INTERNATIONAL LEGAL FRAMEWORK ON CROSS-BORDER MIGRATION: A HUMAN RIGHTS PERSPECTIVE

Joseph Abang Odok[1]
Charles Berebon

***Abstract*:** The international legal framework on cross-border migration, while lacking a unified legal corpus, comprises a complex network of conventions, standards, and institutions that collectively address the multifaceted issues of migration. This study examines these legal instruments through a human rights lens, highlighting the core principles and norms that impact the rights of migrants. Despite the absence of a comprehensive global migration law, various international mechanisms provide for the protection and rights of migrants, with human rights law playing a pivotal role in mitigating the extensive regulatory authority exercised by states over cross-border movements. The analysis explores key human rights guarantees applicable to migrants, including the rights to life, liberty, security, freedom from torture, and protection from slavery. It also delves into emerging issues such as environmentally induced migration, a pressing contemporary concern that underscores the need for a more robust international legal response. Although the current legal framework offers a degree of protection, significant gaps persist, particularly in addressing the unique vulnerabilities of migrants displaced by environmental factors and those migrating for family or economic reasons. This study advocates for strengthening the international legal regime by developing more comprehensive norms and frameworks to safeguard the rights of all migrant groups, ensuring that human rights principles are effectively integrated into global migration governance. Addressing these gaps is essential for establishing a more equitable and humane international system that balances state sovereignty with the fundamental rights of migrants.

Keyword: Cross-Border; Migration; Human Rights; International Legal Framework; Environmental Migration.

INTRODUCTION

In the contemporary international law framework, there exists no single corpus of international law on migration. However, there exist various international conventions, standards, mechanisms and institutions that deal with emerging concerns of migrants

[1] Department of Philosophy, University of Calabar, Nigeria.
2. Rivers State, University, Nigeria.

and the phenomenon of migration itself. Though not systematic, they can together be considered to comprise the international legal regime on migration.

Efforts have been made to understand international law's influence on the movement of people. This work appraises the international law framework inasmuch as it pertains to human migration, and thus the legal regime is examined via the lens of human rights. It examines the core international law principles of human rights that have a bearing upon the rights of migrants. As the challenges associated with the issue of environmentally induced migration are amongst the foremost contemporary issues in migration today; the work then applies itself to understanding the status of environmentally induced migration and migrants under the rubric of international migration and human rights law.

MIGRATION AND INTERNATIONAL LAW

For the better management of contemporary patterns of international migration, it is essential to understand the international law regime governing migration. Over the years, the nature and scope of international law have undergone many changes. International law has evolved and is now no longer limited exclusively to relations amongst States.[2] However, in the field of migration law, States are often still acknowledged as the main subject of International law. The reason for this is that the laws relating to migration are predominantly perceived to be domestic, and States consider the determination of entry and exit of people across its territory to be within its sovereign authority. Domestic affairs as per Article 2(7) of the *Charter of the United Nations*[3] (UN Charter) is generally understood to imply an area where the state authority remains supreme and is not restricted under any international obligation.[4]

The issue of migration has significantly evolved in consonance with the progress of international law. It has come to be internationalised especially by the development of human rights law. Therefore, this area may no longer be simplistically viewed through the lens of domestic affairs. As early as in the year 1923 in the *Nationality Decrees Case* the Permanent Court of International Justice (PCIJ) said that, "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations".[5] Thus, it is no

[2] Mansbach, Richard W. and Kirsten L. Taylor (2014), *Introduction to Global Politics*, Second Edition, London: Routledge, pp. 348-383.

[3] *Charter of the United Nations*, (1945), 1 UNTS XVI.

[4] UN Charter, Article 2(7). The Article provides: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll".

[5] *Nationality Decrees Issued in Tunis and Morocco*, *Advisory Opinion*, (1923), PCIJ (Ser B) No. 4, p.

longer accurate to assert that States have absolute discretion over the question of admission and expulsion of people.

The current understanding of sovereignty has undergone a great transformation and is no longer considered to be an unbridled and absolute power. This change is most apparent in the context of the limitations over the sovereign power of States in the light of Human Rights Laws.[5] The former UN General Secretary Kofi Annan also expressed the same when he placed a higher value on individual human rights than on State sovereignty.[6]

In the area of migration also international law lays out a set of legal principles, like protection of refugees and human rights which limits the absolute authority of a State over the question of migration and migrant rights.[7] The expression 'international migration law' itself was first coined by Louis Varlez and used in international legal scholarship in the year 1927.[8] It was during the interwar period that the contemporary legal regime pertaining to migration gradually started to develop and take its present shape. This development was sporadic, marked by unsystematic and partial measures. The laws on migration which evolved were functional and depended on the rise of specific areas of concern. For example, a significant area of concern was the question of nationality. The issue of distinguishing between nationals and aliens was of substantial interest. It resulted in the "*Convention on Certain Questions Relating to the Conflict of Nationality Law*",[9] 1930 and "*Protocol Relating to Military Obligations in Certain Cases of Double Nationality*",[10] 1935. Even to this day, the issue of nationality remains a hotly debated area and remains central to international law governing migration. Other areas of concern were exploitative labour practices, human trafficking and slave trade. Although such issues were not confined to cross-border movements alone, their international dimensions made them an issue of global concern.

By the close of Second World War the world witnessed great numbers of refugee populations fleeing persecution. This scene was the forerunner for the legal regime of

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24. [5] Perruchoud, Richard (2012), "State Sovereignty and Freedom of Movement" in Brian Opeskin et al. (eds.), *Foundations of International Migration Law*, UK: Cambridge University Press, p. 123.

[6] Mansbach, n. 1, p. 351.

[7] Aleinikoff, T. A. (2003), "International Legal Norms and Migration: A Report", in T. A. Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms*, The Hague: TMC Asser Press, p. 1.

[8] Varlez, L. (1927) "Les migrations internationales et leur réglementation", *Recueil des cours de l'Académie de droit international*, 20, 1927–V, 17. Cited in Chetail, Vincent (2014), "The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law" in Vincent Chetail & Celine. Bauloz, (eds.), *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar Publishing, p. 3.

[9] *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, (1930), 179 League of Nations Treaty Series 89, No. 4137.

