to facilitate competent practitioners from other jurisdictions to be able temporarily to practice in the country.
- In positive group determinations of prima facie eligibility where there is no potential detriment to the individual, individual access to a lawyer may be less necessary, less urgent or less resource-intensive, and legal assistance resources may be distributed to more complex, individual claims in which there is a potential detriment. Such considerations do not apply in any case where the group determination would potentially provide lesser protection than an individual determination would have, and the group determination prejudices any future individual determination.



## **DEPRIVATION OF LIBERTY**

**8. Every deprivation of liberty of any refugee or migrant must be subject to prompt and automatic judicial review of the lawfulness of detention, with guarantees of fair and effective process in each individual case.**

**The judicial authority must be able to make a prompt and effective order for release if it finds that the detention is unlawful under national law or international human rights or refugee law.**

**The detainee has a right to a qualified, independent and competent lawyer to assist in such proceedings.**

### *Commentary:*

- Principle 8 applies to any detention of a migrant or refugee on any ground, whether criminal, administrative or otherwise. It is without prejudice to the position of many (including the ICJ) that no-one should be deprived of liberty solely on grounds of their immigration status, including in cases of irregular entry. International law prohibits, for instance, detention of a refugee or migrant on the basis of his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status. Refugees and migrants may, at most, be detained for immigration-related reasons only exceptionally. Detention of children on grounds of their or their parents' migration status violates the rights of the child and is incompatible with the best interests of the child, and the detention of children solely for immigration-related purposes should be prohibited in all circumstances. In the case of stateless persons, being undocumented or lacking required immigration / residence permits cannot, by itself, constitute grounds for detention.
- International human rights law and standards recognize that anyone who is deprived of liberty by arrest or detention on any grounds has the right to challenge the lawfulness of the detention before a court and to be ordered released if the detention is found not to be lawful (e.g. ICCPR, article 9(4)). Additionally, those arrested on criminal grounds have the right to be brought promptly before a judge or other judicial officer (e.g. ICCPR, article 9(3)). See also the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Articles 4, 11, 32, 37.
- Review of the lawfulness of the deprivation of liberty should include consideration of the legal and factual basis asserted to justify the detention, as well as its necessity, reasonableness and proportionality. In assessing the impact of detention, judges should take into account the age, gender, state of health and other relevant personal circumstances of the individual.
- Judges should, in each individual case, as part of determining whether the detention is lawful and non-arbitrary in relation to the facts and law, should fully consider all available alternatives to detention, ensure such alternatives do not in practice amount to detention by another name, and ensure that detention is only ordered as a time-limited measure of last resort when no alternative is available.
- International standards emphasize the importance of the promptness of the detainee's access to the court, of the hearing and deliberation by the court, the issuance of a decision, and execution of any order for release. Judges and lawyers should therefore do their utmost to avoid

any undue delay at all stages of the process. In general, judicial review should take place no later than 24 to 48 hours after the decision to detain the person. In particular, if the national legal system generally provides for judges to review the lawfulness of detention at the same time as other questions relevant to the applicant's status determination, but the status determination is prolonged, judges have a duty to separately evaluate the question of detention without further delay.

- National legal systems should provide for automatic periodic judicial review of the lawfulness, necessity and proportionality of any ongoing detention. The refugee or migrant and his or her representative should be able to attend and provide information and submissions to such periodic reviews.
- Judges, lawyers, and legal professional associations should, together with States, ensure that refugees and migrants in detention have unconditional, effective, prompt, and regular confidential access to competent and independent legal assistance, including without charge in cases where the person cannot pay.
- Legal professional associations should work with states to ensure that an up-to-date list of contact information of qualified legal personnel is available to all persons detained in airport transit zones and at other points of entry.
- Lawyers should, to the extent possible, monitor the conditions of detention and ensure the rights of refugees and migrants in detention are being respected and that they are being held in a dignified and humane manner. Judges should, to the extent permitted by national law, exercise a similar monitoring function, and legislators should provide for this where not already provided for. Persons deprived of their liberty must be ensured effective remedies, including judicial remedies, where the conditions of detention do not comply with international standards (see also Principle 10).

