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HUMAN SMUGGLING: THE RIGHTS OF SMUGGLED AND TRAFFICKED  
MIGRANTS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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**PART ONE**

**APPLICATION OF INTERNATIONAL HUMAN RIGHTS PROTECTIONS TO SMUGGLED AND TRAFFICKED MIGRANTS**

1. This report covers the rights of smuggled and trafficked migrants under international human rights law. Wherever possible, it identifies rights enjoyed by all irregular migrants, without regard to the manner in which they travelled to a destination country. However, in some cases, it will be relevant to distinguish between the position of “smuggled” and “trafficked” migrants, both in the context of rights conferred by the Palermo Protocols<sup>1</sup> and in the context of more general human rights protections. In general, the rights enjoyed by smuggled migrants will also be enjoyed by trafficked migrants, but trafficked migrants may in some circumstances be entitled to additional forms of protection.
2. Trafficked migrants are understood to be adult persons who have had no meaningful control whatsoever over the decision to migrate, or children whose legal guardians have had no meaningful control over the decision, and who have been transported or transferred with a view to their exploitation by others, and who are thus in a position of particular vulnerability in a destination state. Smuggled migrants, in contrast, are understood to have had *some* degree of meaningful control over the decision to migrate. However, the report rejects any strict dichotomy between trafficked and smuggled migrants in terms of the degree of autonomy over the decision to migrate. It recognises that smuggled persons are a diverse class of persons, whose migration decisions represent varying degrees of choice and coercion. Most important, many smuggled migrants may be subject to serious forms of human rights violation or other hardship

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<sup>1</sup> Protocol to Prevent the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (1998); and Protocol to Prevent the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (1998).

in their country of origin which, while falling short of the requirements for asylum, nevertheless entitle them to a relatively comprehensive form of rights protection within a destination country. That is, smuggling and trafficking are seen as lying along a continuum defined by increasing degrees of coercion in the decision to migrate, which in turn corresponds with a continuum of increasingly comprehensive and absolute forms of rights protection.

3. The sources of international human rights protection considered in this report are the:
  - International Covenant on Civil and Political Rights (“ICCPR”);
  - International Covenant on Economic, Social and Cultural Rights (“ICESCR”);
  - Convention on the Rights of the Child (“CROC”);
  - 1951 Convention Relating to the Status of Refugees (“Refugees Convention”)
  - Convention Against Torture, and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”);
  - Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”);
  - Convention on the Protection of the Rights of All Migrant Workers (“CPRMW”);
  - Protocol to Prevent the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (“Anti-Smuggling Protocol”);
  - Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Anti-Trafficking Protocol”); and
  - 1930 ILO Convention on Forced Labour (C29) (“Forced Labour Convention”) and the 1975 Migrant Workers (Supplementary Provisions) Convention (C143) (“1975 Migrant Workers Convention”).
4. The rights contained in general international human rights instruments such as the ICCPR, ICESCR, CROC, the Refugees Convention, CAT and CEDAW are clearly enjoyed by “all persons”, regardless of factors such as nationality or prior illegal conduct. This is made clear by the language of the Preambles to all of these instruments, which state that the rights set out therein should be understood to derive “*derive from the inherent dignity of the human person*”, and are linked to the principles in the United Nations Declaration on Human Rights which recognise the “inherent dignity” and “equal and inalienable” rights of individuals.<sup>2</sup>
5. In addition, the ICCPR and ICESCR also include specific anti-discrimination prohibitions, which require states to give effect to their human rights obligations “*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*” (Art 2(1), 2(2), 2(1) respectively). The anti-discrimination clause in Art 2 of CROC goes even further, adding disability as a specific ground of discrimination (Art 2(1)), as well as extending the prohibition to discrimination on the basis of family members’ “*status, activities, expressed opinions, or beliefs*” (Art 2(2)). A somewhat more limited anti-discrimination provision is also found in Art 3 of the Refugees Convention, in combination with a broad prohibition against imposing “any penalty” on “*account of illegal entry or presence*”, on the part of refugees “*coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their*

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<sup>2</sup> This is the language found in the Preambles to the ICCPR and ICESCR. Similarly, the Preamble to CROC affirms the “*inherent dignity and of the equal and inalienable rights of all members of the human family*”; the Preamble to the Refugees Convention affirms that “*human beings shall enjoy fundamental rights and freedoms without discrimination*”; the Preamble to CAT affirms “*the equal and alienable rights of all members of the human family*”, and that “*those rights derive from the inherent dignity of the human person*”; and the Preamble to CEDAW recognises the “*inherent dignity and the equal and inalienable rights of all members of the human family*”.

*territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence” (Art 31).*

6. In addition to these general human rights protections, there are also specific human rights protections which apply expressly to irregular migrants.
7. The most comprehensive protections for irregular migrants are those found in the CPRMW, though the Convention has not to date been widely ratified. The Convention is designed to protect the rights of “migrant workers”, who are defined as “*person[s] who [are] to be engaged, [are] engaged or ha[ve] been engaged in a remunerated activity in a State of which he or she is not a national*” (Art 2(1)). The rights under the CPRMW thus apply to all smuggled or trafficked persons who have been engaged in some form of market activity in the state to which they are transported, wherever that activity is “remunerated” in some way (whether by cash or in kind), as well as to smuggled migrants who themselves intend to engage in activity of this kind, or trafficked migrants who are transported by third parties with a view to them engaging in this kind of activity.<sup>3</sup> In addition, however, the CPRMW also confers derivative protection on “members of the family” of a migrant worker, who are deemed to refer to a person’s spouse or partner otherwise recognised by law, dependent children or other dependants recognised by law on the relevant States.
8. Under the Anti-Trafficking Protocol, individuals are entitled to the protections contained in Art 6 of the Protocol wherever they have been the subject of: “*transportation, transfer, harbouring or receipt... for the purpose of exploitation*” by another person, without their consent or the consent of a relevant third person (Art 3). Article 3 provides for a range of circumstances in which a person’s consent (even if ostensibly given: Art 3(b)) will be vitiated, namely: in circumstances where they are subject to the threat or use of force, or to coercion, abduction, fraud, deception, abuse of power or abuse of their position of vulnerability. Art 3 also provides that a third person’s consent may be vitiated, where they are induced to consent to the relevant transport, transfer etc by some payment or other benefit. (The application of the Protocol to “harbouring” or “receipt” will mean that some smuggled migrants, as I have defined them, will be protected by the Protocol, where an initially meaningful form of consent to transport/transfer is superseded by their being exploited in the relevant sense.)
9. Under the Anti-Smuggling Protocol, individuals are entitled to the protections contained in Art 16 of the Protocol wherever they have been the subject of “smuggling” as defined in Art 6 to mean “*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*”. This therefore implies that in almost all circumstances both smuggled and trafficked migrants, as those terms have been defined above, will be entitled to protection under the Anti-Smuggling Protocol.
10. Finally, irregular migrants may also be entitled to protection, as a consequence of states’ obligations under various ILO Conventions.<sup>4</sup> Many important ILO Conventions, such as the 1930 Forced Labour Convention, impose obligations on states party in respect of “all persons” (Art 1(1)). Other ILO Conventions, such as the 1975 Migrant Workers Convention also provide

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<sup>3</sup> It is possible that if a trafficked migrant is to be engaged or engages in unpaid, involuntary labour, they might arguably fall outside the scope of Art 2. However, one could argue that a generous and purposive construction of Art 2 would favour treating any food, shelter or clothing provided to a trafficked person as sufficient “remuneration” for the purpose of the application of the Convention even in these circumstances. On such an approach, it might even be possible to argue that remuneration of a third party would be sufficient in this context, though this might be thought to stretch the bounds of the language of “*engaged in a remunerated activity*” to their limits.

<sup>4</sup> These Conventions are not primary protection instruments, as such. See J Bhabha, “*Migration, Human Smuggling and Human Rights*” at para. 54.

some protections for *all* migrants, both regular and irregular, though the majority of states' obligations are directed toward the protection of regular migrants.<sup>5</sup> (Additional protections for children who are smuggled or trafficked may also be found in the 1999 Convention on the Worst Forms of Child Labour (C182), though it is beyond the scope of this report to address these particular protections.)