[10] *Protocol Relating to Military Obligations in Certain Cases of Double Nationality*, (1935), 178 League of Nations Treaty Series 227, No. 4117.

refugee protection. The unaccountable human misery and viciousness witnessed during the Second World War led to a call for a dramatic overhaul of the old order. This call led to the founding of the United Nations Organisation. The UN's inception ushered in a new order of laws and institutions and also had a substantial impact on the laws concerning migration. For a proper evaluation of the international legal regime dealing with migration, it is essential to appreciate the source of the laws. The expression "sources of law" is conventionally understood to imply the methods of the creation of the legal rules.[11] Four sources of international law have been authoritatively mentioned in the ICJ[12] Statute in Article 38(1). These include a) international conventions; b) customary international law; c) "general principles of law recognised by civilised nations"; and d) "judicial decisions and the teachings of the most highly qualified publicists of the various nations".[13]

Customary International Law and International Conventions are indisputably recognised as sources of international law[14] and regarded by many to be the most important sources of international law. Under the *Vienna Convention on the Law of Treaties*,[15] 1969 (VCLT), "Treaty" is defined to be "an international agreement concluded between States in written form and governed by international law… whatever its particular designation".[16] On the other hand, customary international law evolves from the practice of States. The manner in which customary international law develops is when a widespread group of States consistently adopt a particular practice to recurring situations and attach legal significance to it. The four different international law sources play a role in defining the legal obligations of international migration law, albeit with certain differences. For example, Treaties are premised upon the consent of the States. Therefore, treaty obligations will be legally binding solely upon such States who have become a party to the treaty and have given their express consent to be bound by it. Customary international law, on the other hand, is legally binding on all States, which also includes newly independent States.[17] It, however, is not legally binding upon those states who have persistently objected to a particular customary law during the period of its formation.[18]

INTERNATIONAL LEGAL REGIME GOVERNING MIGRATION

Customary international law and international conventions are the two international law sources amongst the four which are considered to be important as they create binding

[11] Virally, Michel (1968), "The Sources of International Law", in Max Sorensen (ed.) *Manual of Public International Law*, London: Macmillan, p. 120.
[12] *Statute of the International Court of Justice*, (1948), 33 UNTS 993.
[13] Ibid., at Article 38(1).
[14] Virally, n. 11, p. 143.
[15] *Vienna Convention on the Law of Treaties*, (1969), 1155 UNTS 331.
[16] Ibid., at Article 2(1)(a).
[17] Virally, n. 11, pp. 137-138. [18]
Virally, n. 11, p. 138.

obligations upon states. In the legal regime pertaining to migration, they are very relevant.

Treaty Law

The legal regime on migration encompasses legally binding international law and also encompasses non-legally binding principles and best practices. Treaties and conventions form a part of binding international law. As discussed earlier, the legal framework on migration under international law is not systematic. The treaties which have been formulated came about depending upon problems associated with migrants as and when they arose. We find that the legal framework has been mainly focussed upon certain specific and specialised areas of migration and migrant protection. For instance, some treaties deal with the protection of refugees, migrant workers etc. Certain treaties dealing with issues of migration have been widely ratified like the RC[18] and the RC Protocol[19]. However, there are some treaties like the ICRMW[20] that have entered into force with relatively fewer parties. The normative framework of international migration at the universal level focuses upon three categories of migrants - "refugees", "migrant workers" and "smuggled and trafficked migrants". At present, there exist seven multilateral treaties which represent the core instruments in international migration law. All of these legal instruments have seen ratifications to varying extents by the member states.

Apart from these core treaties that focus upon refugees, migrant workers or smuggled and trafficked migrants, various other multilateral agreements that have been made for a more general-purpose are also applicable in the field of migration. These mainly include the considerable human rights law instruments.

At this juncture it should be noted that the legal framework and protection mechanism pertaining to the group of migrants who fall within the definition of 'refugees' has become very well defined and systematised. The legal framework for refugees as such has become a regime of its own setting it apart from the international legal framework on migration. Also, the Refugee Law Regime provides for a definition for the term 'refugee'. However, the international migration regime is yet to have a universally accepted definition for the term 'migrant'.[21] Further, unlike refugees, there is no central UN agency for the protection of all migrants.

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[18] *Convention Relating to the Status of Refugees*, (1951), 189 UNTS 137.

[19] *Protocol Relating to the Status of Refugees*, (1967), 606 UNTS 267.

[20] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, (1990), 2220 UNTS 3.

[21] IOM (2019), *International Migration Law. Glossary on Migration*, Geneva: IOM, p. 132; available at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (accessed on 18 October 2019).

Protection of Refugees

The international refugee regime consists primarily of the 1951 RC and the RC Protocol. These two form the primary refugee protection instruments. The RC was adopted immediately post Second World War to deal with the refugee situation of European origin. For this reason, it had at first a deadline limiting its application to the then "known groups of refugees, i.e. persons who had become refugees as a result of events occurring before 1st January 1951."[22] When different refugee situations began to arise, post the adoption of the RC, a move was made to make the RC applicable to such new refugee situations. This move resulted in the RC Protocol which removed the earlier dateline[23] and geographical limitations.[24] This made the RC a truly universal international legal instrument for refugee protection. The RC in its very first Article defines the term "Refugee". The Article defines a "Refugee" to mean an individual who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country."[26] So, for a person to be considered eligible and fall within the ambit of the term 'Refugee', he or she must be fleeing their country due to the five principal reasons enumerated in the above definition.

The definition provided in the RC thus is narrow in scope. It does not include other forms of hardships that might make it impossible for a person to live in one's own country with minimum adequate conditions. It is strictly confined to situations arising out of the five reasons of persecution provided in the definition. It is fascinating to note that the term 'persecution' on the other hand, has not been defined in the RC. However, it clearly constitutes a cornerstone of the refugee definition. The refugee regime has more frequently come to be characterised by increasing contestations over the scope of the substantive provisions and procedural mechanism for the access of protection under this regime. The importance of the RC is two-fold. Firstly, it provides for a well-defined protection regime for those who come within the scope of the definition. Secondly, the RC enshrines "non-refoulement" as its core principle.

This principle of "non-refoulement" prohibits a State who is party to the RC from expelling or returning refugees who have already entered into the State's territory.[25] The principle of "non-refoulement" is found in Article 33 of the RC. The expression comes from the term "refouler" which literally translated means 'to return'. In this respect the RC provides:

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[22] UN High Commissioner for Refugees (1990), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, p. 4; available at: https://www.refworld.org/docid/53e1dd114.html (accessed on 14 February 2020).

[23] RC Protocol, Article 1(2).

[24] RC Protocol, Article 1 (3). [26] RC,
Article 1.

[25] Grey, Colin (2017), *Justice and Authority in Immigration Law*, USA: Hart Publishing, p. 54; See also, Kesby, Alison (2012), *The Right to Have Rights: Citizenship, Humanity, and International Law*, New York: Oxford University Press, pp. 28-31.

> "No contracting state shall expel or return ("*refoule*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[26]

The principle is applicable to all those who fall within the definitional ambit of Article 1of the RC. The principle is explicitly applicable to refugees outside their country of nationality and cannot be claimed by those who are yet to leave their country.[27] Also, the formal determination of refugee status is not a determinant factor for the application of the principle of "non-refoulement".[28] Consequently, this principle of "non-refoulement" should be respected even in cases where the status of refugee is still to be decided.[29] There, however, are exceptions to the principle of "non-refoulement". Such exceptions have been set forth in Article 33(2) of the RC which mentions that the protection of the principle of "non-refoulement" will not be available to individuals who are considered to be a threat of danger to the security of the receiving country. A person will also be ineligible if convicted by a final judgement of a grave crime and considered to be a danger to the community.

The primary thrust of the RC is to ensure that refugees are provided with international protection in the circumstances when the country of origin of the refugee is averse or unable to provide them with protection on account of the five reasons of "persecution".