## REMOVALS

**9. Persons lawfully in the territory of a State, and other persons who claim or otherwise may be entitled to international protection, may not be removed involuntarily from the jurisdiction of a State without recourse to a fair and effective procedure.**

**Such persons have a right of access to a qualified, independent and competent lawyer, both in removal proceedings and in cases where the return is said to be voluntary.**

**Summary, arbitrary, collective or mass expulsions or removals should be prohibited in national law.**

### *Commentary:*

- A person is presumptively entitled to international protection whenever the person effectively claims such entitlement, or there are other reasons to believe he or she may be entitled to it (see also Principle 7 and commentary above).
- Principle 9 is based on, among other sources: article 13 of the International Covenant on Civil and Political Rights (ICCPR); *non-refoulement* obligations arising from for instance articles 6 and 7 of the ICCPR or article 3 of the Convention against Torture; articles 32 and 33 of the Refugee Convention; and similar provisions in regional treaties and instruments. To the extent that some of these sources contemplate exceptions to certain procedural guarantees in the context of national security or public order, any such exceptions must be strictly construed, and applied only when and to the extent absolutely necessary and proportionate (including that greater restrictions of procedural safeguards may only be applied when lesser restrictions would demonstrably be ineffective). Further, such exceptions are inapplicable in relation to certain grounds for international protection: for example, in relation to the risk of torture.
- Judges should ensure in removal proceedings that the record is complete, including where necessary by proactively asking questions of the person and the State, and where possible through independent research, to ensure that justice is done. Judges should consider the individual circumstances of every individual with due diligence and good faith and ensure that adequate justification has been presented, and that the removal is not prohibited under international human rights and refugee law and standards, before issuing a removal order. In particular, obligations of *non-refoulement*, whether arising under international human rights or refugee law, must be fully respected.
- Access to a lawyer in removal proceedings is necessary to ensure the fairness and effectiveness of the process. Access to a lawyer in cases where the return is said to be voluntary is necessary to ensure that the will of the migrant is being exercised voluntarily.
- If the consent of a person who claims or otherwise may be entitled to international protection is sought for his or her removal, the person's lawyer (or, if the person is without a lawyer, another independent lawyer) should be present to ensure that any consent to voluntary return processes is fully informed and given free of any coercion and that persons do not sign anything without fully understanding the document's content and consequences.

- Particularly in the context of large scale movements, judges should issue temporary protection measures if needed to prevent mass expulsions at borders. Where such measures are not currently recognized in national law, legislators should provide for them.
- Judges and lawyers should ensure that any removal orders are provided in writing, in a language the person understands, with the reasons for expulsion and information on how to challenge the removal order.
- Judges and lawyers should analyze any readmission agreements entered into by the State, and the factual circumstances, to ensure that no one is removed without effective human rights guarantees. Judges should be confident that no person is removed to a country without a well-functioning asylum system with the resources, infrastructure, and rule of law necessary to guarantee the human rights of the person.
- Judges and government lawyers should ensure that persons claiming or who otherwise may be entitled to international protection, and their lawyers, are fully aware of any removal proceedings and any evidence relied upon to justify removal, and should allow the person and their lawyer sufficient time to prepare and submit evidence and arguments against their expulsion. Judges should never allow such a person to be expelled without a reasoned decision making sufficient reference to the relevant legal provisions and the facts of the individual case after fully hearing the person and their reasons against expulsion.
- In order to ensure that the role of the courts in relation to such matters is meaningful and effective, in cases where a person challenges a removal order on the basis that it will violate the State's *non-refoulement* obligations, the person has the right to an appeal with suspension of the effects of the order pending hearing and decision on the appeal.

## **EFFECTIVE REMEDY AND ACCESS TO JUSTICE**

**10. Refugees and migrants, like other persons, have at all times and in all circumstances the right to an effective remedy and reparation for violations of human rights, which includes access to the courts and access to legal advice and representation.**

**Refugees and migrants who allege they have been victims of crimes, whomever the perpetrator, also have the right to equal access to justice and equal treatment in the process of investigation and prosecution of such crimes, as well as in any procedures for compensation or other forms of reparation.**