11. Under most of these instruments, a state may in some circumstances be validly entitled to impose limitations on the enjoyment of rights on the part of smuggled and trafficked migrants, in order to preserve the integrity of state borders or to promote general welfare within the state. To achieve these goals, states may take measures designed to deter, detect or denounce illegal entry, or to exclude irregular entrants from the benefit of general welfare state measures in order to preserve "public confidence" in those measures. However, such limitations must in all cases be justified as reasonable and proportionate to their objectives, and as consistent with overarching democratic and international human rights commitments to human dignity<sup>6</sup>, where dignity is understood to be both a *baseline* of existence which is necessary for a person's life to count as a fully human, and a *relationship* between persons of respect for and recognition of human subjectivity (the "Kantian version of dignity").
12. In addition, such limitations must not be made on bases which are prohibited as "suspect" under the anti-discrimination provisions found in Art 2(1) of the ICCPR, Art 2(2) of the ICESCR and Art 2(1) of CROC. In each of these provisions, the list of prohibited grounds for discrimination is not closed, and one could certainly argue that the political and social vulnerability of irregular migrants<sup>7</sup>, and the widespread stigma increasingly attached to irregular status in many states, should mean that irregular status is included as a prohibited ground for these purposes.
13. In the case of trafficked migrants, this argument has particular force, given that a person's acquiring the status of an irregular migrant has generally been entirely beyond their control, in common with many of the other immutable characteristics which the anti-discrimination clauses deem suspect. This report thus assumes that discriminatory burdens on the enjoyment of basic international human rights which are imposed on the basis of irregular status will generally be impermissible in the case of trafficked migrants, pending either return or regularisation.
14. However, it is assumed that it will ultimately be more difficult to argue that irregular status amounts to a *generally* impermissible basis for drawing legal distinctions in respect to a state's obligation to respect, protect and fulfil its human rights obligations. Distinctions made on the basis of a person's irregular or unlawful presence in a state, where the person has had *some* degree of meaningful control over that fact, may in some circumstances constitute the kind of "reasonable and objective differentiation" which does not amount to prohibited discrimination.<sup>8</sup>
15. That is not to say, however, that such differentiation will always be permitted. Such differentiation may still breach international human rights obligations, as constituting an invalid limitation on a universally enjoyed right.

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<sup>5</sup> The 1949 ILO Migration for Employment Convention (C97) is also in its most general terms applicable to smuggled and trafficked migrants who are engaged in employment in a destination country: it purports to apply to "a person who migrates from one country to another with a view to being employed otherwise than on his own account" (Art 11), and while this expressly "*includes any person regularly admitted as a migrant for employment*", Art 11 does not purport to *limit* the class of persons enjoying protection under the Convention to regular migrants. However, almost all of the substantive rights under this Convention are limited in application to "immigrants lawfully present in the territory" (see e.g. Art 6).

<sup>6</sup> See e.g. Art 1 of the Universal Declaration on Human Rights; Preambles to the ICCPR, ICESCR, CROC, CAT, CEDAW and Refugees Convention.

<sup>7</sup> Cfr. Stefanie Grant, "Migrants Human Rights: From the Margins to the Mainstream", *Migration Information Source*, March 1, 2005, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=291>.

<sup>8</sup> Cfr. HRC, General Comment, No 18, 37<sup>th</sup> Sess. (1989), para. 13.

16. The actual scope for a state validly to impose limitations on the enjoyment of human rights which are of particular significance to smuggled and trafficked migrants is considered further in Parts II-VI below. The general approach set out in these Parts should be understood to apply with equal force to other civil and political rights which are not specifically addressed in any detail in this report, such as general rights to due process in the criminal process, freedom from imprisonment on the grounds of contractual default, privacy, freedom of conscience, freedom of expression, association, assembly and family life, which are protected by Arts 9, 10, 11, 14, 15, 17, 18, 19 and 23 of the ICCPR and Arts 12, 13, 14, 16, 17, 18, 19 and 20 of the CPRMW.

## PART TWO

### RIGHTS PERTAINING TO PROCESS OF MIGRATION

#### The right to safe methods of transport

17. Art 6 of the ICCPR, in conjunction with Art 2 of the Covenant and general human rights principles, clearly imposes an obligation on states parties to take active measures to *protect* smuggled and trafficked persons from conditions of transport which pose a significant risk to their life. The protection contained in Art 6 is categorical in terms, and leaves no room for doubt that all persons, regardless of their nationality or previous conduct, are entitled to protection.<sup>9</sup> The universal nature of this obligation is also reinforced by Art 9 of the CPRMW<sup>10</sup> and Art 16(1) of the Anti-Smuggling Protocol.
18. In the context of trafficking or smuggling, this positive duty of protection should be understood as imposing on states an obligation to prevent and punish the use of modes of transport which endanger the lives of smuggled and trafficked persons, and also to provide rescue services to persons whose lives are in danger. This latter obligation in particular is expressly stipulated by Art 16(3) of the Anti-Smuggling Protocol, which requires states parties to “*afford appropriate assistance to migrants whose lives or safety are endangered*” by reason of their being smuggled.
19. In fact, if an irregular migrant is in any serious physical danger, even if that danger is not life-threatening, states will have an obligation under Art 9 of the ICCPR and Art 16 of the CPRMW to protect against that danger to the physical “security” of the person, by taking the same kind of punitive and rescue measures.
20. Art 7(1) of the ICCPR also imposes a positive obligation on states to protect irregular migrants from any treatment which is “*cruel, inhuman or degrading*”. Art 10 of the CPRMW and Art 16(1) of the Anti-Smuggling Protocol also further reinforce this obligation in respect of states parties to the Convention and Protocol.
21. The phrase “*cruel, inhuman and degrading*” is to be given a disjunctive reading<sup>11</sup>, and will thus require states to prevent transport “within its territory and subject to its jurisdiction” which is either “inhuman” or “degrading” in the level of physical or mental pain, discomfort or anguish it imposes.<sup>12</sup> The basic test will be whether the conditions of the relevant mode of transport are so bad as to fall below a minimum threshold of human dignity. In determining this question, it will be necessary to consider factors such as smuggled and trafficked persons’ access to food, water, sleep, adequate space and sanitary conditions.

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<sup>9</sup> Cfr. Art 6(1): “Every human being has an inherent right to life”; Art 6(2), clearly providing for application of right to persons convicted of serious criminal offences.

<sup>10</sup> It should especially be noted here that the CPRW explicitly applies “during the entire migration process”, to the process of migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well return to the State of origin or State of habitual residence (Art 1(2)).

<sup>11</sup> M. Nowak, *CCPR Commentary* (1993) at 128; *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Sarah Joseph, Jenny Schultz & Melissa Castan eds., 2d ed. 2004) [Hereafter “*ICCPR Cases and Commentary*”] at 195.

<sup>12</sup> Cfr. e.g. decisions of the HRC in *Pratt and Morgan v. Jamaica*, Nos. 210/1986 and 225/1987 (finding mental anguish occasioned by 20 hour delay in execution after removal from cell amounting to inhuman treatment); *Tshisekedi v. Zaire*, No. 242/1987 (finding psychological anguish caused by deprivation of food and drink for four days after arrest amounting to inhuman treatment).

## Right to access national courts/to legal redress

22. Art 14 of the ICCPR provides that “*all persons shall be equal before the courts and tribunals*” of states parties, and Art 16 provides that: “[*e*]veryone shall have the right to recognition everywhere as a person before the law”. The universal nature of this obligation is made clear by the language of Arts 14 and 16, and is further reinforced in respect of irregular migrants by Arts 18 and 24 of the CPRMW.
23. A state’s duty to *respect* these obligations will therefore clearly include an obligation to allow access on the part of irregular migrants to the court system, for any purpose, including the purpose of seeking redress against those who have trafficked or smuggled them, and to recognise the rights of irregular migrants as legal persons entitled to sue.<sup>13</sup>
24. The obligation does not, however, extend to ensuring that there is substantive redress available for a wrong suffered by an irregular migrant. It is quite possible, for example, that a smuggling contract could be held to be unenforceable as *contra bonos mores* or contrary to public policy, without infringing the obligations in Arts 14 and 16 of the ICCPR or Art 18 of the CPRMW.
25. Any claim to substantive redress must be based in separate obligations, such as, for example, the right to “liberty and security” of the person under Art 9 of the ICCPR. It is at least arguable that in the case of trafficked migrants, a state’s duty to *fulfil* the right contained in Art 9 will require it to provide a system of effective civil remedies against those who have engaged in trafficking, as well as a system of criminal penalties. Such a reading of Art 9 is certainly reinforced by the terms of Art 6(6) of the Anti-Trafficking Protocol, which provide that: “[*e*]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”,<sup>14</sup> and in the case of women who have been trafficked, by Art 6 of CEDAW.

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<sup>13</sup> This is the broader view of Art 16 taken by F. Volio, “Legal Personality, Privacy, and the Family, in *The International Bill of Rights* (L Henkin ed., 1981) at 188. For the narrower view, cfr. Nowak, *supra* n9 at 195.

<sup>14</sup> To this end, the Protocol also imposes an obligation on states to ensure that trafficked migrants have access to information on court proceedings (Art 6(2)), as well as a somewhat less demanding obligation to provide appropriate information in relation to trafficked persons’ legal rights (Art 6(3)(b)).