Migrant Workers

In recent years, the situation of the migrant workers has assumed importance in the area of migration law and policy debates. After refugees, this group of migrants has gained due recognition in the international legal sphere. Subsequently, multilateral treaties have explicitly been adopted to deal with this particular category of migrants. Most developed economies have for long supplemented their labour supply through foreign migrant workers. With increased immigration regulations by the late 19th century, however, such situations also came under the direct purview of the State mechanisms.[32] In fact, the questions that surround the situation of the migrant workers range from decent pay, working hours, their access to justice, to not be exploited, etc. It is noteworthy

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[26] RC, Article 33 (1).

[27] *European Roma Rights Centre and Others* v. *Immigration Officer at Prague Airport*, (2004), UKHL 55, para. 16 (Lord Bingham).

[28] *Report of the United Nations High Commissioner for Refugees*, (1985), Supplement No.12 (A/40/12), para. 22; available at: https://www.unhcr.org/afr/excom/unhcrannual/3ae68c340/reportunited-nations-high-commissioner-refugees.html (accessed on 4 January 2021); *Report on the Twentyeighth Session of the Executive Committee of the High Commissions Programme*, *(*1977), UN doc A/AC.96/549/, para. 53 (4)(c).

[29] Wallace, Rebecca M. M. (2014), "The principle of non-refoulement in international refugee law" in Vincent Chetail & Celine. Bauloz, (eds.), *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar Publishing, p. 418. [32] Grey, n. 27, p. 51.

here to mention that the International Labour Organization (ILO) has been the most pro-active with its concern regarding the rights of migrant workers. Towards this end, the ILO have adopted three legally-binding conventions which are geared towards upholding and safeguarding the rights of migrant workers. These instruments are namely Convention 143[30], Convention 97[31] and Convention 189[32].

Aside from ILO, the UN has likewise spearheaded the formation of a Convention to deal with problems concerning migrant workers. This UN convention is the ICRMW[33]. The ICRMW in Article 2 (1) gives a definition for the term "migrant worker". The provision reads:

> "The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".[34]

The primary objective of the ICRMW is respect for a migrant's human rights. It is an extensive and complex document. It puts forwards many technical queries as well as places monetary obligations upon the member's party to the ICRMW. However, the ICRMW has not seen many ratifications and as of December 2020 there are only 56 State parties to this convention.[35] The reason behind this may be attributable to both practical and political concerns.

Trafficking and Migrant Smuggling

Questions and concerns over human trafficking and migrant smuggling have been areas of great concern for States in the arena of Crimes. Trafficking and migrant smuggling is a specific form of migration which is forced or coerced or is of an exploitative nature.[36] It is fairly recent that this category has emerged as a distinct category of migrants. Nonetheless, though recent, the issues and concerns over this category of migrants have been addressed at the universal level. Two protocols supplement the *United Nations Convention against Transnational Organised Crime*[37] which have a bearing on the protection of this category of migrants. These protocols are namely

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[30] *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975(Supplementary Provisions) (No. 143)*, (1975), Geneva, 60th ILC session.

[31] *Convention concerning Migration for Employment (Revised 1949) (No. 97)*, (1949).

[32] *Convention concerning Decent Work for Domestic Workers (No. 189)*, (2011), Geneva, 100th ILC session.

[33] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, (1990), 2220 UNTS 3.

[34] Ibid., at Article 2(1).

[35] See United Nations Treaty Collection; available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4 (accessed on 24 December 2020).

[36] Gold, Steven J. and Stephanie J. Nawyn (eds.) (2013), *Routledge international Handbook of Migration Studies*, London/New York: Taylor and Francis Books, p. 97.

[37] *United Nations Convention against Transnational Organized Crime*, (2000), 225 UNTS 209.

the Protocol against Trafficking[38] and the Protocol against Smuggling of Migrants[39]. Both these two Protocols emphasise upon information exchange and joint effort towards the curtailing and putting a stop to trafficking and smuggling. With the case of trafficked migrants, in a departure from traditional legal enforcements the Protocol against Trafficking views them more from the perspective of victims and not the perspective of criminals.[40]

TABLE One:

CORE INTERNATIONAL LEGAL INSTRUMENTS ADOPTED IN THE FIELD OF INTERNATIONAL MIGRATION LAW AND THEIR RELEVANT PROVISIONS[41]

S.L NO.	CORE INTERNATIONAL INSTRUMENTS OF INTERNATIONAL MIGRATION LAW	ENTRY INTO FORCE	STATUS (AS OF DECEMBER 2020)	IMPORTANT PROVISIONS

[38] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, (2000), 2237 UNTS 319.

[39] *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, (2000), 2241 UNTS 507.

[40] Protocol against Trafficking, Article 2; See also Weissbrodt, David and Justin Rhodes (2014), "United Nations treaty bodies and migrant workers" in Vincent Chetail & Celine. Bauloz, (eds), *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar Publishing, p. 306; United Nations Convention against Transnational Organized Crime, n. 40, Article 25.

[41] UN Treaty Collection; available at: https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en (accessed on 5 December 2019); International Labour Organization; available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12001:::NO::: (accessed on 5 December 2019).

1	Convention relating to the Status of Refugees 1951	22 April 1954	Parties:146	**Article 1:** Definition of Term Refugee **Article 3:** Non-Discrimination **Article 16:** Access to Courts **Article 22:** Public education **Article 26:** Freedom of Movement **Article 27:** Identity Papers **Article 28:** Travel Documents **Article 31:** Refugees Unlawfully in the Country of Refugee **Article 33**: Prohibition of Expulsion or Return
2	Protocol relating to the Status of Refugees 1967	4 October 1967	Parties: 147	**Article 1(3):** Application of the Protocol "without any geographic limitation"
3	Migration for Employment Convention (Revised), 1949 (No. 97)	22 Jan 1952	Parties: 50	**Article 4:** Facilitation of the departure, journey and reception of migrants for employment. **Article 6:** Non-Discrimination. **Article 11:** Definition of the term "migrant for employment".

4	Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	09 Dec 1978	Parties: 25	**Article 1:** Respect the basic human rights of all migrant workers. **Article 10:** Equality of opportunity and treatment in respect of employment and occupation etc. **Article 11:** Definition of term "migrant worker".
6	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990	1 July 2003	Parties: 56	**Article 1:** Application of the Convention to all migrant workers and members of their families without distinction. **Article 2:** Definition of term "migrant worker". **Article 4:** Definition of the term "members of the family". **Article 7:** Non-discrimination. **Article 9:** Right to Life. **Article 10:** prohibition against torture. **Article 11:** prohibition against

				slavery or servitude. **Article 12:** Freedom of thought, conscience and religion. **Article 16:** Right to liberty and security of person. **Article 17:** If lawfully deprived of liberty the right to be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity. **Article 18:** Right to equality before the courts and tribunals. **Article 22:** Right against collective expulsion. **Article 29:** Right of a child of a migrant worker to a name, to registration of birth and to a nationality.

7	Protocol to Prevent, Suppress and punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000	25 December 2003	Parties: 178	**Article 3:** Use of terms. **Article 6:** Assistance to and protection of victims of trafficking in persons. **Article 7:** Status of victims of trafficking in persons in receiving States. **Article 9:** Prevention of trafficking in persons.
8	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the	28 January 2004	Parties: 150	**Article 3:** Use of terms. **Article 5:** Criminal liability of migrants. **Article 8:** Measures against the smuggling
	United Nations Convention against Transnational Organized Crime, 2000			of migrants by sea. **Article 11:** Border measures. **Article 18:** Return of smuggled migrants.