### *Commentary:*

- Principle 10 applies to all violations of human rights and crimes, not only those related to a person's status as a refugee or migrant. It includes the full range of civil, political, economic, social and cultural rights recognized under international law (as well as relevant regional instruments).
- Principle 10 applies both to violations and crimes in the State of ultimate destination, and to those that occur when a refugee or migrant is in transit. These Principles do not directly address questions relating to the territorial jurisdiction of courts to deal with violations or crimes that have occurred in another State.
- Refugees and migrants must have effective access to justice for human rights violations, without discrimination. In particular, they must in law and practice have access to all necessary remedies before the domestic courts, on an equivalent basis to nationals of the State.
- The right to access to an effective remedy and reparation for violations of human rights, without discrimination, is recognized both by particular treaties (such as the International Covenant on Civil and Political Rights, article 2(3)), and more generally: see for example the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The right to equal access to justice for other crimes is inherent in the non-discrimination clauses of human rights treaties. It is also recognized in instruments such as the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, and is further reflected in article 16 of the Refugee Convention.
- Refugees and migrants must have effective access to qualified, independent, and competent lawyers for the purpose of receiving advice and representation concerning alleged human rights violations by or in the State, on an equivalent basis to nationals of the State.
- Lawyers and judges should seek to ensure that refugees and migrants are not removed from the State as a consequence of asserting their right to remedy and reparation or to access justice.
- Lawyers should consider using strategic litigation to challenge any systemic deficiencies in refugees' or migrant's access to services and to strengthen status determination procedures.
- Judges and lawyers should ensure that effective child- and gender-sensitive information and procedures for seeking remedies are available.





## **INDEPENDENCE, IMPARTIALITY, AND EQUALITY BEFORE THE LAW**

**11. Whenever a decision in relation to a refugee or migrant is entrusted to a judicial body, the body must meet international standards of judicial competence, independence and impartiality.**

*Commentary:*

- In line with the UN Basic Principles on the Independence of the Judiciary:
  - “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”
  - “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”
  - “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”
  - “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”
- The Human Rights Committee, interpreting articles 13 (due process in expulsions) and 14 (independence of judiciary / fair hearing) of the ICCPR, has stated:
  - “The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.” (General Comment no 32, para 7)
  - The Committee has stated that while article 14(1) does not in general directly apply to “expulsion and deportation procedures”, which are more specifically addressed by article 13 ICCPR, at the same time: “The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable. All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.” (General Comment no 32, paras 17 and 62)
- To be impartial, when assessing the credibility of individuals, judges need to take into account cultural differences, trauma, and other

individual circumstances and factors particular to the individual and the country concerned, that may explain behaviours the judge would otherwise infer as reducing credibility, such as lack of details, lack of corroborating documentary evidence, or inaccuracies or inconsistencies in testimony or documentary evidence.

- In order to enhance the competence, independence and impartiality of the judiciary and legal process, judiciaries, States, legal professions, civil society, and international and regional agencies should cooperate to ensure initial and continuing training of judges and lawyers on:
  - International refugee law and relevant international human rights law,
  - National immigration laws,
  - The national framework of refugee and immigration processes and procedures,
  - Cultural competency, detection and countering of inherent bias, and cross-cultural interviewing skills,
  - Country conditions and country of origin information,
  - Migration and human trafficking issues, and
  - The specific needs and vulnerabilities of persons at heightened risk of abuse (including for instance women, children, persons with disabilities, trafficked persons, abuse victims, torture victims, indigenous persons, and persons subject to discrimination or violence on the basis of their actual or imputed sexual orientation or gender identity), and how to sensitively interact with such persons.
- While individual judges should generally remain outside of debate within political institutions about refugee and migration issues, judges and lawyers should be ready when appropriate to insist, both to others within their professions and when necessary to the broader public, on the human rights of all persons, including refugees and migrants, and the fundamental role of independent judges and lawyers in upholding these rights and the rule of law in this context. International, regional and national professional associations, as well as judicial and bar councils, may have a particular role to play in this regard.
- With proper protections to ensure independence and impartiality, as well as full procedural safeguards of fairness, specialized tribunals with expertise in immigration and asylum law can be a further means of ensuring effective and efficient access to justice.