## PART THREE

### DETENTION, PROSECUTION AND ILLEGAL ENTRY

#### Freedom from unjustified detention/imprisonment

26. Art 9 the ICCPR provides that everyone shall have the right to liberty and security of the person, and in particular, that “*No one shall be subjected to arbitrary arrest or detention.*” This obligation is also echoed and reinforced by Art 16(1) and (4) of the CPRMW, the latter of which expressly prohibits the arbitrary arrest and detention of migrant workers both individually and collectively, as well as by customary international law.<sup>15</sup>
27. The effect of this requirement is that any detention of smuggled or trafficked migrants must be reasonably proportionate to achieving a valid state objective, which in the administrative context, implies that it must substantially advance a state’s interest in ascertaining identity or facilitating removal<sup>16</sup>, and which in the criminal context, implies that it must substantially advance the state’s interest in the denunciation or deterrence of illegal entry.
28. In the case of administrative detention, this implies that a state must show that alternatives to detention, such as systems of supervised release or release on bail which have been used in several states parties<sup>17</sup>, would not be sufficient to ensure an irregular migrant’s availability for interview or removal. That is, in order to meet the requirements of proportionality under Art 9, a state must show that there is no less liberty-restrictive alternative available to achieve its objectives.
29. In addition, in the case of administrative detention of irregular migrants who are minors, Art 39(2) of CROC further requires that states show that detention has been employed as a “last resort”.
30. While the current global security context has perhaps increased the margin of appreciation to be afforded states, in determining what policies are necessary in order to conduct identity checks and to ensure the availability of persons for removal, there are still very real doubts as to whether administrative detention of irregular migrants for any substantial period of time can be justified in terms of Art 9.
31. In the case of detention incidental to the criminal process, it is suggested that Art 9 also imposes real limits on the capacity of states to detain irregular migrants.
32. In the case of trafficked migrants, there can be no rational connection between a state’s interest in deterrence or denunciation and the imposition of criminal liability on the victim of trafficking. Any arrest or detention incidental to the criminal prosecution of trafficked persons would therefore clearly infringe the prohibition in Art 9 of the ICCPR and Art 16 of the CPRMW.
33. In the case of smuggled migrants, there will be some rational connection between deterrent and denunciation objectives and processes of criminal punishment. However, in many cases involving smuggling, it will be far more doubtful whether the punishment of persons who have

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<sup>15</sup> Arthur C. Helton, “Reforming Alien Detention Policy in the United States” in *Protection or Punishment* (Mary Crock ed. 1993).

<sup>16</sup>This will require states to show that alternatives less restrictive of liberty and security of the person (such as the use of open-accommodation centres or the release of persons on bail) are not adequate to achieve the relevant objectives: Cfr. decision of HRC in *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997), available at <http://www.unhcr.ch/tbs/doc/nsf>.

<sup>17</sup> See e.g. Helton, *supra* n13.

been smuggled will sufficiently advance a state's interest in border control to count as a proportionate infringement of the right to liberty and security of the person. First, states may find it difficult to show that smuggling patterns are in fact responsive to the policies of destination countries in this context, given that smuggled persons are generally unaware of the laws of the countries to which they migrate (and sometimes even the identity of the country itself)<sup>18</sup>, and that smugglers may have little commercial incentive to concern themselves with conditions after entry.

34. Secondly, as the country studies in this Project have demonstrated, smuggled persons are often subject to substantial "push-factors" as well as "pull-factors" in the decision to migrate.<sup>19</sup> Those push-factors will often include serious human rights violations or other very substantial forms of hardship<sup>20</sup> which mean that deterrence policies will be ineffective, at least providing they respect basic minimum commitments to human dignity. In addition, the existence of these kinds of push-factors will also mean that denunciation of a person's decision to migrate will in many circumstances be wholly morally inappropriate.
35. In these circumstances, it is suggested that the arrest or detention of smuggled migrants, rather than people-smugglers, for purposes of criminal prosecution will tend to be wholly disproportionate to the aim of effective border control, and thus contrary to Art 9(1) of the ICCPR and Art 16 of the CPRMW.
36. This understanding is clearly reinforced by Art 5 of the Anti-Smuggling Protocol, which clearly provides that: "[m]igrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object" of smuggling.
37. Even if criminal prosecution was ultimately considered proportionate to its ends, however, the same kind of proportionality considerations would apply in the context of Art 7 of the ICCPR, to restrict the permissible severity of any punishment imposed given a finding of guilt. It is suggested that, in light of the factors set out above, any lengthy term of imprisonment would in most cases clearly be disproportionate to either deterrence or denunciation objectives.

### **Procedural protections in the case of detention**

38. Where a smuggled or trafficked migrant is subject to arrest or detention in a destination country, they will be entitled to claim a range of procedural due process protections under the ICCPR, including the right to be informed of the reasons for arrest and any charges which are made against the person (Art 9(2)), to be brought promptly before a judge or other officer exercising judicial power (Art 9(3)), to challenge the legality of his or her arrest/detention (Art 9(4)), to recover compensation in the event of wrongful detention (Art 9(5)), to be detained except in exceptional circumstances in separate facilities from those who have been convicted of an offence, and in all cases in separate juvenile facilities (Art 10(2)). These obligations are also echoed and reinforced in the case of migrant workers by Arts 16 and 17 of the CPRMW, which in addition, require states to communicate with and provide a right to communicate with consular officials (in accordance with the Vienna Convention on Consular Relations), as well as to inform persons of any applicable right to meet with such officials (Art 17(7)).

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<sup>18</sup> Cfr. Marcus Einfeld, "Detention, Justice and Compassion" in *Protection or Punishment* (Mary Crock ed. 1993).

<sup>19</sup> Cfr. also e.g. Viti Muntarbhorn, "Combating Migrant Smuggling and Trafficking in Persons, especially Women: the Normative Framework Re-appraised", Paper presented at the International Symposium on Migration, Geneva, 23-25 May 2002.

<sup>20</sup> Even where extremely serious, these violations or forms of hardship may not rise to the level of, or fit within the requirements of, the concept of "persecution" within the meaning of the Refugees Convention.

39. In the case of smuggled persons, Art 16(5) of the Anti-Smuggling Protocol also reinforces the obligation of states to respect the rights of consular access provided for under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

## PART FOUR

### PROTECTION FROM EXPLOITATION, ABUSE AFTER ENTRY

#### Freedom from involuntary labour

40. Art 8 of the ICCPR provides that: “*No one shall be held in slavery... servitude...or be required to perform forced or compulsory labour*”. Further, the obligation in Art 8 is reinforced by parallel provisions in Art 11(1), (2) of the CPRMW, as well as by customary international law principles.<sup>21</sup> More indirectly, the obligation is also reinforced by Art 6(1) of the ICESCR, which requires states to take “appropriate steps” to safeguard the right to the “*opportunity to gain [one’s] living by work which [one] freely chooses or accepts*”.<sup>22</sup>
41. While the terms “slavery”, “servitude”, and “forced or compulsory labour” are not defined in this context other than by reference to certain exclusions, all three forms of prohibition are clearly directed to circumstances where a person could reasonably be expected to but does not provide meaningful ongoing consent in the provision of physical or sexual labour.<sup>23</sup> The prohibition clearly covers a spectrum of conduct, ranging from a situation involving total coercion, where one human being effectively “owns” another (slavery), to circumstances involving more indirect or incomplete forms of coercion (compulsory labour).<sup>24</sup>
42. In light of the general responsibility of states to respect, *protect* and fulfil international human rights obligations (and in the case of Art 8 of the ICCPR, the express terms of Art 2), Arts 8 of the ICCPR and Art 11 of the CPRWM will therefore require states to take all necessary measures, including both criminal and labour law measures, to ensure that no smuggled or trafficked person is engaged in rendering services where, because of factors such as physical confinement, actual or threatened violence, or the threat of deportation, they have not provided meaningful consent.
43. Both the existence and content of this obligation are reinforced by Art 1 and 25 of the ILO Forced Labour Convention No 29 (1930), which require states parties to the Convention to “*suppress the use of forced or compulsory labour in all its forms within the shortest possible period*” (Art 1(1)), by taking measures which include making the illegal exaction of forced or compulsory labour “*punishable as a penal offence*” for which “*the penalties imposed by law are really adequate and are strictly enforced*”.
44. The obligation is also reinforced by Arts 3 and 5 of the Anti-Trafficking Protocol, which require states to criminalize the “harbouring” or “receipt” of persons for the purpose of exploitation, which is defined to include the “*exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery [and] servitude*” (Art 3). The obligation as it applies to “the exploitation of the prostitution of women” is also amplified by Art 6 of CEDAW.

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<sup>21</sup> The prohibition on slavery, including sexual slavery, is clearly recognised under customary international law as having *jus cogens* status. It is also arguable that in light of the widespread ratification of the ILO Convention on Forced Labour no 29 (1930) and (1957), and the decreasing use of such labour by states, the prohibition on forced and compulsory labour has customary status.

<sup>22</sup> It is suggested that such steps would clearly include the requirement that states take measures to avoid the kind of conduct prohibited by Art 8 of the ICCPR.

<sup>23</sup> The original focus of the ICCPR was largely on physical forms of labour, but evolving understandings clearly support reading Art 8 in broader terms, to encompass sexual slavery and forced prostitution, as well as more traditional forms of enslavement or forced labour. See e.g. the recognition of sexual enslavement as a form of enslavement under international humanitarian law: *Prosecutor v. Kunarac, et al*, Case No IT-96-23T, Judgement, 22 February 2001, *aff’d* on appeal *Prosecutor v. Kunarac, et al*, IT-96-23 & IT-96-23/1-A (June 12, 2002)..

<sup>24</sup> Cfr. definitions provided in *ICCPR Cases and Commentary*, *supra* n9, at para. 10.03-04.

The obligation is also more generally reinforced by Art 16(1) of the Anti-Smuggling Protocol, as it applies to both trafficked and smuggled migrants.