Human Rights Instruments

As discussed in the preceding sections, international migration law deals explicitly with three categories of migrants- "refugees", "migrant workers" and "smuggled and trafficked migrants". However, apart from these three distinct categories which have found prominence within the domain of international law; there are yet other categories who have not been given due recognition. Such categories for example include the undocumented migrants and environmentally induced migrants. It is precisely in this context and even from a broader perspective that other multilateral human rights treaties which have been drafted for general purposes become relevant to the field of migration. A State enjoys broad authority in the making of rules and regulations in its domestic

matters as well as with its relationship with other sovereign States. The authority of sovereign States to regulate entry, exit and control its borders is undisputed in legal theory and practice.[42] This authority extends over the regulation of movement of foreign nationals across the borders of its territory and treatment meted out to such individuals. However, the evolution and growth of international human rights have placed certain limits on this discretionary authority of the State.[43] In the area and domain pertaining to migration, international human rights law oversees the manner in which migrants should be treated inside the borders of States.

Human rights law comprises of a collection of international rules which have been recognized through custom or treaty. It allows individuals and groups to make demands and assertion towards particular rights, prerogatives and interests from the government. Human rights may be defined as inherent rights that belong without discrimination to each and every person simply because they are human. The catastrophic and ruinous circumstances that emerged in consequences to the Second World War spearheaded the recognition of rights for an individual which could be enforced by an individual directly against a violating State. World leaders acknowledged that there was a need for the upholding and recognition of human rights on a global scale. It was in response to this need that the United Nations Organization was established in 1945. The UN Charter necessitates and calls for all members to take joint and separate action for the achievement of, "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[44] The UN has over the years been instrumental for the formation of a variety of legal instruments geared towards achieving respect and recognition of human rights.

The principal notion of human rights is that all humans irrespective of who they are and without exception enjoy protection. The UDHR[45] in Article 2 provides that:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, *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.* Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs." (*emphasis added*)

The legal framework of International Human Rights primarily comprises of the UDHR and seven other UN human rights treaties. Collectively and as a whole these eight legal documents constitute the international standard for due esteem approbation and advancement of Human Rights. The UDHR, the ICCPR[46] and the ICESCR[47] together have

[42] Perruchoud, n. 5, p. 150.
[43] See Shaw, Malcolm N. (2017), *International Law*, Eighth Edition, India: Cambridge University Press, p. 212.
[44] UN Charter, Article 55 (c).
[45] *Universal Declaration of Human Rights*, (1948), UNGA Resolution, 217 A (III).
[46] *International Covenant on Civil and Political Rights*, (1966), 999 UNTS 171.
[47] *International Covenant on Economic, Social and Cultural Rights*, (1966), 993 UNTS 3.

been referred to as the "International Bill of Human Rights"[48], and they provide for the human rights of all persons. The other treaties protect specific groups like women and children. They are namely ICERD, CEDAW[49], CRC, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1984 (CAT) and ICRMW.

The UDHR is considered as the most basic document of Human Rights. Being a declaration, the UDHR is not legally binding on States. However, the UDHR has an excellent bearing upon the evolution of human rights and can be considered to be the fountain of human rights. It is based on UDHR that all other contemporary Human Rights instruments have followed. Certain provisions of the UDHR have also attained customary international law status.[56] Baring the ICRMW most members of the UN have ratified the six of the seven treaties.

TABLE Two:
IMPORTANT HUMAN RIGHTS TREATY PROVISIONS

CONTEMPORARY HUMAN RIGHTS OF MIGRANTS	TREATY PROVISIONS
Equality and Non-Discrimination	UDHR: Article 2 ICCPR: Article 2 ICESCR: Article 2(2) ICERD: Article 1 ICRMW: Article 7 CRC: Article 2
Right to Life and Liberty	UDHR: Article 3 ICCPR: Article 4, Article 6, Article 9 ICRMW: Article 16
Right to Enter one's own Country	ICCPR: Article 12 ICERD: Article 5
Right to Culture, Religion and Language	ICCPR: Article 18, Article 27 ICRMW: Article 12 ECHR: Article 9 ACHR: Article 12 ICESCR: Article 15
Right to Freedom of Expression	ICCPR: Article 19 ICRMW: Article 13 UDHR: Article19 ACHR: Article 13

[48] OHCHR, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*; available at: https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf (accessed on 1 December, 2020). [52] *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965), 660 UNTS 195.

[49] *Convention on the Elimination of All Forms of Discrimination Against Women*, (1979), 1249 UNTS 13.

	ECHR: Article 10
Protection from refoulement and arbitrary expulsion	ICCPR: Article 13 ICRMW: Article 22(1), Article 22(2) ACHR: Article 22(9)
Right to Nationality	UDHR: Article 15 CRC: Article 7, Article 8 ICCPR: Article 24 ICRMW: Article 29
Right to Health	UDHR: Article 25 ICESCR: Article 12 ICRMW: Article 28
Right to an Adequate Housing	ICESCR: Article 11 ICRMW: Article 43
Right to Work	UDHR: Article 23(1), ICESCR: Article 6, Article 9 ICRMW: Article 25, Article 26 ACHR: Article 6(2) ECHR: Article 4
Right to Education	UDHR: Article 26(1) ICESCR: Article 13 ICRMW: Article 30
Human Rights Provisions specifically for non- citizens	CRC: Article 22 CAT: Article 3 International Convention for the Protection of All Persons from Enforced Disappearances: Article 16

UDHR: Universal Declaration of Human Rights; **ICCPR:** International Covenant on Civil and Political Rights; **ICESCR:** International Covenant on Economic, Social and Cultural Rights; **ICRMW:** International Convention on the Protection of the Rights of all Migrant Workers; **ICERD:**
International Convention on the Elimination of All Forms of Racial Discrimination; **ACHR:** American Convention on Human Rights; **ECHR:** European Convention on Human Rights; **CRC:** Convention on Rights of Child; **CAT:** Convention Against Torture

Freedom of Movement

The liberty to travel and move from place to place is celebrated and acknowledged by many as one of the fundamental and most basic of human liberties.[66] As discussed earlier, the regulation of international migration is regarded as the last bastion of State Sovereignty. It is, therefore, within this context, the idea of freedom of movement as a human right becomes highlighted. Historically when States in the contemporary sense was not yet established, and there existed minimum or no border controls free movement flourished and was more the norm than an exception. However, the world scenario is much changed, and States today impose restrictions on the movement, more so in the context of non-nationals.

Hannah Arendt observes that "nobody would ever be able to arrive at a place where freedom rules if he could not move without restraint"[50]. The natural law conception of the right to leave finds formal consecration in the UDHR. The UDHR in Article 13(1) mentions that, "Everyone has the right to leave any country, including his own, and to return to his country". Several other treaties at both the international and regional levels have also recognised the freedom of movement along similar lines as provided for in the UDHR. As it stands contemporary human rights provisions within international as well as regional treaties allow for the freedom of movement inside the territorial limits of a State. It also recognises the right of departure and right to return to the country of one's nationality. However, the aforementioned right does not include a right to enter another country upon leaving one's own.

