Master's Thesis in Law

From Inside a Gap:

Enhancing the Claimability of Non-Citizens' Human Rights

국제인권법상 비시민 권리의 실질화 방안 연구

August 2022

Graduate School of Law

Seoul National University

Human Rights Law Major

Andrew Blackie

From Inside a Gap:

Enhancing the Claimability of Non-Citizens' Human Rights

국제인권법상 비시민 권리의 실질화 방안 연구

지도교수 신 윤 진

이 논문을 법학석사 학위논문으로 제출함

2022 년 5 월

서울대학교 대학원

법학과 인권법전공

Andrew Blackie

Andrew Blackie 의 석사 학위논문을 인준함

2022년 7월

위 원 장 _____ (인)

부 위 원 장 _____ (인)

위 원 _____ (인)

Every nation has its others, within and without… "The other" is not elsewhere.

— Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 18, 87

In between representations of the self and the other are lost a myriad of OUR SELVES who fall into the chasm between Us and Them. These are the untranslatables, the alterNATIVES, those who resist translation into the language of the nation.

— Annie Paul, 'The enigma of survival: Traveling beyond the expat gaze,' 62(1) *Art Journal* (2003) 65

… Sometimes the needs of States and migrants overlap, and sometimes they do not… That is where sovereignty comes up not against a challenge to its unlimited freedom to act, but against the moral imperative to live up to a standard of reciprocal decency in its actions… while we may or may not join in deriding international guidelines, standards and commitments that infringe on our absolute sovereignty to choose any means to achieve our purposes, it is nonetheless a fact that expectations are beyond the remit of sovereignty to contain.

— Teodoro L. Locsin Jr., Secretary of Foreign Affairs of the Philippines, 19 December 2018

Abstract

From Inside a Gap: Enhancing the Claimability of Non-Citizens' Human Rights

Human rights are universal, indivisible and interdependent and interrelated. They expressly apply to all people, by virtue of their humanity. Equally, however, human rights itself is the ongoing struggle to achieve inclusion of various 'others.' This thesis argues that coterminous with the rise of international human rights law, even pre-dating it in some important ways, is a persistent and unresolved source of tension on how to conceive the humanity of non-citizens – the spectrum of individuals who are not citizens of the territory to whose jurisdiction they are subject. This tension operates across two legal dimensions: firstly, through the divergence between international human rights norms and state practice, which emerges due to the state-centric architecture of international human rights law; and, secondly, through a hierarchy of 'rights claimability' (defined here as the ability to claim for and access a right in practice, rather than the legal status of entitlement), created by the patchwork of rights frameworks for non-citizens, in addition to uneven alignment between different categories of non-citizens in international and domestic law. This thesis argues that it is the interaction of these two dimensions that produces and reinforces the 'gap' with respect to non-citizens.

This thesis proceeds according to the following structure. The introduction presents an overview of challenges to the status quo, distinguished in particular by the increasing

pace and complexity of migration flows. Chapter two comprises a literature review, examining how the subject of non-citizens is located at the intersection of theoretical and legal disciplines, and proposes a theoretical framework guiding the thesis. Chapters three and four are concerned with substantiating the 'gap' with respect to the human rights of non-citizens. Chapter three evaluates the century-long effort to incorporate non-citizens within the scope of international human rights law, from early attempts to codify the rights of 'aliens' in the 1920s through to the 2018 Global Compacts for Migration and Refugees. Although the binding human rights treaties are distinguished by their cosmopolitan purpose, they paradoxically reinforce the state in practical application, exacerbating the human rights challenges faced by non-citizens. Chapter four maps major categories of non-citizens in international human rights law against domestic jurisdictions, to illustrate hierarchies in state practice between different categories of non-citizens and different groups of rights. Chapter five turns to the interaction of these two dimensions – domestic and international law – through various interfaces, focusing on UN human rights treaty bodies, national constitutions, national human rights institutions and transnational coalitions. Building on these implications, the study concludes by proposing recommendations towards a new normative frame of reference. The thesis argues, first, that a vocabulary of claim-making by non-citizens is needed to instantiate the provisions of international human rights law in individual circumstances. The practice of human rights treaty bodies provides pointers in this direction. Second, it argues that the current fragmented position of non-citizens, spanning multiple legal regimes and categories, should converge towards a single, more inclusive concept of

non-citizens, so that the domestic legal status of non-citizens is less important than their normative position as equal rights-bearers under international human rights law.

Keywords: non-citizens; migrants; rights claimability; human rights; international human rights law; migration; citizenship

Student Number: 2020-28500

Contents

List of Tables and Figures

Tables

Figures

Appendices

Chapter 1: Introduction

1.1 Background

Human rights are universal, indivisible and interdependent and interrelated. They expressly apply to all people, by virtue of their humanity. Equally, however, human rights itself is the ongoing struggle to achieve inclusion of various 'others,' as evidenced by the progressive development of treaties for refugees, women, children, persons with disabilities, and other specifically delineated groups in international human rights law. Recent human rights instruments also make clear that the concept of 'otherness' is not static, but incorporates important contextual and situational elements.[1]

The salience of migration in this equation needs little explanation in a world in movement. The number of non-citizens as a proportion of humanity has continued to grow, accounting for 3.6 percent of the total population: one in every thirty people worldwide, based on the most recent assessments.[2] That this proportion remains small overall is incontestable; however, migration has accelerated at twice the rate of world population growth in the period from 2000 to 2020, an increase of over 100 million

[1] The *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) does not define disability, instead recognising it as 'an evolving concept' that 'results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis': Preamble, para (e). The United Nations Declaration on the Rights of Indigenous Peoples similarly does not define indigenous peoples, affirming 'the right of all peoples to be different, to consider themselves different, and to be respected as such,' while at the same time being 'equal to all other peoples': Preamble, para 3 (United Nations General Assembly, A/RES/61/295 [13 September 2007]).

[2] United Nations Department of Economic and Social Affairs, Population Division, *International Migration 2020 Highlights*, ST/ESA/SER.A/452 (2020), 45 ('UN DESA').

people in absolute terms.[3] Non-citizens comprise one quarter or more of the total population in approximately 20% of all states worldwide.[4] Migration pathways and destinations continue to diversify, with 'the emergence of major regional hubs' outside traditional destinations of North America and Europe.[5] Simultaneously, in a quandary seemingly incapable of resolution, the number of forcibly displaced continues to rise, year on year, to its highest levels in history.[6]

Table 1: Growth in international migration in comparison to world population[7]

Year	International migrant population	World population
2000	173 million	6.143 billion
2020	281 million	7.795 billion
Increase	62%	27%

Perhaps inevitably, political as well as academic interest in citizenship has revived to meet these trends. Scholarly attention towards citizenship reached an 'all-time high' in the early 2000s, reversing a slow decline throughout much of the twentieth century.[8]

[3] Seyla Benhabib writes on this point: 'It is not the *absolute* number of migrants or their proportion of the world's population that merits attention but the fact that the number of migrants has grown *faster* than the world's population in this period': 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights,' 2 *Jus Cogens* (2020), 91, n 88 (emphasis in original).
[4] UN DESA (2020), 11.
[5] Ibid, 10, 22-23.
[6] UNHCR, *Global Trends: Forced Displacement in 2020* (2021), 2. The numbers of forcibly displaced worldwide stood at 82.4 million at the end of 2020.
[7] All figures are based on data sourced from United Nations Department of Economic and Social Affairs, Population Division, 'International Migrant Stock 2020' (2020), available at https://www.un.org/development/desa/pd/content/international-migrant-stock (accessed 5 May 2022). Figures are rounded to the nearest million.
[8] Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink, 'Introduction: Citizenship—*Quo Vadis*?,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook*

'Citizenship, or its lack, is often felt most sharply by those who move across borders;'[9] the "non-citizen" is a legal distinction created and perpetuated by an international community anchored around states.[10] As the most visible feature of the era of globalisation, migration has been swept up in weaponised political rhetoric and fears of loss of control.[11] The embedding of international migration into the structure of advanced economies is another manifestation of what has been described as the overlap and interpenetration of the global and the domestic;[12] non-citizens fill critical labour gaps, particularly in work perceived as undesirable by local populations (otherwise known as the 'DDD' triad: difficult, dirty and dangerous), and contribute to economic and population growth in aging societies.[13] From the other end of the spectrum, low- and middle-income countries absorb the vast majority of refugees and asylum seekers, a situation that has changed little in decades.[14] The extent to which non-citizens are able to exercise their human rights in states in which they are not members of the *demos*, therefore, is a matter of real-world significance and urgency.

of Citizenship (Oxford University Press, 2017), 3-4. The literature on citizenship is described by the authors as 'too vast to cite' (note 3).

[9] Ibid, 5.

[10] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), 54-55; Linda Bosniak, 'Status Non-Citizens,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), 315.

[11] IOM, *World Migration Report 2020* (2019), 7; Benhabib (2020), 82; 'Welcome, up to a point,' *The Economist* (26 May 2016), available at https://www.economist.com/special-report/2016/05/26/welcome-up-to-a-point (accessed 5 May 2022).

[12] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006), 7-9.

[13] UN DESA (2020), 7, 11, 20.

[14] Ibid, 7. A small number of states, including Canada, the United States and Australia, have traditionally served as resettlement destinations: IOM (2019), 41.

Systematic analyses of non-citizens from an international human rights law perspective remain comparatively rare in scholarship. This study argues that coterminous with the rise of international human rights law, even pre-dating it in some important ways, is a persistent and unresolved source of tension on how to conceive the humanity of non-citizens – the spectrum of individuals who are not citizens of the territory to whose jurisdiction they are subject. This tension operates across two dimensions: firstly, through the divergence between international law norms and state practice, a divergence inadvertently facilitated by the state-centric architecture of international human rights law; and, secondly, through a hierarchy of 'rights claimability,' created by the patchwork of rights frameworks applicable to non-citizens in both international and domestic law, in addition to uneven alignment between different categories of non-citizens. This study argues that it is the interaction of these two legal dimensions – international and domestic – that produces and reinforces a multidimensional gap with respect to rights claimability for non-citizens.

1.2 Methodology

This study adopts a synthetic approach. Its focus is on the *interface* between international and domestic law, as formed through *interactions* between the two levels, and the implications this holds for the human rights of non-citizens in practice. To this end, it closely examines the core international human rights treaties, along with other international human rights agreements and declarations pertaining to non-citizens. The study analyses these documents in their historical contexts, incorporating scrutiny of their drafting and negotiation processes, guided by the maxim that what is omitted or left

ambiguous in the final agreement may be as revealing as that which is stated explicitly. Additionally, it reviews on a comparative basis the implementation of international obligations with respect to the human rights of non-citizens at the domestic level. To enable the identification of common themes, thirty states (listed in Table 2 below) are reviewed in this study, classified according to UN regional groupings.[15]

Table 2: States reviewed in this study

State	**Region**	**Non-citizens as % of total population**[16]
Australia	Western Europe and others	30.1
Belize	Latin America and Caribbean	15.6
Canada	Western Europe and others	21.3
Chile	Latin America and Caribbean	8.6
Costa Rica	Latin America and Caribbean	10.2
Czechia	Eastern Europe	5.1
Djibouti	Africa	12.1
Ecuador	Latin America and Caribbean	4.4
El Salvador	Latin America and Caribbean	0.7
Equatorial Guinea	Africa	16.4
Estonia	Eastern Europe	15

[15] There are five regional groupings for UN member states: African States; Asia-Pacific States; Eastern European States; Latin American and Caribbean States; Western European and other States: United Nations Department for General Assembly and Conference Management, 'Regional groups of Member States,' available at https://www.un.org/dgacm/en/content/regional-groups (accessed 5 May 2022).
[16] All data sourced from UN DESA, 'International Migration Stock 2020' (2020).

Gabon	Africa	18.7
Germany	Western Europe and others	18.8
Hungary	Eastern Europe	6.1
Indonesia	Asia-Pacific	0.1
Italy	Western Europe and others	10.6
Kazakhstan	Asia-Pacific	19.9
Kenya	Africa	2
Kuwait	Asia-Pacific	72.8
Latvia	Eastern Europe	12.7
Libya	Africa	12
Mexico	Latin America and Caribbean	0.9
New Zealand	Western Europe and others	28.7
Philippines	Asia-Pacific	0.2
Poland	Eastern Europe	2.2
Qatar	Asia-Pacific	77.3
Slovakia	Eastern Europe	3.6
South Africa	Africa	4.8
South Korea	Asia-Pacific	3.4
Turkey	Western Europe and others	7.2

As seen above, the proportion of non-citizens as a total of the population varies widely among the thirty states, from 0.1% (Indonesia) to a supermajority (77.3%, Qatar). States

were selected for inclusion based on the following criteria, in descending order of importance:

1. Regional balance was maintained: six states are included from each of the five regional groupings. The purpose of this was to avoid Eurocentricism,[17] either theoretically or methodologically, and to reinforce the international nature of migration as an embedded global and transnational phenomenon. Reviewing domestic law and practice outside of major destination states, and across regions, may also illuminate various permutations of non-citizenship status. The decision to classify states according to UN regional groupings was somewhat arbitrary: the UN Office of the High Commissioner for Human Rights, for example, maintains a separate regional grouping system,[18] as does the IOM.[19] Ultimately, however, regional groupings of UN member states are the most influential in the quotidian practice of human rights at the international level: determinative of, inter alia, elections to membership of the UN Human Rights Council, the timing of periodic reporting, and membership of UN human rights committees. Acknowledging the political character of human rights as an element of international discourse,[20] this reality was taken into account in structuring the methodology.

[17] For example, IOM (2019) states that literature on migration 'is dominated with perspectives from destination countries, especially in relation to Europe' (at 4). It also remarks on criticism that the United States 'has disproportionately influenced the study of migrants globally' (at 163).
[18] The OHCHR regional groupings are Africa, Americas, Asia Pacific, Europe and Central Asia, and Middle East and North Africa, respectively: United Nations Office of the High Commissioner for Human Rights, 'Countries,' available at https://www.ohchr.org/en/countries (accessed 5 May 2022).
[19] Comprising Africa and the Middle East, Americas and the Caribbean, Asia and the Pacific, and Europe and Central Asia, in conjunction with nine regional offices: IOM, 'Where we work,' available at https://www.iom.int/where-we-work; 'Regional offices,' available at https://www.iom.int/regional-offices (both accessed 5 May 2022).
[20] Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009, 2011 ed), 102-3.

2. A compelling reason relevant to non-citizens was needed for each state to be included. Generally, the presence of a significant non-citizen population was taken to be sufficient justification. However, each state was evaluated on a case-by-case basis: the population of Equatorial Guinea, for example, has increased by over 50% in the space of a decade, with non-citizens contributing substantially to this increase.[21] Indonesia and Mexico have significant diaspora populations, and advocate consistently at the international level for the protection of migrant rights.[22] Libya has become a significant transit point for non-citizens attempting to reach Europe,[23] while El Salvador has in recent years witnessed a mass exodus of its population, creating (in legal terms) significant numbers of non-citizens.[24]
3. The state's record of ratifying human rights treaties and optional protocols was considered. A significant volume of individual communications before UN human rights committees concerning non-citizens was a factor for inclusion, however this was not determinative; a number of states that have not to date ratified any optional protocols were also included.
4. Lastly, the existence of previous literature considering the human rights of non-citizens in the state was considered.

[21] IOM (2019), 56. Data on proportional population change covers the period 2009-2019. Underscoring the pace of change, the report also notes that international migrants accounted for less than one percent of the country's population in 2005.
[22] Sarah Song, 'Democracy and noncitizen voting rights,' 13(6) *Citizenship Studies* (2009), 617, remarking on the development of 'diasporic bureaucracies' in Mexico's provincial states that coordinate work on migration issues. Mexico also took the initiative in 2002 of requesting an advisory opinion from the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants: Antônio Augusto Cançado Trindade, 'Uprootedness and the protection of migrants in the International Law of Human Rights,' 51(1) *Revista Brasileira de Política Internacional* (2008), 157.
[23] IOM (2019), 67-68.
[24] Ibid, 99, 104.

The methodological purpose is not to systematically compare the states under review; rather, discussion is intended to illuminate the human rights position of non-citizens. Review of each state incorporated consideration of the following mechanisms: national constitutional frameworks, including constitutional jurisprudence; subsidiary legislation pertinent to either human rights or non-citizens; periodic state reporting to UN human rights committees; and individual communications submitted to UN human rights committees alleging human rights violations. Comprehensive data on these mechanisms pertaining to each state are located in the appendices.

Finally, a note on the analytical approach. Research on the human rights of non-citizens necessitates consideration of several overlapping disciplines, including citizenship, migration studies, international law and international human rights law. Each of these is open to criticism for attachment to dichotomies: in the realm of citizenship, with respect to membership;[25] in international law, regarding state sovereignty;[26] and, more recently in international human rights law, between refugees and migrants. The effect of each of these dichotomies, in conjunction, threatens to flatten and diminish the agency and

[25] T. Alexander Aleinikoff, 'Citizens, Aliens, Membership and the Constitution,' 7(9) *Constitutional Commentary* (1990) 9-34 (writing at 12 that 'Understanding citizenship as membership is deeply ingrained in constitutional thinking').
[26] Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff Publishers, 2004), arguing that sovereignty is a word of 'great power and social effect' (12).

humanity of non-citizens.[27] Scholars in the fields of culture,[28] sociology[29] and media[30] have pioneered models of identity that recognise hybridity and fluidity and go beyond 'methodological nationalism,' defined by Wimmer and Schiller as the assumption that the society centred around the (nation-)state is 'the natural social and political form of the modern world.'[31] The rate of change with respect to difference and diversity of identity in the legal discipline to date has been much more incremental. This is despite the existence of substantial groups for whom the label of non-citizen is inapt: sixty-three states worldwide report permitting dual or multiple citizenship,[32] while the number of dual citizens is estimated to be at its highest ever, heightening the likelihood of plural, overlapping (trans)national identities and solidarities.[33] The ten largest multinational

[27] See for example United Nations General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General,' A/76/642 (27 December 2021), para 95 ('Secretary-General report').
[28] Annie Paul, 'The enigma of survival: Traveling beyond the expat gaze,' 62(1) *Art Journal* (2003) 48-65.
[29] Jaeeun Kim, *Contested Embrace: Transborder Membership Politics in Twentieth-Century Korea* (Stanford University Press, 2016), 1-28.
[30] Myria Georgiou, 'Does the subaltern speak? Migrant voices in digital Europe,' 16(1) *Population Communication* (2018) 45-57.
[31] Andreas Wimmer and Nina Glick Schiller, 'Methodological nationalism and the study of migration,' 43(2) *European Journal of Sociology* (2002), 217. The authors ascribe the 'discovery' of transnational communities in scholarship as not representing something new, but the product of a shift in thinking: 218.
[32] Including states allowing dual citizenship with certain conditions or restrictions, the number rises to eighty-three: Data sourced from United Nations Department of Economic and Social Affairs, Population Division, 'World Population Policies 2019: International Migration Policies and Programmes,' available at https://www.un.org/en/development/desa/population/theme/policy/wpp2019.asp (accessed 5 May 2022). A total of 111 countries provided data. The same division has previously observed that 'developed countries' (defined as all regions of Europe, Northern America, Australia, New Zealand and Japan) are more likely to allow dual citizenship: United Nations Department of Economic and Social Affairs, Population Division, 'Population Facts: Changing Landscape of International Migration Policies' (No. 2013/5, September 2013), 4.
[33] Bosniak (2006), 26. By way of example, Germany registered 27.2% of its population as having a migrant background in 2021, defined as a person, or at least one of their parents, who did not acquire German citizenship by birth: Federal Statistical Office of Germany (Destatis), 'Well over one in four people in Germany had a migrant background in 2021' (12 April 2022), available at https://www.destatis.de/EN/Press/2022/04/PE22_162_125.html (accessed 5 May 2022). This is well above the percentage (18.8) of its non-citizen population.

corporations alone employ an estimated total of over eight million people,[34] creating a parallel transnational population. These phenomena challenge the exercise of state regulatory power, while complicating the categorisation of individuals into discrete legal groups of non-citizens. This study draws on cross-disciplinary studies and perspectives to critique existing binaries (citizen/non-citizen) and categories (of non-citizen) within international human rights law.

1.3 Terminology

Diverse and inconsistent terminology presents a challenge to studies in this area. A non-citizen is defined by the Office of the United Nations High Commissioner for Human Rights (OHCHR) as 'a person who has not been recognized as having [the] effective links [of citizenship] to the country where he or she is located.'[35] Another leading scholar defines non-citizens as 'anyone who is not a citizen of the country in which he or she presently resides.'[36] This study follows the core human rights treaties in construing a non-citizen as anyone subject to the jurisdiction of a state of which they are not a citizen.[37] Territorial presence will generally be determinative of jurisdiction, although not always.[38] 'Non-citizen' is presently standard and non-derogatory terminology in

[34] Data sourced from Fortune, 'Fortune Global 500 2021,' available at https://fortune.com/global500/2021/search/ (accessed 5 May 2022).
[35] Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-citizens*, HR/PUB/06/11 (2006), 5 ('OHCHR').
[36] David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008), 2.
[37] United Nations General Assembly resolution 217 A (III), 'Universal Declaration of Human Rights,' A/RES/3/217A (10 December 1948) ('UDHR'), preamble (pledging to secure human rights 'both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 2(1) ('ICCPR'); United Nations General Assembly, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,' A/RES/63/117 (5 March 2009), Article 2.
[38] As discussed in section 5.1 of this study.

international human rights law and academia,[39] replacing older terms with the same meaning, including alien, non-national, and the colloquial foreigner.[40] An umbrella term, it encompasses legally recognised categories of individuals – among them refugees, asylum seekers, and stateless persons – as well as those without an international legal definition, be they migrants,[41] permanent residents, "expatriates" or "marriage migrants."

As 'non-citizen' is the most widely accepted term at present, the term is employed in this study for descriptive reasons and consistency. This usage is potentially counter-productive, as the term is itself a linguistic extension of subjugation. Exclusion is embedded into its prefix, suggesting an individual (outsider) who is less than whole, certainly incapable of belonging.[42] This study, accordingly, encourages the need for further evolution of the language in a more positive, validating direction. For example, Benhabib identifies intriguing examples from German jurisprudence of expressions such as 'cohabitants' and 'cocitizens of foreign origin.'[43]

---

[39] Weissbrodt (2008), 2, note 4.