### **The right to safe and humane working conditions**

45. As noted in Part II(a) above, Art 9 of the ICCPR and Art 16 of the CPRMW guarantee a universal right to “liberty and security” of the person. A state’s affirmative duty to *protect* these rights will in turn imply that states must take active measures to protect individuals from any threat to their safety and integrity posed by third parties, including their employers. In the employment context in particular, this obligation is reinforced by Art 7(1)(b) of the ICESCR, which requires that states “*recognize the right of everyone to the enjoyment of just and favourable conditions of work*” and in particular “*safe and healthy working conditions*”.
46. International human rights law thus clearly requires that states take all necessary measures to protect both smuggled and trafficked migrants from working conditions which pose a threat to their physical safety.<sup>25</sup>
47. In the case of trafficked migrants in particular, the obligation to protect workers’ physical safety<sup>26</sup> is reinforced by Art 6(5) of the Anti-Trafficking Protocol, which provides that states parties: “*shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory*”.
48. Where an unsafe workplace poses a life-threatening risk, a state’s protection obligations will be particularly strong, given the obligations under Art 6 of the ICCPR and Art 9 of the CPRMW. This is also reinforced by the terms of Art 16(1) of the Anti-Smuggling Protocol, which impose a special obligation on states to take measures to protect the right to life of those smuggled and trafficked migrants covered by the Protocol.
49. In addition, states will have an obligation under Art 7 of the ICCPR and Art 10 of the CPRMW to protect smuggled and trafficked persons from working conditions which constitute “inhumane” or “degrading” treatment, because, for example, they are characterised by a lack of ventilation or sanitation, severe restrictions on movement, or severe forms of harassment.
50. Further, to the extent that these kinds of conditions have the capacity substantially to impair psychological as well as physical integrity, it is at least arguable that Art 9 of the ICCPR and Art 16 of the CPRMW also require that states actively protect irregular migrants against these kinds of conditions.<sup>27</sup>
51. Finally, in destination states which have adopted broad occupational and safety protections, all of the above obligations will be reinforced by Art 25 of the CPRMW, which requires states to prevent irregular migrants from being deprived of the benefit of general workplace protections, by reason of their irregular status.
52. While a system of civil and criminal penalties will clearly be central in meeting a state’s obligations in all of the above contexts, it is suggested that additional measures may also be

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<sup>25</sup> It is suggested that any deterrence-based rationale for limiting this right would not be compatible with a commitment to fundamental human dignity, in the sense of a baseline of protection from pain and injury necessary for one’s existence to count as fully human, and would thus fall foul of Art 4 of the ICESCR, and the substantive due process limitations in Art 9 of the ICCPR.

<sup>26</sup> The obligation under Art 8(2)(c) the Anti-Trafficking Protocol to consider implementing measures to provide psychological assistance is expressed in terms of the process of “recovery” of victims of trafficking.

<sup>27</sup> For the understanding that Art 7 of the ICCPR protects against mentally as well as physically degrading treatment, see HRC, General Comment No. 20, 44<sup>th</sup> Sess. (1992), at paras 4-5.

required in order effectively to guarantee protection in some circumstances. Thus, for example, one could argue that an effective system of civil or criminal penalties will require that irregular migrants who assist authorities in detecting and prosecuting illegal conduct are protected from adverse consequences arising from disclosure.

### **Fair remuneration for any work performed, social security and the right to organise**

53. Art 6 of the ICESCR provides that states parties to the Covenant shall “*recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts*”. The right in Art 6 thus *prima facie* applies to irregular migrants as well as nationals and regular migrants. It is generally understood, however, that pursuant to Art 4 of the Covenant, states parties should be entitled to impose limits on this right given an over-supply of potential workers, in order to promote full employment and an adequate minimum wage (i.e. “general welfare”), provided at least that adequate social assistance is provided to those who are legally barred from access to the labour market.
54. Further, in seeking to limit access to the labour market, a state will generally be entitled to draw distinctions based on a person’s lawful right to reside in a country. In general, drawing this distinction will permit the state to advance its policy objectives, without imposing an undue cost on persons who have lawfully chosen to reside in a state *in reliance* on an expectation that they will have access to the labour market.
55. It is possible that a state may be prohibited from restricting access to the labour market by trafficked migrants. As noted in the introduction to this report, trafficked status is clearly analogous to the other prohibited grounds of discrimination contained in Art 2(1) of the ICCPR, as a socially stigmatised status which is wholly beyond the control of the individual, and as such, drawing a distinction on this basis will arguably be prohibited. This interpretation also gains some support in the employment context from Art 6(3)(d) of the Anti-Trafficking Protocol, which requires state to consider implementing measures for the “social recovery” of victims of trafficking through the provision of employment opportunities. However, it is clear that a state *will* generally be permitted to restrict access on the part of smuggled migrants simply on the basis of their irregular status.
56. Even where a state is entitled to bar persons from access to the labour market, however, states will still have a duty to protect individuals from unfair remuneration for work performed in the informal sector.
57. Art 7 of the ICESCR provides that “*states parties...recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular (a) remuneration which provides all workers, as a minimum, with: (i) fair wages and equal remuneration for work of equal value without distinction of any kind...[and] (ii) a decent standard of living for themselves and their families in accordance with the provisions [of the rest of the Covenant].*”
58. This clearly implies that states have a duty, at the very least, to protect irregular migrants from employment practices involving the payment of wages below the legal minimum wage. This interpretation is also indirectly supported by the content of a state’s duty to protect the rights of regular workers under Art 7 of the ICESCR. That is, if states are fully and effectively to protect the rights of regular workers to receive a legally mandated minimum wage (which Art 7 suggests should be set to achieve fair remuneration and a living wage), logic requires that they must take measures to prevent any competitive advantage accruing to employers who engage irregular workers at wages below this level. In this sense, the protection of the rights of regular workers requires equivalent protection for irregular workers.

59. The obligation to *protect* irregular workers from receiving wages below the legal minimum is also reinforced by Art 25 of the CPRMW, which requires states to ensure that migrant workers “*enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration*” (Art 25(1)), and to “*take all appropriate measures to ensure that migrant workers are not deprived of any rights [under Art 25] by reason of their irregularity of stay or employment*” (Art 25(3)), and by Art 9(1) of the 1975 Migrant Workers Convention, which requires states parties to ensure “*equality of treatment*” for irregular migrant workers who are to be expelled in “*respect of rights arising out of past employment as regards remuneration, social security and other benefits*”.
60. This implies that states must take a range of measures to ensure that employers pay the legal minimum wage in all cases, by, for example, imposing additional penalties on employers who pay irregular workers less than the minimum wage, in addition to any penalties which may be imposed for engaging irregular workers in the first place. However, it also implies that irregular workers should be able to take action to recover unpaid wages, or the difference between wages received and the legal minimum.<sup>28</sup> The mere fact that wages were earned in the context of an irregular situation cannot be a bar to the recovery or retention of those wages, once one acknowledges the autonomy and dignity-based reasons for granting a worker’s right to fair and equal remuneration for labour actually performed.<sup>29</sup>
61. It is possible, though not necessarily likely, that an irregular worker will contractually be entitled to wages *above* the legal minimum, as more accurately representing fair remuneration for the work performed. In these circumstances, states will also have a *prima facie* obligation under Art 7(a) of the ICESCR to ensure enforcement of contractual wages, an obligation which is reinforced by Art 25(3) of the CPRMW. In these circumstances, however, a state may have a valid argument under Art 4 of the ICESCR that they are entitled to prevent full contractual enforcement<sup>30</sup>, in the interest of deterring work in an irregular situation, in preference to reliance on social assistance pending regularisation or removal.
62. In cases where irregular migrants have been working in an ostensibly regular situation, and thus made contributions to a social security system for the protection of workers and their families, Art 25 of the CPRMW and Art 9(1) of the 1975 Migrant Workers Convention also provides *prima facie* protection for an irregular migrant’s right to receive social security payments, without discrimination on the grounds of their irregular status.<sup>31</sup>
63. This right may also be argued to arise under Art 9(1) of the ICESCR, which provides that “*everyone shall have the right to social security*”. It is suggested, however, that where an irregular worker is expelled from the territory, it may be that Art 4 of the ICESCR would permit a state to refuse to pay-out any accrued social security benefits, in order to protect the financial stability of the social

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<sup>28</sup> It should be noted that in the United States, the United States Supreme Court has rejected this argument, as a matter of statutory construction: cfr. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S., No. 00-1595 (Mar. 27, 2002).

<sup>29</sup> Therefore, the qualification in Art 9(1) of the 1975 Migrant Workers Convention that the rights in that section are “without prejudice to measures designed to control movements of irregular migrants for employment” should not be interpreted as depriving a worker’s personal right to recover or retain the legal minimum wage for work actually performed. Cfr. in this context the reasoning of the majority (though in the context of statutory interpretation only) *Hoffman*, *supra* n27. For a previous decision of the United States Supreme Court taking the contrary view, see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

<sup>30</sup> If not on a state’s obligation to ensure that employers do not profit from any contractual under-payment.

<sup>31</sup> Art 27 of the CPRMW on its face appears more generous in this context, requiring treatment on the same basis as nationals, but this obligation is subject to a person meeting the “requirements provided for by statute, which may readily exclude irregular workers from its coverage, even though in such circumstances, the state is required to examine the possibility of providing reimbursement to the worker. Cfr. Martin Scheinin, “The Right to Social Security” in *Economic, Social and Cultural Rights* (Asbjørn Eide et al, 2001) at 215 (suggesting that Art 27 is more salient in this context).

security system, or in order to preserve the fundamental purpose of the system, which is often seen as the desire to preserve collective dignity *within a society*, through a system of risk-sharing and income-smoothing between workers in that society.

