

# INTERNATIONAL LAW ASSOCIATION

## ATHENS CONFERENCE (2024)

### INTERNATIONAL MIGRATION AND INTERNATIONAL LAW

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# Interim Report: The Right to Enter<sup>1</sup>

## I. Introduction

### 1.1 Overview

1. Migration patterns are increasingly complex – driven and impacted by the changes we see in the world today. Conflict, climate change, environmental degradation and uneven development are increasingly driving displacement and irregular migration. In 2024, nearly 300 million people around the world will need humanitarian assistance and protection due to conflicts, climate emergencies and other drivers.<sup>2</sup> In 2021, there were around 281 million international migrants, which equates to 3.6 per cent of the global population.<sup>3</sup> Compared to 1990, when international migration represented 2.9 per cent,<sup>4</sup> the relative number of migrants has increased. This is, however, still a rather small minority of the world's population, meaning that staying within one's country of birth overwhelmingly remains the norm.<sup>5</sup> However, this overall average masks a number of disparities. Even though the number of international migrants has increased in all regions, a higher increase can be detected in Europe and Asia compared to other regions. Europe and Asia each hosted respectively around 87 and 86 million international migrants in 2021 – comprising 61% of the global number of migrants.<sup>6</sup>
2. The Committee on International Migration and International Law was established to develop recommendations on key issues relating to international legal regulation of migration in the absence of a comprehensive multilateral legally binding instrument on the topic. It aims to focus on issues related to admission, sojourn and departure of international migrants from public and private international law perspectives. An important starting point for the determination of relevant international legal framework and reflection on its possible improvements is the question of the conditions according to which international migrants possess or not the right to enter a foreign State's territory. In the absence of a comprehensive set of international norms on the matter, the Committee's first interim report offers some reflections underlying the legal debate on the right to enter in order to stimulate discussions, aimed at developing recommendations to be reflected in the final report.
3. This interim report includes five sections. The first, introductory, section provides definitions of some key terms and contextualization of the right to enter in relation to State sovereignty and jurisdictional issues. Section two deals with the international legal framework of the right to enter, including brief discussion on international human rights law and international refugee law and then focusing on treaties, customary international law, general principles of law and soft law in relation to international migration law. The third section focuses on the right to enter for nationals and the fourth section deals with the right to enter of aliens, including those aliens entering 'their own country' but not the country of nationality, the principle of non-

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<sup>1</sup> This 1<sup>st</sup> Interim Report of the ILA Committee on International Migration and International Law was prepared on the basis of contributions by Funmi Abioye, Mariana Ferolla Vallandro do Valle, Thibaut Fleury Graff, Michael Lysander Fremuth, Jean-Pierre Gauci, Sanzhuan (Sandra) Guo, Tamas Molnár, Andreas Müller, James Nafziger, Kaoru Obata, Giulia Raimondo, Jaya Ramji-Nogales, Adel-Naim Reyhani, Vasilka Sancin (listed in the alphabetical order).

<sup>2</sup> IOM, 'IOM Global Appeal 2024', 4, <<https://www.iom.int/iom-global-appeal-2024>> accessed 4 March 2024.

<sup>3</sup> IOM, 'World Migration Report' (2022), xii <<https://publications.iom.int/books/world-migration-report-2022>> accessed 1 March 2024.

<sup>4</sup> Ibid 23.

<sup>5</sup> Ibid 21.

<sup>6</sup> IOM (n 3), 24.

refoulement, family reunification, and stateless persons. The last section is on anti-discrimination in the context of the right to enter.

## 1.2 Definition of Key Terms

4. This interim report adopts the definition of ‘aliens’ in the International Law Commission (ILC)’s Draft Articles on Expulsion of Aliens (Draft Articles), which refer to ‘an individual who does not have the nationality of the State on whose territory that individual is present’.<sup>7</sup> The notion includes foreign nationals and stateless persons, but not those who have, in addition to the respective State’s nationality, one or more other nationalities.<sup>8</sup>

5. The term ‘migrants’, while not being legally defined, is understood in this report in accordance with the definition suggested by the International Organization for Migration (IOM) as

[...] a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.<sup>9</sup>

6. As this Interim Report, though, is confined to addressing the right to enter a territory, only migration of a transboundary character is of relevance here. For this report’s purpose, ‘international migrant’ refers to ‘a person who moves away from their own country of usual residence, temporarily or permanently’. It is noted that the definition of ‘international migrant’ used in this report is broader than the definition of the UN Department of Economic and Social Affairs (UNDESA) of ‘international migrant’<sup>10</sup>, as UNDESA’s definition excludes certain forms of international migration i.e. due to ‘recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimages’,<sup>11</sup> and it involves a period of stay of at least one year.<sup>12</sup>

7. This report adopts the IOM definition of ‘international migration’, which refers to:

The movement of persons away from their place of usual residence and across an international border to a country of which they are not nationals.<sup>13</sup>

8. This report does not intend to define all relevant terms under the mandate of the Committee, such as ‘undocumented migrants’<sup>14</sup>, ‘migrants in vulnerable situation’,<sup>15</sup> ‘migrant workers’ and ‘human trafficking’ to name a few. However, the two most relevant categories of migrants in this report should be defined: asylum seekers and refugees. ‘Asylum seeker’ has been

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<sup>7</sup> ILC, ‘Draft Articles on the Expulsion of Aliens’ (2014) UN Doc A/69/10, Article 2.

<sup>8</sup> ILC, ‘Draft Articles on the Expulsion of Aliens, with commentaries’ (2014) UN Doc A/69/10, 5.

<sup>9</sup> IOM, ‘Key Migration Terms’, <<https://www.iom.int/key-migration-terms>> accessed 1 March 2024; IOM, *International Migration Law: Glossary on Migration* (2019)132.

<sup>10</sup> UN Department of Economic and Social Affairs (UNDESA)’s definition: ‘any person who changes his or country of usual residence’ at UNDESA, *Recommendations on Statistics of International Migration, Revision 1* (UN Publications 1998) para 32; see also: IOM ‘Key Migration Terms’, *ibid*.

<sup>11</sup> IOM, ‘Key Migration Terms’ (n 9).

<sup>12</sup> UNDESA (n 10) para 36.

<sup>13</sup> IOM ‘Key Migration Terms’ (n 9); IOM, *International Migration Law* (n 9) 113.

<sup>14</sup> See Jaya Ramji-Nogales, “‘The Right to Have Rights’: Undocumented Migrants and State Protection” (2015) 63 *University of Kansas Law Review* 1045, 1049. See also: IOM, *International Migration Law* (n 9) 223-224.

<sup>15</sup> See UN Human Rights Office of the High Commissioner (OHCHR), *Principles and Guidelines, supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations* (2018).

defined by the IOM as '[a]n individual who is seeking international protection'<sup>16</sup> while 'refugees' has been defined under Article 1(A) of the 1951 Geneva Convention Relating to the Status of Refugees (1951 Refugee Convention) as amended by the 1967 Protocol to the 1951 Refugee Convention (Refugee Convention or GCR). It is generally agreed that all refugees were asylum seekers, but not all asylum seekers are refugees. Refugees are those who are recognised under the 1951 Refugee Convention, as anyone who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it...<sup>17</sup>

### 1.3. The Right to Enter, State Sovereignty and Jurisdiction

9. The right to enter a State's territory in international law can be discussed from at least four perspectives. First, generally speaking, a sovereign State has no obligation to grant visas and permit aliens to enter. Second, seeking asylum may provide an exception to the general international law rules not recognising aliens' right to enter. Third, there is a right to enter one's own country,<sup>18</sup> although what 'one's own country' means may not be fully agreed. Fourth, the right to enter is closely relevant to the questions of permissible expulsion.
10. Migration is an area where States' sovereignty still finds a firm place although the concept of sovereignty in international law has been gradually balanced in many other areas, especially through international human rights law. In principle, States decide who will be admitted to their territory with limited restrictions from international law, bearing in mind that treaties, especially some regional and bilateral treaties, may have established the right to enter through the right to free movement in some circumstances such as the Schengen scheme.<sup>19</sup>
11. The UN Human Rights Committee (HRCttee or HRC) has made it clear in relation to the International Covenant on Civil and Political Rights (ICCPR) that this treaty 'does not recognize the rights of aliens to enter or reside in the territory of a State party'.<sup>20</sup>
12. Last but not least, the right to entry has to be linked with the issue of the extent of States' jurisdiction. Deriving from States sovereignty, the concept of jurisdiction has indeed a critical relevance for rights of migrants related to accessing the territory of a State. Jurisdiction can be considered a '*conditio sine qua non*' – a 'threshold criterion' for the right to enter.<sup>21</sup>

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<sup>16</sup> IOM 'Key Migration Terms' (n 9), IOM, *International Migration Law* (n 9) 14.

<sup>17</sup> 1951 Geneva Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention), art 1(A).

<sup>18</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 12(4).

<sup>19</sup> See Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 13.

<sup>20</sup> HRCttee, General Comment No 15, 'The Position of Aliens Under the Covenant', [5], UN Doc. HRI/GEN/1/Rev.9 (vol 1) (11 April 1986).

<sup>21</sup> The notion of 'a threshold criterion' has particularly been emphasised in the practice of the European Court of Human Rights (ECtHR), noting that 'the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.' See e.g. ECtHR, *Catan and Others v. Moldova and Russia*, 43370/04, 8252/05 and 18454/06, 19 October 2012, para 103. This conception thus differs from the use as a matter of General International Law, where it usually describes the limits of a state's legal competence.

Without jurisdiction of a State, a potential right of migrants to enter cannot emerge and thus *ab initio* cannot be violated. In turn, once jurisdiction is established, the rights and obligations provided in different instruments, including the principle of *non-refoulement*, can provide a legal basis that can be opposed to a State.

13. Although territorial jurisdiction is still considered the primary and original form of jurisdiction, the prevalent position on extraterritorial applicability of core human rights treaties,<sup>22</sup> which is naturally of significance for the rights of migrants in relation to entering a State's territory, is arguably established.<sup>23</sup> For example, the test of "effective control" over an area or person abroad in determining jurisdiction has been noted.<sup>24</sup> However, approaches to the application of jurisdiction also critically differ across various legal fields, instruments, and judicial bodies.<sup>25</sup> Distinct institutional, normative, and political environments have led the HRCttee and Inter-American human rights bodies, for example, to tend to adopt a broader perspective compared to the European Court of Human Rights (ECtHR).
14. While the HRCttee generally follows the "effective control" test, it has recognised extraterritorial jurisdiction in cases where a State functions as 'a link in the causal chain that would make possible violations in another jurisdiction'.<sup>26</sup> The risk of a breach must be a necessary and foreseeable consequence based on the knowledge of the State at the time.<sup>27</sup> The HRCttee, on that basis, for example, found that Italy exercised jurisdiction over more than 200 migrants whose vessel sank in the Maltese SAR region based on the notion of a 'special relationship of dependency' and violated their right to life.<sup>28</sup>

## II. The Right to Enter: International Legal Framework

15. As a preliminary issue, this section will go through relevant sources of international law, including both global and regional treaties and instruments. The aim of this report is to identify relevant norms and principles of international migration law regarding the right to enter. The

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<sup>22</sup> See for example, Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26(3) Michigan Journal of International Law 739.

<sup>23</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion of 2004* [2004] ICJ Reports 136; see also: *DRC v. Uganda* [2000] ICJ Reports 111; *Georgia v. Russian Federation (Provisional Measures)* [2008] ICJ Report; *Cyprus v Turkey* ECtHR, Application No. 6780/74 and 6950/75; Robert K. Goldman, 'Extraterritorial Application of the Human Rights to Life and Personal Liberty, including Habeas Corpus, during Situations of Armed Conflict', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 104, 106. However, it should be noted that the extraterritorial application of international human rights law is controversial. See: Ralph Wilde, 'The Extraterritorial Application of the International Human Rights Law on Civil and Political Rights', in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2014) 635.

<sup>24</sup> Violeta Moreno-Lax, Daniel Ghezelbash and Natalie Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32(4) Leiden Journal of International Law 715, 721. See also, principally confirming this view, the ECtHR in *M.N. and Others. v. Belgium*, Appl. no. 3599/18, 5 May 2020.

<sup>25</sup> See for example, Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in Steve Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) 1657.

<sup>26</sup> HRCttee, *Mohammad Munaf v. Romania* (30 July 2009) CCPR/C/96/D1539/2006, para. 14.2.

<sup>27</sup> *Ibid.* Also *A.R.J. v Australia*, CCPR/C/60/D/692/1996; *Roger Judge v Canada*, CCPR/C/78/D/829/1998; *Samuel Lichtensztejn v Uruguay*, CCPR/C/OP/2 (1990) para. 102; *Alzery v Sweden* (10 November 2006) CCPR/C/88/D/1416/2005.

<sup>28</sup> HRCttee, *A.S. and others v. Italy and Malta*, CCPR/C/130/D/3042/2017 and Views from Italy, CCPR/C/128/D/3043/2017 of 27 January 2021.

section first presents relevant international human rights law, followed by international refugee law. Under each subsection, both global and regional instruments are included.

## **2.1 International Human Rights Law**

### **2.1.1 Universal Declaration of Human Rights (UDHR), 1948**

16. The UDHR<sup>29</sup> presents a set of rights which can be of direct benefit to migrants:<sup>30</sup>

Article 13(2) provides that:

Everyone has the right to leave any country, including his own, and to return to his country.

Article 14 provides that:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15(1) states that

Everyone has the right to a nationality.

17. The UDHR, as the UNGA resolution, is not legally binding. It nevertheless formed a basis for the development of relevant treaty law, as seen below. More importantly, it is considered by some authors that Articles 13, 14 and 15 of UDHR have attained the status of customary international law, which binds all States.<sup>31</sup>

### **2.1.2 Core International Human Rights Treaties**

18. Within the nine core international human rights treaties, the following eight are all relevant to the right to enter:<sup>32</sup>
- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD);<sup>33</sup>
  - International Covenant on Civil and Political Rights (ICCPR);
  - International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>34</sup>

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<sup>29</sup> UNGA Res 217 (10 December 1948) A/RES/217 (III).

<sup>30</sup> Marie-Bénédicte Dembour, 'The Alien in the Social Imagination of the Founding Texts', in Marie-Bénédicte Dembour (ed) *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 52.

<sup>31</sup> See, e.g. Chetail, *International Migration Law* (n19), 79; William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021); Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', (1995) 25 Georgia Journal of International and Comparative Law 287.

<sup>32</sup> Regarding the ratification status of these treaties, see UN Treaty Collections, Multilateral Treaties Deposited with the Secretary-General, <[https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=\\_en](https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en)> accessed 1 March 2024.

<sup>33</sup> ICERD (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

<sup>34</sup> ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>35</sup>
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>36</sup>
- Convention on the Rights of the Child (CRC);<sup>37</sup>
- Convention on the Rights of Persons with Disabilities (CRPD);<sup>38</sup> and
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).<sup>39</sup>

19. It is noteworthy that the ICCPR does not contain a general right to enter a territory.<sup>40</sup> Instead, Article 12 of the ICCPR provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant
4. No one shall be arbitrarily deprived of the right to enter his own country.

20. Article 5(d)(ii) of the ICERD states that:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

.....

(ii) The right to leave any country, including one's own, and *to return to one's country (emphasis added)*;

21. Specifically for children, the CRC in Article 10 provides that:<sup>41</sup>

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to *enter* or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission

<sup>35</sup> CEDAW (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>36</sup> CAT (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>37</sup> CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>38</sup> CRPD (adopted 30 March 2007, entered into force 3 May 2008) 2516 UNTS 3.

<sup>39</sup> ICRMW (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. It is noted that most Member States of ICRMW are in Africa and Latin America.

<sup>40</sup> William Schabas and Manfred Nowak, *Nowak's CCPR Commentary: U.N. Covenant on Civil and Political Rights* (revised 3rd edn 2019), art. 12 para 58.

<sup>41</sup> It should be noted that 196 States have ratified the CRC.

of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to *enter* their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention (*emphasis added*).

22. For women, Article 9 of CEDAW is particularly relevant to the right to enter through equal rights in terms of nationality, which states:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

23. For disabled persons, Article 18 of the CRPD on ‘Liberty of Movement and Nationality’ provides that:

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
  - a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
  - b. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of *the right to liberty of movement*;
  - c. Are free to leave any country, including their own;
  - d. Are not deprived, arbitrarily or on the basis of disability, of *the right to enter their own country*.
2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and, as far as possible, the right to know and be cared for by their parents (*emphasis added*).