[40] The ICCPR (1966) and *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), refer to 'aliens' in Articles 13 and 9, respectively; Article 2 of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR') distinguishes 'non-nationals.' Foreigner, meanwhile, is widely used in national contexts: see, for example, *Framework Act on Treatment of Foreigners Residing in the Republic of Korea* (2007).

[41] IOM (2019) cautions that the terms migration and migrant lack a 'universally agreed definition': 20.

[42] As Bosniak (2006) puts it, the term citizenship's 'normative valence – its appraisive meaning – is almost unfailingly positive… Describing aspects of the world in the language of citizenship is a legitimizing political act' (at 12). She further describes the language of citizenship as 'a powerful term of appraisal,' 'centrally constitutive and defining of our collective lives': Linda Bosniak, 'Denationalizing Citizenship,' in T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001), 245. Non-citizenship would thus carry the opposite meaning by definition.

[43] Benhabib (2004), 208. She writes that this terminology emerged from 'intense and soul-searching public debate [that] finally led to an acknowledgement of the *fact* as well as the *desirability* of immigration' (emphasis in original).

The term human rights is used in this study in its legal sense; that is, to refer to the human rights enshrined in the core international human rights treaties, read singularly and in conjunction. Although nationality is the standard term used in international law,[44] this study refers to citizenship throughout, in order to emphasise the distinction between citizens and non-citizens; the two terms (nationality and citizenship) are treated as interchangeable within the context of this study.

Finally, the concept of 'rights claimability' is defined within this study as the ability to advocate for and access a right in *actuality*, as distinct from the *legal* status of entitlement. The relevance of this concept to the human rights of non-citizens, and its role in structuring the findings of this study, are discussed at further length in section 2.3.

1.4 Structure

This study proceeds according to the following structure. This introduction presented an overview of the status quo relating to global migration flows, characterised by increasing pace and complexity. Chapter two incorporates a literature review, examining how the subject of non-citizens is located at the intersection of theoretical and legal disciplines, in particular citizenship studies, migration studies and international human rights law, which reinforces the gap between the human rights of citizens and non-citizens. Informed by this literature, the chapter concludes with a theoretical framework that guides subsequent chapters. Chapter three comprises a linear analysis and evaluation of

[44] *Nottebohm Case (Liechtenstein v. Guatemala) (second phase)*, Judgment of 6 April 1955, ICJ Reports 1955, 4. Views published by UN human rights treaty bodies also denote the author's 'nationality.'

international human rights law, focusing on the century-long effort to incorporate non-citizens within its scope. The analysis in this chapter is confined to textual international law, from early attempts to codify the rights of 'aliens' in the 1920s through to the 2018 Global Compacts for Migration and Refugees. This is followed by a category-based approach in chapter four, which maps major categories of non-citizens in domestic legislation, policies and practices against international human rights law, to demonstrate shortfalls in rights claimability for non-citizens. For each category examined in the chapter, an illustrative case study is drawn from among the states under review, with the purpose of substantiating the gap between different categories of non-citizens (and, implicitly, between non-citizens and citizen populations) in domestic law, while identifying discrepancies and divergences between domestic practice and international human rights law. Chapter five addresses and evaluates the interaction of these two dimensions – international and domestic – through various configurations, including national constitutions, UN human rights treaty bodies, national human rights institutions and transnational coalitions. Particular attention is paid to the development and interpretation of international human rights law norms by these actors, to examine the support they provide to non-citizens in practice. Chapter six concludes by proposing recommendations towards a new normative frame of reference, arguing firstly that a vocabulary of claim-making by non-citizens is needed to instantiate the provisions of international human rights law in individual circumstances. The practice of human rights treaty bodies already provides pointers in this direction. Second, it argues that the current fragmented position of non-citizens, spanning multiple legal regimes and categories, should converge towards a single, more inclusive concept of non-citizens, so that legal

status is less important than their normative position as equal rights-bearers under international human rights law.

Chapter 2: Theoretical Framework

2.1 The Citizenship-Rights Nexus

Non-citizens are defined, semantically as well as legally, by a negation. This implies the need to determine what it is that they are not. Citizenship as a norm, together with the state-centricity of international architecture and methodological nationalism in scholarship, serve to reinforce the normality of state boundaries and the practices and institutions that accompany 'access to and exit' from them.[45] This leaves the condition of movement – whether through transnational migration, temporary residence, multiple and overlapping memberships or, conversely, loss of membership – theoretically overlooked and deprived of nuance in a considerable literature on citizenship status. Benhabib writes that '[p]olitical membership has rarely been considered an important aspect of domestic or international justice.'[46] Bosniak observes that citizenship in the literature is 'an ideal [that] is understood to embody a commitment against subordination,' yet it 'can also represent an axis of subordination itself,' for its implementation implicates 'questions of exclusion.'[47] Supported by a close reading of these two authors, this section explores the nexus between citizenship and human rights, and how the presence of non-citizens complicates the practices of both. This discussion establishes the theoretical framework that has shaped the position of non-citizens in states to whose jurisdiction they are

[45] Benhabib (2004), 1-2.
[46] Ibid, 1, 74.
[47] Bosniak (2006), 1.

subject, both historically and through the commitments embodied in international human rights law.

The (Nation-)State Paradigm of Citizenship

At the level of first principles, the concept of citizenship 'lacks analytical clarity.'[48] Its definition is not fixed; it has 'an enormously broad range' of potentially incompatible usages; it entails 'struggle' over its normative meaning and entitlements; and, pertinently, the 'language of citizenship' is 'a political act,' 'grounded in experiences of collective identification' that 'evoke an emotional response.'[49] The constituent parts of citizenship are a 'bundle' of practices that incorporate 'distinct discourses' and varied forms, institutions and practices that are subject to a range of interpretations and 'converge in some respects' while remaining 'relatively autonomous in others.'[50]

Context and contingency aside, citizenship is also 'not entirely indeterminate.'[51] Citizenship is linked symbiotically with the sovereign national community,[52] although its

[48] Jean L. Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos,' 14(3) *International Sociology* (1999), 247.
[49] Bosniak (2001), 238-240, 245, 247.
[50] Ibid, 240-41; Bosniak (2006), 3, 5, 35; Cohen (1999), 248. Bosniak (2001) identifies four different formulations of citizenship: Legal, 'formal status of membership in a political community'; '[s]ociological tradition' referring to 'the individual's possession and enjoyment of fundamental rights in society'; civic republican, 'state of active engagement in the life of a polity'; and 'psychological or cultural… experience of identity and solidarity that a person maintains in collective or public life.' Cohen (1999) points out three distinct components: Political, involving 'participation in deliberating and decision-making by political equals for a body politic;' juridical status of legal personhood, carrying 'a set of legally specified rights'; and form of membership in an exclusive category… 'the basis of a special tie [that] affords a social status', a 'thick and important identity'.
[51] Bosniak (2006), 35.
[52] Cohen (1999), 247, 253.

history 'long precedes' the emergence of the (nation-)state.[53] Members of this bounded national community are imagined as a *demos* of self-ruling, politically equal, socially interdependent individuals, acting in sovereign self-determination.[54] Through acting in concert, this community generates mutual feelings of 'sympathy and mutual solidarity' that are ostensibly 'greater than that felt among any random collection of human beings,'[55] although even defenders of this position concede that it is empirically difficult to prove.[56] The right of this community, which takes the external form of the (nation-)state, to determine its own membership and control entry are perhaps the most important constituent practices of sovereignty. As Alienikoff points out, under this paradigm of citizenship as membership, non-members are merely 'guests,' and 'the host is free to revoke the invitation at will.'[57] Traditional theory holds that non-members are subject merely to 'a tacit agreement to play by the rules *while passing through*;'[58] it was taken for granted that they could not acquire any status or identity in relation to that particular community.

---

[53] Bosniak (2006) documents how 'the idea of citizenship originated as a concept linking membership to the city-state': 23. Furthermore, citizenship may be distinct, both legally and in practice, from nationality, as demonstrated by Carmen Tiburcio in *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers, 2001), 2-3.

[54] Rainer Bauböck, 'How migration transforms citizenship: international, multinational and transnational perspectives,' *IWE Working Paper Series No. 24* (2002), 4; Cohen (1999), 246; Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate,' in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003), 156.

[55] Jeremy Waldron, 'Democracy,' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (Oxford University Press, 2012), 191.

[56] Randall Hansen, 'The poverty of postnationalism: citizenship, immigration, and the new Europe,' 31(1) *Theory and Society* (2009), 13.

[57] Aleinikoff (1990), 17.

[58] A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001) at 170, analysing the relationship between 'denisons' and 'aliens' in Locke's writings (emphasis added).

The paradox of (nation-)state citizenship is that it is ideally a universal condition – in the sense that each individual has a polity to which they belong – yet also one that is *circumscribed* by the territorial boundaries of the nation-state, and each state's citizenship policy. In the modern era, democracies evolved based on the premise of 'citizens as rights-bearing consociates,'[59] creating 'entitlement to, and enjoyment of… rights under law.'[60] The US Declaration of Independence and French Declaration on the Rights of Man and Citizen adopted social contract notions while proclaiming universal principles, 'which [were] then circumscribed within a particular civic community.'[61] Citizenship therefore 'represents both an engine of universality and a brake or limit upon it.'[62]

The privileges and 'compensatory achievements' brought by citizenship status crucially depend upon the presence of non-members denied access to it.[63] Citizenship's aspirational, collectivising rhetoric disguises the violence inherent in ongoing acts of self-constitution, triggered by struggles among a non-homogenous constituency of disaggregated groups for 'full membership rights.'[64] Benhabib interprets the 'history of democratic reforms and revolutions' as a series of mobilisations and claims by 'the

[59] Benhabib (2004), 44.
[60] Bosniak (2006), 19.
[61] These universal principles 'are in some sense said to precede and antedate the will of the sovereign' and to bind it accordingly: Benhabib (2004), 44. See also Weissbrodt (2008), 24-25, citing a number of national constitutions influenced by the US and French examples, including Belgium, Denmark, Liberia, the Netherlands, Norway, Prussia, Sardinia, Spain, and Sweden. National constitutions were also the basis for initial treaty-making exercises in international human rights law, as discussed further in Chapter 3.
[62] Bosniak (2006), 18.
[63] Benhabib (2004), 1, 172. An early example of this is the 1791 Declaration of the Rights of Woman and of the Female Citizen, a rejoinder to the 1789 French Declaration. The author of the 1791 Declaration was subsequently executed. Kant, meanwhile, notoriously maintained that women were 'mere auxiliaries to the commonwealth' (cited in ibid, 172).
[64] Ibid, 45, 82 175.

excluded and the downtrodden, the marginalized and the despised' to 'political agency and membership.'[65] It is only through undergoing these cyclical processes that the 'circle of addresses' of rights is 'widen[ed]' to those whose 'legal and political agency had not been foreseen or normatively anticipated,' transforming the content and character of the rights subject to contestation.[66] Benhabib describes this process of contestation and claim-making using the phrase 'democratic iterations,' to represent the subtle enrichment of meanings introduced into a concept through the variation that repetition entails.[67]

Citizenship, Non-Citizens and Human Rights

There has historically been a strong congruence between minorities – the actors in the processes of contestation above – and non-citizens, in practice as well as in law.[68] Whereas the 'thicker, more communitarian understandings' of citizenship provide an extra layer of protection for those 'ordinary people' that make up the core of the *demos*,[69] minorities and non-citizens are uniquely vulnerable to a 'wrong [or] inappropriate' decision by the majority.[70] Furthermore, benefits linked to citizenship status are intended to discriminate, from the state's perspective,[71] in the interests of closure and certainty in distribution of potentially limited resources.[72] This understanding of citizenship in the

[65] Ibid, 123-24.
[66] Ibid, 123-24, 168-69.
[67] Ibid, 179.
[68] Bauböck (2002), 10, holding that 'immigrants are not essentially different from historic minorities' within states.
[69] Cohen (1999), 256.
[70] Waldron (2012), 194.
[71] Bosniak (2006), 37.
[72] Michael J. Perry describes this in terms of sharing the 'resources and largesse' of the political community, whereby citizens are necessarily 'more deserving by virtue of [their] status': 'Modern Equal Protection: A Conceptualization and Appraisal,' 79(6) *Columbia Law Review* (1979), 1061.

popular imagination is witnessed in the rise of 'homeland'-first sentiment in recent years.[73] Tamir, a proponent of liberal nationalism, writes that arguments that the (nation-)state should be abandoned in favour of an alternative fall apart because 'none has so far emerged.'[74] She calls for the reinvigoration of a traditionally bounded community, in which members 'must come first, not because they are in some inherent way better,' but because that is the best way to guarantee equal distribution.[75]

Examples of the gap dividing citizens and non-citizens abound in the literature. The first and most primal of these is the psychological fear of the stranger and outsider, given voice in reflexive policies couched in terms of 'alarm, crisis and panic.'[76] The second is a lack of political will to protect non-citizens: as Song points out, '[t]he presumption is that outsiders are not owed justification for states' migration decisions.'[77] This remains a default position in public debates, with the result that protecting non-citizen populations is, as a general rule, politically unpopular.[78] Traditional international law approaches, granting virtually unlimited discretion to states to determine entry into their territory, continue to be reproduced in state practices, in particular immigration law;[79] a corollary of this extant position is that the non-citizen is perceived (especially before gaining entry

[73] Shachar, Bauböck, Bloemraad and Vink (2017), 5.
[74] Yael Tamir, *Why Nationalism* (Princeton University Press, 2019), 7.
[75] Ibid, 118. Elsewhere, she diagnoses a 'present-day sense of disappointment… grounded in… the illusion that all problems can be solved, that progress is eternal and there will be more for everyone' (at 11), and asserts that 'conceptions of membership' are 'much more… destiny than choice' (at 37).
[76] Pia Oberoi and Eleanor Taylor-Nicholson, 'The Enemy at the Gates: International Borders, Migration and Human Rights,' 2 *Laws* (2013), 170; see also Benhabib (2020), 77, 91; Tiburcio (2001), xxi.
[77] Jiewuh Song, 'Migration as a Matter of International Concern,' *Res Publica* (2021), 1.
[78] Ibid; Oberoi and Taylor-Nicholson (2013), 182; Shachar, Bauböck, Bloemraad and Vink (2017), 6.
[79] Song (2021) writes at 1 that 'a state's immigration law will [often] be the most brutally honest part of its legal system.'

to a state's territory) as the 'subject' of another (nation-)state, to whom no special obligations are owed.[80] Finally, border studies theorises the border as a barrier to separate and protect the self from the 'other,' but also as an institution to create and construct difference.[81] As interaction with a border is one of two characteristics that all non-citizens share in common[82] – the other being susceptibility to deportation – this is what Bosniak means when she writes that 'the border effectively follows' non-citizens inside the (nation-)state territory.[83] In practice, border controls are associated with three functions: protection against military invasion or attack; crime prevention and criminal law enforcement; and regulation of entry into and exit from the territory.[84] In this context, it is perhaps not surprising that the condition of being a non-citizen evokes adverse, negative connotations, in contrast to the 'favorable normative valence' of citizenship.[85] As the most visible manifestation of globalisation – non-citizens have an inescapable corporeality, whereas cyberspace, capital flows, imported goods and cross-border phenomena such as climate change are more intangible – the bodies of non-citizens become the site upon which the citizen majority inscribes practices and assertions of sovereignty.[86]

---

[80] Bauböck (2002), 5, 8-9. The language of 'subject' was relied on by the Permanent Court of International Justice to refer to non-citizens in *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom)*, Judgment, PCIJ Series A No. 2 (1924), 12.
[81] David Newman, 'On borders and power: A theoretical framework,' 18(1) *Journal of Borderlands Studies* (2003), 14-15.
[82] With the possible, limited exception of stateless individuals born within a state of which they are denied citizenship.
[83] Bosniak (2006), 4.
[84] Oberoi and Taylor-Nicholson (2013), 170, identifying these three functions as the findings of an expert meeting on the subject.
[85] Bosniak (2017), 317, listing these negative connotations as including 'deficiency, incongruity, danger, exclusion, abjectness,' 'suffering' and 'absence.' See also Yee-Fui Ng, 'Alie(n)ation: The Parched Rights of Non-Citizens in the Oasis of Globalisation,' 1(2) *Journal of Migration and Refugee Issues* (2005), 77.
[86] Benhabib (2020), 82.

The presence of non-citizens therefore poses 'fundamental challenges to the self-understanding' of (nation-)state communities.[87] Bosniak, who examines this challenge at length, contends that the law has responded by constructing what she terms the status of 'alienage' as a 'hybrid' category, situated 'at the nexus of two legal and moral worlds.'[88] This position takes the form of a 'jurisdictional dispute,' between legal equality and immigration control.[89] Inside of the territorial domain, the legal status of non-citizens 'is, in many respects, hardly distinguishable from that of citizens': their territorial presence and personhood makes them subject to the nominally inclusive ethos of citizenship, including, *inter alia*, equal protection of the law.[90] At the same time, and paradoxically, non-citizens are by definition subject to citizenship's 'exclusionary regime,'[91] and '[s]tate border imperatives' often function to defeat or trump the 'general individual rights non-citizens otherwise enjoy.'[92] As Aleinikoff writes in stark terms, 'as long as the deportation power exists, there remains a huge difference between aliens and citizens.'[93]

One major development with respect to the normative position of non-citizens has been the proclamation and progressive codification of international human rights standards since the Second World War. As a result, 'states can no longer be said to be the sole

[87] Benhabib (2004), 126.
[88] Bosniak (2006), 38. The focus of the author's work is on US law.
[89] Ibid, 14, 39, 52-53. Bosniak rephrases this as a question at 39: 'how far does sovereignty reach before it must give way to equality; when, that is, does discrimination against aliens implicate a different kind of government power, subject to far more rigorous constraints?'
[90] Ibid, 34.
[91] Ibid.
[92] Bosniak (2017), 316.
[93] Aleinikoff (1990), 27, note 67.

source of existing positive rights.'[94] International human rights are proclaimed on a genuinely universal basis: everyone, everywhere is a rights-bearer, representing an 'alternative source of rights that transcends the jurisdiction of individual nation-states.'[95] This creates a 'tension, and at times outright contradiction'[96] in a globalised system of (nation-)states between human rights, with its universal, 'context-transcending appeal,' and citizenship status.[97] Whereas citizenship continues to be defended in scholarship as 'the single most important generator of rights,'[98] the influential account postulated by Hannah Arendt in the immediate post-war period, that citizenship amounts to the 'right to have rights,'[99] is no longer accurate.[100] This conflict of norms is conceived by Benhabib as the 'late-modern… permanent tug of war between the vision of the universal and the attachments of the particular.'[101] The rise of human rights, in turn, throws into sharper relief a deeper 'ambiguity about the value of citizenship': is its normative core membership in a political community, or should it be defined more instrumentally as benefits that accrue to the individual?[102] Even under the prototypical model of (nation-)state citizenship, the question as to what citizenship really means remains.

---

[94] Bosniak (2006), 25.
[95] Ibid. See also Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994), 164.
[96] Benhabib (2004), 61.
[97] Ibid, 19, 61.
[98] Hansen (2009), 5.
[99] As advanced in *The Origins of Totalitarianism* (Schocken, 1951), Chapter 9.
[100] Bosniak (2017), 331, basing her conclusion on the fact that territorial presence is sufficient to ground a 'great many core rights' to individuals, independent of their status. Benhabib (2004) also discusses Arendt's work at length, concluding that despite 'great strides' since World War II, Arendt's description is 'not altogether wrong': at 168.
[101] Benhabib (2004),16-17, 21. See also Bosniak (2006), 127, on the acute contest 'between universalism and particularism.'
[102] Discussed in Bauböck (2002), 18.

An additional question, lateral to but outside the scope of this study, concerns the *ethical* as well as *substantive* importance of the (nation-)state. Bosniak puts it bluntly: 'why should national ties matter more than others?'[103] A range of subjective responses to this conundrum are of course possible. Objectively, however, in a world in which 'immigration and multiculturalism… flow into each other,'[104] enmeshed within an 'international legal order of human rights,'[105] the (nation-)state becomes increasingly difficult to justify on a higher level than utilitarianism: in effect, as a cooperative enterprise. Examining the constitutional treatment of non-citizens, Aleinikoff critiques, from both a moral and legal standpoint, a model of citizenship as membership arranged exclusively around insider/outsider status, trenchantly describing this as 'inflicting harm solely to make the non-afflicted feel special.'[106] Even setting ethical concerns aside, the centrality of the sovereign state in the international system has come under unprecedented pressure in the twenty-first century.[107]

Confronted with the tension between citizenship and human rights, Benhabib's proposed solution is not to deny this, but to better mediate norms through 'resituating or reiterating the universal in concrete contexts.'[108] She argues that the distance between citizens and non-citizens can be reduced and made 'fluid and negotiable through democratic

[103] Bosniak (2001), 248.
[104] Benhabib (2004), 210.
[105] David Owen, 'Citizenship and Human Rights,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), 258-259.
[106] Aleinikoff (1990), 28, citing US jurisprudence that has ruled 'desire to harm a politically unpopular group' and irrational prejudice as unconstitutional objectives: ibid, note 69.
[107] Cohen (1999), 246-47, 257, 259; Bosniak (2001), 238; Anne Peters, 'Humanity as the A and Ω of Sovereignty,' 20(3) *The European Journal of International Law* (2009), 530.
[108] Benhabib (2004), 133-34.

iterations.'[109] Proceeding on this basis, Benhabib introduces the concept 'jurisgenerative politics' for 'iterative acts' of 'argument, contestation, revision, and rejection' through which 'guiding norms and principles,' institutions and traditions, are reappropriated and reinterpreted by individuals whose identities differ from the majority.[110] Building upon Cover's definition of 'jurisgenerativity,'[111] she elaborates on 'law's capacity to create a normative universe of meaning that can often escape the provenance of formal lawmaking.'[112] Periodic challenges to, and rearticulations of, legal principles in the public sphere, using the language of human rights, enrich their original meaning, creating space for 'new vocabularies' of justice that embed 'context-transcending validity' in a domestic setting, while potentially exposing fundamental limitations of constitutional and legal traditions.[113]

Cosmopolitan Citizenship as an Alternative to (Nation-)State Citizenship

As explored above, the (nation-)state paradigm of citizenship is beset by normative ambiguities. It has also been subjected to sustained pressure as a result of global developments. It is therefore useful to consider potential alternatives. Cosmopolitanism, which came to prominence in the late eighteenth century, prior to the rise of nationalism and the (nation-)state in the nineteenth century, provides alternative positions on moral,

[109] Ibid; see also 177-178, 212. Cohen (1999) makes a similar point at 251.
[110] Benhabib (2004), 169, 181.
[111] 'The uncontrolled character of meaning exercises a destabilising influence upon power': Robert M. Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,' 97 *Harvard Law Review* (1983), 18.
[112] Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty,' 103(4) *American Political Science Review* (2009), 696.
[113] Ibid; Benhabib (2004), 196-7.

political, economic and cultural aspects of community membership.[114] The cosmopolitan thinker with the most enduring influence has been Immanuel Kant,[115] who introduced three categories of public right: constitutional, international and cosmopolitan.[116] His writings emphasise that each category is an 'essential condition' for a rightful global order.[117] The core of cosmopolitan right is 'hospitality,' defined by Kant as a *right*, rather than its ordinary meaning of charity or goodwill.[118] Hospitality comprises the right of states as well as individuals to request interaction across borders, encompassing diverse activities including travel, migration, intellectual exchange and commercial relations.[119] The interlocutor has the right to refuse the interaction, as long as this would not cause the 'demise' of the individual requesting it.[120] Kant's position anticipates the eventual development of international law on non-citizens: there is a right to 'present oneself' without hostility at the borders of a state, but no general right of entry save for certain exceptional situations, given expression in the modern norm of non-refoulement for vulnerable groups such as refugees.[121] Of equal importance, Kant's theory of cosmopolitan right extends equal juridical standing to individuals as universal bearers of basic rights, independent of their affiliation with any state.[122]

---

[114] Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012) 3-4. Kleingeld attributes the decline of cosmopolitanism, until recently, to the 'hostility and contempt' engendered by nationalist perspectives. Benhabib (2020), meanwhile, writes that 'the regulation of human motility through national borders is quite recent in human history' (at 94).