64. It is somewhat more difficult to determine whether Arts 25 and 26 of the CPRMW or Art 8(1) of the ICESCR should be understood to support a right on the part of irregular workers to organise for their own protection, especially in relation to irregular workers who may validly be prohibited from accessing the labour market. It is suggested that the better view is probably that irregular migrants do *prima facie* enjoy the right to organise, but that the enjoyment of such a right may be restricted by the state in order to protect the rights of regular workers to receive a living wage (which is clearly a “right” for the purpose of the limitation clause contained in Art 8(1) of the ICESCR, and which is also arguably a form of human freedom protected by Art 26(2) of the CPRMW). The net result will be that states may limit irregular workers’ right to organise, but not may not prohibit it altogether. At a minimum, the state will be required to permit forms of organisation designed to promote irregular workers’ rights to safe, humane and fair working conditions, if not their right to full legal access to the labour market.<sup>32</sup>

### Freedom from sexual and physical abuse

65. Beyond the work context, Art 9(1) of the ICCPR and Arts 16(1), (2) of the CPRMW, also impose obligations on states to provide effective police and other criminal justice protection for smuggled and trafficked persons who are subject to all forms of physical or sexual violence.<sup>33</sup>
66. Further if the relevant form of abuse can be said to rise to the level of “inhuman” or “degrading” treatment, the state’s positive obligation will also be reinforced by Art 7 of the ICCPR and Art 10 of the CPRMW.
67. In the case of irregular migrants who are unaccompanied minors, the state’s obligation to ensure effective protection against abuse will also be strengthened by Art 3(2) of CROC, which requires states parties to “*ensure the child such protection and care as is necessary for his or her well-being*” taking into account the obligations of parents and other persons legally responsible for him/her. Where there is no person within the jurisdiction who can properly be considered legally responsible for a child, this obligation will clearly be engaged. In addition, where a smuggler or trafficker continues to have some “care” or control of a child, a state will have additional obligations under Art 19 of CROC to “*take all appropriate... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse*” while in the “care” of that person.<sup>34</sup>

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<sup>32</sup> It should further be noted that in providing a right to present a case for recovery of wages/social security benefits, Art 9(2) of the 1975 Migration Workers Convention allows for a person to be “represented”, presumably by either a lawyer or trade union representative.

<sup>33</sup> Cfr. *Carmichele v. Minister of Safety and Security*, CCT 48/00 (where the South African Constitutional Court interpreted the analogous provision to Art 9 in s 12 of the South African Constitution).

<sup>34</sup> An argument could be made that this obligation of protection on the part of the state is also reinforced by Art 24(1) of the ICCPR, which provides that “*Every child shall have, without any discrimination as to ... birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State*”. It is suggested, however, that the grounds on which discrimination is prohibited in Art 24(1) appear to be exhaustive, and further do not appear to extend to trafficked or smuggled status. For this reason, it is suggested that reliance is more properly placed in this context on Art 9 of the ICCPR, and 3(2) and 19 of CROC, rather than Art 24 of the ICCPR.

68. Further, in the case of irregular migrants who are women, states will have a special duty under Art 3 of CEDAW to protect women against the risk of sexual violence or abuse, as a major impediment to women’s full equality in the enjoyment of other human rights.<sup>35</sup>
69. The Anti-Smuggling and Anti-Trafficking Protocols also impose additional obligations on states to protect against physical and sexual abuse/violence, but each Protocol is focused on particular kinds of abuse only: in the case of the Anti-Smuggling Protocol, on violence inflicted “by reason” of a person having been the object of smuggling (Art 16(2)), and in the case of the Anti-Trafficking Protocol, on forms of violence which threaten actual bodily harm or safety (Art 6(5)).<sup>36</sup>

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<sup>35</sup> For the connection between sexual violence and restriction on women’s liberty and equality more generally, e.g. the discussion in *Carmichele v. Minister of Safety and Security*, CCT 48/00.

<sup>36</sup> Art 6(5) of the Anti-Trafficking Protocol provides that states party: “*shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory*”.

## PART FIVE

### SOCIAL WELFARE GUARANTEES

#### The right to housing

70. Art 11 of the ICESCR provides that states parties shall “*recognize the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing, and to the continuous improvement of living conditions*” and that states parties “*will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent*”.
71. In terms of a state’s duty to *respect* the right to adequate housing, Art 11 thus requires that states refrain from restricting the access of any person to adequate housing in the private rental market, including on the basis of irregular presence. Any such legal restriction will constitute a limitation on the right contained in Art 11 and thus call for justification according to the requirements in Art 4 of the Covenant.
72. Two potential arguments could be made by a state in this context, to support the validity of a limitation under Art 4, namely: (i) the state’s interest in the deterrence of illegal migration; and (ii) the state’s interest in detecting the presence of irregular migrants within the jurisdiction.
73. It is suggested, however, that deterrence-based arguments will tend to provide a fairly weak form of justification in this context. First, deterrence-based arguments will be wholly inapplicable in the case of trafficked migrants rather than smuggled migrants. Secondly, these arguments can have no force unless a state can show that smuggled migrants coming to the country actually have some knowledge of private housing practices, or that smugglers are influenced by these considerations in their identification of destination states. Thirdly, such arguments cannot by themselves provide a sufficient basis for limiting access to the rental market even in the case of smuggled migrants. This constraint arises because of the requirement that, for a limitation on the enjoyment of rights to advance the “general welfare in a *democratic society*” as is required by Art 4, it must be consistent with the basic values of a “*democratic society*” committed to dignity for all (ICESCR Art 4, Preamble), which in turn imposes a requirement that each individual be treated as an end in his/herself, and not simply as a means to achieving broader social policy goals.
74. A state may have a legitimate interest in imposing some restrictions on access to housing by irregular migrants, in order to promote the detection of the presence of those persons within the territory of a state. It is submitted, however, that a total ban on access to the private rental market by irregular migrants would be disproportionate to the state’s objectives in detection, in part because of the existence of what would likely be effective alternatives, such as the imposition of documentation and reporting requirements on private parties in respect of the immigration status of lessees<sup>37</sup>, which would impose a lesser burden on irregular migrants’ right to enjoy adequate housing.<sup>38</sup>
75. A state’s duty to *respect* the right to adequate housing will also create a very strong presumption against the state’s engaging in the practice of forced eviction<sup>39</sup>, even where a person is occupying land or buildings irregularly, without the state providing an alternative form of interim housing.
76. This obligation is also strengthened by the nature of a state’s positive duty to *fulfil* the obligation to provide adequate housing, through a process of progressive realisation. The CESCR has

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<sup>37</sup> Subject, of course, to the privacy concerns that this would raise.

<sup>38</sup> Any reporting requirement imposed in this context would most likely need to provide some kind of immunity for trafficked migrants, to prevent their being burdened in a discriminatory manner (when compared to other regular migrants, for example), in contravention of Art 2(2).

<sup>39</sup> CESCR, General Comment No 4: The Right to Adequate Housing, 6<sup>th</sup> Sess. (1991), para. 18.

recognised elsewhere that the obligation of progressive realisation necessarily implies a strong presumption against non-retrogression<sup>40</sup>, which in the housing context translates into a presumption against persons being evicted *without being provided alternative forms of shelter*. And as a matter of first principles, this presumption should be understood to apply with equal force to the eviction of smuggled or trafficked migrants, as to the eviction of regular migrants and citizens, given the dignitarian basis of the right to housing.<sup>41</sup>

77. In terms of a state's *further* duty to *fulfil* the right to adequate housing, however, the obligation of non-retrogression may be of less assistance to smuggled and trafficked migrants than to residents who have historically enjoyed some measure of access to public housing. As new entrants, irregular migrants are obviously unlikely to enjoy this kind of historical tenure, and will thus be asserting a new rather than ongoing claim to protection.
78. There may, however, be another aspect of the state's duty of progressive realisation which will have greater force *vis-à-vis* a state's obligation toward irregular migrants, namely; the obligation to give priority to especially vulnerable groups. That is, in its General Comment No 4, the CESCR has made clear that the duty of progressive realisation must be fulfilled with special attention to the needs of "*disadvantaged groups*" such as "*the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, the victims of natural disasters, people living in disaster-prone areas*" or "*social groups living in unfavourable conditions*".<sup>42</sup> This special priority appears designed to recognise the significant intersection between the right to housing and other rights, such as the right to physical and mental health (ICESCR Art 12), and the right to freedom and security of the person (ICCPR Art 9, CPRMW Art 16).<sup>43</sup>
79. Where smuggled or trafficked migrants have undergone substantial psychological trauma either in the course of travel to a destination country, or as the victims of forced or compulsory labour within the destination country, it may thus be possible to argue that they fall into this category of "specially vulnerable" persons, whose mental health requires special priority in the provision of access to public housing.<sup>44</sup>
80. This argument will clearly be at its strongest in the case of trafficked migrants, who have necessarily experienced a severe form of trauma, regardless of the circumstances in which they have travelled. This is clearly recognised by the Anti-Trafficking Protocol, which provides that states parties shall consider providing "appropriate housing" in order to ensure the "*physical, psychological and social recovery of the victims of trafficking*" (Art 6(3)(b)).
81. However, it is suggested that the argument should be understood to be at least *prima facie* available in appropriate circumstances in the case of both smuggled and trafficked migrants. Further, in the case of all irregular migrants who are children, or the children of irregular migrants, Art 27 of CROC reinforces this obligation, by imposing an obligation on states to "*provide material assistance*" and "*to support programmes, particularly with regard to... housing*" which are necessary to fulfil the "*right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development*", and in the case of irregular migrants who are women, Art 3 of CEDAW reinforces this obligation, to the extent that it is necessary to the protection of women against the danger of sexual violence.