24. Arguably, stripping individuals of their nationality/citizenship, which would lead to losing their rights to enter, at least to their own country, may constitute ‘cruel, inhuman or degrading treatment or punishment’, which is prohibited under ICCPR and CAT.<sup>42</sup>
25. Additionally, CAT and ICCPR include provisions on non-refoulement, either by implication or explicitly,<sup>43</sup> which is relevant to the right to enter. This will be discussed in the later section on the *non-refoulement* principle.
26. Unfortunately, the ICRMW, a human rights treaty specifically on migrant workers and their families, has not yet been widely accepted: only 59 States<sup>44</sup> have ratified it, amongst which are none of the major immigration countries from the global north. Due to the reluctance of States to ratify the treaty and implement its provisions, the ICRMW has so far been of limited practical importance.<sup>45</sup>
27. The ICRMW is confined to an economic context (please see the definition of ‘migrant workers’ under Article 2(1) requiring – at least past – engagement) and, thus, addresses only one dimension of migration.
28. Nevertheless, it does not provide for a right of free choice to enter a State and differentiates between persons in a regular and those in an irregular situation – a distinction which, *inter alia*, rests upon the question of whether they were authorised to enter under domestic or applicable international law. As stated by Article 5:

For the purposes of the present Convention, migrant workers and members of their families:

- (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
  - (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.
29. It should be noted that the Committee under the ICRMW (CMW) and the CRC Committee issued two joint General Comments:

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<sup>42</sup> Emily Schilling, *Banished, But Not Forgotten: An International Law-Based Criticism of Australia’s Citizenship Stripping Law against Foreign Terrorist Fighters* (Master Thesis, Flinders University, 2021). See also, ICCPR, art 7; CAT, art 16.

<sup>43</sup> ICCPR, art 7; CAT, art 3.

<sup>44</sup> ICRMW has 59 Member States by 17 February 2024, see:

<[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en)> accessed 1 March 2024.

<sup>45</sup> Paul de Guchteneire and Antoine Pécoud, ‘Introduction: The UN Convention on Migrant Workers’ Rights’, in Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (Cambridge University Press 2009) 1; See also Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017).

- (a) General Comment No 3 (2017) for CMW and No 22 (2017) for the CRC Committee in relation to the General Principles regarding the human rights of children in the context of international migration;<sup>46</sup> and
  - (b) General Comment No 4 (2017) for CMW and No 23 (2017) for the CRC Committee in relation to State Obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.<sup>47</sup>
30. The right to enter to and remain within a territory is confined to the migrants' State of origin (ICRMW, Article 8(2)) and does not address the State of destination. Furthermore, freedom of movement is confined to regular migrants in the territory of the State of employment (Article 39). Accordingly, the question of whether a migrant worker is entitled to enter a State in order to work is not based on a substantive right, but the political decision of the respective State. The ICRMW does not envisage any specific procedure regarding the admission of migrant workers, nor does it create any direct obligation on State parties to welcome migrant workers. This is made explicit by Article 79, stating that:
- Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.
31. This is further reiterated by Articles 34 and 35. Article 34 stresses migrants' obligation to comply with "laws and regulations", including those on administrative status, while Article 35 explicitly rejects any right to regularisation in case of an irregular situation;<sup>48</sup> and when State parties consider regularising migrants, they should take into account, *inter alia*, the circumstances of entry (Article 69(2)). Also, Article 17(3), by addressing the question of detention 'for violation of provisions relating to migration', implies the right of States to enact and enforce their migration policy.
32. Even though ratification of the ICRMW is often associated with "a loss of national sovereignty", it has to be stressed that it in no way restricts States' sovereignty, since States retain a monopoly on access to their territory and their labour market.<sup>49</sup> While the right to emigrate (Article 8(1)) but not to immigrate might be regarded as an asymmetry, it is, however, ultimately rooted in the desire to ensure State sovereignty.<sup>50</sup>

### 2.1.3 Regional Human Rights Treaties

33. Most regions have established their own human rights protection systems, including human rights treaties containing substantive human rights and establishing protection mechanisms.

<sup>46</sup> UN Doc: CMW/C/GC/3-CRC/C/GC/22.

<sup>47</sup> UN Doc: CMW/C/GC/4-CRC/C/GC/23.

<sup>48</sup> Athanasia Georgopoulou, Tessa Antonia Schrempf & Denise Venturi, 'Putting Things into Perspective: The added value of the substantive Provisions of the ICMW' in Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017) 129, 135.

<sup>49</sup> Sheetal Sheena Sookrajowa & Antoine Pécoud, 'United Nations Migrant Workers Convention' in S Ratuva (ed), *The Palgrave Handbook of Ethnicity* (2019) <[https://link.springer.com/referenceworkentry/10.1007/978-981-13-0242-8\\_142-1](https://link.springer.com/referenceworkentry/10.1007/978-981-13-0242-8_142-1)> accessed 1 March 2024.

<sup>50</sup> Georgopoulou, Schrempf and Venturi (n 48) 133.

Those conventions are the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR),<sup>51</sup> the American Convention on Human Rights (ACHR),<sup>52</sup> the African Charter on Human and Peoples' Rights (ACHPR),<sup>53</sup> the Arab Charter on Human Rights (ArabCHR),<sup>54</sup> as well as the – not legally binding – ASEAN Human Rights Declaration (ASEAN-HRC).<sup>55</sup> Furthermore, there is the Charter of Fundamental Rights of the European Union (CFR),<sup>56</sup> which, however, has a more limited (functional) scope of application compared to the other human rights conventions (it applies only to the institutions and bodies of the Union, and to the Member States when they apply Union law: Article 51 of CFR), even though its substantial provisions might exceed protection under international human rights law when applicable.

34. None of these conventions and instruments provide a human right to enter a State of free choice, while all of them contain the right to enter one's own State (Article 3(2) of Protocol No. 4 to ECHR, Article 22(5) of ACHR, Article 12(2) of ACHPR, Article 27(2) of ArabCHR, Article 15 of ASEAN-HRD). Protocol No 4 to ECHR and the ACHR in particular used the wording of 'the State of which he is a national', rather than 'his country' or 'his or her country' in other treaties/declaration.

## 2.2 International Refugee Law

35. The 1951 Refugee Convention, as supplemented by its 1967 Protocol, is still the cornerstone public international law legal basis for the protection of refugees and it forms the reference point of most legal provisions for international protection under international, regional and domestic law.
36. What is of relevance for this interim report is the most urgent need of refugees to secure entry into a territory in which they are sheltered from the risk of being persecuted, as well as that this fundamental concern must somehow be reconciled with the fact that most of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens.<sup>57</sup> While some correspondingly argue that the principle of *non-refoulement* might request States to grant entry to their territory to individuals seeking international protection (not explicitly speaking of a corresponding right)<sup>58</sup> and some argue that Article 33 of the Refugee Convention establishes at least a limited duty to admit the refugee,<sup>59</sup> since admission is normally the only means of avoiding the alternative,

<sup>51</sup> ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

<sup>52</sup> ACHR (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>53</sup> ACHPR (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>54</sup> ArabCHR (adopted 22 May 2004, entered into force 15 March 2008).

<sup>55</sup> ASEAN-HRC, adopted by the Heads of States/Government of ASEAN Member States at Phnom Penh, Cambodia on 12 November 2012, available at <<https://asean.org/asean-human-rights-declaration/>>.

<sup>56</sup> Charter of Fundamental Rights of the European Union, adopted on 7 December 2000 by the European Parliament.

<sup>57</sup> James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2021) 313.

<sup>58</sup> UNHCR 'The principle of non-refoulement under international human rights law', 2 <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 1 March 2024; UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, para. 8 ("no asylum but states might be required to grant access to the territory).

<sup>59</sup> Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) University of Michigan Law School Scholarship Repository.

impermissible consequence of exposure to risk,<sup>60</sup> others argue that at least a limited right to entry might be assumed in order to protect the vital interests of asylum seekers.<sup>61</sup>

37. Several regional instruments also deal with international protection of people fleeing persecution and broaden it compared to the 1951 Refugee Convention. Such is the case of the Organisation of African Unity (OAU)'s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention or OAU Refugee Convention)<sup>62</sup> and the 1984 Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (Cartagena Declaration),<sup>63</sup> which apply the term refugee to:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (Article 1(2), OAU Refugee Convention)

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order (Point III.3, Cartagena Declaration).

38. As to EU law, it adds to the refugee status a distinct and *sui generis* form of international protection called 'subsidiary protection'. It can be granted to people exposed to a serious risk of death penalty, execution, torture or inhuman or degrading treatment, or to indiscriminate violence in situations of international or internal armed conflicts (Qualification Directive,<sup>64</sup> Article 15). As to people fleeing armed conflicts *en masse*, the Russian war of aggression against Ukraine demonstrated the importance of the 'Temporary Protection Directive',<sup>65</sup> which provides a tool for the EU to address situations of mass influx of displaced persons from non-EU countries into EU countries.

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<sup>60</sup> Hathaway (n 57) 339; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17(3) International Journal of Refugee Law 542, 572.

<sup>61</sup> Asher Hirsch and Nathan Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime', (2017) 18(4) Human Rights Review 417, 429 ; Hathaway (n 57) 339.

<sup>62</sup> OAU Refugee Convention (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

<sup>63</sup> The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, 22 November 1984.

<sup>64</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>65</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

## 2.3 International Migration Law

### 2.3.1 Multilateral Treaties and/or Organisations

39. The relevant multilateral treaties in relation to international migration law are scattered in various branches of international law, including international human rights law and international refugee law.
40. Different types of migration or migrants might have been included in different multilateral treaties and involve different international organisations. For example, migration for employment forms a considerable part of the global agenda of the International Labour Organization (ILO), which is expressed in its 2008 Declaration on Social Justice for a Fair Globalization (as updated in 2022).<sup>66</sup> ILO, founded in 1919<sup>67</sup> and counting 187 Member States as of April 2024 ‘has an obligation ... in developing principles and guidelines ... in labour migration policy and practice in the overarching framework of decent work and social justice for a fair globalization.’<sup>68</sup> Thus, ILO conventions provide another source of international migration law, including the right to enter.
41. The IOM’s role, with its 175 Member States (as of 20 Feb 2024), and further eight States holding observer status, as do numerous international and non-governmental organizations<sup>69</sup>, has evolved over time to adequately manage international migration amidst frequently changing circumstances and geopolitical realities, expanding in particular its humanitarian action.<sup>70</sup> The 1987 amendments to its Constitution included a broader definition of the persons to whom the organization may provide services linked to migration issues, extending thus its potential scope of activities to provide migration services for refugees and internally displaced persons (IDPs).<sup>71</sup> Yet, IOM does not have an explicit mandate to protect the rights of migrants, including refugees and IDPs. Many Member States see the organization’s lack of formal protection mandate as a key strength – and IOM has been given a lot of work that its Member States are reluctant to do themselves.<sup>72</sup> In potential development of a new treaty to regulate international migration, the IOM would play an important role in such negotiations.
42. Given the needs of international athletes, who regularly cross borders for the purposes of training or competitions in different countries, it is relevant to mention also the role of the International Olympic Committee (IOC), the guardian of the Olympic Games and Movement,

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<sup>66</sup> See International Labour Conference, ILO Declaration on Social Justice for a Fair Globalization, <[https://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS\\_099766/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm)> accessed 28 February 2024.

<sup>67</sup> As a quite unique legal technique, the ILO Constitution has been incorporated into the Treaty of Versailles and other peace treaties concluded to legally end the First World War [as Chapter XIII of them in each case]. ILO then became the UN’s first specialised agency in 1946.

<sup>68</sup> International Labour Office, *International Labour Migration. A Rights-based Approach* (International Labour Organization 2010) v.

<sup>69</sup> IOM Website: <<https://www.iom.int/members-and-observers>> accessed 20 Feb 2024.

<sup>70</sup> Megan Bradley, ‘The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime’ (2017) 33 *Refuge* 99.

<sup>71</sup> Jürgen Bast, ‘International Organization for Migration (IOM)’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedias of Public International Law* (Oxford University Press 2010) para 6; Richard Perruchoud, ‘Persons Falling Under the Mandate of the International Organization for Migration (IOM) and to Whom the Organization May Provide Migration Services’ (1992) 4(2) *International Journal of Refugee Law* 205, 211-212.

<sup>72</sup> Jan Klabbers, ‘Notes on the ideology of international organizations law: The International Organization for Migration, State-making and the Market for Migration’ (2019) 32 *Leiden Journal of International Law* 383.

established in 1894.<sup>73</sup> The IOC's constitutional Charter is relevant to the right to enter.<sup>74</sup> IOC repeatedly asserts its mission to promote and protect universality and international harmony through solidarity of competing athletes.<sup>75</sup> IOC relies primarily on local Organizing Committees that have been authorised by National Olympic Committees (NOCs). Under Rule 36 of the Charter, the IOC enters into a tripartite agreement (an "Olympic Host Contract") with the selected local organiser and NOC of the country concerned. This interim report will include some discussion in a later section (Section 5) on discrimination and the right to enter of Russian athletes as a brief case study, partly elaborating on the relevance of IOC to the right to enter.

43. Relevant provisions and arrangements under the General Agreement on Tariffs and Trade (GATT)<sup>76</sup> and the World Trade Organization (WTO) could also be of relevance when discussing the right to enter.<sup>77</sup>

### **2.3.2 Regional Arrangements**

44. At the regional level, European, African and American arrangements will be briefly touched upon. No such arrangements exist in Asia so far, and as such this report will not touch on Asia.

#### **2.3.2.1 Europe**

45. The EU is a regional integration organisation with 27 Member States, plus Iceland, Liechtenstein, Norway and Switzerland which also participate in the legal regime described subsequently on the basis of association agreements with the EU. Within the EU, there exists an individual right to freedom of movement and residence (including the right to enter the territory of the other EU Member States for that purpose) for Union citizens (i.e. persons holding the nationality of an EU Member State) and their family members. This right was already guaranteed in the founding treaties of the EU and is today enshrined in Article 45 of the CFR as well as in Articles 21, 46 and 49 of the Treaty on the Functioning of the European Union (TFEU).

Article 45 of the CFR on Freedom of movement and residence provides that

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

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<sup>73</sup> International Olympic Committee, Overview <<https://olympics.com/ioc/overview>> accessed 1 March 2024.

<sup>74</sup> The Olympic Charter (last republished 2020) is the basic instrument of the Olympic Movement. It includes a brief Introduction, a Preamble, seven Fundamental Principles and 61 detailed Rules, many with attached Bye-laws.

<sup>75</sup> See, e.g. The Olympic Charter, Fundamental Principles 1,2 and 3. Rule 1 establishes that '[t]he goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced in accordance with Olympism and its values.'

<sup>76</sup> General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into for 1 January 1948), 55 UNTS 187 (GATT).

<sup>77</sup> See, e.g. Chetail, *International Migration Law* (n 19) 95.

Originally, the right to freedom of movement and residence was conditional upon the exercise of an economic activity on the part of the individual concerned (notably as an employee or entrepreneur). However, following the adoption of a series of EU directives, the creation of Union citizenship by the Treaty of Maastricht and the dynamic case-law of the Court of Justice of the European Union (CJEU), the right to freedom of movement and residence has been extended to also cover non-economic mobility (for instance, for students or retired persons). The most important legislative act on the matter (apart from the afore-mentioned guarantees in the EU treaties) is Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.<sup>78</sup>

46. In addition, the 1997 Amsterdam Treaty,<sup>79</sup> revising the EU founding treaties, inserted a new policy area of Union competence titled ‘Visas, asylum, immigration and other policies related to free movement of persons’. After the reforms brought by the Lisbon Treaty,<sup>80</sup> this now forms part of Title V [Area of freedom, security and justice] of the TFEU<sup>81</sup> as its Chapter 2 [Policies on border checks, asylum and immigration]. The latter also afforded the EU new powers in the field of integration of third-country nationals, i.e. non-Union citizens (Article 79(4) TFEU). The Treaty on European Union (TEU)<sup>82</sup> also refers, in general terms, to ‘an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’ (Article 3(2) TEU). As a result, EU competence has been covering for over 20 years measures taken in the areas of asylum, immigration and safeguarding the rights of third-country [non-EU] nationals, external border controls, and visas. The plethora of secondary EU law, adopted on the basis of various provisions under the above-mentioned Chapter of the TFEU, is not reproduced or listed here due to their *sui generis* legal nature (not being international treaties *per se* but acts of the EU institutions as ‘derivative law’ of the international organisation); and their sheer number which extends over 60 EU regulations, directives and decisions in force.<sup>83</sup>
47. In addition to the relevant provisions of the TFEU and TEU, it is necessary to mention that the Amsterdam Treaty integrated the 1985 Schengen Agreement on the Gradual Abolition of Internal Border Checks<sup>84</sup> and the 1990 Convention Implementing the Schengen Agreement<sup>85</sup>

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<sup>78</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ 2004 L 158/77.