[115] Kleingeld (2012) situates Kant's work in its historical context of debates with other German and French philosophers.

[116] Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (ed Pauline Kleingeld, trans David L. Colclasure, Yale University Press, 2006 [1795]), 8:358-59; Kleingeld (2012), 73.

[117] Kleingeld (2012), 73.

[118] Kant (2006 [1795]), 8:357; Kleingeld (2012), 76.

[119] Kant (2006 [1795]), 8:358; Kleingeld (2012), 73-76.

[120] Kleingeld (2012), 73.

[121] Kant (2006 [1795]), 8:358; Kleingeld (2012), 73, 76-7. Benhabib (2004) discusses Kant's right of hospitality within this context at 21-29.

[122] Kant (2006 [1795]), 8:349 n, 358-59; Kleingeld (2012), 7, 74-5, 77.

Recent scholarship engages with and adapts Kant's cosmopolitan theory to contemporary conditions. Benhabib, in particular, advances the concept of cosmopolitan citizenship, which begins from the premise that '[t]he notion that the state must be a sovereign totality – bounded, self-sufficient and exercising uniform control over its citizen-subjects – is no longer empirically accurate.'[123] In an interdependent global system, nation-state ties may still objectively be the most prominent (or 'thickest') identity, if only because of the administrative and bureaucratic power of states supporting such an institution, yet communities and relations across borders are too significant to discount.[124] Individuals 'increasingly maintain central identities and commitments that transcend or traverse national boundaries.'[125] Not merely non-citizens, but also dual citizens, members of a diaspora and people with family members overseas, mixed heritage, or other cultural or religious ties that involve a transnational dimension 'lead dual lives,' in the words of Portes.[126] In the contemporary international system, contemplation of 'plural identities and solidarities' among individuals is not reducible to the 'statist' citizen/non-citizen divide; this binarism is inadequate in the face of a 'much more fluid' reality.[127]

[123] Cohen (1999), 257.
[124] Benhabib (2009), 701. The author is here referring specifically to 'relations of justice,' but the point may be extended into other spheres. See also Nancy Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World,' 24(4) *Theory, Culture & Society* (2007) 16; Cohen (1999), 264.
[125] Bosniak (2006), 26.
[126] Alejandro Portes, 'Global Villagers: The Rise of Transnational Communities,' 25 *American Prospect* (1996) 74-77.
[127] Bosniak (2006), 26; Benhabib (2004), 210.

Benhabib conceives of the 'likely' individual in a liberal-democratic culture as a 'creature[ ] with... overlapping attachments to partial communities… caught in circles' that overlap and intersect.[128] She defines her cosmopolitan model of 'disaggregated citizenship' as enabling individuals 'to develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts.'[129] Disaggregated citizenship rights foster a plurality of forms within the state itself, creating 'a network of obligations and imbrications around sovereignty.'[130] This model has the added advantage (from a human rights perspective) that it values the individual, rather than privileging the state.

2.2 Locating the Non-Citizen Within International Human Rights Law

In international human rights law, assessments of the rights of non-citizens from a systematic perspective remain comparatively rare. This may be because, as one author discovered when researching the subject, '[i]n few areas of public international law is there more precedent but less consensus' than that governing the treatment of non-citizens.[131] Three primary titles have been published in this area: a 1984 monograph by Lillich attempted to elucidate the human rights principles applicable to non-citizens based on the text of treaties and international legal jurisprudence. This was followed in 2001 by Tiburcio's comparative study, which examined the implementation of treaty-

[128] Benhabib (2004), 86.
[129] Ibid, 174-175. Bosniak (2006) makes a similar point, from a slightly different theoretical angle, at 29.
[130] Benhabib (2004), 67.
[131] Richard B. Lillich, *The human rights of aliens in contemporary international law* (Manchester University Press, 1984), 1.

level rights of non-citizens in domestic jurisdictions.[132] The most recent contribution is a 2008 book by former UN Special Rapporteur on the rights of non-citizens, David Weissbrodt.[133] Building on a report developed for the Office of the High Commissioner for Human Rights, Weissbrodt's text is weighted towards human rights mechanisms within the UN system. The next chapter examines in detail the substantive content of international human rights applicable to non-citizens, and all three texts are referred to throughout this study. This section limits itself to synthesising the conclusions of the three authors on the position of the non-citizen in international human rights law.

Writing in 1984, Lillich argued that 'the logic of the traditional international law system protecting the rights of aliens' had to 'give way,' and had 'already begun to do so,' in favour of 'direct protection of the rights of individual' non-citizens.[134] This 'poses a clear test of the relevance and enforceability' of international human rights norms, he adds, stating that the rights of non-citizens are therefore 'inextricably linked to the contemporary international human rights law movement.'[135] Lillich's optimistic position was that the pieces of a 'giant… juridical jigsaw puzzle' could be assembled into a comprehensive treaty on the human rights of non-citizens in international law.[136] Tiburcio structures her study according to the character of rights,[137] implicitly appraising

[132] Tiburcio (2001).
[133] Weissbrodt (2008).
[134] Lillich (1984), 2.
[135] Ibid.
[136] Ibid, 3.
[137] The author divides human rights into the following categories: fundamental or non-derogable rights; private or civil rights, including the right to family life and property; social and cultural rights, including the right to work, education and social assistance; economic rights, which she construes as protection of economic activities; political rights; and public rights, covering individual freedoms including expression, religion and movement.

non-citizens comprehensively as a single group. She observes several 'deprivations [of rights] imposed… at the national' level on non-citizens, some contrary to international law patterns and some not,[138] grouping these under three major categories of rights: non-derogable rights that may not be denied under any circumstances (the right to life, freedom from torture, recognition as a person before the law); rights that 'should be granted,' but 'admit limitations' (such as freedom of expression, freedom of movement and social rights) and rights that are not granted under international law (political and economic rights generally).[139] Weissbrodt encourages viewing the human rights of non-citizens as 'a unified domain,' instead of an 'amalgmation' of various 'subgroups.'[140] He writes that non-citizens 'have traditionally seen themselves as separate and their problems as unique,' a trend further encouraged by the existence of human rights treaties categorising discrete groups and aided by various 'advocacy and interest groups' under each regime.[141] He emphasises, however, 'similar goals and common circumstances,' naming racism and xenophobia (encapsulated in catch-all derogatory terms such as 'aliens' or 'foreigners'), economic scapegoating, difficulty realizing economic, social, and cultural rights, challenges in obtaining identity documents, and the difficulty faced by non-citizens in obtaining remedies for human rights violations as among these.[142] Of the three studies, only Weissbrodt proposes concrete reforms to international human rights law. He calls for 'clear, comprehensive standards governing the rights of non-

[138] Tiburcio (2001), xv.
[139] Ibid, 276.
[140] Weissbrodt (2008), 5.
[141] Ibid, 36-37.
[142] Ibid, 17, 36-37.

citizens and States' implementation of these rights,' accompanied by 'a unified movement for the protection of non-citizens.'[143]

2.3 Theoretical Approaches

This chapter has reviewed the major literature on citizenship, how it perceives the 'other' (the non-citizen being the archetypal example in this case), and the nexus between citizenship and human rights. It also seeks to synthesise a much narrower source of literature on the position of non-citizens within the discipline of international human rights law itself. Informed by the principles outlined above, the following theoretical parameters comprise the framework of this study:

- First, it acknowledges the reality of state borders, and the continuing dominance of the nation-state as the *legal* form through which international law is expressed.
- Directly related to the above proposition, it endorses the position that nationality, as formalised through citizenship, is not determinative of identity but one of several 'overlapping attachments' that may be held by an individual,[144] albeit one reinforced through bureaucratic practices. As outlined by the model of cosmopolitan citizenship, it affirms that individuals are capable of holding plural identities, each of them equally valid, and as a necessary consequence rejects binary approaches, according to which one is either a citizen or a non-citizen.
- It proceeds from the cosmopolitan position that the individual is the ultimate unit of moral concern, and the central site of dignity. The study adopts the concept of

[143] Ibid, 37.
[144] Benhabib (2004), 86.

dignity elaborated by Iglesias and Forst: that the fact of being a human is a 'matter of basic recognition' that cannot be subjected to, or qualified by, further grounds or proofs.[145] This basic recognition requires that every human being be accorded respect as an autonomous, normative agent with equal standing.[146] This premise, in turn, grounds the right to justification 'for any social or political structure or law that claims to be binding upon' an individual as the moral basis for human rights.[147] Iglesias further proposes a distinction between human beings, as capturing 'our universal and shared humanity – *what we are*,' and human persons, as autonomous actors with agency, 'inner lives and individual stories – *who we are*.'[148] The term 'personhood' is used throughout this study in this latter sense of 'human person,' to emphasise the individuality of non-citizens.

- It seeks to engage with scholars who grapple with the citizenship-human rights nexus, and the position of non-citizens on this spectrum, while simultaneously critiquing them for not going far enough in taking into account real-world conditions in more diverse forms. As a primary example, much of the theorising by Benhabib and Bosniak assumes a liberal democratic government. This author argues that approach is too exclusionary.[149] In light of the above principle that the individual is

[145] Teresa Iglesias, 'Bedrock Truths and the Dignity of the Individual,' 4(1) *Logos: A Journal of Catholic Thought and Culture* (2001), 114-15.
[146] Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,' 120 *Ethics* (2010) 719-724.
[147] Ibid, 712, 719.
[148] Iglesias (2001), 118. Emphasis in original.
[149] For example, the Economist reported that under ten percent of the world's population lives in a full democracy, while the Varieties of Democracy Institute finds that 70% of the world population is living in an autocracy, up from 49% in 2011: 'Global democracy has a very bad year,' *The Economist* (2 February 2021), available at https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year (accessed 5 May 2022); Vanessa A. Boese et al, *Autocratization Changing Nature? Democracy Report 2022*, Varieties of Democracy Institute (V-Dem) (2022), 6. Reserving arguments about whether democracy is a human right, this study contends that upholding the content of international human rights law is a moral

the central unit of moral concern, as well as the normativity of international human rights law, this study applies (or extends, where necessary) their work to polities in general, whether democratic or otherwise.

- It follows previous studies in this area in appraising the human rights of non-citizens as a single overall group, albeit containing variations and separate legal regimes within.
- It endorses Bosniak's position that susceptibility to deportation structures the experiences of non-citizens more than any other single factor.[150] Deportation is the most acute expression of state power, and the most likely to negatively impact on the ability of non-citizens to actually *claim* human rights.
- Finally, the study seeks to build on previous scholarship by advancing a concept of 'rights claimability.' In human rights literature, primarily the work of Onora O'Neill,[151] the 'claimability condition' is presented as a theoretical device to examine the validity of human rights as a claim or entitlement against others. According to this line of argument, unless a human right assigns a corresponding obligation that allows the rights holder to identify the duty-bearer to whom they may address their claim, human rights are indeterminate and perhaps incoherent.[152] As this study

necessity, even if a (nation-)state is not democratic. To do otherwise would be to disavow the universality of human rights.

[150] Bosniak (2017) describes this as 'common subjection to the state's border authority' on the part of non-citizens (at 333). On this point, see also Lillich (1984), 122, noting 'the chilling effect of the State's far-reaching sovereign powers over… admission, stay and expulsion.' The author does concede that 'the trend has been towards greater protection,' yet adds the qualifier that 'the extent of such protection varies greatly, leaving aliens in many States inadequately protected, both substantively and procedurally.'

[151] *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996).

[152] Ibid, 129; see also Adam Etinson, 'Human Rights, Claimability and the Uses of Abstraction,' 25(4) *Utilitas* (2013), 465; Cristián Rettig, 'The Claimability Condition: Rights as Action-Guiding Standards,' 51(2) *Journal of Social Philosophy* (2020), 322.

engages with human rights in their legal sense – that is, it takes the core human rights treaties as establishing binding and normative provisions, as defined in section 1.3 – the discussion of 'claimability' proceeds from a necessarily different premise. Rights claimability, in this context, focuses on the ability of rights holders to advocate for and meaningfully access human rights. The two constituent elements of *advocacy* and *access* mark it as distinct from legal entitlement, although the formulation generally presumes that entitlement to a human right, through recognition in a universal human rights treaty, will precede advocacy and access, as these are construed as actions taken towards realisation of the entitlement. Claim-making by non-citizens incorporates Benhabib's notion of 'democratic iterations,'[153] as processes of contestation with the purpose of extending the normative coverage of human rights, as well as Forst's right to justification. The application of both these ideas in an augmented public sphere[154] that traverses domestic jurisdictions and international mechanisms generates a vocabulary that facilitates individual claim-making, as discussed further in chapter five. Importantly, the study does not hold that rights claimability is limited to the human rights of non-citizens, although it does contend that the concept is particularly applicable to the human rights challenges faced by non-citizens.

[153] Benhabib (2004), 168-69.

[154] The concept of the public sphere was first articulated in relation to the state by Jürgen Habermas in *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity, 1989 [1962]). On its transnational application, see Fraser (2007).

Chapter 3: International Human Rights Law and Non-Citizens

3.1 Synthesis of Treaty Law Provisions on Non-Citizens

The International Bill of Rights

In international human rights law, the Universal Declaration of Human Rights (UDHR), together with the International Covenant on Civil and Political Rights (ICCPR), including its two optional protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) constitute the core texts, commonly known as the International Bill of Rights. As the foundational document for contemporary international human rights law, the UDHR holds a normative importance that transcends its initially non-binding status. The two binding covenants, the ICCPR and ICESCR, augment the tenets of the UDHR and are among the most universally accepted treaties in international law, with 173 and 171 States parties, respectively, as of May 2022.[155]

The core texts establish the universal, panhuman scope of international human rights law. The Declaration provides, in the first words of its preamble:

[155] Within international human rights law, the two treaties are surpassed in universality by the Convention on the Rights of the Child (196 ratifications), the Convention on the Elimination of All Forms of Discrimination Against Women (189 ratifications), and the International Convention on the Elimination of All Forms of Racial Discrimination (182 ratifications). The Convention Against Torture equals the ICCPR, with 173 ratifications. OHCHR, 'Status of Ratification' (2022), available at https://indicators.ohchr.org/ (accessed 5 May 2022).

> [R]ecognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world.[156]

The rights delineated in the three texts share a similarly cosmopolitan conception: the majority of articles therein stipulate that they apply to 'everyone' or 'anyone,' depending on the character of the right. Additionally, the ICCPR commits states to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.'[157] Similar, albeit slightly different, formulations are found in the UDHR[158] and the ICESCR.[159]

All three texts enshrine substantive provisions on non-discrimination. The Declaration provides:

> *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*.[160]

[156] UDHR, preamble para 1. Emphasis added.
[157] Article 2(1).
[158] Paragraph 10 of UDHR's preface commits 'all peoples and all nations' to 'secure [the] universal and effective recognition and observance' of human rights 'both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.' Read in conjunction with Article 2 of the Declaration, the intent was presumably to assert the equal applicability of the Declaration to colonies, mandated territories and dominions as well as independent states, in line with the prevailing historical circumstances at the time.
[159] Article 2(1) establishes the principle of progressive realisation, whereby states undertake 'to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.'
[160] UDHR Article 2. Emphasis added.

The two Covenants mirror this provision, assigning responsibility to states parties 'to respect and to ensure' (ICCPR) or 'guarantee' (ICESCR) all enumerated rights without distinction 'of any kind,' including 'national or social origin' or any 'other status.'[161] The Declaration and ICCPR further recognise the equality of all before the law and entitlement to 'equal protection against discrimination on any ground,' including 'national or social origin' or any 'other status.'[162] This, in turn, is reinforced by the right to an 'effective remedy' for violations, presumptively at the national level.[163]

Finally, when non-citizens explicitly appear in the three texts, they do so only in narrow contexts. Non-citizens are not expressly mentioned in the Declaration. Within the covenants, ICCPR includes one article applicable only to non-citizens: Article 13 protects 'alien[s] lawfully in the territory of a State Party' from arbitrary expulsion. Rights to participate in public affairs, vote and have access to public service, on the other hand, are exclusively reserved to 'citizens' by Article 25. Non-citizens are mentioned only once in ICESCR; the non-discrimination clause is qualified by the following provision: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'[164]

[161] ICCPR Article 2(1); ICESCR Article 2(2). ICESCR adopts the phrase 'without *discrimination* of any kind.'
[162] ICCPR Article 26; the UDHR equivalent is Article 7.
[163] The UDHR recognises 'the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted… by the constitution or by law': Article 8. The equivalent provision in ICCPR prioritises 'an effective remedy,' as 'determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State': Article 2(3)(a) and (b). This would, in contrast to UDHR, appear to allow for remedies determined outside of a national system.
[164] Article 2(3).

Three themes emerge from the textual evidence of the International Bill of Rights. The first is ostensible universality: their scope encompasses all human beings, ipso facto including non-citizens. Second is the inclusion of substantive provisions pertaining to non-discrimination and equality, of which non-citizens may presumably avail themselves, on the grounds of either 'national… origin' or, alternatively, 'other status.' Third, from the perspective of non-citizens specifically, they have the right to movement – both within a state territory, provided that their presence is lawful,[165] and internationally, in the freedom to leave any country, including their own,[166] as well as limited protection against expulsion.[167] They do not, however, have the right to *enter* a state, except for their own.[168] They have the right to apply for and 'enjoy' asylum,[169] but not to be granted it; they have a right to hold and change their nationality,[170] but there are no corresponding obligations on states to provide citizenship. The failure to resolve these contradictions would perpetuate the presence of 'floating groups of oppressed and miserable persons' that is perhaps the most acute expression of non-citizenship.[171]

[165] ICCPR, Article 12(1) ('Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement …'); UDHR, Article 13(1) ('Everyone has the right to freedom of movement and residence within the borders of each state.')
[166] ICCPR, Article 12(2) ('Everyone shall be free to leave any country, including [their] own.'); UDHR, Article 13(2) ('Everyone has the right to leave any country, including [their] own, and to return to [their] country.')
[167] ICCPR, Article 13.
[168] ICCPR, Article 12(4) ('No one shall be arbitrarily deprived of the right to enter [their] own country.'); UDHR, Article 13(2).
[169] UDHR, Article 14.
[170] UDHR, Article 15. ICCPR provides only that 'Every *child* has the right to acquire a nationality' (Article 24(3), emphasis added).
[171] Lillich (1984), 63.

The Disaggregated Non-Citizen: Other International Human Rights Law

A number of other human rights treaties address the rights of non-citizens. In chronological order, these are:

- The 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to the Status of Refugees[172]
- The 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness[173]
- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination[174]
- The 1989 Convention on the Rights of the Child[175]
- The International Labour Organization (ILO) conventions on migrant workers,[176] which were consolidated into:
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[177]

[172] *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention'); *Protocol relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Refugee Protocol').
[173] *Convention relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('Statelessness Convention 1954'); *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('Statelessness Convention 1961').
[174] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD').
[175] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').
[176] *Migration for Employment Convention (Revised)*, July 1, 1949, ILO No. 97, 1616 UNTS 120 (entered into force 22 January 1952); *Migrant Workers (Supplementary Provisions) Convention*, June 24, 1975, ILO No. 143, 17426 UNTS 1120 (entered into force 9 December 1978).
[177] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) ('ICMW').

These treaties, as indicated by their titles, are applicable only to certain groups of non-citizens. Nevertheless, through the legal creation of separate categories of non-citizens – particularly so when accompanied by the attribution of specific rights to those – individual instruments affect the operation of the international human rights regime as a whole. A further, related question is whether the disaggregation of non-citizens into various legal groups, while intended to protect the most vulnerable, has the unintended effect of establishing or exacerbating hierarchies of rights. Accordingly, this section briefly examines the definition of each group of non-citizens recognised by international human rights law, and the relationship between that categorisation and delimitation of rights.