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<sup>40</sup> Cfr. e.g. CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health, 22<sup>nd</sup> Sess. (2000), para. 32 (noting strong presumption against retrogressive measures under all rights in ICESCR).

<sup>41</sup> CESCR, General Comment No 4: The Right to Adequate Housing, 6<sup>th</sup> Sess. (1991), para. 7.

<sup>42</sup> CESCR, General Comment No 4: The Right to Adequate Housing, 6<sup>th</sup> Sess. (1991), paras 8, 11.

<sup>43</sup> Cfr. CESCR, General Comment No 4: The Right to Adequate Housing, 6<sup>th</sup> Sess. (1991), para. 7 (noting that the right to housing should be understood broadly as "the right to live somewhere security, peace and dignity... [because] the right to housing is integrally linked to other human rights and to fundamental principles upon which the Covenant is premised [namely] the inherent dignity of the human person")

<sup>44</sup> For an analysis of the particular vulnerability of smuggled migrants, see e.g. Grant, *supra* n7.

82. Further, there may also be an argument that where adequate state resources are available, progressive realisation requires a state to fulfil the “minimum core” of the right for all persons, namely to provide “*basic shelter and housing*”, before allocating resources to the fulfilment of the right in other ways.<sup>45</sup> Read in conjunction with a state’s duty under Art 6 of the ICCPR, the minimum core requirement would clearly impose a duty on a state to (within the available resources) provide basic life-preserving shelter to all who need it, at public expense.
83. In many states which are destination countries for smuggled and trafficked migrants, governments do not deny this minimum core obligation, or absolutely deny a duty to provide access to public housing to irregular migrants, but have rather argued that access to accommodation in immigration detention or processing centres is adequate in this regard.
84. The difficulty with this argument, however, is that the right to *adequate* housing must be viewed in the context of other human rights enjoyed by smuggled and trafficked migrants, such as freedom from arbitrary detention (ICCPR Art 9, CPRMW Art 16), (at least arguably) the right to psychological security and integrity (ICCPR Art 9, CPRMW Art 16), and the right to privacy and to protection of family life (ICCPR Art 17, 23, CPRMW Art 14).<sup>46</sup>
85. It is therefore suggested that, where state resources are adequate to permit the provision of individual public housing, the provision of communal housing in an immigration centre constitutes a partial fulfilment but also a partial non-fulfilment of or limitation on a state’s obligation to provide access to adequate housing to irregular migrants, which calls for justification under Art 4 of the ICESCR.
86. In this context, a state may again be able to rely on two potential rationales for such a limitation, namely: (i) the state’s interest in deterrence of illegal migration; and (ii) the need to maintain public support for the public housing system.
87. The same difficulties with deterrence-based arguments apply here as they do in the context of the duty to *respect* the right in Art 11 (though, in this case, it will be necessary to show that a substantial number of smuggled persons are aware of the public housing generally available in the destination country, and that this kind of pull-factor is of real significance to the migration decision of many irregular migrants, as compared to factors such as extended-family networks or effective access to employment, or push-factors in the country of origin). However, the duty to *fulfil* the right in Art 11 does also raise a distinct set of considerations in determining the scope of a state’s duty, which relate to the need to maintain public confidence in the public housing system.
88. The desire to preserve public support for welfare state measures such as public housing is clearly an important government objective, consistent with the preservation of the “general welfare in a democracy”.<sup>47</sup> Further, imposing some limit on the number of potential claimants on the welfare state clearly has a rational connection to this objective<sup>48</sup>, provided that such limits are not a mere pretext for the expression of prejudice against non-beneficiaries.<sup>49</sup>

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<sup>45</sup> Cfr. CESCR, General Comment No 3: The Nature of States Parties Obligations, 5<sup>th</sup> Sess. (1990), para. 10, and discussion in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Audrey Chapman & Russell Sage eds., 2002).

<sup>46</sup> The CESCR has emphasised this latter aspect in particular: see General Comment No 4 at para. 9 (noting that “the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing”).

<sup>47</sup> Cfr. Mathew Gibney, *The Ethics and Politics of Asylum* (2004) (arguing for the relevance of partialist as well as impartialist theories of justice in the migration context).

<sup>48</sup> Cfr. Gibney, *Ibid.* (arguing that limiting refugee access to a country will have this effect).

<sup>49</sup> Cfr. here the reasoning of the United States Supreme Court in *United States Department of Agriculture v Moreno*, 413 U.S. 528 (1973) (Brennan J.).

89. However, any limits imposed in this context must be compatible with the requirements of proportionality, which implies that the salutary effect of excluding irregular migrants from access to general public housing must in a particular country be affirmatively demonstrated to outweigh the cost to those migrants in terms of the enjoyment of the right to fully adequate housing under Art 11 of the ICESCR, and the right to liberty and security of the person, privacy and family life under Arts 9, 17 and 23 of the ICCPR and Arts 16, 14 of the CPRMW in particular.
90. In addition, states must show that in imposing such limits, they are not in breach of anti-discrimination requirements under Art 2(2) of the ICESCR and Art 2(1) of the ICCPR, which likely implies that special provision will need to be made in any such context for trafficked migrants.
91. In addition, states will be bound by principles of non-discrimination in respect of irregular migrants who are found to be “refugees” within the meaning of Art 1A of the Refugees Convention, by reason of the requirement in Art 21 of the Refugees Convention that such persons be afforded “*treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances*” in regard to housing. (Absent such a finding, however, the “*lawful presence*” requirement, which does not apply in the rest of the Convention, would appear to mean that even irregular migrants who are *bona fide* asylum-seekers will not be entitled to claim any presumptive protection under the Refugees Convention.)
92. Finally, under Art 11 of the ICESCR the state will also have a duty to *protect* irregular migrants’ access to adequate housing, by preventing discriminatory access to private housing, and by preventing unconscionable conduct on the part of private lessors, who seek to rely on irregular migrant’s vulnerable status as a basis for charging super-market rents in the private leasing market. If the state were to permit this kind of discrimination in the private rental market, it would necessarily be limiting the basic right of “everyone” to adequate housing, and would thus be called to justify its action/omission under Art 4 of the Covenant – in the same way it would if it were itself restricting access by positive legal enactment.

### **The right to health**

93. Art 12 of the ICESCR provides that states parties to the Covenant “*recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*”.
94. In General Comment No 14, the Committee on Economic, Social and Cultural Rights has said that the right in Art 12 contains several “*interrelated and essential elements*”, one important element of which is the “accessibility” of health care facilities, goods and services. Accessibility in turn requires non-discrimination, physical, economic and information accessibility.
95. The scope of the principle of non-discrimination in this context is somewhat ambiguous. In its narrow sense, it refers to the prohibition on discrimination under Art 2(2) of the ICESCR. In this context, trafficked migrants enjoy substantially greater protection than smuggled migrants. However, non-discrimination in this context also has a broader dimension, which is concerned to ensure universal enjoyment of the right to health by all persons. Thus in General Comment No. 14, the Committee suggests that non-discrimination here implies that health-care must “*be accessible to everyone without discrimination, within the jurisdiction of the State party*”.<sup>50</sup>
96. Thus, in the context of the duty to *respect* the right to health, the CESCR makes clear in its General Comment No 14 that discrimination on the ground of irregular status will constitute

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<sup>50</sup> CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health, 22<sup>nd</sup> Sess. (2000), para. 12.

prohibited discrimination, as states are clearly prohibited from denying or limiting equal access to preventive, curative and palliative health services for *all persons*, including “asylum seekers and illegal immigrants”.<sup>51</sup> This in turn implies that states may have a duty to *protect* irregular migrants from discrimination by private actors in the provision of these kind of health-care services.