<sup>79</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

<sup>80</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 13 December 2007) [2007] OJ C 306/1.

<sup>81</sup> Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (adopted 13 December 2007, entered into force 1 December 2009) [2012] OJ C 326/47.

<sup>82</sup> Treaty on European Union (consolidated version as amended by the Lisbon Treaty (adopted 13 December 2007, entered into force 1 December 2009) [2012] OJ C 326/13.

<sup>83</sup> For more on the EU *acquis* relating to borders, asylum and migration, see eg Daniel Thym, *European Migration Law* (Oxford University Press 2023); Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary* (3rd edn, CH Beck/Hart/Nomos 2022); and Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th edn, Oxford University Press 2016).

<sup>84</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders (adopted 14 June 1985) [2000] OJ L 239/13.

<sup>85</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders (adopted 19 June 1990) [2000] OJ L 239/19.

(the backbones of so-called *Schengen acquis*<sup>86</sup>) into the EU legal order. The Schengen regime today covers all EU Member States (except for Ireland) as well as Iceland, Liechtenstein, Norway and Switzerland which are integrated into the Schengen area by virtue of association agreements with the EU.

48. It is also worth mentioning various agreements drawn up by the Nordic countries since the 1950s. These agreements<sup>87</sup> allow citizens of the Nordic countries – Iceland, Denmark, Norway, Sweden, and Finland – to travel, reside and settle in another Nordic country without any travel documentation (e.g. a passport or national identity card) or a residence permit, together with the right to take up employment.

### 2.3.2.2 Africa

49. Within the African Union (AU), economic and regional integration goals have given rise to provisions on the right to enter. The Agreement Establishing the African Continental Free Trade Area (AfCTA) entered into force in 2019,<sup>88</sup> while its protocol on the free movement of persons ('Free Movement Protocol') has not seen as much attraction, and is still not in force.<sup>89</sup> The Free Movement Protocol was adopted in 2018, and it defines 'right of entry' as the right of a national of a Member State to enter and move freely in another Member State in accordance with the laws of the host Member State".
50. The AU's Migration Policy Framework for Africa (MPFA) and its Plan of Action (2018-2030), also has as one of its goals, 'the harmonization of member-States' immigration control regimes and working towards establishing a continent-wide visa-free zone'.<sup>90</sup>
51. At the sub-regional level, arrangements like the Economic Community of West African States (ECOWAS) and the East African Community (EAC), seek to facilitate regional economic integration by promoting free movement of persons.<sup>91</sup> Such provisions consequently give rise to a right to enter to citizens of countries that are members of these bodies.<sup>92</sup> Similarly, within the Southern African Development Community (SADC) region, the Protocol on the

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<sup>86</sup> Schengen acquis refers to a set of rules and legislation in relation to the Schengen arrangement, including the Schengen Agreement, the Schengen Convention, and other agreements and rules.

<sup>87</sup> e.g. Agreement Concerning a Common Nordic Labour Market, available at <<https://www.norden.org/en/treaties-and-agreements/agreement-concerning-common-nordic-labour-market>> (last accessed 15 May 2023).

<sup>88</sup> Agreement Establishing the African Continental Free Trade Area, opened for signature 31 March 2018 (entered into force 30 May 2019). As at August 2023, 47 of 54 African countries have ratified this agreement, see <<https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>>.

<sup>89</sup> Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Rights of Residence and Right of Establishment, opened for signature 29 January 2018. The ratification of the protocol can be found at <<https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons>>. It is noted that only three countries have ratified the protocol: Niger, Rwanda and Mali.

<sup>90</sup> African Union, *Migration Policy Framework for Africa and Plan of Action (2018-2030)*, available at <[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other\\_documents/35316-doc-au-mpfa\\_2018-eng.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf)> accessed 1 March 2024. See also: Steven Gordon, 'Mass Preferences for the Free Movement of People in Africa: A Public Opinion Analysis of 36 Countries' (2021) 50(1) *International Migration Review* 270.

<sup>91</sup> See generally, Aderanti Adepoju, Alistair Boulton and Mariah Levin, 'Promoting Integration through Mobility: Free Movement under ECOWAS' UNHCR paper, available at <<https://www.unhcr.org/sites/default/files/legacy-pdf/49e479c811.pdf>> accessed 1 March 2024.

<sup>92</sup> Ibid. The ECOWAS initiatives includes abolition of visa requirement and a uniform ECOWAS passport, like EU passport.

Facilitation of Free Movement of Persons, drafted in 2005, is yet to come into force due to an insufficient number of ratifications.<sup>93</sup>

### 2.3.2.3 Latin America<sup>94</sup>

52. The Organization of American States (OAS) has thirty-five States Parties while 25 have ratified the ACHR.<sup>95</sup> As mentioned earlier under section 2.1.3, Article 22(5) of ACHR recognise the right to enter one's country of nationality, but there is no general right to enter another country under the inter-American system of human rights. In 1996, the Inter-American Commission on Human Rights (IACHR) created the Rapporteurship on the Rights of Migrants and the Rapporteurship on Internally Displaced Persons.<sup>96</sup>
53. There are also several sub-regional instruments that govern migration. For example, the 2002 Residence Agreement for Nationals of the MERCOSUR State Parties provides nationals of nine countries with the rights to residence and employment in all other member states.<sup>97</sup> The Andean Community authorises citizens of four member States, Bolivia, Colombia, Ecuador, and Peru, to reside and work legally in the same conditions as nationals for up to two years; it also grants education and family reunification rights.<sup>98</sup>
54. Another example is the Revised Treaty of Chaguaramas Establishing the Caribbean Community, which include the creation of a single market.<sup>99</sup> Article 46 of this treaty provides for the right to seek employment in member States to certain categories of skilled workers: university graduates, artists, musicians, professional athletes and media workers. Accordingly, States parties have obligations to facilitate such people's movement, including by 'the elimination of the requirement for passports' and 'the elimination of the requirement for work permits'.<sup>100</sup> However, the treaty does not grant an *absolute* right to enter as Member States can still limit such a right based on 'public interest'.<sup>101</sup>

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<sup>93</sup> Nicasius A Check, 'Free Movement of Persons, Right of Residence and Right of Establishment and Agenda 2063: What Policy Options of South Africa' (2022) 13(1) African Journal of Public Affairs 129.

<sup>94</sup> It should be noted that this section is supposed to go beyond the human rights and asylum/refugee law and therefore it does not include the 1939 Montevideo Convention on Political Asylum and Refuge, under which the right to asylum was established. More details will be included in the future report.

<sup>95</sup> The Member States of the OAS are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela.

<sup>96</sup> Inter-American Commission on Human Rights, 'Human Mobility: Inter-American Standards', OEA/Ser.L/V/II. Doc. 46/15 (31 December 2015) at Para. 76-77. The former was originally known as the Rapporteurship Migrant Workers and Members of Their Families; its scope was expanded in 2012 to cover all migrants.

<sup>97</sup> Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, and Uruguay. Diego Acosta and Jeremy Harris, *Migration Policy Regimes in Latin America and the Caribbean: Immigration, Regional Free Movement, Refuge and Nationality* (Inter-American Development Bank 2022) 36.

<sup>98</sup> Decision No. 878, Andean Migration Statute, May 12, 2021. See also Acosta and Harris (n 97) 19.

<sup>99</sup> The treaty was adopted on 5 July 2001 (entered into force on 1 January 2006). All CARICOM member states except Barbados have ratified the treaty. See also Acosta and Harris (n 99) 21.

<sup>100</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community and Including the Single Market, <[https://caricom.org/documents/4906-revised\\_treaty-text.pdf](https://caricom.org/documents/4906-revised_treaty-text.pdf)> accessed 2 March 2024, arts 46(1) and 46(2).

<sup>101</sup> Ibid art 46(3).

### 2.3.3. Bilateral Treaties

55. States are of course free to negotiate bilateral treaties granting the right to entry to their territory, or a facilitated access to it, to nationals of the other State party. Without prejudice to the requirements under international law, these States may define criteria and conditions for such a right to be established.
56. Recognising the impossibility to list all relevant bilateral agreements, this interim report mentions only a sample of examples grouped in different categories depending on the main object and purpose of these treaties:
- a) Visa Waiver Agreements. For example, the EU has entered into visa waiver agreements with a wide range of countries, such as Brazil and UAE.<sup>102</sup>
  - b) Free Trade Agreements, such as the Free Trade or Economic Partnership Agreement between Australia and 17 other countries, including UK, USA, Singapore, China, Japan and South Korea.<sup>103</sup> Such bilateral agreements generally include provisions on mobility of people between countries, with the benefit of more freedom of movement. For example, employer-sponsored visa applicants from these free-trade-agreement countries may receive a longer period of visa to stay and work in Australia, comparing with those from non-free-trade-agreement countries.<sup>104</sup>
  - c) Labour Agreements: usually referred to as BLAs (bilateral labour agreements), these regulate the possibilities of nationals of one State-party to enter the territory of another State-party for work purposes and the working conditions in the host country. BLAs and readmission agreements were the kinds of bilateral agreements most often mentioned by States in their voluntary reports on the implementation of the Global Compact for Safe, Orderly, and Regular Migration. BLAs may encompass any kind

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<sup>102</sup> EU, 'Visa Waiver Agreements', EUR-Lex, available at <<https://eur-lex.europa.eu/EN/legal-content/summary/visa-waiver-agreements.html#:~:text=The%20visa%20waiver%20agreements%20referred,during%20a%20180%2Dday%20period>> (accessed on 26 Feb 2024).

<sup>103</sup> Australian Department of Foreign Affairs and Trade, About Free Trade Agreements, available at <<https://www.dfat.gov.au/trade/agreements/in-force/jaepa/japan-australia-economic-partnership-agreement>> (accessed on 17 Feb 2024).

<sup>104</sup> Such as Subclass 482 visa under Australian Migration Act 1958 (Cth).

of prospective and actual migrant workers or regulate labour migration only in specific fields.<sup>105</sup> A report issued by the ILO in 2015 identified 358 BLAs in force and analysed patterns in 144 of them.<sup>106</sup>

- d) Readmission Agreements: these are described as ‘technical instruments that bring procedural improvements to cooperation between the administrations of two (or more) countries involved in the readmission process of the nationals of one to the territory of the other’.<sup>107</sup> These kinds of agreements are most commonly found

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<sup>105</sup> Estatuto Migratorio Permanente, entre Colombia y Ecuador (n 2) art 2; agreement on Labour Co-operation for Domestic Service Workers Recruitment between the Ministry of Overseas Indian Affairs of the Republic of India and Ministry of Labour of the Kingdom of Saudi Arabia (adopted 2 January 2014). Kenya, ‘Kenya Voluntary Country Review Report on the Implementation of the Principles and Objectives of Global Compact on Migration (GCM)’ (Ministry of Interior and Coordination of National Government 2020) 16 <<https://migrationnetwork.un.org/resources/kenya-gcm-voluntary-national-report-regional-review-africa>> accessed 4 June 2022 (mentioning bilateral agreement with the United Kingdom on health sector workers); Philippines, ‘Philippines’ Submission of the Voluntary GCM Review’ (Department of Foreign Affairs, Office of the Undersecretary for Migrant Workers Affairs 2020) 5 <[https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/philippines\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/philippines_voluntary_gcm_survey_report.pdf)> accessed 4 June 2022 (mentioning bilateral agreement with Israel on the recruitment and deployment of caregivers and hotel workers); Moldova, ‘National Voluntary Review Report on the Status of Implementation of the Global Compact for Safe, Orderly and Regular Migration by the Republic of Moldova’ (2022) 7 <<https://www.un.org/sites/un2.un.org/files/imrf-moldova.pdf>> accessed 4 June 2022 (mentioning bilateral agreement with Israel on workers in the construction sector).

<sup>106</sup> ILO, ‘Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review’ (Geneva, 2015) 14.

<sup>107</sup> European Commission, ‘Communication from the Commission to the European Parliament and the Council: Evaluation of EU Readmission Agreements’ COM (2011) 76 final (23 February 2011) 10.

among European States.<sup>108</sup> Even so, readmission agreements are also found involving African,<sup>109</sup> Latin American,<sup>110</sup> and Asian States.<sup>111</sup>

- e) Climate change-related bilateral agreement: Australia-Tuvalu Falepili Union Treaty<sup>112</sup> provides a positive<sup>113</sup> example in this category in relation to mobility due to climate change. Article 3 of the treaty states that:

Australia shall arrange for a special human mobility pathway for citizens of Tuvalu to access Australia, which shall enable citizens of Tuvalu to:

- (a) live, study and work in Australia;
- (b) access Australian education, health, and key income and family support on arrival.

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<sup>108</sup> For State members of the European Union (EU), the Union itself has been mandated with entering into readmission agreements with non-EU States. Member States, nevertheless, often enter into bilateral protocols to implement the EU readmission agreements. EMN, 'Bilateral Readmission Agreements' (Inform, September 2022) 2-4. Examples of readmission agreements between European States: Agreement between the Government of the Republic of Armenia and the Government of the Kingdom of Sweden on the Readmission of Persons Staying without Authorization (adopted 7 November 2008); Agreement between the Government of the Republic of Armenia and the Government of the Kingdom of Norway on the Readmission of Persons Staying without Authorization (adopted 29 January 2010); Agreement between the government of the Republic of Armenia and the Government of the Russian Federation on the Readmission of Persons Staying without Authorization (20 August 2010); Belarus, 'Voluntary Review of the Implementation of the Global Compact for Safe, Orderly and Regular Migration by the Republic of Belarus' (Ministry of Foreign Affairs 2020) 12 <[https://migrationnetwork.un.org/sites/g/files/tmzbd146/files/docs/belarus\\_en.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd146/files/docs/belarus_en.pdf)> accessed 4 June 2022 (mentioning a bilateral agreement with Ukraine); Russia, 'Information on Progress in the Implementation of the Global Compact for Safe, Orderly and Regular Migration' (2020) 10 <[https://migrationnetwork.un.org/sites/g/files/tmzbd146/files/docs/in\\_7517\\_russian\\_federation\\_eng.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd146/files/docs/in_7517_russian_federation_eng.pdf)> accessed 4 June 2022 (mentioning bilateral agreements with the EU, Norway, Switzerland, Liechtenstein, Iceland, Armenia, Denmark, Uzbekistan, Turkey, Kazakhstan, Ukraine, Belarus, Serbia, and Bosnia and Herzegovina); Moldova, 'National Voluntary Review Report on the Status of Implementation of the Global Compact for Safe, Orderly and Regular Migration by the Republic of Moldova' (2022) 7 <<https://www.un.org/sites/un2.un.org/files/imrf-moldova.pdf>> accessed 4 June 2022 (mentioning bilateral agreements with Denmark, Norway, North Macedonia, Serbia, Bosnia and Herzegovina, Montenegro, Turkey, Albania, Georgia, Kazakhstan and Ukraine); Kazakhstan, 'National Voluntary Global Compact for Safe, Orderly and Regular Migration Review' (2021) 23 <[https://www.un.org/sites/un2.un.org/files/imrf\\_kazakhstan.pdf](https://www.un.org/sites/un2.un.org/files/imrf_kazakhstan.pdf)> accessed 4 June 2022 (mentioning bilateral agreements with Germany, Switzerland, Czechia, Latvia, Lithuania, Russia, Norway, Belarus, Hungary, Benelux countries, Moldova, and Poland). CMW, 'Concluding observations on the second periodic report of Algeria' (25 May 2018) UN Doc CMW/C/DZA/CO/2 para 57.

<sup>109</sup> CMW, 'Concluding observations on the second periodic report of Algeria' (25 May 2018) UN Doc CMW/C/DZA/CO/2, para 57.