The 1951 Refugee Convention defines a refugee as any person who:

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[178]

The 1951 Convention limits this definition temporally to events occurring before 1 January 1951.[179] A subsequent Protocol, concluded in 1967, removes temporal and

[178] Refugee Convention, Article 1(A)(2).
[179] Ibid, Article 1(B)(1).

geographic restrictions.[180] Refugees recognised under this definition are entitled to certain rights enumerated in the Convention. These provisions divide evenly: on the one hand, refugees are afforded treatment 'not less favourable than that accorded to *aliens generally*': this condition applies to property rights,[181] the right of association,[182] employment,[183] housing,[184] education above elementary level[185] and freedom of movement.[186] On the other hand, several provisions explicitly place refugees on an equal footing with citizens: these include, inter alia, eligibility for social welfare,[187] access to courts and legal assistance,[188] elementary education,[189] freedom to practice religion[190] and a range of exemptions from legislative reciprocity,[191] labour market restrictions[192] and separate or higher taxes.[193] Refugees are, additionally, exempt from penalisation for 'illegal entry or presence'[194] and protected by an absolute prohibition of non-

[180] Refugee Protocol, Article 1(2)-(3).
[181] Refugee Convention, Article 13.
[182] Ibid, Article 15.
[183] Ibid, Articles 17-19.
[184] Ibid, Article 21.
[185] Ibid, Article 22(2).
[186] Ibid, Article 26.
[187] Ibid, Article 24. See also Article 23, on entitlement to public relief and assistance, and Article 20, on access to products subject to rationing.
[188] Ibid, Article 16.
[189] Ibid, Article 22(1).
[190] Ibid, Article 4.
[191] Subject to a period of three years' residence. Ibid, Article 7(2).
[192] Subject to meeting one of three conditions, among them three years' residence. Ibid, Article 17(2).
[193] Ibid, Article 29.
[194] '[P]rovided they present themselves without delay to the authorities and show good cause for their illegal entry or presence': ibid, Article 31.

refoulement,[195] combined with a general prohibition on expulsion.[196] States are obliged to expedite naturalisation proceedings for recognised refugees.[197]

Statelessness is defined by the 1954 Convention relating to the Status of Stateless Persons as the status attaching to a person who 'is not considered as a national by any State under the operation of its law.'[198] Stateless persons are therefore by definition non-citizens. Befitting their origins in the same multilateral conference,[199] the rights provisions of the 1954 Convention largely mirror the Refugee Convention *mutatis mutandis*, with exceptions of the prohibition on refoulement and non-penalisation of 'illegal entry or presence.' As with refugees, states are obligated to expedite naturalisation proceedings[200] for stateless populations and refrain from expulsion of lawfully present individuals.[201] The 1954 Convention is accompanied by the 1961 Convention on the Reduction of Statelessness, which is directed towards states, in particular the standards found in nationality laws. Whereas the 1954 Convention enumerates rights for the individual, the 1961 Convention is intended to establish safeguards against loss of nationality, where this would otherwise result in statelessness.

[195] Defined as the expulsion or return of a refugee to a territory where their 'life or freedom would be threatened': ibid, Article 33.
[196] Except on grounds of 'national security or public order': ibid, Article 32. Even in this case, the state is required to permit 'a reasonable period' for the refugee 'to seek legal admission into another country': Article 32(3).
[197] Ibid, Article 34.
[198] Statelessness Convention 1954, Article 1(1).
[199] 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,' 25 July 1951, 189 UNTS 137.
[200] Statelessness Convention 1954, Article 32.
[201] '[S]ave on grounds of national security or public order,' in which case the individual must be allowed 'a reasonable period… to seek legal admission into another country': ibid, Article 31.

Refugees and statelessness are closely linked in practice; indeed, the United Nations High Commissioner for Refugees is the designated agency to identify, prevent and reduce statelessness and protect stateless persons.[202] Provisions that explicitly assert equality between citizens and non-citizens, require expedited naturalisation and constrain expulsions, along with (in the case of refugees) prohibit refoulement and penalties for illegal entry or presence are unique to this area of law; they do not appear in any other conventions pertinent to non-citizens.

The opening provision of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination defines 'racial discrimination' as:

> … any *distinction, exclusion, restriction or preference based on* race, colour, descent, or *national* or ethnic *origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[203]

However, this inclusive definition is immediately qualified to exclude 'distinctions, exclusions, restrictions or preferences' made between citizens and non-citizens from its scope.[204]

The 1989 Convention on the Rights of the Child applies specifically to children, defined

[202] United Nations General Assembly, 'Office of the United Nations High Commissioner for Refugees,' A/RES/50/152 (9 February 1996).
[203] ICERD, Article 1(1). Emphasis added.
[204] Ibid, Article 1(2).

as individuals below the age of eighteen years,[205] without 'discrimination of any kind' based on the 'race, colour… language… national, ethnic or social origin… birth or other status' of both the child *and* their parents or legal guardian/s.[206] The Convention contemplates non-citizens in several clauses, including a reaffirmation of the right of both child and parents to 'leave any country' and 'to enter their own country,' in the context of family reunions;[207] protection for children who are refugees or seeking refugee status;[208] and commitments on behalf of states to combat human trafficking and illicit transfer of children.[209]

Finally, the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines migrant workers as any person 'engaged... in a remunerated activity in a State of which he or she is not a national.'[210] With certain exceptions,[211] the Convention therefore presumptively applies to most non-citizens employed in any capacity in a state outside their nationality. A non-discrimination clause prohibits 'distinction[s] of any kind,' including as to 'race, colour, language… national, ethnic or social origin… birth or other status' and 'nationality,' making it the only Convention to enumerate this ground.[212] The preamble emphasises the 'importance and

[205] Unless 'under the law applicable to the child, majority is attained earlier': CRC, Article 1.
[206] Ibid, Article 2(1).
[207] Ibid, Article 10.
[208] Ibid, Article 22. However, this article does not explicitly extend all Convention rights to refugees and refugee applicants; rather, it provides that they shall 'receive *appropriate protection* and humanitarian assistance in the enjoyment of *applicable rights* set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties' (emphasis added). This would appear to permit states to interpret the scope of 'appropriate protection' and 'applicable rights.'
[209] Ibid, Articles 11, 35.
[210] ICMW, Article 2(1). Article 2(2) elaborates sub-categories within this definition.
[211] Article 3 excludes diplomats and government officials, investors, refugees, stateless persons, students, trainees, 'seafarers and workers on an offshore installation' from the scope of the Convention.
[212] Ibid, Article 7 (emphasis added). See also Article 1(1).

extent of the migration phenomenon,' the 'vulnerability' of migrant workers and members of their families, a failure to 'sufficiently' recognise their rights and the consequent 'need to bring about [their] international protection… in a comprehensive convention which could be applied universally.'[213]

An important distinction embedded throughout the Convention is between regular and irregular migration.[214] The text is divided into separate parts, one applicable to all migrant workers and a shorter section of 'other rights' for those who are 'documented or in a regular situation.' This makes it the only convention-level instrument to incorporate human rights protections, albeit limited, for irregular migrants. As a remedy to insufficient recognition of migrant workers' human rights, the Convention proposes the 'granting [of] certain additional rights to migrant workers and members of their families in a regular situation [to] encourage… respect and compl[iance]' with the law.[215] This manifests for the most part as an overlap with the provisions of the International Bill of Rights: equality between migrant workers and citizens is proclaimed with respect to freedom of movement,[216] freedom of association,[217] education[218] and social welfare.[219] A limited number of (cautiously worded) provisions are directed towards the particular

[213] Ibid, preamble.
[214] The Convention adopts the terminology 'documented or in a regular situation' and 'non-documented or in an irregular situation': ibid, Article 5.
[215] Ibid, preamble.
[216] Ibid, Article 39.
[217] Ibid, Article 40.
[218] Ibid, Article 43(1)(a)-(c) (applicable to migrant workers); mirrored in Article 45(1)(a), (b) for members of their families.
[219] Ibid, Articles 43(1)(d) (access to housing for migrant workers); 43(1)(e) (access to social and health services for migrant workers); 45(1)(c) (access to social and health services for family members); 54(1) (workplace protections and access to unemployment benefits).

situation of migrant workers: for example, regarding transfer and taxation of renumeration,[220] authorisation of temporary absences,[221] and community participation.[222] Several clauses offer limited protection without bestowing rights: the prohibition against arbitrary expulsion is coupled with a proviso that 'humanitarian considerations' and the duration of residence should also be taken into account;[223] favourable consideration for family members to remain in the event of death of a migrant worker or marriage dissolution;[224] and political rights, which 'may [be] enjoy[ed]… if [the] State, in the exercise of its sovereignty, grants [migrant workers] such rights.'[225]

Irregular migrants, by contrast, are ascribed minimum protections under the Convention. Within this category are the right to life,[226] equality before the law,[227] equal working conditions[228] and emergency medical care.[229] Irregular migrants are also covered by procedural guarantees against expulsion,[230] and subject to separate confinement from those convicted of crimes 'in so far as practicable.'[231] Crucially, these provisions interact with a separate section of the Convention directed towards states parties. Despite its title,

[220] Ibid, Articles 46-48.
[221] 'States of employment shall make every effort to authorize… [temporary absences] without effect upon… authorization to stay or to work,' taking into account 'the special needs and obligations of migrant workers and members of their families': ibid, Article 38.
[222] States are required to 'facilitate… consultation or participation' of migrant workers in local community decisions,' and to 'consider' establishing 'procedures or institutions' representative of the 'special needs, aspirations and obligations' of migrant workers and their families: ibid, Article 42.
[223] Ibid, Article 56.
[224] Ibid, Article 50.
[225] Ibid, Article 42(3).
[226] Ibid, Article 9.
[227] Ibid, Articles 18, 24.
[228] Ibid, Article 25.
[229] Ibid, Article 28.
[230] Ibid, Article 22.
[231] Ibid, Article 17(3).

'promotion of sound, equitable, humane and lawful conditions in connection with international migration,' one of the purposes of this section is to foster collaboration 'to eliminate employment… of migrant workers in an irregular situation.'[232] The relevant provision provides:

> *States Parties shall*, when there are migrant workers and members of their families within their territory in an irregular situation, *take appropriate measures to ensure that such a situation does not persist*.[233]

This wording allows states parties wide discretion to take action, including punitive, against irregular migrants. There is no obligation to regularise irregular migrants, only a proviso that if states 'consider the possibility of regulari[sation],' they shall take into 'appropriate account' the circumstances of entry, duration of stay and 'other relevant considerations, in particular… their family situation.'[234]

An additional consideration concerning the Migrant Workers Convention is its low uptake by states. With fifty-six parties,[235] the Convention is by far the least ratified of all the core human rights conventions. Furthermore, as not a single destination state has ratified the text, there is a marked divide between developed and developing states.

This section has outlined the formal position of non-citizens in international human rights law as it presently stands. Beyond the protection of the International Bill of Rights,

[232] Ibid, Article 68.
[233] Ibid, Article 69(1). Emphasis added.
[234] Ibid, Article 69(2).
[235] As of February 2022: OHCHR, 'Status of Ratification' (2022), available at https://indicators.ohchr.org/ (accessed 28 February 2022).

specific instruments have disaggregated non-citizens into separate categories, primarily refugees, stateless persons and migrant workers, creating separate legal statuses and additional rights that complicate a general, non-citizen identity. The following section, in turn, examines the evolution of the discipline. Its purpose is to seek explanations for the reasons that international human rights law has assumed its existing form, identify continuities, and show how, despite a normatively different landscape post-World War II, the singular position of non-citizens continues to elude the reach of international human rights law.

3.2 Evolution of 'Non-Citizen' in International Law and International Human Rights Law

Pre-International Human Rights Law

The conundrum of non-citizens predates the advent of international human rights law. Attempts to accommodate non-citizens within a system of inter-state relations has challenged international lawyers for generations. In classical international law, non-citizens are subsumed into their (nation-)state, producing the fiction that an injury inflicted upon a non-citizen was equivalent to an injury to the state itself.[236] An alleged wrongful act – entailing, in international law parlance, state responsibility – entitles a state to exercise diplomatic protection on behalf of its citizen/s against another state. This doctrine diminished the individual by excluding their ability to make direct claims, while reinforcing the 'rights and duties' of states by extending to them the discretion to act (or

[236] The paradigmatic statement of this classical doctrine is found in *Mavrommatis* (1924), 12, describing state action as 'asserting its own rights' through protection of its 'subjects;' see also the discussion in Lillich (1984), 11-12.

to decline to do so).[237] This system was open to abuse and was associated, both historically and in contemporary scholarship, with nineteenth century Western colonialism.[238] Nonetheless, this system was the closest analogy in classical international law to international human rights law,[239] and the vast amount of case law it produced on 'treatment of aliens' has provided a legacy that informed the subsequent development of both state responsibility and human rights.[240]

Reactions to the abuse of diplomatic protection triggered the first attempts, in the early 1900s, to codify the doctrine vis-à-vis non-citizens. This process was led by Latin American states. The first of these instruments was the 1902 Convention Relative to the Rights of Aliens, which provided that '[a]liens shall enjoy all civil rights pertaining to citizens,' and accordingly that states would 'not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.'[241] The Convention on [the] Status of

[237] Emer de Vattel's seminal work, for example, declares that 'No individual, though ever so free and independent, can be placed in competition with a sovereign; this would be putting a single person upon an equality with an united multitude of his equals': *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008 [1758]) Book II, Chapter III, s 35. On the 'unrivalled' authority of Vattel's 'strictly inter-state perspective' of international law between the eighteenth and early twentieth centuries, see Emmanuelle Jouannet, 'Emer de Vattel (1714-1767),' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1118-19. On the centrality of the state in this system, see Lillich (1984), 9, 11-12; Peters (2009), 525 (although the position is overstated as an 'obligation' on behalf of the state of nationality to protect the individual non-citizen).

[238] Lillich (1984), 14-5.

[239] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2010 edition), 58-59.

[240] Ibid, 84; Lillich (1984), p 13.

[241] *Convention Relative to the Rights of Aliens* (29 January 1902), 32 OASTS 58, Articles 1-2; text accessible in International Law Commission, *Yearbook of the International Law Commission, Vol. II* (United Nations, 1956), 226.

Aliens followed in 1928, stipulating that states 'should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment,' excluding 'political activities.'[242] Notwithstanding advocacy by regional states to incorporate these treaties into the progressive development of international law,[243] acceptance was confined to Latin America. The conventions created no new obligations for states; their essential purpose was to foreclose the exercise of diplomatic protection. Finally, the titles of the 1902 and 1928 conventions are themselves misleading, as neither was conceived with what would now be described as a human rights perspective; rather, they were intended to regulate state responsibility.

The geopolitical implications of World War I induced a number of shifts in international law. The primary legacies of the Paris Peace Conference were limited recognition of a right to self-determination[244] and a new, treaty-based regime for protection of the rights of minorities, both under the auspices of the League of Nations. Both these innovations would now be described as collective rights, evincing a transition away from the erstwhile state-to-state model of international law. Also noteworthy is that a provision on

[242] *Convention on [the] Status of Aliens* (20 February 1928), 132 LNTS 301, Articles 5, 7; text accessible in 23 *American Journal of International Law Special Supplement* (1929), 234-35.
[243] Most notable of these is in the *Convention on Rights and Duties of States* (26 December 1933), 165 LNTS 19 ('Montevideo Convention'), Article 9 of which provides in part: 'Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.' See also 'Conclusions of a sub-committee, communicated to various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law' (29 January 1926), C.196.M.70.1927.V, 104; cited in 23 *American Journal of International Law Special Supplement* (1929) 219-20.
[244] Jörg Fisch, 'Peoples and Nations,' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 41-42. Fisch notes that '[n]o colonies with a non-white population gained real independence in the peace treaties of 1918-23.'

free movement among member states of the League of Nations was proposed for inclusion in the Treaty of Versailles, yet this was vetoed by the Australian government.[245] Parallels exist between the position of individuals under the League of Nations system and that of present-day non-citizens: as documented by Arendt during the period, the disintegration of multinational and multiethnic empires in Europe resulted in 'extensive use of denaturalization… to deal with unwanted minorities and refugees.'[246] The minority treaties were intended to provide a measure of protection to these populations, by stipulating that the treatment of 'persons belonging to racial, linguistic or religious minorities' would be a matter of international concern 'placed under the guarantee of the League of Nations.'[247] The system did technically allow individuals to submit communications on behalf of a minority group to the League Council for review by member states, although records show significant uncertainty about how this should work in practice. Poland and Czechoslovakia complained about publicization of petitions, successfully arguing that circulation should initially be restricted and that the state concerned should be given the opportunity to express objections.[248]

[245] Gillian Triggs, 'Hotung Fellowship Public Lecture 2016' (6 April 2016), available at https://humanrights.gov.au/about/news/speeches/hotung-fellowship-public-lecture-2016 (accessed 5 May 2022). During this period, Australia maintained laws designed to prevent the entry of non-white peoples.
[246] Cited in Benhabib (2004), 71.
[247] 'The Guarantee of the League of Nations in Respect of the Minorities Clauses of Certain Treaties,' Report presented to the Council of the League of Nations by the Italian Representative, M. Tittoni (22 October 1920), in League of Nations, *Protection of Linguistic, Racial or Religious Minorities by the League of Nations*, C.24.M.18.1929.1 (January 1929), 9-10. This provision, replicated in subsequent treaties, was initially proclaimed in Article 12 of the *Minorities Treaty between the Principal Allied and Associated Powers and Poland*, signed at Versailles, 28 June 1919.
[248] Letter from the Polish Representative to the League of Nations to the Secretary-General, 3 June 1921, in League of Nations (1929), 14-15; Letter from the Ministry of Foreign Affairs of the Czechoslovak Republic to the Secretary-General, 4 June 1921, in ibid, 13-14; see also 'Resolution Adopted by the Council on September 5th, 1923,' in League of Nations (1929), 7-8.

A significant shortcoming of the interwar mechanisms was their lack of universality. Minority treaties were only applicable to defeated states, not to victors of the conflict. The availability of remedies for mistreatment of minority populations was curtailed by a range of factors, among them increasing political tension throughout the 1930s, lack of willingness to enforce the treaty guarantees and a lack of faith on the part of minorities to bring their claims before the League of Nations.[249] The geographical remit of the system was limited to Europe, thereby excluding scrutiny of practices in colonial territories. Finally, the collective design of the treaties was co-opted by Nazi Germany in support of its irredentist claims. The failure of the collective system of minority rights led to advocacy for reform during World War II.[250] Czech president in exile Edvard Benes advocated for the wholesale termination of the minority rights regime in favour of 'human democratic rights' guaranteed at the international level.[251] He did, however, call for a right of emigration, on the dubious grounds that it would allow minorities to depart 'a foreign state' and 'unite with their own people.'[252] Allied powers, especially the US and UK, shifted lexically in this period towards describing rights that previously belonged to citizens, men, or minorities as universal 'human rights.'[253] The interwar

[249] Mark Mazower, 'The Strange Triumph of Human Rights, 1933-1950,' 47(2) *The Historical Journal* (2004), 382. Even as early as 1920, the British delegate, Lord Balfour, wondered if it would be possible for the League to abandon its guarantee of minorities: 'Extract from the Minutes of the Tenth Session of the Council' (22 October 1920), in League of Nations (1929), 9.
[250] See for example Joseph B. Schechtman, *Postwar Population Transfers in Europe, 1945-1955* (University of Pennsylvania Press, 1955), 3: 'Some students find explanations and extenuating circumstances for the ineffectual operations of these [minority] treaties; nobody, however, has tried to challenge the very fact of failure;' Mazower (2004), 387: '[T]he considerable wartime discussion of the way minority rights had worked under the League tended to start out from the premise that the system as a whole had failed.'
[251] Eduard Beneš, 'The Organization of Postwar Europe,' 20(2) *Foreign Affairs* (1942) 239, 241.
[252] Ibid, 239.
[253] Mazower (2004), 385-86.

period therefore furnished the context in which an individual-centred international human rights law developed.

A further, near contemporaneous development during the interwar era came through the negotiation of agreements regulating the rights of refugees. Viewed collectively, these agreements are subject to similar limitations as the minority rights regime: their focus was limited to Europe; they were developed ad hoc to respond to specific crises; and state adherence was low.[254] Nonetheless, within the texts of the agreements can be seen the inception of the eventual universal regime of refugee law. Initial activity in this area came in the form of a 1922 'arrangement' on certificates of identity to Russian refugees. In it, states parties agreed on adoption and issuance of a standardised certificate of identity.[255] This was followed, in 1928, by an 'agreement' premised on the necessity of 'defin[ing] more clearly the *legal status* of Russian and Armenian refugees.'[256] Although this instrument contains a list of provisions regulating the status of refugees in their host territory, these were phrased as mere recommendations.[257] Subsequent conventions of 1933[258] and 1938[259] anticipate the form of the 1951 Refugee Convention; in addition to comprising binding undertakings on states, they also extend rights to refugees

[254] Indicatively, the 1922 Arrangement had sixteen parties; the 1933 Convention only eight.
[255] *Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees*, 5 July 1922, XIII LNTS 237. Further arrangements on identity certificates were concluded on 31 May 1924 and 12 May 1926.
[256] *Arrangement relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, LXXXIX LNTS 53, preamble. Emphasis added.
[257] Each paragraph commences with the phrase, 'It is recommended that…'
[258] *Convention relating to the International Status of Refugees*, 28 October 1933, CLIX LNTS 199. The name of this Convention is misleading, as it applies only to 'Russian, Armenian and assimilated refugees': Article 1.
[259] *Convention concerning the Status of Refugees coming from Germany*, 10 February 1938, CXCII LNTS 59.

themselves, through making them the subject of multiple provisions.[260] This study argues that these agreements, collectively, represent the first time non-citizens were elevated to the status of subjecthood in international law, creating international legal obligations for states.

A review of these mechanisms reveals the ways in which international law relating to the status of non-citizens was shaped by, and subordinate to, the force of historical and political events. However, these legal measures also prepared the groundwork for the emergence of international human rights law, if only through a process of elimination: the doctrine witnessed a shift from diplomatic protection, an expression of classical international law, to an abortive recognition of collective rights for minorities, to tentative foregrounding of the individual, through the urgency of refugee challenges. World War II was to demonstrate that only a universal, individual-centred paradigm would be viable going forward. This paradigm of human rights is described by one author as 'revisionist appurtenances of a global political order composed of independent states;'[261] its implicit promise is to humanise international law, perhaps even to rescue a state-centric international order from itself.[262]

[260] Among other rights, the 1933 Convention provides in Article 6 that 'Refugees *shall have*… free and ready access to the courts of law' (emphasis added), while the 1938 Convention stipulates in Article 5(2) that 'refugees who have been authorised to reside [within a state party's territory] *may not be subjected* by the authorities *to measures of expulsion* or recondition [*sic*] unless such measures are dictated by reasons of national security or public order' (emphasis added).
[261] Beitz (2009), 197.
[262] On the messianic aspects of human rights, see Eleanor Roosevelt, 'The Promise of Human Rights,' 26(3) *Foreign Affairs* (1948) 470-77; Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights,' 42(1) *Harvard International Law Journal* (2001) 201-246.