97. However, in relation to the duty to *fulfil* the right to the highest attainable standard of health, the scope of the obligation owed to smuggled migrants is more uncertain in scope. The Committee suggests that states are required the duty to fulfil the right I Art 12 of the ICESCR implies an obligation “to take positive measures that enable and assist individuals and communities to enjoy the right to health”, and that more specifically, the state is obliged to “fulfil (provide) a specific right contained in the Covenant when individual or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal”.
98. In the case of access to non-emergency health care, a state might seek to argue that the decision to use irregular channels of migration and to remain within the destination state in an irregular situation may itself put the migrant in a position where he or she is legally disqualified from or economically impaired in realising the right. Responsibility for the protection of the right would thus be considered to arise only in the country of origin.
99. Even if such an argument were accepted, however, a different position should emphatically be considered to apply in relation to emergency health-care, where the effective satisfaction of any residual protection obligation on the part of the country of origin would be wholly impractical, and thus where any protection enjoyed by a person in their country of origin would be illusory. In these circumstances, it is submitted that the duty to fulfil the right in Art 12 by providing publicly funded health-care should be understood categorically to apply to both smuggled and trafficked migrants.
100. This conclusion is reinforced by the existence of a positive obligation on the part of states parties to the ICCPR to *fulfil* the right to life in Art 6 of the Covenant, as well as by the provisions of Art 28 of the CPRMW, which provide that:
  101. “[m]igrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.”
  102. Even if one assumes that both trafficked and smuggled migrants are *prima facie* equally entitled with others to access *all* publicly-funded healthcare in a destination country, it may still be that the state’s duty to fulfil the right is qualified by a lack of available resources. In this case, the discretion enjoyed by a state in determining how best to achieve the progressive realisation of the right may mean that a state is entitled to give somewhat lesser priority to the needs of smuggled migrants in relation to non-emergency health-care, unless they can be shown to be particularly socially vulnerable.<sup>52</sup>
  103. In addition, even in states with a relatively comprehensive capacity to fulfil the obligation under Art 12, a state may still seek to rely on Art 4 of the ICESCR as justifying limitations on the *prima facie* right on the part of irregular migrants to access publicly-funded health-care services.
  104. Like in the housing context, a state may seek in this context to rely on a combination both deterrence- and “public confidence”- based rationales, and whether any limitations are proportionate to these aims will depend very heavily on the prevailing conditions in a particular

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<sup>51</sup> CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health, 22<sup>nd</sup> Sess. (2000), para. 34.

<sup>52</sup> Cfr. discussion in the context of Pt IV(a) *supra*.

destination country. It is suggested, however, that as a general matter, a state will find it almost impossible to carry this burden of persuasion in respect of limitations on emergency health-care. In contrast, however, if a state can show that it faces large-scale irregular entry or an imminent crisis in support for the public-health system, it seems much more likely that it will be able to show justification in terms of Art 4 in restricting any right of access to non-emergency health-care found to exist on the part of smuggled rather than trafficked migrants.

### The right to social assistance

105. It will be recalled that Art 11(1) of the ICESCR recognises a general right to “*everyone to an adequate standard of living for himself and his family*”, in particular in relation to food, clothing and shelter. In appropriate circumstances, where a person is unable to earn a sufficient income to ensure such a standard of living, this general obligation should be understood to imply a more specific obligation, to provide social welfare assistance. And it is suggested that this obligation will be particularly strong where a person is *legally* rather than simply economically unable to support themselves.
106. Irregular migrants will therefore have a *prima facie* claim to public assistance, wherever they are legally disqualified from working, or where irregular work is legally or even *de facto* permitted, wherever they are effectively unable to support themselves.
107. Where a state lacks the necessary resources to provide social assistance to all those in need, the principle of progressive realisation enshrined in Art 11 will of course permit a state some margin of appreciation in deciding how best to achieve an adequate standard of living for everyone, which may disadvantage irregular migrants who are not deemed “particularly vulnerable”. However, wherever sufficient resources do exist, it is suggested that a state’s “minimum core” obligation under Art 11 should be understood as supporting the priority of the claim to life-preserving social assistance on the part of irregular migrants, over the claim to more comprehensive forms of social assistance on the part of other persons within the territory.
108. This understanding is also buttressed by the nature of a state’s positive obligations under Art 6 of the ICCPR (and Art 9 of the CPRMW), to protect the right to life.<sup>53</sup> While a state’s obligation in this regard will be stronger where it is a state to both the ICCPR and the ICESCR<sup>54</sup>, it is suggested that even where a state is not party to the ICESCR, this limited positive obligation should still be considered to arise under the ICCPR (and the CPRMW).<sup>55</sup> In the context of the claims of irregular migrants in particular, it is submitted that this understanding is strengthened by states’ particular obligation under Art 16(1) of the Anti-Smuggling Protocol to take all appropriate measures to preserve and protect smuggled (and trafficked) migrants’ “right to life”.
109. States parties to the ICESCR who have adequate resources to provide a more comprehensive form of social assistance, will be required by Art 11 to do so, without impermissible discrimination or arbitrary limitation.
110. A state will thus likely be prohibited in this context from discriminating against trafficked migrants. Further, in the case of any limitations imposed on access by smuggled migrants, a state will be required to show that deterrence and public confidence rationales outweigh the resulting

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<sup>53</sup> Cfr. HRC General Comment 6, 16<sup>th</sup> Sess. (1982), at para. 5 (acknowledging a positive, material dimension to the right to life).

<sup>54</sup> See Bobana Ugarkovic, “*A Comparative Study of Social and Economic Rights of Asylum Seekers and Refugees in the United States and the United Kingdom*”, 32 Ga. J. Int’l & Comp. L. 539 (2004) (suggesting that obligations of less force where state is party only to the ICCPR).

<sup>55</sup> Cfr. *ICCPR Cases and Commentary*, *supra* n9, at 185 (suggesting that such an obligation has at least a ‘soft law’ character).

damage to the physical and psychological integrity of smuggled migrants, and the harm to their dignity, both in the sense of their enjoyment of a baseline of existence which counts as fully human, and their enjoyment of full human subjectivity.<sup>56</sup>

111. Given a sufficiently egregious effect on dignity, particularly in this first sense, it is at least arguable that limiting the right to social assistance would not only be impermissible under Art 4 of the ICESCR, but also in breach of a state's positive obligations under Art 7 of the ICCPR (and Art 10 of the CPRMW), to *protect* persons from inhuman and degrading treatment.<sup>57</sup>
112. This broader right to social assistance is also reinforced in the case of trafficked migrants by Art 6(3)(c) of the Anti-Trafficking Protocol (in so far as such material assistance is designed to promote social recovery), in the case of smuggled migrants who are children or the children of smuggled migrants, by Art 27 of CROC, and in the case of persons found to be "refugees" within the meaning of Art 1A of the Refugees Convention, by Art 23 of the Convention, which requires states to provide "*public relief and assistance*" to refugees on the same basis as a country's nationals.

### The right to education

113. Art 13 of the ICESCR provides that states parties must "*recognize the right of everyone to education*", and that with a view to achieving the full realisation of this right, states must further recognise that:

- Primary education shall be compulsory and *available free to all*;
- Secondary education in its different forms, including technical and vocational secondary education, shall be made *generally available and accessible to all* by every appropriate means, and in particular by the progressive introduction of free education;
- Higher education shall be made *equally accessible to all, on the basis of capacity*, by every appropriate means, and in particular by the progressive introduction of free education; [and]
- Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education". (emphasis added)

114. The obligations in Art 13(1)(a)-(c) are also reinforced by Art 28(1)(a)-(c) of CROC, which set out the rights to primary, secondary and tertiary education in almost identical terms to those found contained in the ICESCR.<sup>58</sup> In both cases, the rights are expressed in strongly universal terms, as applying to "all" persons, and should ding is confirmed by Art 30 of the CPRMW, which provides that:

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<sup>56</sup> For the Kantian dimension to Art 7, see e.g. the decision of the HRC in *Viana Acosta v. Uruguay*, No. 5/1977 (finding that forced psychiatric experimentation, involving injections against the will of imprisoned person, to be inhuman treatment). For the notion that denial of social assistance may put a person in the position of "supplicant" and thus infringe dignity in the Kantian sense, see e.g. the decision of the South African Constitutional Court in *Khosa v. Minister for Social Development; Mahlaule v. Min.*, CCT 12/03.

<sup>57</sup> Note that similar arguments have been upheld under Art 3 of the European Convention on Human Rights. See e.g. discussion in Guy Goodwin-Gill, "*Refugees and their Human Rights*", Refugee Studies Centre Working Paper No. 17 (2004) Pt 4. Some commentators suggest, however, that, at least as originally drafter, Art 7 was not designed to reach this far: cfr. Nowak, *supra* n9, at 128. Such an interpretation is certainly not free from controversy.

<sup>58</sup> The only difference is in terms of an express obligation to "offer financial assistance" to support secondary education in the case of need and with no express obligation to work toward the provision of free tertiary education.

115. “[e]ach child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.
116. In the case of adult irregular migrants, the right to “fundamental education” in Art 13(d) of the ICESCR is not expressed in as strongly universal or absolute terms as the right to primary and secondary education. It is suggested, however, that adult irregular migrants will nevertheless be entitled to claim at least a *prima facie* right to receive fundamental education, consistent with a state’s duty of progressive realisation in this area. Any limitations on this right must be justified by the state either by reference to its approach to progressive realisation, or by reference to deterrence and public confidence objectives (Art 4).
117. Further, those adult migrants who have been the victims of trafficking will also have a limited right to education and training under Art 6(3)(d) of the Anti-Trafficking Protocol, which requires states consider providing trafficked migrants with “*educational and training opportunities*” which will assist in their psychological or social recovery.