It is in this context that the State authority over freedom of movement is emphasised in its exercise of restrictions upon the admission of non-nationals[51] which also extends to their expulsion. States can also define admissible classes of migrants and make rules to refuse the admission of others[52] on various grounds ranging from health to national security. International Human Rights Law does, however, put limitations on the authority of States over regulation of flow of persons over its borders. States in exercise of its authority over the admission of migrants must act in line with the principle of "nondiscrimination". Also, specific categories of migrants enjoy special protection against non-admission. The primary category falling within this ambit is refugees under the internationally accepted obligation of non-refoulement. This protection provided to refugees is significant as it will apply regardless of lawful or unlawful entry of such refugees within the territory of another State.

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[66] [50] Arendt, Hannah (1962), *On Revolution*, New York: Penguin Books, pp. 32-33.

[51] ICRMW, Article 79; *Declaration on the Human Rights of Individuals Who Are Not Nationals of the*
Country in Which They Live, (1985), UNGA Resolution, A/RES/40/144, Article 2(1); See also *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom* (Judgement), (1985), European Court of Human Rights, 15/1983/71/107-109, para. 67.

[52] Perruchoud, n. 5, p. 131.

Apart from this special protection accorded to refugees which put limitations on a State's power to expel migrants the CAT also states that "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".[53] Additionally, provisions in the ICCPR also places an obligation not to place migrants in their jurisdiction in a position where they may be subjected to "cruel, inhuman or degrading treatment".[54] The obligation not to expel a migrant who may be subjected to torture in transit or destination country is absolute. It may not be derogated from even under circumstances when there exist war or national security issues.[75] Human rights provisions also allow for migrants who face expulsion to the benefit of procedural guarantees.[76] However, such procedural guarantees do not take into consideration, undocumented migrants. Notably, the ICRMW does, however, extend procedural guarantees to migrants facing expulsion irrespective of their legal status.[77]

Conceptually, a right to leave will necessarily also entail the symmetrical right to enter another country on leaving from one's own country. Contemporary international law, however, does not recognise such a right, i.e., the nationals of one country do not have a right to enter into a foreign country.[78] Thus, the conception of having a right to depart from one's own nation and consequent right to stay in a foreign nation which had been considered as two faces of one coin as recognised by early international law scholars like Grotius is no longer applicable. The State authority regulates the right of entry and residence in a foreign country. The conventional wisdom of a State's competence in this regard rests on the notion of territorial sovereignty. It is representative of the foundational "axiom" in classical international law which has been founded upon the Westphalian idea of Nation-States.[55] As it stands today, the right to leave in essence is incomplete as it remains contingent upon the right to enter another country.

Trade Law

Apart from the earlier stated four broad groups, international trade law also has a certain impact upon the situation of migrants. This area focuses upon international collaboration in respect to management of international migration specially in terms of movement of service providers. The *General Agreement on Trade in Services*[56] (GATS) provides for States voluntarily consenting and committing themselves to rules regarding the admission of specific categories of migrants.[57]

CUSTOMARY INTERNATIONAL LAW

The only mode for the creation of universally binding norms is customary international law. Though, treaty law has grown, customary international law remains

[53] CAT, Article 3.
[54] ICCPR, Article 7.
[55] Chetail (2014), n. 56, p. 28.
[56] *General Agreement on Trade in Services*, (1869), UNTS 183, 33 I.L.M. 1167.
[57] Ibid., at Annex on Movement of Natural Persons Supplying Services Under the Agreement.

an important international law source.[58] The unwritten nature of customary international law makes it difficult sometimes to identify it, thus leading to controversy among States. There are two components of customary international law: an objective element which is State Practice whilst the subjective element is expressed by the term "*Opinio Juris*". In essence, customary international law arises in consequence of the conduct of those whom it binds.[59] In the field of migration law, there is an assertation that the principle of "nonrefoulement" is of customary law nature. This assertation has been backed by the arguments that there exists widespread state practice as many member states of the United Nations are party to a treaty or several treaties which endorse this principle.[60]

The principle of "non-refoulement" apart from being expressed and laid down in the RC can also be found in other regional treaties like the 1969 *Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa*[61] and the 1969 *American Convention on Human Rights*[62]. Further, in the year 2001 a declaration of State parties to the RC and the RC Protocol recognized "the principle of non-refoulement, whose applicability is embedded in customary international law".[63] There also exists a relationship between customary international law and treaty law. Many a convention is a codification of customary law. In this manner, a norm ends up having two legal bases, one as customary law and the other as treaty law. For example, the right to "self-defence" as an inherent right exists both in customary international law and the treaty provision of the UN Charter.[64] Treaty law and customary law have a dynamic relationship. They both interact mutually and support each other. However, they remain distinct sources of international law. In the *Military and Paramilitary Activities in and against Nicaragua*[65] case the ICJ stated that conventional and customary rules retain a separate existence, i.e., "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content".[66]

[58] Virally, n. 11, p. 129.
[59] Virally, n. 11, p. 130.
[60] Report of the United Nations High Commissioner for Refugees, n. 30, para. 23.
[61] *Convention Governing the Specific Aspects of Refugee Problems in Africa*, (1969), 1001 UNTS 45, Article 2(3).
[62] *American Convention on Human Rights, "Pact of San Jose", Costa Rica* (1969), n. 7-, Article 22(8).
[63] *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, (2002), UNHCR/MMSP/2001/09, Preamble, para. 4.

[64] *Nicaragua* v. *United States* (merits), (1986) ICJ Reports, 14; Shaw, n. 46, pp. 71-72.
[65] *Nicaragua* v. *United States*, n. 88.
[66] Ibid., at p. 96, para 179.

In the realm of migration law as well, there have been many such instances where a treaty is a codification of customary law. For example, *Convention on Certain questions relating to the conflict of Nationality Laws*,[67] 1930 in its first provision states:

> "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

A treaty can also provide the impetus for the formation of a new custom. The right to leave may be considered to be an example of such a formation of customary law. This may be deciphered from the fact that there exist widespread and representative participation of States in human rights treaties of the UN which acknowledge this right.

Ius-Cogens

Within the context of the international legal system, everything is done through a consensual basis. The only exception to this norm is in respect to "Peremptory Norms of General International Law", also termed as *Ius-Cogens*. *Ius-Cogens* assumes that there exist particular rules which are fundamental, from which States cannot derogate from in any manner what so ever. As such, any treaty that contradicts a peremptory norm becomes void. The VCLT in Article 53 defines *Ius-Cogens* as "A norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The identification of these norms has formed a basis for debates amongst academicians.

Concerning migration as well *Ius-Cogen* assumes relevance. This can be especially seen in the realm of human rights, for example, the prohibition of torture is an acknowledged peremptory norm of international law.[68] The peremptory nature of "non-refoulement", however, remains more controversial.[69] The Inter-American Court of Human Rights in the case of *Juridical condition and rights of the undocumented migrants*, stated:

> "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *Jus-Cogens*, because the whole legal structure of National and International public order rests on it".[70]

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[67] *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, (1930), 179 League of Nations Treaty Series 89, No. 4137.