<sup>110</sup> Acuerdo Operativo entre la Dirección Nacional de Migraciones de la República Argentina y la Subsecretaría de Interior de la República de Chile sobre Cooperación en los Controles Migratorios Fronterizos (adopted 23 September 2008) art 5; Acuerdo entre el Gobierno de la República Argentina y el Gobierno de la República Francesa relativo a la Readmisión de Nacionales en Situación Irregular (adopted 1 February 1995); Acuerdo entre el Gobierno de la República de Costa Rica y el Gobierno de la República Francesa, relativo a la Readmisión de Personas en Situación Irregular (adopted 16 July 1998).

<sup>111</sup> Kazakhstan (n 108) 23 (mentioning bilateral agreements with Kyrgyzstan and Tajikistan); Russia (n 108) 10 (mentioning bilateral agreements with Vietnam, Kyrgyzstan, and Mongolia); 'MoU of return and readmission of persons signed between Sri Lanka and Australia', *News Cutter* (online, 21 December 2021) <<https://www.newscutter.lk/sri-lanka-news/mou-of-return-and-readmission-of-persons-signed-between-sri-lanka-and-australia-21122021-16231/>>.

<sup>112</sup> Australia-Tuvalu Falepili Union Treaty, available at <<https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>> accessed on 18 Feb 2024.

<sup>113</sup> Please see also some critical analysis on the agreement: Clare Francis, 'The Deal That Exposes the Global North's Flawed Approach to Climate Migration', *Foreign Policy* (14 December 2023), available at <<https://foreignpolicy.com/2023/12/14/australia-tuvalu-pacific-islands-climate-migration-deal/>>.

### 2.3.4. Customary International Law

57. Even though it has been argued that freedom of movement and the right to migrate existed under natural law,<sup>114</sup> there is neither State practice nor *opinio juris* supporting an argument that a general right to enter a territory of one's own choice does exist under customary international law.<sup>115</sup> Rather, as exemplified by migration policies, visa requirements and border controls, State practice is dominated by States' sovereignty on these issues, and only a very limited group of persons being entitled to claim a right to enter.<sup>116</sup>
58. The ILC, tasked with codification and progressive development of international law, in its 2014 Draft Articles, did not address the issue of the existence of a customary right to enter, while one could have expected the ILC to address the articulation between the *non-refoulement* principle and the right to be admitted. Yet, the ILC rather excludes this issue from the scope of the principle of *non-refoulement* with regard to refugees.<sup>117</sup> The ILC limits the scope of the *non-refoulement* principle to "expulsion" alone,<sup>118</sup> a term defined to explicitly exclude the notion of admission (or non-rejection at the frontier).
59. Nevertheless, it is important to stress that the principle of *non-refoulement* is generally recognised to form a part of customary international law.<sup>119</sup>
60. Finally, this report recognises the possible existence of regional customary international law potentially relevant for the right to enter, such as the case of recognition of diplomatic asylum in Latin America.<sup>120</sup>

### 2.3.5 General principles of law

61. For a general right to freely enter the territory of a State to exist as a general principle of law it would have to be proven that a principle, rule or right is widely accepted in national legal systems around the world and might be transferred to the international level to be applied there to complete lacunae or to contribute to the interpretation of another legal source. However, there is no proof of such a general right to entry being widely accepted or spread in national legal systems. Correspondingly, general principles of law are hardly ever discussed in relation to the right to enter in international (migration) law.

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<sup>114</sup> e.g. Maximilian Ernst, 'International Migration as Absolute Natural Law: An Inquiry into International Migration from the Perspective of Legal Philosophy' (2016) 8(1) *Yonsei Journal of International Studies* 14.

<sup>115</sup> See: William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021), Chapter 6 – Fundamental Freedoms, Section G: Mobility and Asylum.

<sup>116</sup> See also Alessia di Pascale, 'Exceptional Duties to Admit Aliens', in Richard Plender (ed) *Issues in International Migration Law* (Brill/Nijhoff 2015) 214; Jean Francois Flauss, 'Entre souveraineté nationale et droits de l'homme' in Jean-Yves Carlier (ed), *L'étranger face au droit: XXes Journées d'études juridiques Jean Dabin* (Bruylant 2010) 45.

<sup>117</sup> See International Law Commission, Draft Articles, arts 1 and 2 and the commentaries thereto, 3-50.

<sup>118</sup> Ibid, arts 23 and 24.

<sup>119</sup> The Committee recognizes that there are different voices regarding the nature of the *non-refoulement* principle as customary international law. See Hathaway (n 57). In addition, there are also voices that non-refoulement principle have acquired the status of *jus cogens*. Please see: Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) *International Journal of Refugee Law* 533. Committee members have different views on this issue. It is noted that some Asian countries have not yet ratified the 1951 Refugees Convention such as India, Bangladesh, Mongolia, Malaysia and Indonesia, and some has not yet ratified ICCPR such as China, and some has yet ratified neither the ICCPR nor the 1951 Refugees Convention, such as Malaysia and Singapore.

<sup>120</sup> e.g., *Asylum Case (Colombia v Peru)*, ICJ Report (20 November 1950); Havana Convention on Asylum, opened for signature 20 February 1928, OAS Series (entered into force 21 May 1929); C Neale Ronning, *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (Martinus Nijhoff 1965).

62. The question remains whether the existence of visa requirements in almost all countries regarding the right to enter, means that there is a general principle of law that a visa or permit or a due procedure is required for the realisation of the right to enter. Furthermore, some authors suggest there might be a general principle of law on the prohibition of collective expulsion.<sup>121</sup>

### 2.3.6 Soft Law

63. Soft law is of particular importance for potential further development and interpretation of international migration law.
64. The most important soft law<sup>122</sup> regarding the right to enter developed recently is the New York Declaration for Refugees and Migrants<sup>123</sup>, which was followed by the adoption in 2018 of the Global Compact for Safe, Orderly and Regular Migration (Global Migration Compact)<sup>124</sup> and the Global Compact on Refugees.<sup>125</sup> The Global Migration Compact intends to give a more positive connotation to migration, covers all dimensions of international migration in a holistic and comprehensive manner, and contains a set of 23 objectives and commitments to better govern migration, based on international cooperation and solidarity, in the future.
65. Both international human rights law and international refugee law are well established, and a wide range of soft law exists in these two branches of international law.<sup>126</sup>
66. One of the relevant soft law instruments is the Joint Guide to Rescue at Sea issued by the UNHCR, the International Maritime Organization (IMO), and the International Chamber of Shipping (ICS), as it provides important guidance on the application of the principle of *non-refoulement* in the special situation of rescue at sea.<sup>127</sup> It is noted that another ILA Committee is working on relevant matters.<sup>128</sup>
67. In addition, reports of the UN Special Rapporteur on the Human Rights of Migrants deserve special attention. Created in 1999, the Special Rapporteur has been providing ever since an annual thematic review on these issues.<sup>129</sup> Published in 2018, the report on ‘return practices’ is especially relevant to the right to enter.<sup>130</sup>

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<sup>121</sup> Maurice Kamto, ‘Expulsion of Aliens: Third Report on the Expulsion of Aliens’, [115], <[https://legal.un.org/ilc/documentation/english/a\\_cn4\\_581.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_581.pdf)> accessed 1 March 2024.

<sup>122</sup> As to the non-binding nature of those instruments, see Global Compact for Safe, Orderly and Regular Migration (n 124) 4.

<sup>123</sup> The New York Declaration for Refugees and Migrants (2016) UN Doc A/RES/71/1.

<sup>124</sup> Global Compact for Safe, Orderly and Regular Migration has been endorsed by the UNGA on 19 December 2018, see UN Doc A/RES/73/195.

<sup>125</sup> Global Compact on Refugees (2018) UN Doc a/73/12.

<sup>126</sup> e.g. Michèle Olivier, ‘The Relevance of “Soft Law” as a Source of International Human Rights’ (2002) 35(2) Comparative and International Law in South Africa 289; see generally; Alexander Betts ‘Soft law and the Protection of Vulnerable Migrants’ (2010) 24 Georgetown Immigration Law Journal 532, and Andrew T Guzman and Timothy L Meyer, ‘International Soft Law’ (2010) 2(1) Journal of Legal Analysis 171, 210-213.

<sup>127</sup> UNHCR, IMO and ICS, ‘Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants’ 9 and 14, available at <<https://www.refworld.org/policy/opguidance/unhcr/2015/en/104994>>.

<sup>128</sup> ILA Committee on Protection of People at Sea, established on 18 June 2023, available at <[https://www.ila-hq.org/en\\_GB/committees/protection-of-people-at-sea](https://www.ila-hq.org/en_GB/committees/protection-of-people-at-sea)>.

<sup>129</sup> The current Special Rapporteur is Mr. Gehad Madi (2023-2026). The annual report list can be found in the UNOHCHR website: <https://www.ohchr.org/en/special-procedures/sr-migrants/annual-reports>.

<sup>130</sup> Report of the Special Rapporteur on the human rights of migrants, 2018, UN Doc: A/HRC/38/41.

### III. The Right to Enter of Nationals

68. The UDHR and ICCPR have established the right to enter for nationals. Article 13(2) of the UDHR states “the right of everyone to... return to his country”. Article 12(4) of the ICCPR states that “[n]o one shall be arbitrarily deprived of the right to enter his own country”.
69. As mentioned above, regional human rights treaties also recognise that nationals have the right to enter their country. Protocol No 4 to ECHR, and ACHR in particular, establish the right of everyone to enter the territory of ‘the State of which he is a national’.
70. To what extent the terms ‘his country’ or ‘his own country’ go beyond the country of someone’s nationality will be discussed under Section IV of this report. Meanwhile, no one denies that ‘his own country’ includes at least country of someone’s nationality.
71. Partially mirroring the UDHR, the ICCPR's provisions are even more narrowly defined than those in the declaration. Not only did the drafters intentionally omit to include any reference to asylum,<sup>131</sup> but Article 12(4) is negatively phrased in the sense that ‘No one shall be arbitrarily deprived of the right to enter his own country’, i.e. explicitly linking the right to its possible restriction and, therewith, stressing the respective competencies of the States. Furthermore, internal freedom of movement under Article 12(1) is more narrowly defined, concretising that the right is only granted to persons being ‘lawfully within the territory of a State’.
72. This section addresses four issues: (1) who are nationals? (2) restrictions on the right to enter for nationals; (3) refugee’s return to their own country; and (4) recent denationalisation practice due to security concerns.

#### 3.1 Who Are Nationals?

73. The right to a nationality is important as nationals are vested with the right to return to their countries under Article 13(2) of the UDHR. Article 15 of UDHR does not speak of a right to a specific or freely chosen nationality, but includes: (1) the right to acquire a nationality and (2) the right to retain and change one’s nationality.<sup>132</sup>
74. Usually, whether a person is a national of a certain country is not controversial. However, the issue might be contentious in some cases, especially when a country’s citizenship law itself can be challenged, such as Myanmar’s 1982 Citizenship Law,<sup>133</sup> or Australia’s citizenship stripping law,<sup>134</sup> or whether someone has lost their nationality intentionally or unintentionally, and sometimes even without their knowledge.<sup>135</sup>

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<sup>131</sup> Michael Lysander Fremuth, ‘Access Denied? – Human Rights Approaches to Compensate for the Absence of a Right to Be Granted Asylum’ (2020) 4(1) University of Vienna Law Review 79, 87.

<sup>132</sup> See Sanzhuan Guo, ‘Advantages and Disadvantages of Dual Citizenship’, in Jean-Denis Mouton and Peter Kovac (eds) *The Concept of Citizenship in International Law* (Brill 2018) 131, 139; See also: Mirna Adjami and Julia Harrington, ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’ (2008) 27 Refugee Survey Quarterly 93, 101.

<sup>133</sup> 1982 Citizenship Law of the Republic of the Union of Myanmar.

<sup>134</sup> Australian Citizenship Amendment (Citizenship Repudiation) Act 2023 (Cth).

<sup>135</sup> For example, Chinese nationals might ‘automatically’ lose their Chinese nationality if they have voluntarily obtained another country’s citizenship and have ‘settled’ in that country. However, when does this losing nationality ‘automatically’ happen is not clear. See: Sanzhuan Guo and Tim McFarland, ‘Dual Nationality and National Belonging:

75. Whether a person is a national or citizen of a country is primarily decided by the State's domestic law. However, the State's sovereignty to include or exclude certain people as their nationals shall be confined by international law.<sup>136</sup> This is partly the rationale for why Myanmar's 1982 Citizenship Law has been heavily criticised by the international community, especially in the context of stateless Rohingyas, as it is discriminatory.<sup>137</sup>
76. The 'effective/genuine link' test established in the *Nottebohm* case<sup>138</sup> is still applicable in international law but it is also increasingly contested, especially when there is only one nationality at stake. Does this mean that, by application of this test, only certain nationals, such as 'resident nationals' or those who have a 'substantial link could be granted with the right to return their own country'?<sup>139</sup> Resident citizens and non-resident passport holders may indeed be treated differently in practice.<sup>140</sup> In some States, people may lose their nationality due to a long-lasting residence abroad.<sup>141</sup>

### 3.2 Limitations on the Right to Enter for Nationals

77. Nationals' right to enter their own country is not an absolute right. It is subjected to limitations - such as those provided for in Article 12(4) of ICCPR – or to derogation - e.g. under Article 4 of ICCPR.<sup>142</sup>
78. For example, it has been seen during the COVID pandemic that nationals' right to return to their country was limited or derogated. During COVID many States across all continents adopted laws and policies to limit their nationals to return to their home country.<sup>143</sup> According to IOM, a total of 272 COVID-19-related entry restrictions in relation to nationals were adopted by 27 July 2020.<sup>144</sup>
79. Were these restrictions 'arbitrary' in the meaning of Article 12(4)? According to the HRCtee:

[t]he reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action...; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few,

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A Case Study of Chinese Diaspora in Indonesia from 1949 to 1960s' (2023) *Revue Européenne des Migrations Internationales* 155, 158.

<sup>136</sup> See also Nationality of Natural Persons in relation to the Succession of States, International Law Commission, 1999, Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10).

<sup>137</sup> See Sanzhuan Guo and Madhav Gautam 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law', in Leon Wolff and Danielle Ireland-Piper (eds) *Order and Disorder in the 21<sup>st</sup> Century* (Routledge 2018) 83.

<sup>138</sup> *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Report (6 April 1955).

<sup>139</sup> Rosalyn Higgins, 'The Right in International Law of an Individual to Enter, Stay in and leave a Country' (1973) 49(3) *International Affairs* 341, 349.

<sup>140</sup> *Ibid* 341.

<sup>141</sup> See Mai Takeuchi, 'Japan to Cut Off Japanese? Protecting the Ties between Japan and the Japanese Citizens Who are Successful Overseas' <[https://www.rieti.go.jp/en/columns/s24\\_0008.html](https://www.rieti.go.jp/en/columns/s24_0008.html)> accessed 1 March 2024.

<sup>142</sup> Regarding the limitations and derogations of human rights, please see: Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2<sup>nd</sup> edition, 2017) 112-117.

<sup>143</sup> Guofu Liu, 'COVID-19 and the Human Rights of Nationals Abroad' (2020) 114 *AJIL Unbound* 317, 318.

<sup>144</sup> IOM, *Global Mobility Restriction Overview* (27 July 2020) <<https://dtm.iom.int/sites/g/files/tmzbd1461/files/reports/DTM-Covid19%20Global%20Overview%20Output%2027.07.2020%20Final.pdf>> accessed 1 March 2024; see also Liu (n 143).

if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.<sup>145</sup>

80. It should be pointed out that Article 12(3) of ICCPR, concerning 'national security, public order (ordre public), public health or morals or the rights and freedoms of others', does not confine the rights under Article 12(4).<sup>146</sup> On the other hand, Article 4 of the ICCPR does not prohibit derogation under Article 12. Article 4(1) of ICCPR states that:

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

81. The lawfulness under human rights law of these and other measures restricting or hindering nationals' return to their country is, nevertheless, contested.<sup>147</sup> The right to enter one's country of nationality under the ACHR and the ECHR does not expressly provide for limitations nor is it qualified by the formulation that no one shall be *arbitrarily* deprived of this right. Accordingly, it is doubtful whether these provisions can be subject to limitations. Even in treaties which do expressly allow for restrictions upon the right to enter, most notably the ICCPR and the ACHPR, such measures must observe the principle of proportionality. Thus, for example, in 2020, a group of Australian nationals filed a petition before the HRCtee, claiming that Australia's entry restrictions in response to the pandemic of Covid-19 violated article 12(4) of ICCPR.<sup>148</sup> The same requirement applies to derogations, which have been invoked by some States under the ACHR and the ECHR.