**12. Judges and lawyers should ensure that refugees and migrants have access to a qualified and independent interpreter in preparation for, during, and if relevant following, all proceedings including status determinations, detention proceedings, removal proceedings, and appeals.**

*Commentary:*

- For the right to procedural fairness and to an effective remedy to be meaningful, and to ensure the quality and justness of judicial decision-making, persons affected by such proceedings must be able to understand and to participate as regards both the decision-maker and the person's lawyer; where the person is not competent in the language used in the proceeding, interpretation becomes necessary.
- All court decisions and similar legal documents relevant to the status or rights of a person should be translated into and presented to the person in a language the person is known to understand.
- Legal professional associations, individual lawyers, judges, and administrative officials should ensure that interpreters are competent, independent, and not biased in any way against refugees and migrants. They must ensure that there is sufficient ability for meaningful communication between the individual, their lawyer, and the decision-maker throughout all aspects of the process.

**13. Judges and lawyers must ensure equal treatment, equal protection of the law, and equality before the law, without discrimination, in accordance with international standards.**

**Formal equality of treatment is not enough; judges and lawyers should consider and counter-act the potential for formally neutral measures or standards to result in indirect discrimination in their actual impact.**

**Consistent with the principle of non-discrimination, the rights of those at heightened risk of discrimination or other human rights violations and abuses must be ensured at all times, including but not limited to: persons with disabilities; women; children; trafficked persons; stateless persons; victims of torture and other such abuses; members of national, ethnic, religious or linguistic minorities; indigenous persons; stateless persons; persons subject to discrimination or violence on the basis of their actual or imputed sexual orientation or gender identity.**

*Commentary:*

- Judges and lawyers should recognize and correct any real disadvantages a person who claims or otherwise may be entitled to international protection might have and, to the extent possible, should institute any necessary countervailing measures to help reduce or eliminate the obstacles. (Where the judge is not able to institute such measures directly, he or she should at minimum affirm the need for such measures and take appropriate remedial action in their absence.)
- Judges should consider the heightened risks of violations of fundamental rights upon return to their country of origin of such persons due to their specific vulnerability.
- Judges and lawyers should be aware of, advise on, and consider the variety of claims that might be available to different applicants

- especially where there may be additional options for certain classes of people including women, children, and trafficking victims.
- Judges and lawyers need to be aware of the special vulnerabilities of those in detention such as children who may be more likely to withdraw their claims and agree to return as a result of misunderstandings or the threat of prolonged detention or uncertainty.
  - Judges should be aware of child-specific forms and manifestations of persecution entitling the child to protection under international law. In matters relating to children, judges should make the best interests of the child a primary consideration. Judicial procedures should be adapted to the specific needs of children. Determination of the status of unaccompanied or separated children should be treated with urgency, as should cases in which the age of a child is being disputed. Legal assistance should be assured age determinations processes.
  - Legal professional associations should work with States to develop gender and age sensitive policies and capacities to ensure the rights and address the particular needs of children, prevent separation of families, and prevent and respond to cases of gender-based violence.
  - Lawyers should ensure that female asylum-seekers are given the opportunity to lodge an individual application separate from male relatives, have the right to be given their own legal advice, and are given the opportunity to be interviewed in private and separately from their male relatives and by a female interviewer, with similarly separate hearings if desired.
  - In assessing credibility, judges must fully consider and take account of sensitive circumstances and any particular vulnerabilities of or risks to the individual, including how disability or trauma can affect memory, the manner in which evidence is given, and the way questions are answered. Judges should tailor their inquiry and questioning appropriately to the needs of the applicant. Judges and lawyers should ensure that the interview and hearing environment is not intimidating, hostile, or insensitive to those with particular vulnerabilities.
  - Any disability or particular vulnerability should not negatively affect access to legal aid, the right to be present and heard, or any of the other rights set out in these Principles.
  - Judges and lawyers should strive to minimize re-victimization or trauma. When interviewing those at heightened risk, judges and lawyers should generally use open-ended questions that enable the more difficult issues to emerge and the individual to approach their trauma in a manner they are most comfortable with
  - Especially regarding children, judges should be aware of and fully consider any conflicts of interest between the government agencies making assessments as to age and eligibility for social services and the outcome of that decision.
  - Judges should seek to ensure that refugee and migrant children are placed in the same facilities as and have equal access to social services and education as would be a child national in need of state protection.
  - It is the role of the judge and the lawyer to protect individuals against any risk of abuse arising from the imbalance of power between the government and the individual.
  - Where a person is unable to read, decisions regarding the person should be communicated to him or her orally, in addition to the written judgment or order.