The Genesis of Human Rights: Development of the UDHR

The UDHR has a special, disproportionate influence as the foundational text of international human rights law. The Declaration was developed subsequent to explicit recognition of human rights in the wartime Declaration of the United Nations and the UN Charter, which describes 'promoting and encouraging respect for human rights' as one of the purposes of the United Nations.[263] A classic statement describing the context of its drafting, by a committee of individuals representing various regions, cultures, languages and polities, was related by the French delegate, philosopher Jacques Maritain: 'We agree about the rights *but on condition that no one asks us why*.'[264] As detailed in Section 3.1 above, the Declaration makes no distinction between citizens and non-citizens, terms that are not employed in the text. Its preamble upholds the new universality,[265] stipulating a purpose to secure 'universal and effective recognition and observance.' The *travaux préparatoires*, however, makes clear that non-citizens (referred to by the contemporary epithet of 'aliens') were a subject of discussion during the negotiations. Drafting was an iterative, comparative process, taking as a starting point the rights and duties recognised in national constitutions.[266] The constitutional paradigm, however, tended to delimit rights and duties exclusively for the benefits of citizens: that is, individuals in a pre-

[263] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 1(3). In the Declaration by United Nations (1 January 1942), signatory governments recognise the necessity of 'preserv[ing] human rights and justice in their own lands as well as in other lands': Preamble, para 3.
[264] UNESCO, *Human Rights: Comments and Interpretations* (25 July 1948), 1. Emphasis in original.
[265] In Mazower's rather cynical reading, '[b]ehind the smokescreen of the rights of the individual… the corpse of the League's minorities policy could be safely buried': (2004), 389.
[266] The drafters were particularly diligent to incorporate both so-called 'first generation' rights, as pioneered by the British, French and US revolutionary declarations and subsequent constitutions, as well as 'second generation' economic rights, espoused in the late nineteenth and early twentieth centuries by Sweden, Norway, the USSR and Latin American states. Each draft article was also accompanied by 'extensive annotation detailing its relationship to rights instruments then in force in the U.N.'s Member States': Mary Ann Glendon, 'John P. Humphrey and the Drafting of the Universal Declaration of Human Rights,' 2 *Journal of the History of International Law* (2000), 253-54.

existing relationship with the body politic. This, in turn, raises the question as to why the drafters of the UDHR decided to elide the distinction between citizen and non-citizen in this foundational text, only for it to resurface in the later Conventions.

Early drafts of the UDHR explicitly preserved distinctions between citizens and non-citizens. An initial comparative exercise circulated in January 1947 by the UN Division of Human Rights for the purposes of developing an 'International Bill of Rights' divided an article on implementation into two parts: 'general' and 'in regard to aliens.'[267] An analysis prepared contemporaneously by the same division evinced uncertainty as to the position of aliens. A section titled 'International Bill of Rights and the Diplomatic Protection of Citizens Abroad' (demonstrating the extant link between this question and the practice of diplomatic protection) tentatively concluded:

> Not all the drafts make it clear how far their provisions apply to aliens as well as to nationals… The fact that all the drafts use the expression 'man,' 'individual,' or 'person,' (and not 'national' or 'citizen') would suggest that, in principle, all the rights and freedoms listed therein apply both to nationals and foreigners.[268]

Discussions along these lines resurfaced throughout the negotiation process, up until the adoption of the UDHR by the General Assembly in December 1948. Ultimately, delegations failed to definitively resolve the issue, embedding this ambivalence into the final text.

---

[267] 'Textual Comparison of the Proposed Drafts of an International Bill of Rights,' E/CN.4/W.8 (20 January 1947), cited in William A. Schabas (ed), *The Universal Declaration of Human Rights: The* travaux préparatoires (Cambridge University Press, 3 volumes, 2013), 145.
[268] 'Analysis of Various Draft International Bills of Rights,' E/CN.4/W.16 (23 January 1947), cited in ibid, 152-53.

The Secretariat presented a draft 'International Bill of Rights' in June 1947.[269] This outline was divided thematically into four chapters, titled liberties, social rights, equality and general dispositions, respectively. The chapter on liberties included a standalone section for 'aliens'; the central provision within this section was a proposed Article 33:

> No alien who has been legally admitted to the territory of a State may be expelled therefrom except in pursuance of a judicial decision or recommendation as a punishment for offence laid down by law as warranting expulsion.

This section also articulated the right to asylum (Article 34). However, non-citizens are not explicitly mentioned in other chapters. A number of delegations, commenting on the Secretariat's outline, took up this problem. For example, the French delegation remarked on the necessity of 'supplement[ing] such a list by a certain number of rights, which, owing to their international character, are not at present sanctioned by municipal legislation, but are called for by the progress of international law (right to a nationality, rights of foreigners).'[270] A UK proposal went further, incorporating express protection of 'human rights and fundamental freedoms' to 'all persons under [a state's] jurisdiction, whether citizens, *persons of foreign nationality* or stateless,' coupled with an effective remedy.[271]

---

[269] 'Drafting Committee on an International Bill of Rights – Documented Outline,' E/CN.4/AC.1/3/Add.1 (11 June 1947), in ibid, 332-711.
[270] 'Proposal Submitted by the French Delegation to the Drafting Committee of the Commission on Human Rights,' E/CN.4/AC.1/5 (9 June 1947) cited in ibid, 308.
[271] 'Text of Letter from Lord Dukeston, UK Representative on the Human Rights Commission, incorporating draft international Bill of Human Rights,' E/CN.4/AC.1/4 (5 June 1947), cited in ibid, 292.

Proposed provisions on non-citizens immediately generated contention. 'The subject of aliens,' the UK delegate pronounced, 'constituted a most complicated and difficult problem,' urging omission of the prohibition on arbitrary expulsion.[272] On other occasions, the representative warned against 'guarantee[ing] too many privileges to aliens,'[273] predicting that this 'might result in persons who already enjoyed rights granted by one Government attempting to enjoy rights granted by other Governments also.'[274] Delegations questioned whether proposed protections for non-citizens were really rights at all: the chair of the committee expressed doubt as to whether the right of asylum 'exist[ed] in any real measure at this time,'[275] while Australia described it as 'very difficult to determine' whether protection against arbitrary expulsion was a human right.[276] The reaction of the Soviet Union delegate was even more strident: the Declaration, he declared, 'should not deal with the obligation of certain States towards isolated individuals who did not belong to a State nor even to national minorities.'[277]

The only consistent support from state delegations for retaining standalone protections for non-citizens came from France. The French delegate, René Cassin, had reorganised the draft in a sequence that was retained through to its final adoption, and was therefore intimately familiar with its contents and objectives.[278] Cassin reminded delegates 'that

[272] UK, 20 June 1947, cited in ibid, 863. This position was supported by Australia and the US: 18 June 1947, ibid, 825; 9 December 1947, ibid, 1206.
[273] UK, 18 June 1947, ibid, 824.
[274] UK, 1 December 1947, ibid, 1093. These remarks were made in connection with a proposed article protecting the rights of minorities within states.
[275] USA, 8 December 1947, ibid, 1197.
[276] Australia, 18 June 1947, ibid, 825.
[277] USSR, 9 December 1947, ibid, 1206.
[278] See ibid, 837-844; Glendon (2000), 257. Cassin further recognised, in a note submitted to the French government in February 1947, that 'a Universal Declaration cannot be the simple photographic enlargement of

there were people who were expelled from country to country, who needed protection.'[279] The French draft would also have recognised the right of individuals to 'freely emigrate or expatriate,' as a corollary to freedom of movement.[280] Much stronger advocacy was voiced by the international and nongovernmental organisations present.[281] In particular, a December 1947 statement by the International Refugee Organization, the forerunner of the UN High Commission for Refugees, is prescient: it points out that 'no group of human individuals can be more interested in an International Bill of Human Rights than the large numbers of… refugees and displaced persons,' owing to 'the flagrant violation of [their] human rights.'[282] The organisation observes that 'discrimination is frequently based, not only on the grounds of sex, religion, race, or political opinion, but also on the grounds of nationality, or lack of nationality.'[283] The organisation urged the committee to incorporate more expansive protection than a mere provision against arbitrary expulsion. To this end, the following text was proposed:

> There shall, in principle, be *no discrimination* between persons *on the basis of nationality, or lack of nationality*. *Nationals and aliens shall enjoy equal rights* with the exception of political rights and rights which, under national law and within the limits prescribed by the International Bill on Human Rights, are

a national declaration. It cannot ignore the calling of any human being to have a native country or, if he expatriates voluntarily or by force, to have a homeland or to be granted asylum': cited in Antonio Cassese, 'A Plea for a Global Community Grounded in a Core of Human Rights,' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), 137.

[279] France, 18 June 1947, in Schabas (2013), 825.

[280] This was the original text of the eventual Article 13: ibid 839-40. However, note this draft article is prefaced by the qualifier, 'Subject to any general law adopted in the interest of national welfare and security.'

[281] In addition to the International Refugee Organization, see support expressed by the World Jewish Congress and International Union of Women's Catholic Organizations: 8 December 1947, ibid 1196.

[282] 1 December 1947, ibid 1078-9.

[283] Ibid.

> confined to nationals. The principle of reciprocity shall be no bar to the equal granting and enjoyment of human rights and fundamental freedoms.[284]

This advocacy was apparently disregarded by state delegates. The drafting committee voted the same month to delete even the limited draft article pertaining to non-citizens, by the admittedly narrow margin of 3-2, with one abstention.[285]

However, the question of non-citizens continued to be raised by various delegations. In one May 1948 meeting, the French delegate Cassin summarised the substance of the dilemma as it would recur in international human rights law:

> Here was a difficult problem, left unsolved by the declaration, namely, the status of individuals living on foreign soil. There was not a single country which did not discriminate to some extent between its own subjects and aliens. The rights of aliens in respect of the countries in which they lived should therefore be defined more closely. The Draft Declaration should guarantee them a minimum of fundamental rights.[286]

Despite support from the Chilean delegation, this position was opposed by the US and UK; a proposed provision was again removed by vote.[287] At another meeting, discussion on the recognition of personhood invoked differential treatment standards. 'In the present state of the world,' Cassin observed, 'it was inevitable that States should distinguish between their own nationals and foreigners.' For this reason, 'it was the United Nations'

[284] Ibid.
[285] 9 December 1947, ibid 1206.
[286] 18 May 1948, ibid 1550. Support was voiced for the French position in this meeting by Chile, who stated that the provision 'should contain a condemnation of possible discriminatory measures against aliens': 18 May 1948, ibid 1551.
[287] Ibid, 1552.

duty to ensure not only that all human beings had judicial personality, but also that they should be guaranteed certain elementary rights indispensable to their wellbeing and to their dignity.'[288] Despite support offered on this occasion by the Soviet delegate,[289] these negotiations were inconclusive, foundering on wording and distinctions between legal systems.[290]

In the absence of explicit recognition in the Declaration's text, coverage of non-citizens was relegated to the realm of interpretation. Commenting on a final draft in October 1948, the Uruguayan delegate expressed the opinion that 'the social order of a State would be disrupted' if fundamental liberties (personal liberty, the right to housing and the right to health were cited as examples) were not recognised equally for citizens and non-citizens.[291] The USSR delegate merely observed that 'the question of fundamental human rights' was especially 'delicate… in connexion with the status of aliens,' resulting in 'differences in treatment.'[292] The US and UK agreed that 'any foreigner admitted into a country should enjoy the same freedom in that country as the nationals.'[293] France emphasised the principle of non-discrimination, asserting that the Declaration 'eliminate[d] all distinction between nationals and aliens in regard to fundamental rights,' while 'consecrat[ing] the principle of territorial universality.'[294]

[288] 3 June 1948, ibid 1742.
[289] Ibid.
[290] Reservations were expressed by the US and UK: ibid, 1743-1744.
[291] 2 October 1948, ibid 2060. The delegate's wording was somewhat more idiosyncratic, urging recognition 'not only for men but also for women and for aliens.'
[292] 23 October 1948, ibid 2317.
[293] 2 November 1948, ibid 2409, 2414.
[294] 9 December 1948, ibid 3033.

To an extent, disagreements over the position of non-citizens were symptomatic of broader fault-lines within the newly emergent discipline of international human rights law. Having decided, in the description of the Brazilian delegation, to impose 'positive legal obligations' upon states in the form of human rights,[295] as an innovation to state-centric international law, positions diverged on the relationship between individual and state, territoriality and universality, aspiration and implementation.[296] Caught in between lexical categories, it is perhaps not surprising that non-citizens were consigned to a normative gap.

As the above review of the record shows, the position of non-citizens within this new order was the subject of consistent debate among states, from the preparatory drafts to negotiations through to the final stages. In the absence of unity, states addressed this visible but ostensibly subsidiary problem by leaving it unresolved. This would become a persistent theme throughout the subsequent development of international human rights law. As a consequence, the discipline would struggle to extend its reach over the lacuna of non-citizens' rights, while subsequent treaty-making would paradoxically reinforce hierarchical rights availability within and between groups of non-citizens.

The Non-Citizen as a General Subject of International Human Rights Law

Since codification of the International Bill of Rights, there have been several attempts to address the status of non-citizens comprehensively through the prism of international

[295] 2 October 1948, p 2063. The delegate goes on to add that this 'was the greatest of victories achieved at the cost of the sacrifices made during the Second World War.'

[296] This was a major reason that a consensus evolved during the negotiations to divide the instruments into an initial declaration, followed by a legally binding convention.

human rights law. These attempts have been sporadic, protracted and controversial. Presumably compensating for the absence of a provision on asylum in the ICCPR, a little-known 1967 Declaration on Territorial Asylum, passed by the General Assembly, reiterates the right to seek asylum found in the UDHR and affirms the principle of non-refoulement for individuals seeking asylum status.[297] A second concerted effort began in the late 1970s, through the now-defunct UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[298] Work was precipitated by the sub-commission's finding in a 1976 report that existing international human rights instruments did not provide adequate legal protection for the human rights of non-citizens.[299] An eventual outcome was the non-binding Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, unanimously adopted by the General Assembly in 1985.[300]

The Declaration affirms that 'protection of human rights and fundamental freedoms provided for in international instruments should also be ensured' for non-citizens.[301] On the other hand, the Declaration articulates the nexus between the state, non-citizens and international human rights law in the following convoluted terms:

[297] United Nations General Assembly, 'Declaration on Territorial Asylum,' A/RES/2312(XXII) (14 December 1967). However, exceptions are recognised for 'overriding reasons of national security,' including 'mass influx of persons': Article 3(2).
[298] Background is provided in United Nations Human Rights Council, 'Sub-Commission on the Promotion and Protection of Human Rights,' available at https://www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx (accessed 6 May 2022).
[299] Lillich (1984), 52.
[300] A/RES/40/144 (13 December 1985); meeting record contained in United Nations General Assembly, 'Provisional verbatim record of the 116th meeting, held at Headquarters, New York, on Friday, 13 December 1985,' A/40/PV.116 (17 December 1985).
[301] Ibid, preamble.

> Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.[302]

The same article provides that the Declaration 'shall not prejudice the enjoyment of the rights… which under international law a State is obliged to accord to [non-citizens], even where this Declaration does not recognize such rights or recognizes them to a lesser extent.'[303] This provision makes it unclear as to whether the Declaration applies to irregular non-citizens. It also leaves open the possibility that there may be additional human rights applicable to non-citizens under international law, arguably defeating the Declaration's purpose of functioning as a comprehensive statement.

The Declaration incorporates ten substantive provisions, the majority of which are reformulations of rights previously delineated in the International Bill of Rights (for example, non-citizens are held to have the right to 'health protection, medical care, social security, social services, education, rest and leisure, provided that… *undue strain* is not placed *on the resources of the state*').[304] A select number of rights pertain specifically to

[302] Ibid, Article 2(1).
[303] Ibid, Article 2(2).
[304] Ibid, Article 8(1)(c). Other provisions that reproduce the International Bill of Rights include Article 5 (recognising the right to life and security of person; protection against unlawful interference with privacy, family or correspondence; equality before the law; the right to marry and found a family; freedom of opinion and

the position of non-citizens: firstly, non-citizens are ascribed '[t]he right to transfer abroad earnings, savings or other personal monetary assets.'[305] Second, a provision regulating expulsion goes slightly beyond its ICCPR counterpart, prohibiting '[i]ndividual or collective expulsion… on grounds of race, colour, religion, culture, descent or national or ethnic origin.'[306] Finally, the Declaration affirms that non-citizens are 'free at any time' to communicate with their respective consulate or diplomatic mission.[307]

A number of observations may be made about the Declaration beyond its substantive content. The first is that an initial draft was developed within the sub-commission in 1974. This text underwent revisions until it was presented to the General Assembly in 1980. The General Assembly, under the auspices of an open-ended working group, then considered the Declaration for several years until final adoption in December 1985.[308] The passage of more than a decade to produce a short, ten article Declaration epitomises the persistent controversy attaching to the question of the human rights of non-citizens. Secondly, the adoption of the terminology of a 'declaration' – although adopted unanimously – is of less legal consequence than a convention, while, unlike the negotiations for the UDHR, there was no consensus on follow-up measures. It is difficult

religion; freedom of expression; peaceful assembly; and the right to leave the country) and Article 6, embodying the prohibition against torture and cruel, inhuman or degrading treatment.

[305] '[S]ubject to domestic currency regulations': ibid, Article 5(1)(g).

[306] Ibid, Article 7. The protections embodied in ICCPR Article 13, and replicated in the Declaration, are: Non-citizens 'lawfully in the territory of a State' a) 'may be expelled… only in pursuance of a decision reached in accordance with law;' b) shall 'be allowed to submit the reasons against [the] expulsion;' and c) are entitled to review before a 'competent authority,' unless 'compelling reasons of national security otherwise require.'

[307] Ibid, Article 10. This substantially reproduces language found in Article 36 of the *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

[308] Lillich, 56.

to know what legal purpose and function the Declaration is intended to serve. Third, and related to this second point, is its actual lack of effect. The hopes of one contemporary commentator that passage of the Declaration may lead to 'a legally binding convention on the subject' came to naught.[309] A more recent account on the human rights of non-citizens barely mentions the Declaration.[310] These factors ensured that the Declaration has not been seen as fit for purpose or comprehensive enough to address ongoing disparities in human rights availability for non-citizens.

Following sporadic attention to the human rights of non-citizens throughout the 1990s,[311] a second period of increased attention occurred in the aftermath of September 11, 2001. A central concern in this context was the arbitrary or indefinite detention (according to international human rights law) of non-citizens on suspicion of terrorism.[312] The Sub-Commission on the Promotion and Protection of Human Rights appointed a special rapporteur on the rights of non-citizens,[313] the first time such a cross-cutting position had been created. The special rapporteur's primary activity was to compile a report identifying previously existing standards for non-citizens.[314] The report was submitted in 2003 (and published by the OHCHR in 2006), although the mandate lapsed after this. It

[309] Ibid, 56.
[310] Weissbrodt (2008). A single mention is in connection with protection from *refoulement* and arbitrary expulsion (at 57), in which it is cited in conjunction with a number of other authorities.
[311] As documented in Trindade (2008), 163-65.
[312] OHCHR (2006), 5-6. States also sought 'expanded powers' to depart non-citizens in the years immediately following 9/11: Hansen (2009), 14.
[313] United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'The rights of non-citizens: Preliminary report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103,' E/CN.4/Sub.2/2001/20 (6 June 2001), paras 1-6.
[314] United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Commission resolution 2000/104 and Economic and Social Council decision 2000/283,'E/CN.4/Sub.2/2003/23 (26 May 2003).

should also be noted that the then-Commission on Human Rights in 1999 created the mandate of the Special Rapporteur on the Human Rights of Migrants,[315] which has since been continuously renewed.

3.3 The International Community's Response to Recent Challenges

Beginning in 2015, migration has received renewed, sustained attention. The most salient aspect of this phenomenon has been the cycles of large, mixed migration movements to Europe and the United States. In this context, the phrase large movements refers to scale, denoting large groups simultaneously traversing specific cross-border routes: examples include the Mediterranean crossing from Libya to Italy,[316] overland crossings from Syria to the European Union via Turkey and Eastern Europe,[317] and overland through Central America to the USA.[318] Mixed migration flows, although the term itself has been critiqued as problematic,[319] describes the participation of individuals subject to distinct legal frameworks, incorporating refugees, asylum seekers, irregular migrants and stateless persons.[320] The extent to which events since 2015 are novel is easily overstated: developing countries have remained the principal hosts of refugee populations, for

[315] United Nations Commission on Human Rights, 'Human rights of migrants,' E/CN.4/RES/1999/44 (26 April 1999).
[316] IOM (2019), 94.
[317] Ibid, 72.
[318] Ibid, 99.
[319] Christina Oelgemöller writes that 'mixed migration' terminology is a 'political tool to refocus the governance of migration to ask questions about the legitimacy of access into a sovereign country's territory,' leading to 'a near-exclusive focus on deterrence… and containment of mobile people in the Global South': 'The Global Compacts, Mixed Migration and the Transformation of Protection,' 23(2) *Interventions* (2021), 184-85.
[320] UNHCR, 'Asylum and Migration,' available at https://www.unhcr.org/asylum-and-migration.html (accessed 5 May 2022).

example.[321] The primary legacy of the 'perceived global migration crisis'[322] may be increased visibility of migration as a political and security issue in the Global North, accompanied by intense scrutiny among states, populations and in the media regarding the sustainability of current models of regulation and cooperation.