### 3.3 Refugees' Return to Their Country of Nationality<sup>149</sup>

82. A specific question is whether refugees have a right to return to their country of origin. For example, after the 1989 Tiananmen Square Incident, many Chinese went overseas and obtained the refugee status; as of today, their return to China is still difficult. However, are Article 13(2) of UDHR and Article 12(4) of the ICCPR sufficient for the establishment of such a right? What if a country has not yet ratified the ICCPR and does not belong to any regional human rights regime, such as China? Is it possible to claim that a customary right to return exists in international law?

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<sup>145</sup> Human Rights Committee, General Comment No 27, [21].

<sup>146</sup> Regarding the relationship between Article 12(4) and Article 12(3) of the ICCPR, Article 12(3) refers to the 'above-mentioned rights', which means rights under Article 12(1) and Article 12(2), rather than Article 12(4). This means that 'national security', 'public order (ordre public)', 'public health or morals or the rights and freedoms of others' may not be the reason to refuse right to enter one's own country.

<sup>147</sup> Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2021) 27(2) Australian Journal of Human Rights 211.

<sup>148</sup> Human Rights Committee, Communication No 3915/2021. At the time of writing of this report, no views have been adopted in this case. See the analysis by Aziz Tuffi Saliba and Mariana Ferolla V. do Valle, 'Stranded at the Border: An Analysis of the Legality of International Travel Restrictions Adopted by States in the COVID-19 Pandemic in Light of the Right to Return to One's Country' (2021) 38(1) Wisconsin International Law Journal 39.

<sup>149</sup> It should be noted that this section did not discuss the case of protracted Palestinian refugees due to the complexity of the issue and the limited space here. Regarding the relevant issues, please refer to: Marjoleine Zieck, 'Refugees and The Right to Freedom of Movement: From Flight to Return' (2018) 39 Michigan Journal of International Law 19; Don Peretz, *Palestinians, Refugees, and the Middle East Peace Process* (US Institute of Peace Press, 1993).

83. As refugees remain nationals of their home country, they continue to hold the right to return to ‘their country’ as enshrined in Article 12(4) of ICCPR and other pertinent human rights guarantees. This may even apply in case of loss of nationality as refugees will often qualify under the additional criteria established in the case law of the HRCttee (notably having “close personal and family ties”). In addition, it should be taken into account that the UNHCR recognises voluntary repatriation, i.e. return of refugees to their home country (next to local integration and resettlement to another country) as one of the durable solutions for refugees. The HRCttee also accepts that ‘[t]he right of return is of the utmost importance for refugees seeking voluntary repatriation’.<sup>150</sup>
84. There has been a debate as to whether, notably in the light of the drafting history of the ICCPR, the right of return might not apply in case of displacement of whole groups or populations.<sup>151</sup> However, the prevailing view seems to be that neither the text of the ICCPR (“everyone”) nor its *travaux préparatoires* would limit the protection of Article 12(4) to individual cases.<sup>152</sup> Thus, the right of return also exists in situations of mass displacement. Furthermore, the HRCttee understands Article 12(4) of ICCPR to ‘impl[y] prohibition of enforced population transfers or mass expulsions to other countries’ in the first place.<sup>153</sup>

### 3.4 Right to Enter, Denationalisation and Security Concerns

85. States may sometimes denationalise some group of people from their nationalities, such as Japanese nationality of Koreans in Japan being taken away in 1952.<sup>154</sup> In the recent efforts fighting against terrorism, several countries have adopted citizenship stripping laws, including UK and Australia.<sup>155</sup> The question of whether a national can be exiled as a lawful punishment has thus returned to prominence.<sup>156</sup>
86. As to the links between security, terrorism and the right to enter, one critical issue concerns the right to return of nationals who went abroad to commit terrorists’ acts or to train to commit such acts, as well as the right of return of their children and wives. Some States most affected by the phenomena – including European States – have adopted heterogeneous and even contradictory strategies in relation to the repatriation of their nationals in such situations. Any return of such individuals will likely be accompanied by criminal investigation, monitoring, rehabilitation, child safeguarding and safeguarding of the public safety interest. In the case of Begum, the UK Supreme Court stayed the decision on the deprivation of UK citizenship ‘until she can play an effective part in it (the proceedings) without the safety of the public being compromised’.<sup>157</sup>

<sup>150</sup> Human Rights Committee, General Comment No 27, para 19.

<sup>151</sup> See Ruth Lapidoth, ‘Legal Aspects of the Palestinian Refugee Question’, Jerusalem Letter / Viewpoints (September 2002), ft 11, <<https://www.jcpa.org/jl/vp485.htm>> accessed 1 March 2024.

<sup>152</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> revised edition, 2005) 284.

<sup>153</sup> Human Rights Committee, General Comment No 27, para 19.

<sup>154</sup> See Onuma Yasuaki, ‘Interplay Between Human Rights Activities and Legal Standards of Human Rights: A Case Study on the Korean Minority in Japan’ (1992) 25 Cornell International Law Journal 515.

<sup>155</sup> UK Immigration Act 2014; Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth). See also: Tamara Laine, ‘Passing the Buck’ (2017) 12(2) Journal of Peacebuilding and Development 22, 25 and 27.

<sup>156</sup> Some discussion on the issue can be found: Nowak (n 152), 283.

<sup>157</sup> *Begum v Secretary of State for the Home Department* [2020] 7 HRLR 161. For more information on this case, please see: Nishita Jha, ‘The Whole World Is Debating Whether “ISIS Brides” Should Go Home. But Yazidi Women Want Them Brought to Justice’, *Buzzfeed* (Web Page, 2019) <<https://www.buzzfeednews.com/article/nishitajha/isis-yazidi-shamima-begum-hoda-muthana>>; Alison Harvey, ‘Shamima Begum Supreme Court judgment: What are the implications for statelessness cases?’ European Network on Stateless (2 March 2021) available at <<https://www.statelessness.eu/updates/blog/shamima-begum-supreme-court-judgment-what-are-implications-statelessness-cases>> accessed 1 March 2024.

87. In cases concerning the repatriation of children from Syria whose parents were linked to terrorist activities in that country, the CRC Committee effectively read a right to be admitted into the country of origin from the need to prevent risks to the children's right to life and the right to be free from ill-treatment.<sup>158</sup> Whilst fair trial considerations were not considered paramount (for example in the Begum case), the best interest of the child, and the prohibition and prevention of ill-treatment were so considered by the Committee. The situation is further complicated when the individual left the country as a child but has since reached adulthood.<sup>159</sup>
88. Understandably, the right to enter of peoples suspected of, or convicted for, terrorist acts and their family members has connections with other international law issues, such as statelessness, nationality and human rights, and it requires further research and report.

#### IV. The Right to Enter: Aliens

89. In public international law there is no right for an alien to enter another country without the host country's permission.<sup>160</sup> This section will first briefly discuss the right to enter of aliens in general, and then focus on four specific scenarios: (1) aliens falling within the category of 'his or her own country'; (2) right to enter under the principle of *non-refoulement*; (3) family reunification; and (4) right to enter for stateless persons.

##### 4.1 Introduction

90. States can legally make a distinction between individuals based on their nationality to decide whether they will be permitted to enter or not on their territory.<sup>161</sup> However, depending on their nationalities, individuals are not equals regarding this sovereign power of States. Some passports are indeed considered 'stronger' than others, such as Australia, USA, Japan, Singapore, South Korea, and passports from some EU member States such as France, Germany and Italy. They allow legal access, at least for short-term stays, to the territories of a large number of third countries without applying for any visa or only an electronic authorisation for free or minimal charges. We can therefore conclude that people with such nationalities could migrate to those third countries without running the risk of taking a dangerous migratory route. It should also be noted that these nationalities, which are favoured in the migration process, are also the least affected by potential exile.<sup>162</sup>
91. Once an alien is in the territory of a State, the State is prohibited to arbitrarily deport such aliens.<sup>163</sup>

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<sup>158</sup> HRCttee, *S.N. et al v. Finland*, UN Doc CRC/C/91/D/100/2019 (12 September 2022); HRCttee, *S.B. et al v. France*, UN Doc CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/2019 (8 February 2022).

<sup>159</sup> See for example the decision of the ECtHR in *H.F. and Others v. France* (14 Sept. 2022, n°24384/19 and 44234/20) 2(b) & 2(c)(ii), where the Court found no obligation for States' parties to the ECHR to repatriate its own nationals but only an obligation to issue a decision refusing the repatriation and a possibility to contest this decision before a Court.

<sup>160</sup> Higgins (n 139) 344.

<sup>161</sup> Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20(4) *European Journal of Migration and Law* 452, 467.

<sup>162</sup> See also: access to nationality as a means to overcome/circumvent less favourable migration rules: golden passports (investor citizenship schemes) in order to benefit from visa exemption regimes (e.g. nationality of Saint Kitts and Nevis for legal entry into the EU and also the case of Malta).

<sup>163</sup> ICCPR, art 13.

92. One area worth further investigation is about former nationals/residents (not dual nationals) and their right to return/enter the country of origin. The country of origin may no longer be ‘their own country’, but they may still have special connections with the country. Some countries may give preferable treatment to their former nationals. For example, China is considering to issue ‘Hua Yi cards’ to ethnic Chinese who have obtained another country’s nationality.<sup>164</sup> The consideration here would be where the boundary of ‘their own country’ is and whether it is possible to have another category between nationals and non-nationals for whom the State is ‘their own country’.

#### 4.2 Right to Enter ‘His Own Country’ for Non-Nationals

93. As indicated earlier, the right to enter ‘his or her own country’ may be extended to non-nationals.
94. While certain regional treaty provisions, e.g. Article 3(2) of Protocol 4 to the ECHR and Article 22(5) of the ACHR limit the right to enter to nationals,<sup>165</sup> neither the UDHR nor the ICCPR invite such a narrow interpretation.
95. The UDHR does not, however, contain a right of ‘everyone’ to enter or return to a country of their choice but confines the right to return to ‘his country’. While ‘his country’ undoubtedly encompasses citizens, the term is sufficiently broad to cover further categories of people who have a stable relationship to the concerned country, such as people having a residence permit or even people having strong factual bonds.<sup>166</sup> In any case, that leads to a limited number of countries a person might be allowed to enter. The denial of a general and unconditional right to enter can also be deduced from Article 13(1) of the UDHR, which grants freedom of movement and residence only internally, i.e. within the borders of each State.
96. Since the adoption of the ICCPR, there has been some debate about the meaning of the expression ‘his own country’ in Article 12(4). The *travaux préparatoires* surrounding this provision show that this formulation was introduced by the Australian delegation with the express aim of extending the right to enter to persons who were not formally nationals of the country but had established their ‘home’ therein.<sup>167</sup> Some delegations expressly opposed this reasoning and affirmed that this provision should only apply to one’s country of nationality,<sup>168</sup> while fewer others voiced support for Australia’s position.<sup>169</sup> Despite this, the formulation ‘his own country’ was retained in the ICCPR’s final text.

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<sup>164</sup> This is a policy in consideration rather than a legal practice. It seems there might be barriers to fully implement such a policy. See: Guo and McFarland (n 135), 156.

<sup>165</sup> Schabas (n 40), art. 12 para. 61.

<sup>166</sup> Please refer to HRCtee, General Comment No 27, UN Doc CCPR/C/21/Rev.1/Add.9. Even though the interpretation is based on Article 12(4) of the ICCPR, it does show that the term ‘his country’ under UDHR can, in principle, encompass this more expansive interpretation.

<sup>167</sup> U.N. Commission on Human Rights, Draft International Covenant on Human Rights, UN Doc. E/CN.4/SR.151 paras 49, 52.

<sup>168</sup> Namely the Philippines, the United States, Egypt, Canada, Pakistan, Japan, India, the United Kingdom, and Czechoslovakia. See the records in: *ibid* paras 54, 58, 59; Third Committee, Article 12 of the Draft Covenant on Civil and Political Rights, U.N. Doc. A/C.3/SR.954 (12 November 1959) para 25; Third Committee, Article 12 of the Draft Covenant on Civil and Political Rights, U.N. Doc. A/C.3/SR.956 (13 November 1959) paras 1, 30; Third Committee, Article 12 of the Draft Covenant on Civil and Political Rights, U.N. Doc. A/C.3/SR.957 (16 November 1959) paras 1, 13, 19; Third Committee, Article 12 of the Draft Covenant on Civil and Political Rights, U.N. Doc. A/C.3/SR.958 (17 November 1959) para 5.

<sup>169</sup> Namely, Chile and Saudi Arabia. See: UN Doc. E/CN.4/SR.151, *supra* note XX, para 53; UN Doc. A/C.3/SR.957, *supra* note XX, para 25.

97. Because of these competing views during the drafting process, there are still debates as to whether the *travaux préparatoires* confirm<sup>170</sup> or reject<sup>171</sup> the proposition that ‘his own country’ be read as broader than one’s country of nationality. Nevertheless, the HRCttee has since taken up this broader reading and, in General Comment No. 27, stated its understanding that the language of Article 12(4) also encompasses individuals who, because of their special ties to the country, could not be considered mere aliens.<sup>172</sup> Despite an initially restrictive approach,<sup>173</sup> from 2011 onward the HRCttee has held that an individual who has strong and enduring connections with a country may consider this country as their own for the purposes of the right to enter, even if the individual never acquired that country’s nationality.<sup>174</sup>

98. In this regard, the HRCttee argues:

The wording of art. 12, paragraph 4 (the right to enter one’s own country) does not distinguish between nationals and aliens (“no one”). Thus, persons entitled to exercise this right must be identified by interpreting the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense (nationality acquired at birth or by conferral). The language paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country.<sup>175</sup>

99. This understanding was already developed by the HRCttee's views in *Stewart v. Canada*, in which it was argued that

[...] the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with social circumstances obtaining in it. This is what Art. 12 paragraph 4 protects.<sup>176</sup>

100. Over time, the HRCttee concretised its understanding and held, e.g. in *Nystrom et al. v. Australia*,<sup>177</sup> that the words “one’s own country” entail considerations such as long-standing

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<sup>170</sup> Higgins (n 139); Stig Jagerskiöld, 'The Freedom of Movement' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia Univ Press 1981); Nowak (n 152); Kathleen Lawland, 'The Right to Return of Palestinians in International Law' (1996) 8 *International Journal of Refugee Law* 532.

<sup>171</sup> Jamil Ddamulira Mujuzi, 'The Right to Enter One's Own Country: The Conflict between the Jurisprudence of the Human Rights Committee and the Travaux Préparatoires of Art. 12(4) of the ICCPR', (2021) 10 *International Human Rights Law Review* 75, 122.

<sup>172</sup> Human Rights Committee, General Comment No. 27, para 20, UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999).

<sup>173</sup> In the much-criticised decision of *Stewart v. Canada*, the HRCttee considered the fact that the applicant had never applied for Canadian nationality despite the criteria for such not being arbitrary as a circumstance that prevented him from claiming protection under Article 12(4). Human Rights Committee, *Stewart v. Canada*, paras 12.5-12.9, U.N. Doc. CCPR/C/58/D/538/1993 (16 December 1996). See also Human Rights Committee, *Canepa v. Canada*, para 11.3, U.N. Doc. CCPR/C/59/D/558/1993 (20 June 1997); Human Rights Committee, *Madafferi v. Australia*, para 9.6, U.N. Doc. CCPR/C/81/D/1011/2001 (26 August 2004).

<sup>174</sup> Human Rights Committee, *Nystrom v. Australia*, 7.4, U.N. Doc. CCPR/C/102/D/1557/2007 (1 September 2011).

<sup>175</sup> Human Rights Committee, CCPR General Comment No. 27: Article 12, UN Doc: CCPR/C/21/Rev.1/Add.9, para. 20.

<sup>176</sup> Human Rights Committee, *Stewart v. Canada*, CCPR/C/58/D/538/1993 (1 November 1996), para 5.