[68] *Prosecutor* v. *Furundzija* (Judgement), (1998), International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber II, Case No. IT- 95-17/1-T, 153; *Caeser* v. *Trinidad and Tobago*, (2005), Inter American Court HR (Series C) No. 123.

[69] See also Report of the United Nations High Commissioner for Refugees, n. 30, para. 23.

[70] *Juridical condition and rights of the undocumented migrants*, *Advisory opinion*, (2003), OC-18/03, Inter-American Court HR (Ser A) No. 18, para. 101.

Barcelona Traction[71] case has also been instrumental in heralding the importance of protecting human rights norms. The ICJ in this case stated:

> "When a State admits into its territory foreign investments or foreign nationals, … it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[72]

An argument can thus be proffered that The Barcelona Traction case has emphasised upon the existence of *jus cogens* norms in the area pertaining to migration.

SOFT LAW OR NON-FORMAL SOURCES OF INTERNATIONAL LAW

The ICJ Statute, in Article 38 lays down the sources of law. The ensuing years have, however, seen the placement of normative statements in non-binding political instruments such as resolutions, declarations and programmes of action. Increasingly, the formal sources of international law have been supplemented by numerous such instruments commonly referred to as 'soft law'. There have been numerous debates over whether such instruments and the process of their adoption is evidence of a new mode of international lawmaking. Presently, States seem to perceive such texts as not legally binding and simply to be political commitments which could, in turn, lead to the formation of law. Some even consider soft-law to be a social norm.[73] Soft law norms however, does have "their own significance at the normative level".[74] There as yet exists no universally acknowledged or recognised definition of 'Soft Law'. P. Sreenivasa Rao, succinctly states that "Soft law comes in different forms and it may be difficult to define

[71] *Barcelona Traction, Light and Power Company Limited* (*Belgium* v. *Spain*), (Second Phase) (1970), ICJ Reports, 3.
[72] Ibid., at paras. 33-34.
[73] Shelton, Dianah L (2008), "Soft Law", in David Armstrong et al. (eds.), *Routledge Handbook of International Law*, Abingdon: Routledge, GWU Legal Studies Research Paper No. 322. GWU Law School Public Law Research Paper No. 322, p. 3; available at: https://ssrn.com/abstract=1003387 (accessed on 14 January 2020).
[74] Desai, Bharat H. (2003), *Institutionalizing International Environmental Law*, New York: Transnational Publisher, p. 114.

the same".[75] Scholars tend to also alternatively use the term "Soft law" to denote provisions that are of a tenuous or indeterminant nature present in a legally binding treaty. From a legal viewpoint, it would be inaccurate to term any non-binding instrument to be 'law' either soft or hard, but this is done by many mainly for the sake of expediency.[76] Similarly, in this work as well for the sake of convenience, the term 'soft law' is used to denote normative statements which have been contained in non-legally binding instruments.

Soft-law has been steadily gaining ground, especially in areas that require more flexibility and urgency and areas where States are as yet hesitant to agree for more concrete commitments.[77] Soft law also exercises considerable influence in international politics.[113] Today, soft law has become an important source for the development of migration law and policy. Soft law which has been derived from resolutions or accords of international organisations, conference recommendations and declarations have become the root through which issues of migration are being sought to be addressed. Soft law assumes significance as often it acts as a precursor to hard law.

Soft law, although not an official source of international law is of note. The rationale for this is *first,* its relationship with customary international law, as they at times provide an evidence of custom. An illustration of this relationship may be seen with regards to resolutions of international organisations, particularly of the UNGA**.** The resolutions of the UNGA help show the existence of *Opinio Juris.* The ICJ in the *Nicaragua* case has stated that:

> "The effect of consent to the text of such resolutions… may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[78]

The ICJ Further in the *Legality of the Threat or Use of Nuclear Weapons* Case explained that: "General Assembly resolution, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide the evidence necessary for establishing the existence of a rule or the emergence of an *Opinio Juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption. . . ."[79]

Therefore, for the assessment of whether a resolution is evidence of *Opinio Juris,* two conditions need to be fulfilled.

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[75] Rao, P.S. (2007), "Role of Soft Law in the Development of International Law: Some Random Notes" *in Asian-African Legal Consultative Organisation*, *Fifty Years of AAlCO: Commemorative Essays in International Law*, New Delhi: AALCO, 62-91, p. 62.
[76] Shaw, n. 46, p. 87.
[77] Desai (2003), n. 109, p. 112. [113]
Shaw, n. 46, p. 88.
[78] *Nicaragua* v. *United States*, n. 88, p.100, para. 188.
[79] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, (1996), ICJ Reports, 226, pp.
254-255.

1. The content of the resolution should be written in prescriptive terms ensuring that the existence of an obligation is highlighted.
2. The resolution must be adopted by a high degree of States. This adoption must be consensual and representative of a majority of States.

It is very rarely that General Assembly (GA) resolutions are capable of fulfilling the conditions mentioned above in the field of migration. However, there are some resolutions in the area of migration which do fulfil these conditions and are thus relevant. For example, "*Declaration on Territorial Asylum*",[80] 1967 and the "*Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live*",[81] 1985. These declarations were unanimously adopted by the GA and are a restatement of existing norms endorsed in various multilateral treaties.

Second, soft law also provides guidance for the application of treaty law and may be used as a tool of treaty interpretation. It compliments Treaty Law by filling in gaps that are present in a treaty which may arise for specific issues and their implementation. This circumstance may be seen in ILO Conventions which are supplemented by recommendations. For example, both Convention 97 and the Convention 143 are complemented by recommendations.[82] Those recommendations provide guidance to State parties on several issues.

Third, soft law can be seen on its own merit. It plays an important part in the formation of the normative process in international law, which contributes in the process of crystallisation of emerging norms. Even when Soft Law does not in due course of time harden it still becomes a reference mark[83] and maybe used for the facilitation of Inter-State co-operation.[84] In the field of migration, such manner of promising use of soft law has been witnessed. For example, way back in the year 1994, the "*Cairo Declaration on Population and Development*"[85] and its accompanying Programme of Action, the "*Programme of Action of the International Conference on Population and Development*", 1994, with its thorough and comprehensive recommendations for measures which were to be taken by States in the context of international migration [86] provided for one of the first inclusive approaches to multilateral co-operation in the field of migration. This declaration substantively brought attention to the nexus between migration and

[80] *Declaration on Territorial Asylum*, (1967), UNGA Resolution, A/RES/2312(XXII).
[81] *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, (1985), UNGA Resolution, A/RES/40/144.
[82] *Migration for Employment Recommendation (Revised)* (ILO Convention No. R86), 1949; *Recommendation concerning Migrant Workers* (ILO Convention No. R151), 1975.
[83] Desai (2003), n. 109, p.120.
[84] Chetail (2012), n. 99, p. 88.
[85] *Cairo Declaration on Population and Development*, (1994), International Conference of Parliamentarians on Population and Development; available at: https://www.unfpa.org/sites/default/files/event-pdf/Cairo_Declaration_English.pdf (accessed on 1 September 2020).
[86] UN Population Fund (UNFPA) (1995), *Report of the International Conference on Population and Development*, Cairo, 5-13 September 1994, A/CONF.171/13/Rev.1, (ICPD), Ch X.

development. Another example is the "*Conference on Security and Cooperation in Europe Final Act*",[87] 1975.