At the multilateral level, the outcome of large, mixed migration movements has been the Global Compact for Safe, Orderly and Regular Migration[323] and Global Compact on Refugees,[324] both concluded under the auspices of the UN in 2018. Although described as 'the first comprehensive global document on migration,'[325] the international community's response was once again reactive. The sheer scale of movements overwhelmed state agencies and screening capabilities, overtaking the artificial separation of non-citizens into distinct legal categories. The familiar question recurs: which rights 'belong' to non-citizens, and are practically claimable by them? Moreover, as a subsidiary matter, how should rights be 'distributed' among the disaggregated groups of non-citizens? The Global Compacts, to their credit, do evince recognition of these dilemmas. The passage of the Global Compact for Migration was lauded by the OHCHR in the following terms:

[321] UNHCR (2021), 2.
[322] This term is borrowed from Bradley (2021), 252 *passim*.
[323] United Nations General Assembly, 'Global Compact for Safe, Orderly and Regular Migration,' A/RES/73/195 (19 December 2018) ('Global Compact for Migration').
[324] United Nations General Assembly, 'Report of the United Nations High Commissioner for Refugees, Part II: Global Compact on Refugees,' A/73/12(II) (2 August 2018) ('Global Compact on Refugees').
[325] Statement by Thailand, in United Nations General Assembly, 'General Assembly official records, 73rd session: 60th plenary meeting, Wednesday, 19 December 2018, New York,' A/73/PV.60 (19 December 2018). Similar statements were also made by China and Indonesia.

> [W]e have drawn a line: A line between the abusive, chaotic, and ultimately failed approaches to migration of the past and a new human rights-based vision for the safe, orderly and regular movement of people.[326]

Significantly, the 2016 New York Declaration for Refugees and Migrants, which formally initiated the negotiation process for the Global Compacts, affirms that despite the existence of separate legal frameworks, 'refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities.'[327] However, a subsequently adopted resolution on negotiation 'modalities' appeared to backtrack on this recognition of intersectionality, stipulating that 'the two processes' (that is, relating to migrants and refugees) are 'separate, distinct and independent.'[328]

The Global Compact for Safe, Orderly and Regular Migration is structured as a 'non-legally binding, cooperative framework.'[329] While it embodies a commitment to 'facilitate and ensure safe, orderly and regular migration for the benefit of all,'[330] it does not create or recognize any new rights, and one of its stated purposes is to 'reinforce' state sovereignty.[331] The Compact comprises twenty-three objectives, which may be

[326] OHCHR, 'Statement on the Adoption of the Global Compact on Migration - Global Compact on Migration, Plenary Debate, Marrakesh' (11 December 2018), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24020&LangID=E (accessed 5 May 2022).
[327] United Nations General Assembly, 'New York Declaration for Refugees and Migrants,' A/RES/71/1 (19 September 2016), para 6.
[328] United Nations General Assembly, 'Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration,' A/RES/71/280 (6 April 2017), 1.
[329] Global Compact for Migration, para 7.
[330] Ibid, para 13.
[331] Statement by President of the General Assembly Espinosa Garcés, United Nations General Assembly (19 December 2018).

broadly grouped into three categories: migration governance,[332] international cooperation[333] and status of non-citizens.[334] The language of the text, together with the preponderance of objectives addressing migration governance at the domestic level (ten out of a total of twenty-three), indicate that states, and state institutions, are the primary intended actors in its implementation. Each objective contains a commitment, accompanied uniformly by this formulation: 'To realize this commitment, we will *draw from* the following actions.'[335] The term 'compact' itself was specifically nominated for the agreement due to its lack of a 'settled meaning in international law.'[336] According to

[332] Objectives 1 (Collect and utilize accurate and disaggregated data as a basis for evidence-based policies), 2 (Minimize the adverse drivers and structural factors that compel people to leave their country of origin), 3 (Provide accurate and timely information at all stages of migration), 5 (Enhance availability and flexibility of pathways for regular migration), 6 (Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work), 7 (Address and reduce vulnerabilities in migration), 11 (Manage borders in an integrated, secure and coordinated manner), 12 (Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral), 13 (Use migration detention only as a measure of last resort and work towards alternatives) and 22 (Establish mechanisms for the portability of social security entitlements and earned benefits).

[333] Objectives 8 (Save lives and establish coordinated international efforts on missing migrants), 9 (Strengthen the transnational response to smuggling of migrants), 10 (Prevent, combat and eradicate trafficking in persons in the context of international migration), 14 (Enhance consular protection, assistance and cooperation throughout the migration cycle), 21 (Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration) and 23 (Strengthen international cooperation and global partnerships for safe, orderly and regular migration).

[334] Objectives 4 (Ensure that all migrants have proof of legal identity and adequate documentation), 15 (Provide access to basic services for migrants), 16 (Empower migrants and societies to realize full inclusion and social cohesion), 17 (Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration), 18 (Invest in skills development and facilitate mutual recognition of skills, qualifications and competences), 19 (Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries) and 20 (Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants).

[335] Global Compact for Migration, para 16 ff. Emphasis added

[336] Statements by the Philippines and the US, United Nations General Assembly (19 December 2018). Peter Hilpold argues that 'traditional international law analysis can give only inadequate answers as to the legal value of these Compacts' provisions': 'Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018,' 26 *European Law Journal* (2021), 230.

diverging interpretations, this may either suggest no enforceability 'other than the compulsion of conscience,'[337] or 'impl[y] legal obligation.'[338]

The Global Compact was adopted by a vote of the UN General Assembly.[339] The voting record is revealing of the contentiousness of the negotiation process, as well as a lack of unity among states on interpretations of the agreement's object and purpose. The Compact affirms 'an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status,'[340] yet a major stated objection was a perceived failure to sufficiently distinguish between regular and irregular migration: this point was emphasized by Australia, Austria, Chile, Lebanon, Poland and the USA.[341] In a characteristic statement, the UK held:

> The Compact provides a useful framework for improving international cooperation on migration… It does not in any way create legal obligations for States nor does it seek to establish international customary law or further interpret existing treaties or national obligations. *The Compact does not* create any new legal categories of migrants or associated benefits, nor does it *establish a human right to migrate* … The list of actions under each commitment constitute examples that could contribute to the implementation of the Compact. However, it is up to each State to decide how and whether to draw from those examples.[342]

[337] Statement by the Philippines, United Nations General Assembly (19 December 2018).
[338] Statement by the US, ibid.
[339] The outcome of the vote was 152 states in favour with 5 against, and 12 abstentions: ibid.
[340] Global Compact for Migration, para 11.
[341] United Nations General Assembly (19 December 2018).
[342] UK statement, ibid. Emphasis added.

Similar interpretations were advanced by China, Denmark (on behalf of Iceland, Lithuania, Malta and the Netherlands), Namibia (on behalf of the Group of African States), Norway, Russia and Slovenia.[343] As a product of compromise, the Compact permits a degree of ambiguity in its interpretation that is unusual even for an international instrument, encouraged further by its 'pick and choose' configuration that allows states to elect which elements from each objective they will, or will not, apply. Destination states were generally the most outspoken in the General Assembly debate in advocating their preferred positions.

By contrast to its counterpart, the Global Compact on Refugees is more straightforward in structure. It simply reaffirms 'the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol.'[344] The Compact identifies four objectives, to be achieved through 'mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions.'[345] This makes clear that state-centric action is envisioned as the primary solution to refugee challenges, operating within the guidelines of the rights previously established by the 1951 Refugee Convention.

[343] Ibid.
[344] Global Compact on Refugees, para 5. Distinct from the fractious Global Compact for Migration negotiations, the Global Compact on Refugees was prepared in a UNHCR report that was subsequently endorsed by the General Assembly: 'Office of the United Nations High Commissioner for Refugees,' A/RES/73/151 (17 December 2018), para 23.
[345] Global Compact on Refugees, para 7. The four objectives are: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity.

In the lead-up to the passage of the Global Compact for Migration, one of the sponsors of the agreement, Morocco, described it as 'the start of a long process for strengthening the management of migration based on the Compact's provisions.'[346] As both the compacts are non-binding, a key measure to strengthen the effectiveness of its provisions in practice may rest in its future iterative development, particularly by rights holders. Both compacts contain 'periodic… follow-up and review mechanism[s]' to assess progress.[347] The ability and potential of these mechanisms are addressed in chapter five.

3.4 Evaluation

Evaluating the position of non-citizens in both the history and the provisions of international human rights law, two traits are apparent. At the formal, textual level, non-citizens are generally *invisible*: ostensibly subject to the human rights norms of equality and non-discrimination. Initial *ambivalence* towards non-citizens, as evidenced in the negotiations for the UDHR, has led to ongoing *inadequacy* in human rights coverage, manifested by periodic law-making attempts, including the 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live and the 2018 Global Compacts, to remedy this shortcoming. Textual uncertainty surrounding the human rights of non-citizens is exacerbated by their disaggregation into different groups of separate legal regimes for an interlinked phenomenon. The Global Compacts, precipitated by large-scale movements since 2015 of non-citizens at the

[346] United Nations General Assembly (19 December 2018).
[347] Global Compact on Migration, para 14. The Global Compact for Migration establishes a quadrennial International Migration Review Forum to discuss implementation (para 49); the Global Compact on Refugees similarly provides for a quadrennial Global Refugee Forum, in addition to biennial high-level officials' meetings and annual reporting to the General Assembly from UNHCR (para 101).

boundaries of each of these legal categories, represent a belated, albeit partial recognition of this reality. In essence, the Global Compacts bring the international human rights law pertaining to non-citizens full circle: they reaffirm an existing human right to *movement*, but not to *migrate* across state boundaries, thus preserving the ambiguity that has been a hallmark of this area of law.

The purpose of this chapter has been to explore developments in international (human rights) law along a linear plane, from the 1800s to the most recent multilateral efforts to date. Based on the textual evidence, the formal entitlement of non-citizens to human rights, much less their ability to claim them, remains incomplete and unresolved, an 'unfinished project' of international human rights law. However, this is not the only dimension in which human rights law operates. Another trait that requires critical observation is the state-centric architecture of international human rights law treaties, which assigns responsibility to states for upholding remedies. The consequences of this structural element are explored in the following chapter. The interaction of international and domestic levels will be turned to in chapter five, with a focus on mechanisms that overcome textual limitations and problems of domestic implementation to extend rights to non-citizens.

Chapter 4: Non-Citizen Categories in Domestic Jurisdictions

International human rights law involves an indispensable domestic dimension. Sassen puts this bluntly: 'human rights are enforced through national law or not at all.'[348] Norms of equality and non-discrimination are enshrined in the core international treaties, as set out in chapter three. Nonetheless, Western, Lockhart and Money argue that 'citizens are implicitly or explicitly the primary beneficiaries' of 'most human rights agreements.'[349] The focus of this chapter, accordingly, is on mapping major categories of non-citizens against domestic state practice, evaluating the compatibility of these categories at the domestic level with international human rights law.

A classic judicial statement of the position of non-citizens vis-à-vis the state in which they are present is that they are 'accorded a generous and ascending scale of rights' that 'increases' commensurately as their 'identity' grows closer to that of 'our society.'[350] Though this statement dates to 1950, the approach it outlines has persisted: Bosniak observes that 'At times the law treats alienage as an irrelevant and illegitimate basis on which to justify the less favorable treatment of persons,' while at other times it is

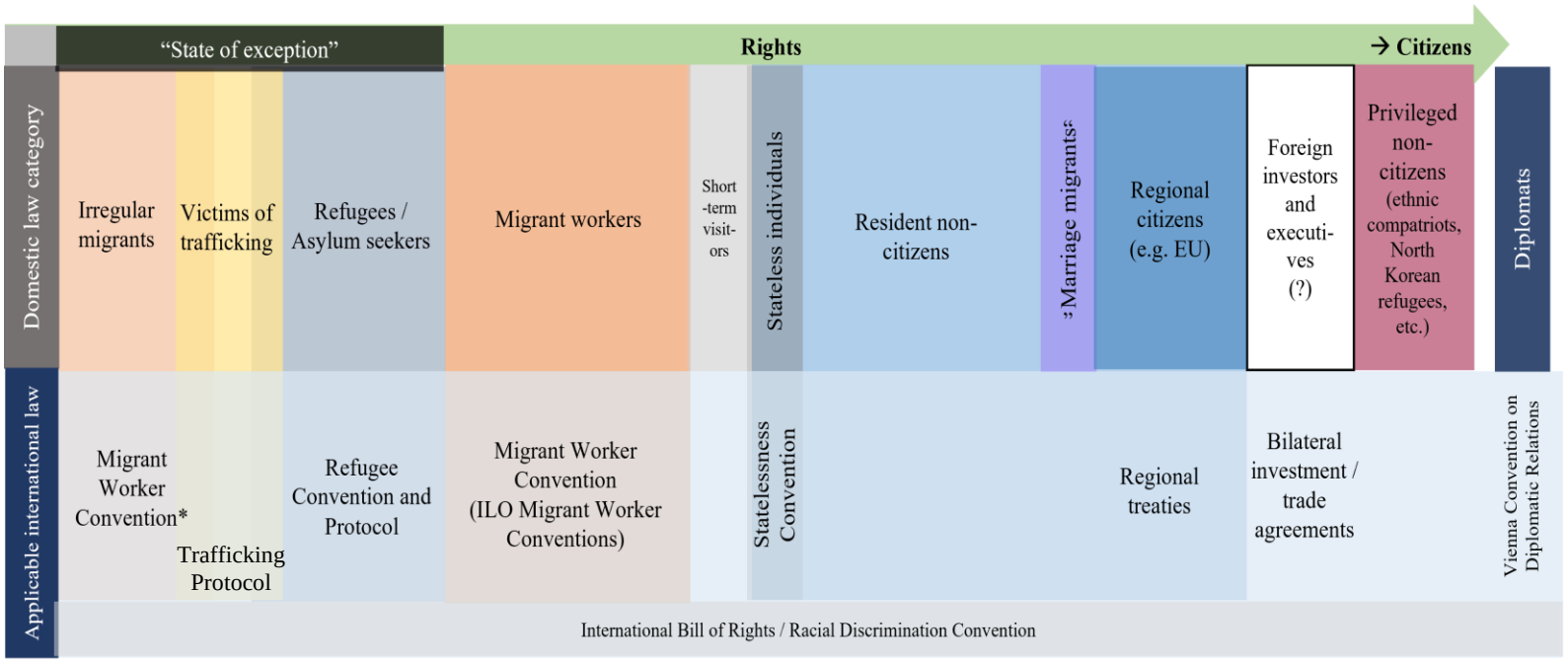
[348] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2008), 309. See also Thomas Nagel, 'The Problem of Global Justice,' 33(2) *Philosophy and Public Affairs* (2005) at 116, describing sovereignty as an 'enabling condition' for just institutions, in the absence of which justice is 'a pure aspiration' with 'no practical expression.'
[349] Shaina D. Western, Sarah P. Lockhart & Jeannette Money, 'Does anyone care about migrant rights? An analysis of why countries enter the convention on the rights of migrant workers and their families,' 23(8) *The International Journal of Human Rights* (2019), 1277.
[350] *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

perceived as 'an eminently appropriate basis for differential treatment.'[351] Such an approach amounts to an affirmation of status hierarchy within national legal systems, premised on charity and conditionality (the non-citizen must integrate into the community, presumably to the exclusion of other identities). Another scholar writes that, 'Excluding an alien or a group of aliens for economic reasons is more acceptable under modern international law (and modern global opinion)… Immigration laws generally reflect economic priorities.'[352]

Among potentially infinite variables of non-citizen status, this chapter examines six major categories in state practice. Three of the categories considered below are recognised in international conventions: two explicitly (refugees and migrant workers), one more peripherally (irregular migrants).[353] One category, regulating expatriates and investors, belongs to an ostensibly separate area of law. One category has regional effect (within the European Union). The final category covers domestic law creations with no international equivalent, assessing co-ethnic non-citizens specifically. In each section, one case study has been selected from amongst the states under review. Selection was based on the way in which state practice illuminates the *essence* of rights claimability problems for a particular category of non-citizens across domestic jurisidictions. Each section also focuses on one group of rights, to illustrate gaps in rights claimability. Figure 1 below presents a spectrum conceiving interactions between non-citizens, the state and international law.

[351] Bosniak (2006), 37.
[352] Tiburcio (2001), xxii.
[353] ICMW, Part III.

Figure 1: Map of major non-citizen categories



4.1 The 'State of Exception': Irregular Migrants

The idea of the 'state of exception' in this section is borrowed from Benhabib. In her work on the rights of 'others,' she laments the treatment of a class of individuals as:

> … quasi-criminal elements, whose interaction with the larger society is to be closely monitored. *They exist at the limits of all rights regimes* and reveal the blind spot in the system of rights, *where the rule of law flows into its opposite*: the state of the exception and *the ever-present danger of violence*.[354]

Whereas the author was describing the plight of refugees and asylum seekers specifically, this study extends the concept to the spectrum of non-citizens in Figure 1, arguing for its general applicability to individuals who are present on a state's territory without authorisation, or subvert border controls to gain access. The scope of the state of exception thus corresponds, in legal terms, to irregular migrants, victims of trafficking, asylum seekers and refugees.

'Irregular migrants' has evolved, comparatively recently, as standard terminology in international human rights law.[355] Most domestic legal frameworks, on the contrary, use the term 'illegal,' or some variant of it, to designate such individuals.[356] From the

[354] Benhabib (2004), 163. Emphasis added.
[355] See ICMW, preamble; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families,' CMW/C/GC/2 (28 August 2013).
[356] Euan MacDonald and Ryszard Cholewinski, 'The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives,' UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS-2007/WS/7 (2007), 79, on the persistence of the use of the term 'illegality' in EU migration documents. In Australia, the law imposes mandatory detention on 'unlawful non-citizens,' combined with extinguishment of their legal capacity to challenge such actions: *Migration Act of the Commonwealth of Australia* (1958), Article 189. In Kenya, police have legal responsibility for identifying and arresting non-citizens deemed unlawfully present: *Kenya Citizenship and Immigration Act* (2011), Article 49.

viewpoint of domestic legal systems, the irregular status of non-citizens becomes the most salient, decisive aspect of their identity. Bosniak writes that the perception that irregular non-citizens have 'willfully flouted' the nation's laws, if not its sovereignty, by the very fact of their territorial presence 'make[s] a great deal of difference' to their ability to access rights guaranteed in domestic law.[357] There are significant numbers of irregular non-citizens in many states, especially advanced economies. A UNESCO report Convention found that 'tacit approval of irregular migration' in much of the Asia-Pacific region coexists with a refusal to formally recognise the rights of irregular migrants.[358] Their presence within a jurisdiction mandates that they are subjects of domestic law; at the same time, the rule of law requires that they are entitled to equal protection of that law. However, whereas all non-citizens are subject to potential deportation, this facet of state power 'weigh[s] most heavily on undocumented or unauthorized immigrants,' rendering the rights they technically enjoy under domestic law as 'ineffective or meaningless.'[359] For this reason, irregular non-citizens 'commonly decline to report private or official abuse and are frequently unwilling to pursue civil claims in court or to step forward to receive benefits to which they are entitled.'[360] It is this vulnerability – simultaneously within and without the law – that paradoxically enhances their

[357] Bosniak (2006), 68.
[358] Nicola Piper and Robyn Iredale, 'Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective,' UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS/2003/MC/1 REV (October 2003), 8, 16.
[359] Bosniak (2006), 69-70; see also Oberoi and Taylor-Nicholson (2013), 178.
[360] Linda Bosniak, 'Exclusion and Membership: The Dual Identity of the Undocumented Workers under United States Law,' 6 *Wisconsin Law Review* (1988) 986. See also Andrew Wolman, 'Protecting Victim Rights: The Role of the National Human Rights Commission of Korea,' 2(2) *Journal of East Asia and International Law* (2009), 469, on the ability of undocumented immigrants to access victims' services; MacDonald and Cholewinski (2007), 59, on the difficulties associated with providing education and healthcare services to irregular immigrants in Germany.

attractiveness for economic reasons. The economic rationale cannot be overlooked; it fuels employer demand and, by extension, irregular migration.[361] This situates irregular non-citizens, in Benhabib's phrasing, at the limits of rights as well as law.