## **NATIONAL JUDICIARIES AND INTERNATIONAL LAW**

- 14. Judges should be aware of the international human rights and refugee law and standards applicable to the State.**

**Judges should be aware that, as an organ of the State, an act (or failure to act) by the judge that is inconsistent with international law will place the State in violation of its international legal obligations.**

**Judges should accordingly seek to ensure that all decisions and other acts or inaction by the judge are fully consistent with the State's international legal obligations.**

- 15. In order that judges are not asked to apply national laws that potentially would lead the judge to violate international human rights or refugee law, legislators and executive officials should regularly review, and if necessary amend, all laws and regulations applicable to refugees and migrants to ensure that the national legal framework is fully consistent with the obligations of the State under international human rights and refugee law.**

- 16. When a judge is confronted with an apparent conflict between national and international law, in which an application of national law by the judge could constitute a violation by the State of its international human rights or refugee law obligations, the judge should use any judicial means and techniques or discretion at his or her disposal to avoid the potential violation, including for instance interpretative techniques and constitutional doctrines, remedies or references.**

**If the judge is of the opinion that a violation would be an unavoidable consequence of applying the national law, the judge should make this clear to the individual, his or her lawyer, and the government, and:**

**(1) where the judicial act or inaction would make the judge responsible for or complicit in a crime under international law, the judge should refuse to do the act or desist from the omission, and state his or her reasons for so doing;**

**(2) where the judicial act or inaction would constitute or contribute to a violation of international human rights or refugee law not constituting a crime under international law, the judge, if he or she does not refuse to act (or to omit to act), should at minimum explicitly state in the judgment, order or decision that he or she believes the act or inaction to be in violation of the State's international human rights or refugee law obligations but that the judge considered that he or she was nevertheless unavoidably compelled by national law to make such a ruling. In such circumstances, any power to suspend the operation of the judgment, order or decision so as to preserve the situation of the affected individual pending appeals to national or international bodies should be exercised.**

- 17. Judges, judges associations, lawyers, and legal professional associations, in their respective roles as guarantors of human rights, should as appropriate promote or support ratification or accession to and domestic implementation of international instruments for the protection of refugees and migrants.**



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## **The 2016 Geneva Forum of Judges and Lawyers**

### **Large movements of refugees and migrants: the role of judges and lawyers**

The seventh annual ICJ Geneva Forum of Judges & Lawyers, 17-18 November 2016, brought together judges, lawyers, and refugee and migration experts from around the world, as well as relevant UN agencies in Geneva, to discuss the role of judges and lawyers in situations of large-scale movement of refugees and migrants.

Participants reflected on practical, policy, and legal challenges posed by contemporary movements of refugees and migrants, perceived as exceptional in terms of their scale and speed. Examples include the situations in Europe (with people coming primarily from and through North Africa and the Middle East, including from Syria, Eritrea, Iraq and Afghanistan); in the Americas (including people coming to the United States of America from Central and South America); in Asia (including in relation to the Rohingya across Southeast Asia, and in relation to practices involving Australia and the Pacific); and within and from parts of Sub-Saharan Africa.

In most of these situations, the legal protections available and the respective roles of the executive, legislative and judicial branches of government in securing these protections have been a matter of debate. Authorities world-wide have faced the challenge of ensuring that in all circumstances people have access to fair and effective procedures in relation to key decisions about their rights and interests, such as: determinations of a person's entitlement to international protection, including determinations as to refugee status; decisions about detention or criminal proceedings based on one's entry or presence in the country; and decisions about expulsion or onward transfer.

In some cases governments have departed radically from ordinary procedures. The framework of "crisis" or "emergency" has been increasingly invoked, sometimes to reduce judicial protections and guarantees and access to justice.

The Forum focussed particularly on the role of judges and lawyers in securing individuals' substantive and procedural rights in such situations, and in reviewing the constitutionality and international legality of relevant national legislation, policies, and practices.

Forum participants were invited to analyze relevant legal and policy frameworks and practices at the national, regional and universal levels, and to make recommendations about the particular role of judges and lawyers in such situations, including relative to the executive and legislative branches of government.