<sup>177</sup> Human Rights Committee, *Nystrom et al. v Australia*, UN Doc CCPR/C/102/D/1557/2007, decided on 18 July 2011.

residence, close personal and family ties and intentions to remain, language spoken, as well as to the absence of such ties elsewhere.<sup>178</sup>

101. Some members of the HRCttee have however further indicated that the individual in question should have at least exhausted domestic remedies to acquire the status of permanent resident in the country, before they could successfully argue the violation of Article 12(4) of the ICCPR.<sup>179</sup>
102. The progressive broadening of the scope of the term ‘his own country’ reflects changes in the significance of citizenship and nationality, which are today not as relevant for the determination of fundamental rights as they have been in the past. Increasingly, most rights of the ICCPR are enjoyed by individuals within the jurisdiction of a State party regardless of their legal status. From a political perspective, the notion of ‘his own country’ is perceived as being increasingly outdated due to the fact that more and more people claim to have close ties with more than one country.<sup>180</sup> However, it has to be borne in mind that already the HRCttee interpretation through a ‘humanitarian lens’<sup>181</sup> is assumed by some to conflict with the drafting history of Article 12(4) which allegedly supports the limitation of its scope of application to nationals.<sup>182</sup>
103. Therefore, there is a trend, at least under ICCPR,<sup>183</sup> towards including not only citizens but also other persons with close ties to a certain State in the right to enter their ‘own State’.

#### **4.3 Right to Enter under the Principle of *Non-refoulement***

104. The term ‘principle of *non-refoulement*’ has been used in international law in relation to different norms, usually arising from treaties, which relate to the obligation of States not to remove an individual to a territory where he or she would be exposed to ill-treatments. However, the exact scope and content of the principle of *non-refoulement* depends on the specific legal framework under consideration in a given situation.
105. Under refugee law, the principle of *non-refoulement* applies to refugees and asylum seekers only.<sup>184</sup> Under human rights law, in turn, *non-refoulement* encompasses all individuals, regardless of whether they have claimed or been granted refugee status. Accordingly, the principle of *non-refoulement* under human rights law means that a person cannot be returned, but it does not mean that the person has to be granted refugee status and be afforded all the rights accruing to refugees. ICCPR includes an implied prohibition and CAT contains an explicit prohibition of *refoulement* applicable to all individuals, but only where there is risk

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<sup>178</sup> *Id.*, paras. 7.4 and 7.5. See also Human Rights Committee, *Warsame v. Canada*, paras 8.4-8.5, UN Doc. CCPR/C/102/D/1959/2010 (1 September 2011); Human Rights Committee, *Budlakoti v. Canada*, paras 9.2-9.3, UN Doc. CCPR/C/122/D/2264/2013 (29 August 2018).

<sup>179</sup> Human Rights Committee, *Abdilahi Ahmed Elmi v Canada*, Joint opinion of Committee members Carlos Gómez Martínez and Vasilka Sancin (partially dissenting), UN Doc CCPR/C/136/D/3649/2019 (1 November 2022) para 5.

<sup>180</sup> Schabas (n 40) art. 12 para. 69.

<sup>181</sup> Mujuzi (n 171) 123.

<sup>182</sup> *Ibid* 122.

<sup>183</sup> The cases beyond ICCPR include, e.g., *Amnesty International v Zambia* (2000) Communication 212/98, AHRLR 325 (ACHPR 1999).

<sup>184</sup> Given the declaratory nature of refugee status, asylum seekers are entitled to the protection of the GRC until their claim has been unsuccessful. This declaratory nature is explained in UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011).

of torture as defined in the convention.<sup>185</sup> Under international humanitarian law, the principle applies to only certain categories of persons that are affected by armed conflicts.<sup>186</sup>

106. Thus, depending on the applicable treaty (body of laws) under which a particular scenario falls, the principle will protect individuals against different dangers that may not be covered by other bodies of law, such as a risk of death penalty, cruel punishment, or child recruitment and participation in hostilities, regardless of whether the danger to the person is based on discriminatory grounds or not. While refugee law recognises certain narrowly defined exceptions to the principle of *non-refoulement*, the principle is absolute under other bodies of law.<sup>187</sup>
107. *Refoulement* may also take place indirectly. Although the country concerned sends the person in question only to a ‘safe country’, the latter may send the individual back to the country where s/he may then be subjected to torture or cruel, inhuman or other degrading treatment or punishment. For example, in 2011 Australia made an arrangement with Malaysia transferring 800 asylum seekers from Australia to Malaysia in exchange for transferring up to 4000 recognised refugees from Malaysia to Australia, but given that Malaysia has not yet ratified the Refugee Convention nor recognises refugee status in its domestic law, the deal was described by the High Court of Australia as unlawful.<sup>188</sup> This is referred to as ‘indirect’ or ‘chain’ refoulement. This also demonstrates that the non-refoulement principle does not lead to the right to enter a preferred country.
108. Under refugee law, the principle applies to cases of rejection at a state’s border. It applies also when States operate extraterritorially, including during interception or rescue operations on the high seas for example.<sup>189</sup> In the context of border closures or pushback operations, the *non-refoulement* principle applies extraterritorially.<sup>190</sup> Thus, *non-refoulement* as a principle will not allow asylum seekers to be turned back or denied entry into a state if the safety and sanctity of such person may be threatened in any way.
109. Despite a right to *non-refoulement*, the right to seek asylum outlined in the UDHR has never been codified into a legally binding treaty except for the TFEU and the CFR.<sup>191</sup> Refugees are protected from *refoulement* but are deprived of the right to legally enter on the territory of a State to claim such a protection.<sup>192</sup>

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<sup>185</sup> ICCPR, Art 7; CAT, Art 3.

<sup>186</sup> The Fourth Geneva Convention, arts. 45, 49, 127.

<sup>187</sup> Tamas Molnar, ‘The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell’ (2016) 1 Corvinus Journal of International Affairs, available at <<https://ssrn.com/abstract=2807437>> accessed 1 March 2024.

<sup>188</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; Michelle Foster, ‘The Implications of the Failed “Malaysian Solution”: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13(1) *Melbourne Journal of International Law* 395.

<sup>189</sup> Inter-American Commission on Human Rights (IACHR) ‘The Haitian Centre for Human Rights et al v United States, Case 10.675’, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

<sup>190</sup> ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ Human Rights Council, 2018, UN Doc A/HRC/37/50, paras 13, 39 and 51, available at <[https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/A\\_HRC\\_37\\_50\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/A_HRC_37_50_EN.pdf)> accessed 16 March 2024.

<sup>191</sup> TFEU, Art 78; CFR, Art 18.

<sup>192</sup> See notably: Asher *ibid* (n 61) 418; UNGA, “Report on means to address the human rights impact of pushbacks of migrants on land and at sea: Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales”, UN Doc A/HRC/47/30 (2021). In Australia, *Migration Act 1958* (Cth) was amended in order to create ‘excised offshore places’ for the immigration law purpose so that asylum seekers would not reach Australia’s territory. See: *Migration Act 1958* (Cth), s 5(1).

110. Even though the status of a refugee is not dependent on recognition by any given State,<sup>193</sup> the Convention neither grants a right to *receive* asylum nor a right to enter a certain State's territory. A general right to be *granted* asylum is absent in public international law.<sup>194</sup> Article 31 of the Refugee Convention asks States only not to "impose penalties, on account of their illegal entry or presence". Finally, and corresponding with general human rights guarantees, freedom of movement for refugees is confined to internal movement, as well as to persons lawfully present in the respective territory.<sup>195</sup> Both provisions also argue against an *implicit* right to free entry.
111. A right to enter might emerge once a person has been granted asylum,<sup>196</sup> which might happen even while persons are still staying abroad. However, there is no undisputed obligation to issue a humanitarian visa to enable asylum requests within States of destination.<sup>197</sup> Accordingly, most asylum seekers can file their request for protection only after getting in contact with jurisdiction of the State of destination, be it at the borders, within territorial waters or – under certain conditions<sup>198</sup> – on the high seas. The crucial State obligation is *non-refoulement*, not admission or grant of residence;<sup>199</sup> accordingly, a person might be protected from being expelled or returned even if they entered the territory of a State illegally.
112. After the naturalisation of a refugee, which States of destination are asked to facilitate as far as possible (article 34 GRC), former refugees would benefit from the right to entry for citizens, as discussed earlier in this report on nationals' right to enter their own country. Bearing in mind the long duration of refugees' stays in the country of destination, another question, not clearly addressed and decided so far, would be whether these persons – still under the status as refugees – may develop ties to the respective country sufficiently close to call the state of destination their 'own state' in accordance with the human right to (re-) enter.
113. At the regional level, the position is similar. Most regional systems do not recognise an explicit right to enter to seek asylum. An exception might be the African Refugee Convention, which provides that State parties should 'use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.'<sup>200</sup> Furthermore, it provides in Article 2(3) that 'no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened ...'.<sup>201</sup>

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<sup>193</sup> Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011), 260. Note: This commentary has a new version in 2024.

<sup>194</sup> Michael Lysander Fremuth, 'Access Denied? – Human Rights Approaches to Compensate for the Absence of a Right to Be Granted Asylum', (2020) 4(1) *University of Vienna Law Review* 79, 87.

<sup>195</sup> Refugee Convention, Art 26.

<sup>196</sup> Noll, *ibid* (n 60) 572; see also: Asher *ibid*, (n 61) 429.

<sup>197</sup> See decision of the ECJ in *X.X. and others v. Belgium*, 7 March 2017 (n°C-638/16 PPU), and decision of the ECtHR in *M.N. and others v. Belgium*, 5 May 2020 (n°3699/18).

<sup>198</sup> Cp. ECtHR [GC], *Hirsi Jamaa and Others v. Italy* (2012) app. no. 27765/09.

<sup>199</sup> IOM & Aleinikoff, *International Legal Norms and Migration: An Analysis*, International Dialogue on Migration No. 3 (2002), pp. 29 et seq.

<sup>200</sup> African Refugee Convention, art 2(1).

<sup>201</sup> *Ibid*, art II.3.

114. The focus on the recipients of the right as ‘persons’, casts a wide net to arguably include not just those qualifying as refugees, but anyone. Furthermore, it would appear that the geographical location of such persons is not relevant under this provision, and States under this convention have an obligation to admit everyone who reaches their frontiers and is unwilling to return to his/her country for ‘well-founded reasons’.

#### **4.4 The Right to Enter and Family Reunification**

115. The right to family reunification works to allow reunification between a non-national and their family in the host State’s territory.<sup>202</sup> As a corollary to the principle of family unity, it is established and protected by the ICCPR,<sup>203</sup> the ICESCR<sup>204</sup> and the CRC,<sup>205</sup> wherein the family is recognised as the fundamental group unit of society and entitled to protection and assistance. ICRMW<sup>206</sup> and the preamble to the ICRPD<sup>207</sup> contain similar language. In terms of the ICESCR, Article 10(1) requires States Parties to accord ‘[t]he widest possible protection and assistance ... to the family ... particularly for its establishment and while it is responsible for the care and education of dependent children’. This provision was explained by the HRCttee in its General Comment No 19 to mean that ‘the right to found a family implies, in principle, the possibility to live together’.<sup>208</sup>
116. While these instruments, as a rule, do not establish a right to family reunification as such, they rather impose procedural obligations upon States to facilitate the process of family reunification. Article 10 of the CRC strongly formulates this when it requires that applications by a child or their parents for family reunification be dealt with ‘in a positive, humane and expeditious manner’. Article 44 of the ICRMW, in turn, mandates states to ‘facilitate’ family reunification towards migrant workers in a regular situation. Obligations of this kind are also found in international humanitarian law, where Article 26 of the Fourth Geneva Convention provides that parties to the conflict shall facilitate enquiries made by members of families dispersed due to the conflict, ‘with the object of renewing contact with one another and of meeting, if possible’. Article 74 of Additional Protocol I to the Geneva Conventions expressly requires States and parties to the conflict to facilitate the reunion of families dispersed as a result of armed conflicts. Article 4(3)(b) of Additional Protocol II further requires parties to non-international armed conflicts to take ‘all appropriate steps... to facilitate the reunion of families temporarily separated’.
117. At the regional level, it is interesting to note that provisions for the right to family reunification, are made in even stronger terms at times. In the Americas, the 1984 Cartagena Declaration acknowledges that the ‘reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of

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<sup>202</sup> Frances Nicholson, ‘The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification’ (UNHCR, 2018) <<https://www.refworld.org/reference/research/unhcr/2018/en/122578>>

<sup>203</sup> ICCPR, art 23(1).

<sup>204</sup> ICESCR, art 10(1).

<sup>205</sup> CRC, arts 9, 10 and 22.

<sup>206</sup> ICRMW, art 44.

<sup>207</sup> ICRPD, Annex 1.

<sup>208</sup> Human Rights Committee, General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses (27 July 1990), [5]; see also Part B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, on the principle of family unity (which is appended to the 1951 GRC),

humanitarian treatment in the country of asylum'.<sup>209</sup> The IACtHR, in a 2002 advisory opinion affirming this, placed an obligation on States to not only abstain from acts that involve separation of families, but also to take positive action to keep the family united.<sup>210</sup>

118. The EU Family Reunification Directive<sup>211</sup> establishes a series of procedures and requirements for third-country nationals to benefit from family reunification. More favourable conditions for reunification apply to third-country nationals who are long-term residents in EU Member States<sup>212</sup> or reside therein for purposes of highly qualified employment,<sup>213</sup> as well as to beneficiaries of temporary protection.<sup>214</sup> The European Convention on the Legal Status of Migrant Workers also allows reunification of certain family members with regular migrant workers through the same procedure by which these workers were admitted into the host country, as long as the worker is capable of providing the family with minimum housing conditions.<sup>215</sup> In Africa, an obligation of family tracing and reunification is also found in the African Charter on the Rights and Welfare of the Child towards children and their parents or relatives, if separation stems from displacement arising from armed conflicts or natural disasters.<sup>216</sup>
119. In addition to these provisions expressly addressing family reunification, such a process has found support in international and regional human rights treaties, through the right to family life and the protection of the family.<sup>217</sup> This is based on the rationale that as family life requires interaction, intimacy and, thus, a form of factual social cohabitation and living together,<sup>218</sup> courts and treaty bodies have, under certain conditions, recognised a right to family reunification.<sup>219</sup> As the HRCtee has stated, though the ICCPR 'does not recognise a right for aliens to enter or reside in the territory of a State party', in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of [...] respect for family life arise".<sup>220</sup> Thus, in these cases, 'a refusal of family reunification can be considered an arbitrary or unlawful interference with

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<sup>209</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>.

<sup>210</sup> Nicholson 11; Advisory Opinion on Juridical Condition and Human Rights of the Child, OC-17/02, Inter-American Court of Human Rights (IACtHR), 28 August 2002, <<http://www.refworld.org/cases,IACRTHR,4268c57c4.html>>, 36. In an subsequent advisory opinion in 2014, the IACtHR ruled that where there are cases of unaccompanied children, or those separated from family, States should try to trace members of the families - Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, OC-21/14, IACtHR, 19 August 2014, <<http://www.refworld.org/docid/54129c854.html>>, 105. See also Article 9(2) of the *2002 Agreement on Residence for Nationals of Mercosur States* which regulates Mercosur States and their associated member States, provides a right to reunification between migrants who are nationals of a member State and family members who are not upon the presentation of certain documents.

<sup>211</sup> Directive 2003/86/EC.

<sup>212</sup> EU Council Directive 2003/109/EC, art 16,.

<sup>213</sup> Directive 2021/1883, art 17.

<sup>214</sup> Council Directive 2001/55EC, art 15.

<sup>215</sup> The European Convention on the Legal Status of Migrant Workers, arts 9 and 12.

<sup>216</sup> African Charter on the Rights and Welfare of a Child, art 25(2)(b).

<sup>217</sup> Art. 17 (Prohibition of arbitrary or unlawful interference with his family), art. 23 (Protection of the family) and art. 24 (Protection of the child), ICCPR; art. 17 para. 1 of the ACHR; art. 18 of the ACHPR; art. 33 of the ArabCHR; art. 8 of the ECHR; 1961 European Social Charter and art. 16 of the 1996 Revised European Social Charter.

<sup>218</sup> Jastram/Newland, 'Family Unity and Refugee Protection' in Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) p. 566.

<sup>219</sup> See e.g. Council of Europe, Family Reunification for Refugees and Migrant Children, Standards and promising practices (2020) 19, referring to arts 17 and 23 of ICCPR.