The deterrent function of the immigration system operates most acutely on irregular non-citizens. The number of undocumented migrants who die in transit or seeking access to a state is high.[362] This phenomenon is exacerbated by the frightening levels of power conferred upon those with the legal responsibility to enforce immigration law.[363] An example of this in state practice is provided by South Korea. Under immigration law, irregular migrants are officially referred to as 'illegal residents,' excluded from the state's framework act on the treatment of non-citizens,[364] and subject to immigration detention and deportation.[365] Domestic practice is characterised by recurrent crackdowns on irregular workers.[366] A 2020 investigation uncovered the death of 522 Thai migrants in South Korea since 2015, the vast majority of whom were irregular.[367] Recruitment and presence of undocumented workers in the country is indirectly facilitated by immigration law, since a bilateral agreement allows 90-day visa-free travel, making South Korea the

[361] Bosniak (2006), 63, noting the role of undocumented migrants in menial labour; also 173, note 183.
[362] At the time of writing, IOM records 49,639 missing migrants since 2014: IOM, 'Missing Migrants Project,' available at https://missingmigrants.iom.int/ (accessed 31 July 2022). These figures do not include deaths that occur in immigration detention or are connected with irregular status.
[363] Oberoi and Taylor-Nicholson (2013), 172-73; see also 181, noting 'a lack of evidence' that punitive regimes deter irregular migrants and asylum-seekers.
[364] *Framework Act on Treatment of Foreigners Residing in the Republic of Korea* (2007), Article 2.
[365] *Immigration Act of the Republic of Korea* (2022), Chapter VI. Incongruously, detention of irregular non-citizens is described in the original Korean text using the term 'protection' (보호): Article 51.
[366] Dong-Hoon Seol, 'The citizenship of foreign workers in South Korea,' 16(1) *Citizenship Studies* (2012), 124, writing from a position of justifying the crackdowns to prevent risks of 'unreported human rights violations.'
[367] The exact figure is 84%: Nanchanok Wongsamuth and Grace Moon, 'Hundreds of Thai workers found dying in South Korea with numbers rising,' *Reuters* (22 December 2020), available at https://www.reuters.com/article/us-thailand-southkorea-workers-idUSKBN28W033 (accessed 25 April 2022).

top destination for Thai migrants: whereas there are approximately 185,000 Thai citizens in the country (of a total 460,000 recorded abroad), only ten percent hold legal residence status.[368] However, undocumented migrants are reported to be 'overworked, unable to access healthcare, and unlikely to report exploitation for fear of being deported.'[369] Despite a 2019 recommendation by the National Human Rights Commission of Korea intended to prevent further deaths of irregular workers,[370] continued reports suggest that this situation persists.[371] Incomplete data also appears to be a problem: in a follow-up report, the Ministry of Justice stated that it is not obliged to register the deaths of undocumented non-citizens that occur in South Korea;[372] the government further admitted in a 2020 report to the Committee on the Elimination of Racial Discrimination that it does not collect data on cases involving force in crackdowns on irregular immigration.[373] Despite the non-derogable nature of the right to life, recognised by both

[368] Ibid. See also Statistics Korea, '2020 Population and Housing Census (Register-based Census)' (29 July 2021), 5. Thai citizens represent close to ten percent of the total non-citizen population in South Korea.
[369] Wongsamuth and Moon (2020).
[370] National Human Rights Commission of Korea, '단속과정에서의 이주노동자 사망사건 직권조사' [Investigation into the death of a migrant worker during a crackdown], 2019.1.16. 18 *Jikgwon* 0001800 (16 January 2019), published in National Human Rights Commission of Korea, *이주인권 정책 결정례집: 2011.1.1-2021.12.31* [Decisions on policies concerning the human rights of migrants, 2011-2021] (March 2022), 441-469.
[371] In 2019, a Thai irregular worker died during an immigration crackdown: Ock Hyun-ju, 'Thai worker's death raises questions over migrant crackdown,' *The Korea Herald* (21 October 2019), available at http://www.koreaherald.com/view.php?ud=20191018000558 (accessed 25 April 2022). Migrant workers are also overrepresented in occupational deaths generally (10%, despite comprising less than 4% of the working population): M.H. Lee, 'Migrant Workers Account for 10 pct of All Industrial Accident Deaths in S. Korea: Lawmaker,' *The Korea Bizwire* (26 January 2022), available at http://koreabizwire.com/migrant-workers-account-for-10-pct-of-all-industrial-accident-deaths-in-s-korea-lawmaker/210004 (accessed 25 April 2022).
[372] Seon Jeong-su, '[팩트체크] 6 년 동안 한국에서 숨진 태국 노동자 522 명?' [Fact-check: 522 Thai workers died in South Korea over six years?], *Newstof*, 8 January 2021, available at http://www.newstof.com/news/articleView.html?idxno=11604 (accessed 25 April 2022).
[373] Committee on the Elimination of Racial Discrimination, 'Information received from the Republic of Korea on follow-up to the concluding observations on its combined seventeenth to nineteenth periodic reports,' CERD/C/KOR/FCO/17-19 (7 October 2020), para 13.

international human rights law and the Korean Constitution,[374] there are no indications that action has been taken by state authorities against agents or individuals to whom deaths may be attributable.[375]

The position in international human rights law is that all non-citizens are rights holders, regardless of status.[376] The Inter-American Court of Human Rights explicitly affirmed in a 2003 advisory opinion that equal protection of the law and non-discrimination are *jus cogens* norms that apply to irregular migrants.[377] This applies especially to the right to life; a recent general comment of the Human Rights Committee urged that the right 'should not be interpreted narrowly' and extends to 'reasonably foreseeable threats and life-threatening situations that can result in loss of life.'[378] However, the dichotomy between 'legal' and 'illegal' non-citizens continues to govern state immigration policies,[379] sustaining a 'state of exception' that exists at the limits of, if not outside, human rights and the rule of law. The gap applicable to the human rights of non-citizens – between formal entitlement and claimability in practice – continues to be most apparent in the case of irregular migrants. Subject to the so-called 'crimmigration' paradigm,[380]

[374] ICCPR, Article 6; 2015 Hun-Ma 1149, Constitutional Court of Korea (23 April 2020).
[375] Wongsamuth and Moon (2020), noting that South Korean labour, justice and foreign affairs ministries declined to comment.
[376] Global Compact for Migration, para 5.
[377] 'Juridical Condition and Rights of Undocumented Migrants,' Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights, para 101.
[378] Human Rights Committee, 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life,' CCPR/C/GC/36 (3 September 2019), paras 3, 7.
[379] Idil Atak and Lorielle Giffin, 'Canada's Treatment of Non-Citizens through the Lens of the United Nations Individual Complaints Mechanisms,' 56 *The Canadian Yearbook of International Law* (2019) 316.
[380] Benhabib (2020), remarking on how 'incarceration and deportation have become the preferred punishment for dealing with migration felonies': 89; Oberoi and Taylor-Nicholson (2013), 171, 176, finding that the 'principal response of the international community to irregular migration has been to criminalize irregular movement across borders.'

irregular non-citizens are deprived of the ability to claim human rights *in toto*, extending even to the right to life.

4.2 Refugees and Asylum Seekers

There is substantial overlap between the situations of irregular (im)migrants, on the one hand, and refugees and asylum seekers, on the other. Both are vulnerable to state mistreatment as 'quasi-criminal elements,' to justify the curtailment of their rights.[381] The assumption, shared by both domestic governments and populations, that irregular non-citizens incur their status through voluntary misconduct is problematic: one scholar cites evidence that many have fled persecution in their country of citizenship but do not 'apply for political asylum because they believe, often rationally, that their chances of success are exceptionally low.'[382] Moreover, an unsuccessful asylum application causes an individual, legally speaking, to lapse into irregular status. This is particularly relevant in domestic contexts in which the rate of refugee acceptance is particularly low,[383] or even non-existent.[384] However, one hundred years of codification in the area of refugee law, as addressed in chapter three, have led to significantly stronger protections under

[381] Benhabib (2004), 163; see also 168.
[382] Bosniak (2006), 169-170, note 164. She provides the example of applications filed in the 1980s by citizens of Guatemala and El Salvador, which 'were granted at the rate of approximately 2 percent and 3 percent, respectively,' leading 'many aliens [to remain] underground rather than risk deportation.' See also Benhabib (2020), questioning the validity of the distinction in popular imagination and state policy between 'deserving refugees' and 'undeserving migrants,' at 86.
[383] For example, South Korea's acceptance rate of refugee claims in 2020 stood at 0.8% (55 individuals out of 6,684 applicants): Ministry of Justice of the Republic of Korea, '출입국통계' [Immigration statistics], available at https://www.moj.go.kr/moj/2417/subview.do (accessed 6 May 2022).
[384] The official position of the Kuwaiti government, for example, is that 'there are no refugees in the country, [therefore] there is no specific legal and institutional framework regulating the status of refugees in accordance with international standards': Human Rights Committee, 'Fourth periodic report submitted by Kuwait under article 40 of the Covenant, due in 2020,' CCPR/C/KWT/4 (18 November 2020), para 150.

international human rights law for recognised refugees compared to other non-citizen groups. These include, *inter alia*, the prohibition on refoulement,[385] restrictions on penalties for irregular entry[386] and expedited naturalisation proceedings,[387] nullifying the deportation power that is otherwise the single greatest factor on claimability of human rights for non-citizens.

This section examines the state practice of Kenya concerning application of the 1951 Refugee Convention and its 1967 protocol. The Refugee Convention appears, *prima facie*, to anticipate protracted refugee situations, through providing for expedited naturalisation, as well as provisions that progressively place the rights of recognised refugees on the same footing as citizens.[388] The question of burden sharing between states, however, is confined to the preamble of the Convention.[389] The majority of refugee populations are hosted in developing countries (the so-called 'global south'); the 'pulling up [of the] drawbridges' in traditional resettlement destinations has compounded this intractability.[390] The response of states bordering humanitarian crises has been to house asylum seekers and refugees in ad hoc camps that evolve inexorably into long-

[385] Refugee Convention, Article 33.
[386] Ibid, Article 31.
[387] Ibid, Article 34.
[388] Article 34 of the Refugee Convention regulates naturalisation into the host state, while Article 17(2) provides for the non-application of 'restrictive measures imposed' with respect to employment, subject to three years of residence in the country.
[389] States parties consider 'that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of… international scope and nature cannot therefore be achieved without international co-operation.'
[390] Nanjala Nyabola, 'The End of Asylum,' *Foreign Affairs* (10 October 2019), available at https://www.foreignaffairs.com/articles/2019-10-10/end-asylum (accessed 6 May 2022). See also Jeff Crisp, 'UNHCR at 70: An Uncertain Future for the International Refugee Regime,' 26 *Global Governance* (2020), 366; Benhabib (2020), 91.

term settlements, as observed in Kenya, Turkey[391] and Bangladesh.[392] (Parallels also exist in the practice of some developed destination states, including Australia[393] and most recently the UK,[394] of 'warehousing' refugees in offshore territories ostensibly not subject to their jurisdiction.) In protracted refugee situations, the role of the UNHCR has been likened to that of a quasi-state in providing status determination and livelihoods;[395] refugee camps are not structurally integrated into the host state and the vast majority of refugees do not access pathways to citizenship,[396] awaiting instead third country resettlement or (from the host state's perspective) repatriation.

Kenya's camps are emblematic of this pattern: the two major complexes, Kakuma and Dadaab, have hosted displaced populations of various nationalities for over three decades. At separate points, each was the world's largest refugee camp; as of 2021, the

[391] Benhabib (2020) includes a discussion of Turkish practice with respect to refugees at 91-92. See also 'At 70, the global convention on refugees is needed more than ever,' *The Economist* (4 August 2021), available at https://www.economist.com/international/at-70-the-global-convention-on-refugees-is-needed-more-than-ever/21803326 (accessed 26 April 2022). Of note is that Turkey has ratified the 1951 Refugee Convention, but not the 1967 Protocol, and is therefore not legally required to recognise refugees originating outside of Europe: see Appendix B.

[392] OCHA, 'Rohingya Refugee Crisis,' available at https://www.unocha.org/rohingya-refugee-crisis (accessed 26 April 2022). The refugee camps in Cox's Bazar were, at the time of writing, the largest refugee camps in the world.

[393] Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources,' *Parliament of Australia Research Paper Series*, 19 December 2016, available at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf (accessed 26 April 2022).

[394] UK Home Office, 'World first partnership to tackle global migration crisis,' 14 April 2022, https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis (accessed 26 April 2022).

[395] Amy Slaughter and Jeff Crisp, 'A surrogate state? The role of UNHCR in protracted refugee situations,' *New Issues in Refugee Research*, Research Paper No. 168 (January 2009). In a contrasting approach, the substantial refugee population in Lebanon lives in rented accommodation in cities or rural settlements, in line with government policy: UNHCR Lebanon, 'Shelter,' available at https://www.unhcr.org/lb/shelter (accessed 26 April 2022).

[396] Michelle J. Bellino and Sarah Dryden-Peterson, 'Inclusion and exclusion within a policy of national integration: refugee education in Kenya's Kakuma Refugee Camp,' 40(2) *British Journal of Sociology of Education* (2019), 225.

combined population was approximately 430,000 people.[397] Both of the camps are situated in remote border areas, overcrowded, and managed through a semi-militarised partnership between the UNHCR and Kenyan security forces, thus creating an 'everyday citizen-refugee binary that is legally anchored in the administrative exception.'[398] Kenya is a party to the Refugee Convention and its Protocol, and its provisions are incorporated into domestic law.[399] Refugees are entitled, under the constitution and domestic law, to the same rights as Kenyan citizens, including freedom of movement, education and employment. As a matter of practice, however, these rights are not upheld;[400] confinement of refugees to the camp areas was adopted as informal government policy for decades, starting in 1992, before it was codified into domestic law in 2014.[401] Asylum-seekers and recognised refugees are encamped together and not permitted to

[397] UNHCR, 'Kenya: UNHCR presents sustainable and rights-based solutions for refugees residing in camps' (9 April 2021), available at https://www.unhcr.org/ke/19945-kenya-unhcr-presents-sustainable-and-rights-based-solutions-for-refugees-residing-in-camps.html (accessed 7 June 2022).

[398] Hanno Brankamp, ''Occupied Enclave': Policing and the underbelly of humanitarian governance in Kakuma refugee camp, Kenya,' 71 *Political Geography* (2019), 73, noting that 'a state of emergency [has been declared] in the [Kakuma] camp which does not apply to the rest of the country;' UNHCR, 'Joint statement by the Government of Kenya and the United Nations High Commissioner for Refugees: Dadaab and Kakuma Refugee Camps Roadmap' (29 April 2021), available at https://www.unhcr.org/news/press/2021/4/608af0754/joint-statement-government-kenya-united-nations-high-commissioner-refugees.html (accessed 6 June 2022); Rahul Chandrashekhar Oka, 'Coping with the Refugee Wait: The Role of Consumption, Normalcy, and Dignity in Refugee Lives at Kakuma Refugee Camp, Kenya,' 116(1) *American Anthropologist* (2014), 34; Human Rights Watch, *"You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi* (May 2013); 'From here to eternity,' *The Economist* (28 May 2016), https://www.economist.com/special-report/2016/05/26/from-here-to-eternity (accessed 6 June 2022). Further background on the 'humanitarian governance' structures that have evolved in Kakuma is set out in Brankamp (2019), 70-75.

[399] *Kenya Refugees Act* (2021), Articles 3, 28.

[400] Bellino and Dryden-Peterson (2019), 226.

[401] Brankamp (2019), 69-70; Human Rights Watch (2013), 43, 47. The 2014 amendment to the *Refugees Act* (2006) provides, in Article 14: 'Every refugee and asylum seeker shall… not leave the designated refugee camp without the permission of the Refugee Camp Officer.' See also Kenya's 2013 report to the Committee on Economic, Social and Cultural Rights: 'Kenya is unable to retract the policy of requiring refugees to live in the designated camps… Kenya, however, ensures that services offered to refugees [will] continue uninterrupted': E/C.12/KEN/25 (1 July 2013), para 36.

reside outside camps.[402] They are required to request 'movement passes' to attend schooling or receive medical treatment in other parts of the country.[403] Although schooling is provided within the camps, access to higher education is severely limited;[404] moreover, educational credentials are ultimately of little value, due to legal inability to work or even leave the camp.[405] A World Bank investigation found that 20% of working-age refugees were employed in Kakuma, compared to a national average of 71%.[406] Citizenship remains in practice unattainable, even for refugees born in Kenya, who are legally eligible to naturalise after seven years of residency.[407]

Through the inapposite application of models designed around temporariness and survival to long-term situations of camp residents (it is not unusual for recognised refugees to have spent their whole lives in the camps),[408] the livelihoods of asylum seekers and recognised refugees alike become suspended in a state of constant precarity.[409] Brankamp considers Kakuma refugee camp to be akin to an 'occupied enclave' within the state, 'sharpen[ing] boundaries between citizens and noncitizens.'[410]

---

[402] Nonetheless, as documented by Human Rights Watch (2013), a substantial population of refugees and asylum seekers (56,000 as of 2012, the majority of them Somali) are registered in Nairobi: 2-3, 44.
[403] Brankamp (2019), 72.
[404] As documented in Michelle J. Bellino, 'Education, merit and mobility: Opportunities and aspirations of refugee youth in Kenya's Kakuma refugee camp,' 47(4) *British Educational Research Journal* (2021) 817-835.
[405] Ibid, 820: 'Even the most highly educated young people struggle to find work in the camp, while most youth are left with nothing.'
[406] Utz Pape and Theresa Beltramo, 'After three decades, how are refugees in Kenya's Kakuma refugee camp faring?,' *World Bank Blogs* (12 April 2021), available at https://blogs.worldbank.org/africacan/after-three-decades-how-are-refugees-kenyas-kakuma-refugee-camp-faring (accessed 7 June 2022).
[407] Bellino and Dryden-Peterson (2019), 226.
[408] Oka (2014), 32.
[409] Rebecca Horn, 'A Study of the Emotional and Psychological Well-being of Refugees in Kakuma Refugee Camp, Kenya,' 5(4) *International Journal of Migration, Health and Social Care* (2009) 20-32, observing at 28 that the emotional problems of refugees 'relate mainly to stressors in the camp, rather than past experiences.'
[410] Brankamp (2019), 68.

As with the 'state of exception' encountered by irregular migrants, this fosters a culture of impunity on the part of state actors,[411] compounded by intermittent threats from the government to repatriate refugees to their country of origin.[412] In March 2021, the Kenyan government abruptly issued an ultimatum to UNHCR to develop a plan within 14 days to close the refugee camps.[413] In April 2021, the government and UNHCR jointly announced a 'roadmap' to close Kakuma and Dadaab by June 2022.[414] Although short on specifics (at the time of writing, no detailed information is available on UNHCR's website), the agreement contemplates four options: 'enhanced voluntary repatriation;' 'alternative-stay arrangements' for refugees from the East African Community;[415] issuance of national ID cards to a minor proportion of refugees (the figure 11,000 is provided in the press release) presumably eligible for Kenyan citizenship; and third country resettlement for 'a small number of refugees who are not able to return home and face protection risks.'[416] This sequencing makes clear the government's preferences guiding the closure of the camps, and there are legitimate questions as to

[411] Ibid, 67; Human Rights Watch (2013) reports widespread police abuse against Somali refugees, in particular, 'including rape, beatings, extortion, arbitrary arrest, and detention': 3, 17. See also 'Abuse in the name of security,' *The Economist* (29 May 2013), available at https://www.economist.com/baobab/2013/05/29/abuse-in-the-name-of-security (accessed 7 June 2022).
[412] In December 2012, Kenya's Department of Refugee Affairs ordered all refugees and asylum seekers living in Nairobi to relocate to the camps. The acting commissioner declared that this would 'closely be followed by repatriation of Somali refugees back to Somalia,' justifying the measures on the basis that they would 'protect our citizens': Human Rights Watch (2013), 2-3, 46, 65. The High Court invalidated the directive on constitutional grounds: UNHCR, 'UNHCR welcomes Kenya High Court decision on urban refugee rights' (30 July 2013), https://www.refworld.org/docid/51f8b8804.html (accessed 6 June 2022).
[413] UNHCR, 'UNHCR Statement on the Government of Kenya's intention to close Dadaab and Kakuma refugee camps' (24 March 2021), https://www.unhcr.org/ke/19849-unhcr-statement-on-the-government-of-kenyas-intention-to-close-dadaab-and-kakuma-refugee-camps.html (accessed 7 June 2022).
[414] UNHCR (29 April 2021).
[415] Incorporating seven states: Kenya, Burundi, the Democratic Republic of Congo, Rwanda, South Sudan, Tanzania and Uganda. Somalia is excluded. East African Community, 'Overview of EAC,' https://www.eac.int/overview-of-eac (accessed 7 June 2022).
[416] UNHCR (9 April 2021).

whether voluntary repatriation conforms to the non-refoulement principle. Apparently prompted by the impending camp closures, a long-delayed legislative amendment to domestic refugee law, the *Kenya Refugees Act* (2021), came into force in February 2022. This amendment formally removed the ban on leaving the camps and explicitly codified the right for recognised refugees to engage in employment.[417]

In the case of Kenya, it remains to be seen whether this timetabled integration will be capable of resolving status uncertainty for refugees, bringing domestic practice closer to the rights recognised in the Refugee Convention. It is clear, however, that the long-term domestic policy and practice of containing refugees in camps serves to frustrate rights claimability in accordance with their status in international human rights law. Restrictions on freedom of movement, the exercise of which would have facilitated other rights, among them the right to work, the privileged position of refugees vis-à-vis other non-citizens is rendered illusory.[418]

4.3 Migrant Workers

Non-citizens employed through temporary work programs, commonly referred to as migrant workers,[419] comprise a majority of the non-citizen population worldwide.[420] They fill critical labour gaps in domestic economies, particularly in work perceived as

[417] *Kenya Refugees Act* (2021), Article 28(5).
[418] On this point, see Cathryn Costello, 'On Refugeehood and Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), 736-37.
[419] As explored in chapter three, the definition adopted by ICMW is broader, encompassing any 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': Article 2(1).
[420] International Labour Organization, *ILO Global Estimates on International Migrant Workers* (2021).

undesirable by citizens (otherwise known as 'DDD' jobs: difficult, dirty and dangerous).[421] Although their presence in a state is typically intended to be temporary, 'they often remain indefinitely;' they 'have no political rights and few, if any, welfare rights,' and they are generally ineligible for citizenship.[422] Domestic law may further impose structural barriers to rights claimability by migrant workers: the informal, 'unseen' nature of work, physical and social isolation of workers and geographical spread of workplaces inhibits effective monitoring and enforcement of legal protections by state authorities.[423] Support mechanisms for migrant workers either may not exist, be inaccessible due to language or administrative constraints, or depend on territorial presence – an obstacle in states where legal status is tied to employment.[424] Regulation of migrant workers occurs through various forms in domestic jurisdictions, including employment permit systems,[425] seasonal worker programs[426] or sponsorship (discussed below), yet under each permutation the full spectrum of human rights is denied. Put simply, migrant workers are regulated as labour commodities, not rights holders.[427]

[421] UN DESA (2020), 11, 20.
[422] Bosniak (2006), 41-42. In the South Korean context, see Seol (2012), 131.
[423] Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, 'General comment No. 1 on migrant domestic workers,' CMW/C/GC/1 (23 February 2011), paras 25-27, citing the specific example of domestic workers.
[424] Ibid; Oberoi and Taylor-Nicholson (2013), 175.
[425] Yoomin Won, 'Why Human Rights Treaty Bodies Make a Difference: An Empirical Study of the Human Rights Committee's Monitoring System and Domestic Implementation' (PhD dissertation, Stanford University, 2019), 131-32.
[426] Both Australia and New Zealand provide short-term seasonal labour programs to citizens of Pacific Island countries: International Labour Organization, *Seasonal worker schemes in the Pacific through the lens of international human rights and labour standards: A summary report* (2021), 1.
[427] MacDonald and Cholewinski (2007), 74. This point is well made by the report of the Special Rapporteur on the human rights of migrants on a mission to Qatar, observing that 'Employers pay for the recruitment of the migrant and therefore feel that *the migrant is an investment they need to hold on to*': United Nations Human Rights Council, A/HRC/26/35/Add.1 (23 April 2014), para 30 (emphasis added).