At a reception where Forum participants were joined by additional representatives of the diplomatic and international community in Geneva, the Forum was honoured to be addressed by remarks from: Judge Sanji Monageng (Appeals Division of the International Criminal Court & Commissioner of the International Commission of Jurists); Mr Olivier Coutau, (delegate to International Geneva (*Le délégué à la Genève internationale*), the Republic and Canton of Geneva); Ms Mona Rishmawi (Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the UN High Commissioner For Human Rights); and His Excellency Mr Jorge Lomónaco, Ambassador, Permanent Mission of Mexico.

The Forum was the main source for much of the content eventually reflected in the ICJ Principles on the role of judges and lawyers in relation to refugees and migrants.

The 2016 Geneva Forum of Judges & Lawyers was made possible with the support of the Republic and Canton of Geneva, Switzerland. The ICJ is also grateful to the Swiss

Confederation, and the Centre d'Accueil Genève Internationale (CAGI), for their in-kind support.

## **2016 Geneva Forum of Judges and Lawyers**

### **Participants**

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<b>Álvaro BOTERO NAVARRO</b>	(Colombia), Attorney; Human Rights Specialist, Office of the Rapporteur on the Rights of Migrants, Inter-American Commission on Human Rights.
<b>Judge Rafael DE MENEZES</b>	(Brazil), Vice-President, International Association of Judges.
<b>Judge Katelijne DECLERCK</b>	(Belgium), President, International Association of Refugee Law Judges.
<b>Laura DUBINSKY</b>	(United Kingdom), Barrister, Doughty Street Chambers, London.
<b>Fanny DUFVENMARK</b>	Migration Law Expert, International Organization for Migration (IOM), Geneva.
<b>Judge Martina FLAMINI</b>	(Italy), Judge, Court of Milan.
<b>Amanda FLORES</b>	Human Rights Officer, Mandate of the Special Rapporteur on the Independence of Judges & Lawyers, Office of the United Nations High Commissioner for Human Rights (OHCHR), Geneva.
<b>Madeline GARLICK</b>	Chief of the Protection Policy and Legal Advice Section, Division of International Protection, Office of the United Nations High Commissioner for Refugees (UNHCR), Geneva.
<b>Professor Guy GOODWIN-GILL</b>	(United Kingdom), Barrister, Blackstone Chambers; Emeritus Professor of International Refugee Law, University of Oxford.
<b>Mohammed Jaouad IDRISSE QAITONI</b>	(Morocco), Lawyer; Member of the Executive Committee of the UNESCO Centre for "The Law and Migration" (CUDM - <i>Centre UNESCO « Droits et Migrations »</i> ).
<b>Vassilis KERASIoTIS</b>	(Greece), Head of Legal Unit, Greek Council for Refugees.
<b>Stefanie KHAN</b>	Office of the United Nations High Commissioner for Human Rights (OHCHR)

- Judge Seong Soo KIM** (South Korea), Presiding Judge, Seoul Central District Court; Vice-President, Asia-Pacific Chapter of the International Association of Refugee Law Judges.
- Tirza del Carmen LANZA FLORES** (Honduras), Lawyer; former Judge, Magistrate and Prosecutor.
- Judge Esteban LEMUS LAPORTE** (Costa Rica), Judge, Costa Rican Administrative Tribunal of Immigration (*Tribunal Administrativo Migratorio*); Vice-President, Americas Chapter of the International Association of Refugee Law Judges.
- Judge Dana Leigh MARKS** (United States of America), President, National Association of Immigration Judges; Immigration Judge, San Francisco.
- Pedro MARTINEZ ESPONDA** Intern, mandate of the Special Rapporteur on the Independence of Judges & Lawyers, Office of the UN High Commissioner for Human Rights (OHCHR), Geneva.
- Pascal MAURER** (Switzerland), Union International des Avocats (UIA) Past President, and currently Director-General of the UIA Institute for the Rule of Law; Lawyer, Keppeler & Associés, Geneva.
- Judge Susana MEDINA** (Argentina), President, International Association of Women Judges; Ministra del Superior Tribunal de Justicia de Entre Ríos; Presidenta de la Asociación de Mujeres Juezas de Argentina.
- Judge Sanji MONAGENG** (Botswana), Appeals Division International Criminal Court; Commissioner, International Commission of Jurists.
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- Mónica OEHLER TOCA** (Mexico), Lawyer.
- Judge Angeliki PAPAPANAGIOTOU-LEZA** (Greece), Judge, Administrative Court of Appeal of Athens, President of Independent Appeals Committee.
- Clara PASCUAL DE VARGAS** Human Rights Officer, Mandate of the Special Rapporteur on trafficking in persons, especially

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**Maya SAHLI-FADEL** (Algeria), Commissioner & Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, African Commission on Human and Peoples' Rights.