In year 2006, the UN convened a "High-Level Dialogue on International Migration and Development". This dialogue resulted in the formation of the "Global Forum on Migration and Development" (GFMD) established for the sole purpose of strengthening multilateral co-ordination in the field of migration. Though not a decision-making body, the GFMD is a state-driven process and a platform for normsetting negotiations. Apart from the GFMD there are other multilateral initiatives like the "ILO Multilateral Framework on Labour Migration"[88] which was adopted in the year 2005. This multilateral framework spells out "non-binding principles and guidelines for a rights-based approach to labour migration".

LEGAL PROTECTION FOR ENVIRONMENTALLY INDUCED MIGRANTS

Examination of the treaties and conventions has shown that, at present, none of the international law treaties identifies environmentally induced migrants as a specific group. In other words, environmentally induced migrants have not been recognised as a subject in international treaty law the way recognition have been given to refugees[89] and migrant workers[90]. It is thus imperative to examine to what extent it is possible to apply the principles enshrined in these treaties and especially those of the human rights treaties for upholding rights and protecting environmentally induced migrants in order to meet the ends of justice.

Firstly, the people migrating as a result of environmental and climate change-induced factors may invoke the human rights treaties for their protection. This is because the basic rights enshrined within these treaties are applicable to all as the human rights instruments are based upon the principle of "non-discrimination". In this respect particularly the "right to life and liberty"[91], and protection from arbitrary expulsion[128] guaranteed in the human rights treaties assumes great significance for people migrating due to a worsening environmental condition. Secondly, with respect to the RC many have advocated that it is applicable to environmental migrants and have even termed these migrants as "climate refugee" or "environmental refugee".

From the definition of the term 'refugee', it can be seen that the movement of people due to environmental reasons do not fall within the purview of the definition. Thus, when

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[87] *Conference on Security and Cooperation in Europe Final Act*, (1975), Helsinki; available at: https://www.osce.org/files/f/documents/5/c/39501.pdf (accessed on 1 September 2020).

[88] ILO (2006), *ILO's Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach*, Geneva: International Labour Office; available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/--migrant/documents/publication/wcms_178672.pdf (accessed on 5 January 2021).

[89] *Convention Relating to the Status of Refugees*, (1951), 189 UNTS 137.

[90] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, (1990), 2220 UNTS 3.

[91] UDHR, Article 3; ICCPR, Articles 4, 6, 9; ICRMW, Article 16.

[128] CAT, Article 3; ICCPR, Article 7.

considered purely from a legal perspective "climate/environment refugee" would be a misleading terminology. This point is further strengthened as those persons who are moving because of environmental factors do not 'flee' because of persecution as is understood under refugee law. This is because though rising sea levels, hazardous weather-events etc. are damaging they do not as yet under law meet the threshold for 'persecution'. Of course, the reason why many are tempted to invoke the term "refugee" for such migrants is that the refugee law framework would provide a well-defined protection regime. The invocation and recognition of a person as "refugee" would automatically provide for international protection. Also, the principle of "non-refoulment" is an added benefit.

There has been much advocacy for the expansion of the definition of "refugee" in the RC. Efforts have been made by the Central American and OAU countries to broaden the term and make it more inclusive.[92] Demand has also been made for the definition of refugee to also include within its domain environmental factors.[93] As early as the year 2006 a proposition for the amendment of the RC was put forward by Maldives.[94] The amendment proposed was to include the term 'Climate Refugee' in the definition of 'Refugee'.[133] The main reason for rejecting proposals for the amendment of the definition of 'refugee' is the fear that a re-opening of the discussion of the RC would lead to the rejection of the Convention itself especially in the contemporary world scenario where anti-migrant and anti-refugee sentiments abound. Nonetheless, RC, as it stands today, does not accord protection to environmental migrants.

UNGA RESOLUTIONS

There has been considerable debate over the legal position of the effect that UNGA resolutions have on International Law. For example, in the previous section, it has been seen how UNGA resolutions at times may be seen to reflect *Opinio Juris*. Irrespective of the divergence in legal opinion over the effect of UNGA resolutions upon international law, it is nevertheless required that they be consider. In the field of migration, there have been numerous UNGA resolutions.[95] Essential observations about these UNGA resolutions that are intended towards protecting migrants include the reaffirmation of Article 13 of the UDHR that deals with the right of freedom of movement. All UNGA resolutions regarding migrants' request Member States to protect, uphold, safeguard and promote the human rights of all migrants in accordance with the UDHR. What is important to note is that the wordings may vary from resolution to resolution, but they

[92] Swain, Ashok (1996), "Environmental migration and conflict dynamics: focus on developing regions", *Third World Quarterly*, 17(5): 959-973, p. 964; available at: https://www.jstor.org/stable/3993239 (accessed on 15 December 2017).

[93] Frelick, Bill (2020), "It is time to change the definition of refugee", *Aljazeera*, 26 January 2020; available at: https://www.aljazeera.com/indepth/opinion/time-change-definition-refugee200126095857235.html (accessed on 5 February 2020).

[94] McAdam, Jane (2011), "Swimming Against the Tide: Why a Climate Change Displacement Treaty is not an answer", *International Journal of Refugee Law*, 23(1): 2-27, p. 6. [133] Ibid.

[95] Refer to Annexure I in this study: List of Important UNGA Resolutions on Migration.

have been adopted through a consensus and have been addressed to all member states.[96] A re-affirmation of the UDHR is done in almost all UNGA resolutions pertaining to migration. Certain other important themes which have been referred to in several of the UNGA resolutions on migration in some form or the other include:

1. The emphasis upon the "global character" of migration.[97]
2. The interrelatedness of migration and development.[98]
3. Concern over the situation of irregular migrants, children and women migrants.[99]
4. They highlight the fact that migration often takes place within the same geographical regions.[139]

The UNGA resolutions on migration also emphasise upon a human rights perspective over the issue of migration and migrant rights. They lay stress on the right against "arbitrary arrest and detention" of migrants, call to States to promote and "effectively" defend the human rights and essential freedoms of all migrants notwithstanding their migration status and to respect the "inherent dignity" of migrants.[100] The UNGA resolutions have also expressed concern over certain States' domestic legislative measures that might restrict the fundamental freedoms and human rights of migrants.[141]

The environmental impact upon migration has also been a topic of discussion within the UN. A UNGA Resolution[101] far back as the year1988, expressed its apprehension and worry over the sufferings of those who were affected by natural disasters. It noted that natural hazards caused losses to both life and property and also prompted population displacement. The discussion of the UN in this respect was, however, more in line with humanitarian aid in times of such emergency crisis by neighbouring States and not hosting the disaster displaced persons as refugees. Over time other UNGA Resolutions have also come to highlight and specifically describe the environment as a driver of migration.[102]