<sup>220</sup> HRCtee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant (1986) para. 5.

the right to family life under Article 17 of [ICCPR]’.<sup>221</sup> This general rationale, that the protection of family life may require a State to allow family reunification in its territory, has also been endorsed by the ECtHR,<sup>222</sup> the CRPD Committee,<sup>223</sup> and the CRC Committee.<sup>224</sup>

120. Several aspects have to be taken into consideration and to be weighed in order to establish a right to entry for purposes of family reunification.
121. First, such a right depends on the understanding of what forms a family, as only family members are eligible for reunification. The HRCtee recalls that the term ‘family’, for purposes of the ICCPR, must be understood broadly as to including all those comprising a family as understood in the society concerned.<sup>225</sup> The protection of such a family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations.<sup>226</sup> Absent a standard definition, the HRCtee accepts a certain margin of discretion of States to define what forms a family (between a ‘nuclear’ and ‘extended’ understanding)..<sup>227</sup>
122. With regard to non-married opposite-sex couples, a certain proof for an existing stable relationship might be required.<sup>228</sup> With regard to same-sex couples, whether married or partnered, the situation differs significantly. While in some countries and regions of the world same-sex couples enjoy equal treatment or a form of registered partnership<sup>229</sup> – in particular under the ACHR and ECHR, whose respective courts have adopted a quite progressive interpretation of the family keeping pace with advancing social developments<sup>230</sup> – in other

<sup>221</sup> Vincent Chetail, ‘The Transnational Movement of Persons under General International Law’, in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing) 42; See also Office of the High Commissioner for Human Rights, *Migration Papers, Family Reunification* (2005) p. 7.

<sup>222</sup> *Tanda-Muzinga v France*, App No 2260/10 (ECtHR 10 July 2014).

<sup>223</sup> CRPD, *Bendsten v Denmark* (31 August 2018) UN Doc CRPD/C/20/D/39/2017.

<sup>224</sup> CRC, *Y.B. and N.S. v Belgium* (27 September 2018) UN Doc CRC/C/79/D/12/2017.

<sup>225</sup> Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (8 April 1988), UN Doc HRI/GEN/1/Rev.1 21.

<sup>226</sup> Human Rights Committee, *Benjamin Ngambi and Marie-Louise Nébol v. France* (16 July 2004) CCPR/C/81/D/1179/2003, para. 6.4.

<sup>227</sup> Human Rights Committee, CCPR General comment No. 19: Art. 23 (The Family) – Protection of the Family, the Right to Marriage and Equality of the Spouses (1990) [2].

<sup>228</sup> *Marckx v. Belgium*, EctHR (1979), app. no 6833/74, para 31; *Johnston and Others v. Ireland*, EctHR app. no. 9697/82 (1986) para. 56; *Atala-Riffo and Daughters v. Chile*, IACtHR (Judgment) (24 February 2012), para. 174; HRCtee, *Benjamin Ngambi and Marie-Louise Nébol v. France* (16 July 2004) CCPR/C/81/D/1179/2003, [6.4].

<sup>229</sup> See ILGA World, *World Map – Legal Recognition of Same-sex Couples (marriage equality and civil unions)* (March 2023), digital image, <<https://ilga.org/sites/default/files/marriage-equality-civil-unions-ilga-world.png>> accessed 4 March 2024; *Mendos, Lucas Ramón et alii: State-Sponsored Homophobia – Global Legislation Overview Update* (2020), ILGA, updated edition, 277.

<sup>230</sup> *Atala Riffo and Daughters v Chile (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C, No. 239, 24 February 2012); IACtHR *Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Advisory Opinion OC-24/17, Ser A No 24 (24 November 2017).

Additionally, the ECtHR interprets the concept of family life as an autonomous concept. Correspondingly, it questions whether close personal ties exist (*Marckx v. Belgium*, EctHR (1979), app. no 6833/74, para. 31). Factors the court considers are: whether the applicants live (*Johnston and Others v. Ireland*, EctHR app. no. 9697/82 (1986) para. 56) or have children together or the length of the relationship (*X, Y and Z v. the United Kingdom*, § 36), EctHR (1997) app. no. 21830/93). According to this understanding, the concept of family also includes non-married opposite-sex couples (*Paradiso and Campanelli v. Italy*, EctHR, (2017) no. 25358/12, para. 140 ; *Oliari and Others v. Italy*, EctHR (2015) app. nos. 18766/11 and 36030/11, [130]).

parts where homosexuality is tabooed and stigmatised, irrespective of whether consensual same-sex conduct is criminalised or not, any recognition of a same-sex family is rejected.<sup>231</sup> This might also include children adopted by one partner or both partners. The Parliamentary Assembly of the Council of Europe (PACE) acknowledged in its 2004 Recommendation on Human Mobility and Family Reunion that ‘the concept of “family” underlying that of family reunion has not been defined at European level and varies in particular according to the value and importance attached to the principle of dependence’.<sup>232</sup> In this context, PACE has urged Council of Europe Member States to interpret the concept of ‘family’ as including ‘de facto family members (natural family), for example [...] partner or natural children as well as elderly, infirm or otherwise dependent relations’.<sup>233</sup> Also, for the Americas the IACtHR has taken an approach that goes beyond ‘the traditional notion of a couple and their children’ to include other blood relatives and others with no biological relation who share ‘close personal ties’.<sup>234</sup> Regardless of the definition adopted, the principle of non-discrimination continues to apply as a cross-cutting guarantee, so that discriminatory definitions of ‘family’ are impermissible.<sup>235</sup>

123. Second, the sole fact of being a family member of a foreigner already regularly staying within a State, do not amount to an automatic right to enter. If there is an invitation for States ‘to admit to its territory relatives of persons residing there’ and to assess individual situations in consequence<sup>236</sup>, it is generally admitted that the right to private and family life ‘cannot be considered to impose on a State a general obligation to respect a married couple’s choice of country for their matrimonial residence or to authorise family reunification on its territory’.<sup>237</sup> This right thus ‘vary according to the particular circumstances of the persons involved and the general interest’.<sup>238</sup> Some general evolutions have however to be mentioned.
124. The HRCtee has been mostly concerned with cases of expulsion and has rendered some criteria relevant for the question under which a family member might be expelled, including ‘length of stay and the link of the family with the country where they live, the practicality of a return in the country of origin, the social relationship and working conditions of the members of the family in the host country’.<sup>239</sup> In the case of *Gonzalez v. Guyana*, which concerned a couple who were unable to enjoy their right to family life elsewhere, the HRCtee held that the Guyanese authorities’ refusal to grant a residence permit to the Cuban husband of a Guyanese national constituted a violation of Article 17(1) of ICCPR, it being evident that the

<sup>231</sup> Cf. ILGA, World map – criminalisation of consensual same-sex sexual acts (March 2023), digital image, accessed 1 June 2023: <[https://ilga.org/sites/default/files/criminalisation-consensual-same-sex\\_sexual-acts-ilga-world.png](https://ilga.org/sites/default/files/criminalisation-consensual-same-sex_sexual-acts-ilga-world.png)> accessed 1 March 2024; *Mendos, Lucas Ramón et alii*: State-Sponsored Homophobia — Global Legislation Overview Update (2020), ILGA, updated edition, pp. 113 et seqq.

<sup>232</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1686 (2004): *Human Mobility and the Right to Family Reunion*, [8] and [9].

<sup>233</sup> Ibid, [8] and [9].

<sup>234</sup> Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, OC-21/14, IACtHR, 19 August 2014, [272].

<sup>235</sup> As decided notably by CRPD, ‘Bendsten v Denmark’ (31 August 2018) UN Doc CRPD/C/20/D/39/2017.

<sup>236</sup> PACE (n 63).

<sup>237</sup> *Jeunesse v. the Netherlands*, ECtHR (2014) app. no. 12738/10, para. 107; *Biao v. Denmark*, ECtHR (2016) app. no. 38590/10, para. 117; *Ahmut v. the Netherlands*, ECtHR (1996) app. no. 21702/93, para. 67.

<sup>238</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, ECtHR (1985) app. no. 9214/80; 9473/81; 9474/81 paras. 67 and 68; *Gül v. Switzerland*, ECtHR, 1996, app. no. 23218/94, para. 38; *Ahmut v. the Netherlands*, ECtHR (1996) para. 63 app. no. 21702/93, para. 63; *Priya v. Denmark*, ECtHR (2006) no. 13594/03; *Osman v. Denmark*, ECtHR (2011) app. no. 38058/09 para. 54; *Berisha v. Switzerland*, ECtHR (2013) app. no. 948/12 para. 60; *Rodrigues da Silva, Hoogkamer v Netherlands*, ECtHR (2007) app. no. 50435/99, para 39; these cases concerned the right to stay, the general assumptions with regard to family reunification can be generalised though.

<sup>239</sup> Office of the High Commissioner for Human Rights, Migration Papers, Family Reunification (2005) p. 7.

couple could not live in Cuba and that Guyana had ‘not indicated where else they might live as a couple’.<sup>240</sup>

125. Furthermore, through the 2018 Global Compact on Migration, States addressed family unity and committed themselves to facilitate access to procedures for family reunification for migrants at all skill levels through appropriate measures that promote the realisation of the right to family life and the best interests of the child, including by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services.<sup>241</sup>

#### 4.4.1 Spouse

126. As already indicated above,<sup>242</sup> the protection of the family unit and family life is contained in numerous international and regional treaties which apply to all, including refugees and asylum seekers throughout the stages of displacement.<sup>243</sup>
127. Provisions on reunification apply to spousal relationships as well, though the type and nature of the relationship must be as understood in the society concerned. Spouses from common law and traditional / religious marriages, proxy marriages, polygamous marriages, same-sex partnerships, and other types of relationships are treated differently in terms of a right to family reunification (and thereby possibly of a right to enter), based on different considerations by States. The active jurisprudence from the EU provides insight on European States’ practices. In terms of common law partnerships, the requirement of cohabitation for about a year or more is applied before the partner would be considered a ‘spouse’ for this purpose. This might be waived if the couple have a child together. Evidence of such cohabitation (e.g. marriage certificate or the like) might be difficult provide in the case of refugees. Some countries apply a strict requirement of formal marriage and thus a legal document to a spousal relationship is needed for the purpose of family reunification,<sup>244</sup> while others have a more flexible approach where civil, religious and customary marriages are recognised.<sup>245</sup>
128. Spouses from proxy marriages, where one party is not present at the ceremony, are common in some countries, and deemed valid in those countries. Careful considerations recognising the cultural sensitivities, and eliminating concerns of forced marriages, are important in evaluating ‘spouses’ in these cases. For example, Ireland, the UK and the Netherlands accept

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<sup>240</sup> Human Rights Committee, *Gonzalez v. Republic of Guyana*, CCPR/C/98/D/1246/2004 (21 May 2010).

<sup>241</sup> The Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195), Resolution adopted by the General Assembly on 19 December 2018, 21(i).

<sup>242</sup> Frances Nicholson, ‘The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied’ (UNHCR Legal and Protection Policies Research Series No 35, 2018).

<sup>243</sup> Articles 16(3) of the UDHR, article 23(1) of the ICCPR, article 10(1) of the ICESCR, article 44 of the CMW, CRC and annex 1 of the 2006 Convention on the Rights of Persons with Disabilities (CRPD) contain similar provisions.

<sup>244</sup> Austria, Estonia, Italy, Romania and others. In Poland, only couples in marriages recognised under Polish law are accepted. In *Hassan and Another v Minister for Justice, Equality and Law Reform* [2010] IEHC 426, Ireland: High Court, 25 Nov 2010, available at: [http://www.refworld.org/cases,IRL\\_HC,58a6e7d04.html](http://www.refworld.org/cases,IRL_HC,58a6e7d04.html), paras. 16 and 20, the Irish High court held in relation to a religious marriage, that where a relationship based on cohabitation and exclusivity has subsisted between the two parties in question over a substantial period, the applicant for family reunification could be considered a ‘spouse in a subsisting marriage’. See generally, Frances Nicholson, ‘The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification’, (UNHCR 2018) 164.

<sup>245</sup> In Belgium for instance, the spouse in the case of a religious and customary marriage would only obtain a humanitarian visa to enter the country hosting the refugee.

these kinds of marriages as resulting in family life, and thereby qualifying for consideration for family reunification.<sup>246</sup>

129. In the case of spouses from polygamous marriages, bearing in mind that international standards disavow polygamy as a system,<sup>247</sup> such unions have also been held to be in contravention of Article 5 of CEDAW. Some States do not recognise polygamous marriages, and for such States, reunification applications by spouses from such marriages will not succeed.<sup>248</sup> In States that do recognise these kinds of marriages, modalities for reunification applications are put in place for the determination of which of the spouses of the sponsor would be deemed eligible for family reunification. Generally, in Europe, the Americas, and New Zealand, only one spouse is permitted to reunify with a beneficiary of international protection. In such cases, other spouses would not qualify.<sup>249</sup>
130. Same-sex relationships as indicated above, are recognised as being able to constitute family life and family unit only in some States. The ECtHR and the IACtHR recognise these unions, and thus, a homosexual couple, in a stable relationship would qualify for family reunification in the same way as a heterosexual couple.<sup>250</sup> However as stated, some countries do not recognise same-sex relationships in the context of family reunification.<sup>251</sup>

#### 4.4.2 Children

131. Several issues have been encountered in terms of children and their right of entry. First, children with disabilities may face difficulties to receive a visa from the destination country and sometimes their disabilities even impact their parents' receiving a visa, which directly impact on the right to enter the country. In Australia, it has become a political issue whether

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<sup>246</sup> *Hamza and Another v. Minister for Justice, Equality and Law Reform*, [2013] IESC 9, Ireland: Supreme Court, 27 February 2013, available at: [http://www.refworld.org/cases,IRL\\_SC,512e0a242.html](http://www.refworld.org/cases,IRL_SC,512e0a242.html); See *Uitspraak 201601089/1/V1*, Netherlands: Council of State, 2017, above fn. 294, in which the Secretary of State did not dispute that the applicant and sponsor were married before they entered the Netherlands and thus that there was a legal family relationship; *QJ (Algeria) v. Secretary of State for the Home Department*, [2010] EWCA Civ 1478, UK: Court of Appeal (England and Wales), 21 December 2010, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV,4d2b1ee72.html](http://www.refworld.org/cases,GBR_CA_CIV,4d2b1ee72.html); *T. v. Secretary of State for the Home Department*, SC/31/2005, UK: Special Immigration Appeals Commission (SIAC), 22 March 2010, available at: [http://www.refworld.org/cases,UK\\_SIAC,4bab727e2.html](http://www.refworld.org/cases,UK_SIAC,4bab727e2.html). Both the UK cases concerned deportation and in both the couple had children. See also *MM & Ors, R (On the Application Of) v. Secretary of State for the Home Department*, [2014] EWCA Civ 985, UK: Court of Appeal (England and Wales), 11 July 2014, available at: [http://www.refworld.org/cases,GBR\\_CA\\_CIV,53d8da9f4.html](http://www.refworld.org/cases,GBR_CA_CIV,53d8da9f4.html), where one of the three appellants was a recognised refugee from Lebanon seeking to bring his Lebanese wife whom he had married by proxy to the UK.

<sup>247</sup> See Human Rights Committee position that polygamy should be abolished based on the fact that the practise violates the dignity of woman, and is discriminatory against women in HRCtee, CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, available at: <http://www.refworld.org/docid/45139c9b4.html>, para. 24

<sup>248</sup> Australia does not recognise polygamous marriages in its Marriage Act, and such none of the parties in a polygamous union would satisfy the definition of a spouse or de facto partner in terms of an application for family reunification in Australia.

<sup>249</sup> See EU Family Reunification Directive, Article 4(4); Turkey: Law on Foreigners and International Protection, 2013, Article 34(2).

<sup>250</sup> See the cases of *Schalk and Kopf v Austria*, Application no. 30141/04, ECtHR, 24 June 2010, available at: <http://www.refworld.org/docid/4c29fa712.html>, paras. 92-94; *P.B. and J.S. v. Austria*, Application no. 18984/02, ECtHR, 22 July 2010, available at: <http://www.refworld.org/docid/5852b79e4.html>, para. 30; *X. and Others v. Austria*, Application no. 19010/07, ECtHR, Grand Chamber, 19 February 2013, para. 95, <<http://www.refworld.org/docid/5852c33f4.html>> accessed 1 March 2024.