## PART SIX

### RIGHTS PERTAINING TO THE ENDING OF MIGRANTS' IRREGULAR STATUS

#### The right not to be *refouled*

118. Given increasing restrictions on legal access to countries of asylum, most asylum-seekers and persons fleeing torture will enter a destination country through irregular migration channels. This does not preclude a person from claiming the benefit of the protection offered by the Refugees Convention or CAT, however. Art 31 of the Refugees Convention expressly prohibits states from imposing “any penalty” on an Art 1A Refugee on account of their illegal entry.
119. An irregular migrant who is determined to be a “refugee” within the terms of the Convention will have an absolute right under both Art 33 of the Convention and under customary international law not to be returned or *refouled* to the country of origin, as long as his or her need for protection continues. Similarly, Art 3(1) of CAT prohibits *refoulement* of any person, including an irregular migrant, wherever there are “substantial grounds” for believing that he or she would be in danger of being subjected to “torture”, if returned. Further, the concept of “torture” has been interpreted by the United Nations Human Rights Committee in relatively broad terms in this context, as including cruel, inhuman or degrading treatment or punishment.<sup>59</sup>

#### The right to favourable consideration in relation to the right to remain

120. Beyond this, however, international human rights law does not give irregular migrants any absolute right to remain in a destination country. Rather, the Anti-Trafficking Protocol provides that in respect of the victims of trafficking states parties are required to: “*consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases*” and that in implementing this obligation, states party must “*give appropriate consideration to humanitarian and compassionate factors*” (Art 7(1)).
121. No equivalent right to favourable consideration arises under the Anti-Smuggling Protocol. However, the CPRW does provide smuggled migrants with a limited right, in any national process considering the possibility of regularisation, to have appropriate account taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation (Art 69(2)). Further, Art 69(1) affirmatively requires states parties to “*take appropriate measures to ensure*” that the irregular situation of migrant workers and their families does not persist (Art 69(1)).

#### Procedural fairness/ due process in relation to removal/expulsion

122. Art 13 of the ICCPR provides that “*an alien lawfully in the territory of a State Party... may be expelled therefrom only in pursuance of a decision reached in accordance with law*”, subject only to certain narrow exceptions. Art 13 thus does not confer any direct right to procedural due process on the part of an irregular migrant threatened with expulsion.<sup>60</sup>
123. It is suggested, however, that Art 13 does confer a limited *derivative* right to procedural due process on the part of an irregular migrant, at least in respect of the question whether the migrant is “legally present” in the first place. Without this limited due process right, lawfully

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<sup>59</sup> HRC, General Comment No 10, 19<sup>th</sup> Sess. (1983), at para. 9.

<sup>60</sup> ICCPR Cases and Commentary, *supra* n9, at para. 13.07

present aliens could wrongly be deemed to fall outside the protection of Art 13 and thus deprived of their rights to full procedural process.<sup>61</sup>

124. This understanding is reinforced by Art 22 of the CPRMW, which provides that: “*Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually. . . accord[ing to] law*”. Art 22 further provides that in the course of such proceedings, irregular migrants shall have a right to be informed of any decision and the reasons for that decision, except in exceptional circumstances where reasons of national security require otherwise (Art 22(3)), and to have a right to seek review of a decision of an administrative nature, except in exceptional circumstances for reasons of national security (Art 22(4)) and a right to communicate with consular officials (Art 23).

### Freedom to leave a country

125. Arts 12(2) and (3) of the ICCPR provides that: “*Everyone shall be free to leave any country, including his own*” and that this right “*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 [ICCPR]*”. Art 8(1) of the CPRMW also reinforces the existence of this obligation on the part of states parties’ in respect of migrant workers and members of their families.

126. State’s duty to *respect* this right means that states parties must refrain from imposing any legal restriction on smuggled or trafficked persons’ right to leave, or imposing any practical impediment, such as would arise, for example, from the confiscation or destruction of travel/identity documents. (The latter obligation is reinforced in express terms by Art 21 of the CPRMW.)

127. In addition, however, states’ duty to *fulfil* the rights contained in Art 12 of the ICCPR and Art 8 of the CPRM means that they will also be required to facilitate irregular persons’ departure by taking such measures as are necessary to ensure the *safe* return of such persons to their country of origin, or a third country.

128. Art 18(1) of the Anti-Smuggling Protocol and Art 8(1) of the Anti-Trafficking Protocol clearly reinforce this understanding, as both expressly provide that states party must as relevant “*facilitate*” or “*accept*” the return of a smuggled or trafficked migrant, without undue or unreasonable delay, and with due regard to the “*safety and dignity*” (Art 18(5)) or “*safety*” of the person.<sup>62</sup>

129. Art 9 of the 1975 Migrant Workers Convention also reinforces the positive obligation of states to facilitate return at least in cases of expulsion, by providing that where an irregular migrant worker or their family is expelled, “*the cost shall not be borne by them*”.

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<sup>61</sup> Similarly, Arts 32 and 33 of the Refugees Convention and Art 3(1) of CAT require states parties to afford some degree of procedural due process in any proceedings to expel an alien who has a *bona fide* claim to protection under those Conventions whose status has not previously been considered according to law, in order to prevent the wrongful expulsion or *refoulement* of a person entitled to protection under the respective Conventions. Even persons who are not ultimately able to sustain a claim to non-refoulement, but who have a *bona fide* claim to protection under these Conventions, will be entitled to a degree of *derivative* protection under those articles.

<sup>62</sup> Art 4 of the ILO Migration Convention also provides that states party must take measures “*as appropriate ... to facilitate the departure, journey and reception of migrants for employment*”. Where persons are smuggled or trafficked, this could arguably be interpreted as requiring states to facilitate the departure of irregular migrants, though the better view may be that Art 4 does not speak to return rather than initial departure.

## The status of children born to irregular migrants

130. Art 24(3) of the ICCPR provides that every child has the “*right to acquire a nationality*”, along with the right to be registered immediately after birth and to have a name (Art 24(2)). Art 7(1) of CROC reinforces states parties’ obligations to respect, protect and fulfil this right, with Art 7(2) imposing a “special obligation” on states parties to ensure that a child is not rendered stateless (Art 7(2)).
131. The duty to *fulfil* the right to acquire a nationality will require that a destination state take all the necessary administrative measures to facilitate a child obtaining citizenship in his or her parents’ country of origin. Where the laws of the country of origin do not permit this result, however, a state may also be required to fulfil the right by granting citizenship to the child, in appropriate circumstances.
132. This understanding is reinforced by Art 29 of the CPRMW, which provides that the child of a migrant worker shall have a “*right to nationality*”, rather than simply the more qualified right to “*acquire a nationality*”.

## SUMMARY

133. This report has sought to explore the scope of rights arising under a variety of international human rights instruments, and the potential if any for states to impose valid limitations on the enjoyment of those rights by irregular migrants. The primary focus has been on the rights arising under the international bill of rights (namely, the ICCPR and ICESCR), and on noting where these rights are reinforced by the CPRMW and Palermo Protocols, rather than on the CPRMW as such, given that relatively few states have to date ratified that convention. In appropriate cases, however, reference has also been made to the particular rights of irregular migrants who are women, children, refugees or those fleeing torture, under CEDAW, CROC, the Refugees Convention and CAT.

134. More specifically, it has been suggested that under the ICCPR and ICESCR, at least in “developed” states parties, smuggled and trafficked migrants should be generally understood to have an *unqualified* right:

- to protection from life-threatening, unsafe or highly painful or demeaning forms of transport;
- to full access to the court system;
- to full procedural protection, in the event of arrest and detention incident to the criminal process;
- to freedom from coercive, unsafe or inhumane working conditions;
- to the legally required minimum wage arising from any work performed;
- to police protection from physical or sexual abuse;
- to primary and secondary education;
- to lawful access to private housing;
- to publicly-funded emergency health-care, where available within the state; and
- to shelter and other forms of social assistance necessary to preserve life; and
- to an unimpeded and safe return to the country of origin.

135. In addition, it has been noted that under the CPRMW and Anti-Smuggling Protocol, irregular migrants who are arrested and detained will also have a right to consular access.

136. Further, it has been suggested that both smuggled and trafficked migrants should also be understood to have at a more *qualified* or *limited* right under the international bill of rights:

- not to be detained for administrative reasons where adequate alternatives for verifying identity or ensuring availability for removal exist;
- not to be criminally prosecuted for the fact of illegal entry, given sufficient push-factors in the decision to migrate;
- not to be subject to any lengthy term of imprisonment as punishment for the fact of illegal entry, given sufficient push-factors in the decision to migrate;
- to social security benefits on the basis of general criteria of eligibility, at least while remaining in the territory;
- to organise for the protection of rights arising in the employment context;
- to access to fully adequate public housing, given available state resources, on the basis of particular vulnerability;
- to adult education and training;
- to social assistance necessary to protect personal freedom and dignity; and
- to procedural due process in the determination of whether their presence in the territory is unlawful.

137. Finally, it has been suggested that under the ICCPR and the ICESCR in combination with the Anti-Trafficking Protocol, trafficked migrants may also be entitled to a broader set of rights in terms of:

- immunity from criminal prosecution;
- rights of civil redress against traffickers;
- the protection of psychological integrity;
- access to non-emergency health-care;
- access to public housing;
- access to the labour market, where necessary for social recovery; and
- the right to favourable consideration of a claim to remain.

138. While there may be some disagreement as to the exact limits or limitations on particular rights, it is suggested that this should be seen to provide a general starting point for a more differentiated, context-sensitive account of the rights of smuggled and trafficked migrants under international law.