OTHER GLOBAL INITIATIVES

The government of Norway hosted the "*Nansen Conference on Climate Change and Displacement in the 21st Century*" in Oslo in the year 2011 was an important international event on the subject of environmentally induced migration. This conference was instrumental in the formulation of ten principles which have come to be known as the *Nansen Principles*.[103] These principles, while not being a soft law instrument, is still

[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid. [139] Ibid.
[100] Ibid. [141] Ibid.
[101] *Humanitarian assistance to victims of natural disasters and similar emergency*, (1988), UNGA Resolution, A/RES/43/131.
[102] Refer to Annexure I in this study: List of Important UNGA Resolutions on Migration.
[103] Norwegian Refugee Council/Internal Displacement Monitoring Centre (2011), *The Nansen Conference: Climate Change and Displacement in the 21st Century*, Norwegian Refugee Council;

relevant as a policy framework which comprehensively outlines how to manage the situation with respect to displacement of people who have been impacted by environmental disasters. The very first principle of the "Nansen Principles" emphasize the requirement for a thorough information base and awareness to enable satisfactory "responses to climate and environmentally related displacement".[145] Principles II to IV enumerates the roles of pertinent stakeholders.[146]

The humanitarian consequence of environment and climate-induced migrations as an adaptation challenge was for the first time explicitly recognised by the international community at the Nansen conference.[104] By the year 2012, these principles have developed into the "*Nansen Initiative on disaster-induced cross-border displacement*" that formed an "open and inclusive" intergovernmental forum.[105]Other significant developments concerning environmentally induced migration and migrants have been the unanimous adoption by all 193 member States of the UN of the *New York Declaration*[106] at the UNGA.

The *New York Declaration* is a "political declaration" which contains commitments that are equally applicable to both refugees and migrants[107] in areas ranging from xenophobia, racism[108] to human trafficking[109]. The *New York Declaration* also contains different commitments for migrants[110] and refugees[154]. The *New York Declaration* is also considered as a landmark development in the area of environment-related migration, as the declaration considers displacement of people "forced to flee or are displaced across borders in the context of sudden- or slow-onset disasters, or in the context of the effects climate change".[111] The *New York Declaration*, states the commitment towards "addressing

available at: https://www.unhcr.org/protection/environment/4ea969729/nansen-conference-climatechange-displacement-21st-century-oslo-6-7-june.html (accessed on 12 October 2018). [145] Ibid., at Principle I.

[104] Kälin, Walter (2012), "From the Nansen Principles to the Nansen Initiative", *Forced Migration Review* 41:48.

[105] McAdam, Jane (2014), "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013" *Refuge: Canada's Journal on Refugees*, 29(2):11-16, p. 11; Gemenne Francois and Pauline Brucker (2015), "From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement', *International Journal of Refugee Law* 27(2): 245–263, p. 245.

[106] *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, (2016), UNGA Resolution, A/RES/71/1.

[107] Ibid., at paras. 21, 22-40.

[108] Ibid., at para. 39.

[109] Ibid., at para. 35.

[110] Ibid., at paras. 21, 41-63. [154]

Ibid., at paras. 21, 64-87.

[111] UNHCR, *The New York Declaration for Refugees and Migrants Answers to Frequently Asked Questions*, p. 3; available at: https://www.globalcompactrefugees.org/sites/default/files/2019-12/New%20York%20Declaration-%20Frequently%20Asked%20Questions%20%282017%29.pdf (accessed on 2 December 2019).

the drivers that create or exacerbate large movements" and "combating environmental degradation and ensuring effective responses to natural disasters and the adverse impacts of climate change".[112] This *New York Declaration* also makes a commitment to assist "impartially and on the basis of needs, migrants in countries that are experiencing conflicts or natural disasters, working, as applicable, in coordination with the relevant national authorities".[113] Also, of relevance are the commitments for the protection of all refugees and migrants regardless of their status.[114] The *New York Declaration* also built the groundwork of further action by initiating the way forward towards the development of two "Global Compacts" which have subsequently come to be adopted.

The year 2018 saw the formal adoption of first the *United Nations Global Compact for Refugees* (Refugee Compact)[115] and subsequently the *United Nations Global Compact for Safe, Orderly and Regular Migration* (Migration Compact).[116] The adoption of these two compacts which deal with population mobility has come to be understood as a new signal of "moral and political undertaking".[161] The two Compacts however are not legally binding nevertheless they do provide an agreement upon a common text.[117] These two Compacts have been welcomed by and large by the international community and are considered to have great future potential.[118] The two Compacts have undertaken to respect the human rights of both refugees and migrants and ensure that they can live a safe, empowered and dignified life.

These two compacts also play an important role in the field of environmentally induced migration. The Migration Compact is an international agreement which for the first time identified climate and environmental change as the driving forces of migration.[119] In its Objectives and Commitments section, the Migration Compact commits to ensuring that "desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration".[165] It also recognises adaptation in country of origin as a priority and commits to advance measures for resilience and adaptation tactics to deal with the situations of both sudden and slow onset natural disasters. The Refugee Compact also acknowledges that environmental degradation as well as sudden-onset natural disasters may lead to external forced displacement. Interestingly, the Refugee Compact does state that though environmental

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[112] New York Declaration, n. 149, at para. 43.
[113] Ibid., at para. 50.
[114] Ibid., at paras. 5, 6, 32, 41.
[115] *Global Compact on Refugees*, (2018), UN doc A/73/12 (Part II).
[116] *Global Compact for Safe, Orderly and Regular Migration*, (2018), UN doc A/RES/73/195. [161] McAdam, Jane (2019), "The Global Compacts on Refugees and Migration: A New Era for International Protection?", *International Journal of Refugee Law*, 30(4):571-574, p. 571.
[117] Chimni, B.S (2018). "Global Compact on Refugees: One Step Forward, Two Steps Back", *International Journal of Refugee Law*, 30(4):630-634, p. 630.
[118] Türk, Volker (2018), "The Promise and Potential of the Global Compact on Refugees", *International Journal of Refugee Law*, 30(4): 575-583.
[119] See Migration Compact, n.160, para. 12, para. 18. [165]
Migration Compact, n. 160, para. 18.

degradation and natural disasters have with increased frequency started to have a link and bearing upon the drivers of refugee movements, they in themselves are not causing the movement of refugee.[120]

CONCLUSION

The international regime on migration, although not systematic, does provide for protection and rights to migrants. However, States hold extensive authority with regards to the question of migration, especially with respect to regulation of immigration or the movement of non-nationals across their territorial borders. The Human Rights Regime does, to an extent, limit this broad authority enjoyed by a State in respect to foreign nationals. Thus, migrants also have the basic rights like the "right to life, liberty and security"; the "right not to be held in slavery or servitude"; the "right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment".

However, gaps remain in the legal framework dealing with migration and the protection of migrants. This is primarily because the legal framework addresses concern of migrants as and when they develop and over the years, the legal regime has specifically addressed certain groups of migrants and their particular issues. Therefore, protection gaps remain for situations dealing with questions of migration for family and economic reasons and more importantly, for this particular work concerning migration due to environmental concerns.

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[120] See Refugee Compact, n. 159, para. 8.

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