**Roxane SHEYBANI** (Switzerland), Lawyer; Rappard & Iafaev Avocats; Membre du Bureau de la Commission des droits de l'Homme de l'Ordre des avocats de Genève.

**Judge Maria Josefina TORRES** (Philippines), Judge, 4th Judicial Region, Philippines & Vice President of the Asia-Pacific Chapter of the International Association of Refugee Law Judges.

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<b>ZAR LI AYE</b>	(Myanmar), National Legal Adviser, ICJ Myanmar Office, Myanmar.
<b>Livio ZILLI</b>	(Italy), Senior Legal Adviser & UN Representative, Legal and Policy Office, Geneva.



## **Remarks by H.E. Ambassador Jorge Lomónaco, Permanent Representative of Mexico**

on the occasion of the 7th annual ICJ Geneva Forum of Judges and Lawyers, *Large Movements of Refugees and Migrants: the Role of Judges and Lawyers*, 17 November 2016:

"It is a real honor for me to be here today and to have the opportunity to address a few words on the occasion of the 7th annual forum of judges and Lawyers organized by the International Commission of Jurists.

I have to say that, to many, it is always a pleasure to be surrounded by judges and lawyers and engage with them in the context of a reception and not in the middle of a court room, particularly if one is not a lawyer.

I am truly honored to have the possibility of sharing some reflections on the role of judges and lawyers in situations of large-scale movements of refugees and migrants.

Without a doubt, the fact that you choose to address this specific issue during this forum is particularly welcomed but also very telling, as we are facing extraordinary times. Not only has the world been facing in the last few years unprecedented movements of refugees and migrants and the terrible humanitarian consequences they suffer, but nowadays we hear more and more voices trying to portray migrants or refugees as a threat to our societies. These voices ignore the great cultural and economic contributions of migrants and, perhaps more worrying, they also disregard the suffering of millions of people who are escaping violence, poverty, natural disasters and only hope for better conditions of living.

Over the last decades, the international community has made much progress in recognizing the rights of migrants and in elevating the standards for the protection of refugees across the world. Among them we can mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families signed in 1990 and entered into force only in 2003. As the number of ratifications remains low (49 so far) we clearly need to work much harder towards universality. Nevertheless, the convention has become a reference and a framework to continue strengthening the protection to which migrants are entitled.

More recently, the New York declaration for refugees and migrants adopted last September whereby Member States commit to, among others:

- Protecting the human rights of all refugees and migrants, regardless of status
- Ensuring that all refugee and migrant children receive education within a few months of arrival.
- Preventing and responding to sexual and gender-based violence.
- Supporting those countries rescuing, receiving and hosting large numbers of refugees and migrants.

- Working towards ending the practice of detaining children for the purposes of determining their migration status.
- Strongly condemning xenophobia against refugees and migrants and support a global campaign to counter it.
- Highlighting the positive contributions made by migrants to economic and social development in their host countries.
- Improving on the delivery of humanitarian and development assistance to those countries most affected, including through innovative multilateral financial solutions, with the goal of closing all funding gaps.

Notwithstanding the progress, we are living in turbulent times. Today we hear more and more voices aiming at taking us backwards, ignoring the legal protections and standards that we have been carefully building over time.

This is where you, judges and lawyers, have a major role to play. When governments fail to protect human rights, the rule of law is the last resort to ensure the protection of the rights of vulnerable groups, those of people who are facing distress, of migrants and refugees.

When governments fail, judges, lawyers, and civil society have the ultimate duty to ensure that human rights are respected and protected.

The New York Declaration, for instance, refers broadly to access to justice and to the legal safeguards of migrants, but does not elaborate on the role that judges and lawyers may play. However this does not mean judges and lawyers do not have a role to play.

Mexico welcomes and encourages all efforts including those of the judiciary, bar associations and civil society in general, that can contribute to strengthen the protection to which migrants and refugees are entitled and to ensure that human rights in general are fully respected.

While wishing you very productive deliberations I respectfully urge you to consider the role that you can and maybe should play.

Thank you.”

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May 2017 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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