<sup>251</sup> Some States in Eastern Europe (Estonia, Latvia, Lithuania), Asia and Africa.

children with disabilities should be granted a visa to enter or stay in Australia.<sup>252</sup> Second, children in some countries may have criminal capacity, particularly after 14 or sometimes 16 years old, which may lead to the failure of meeting character tests of the destination country as it is commonly required for prospective entrants to have no criminal record to get a visa or enter a country.

132. Children, as a special class, have family reunification protections under the CRC. It imposes an obligation on State parties to ensure that a child not be separated from his or her parents against their will, and where such separation has occurred, to ensure efforts are made for family reunification. Further, applications for reunification where concerning or affecting children have to be processed in a ‘humane and expeditious manner’.<sup>253</sup> The CRC Committee has emphasised that all efforts should be made to return an unaccompanied child to its parents except where such separation might be in the ‘best interests’ of the child, taking full account of the right of the child to express his or her views.<sup>254</sup> In the event of reasonable risk that such return might violate the human rights of the child, States are allowed to pause on such reunification attempts. Other related provisions of the CRC impose additional obligations on States to ensure steps are taken to provide a child with the protection in this regard.<sup>255</sup>
133. It is important to note that the principle of the best interests of the child is an overarching human rights principle that must be respected in all matters and decisions on family reunification relating to children.<sup>256</sup> This principle also extends to the considerations on the child’s right to family life. Article 3 of CRC explicitly requires States to ensure that ‘in all actions concerning children [...] the best interests of the child shall be a primary consideration’. Also relevant for the question of family reunification, under Article 9 of CRC the right of children to live together with their parents is guaranteed.<sup>257</sup> Article 10 (1) contains a procedural obligation to process family reunification requests expeditiously, as well as the obligation to avoid adverse consequences for family members. Moreover, Article 22 contains specific obligations in relation to refugee and asylum-seeking children. These more protective standards of protection towards children have also been applied in relation to other instruments, such as the ICCPR.<sup>258</sup>
134. The CRC Committee has expanded further on the term ‘family’, stating that it ‘must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom’ in accordance with Article 5 of CRC. Furthermore, the CRC Committee has stated that the protections under Article 9 of CRC concerning the separation of children from their parents also extend ‘to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal

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<sup>252</sup> Australian Lawyers for Human Rights, ‘Over 100 Organisations and Experts Call on Federal Government to End Australia’s Discrimination against Migrants with Disabilities’, 21 March 2023, available at <<https://alhr.org.au/welcoming-disability/>> accessed 1 March 2024.

<sup>253</sup> Convention on the Rights of the Child, arts 9 and 10.

<sup>254</sup> 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin’.

<sup>255</sup> Article 16 – to ensure a child is not ‘subjected to arbitrary or unlawful interference’; article 18 – to respect the ‘common responsibilities of both parents for the upbringing of the child, article 22 which mandates States to cooperate with family tracing initiatives ‘to obtain information necessary for reunification with his or her family.

<sup>256</sup> Article 8, ECtHR above, article 5 of the Family Reunification Directive of the EU,

<sup>257</sup> A very similar right is enshrined in Art. 18 of the African Charter on the Rights and Welfare of the Child.

<sup>258</sup> A/58/40 Vol. I (2003) 64, 85, *Winata vs. Australia*, Communication No 93/2000, 26 July 2001, para 7.3; Human Rights Committee, *El-Hichou v. Denmark*, Communication No. 1554/2007, UN Doc. CCPR/C/99/D/1554/2007 (20 August 2010), paras 7.4 and 8.

relationship’.<sup>259</sup> This includes for instance *de facto* family ties formed between a child and their guardians in kafala arrangements.<sup>260</sup>

135. The CRC Committee has further stated that family reunification in the country of origin should not be pursued where it would not be in the best interests of the child, or where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child.<sup>261</sup> Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations (including those deriving from Article 3 of CAT and Articles 6 and 7 of ICCPR). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein.<sup>262</sup>
136. Additionally, the ECtHR has stressed the special needs of children and analysed, on a case-by-case basis, whether a fair balance was struck between the individuals’ and the State’s interests, considering the age of children, their dependency on their parents, as well as the situation in the country of origin.<sup>263</sup> The Court has clearly stated that children’s interests must be afforded significant weight in the context of family reunification.<sup>264</sup> General concerns about migration control cannot override best interest of the child considerations. The assessment of this interest should be conducted by appropriately trained officials on the basis of child rights-based benchmarks.<sup>265</sup>

#### 4.4.3 Parents

137. The term ‘parents’ have been given a broad interpretation to include ‘biological, adoptive or foster parents, or where applicable, the members of the extended family or community as provided for by local custom’.<sup>266</sup> The ECtHR jurisprudence has interpreted these rights in a number of decisions that validate adoptive and foster parents as part of the family unit,<sup>267</sup> and as such covered by the provisions on family reunification (discussed above). States are required to and do set out the conditions for the admission of the parents of a migrant who is legally residing in the host country.
138. Parents’ right to enter a State’s territory to join their children, often adult children, has implications for aged care and other social benefits and thus the host country might not be willing to grant such a right. In the absence of an international convention on older persons’

<sup>259</sup> UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration (art. 3 para. 1), 29.5. 2013, CRC/C/GC/14, paras. 59 et seq.

<sup>260</sup> CRC, ‘Y.B. and N.S. v Belgium’ (27 September 2018) UN Doc CRC/C/79/D/12/2017.

<sup>261</sup> UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration (art. 3 para. 1), 29.5. 2013, CRC/C/GC/14, paras. 59 et seq.

<sup>262</sup> CRC-Committee, General Comment No. 6, treatment of unaccompanied and separated children outside their country of origin (2005) para 82.

<sup>263</sup> ECtHR, *Case of M.A. v. Denmark*, Application no. 6697/18 (9 July 2021).

<sup>264</sup> e.g. ECtHR, *Jeunesse v. the Netherlands* [GC], Application no. 12738/10 (3 October 2014).

<sup>265</sup> Cp. UNHRC, Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child 2021, 44; University of Florence <[https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT\\_Handbook\\_Best-interest-of-the-child-compresso.pdf](https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT_Handbook_Best-interest-of-the-child-compresso.pdf)> accessed 2 March 2024.

<sup>266</sup> 2017 Joint General Comment by the CMW Committee and the CRC Committee ‘Joint General Comment on the general principles regarding the human rights of children in the context of international migration, para. 27 referring to CRC Committee, General Comment No. 14, 2013, para. 59.

<sup>267</sup> ECtHR, *Pini and Others v. Romania* (22 September 2004), paras. 143-148. This language was reiterated in ECtHR, *Topčić-Rosenberg v. Croatia*, Application no. 19391/11 (14 November 2013). <<http://www.refworld.org/docid/5852bb034.html>>, para. 38; Moretti et Benedetti c. Italie, Requête no. 16318/07, ECtHR, 27 April 2010, <<http://www.refworld.org/docid/5852a94d7.html>, paras. 48-52.

rights, some country does not hesitate to have parents waiting for potentially 12-29 years to get a parent visa.<sup>268</sup>

#### 4.5 Right to Enter and Stateless Persons

139. Stateless persons refer to those who do not have a nationality of any country.<sup>269</sup> Under the current international law, the *non-refoulement* principle does not apply to stateless persons per se. The *non-refoulement* principle may apply if stateless persons are also asylum seekers, or refugees, or should be protected due to other reasons as discussed under section 4.3.
140. On the other hand, stateless persons may have the right to return to ‘their own country’ even though the country is not their country of nationality. For example, it is recognised that stateless Rohingyas should have the right to return to Myanmar, bearing in mind that they should not be forcibly returned.<sup>270</sup> The discussion in section 4.2 may be helpful in determining whether a country is a stateless person’s own country.

### V. The Right to Enter and Discrimination

141. This section includes a general discussion on the right to enter and discrimination, and future reports will provide further details.
142. The increasing rate of international migration has led to a marked increase in discrimination and violence directed against migrants,<sup>271</sup> including in the assessment and granting of the right to enter. While international law recognises States’ right to control the entry on their territory, this right, when granted, should not be exercised in a discriminatory way.<sup>272</sup>
143. ‘Immigration status’ is not one of the explicitly mentioned grounds for the prohibition of discrimination, although it could be argued under the ‘other status’ general clause. Namely, the ICCPR in Article 2(1) requests States parties to undertake:

to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. (emphasis added)

It further posits in Article 26 that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

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<sup>268</sup> See Australia’s parents visa processing time: <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates>>.

<sup>269</sup> 1954 Convention relating to the Status of Stateless Persons, opened for signature 26 April 1954, UNTS, art 1. See also, Melbourne University, Factsheet, ‘An Overview of Statelessness’, available at <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3489676/Statelessness\\_overview\\_factsheet\\_Sept\\_2020.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3489676/Statelessness_overview_factsheet_Sept_2020.pdf)> (accessed 29 Feb 2024).

<sup>270</sup> e.g. Amnesty International, ‘Rohingya Repatriation: What Happens Next?’, available at <<https://www.amnesty.org.au/rohingya-repatriation-what-happens-next/>> accessed 29 Feb 2024.

<sup>271</sup> ILO *et al* (2001), ‘International Migration, Racism, Discrimination and Xenophobia’ in *World Migration Report* (2022), 9, available at <[publications.iom.int](https://publications.iom.int)> accessed 1 March 2024.

<sup>272</sup> Guy Aitchison, ‘Border-Crossing: Immigration Law, Racism and Justified Resistance’ (2023) 71(3) *Political Studies* 597, 599.

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

144. Article 14 of the ECHR provides for:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

145. Furthermore, migratory status has been acknowledged as a prohibited ground of discrimination notably by the IACtHR<sup>273</sup> and the ICESCR.<sup>274</sup>

146. Discrimination, though often played down and most times denied by authorities, is seen in migration management in many forms, including race, gender, nationality, religion, age and other forms. Very often, nationals from different countries may be treated differently in terms of receiving a visa to enter a destination country. It also occurs at any stage of migration, either upon arrival, during stay and in the return process.

147. Whilst immigration controls may differentiate between nationalities at times for various reasons, such distinction needs not result in racism, xenophobia, or any kind of gender-based discrimination. They do so when procedures targeting particular ethnic groups become arbitrary or lack transparency, or when the application for entry process itself is made as gruelling as possible from the nationals of some countries, so as to act as a deterrent to those wanting to enter a territory.<sup>275</sup>

148. Article 3 of the Refugee Convention specifically provides that it should be applied to all refugees “without discrimination as to race, religion or country of origin”. States are thus prohibited from creating various categories of refugees depending on their race, religion, or country of origin. However, discrimination based on sex or the mere fact of being a refugee was explicitly left out of the scope of Article 3.

149. It is important to note that discrimination does not require specific intent and nor does it need to be direct and evident, but may be a result of the application of norms and practices that, though framed in a neutral manner, have disproportionate effects on particular groups, hindering the exercise of their rights.<sup>276</sup> Situations of structural discrimination, in which historically marginalised groups are put in a position of disadvantage in relation to the rest of society in the enjoyment of their rights, have been tackled particularly by the IACtHR.<sup>277</sup>

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<sup>273</sup> *Pacheco Tineo Family v. Plurinational State of Bolivia (Preliminary objections, merits, reparations and costs)* Inter-American Court of Human Rights Ser C No 272 (25 November 2013) para 129.

<sup>274</sup> CESCR, ‘Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights’, 13 March 2017, UN Doc E/C/12/2017/1, paras 6-7, 11.

<sup>275</sup> ILO et al, ‘International Migration, Racism, Discrimination and Xenophobia’, Discussion Paper, prepared for the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 7, <efaidnbmnnibpcajpcglclefindmkaj/https://publications.iom.int/system/files/pdf/international\_migration\_racism.pdf> accessed 1 March 2024.

<sup>276</sup> As explained notably in CESCR, General Comment No 20, UN Doc E/C.12/GC/20 (2 July 2009) para 10(b).

<sup>277</sup> Notably: *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil (Preliminary objections, merits, reparations and costs)* Inter-American Court of Human Rights Ser C No 407 (15 July

Nevertheless, such considerations have never been applied by international human rights bodies in relation to potentially discriminatory practices regulating the entry of migrants in a host State. Further discussion of these situations and of the limits to States' sovereignty in deciding which persons may enter their territory is thus needed.

150. The differential treatment between citizens and non-citizens is seen as an inherent to States' sovereignty. In consequence, international antidiscrimination norms generally do not explicitly include nationality as a prohibited ground for discrimination. Nonetheless, under human rights law, distinctions based on nationality with no objective and reasonable justification can be unlawful.<sup>278</sup> In addition, such distinctions can also denote racial discrimination.<sup>279</sup> In the view of the CERD Committee unequal treatment based on citizenship or immigration status constitutes racial discrimination.<sup>280</sup> In this respect, the emergence of the prohibition of discrimination on grounds of nationality as a general principle of international human rights law is highlighted.<sup>281</sup>
151. This approach is, however, open to debate. Notably, Article 1 of ICERD includes 'national origin' as a ground for discrimination, but explicitly leaves out of the scope of this article the provisions of the Convention on nationality, citizenship, or naturalization.<sup>282</sup> 'National origin', generally refers to someone's country of origin, and is included in most international norms prohibiting discrimination. By contrast, 'nationality' refers to the legal bond of citizenship, and its discriminatory nature is less established. The legal difficulties around these two terms and their interrelations are illustrated in the divergent interpretations of the CERD Committee and the International Court of Justice (ICJ) in *Qatar v United Arab Emirates*.<sup>283</sup> While the CERD Committee found that 'national origin' included 'nationality' as a basis for racial discrimination,<sup>284</sup> the ICJ interpreted 'national origin' as an inherent and immutable characteristic not encompassing a purely legal and mutable attribute such as current 'nationality'.<sup>285</sup> This decision has been criticised for eroding the protection of the CERD by failing to consider that nationality may conceal indirect race discrimination.<sup>286</sup>
152. Nevertheless, such considerations have been scantily applied by international human rights bodies in relation to potentially discriminatory practices regulating the entry of migrants into a host State. Visa algorithms, racial profiling, travel bans and expulsions have been challenged for discriminating against nationals and migrants based on prohibited grounds. Visas pre-

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2020); *Caso de los Buzos Miskitos (Lemoth Morris y otros) vs. Honduras* Inter-American Court of Human Rights Ser C No 432 (21 August 2021).

<sup>278</sup> Human Rights Committee, *Ibrahima Gueye and others v France*, Communication No 196/198, CCPR/C/35/D/1985, 3 April 1989; ECtHR, *Gaygusuz v Austria*, Appl No 17371/90, 16 September 1996.

<sup>279</sup> CERD, *Ziad Ben Ahmed Habassi v Denmark*, Communication No 10/1997, UN Doc CERD/C/54/D/10/1997 (6 April 1999).

<sup>280</sup> CERD, General Recommendation No 30: *Discrimination Against Non-Citizens*, CERD/C/64/Misc.11/rev.3, 2004, para 4.

<sup>281</sup> Olivier De Schutter, *Links between Migration and Discrimination* (European Commission 2016) 103.

<sup>282</sup> CERD, art 1(3).

<sup>283</sup> CERD, *Admissibility of the Inter-State communication submitted by Qatar against the United Arab Emirates*, CERD/C/99/4, 27 August 2019; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)*, Preliminary Objections, 4 February 2021.

<sup>284</sup> CERD, (n 25) para 63.

<sup>285</sup> ICJ (n 25) para 81.

<sup>286</sup> Cathryn Costello and Michelle Foster, 'Race Discrimination Effaced at the International Court of Justice' (2021) 115 *American Journal of International Law* 339.

clearance controls and other migration policies have been litigated for being discriminatory on religious and racial grounds, but the success of these claims remains limited.<sup>287</sup>

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<sup>287</sup> Catherine Briddick and Cathryn Costello, ‘Symposium on Undoing Discriminatory Borders’ (2021) 115 AJIL Unbound 328. One counterexample is the Prague Airport case, where despite finding the Refugee Convention inapplicable, the House of Lords found the UK pre-clearance checks conducted by British authorities at Prague airport targeting Roma travellers unlawfully discriminatory. See *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre and Others* [2004] UKHL 55; [2005] 2 AC 1.