Although migrant worker programs are a feature of many high-income economies, the most extreme example is presented by the Gulf states. With the exception of Saudi Arabia and Oman, non-citizens comprise the majority in every Gulf state.[428] Constituting a challenge to citizenship theory, these populations are a quasi-*demos* without a polity.[429] Citizenship in these states is characterised by its highly exclusive, ethnic nature, underpinned by an idiosyncratic social contract: Qatari citizens, for example, receive free education and healthcare, along with an array of 'special merits,' described as 'free distribution of residential land, easy loans, … tax exemption,' subsidised goods, and 'specific pensions' for priority groups, 'including a request for a housemaid allowance.'[430] These benefits are supported by the region's substantial migrant worker population, who may renew employment permits indefinitely, yet are regarded as 'visitors' and ineligible for citizenship.[431]

Migrant workers have conventionally been regulated through the *kafala* (sponsorship) system, iterations of which were implemented in all Gulf states, legalising lower pay, lesser legal protections and stringent restrictions on movement.[432] Migrant workers are

[428] IOM (2019), 4. In descending order, these are: United Arab Emirates (88.1%), Qatar (77.3%), Kuwait (72.8%), Bahrain (55.0%), Oman (46.5%) and Saudi Arabia (38.6%).
[429] This has caused disquiet in some states: see, for example, Yasmena Al Mulla, 'Kuwait: Expat quota bill discussed in parliament,' *Gulf News* (8 September 2020), reporting on 'ongoing discussion regarding the demographic imbalance in Kuwait.'
[430] National Human Rights Committee of Qatar, 'Shadow Report: In conjunction with submitting the country's preliminary national report in implementation of the provisions of the International Covenant on Economic, Social and Cultural Rights' (17 August 2021), 3, 15.
[431] 'The Gulf states offer citizenship to a select group of foreigners,' *The Economist* (11 December 2021), https://www.economist.com/middle-east-and-africa/2021/12/09/the-gulf-states-offer-citizenship-to-a-select-group-of-foreigners (accessed 7 June 2022); 'Keep out of politics, Kuwait warns expats,' *Kuwait Times* (11 April 2010), quoting the Kuwaiti Interior Minister: 'They are visitors in Kuwait, and we look at them as visitors in Kuwait.'
[432] A Saleh, 'Kuwait mulling cancellation of kafala system for expats,' *Kuwait Times* (15 January 2019); 'Saudi Arabia relaxes restrictions on expats,' *Arab Finance* (4 November 2020).

reportedly subject to violations of multiple economic and social rights, including withholding of salaries, poor living conditions, exit bans, confiscation of passports, despite the illegality of this practice under domestic law; and lack of access to healthcare.[433] The disparity between citizen minority and non-citizen majority is unwittingly captured in a 2021 report by the National Human Rights Committee of Qatar on economic and social rights: whereas citizens 'obtain economic *advantages*' through the fact of citizenship, non-citizens 'obtain economic *rights* through a contractual labor relationship, and the rights associated therewith.'[434] However, the report goes on to acknowledge complaints pertaining to those 'contractual rights,' including wage non-payment, harsh working conditions and poor accommodation.[435]

Gulf states have recently embarked on reform programs as a component of efforts to diversify their economies. Competition among states in the region to implement these comprehensive national 'visions' has resulted in the abolition in law of the *kafala* system, accompanied by policies to attract and retain non-citizens.[436] An element of 'rights bargaining' is discernible in this approach: Qatar, for instance, in 2018 ratified the ICCPR and ICESCR, describing the 'promotion and protection of human rights [as] a *strategic option* for Qatar, forming the backbone of its policy of sweeping constitutional,

[433] United Nations Human Rights Council (23 April 2014), paras 25-28, 44-45, 48; Saleh (15 January 2019).
[434] National Human Rights Committee of Qatar (17 August 2021), 7. See also ibid, para 48, criticising the explanation that 'domestic work is regulated in the contract signed between the employee and the employer, so there [is] no need for a law.'
[435] National Human Rights Committee of Qatar (17 August 2021), 13.
[436] *The Economist* (11 December 2021); Human Rights Committee, 'Concluding observations on the initial report of Qatar,' CCPR/C/QAT/CO/1 (30 March 2022), para 24, welcoming 'legislative measures adopted by the State party to abolish the sponsorship (*kafala*) system; 'Saudi Arabia labour reforms offer more expat rights,' *TradeArabia News Service* (4 November 2020).

economic, social and cultural reform.'[437] Saudi Arabia announced labour reforms in 2020 'to allow expatriate workers additional rights in line with the kingdom's Vision 2030,'[438] while Kuwait was reportedly considering labour reform to improve the country's human rights reputation.[439] Regardless of the degree to which these reforms are implemented, however, the majority populations in the region will remain non-citizens; even states considering naturalisation pathways, such as Qatar and the UAE, make it available only to high-net-worth individuals or those in desired professions, including doctors, inventors and scientists.[440]

The Gulf states provide a case study in the migration policy of destination states, taken to logical extremes. The non-citizens present in their territories are by definition essential populations; indeed, as the majority, it could not be otherwise. The lavish benefits of citizenship depend on the maintenance of distance from non-citizens in the same jurisdiction. Denial of internationally recognised economic and social rights disempowers migrant workers,[441] accompanied by the fiction that these rights are regulated through contract.

[437] Human Rights Committee, 'Initial report submitted by Qatar under article 40 of the Convention, due in 2019,' CCPR/C/QAT/1 (21 August 2019), para 293. Emphasis added.
[438] *TradeArabia News Service* (4 November 2020). The reforms came into force in March 2021.
[439] Saleh (15 January 2019).
[440] *The Economist* (11 December 2021); National Human Rights Committee of Qatar, 'Shadow Report submission: On The State's initial national report on implementation of the International Covenant on Civil and Political Rights' (October 2019), 17.
[441] Bauböck (2002), 11.

4.4 Expatriates and Investors

At this juncture, a significant discursive gap must be observed between two adjacent categories of non-citizen, 'migrant workers' and 'expatriates' (expats), the latter including investors. Protections for non-citizens developed historically in parallel with the law of international commerce, for the benefit of 'investors, traders, merchants, and business people.'[442] International-level protections for this group continue today, but within the realms of international trade and investment law, nominally separate from human rights.[443]

The movement of natural persons has been a feature of trade agreements at both the bilateral and multilateral level.[444] Provisions on the free movement of natural persons provisions typically stipulate that the state 'shall grant temporary entry' (or extension of stay) to defined classes of individuals.[445] The agreements exclude 'measures regarding

[442] Weissbrodt (2008), 36.
[443] Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights?,' 39(3) *Denver Journal of International Law & Policy* (2011), 484. The United States did, however, advocate for coverage of foreign investors in ICMW, although this was not adopted in the final text: Beth Lyon, 'The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm,' 42(2) *New York University Journal of International Law and Politics* (2010), 407.
[444] Provisions on temporary movement of natural persons were first established in the WTO General Agreement on Trade in Services (GATS), which entered into force in 1995. Marion Panizzon notes that this was a 'concession made by industrialized countries to developing countries': 'Temporary Movement of Workers and Human Rights Protection: Interfacing the "Mode 4" of GATS with Non-Trade Bilateral Migration Agreements,' 104 *Proceedings of the Annual Meeting (American Society of International Law)* (2010), 132. Among recent agreements, dedicated chapters on movement of natural persons are found in the *Regional Comprehensive Economic Partnership*, 15 November 2020 (entered into force 1 January 2022), Chapter 9; the *Agreement between the United States of America, the United Mexican States, and Canada*, 10 December 2019 (entered into force 1 July 2020), Chapter 16 (also known as the United States-Mexico-Canada Agreement: 'USMCA'); the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force 30 December 2018), Chapter 12; the *Comprehensive Economic and Trade Agreement* between Canada and the EU, 30 October 2016 (not in force), Chapter 10; and the *European Union–South Korea Free Trade Agreement*, 6 October 2010 (entered into force 13 December 2015), Chapter 7.
[445] USMCA, 16.4(1).

citizenship, nationality, residence' or permanent employment, while incorporating the saving clause that '[n]othing… prevents a Party from applying measures to regulate' entry or temporary stay in its territory, 'including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders.'[446] However, such measures may not be 'applied in a manner as to nullify or impair the benefits accruing to any Party.'[447] This represents a binding commitment by the state to facilitate the entry of non-citizens into its territory, frequently coupled with ongoing review to 'further facilitate temporary entry of business persons on a reciprocal basis.'[448] Additional initiatives, such as the APEC Business Travel Card (ABTC), provides streamlined entry process into APEC economies for 60-90 days at a time for a five-year period.[449] To object that this is only temporary is reductive; as reflected above, many migrant workers, as well as irregular migrants, gain initial entry into a state through programs that are designed to be temporary in nature. Concretisation of a *right* of entry to non-citizens within free trade agreements represents the 'only binding international obligation in place to limit national sovereignty over the admission of foreigners' outside of the non-refoulement principle.[450]

[446] Ibid, 16.2(3).
[447] Ibid.
[448] Ibid, 16.6(2)(b).
[449] APEC, 'APEC Business Travel Card (ABTC)' (April 2022), available at https://www.apec.org/groups/committee-on-trade-and-investment/business-mobility-group/abtc. There are currently 'more than 340,000 active ABTCs across the APEC region': APEC, 'Business Mobility Group' (December 2021), available at https://www.apec.org/groups/committee-on-trade-and-investment/business-mobility-group (both accessed 27 April 2022).
[450] Panizzon (2010), 132.

Likewise, bilateral investment treaties (BITs) are international legal instruments that guarantee the protection of investments in foreign states. BITs grant substantive rights to foreign investors, by permitting them to initiate international arbitration proceedings against the host state and obtain compensation for purported discriminatory treatment.[451] Arbitration proceedings to date, the majority of which have been initiated by individual investors, have largely been resistant to incorporating human rights considerations in their reasoning.[452] A small amount of literature seeking to connect BITs with international human rights law focuses on the effect of foreign direct investment agreements on host state populations; that is, 'local citizens.'[453] Inverting that approach, however, may be more revealing about the nature of rights claimability: foreign investors are also a category of non-citizens. These individuals utilise mechanisms, albeit drawn from a separate international area of law, to make claims against a foreign state that are legible in the language of rights – discrimination, equal treatment, remedy – and obtain access to justice. To the extent that they align with the provisions of international human rights law, they appear to rely on a highly justiciable, enforceable version of economic rights to seek protection of their investment. This presents a profound contrast with other groups of non-citizens discussed in this chapter, who are more likely to require protection of their personhood itself. This divergence cannot be answered solely by law. Investment and trade agreements are often justified on the grounds of economic benefit

[451] Henok Gabisa, 'The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?,' 48(2) *The International Lawyer* (2014), 154-55, 159.
[452] Ibid, 158, 165-66.
[453] Ibid, 155. See also Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?,' 60(3) *International and Comparative Law Quarterly* (2011) 573-596.
573, 576 (2011).

(for the state and its citizens); yet the same argument could be made regarding the economic contribution of migrant workers and irregular migrants. Placing expatriates and foreign investors in this context, against other non-citizens, indicates that rights claimability is most available for this group, as the level of 'publicly funded security'[454] afforded by international trade and investment law to economic rights surpasses, in some respects, even the human rights of citizens in the receiving state.

4.5 Multi-Layered Citizenship: The Case of the EU

The European Union is the clearest embodiment of multi-layered citizenship in the contemporary international community.[455] Citizenship of the EU was established '[f]or every person holding the nationality of a Member State' by the 1992 Maastricht Treaty;[456] the 2007 Treaty of Lisbon provides that 'Citizenship of the [European] Union shall be additional to national citizenship and shall not replace it,'[457] whereas in 2001 the European Court of Justice held that EU citizenship 'is destined to be the fundamental status of nationals of the Member States.'[458] At its core, European citizenship is a 'skinny status,' underpinned primarily by the right to free movement and residence in any EU

[454] In the description of a leading critical scholar, Gus Van Harten, who charges investment treaties with mandating 'an extraordinary level' of protection that 'could never be extended to all because doing so would bankrupt the state': *The Trouble with Foreign Investor Protection* (Oxford University Press, 2020), 9.
[455] Willem Maas, 'Multilevel Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), 659. However, the author perceives 'multilevel citizenship' as a historical norm, and unitary citizenship as merely an anomaly of the twentieth century: 645, 647.
[456] *Treaty on European Union*, 7 February 1992, 2002/C 325/5 (entered into force 1 November 1993), Article 8 ('Maastricht Treaty').
[457] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01 (entered into force 1 December 2009), Article 8.
[458] *Grzelczyk*, Case C-184/99, EU:C:2001:458 (20 September 2001), para 31.

member state.[459] However, as this study argues that the susceptibility of non-citizens to deportation is more determinative of rights claimability than any other factor, this regional innovation holds substantial normative significance.

Multi-layered citizenship holds two primary implications for non-citizens. The first is that the distance between human rights and state-level citizens' rights is narrowed for those who hold EU citizenship. Distinction between European citizens and non-citizens are effectively erased in member states, with the sole exception being the full exercise of political rights.[460] Since the advent of the Maastrict Treaty, EU citizens resident in other member states have enjoyed voting rights for local and European Parliament elections, placing them in a small minority of non-citizens worldwide.[461] Bauböck observes that naturalisation rates of EU citizens in other member states are very low, because 'extra benefits' are 'minimal.'[462] The European Court of Justice has 'aggressively deployed' non-discrimination and equal treatment principles to extend the basis of European citizenship to encompass most rights granted to citizens of a European state.[463] The second implication is that the rights of EU citizens are 'sharply delineated' from so-

[459] Francesca Strumia, 'Supranational Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), 674-75; Maas (2017), arguing at 659 that the EU 'remains the only case of regional integration where free movement rights are relatively entrenched.' *Contra* see Hansen (2009), writing that '[t]he most significant right associated with EU citizenship, the right to free movement, long predated' it (at 6).
[460] Maastricht Treaty, Article 8b.
[461] Bauböck (2002), 5, note 3.
[462] Ibid, 18.
[463] Strumia (2017), 675-76; Willem Maas, 'Migrants, states, and EU citizenship's unfulfilled promise,' 12(6) *Citizenship Studies* (2008), 592; Rainer Bauböck, 'The Three Levels of Citizenship within the European Union,' 15(5) *German Law Journal* (2014) 758. On case law, see *Trojani*, C-456/02, EU:C:2004:488 (7 September 2004); *Zambrano*, C-34/09, EU:C:2011:124 (8 March 2011). Maas (2008) notes however that some social benefits may still be reserved for residents: 592.

called third-country nationals;[464] as Maas puts it, the separation between citizen and non-citizen 'has gradually been replaced by the distinction between European and non-European.'[465] Hansen writes that the Maastricht Treaty perversely froze the non-citizenship status of thirteen million third-country nationals resident in the EU, contributing to a situation of ongoing disenfranchisement of this mainly guest worker population.[466] Third-country nationals within the territory of Europe benefit from directives on family reunification and long-term residence, although the latter permits member states to restrict equal treatment to ill-defined 'core benefits.'[467] However, progress towards a common, rights-based migration policy granting third-country nationals 'rights and obligations comparable to those of EU citizens,'[468] an objective first proclaimed in 1999, has been considerably slower, incurring further setbacks due to the 2015 perceived migration crisis.[469]

Multi-layered citizenship in the European Union, accompanied by powerful regional human rights norms, has narrowed the gap between citizens and non-citizens for those lawfully present in EU territory. The major disparity emerges when the regional regime is compared against international human rights law requirements. For example, the allocation of (only) 'core benefits' to long-term residents in the 2003 council directive

[464] Benhabib (2004), 146.
[465] Maas (2008), 588.
[466] Hansen (2009), 17, 20.
[467] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44), Article 11(4); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12); MacDonald and Cholewinski (2007), 14.
[468] European Council, 'Tampere European Council: Presidency Conclusions' (15-16 October 1999), para 18.
[469] Hilpold (2021), 226.

clearly implies that migrants without that status are not entitled to those rights.[470] A comprehensive report exploring obstacles to EU ratification of the ICMW found that EU practice continues to adhere to a 'crimmigration' paradigm with respect to irregular immigration.[471] Finally, in relation to the Global Compacts, Gördemann and Boucher demonstrate that the EU's approach to international protection of refugees and migrants is 'based on a notion of *voluntary* humanitarian assistance,' rather than binding international legal obligations.[472] The creation of multi-layered citizenship has secured rights claimability to EU citizens (second-country nationals) with respect to freedom of movement across international borders and the right to vote, while diminishing claimability for those outside of its ambit.

4.6 Anomalies: Domestic Categories with No International Counterpart

The final category of non-citizens considered in this chapter are anomalies created by domestic law, with no international law counterpart. Of the states under review in this study, South Korea presents the most examples of non-citizen categories in domestic law (as shown in Appendix A): these include foreign workers, "marriage migrants,"[473] "overseas Koreans," refugees, resident foreigners and "residents escaping North

[470] MacDonald and Cholewinski (2007), 14.
[471] Ibid, 79.
[472] François Boucher and Johanna Gördemann, 'The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique,' 23(2) *Interventions* (2021) 227-249.
[473] *Multicultural Families Support Act of the Republic of Korea* (2013), Article 2. "Marriage migrants" are legally defined as 'any foreigner in Korea who had or has a marital relationship with a Korean national.'

Korea."[474] The most expansive in scope is the 2007 *Framework Act on Treatment of Foreigners Residing in the Republic of Korea,* which 'prescribes basic matters' relating to the treatment of non-citizens *legally* residing in the country.[475] The focus of this section, however, concerns non-citizens who are awarded preferential treatment for both entry into and residence in a state for ethnic, cultural, or historical reasons. Individuals belonging to this category are described in various ways, including "overseas nationals" (as in the South Korean case) to "kin-minorities,"[476] reflecting their status as creatures of domestic law. In addition to South Korea, similar laws exist in Eastern Europe, Italy and Japan.[477] This study uses the term "co-ethnic non-citizen," to emphasize both non-citizenship status and the privileged ethnic bond with the (nation-)state.

In South Korea, an example of such legislation is the *Act on the Immigration and Legal Status of Overseas Koreans*. This legislation has a history almost as long as the modern Korean state, originating in the 1949 *Registration of Korean Nationals Residing Abroad*

[474] This a literal translation of the Korean term, 북한이탈주민, also translated as 'North Korean refugees' or 'North Korean defectors.' As the official Korean government website uses the expression 'residents escaping north Korea,' it has been reproduced here: *North Korean Refugees Protection and Settlement Support Act,* Article 2(1), available at https://www.law.go.kr/LSW/lsInfoP.do?chrClsCd=010203&lsiSeq=206648&viewCls=engLsInfoR&urlMode=engLsInfoR#EJ2:0 (accessed 2 July 2022).

[475] Articles 1-2. This act is problematic in its own right; it does not provide integrated or specific human rights protections for non-citizens, and therefore fails to perform its purpose as a basic act: Woo-Young Rhee, '인권보장과 체계정합성 관점에서의 외국인 관련 법제의 입법적 분석과 개정방향' [Analysis Of The Laws Concerning Non-Citizen Status And Rights In Korea From The Perspectives Of Human Rights Protection And Legislative Conformity, With Suggestions For Statutory Revisions] 16(1) *입법학연구* (2019) 22. More broadly, it may also be observed that the Act operates within a paradigm of threat, mentioning '[national] security' three times (Articles 13, 17 and 23); human rights, by contrast, are mentioned just once, in Article 10.

[476] This term is adopted by the Venice Commission in 'Report on the Preferential Treatment of National Minorities by their Kin-State' (22 October 2001).

[477] See for example *Act LXII of 2001 on Hungarians Living in Neighbouring Countries*; Venice Commission (2001); Bauböck (2002), 8, n 7, further noting that '[u]ntil after World War II the immigration laws of Canada, Australia and the US had rules for exclusions or preferences on racial grounds.'

Act. The law embraces the umbrella term of 'overseas Koreans,' defined so as to include both Korean citizens residing abroad and former citizens, or their descendants, holding foreign citizenship.[478] The remit of the Act, accordingly, covers both citizens as well as non-citizens, and applies to both equally. The wording of the Act is strongest amongst the suite of South Korean laws applicable to non-citizens: its declared purpose is to 'ensure overseas Koreans the entry into and departure from the Republic of Korea and the legal status therein.'[479] The legislation requires the government to 'give necessary support to overseas Koreans lest [they] should suffer unfair regulation or treatment,' and 'freely' permits a range of rights, prominently employment and other economic activities.[480] It grants 'a wide range of benefits and privileges' that the Constitutional Court has recognised as akin to that of 'dual citizenship.'[481] As seen from the language of the law, a class of non-citizens are entitled to claim rights reserved for citizens, and treated equally in terms of status in the legislation's definitions and substantive provisions. Therefore, even those who renounced Korean citizenship, or have never held it, retain their status as 'foreign nationality Koreans' (or 'compatriots,' in the Korean-language terminology of the Act).[482] The position of the Korean Constitutional Court, which examined the law against the obligations of the ICERD, is that it does not constitute unlawful discrimination because the 'benefit that the government seeks to [gain] from the discrimination in this case is significantly smaller than the resulting pain

[478] *Act on the Immigration and Legal Status of Overseas Koreans* (2013), Article 2.
[479] Ibid, Article 1. Emphasis added.
[480] Ibid, Articles 4, 10. Article 10(5) includes the proviso that such activities '[do] not impair social order or economic stability.'
[481] 99 Hun-Ma 494, Constitutional Court of Korea (29 November 2001) (English translation) 18-19.
[482] *Act on the Immigration and Legal Status of Overseas Koreans* (2013), Article 2(2).

and division among fellow Koreans.'[483] Of significance in this context, however, is that the Venice Commission concluded, in a human rights analysis in a comparable situation, that preferential treatment on ethnic grounds should 'be granted only in exceptional cases' in fields other than education and culture, where the benefit accords with those available to other non-citizens.[484]

A similar dynamic may be observed in contrasting the provisions of the *Refugee Act* and the *North Korean Refugees Protection and Support Act*. The 2013 *Refugee Act* formally incorporates the provisions of the 1951 Refugee Convention into domestic law. However, the legislation is predated by the 1999 *North Korean Refugees Protection and Settlement Support Act*, reflecting the contingent geopolitical circumstances of Korean nationhood.[485] South Korea does not recognise North Korea as a state and does not therefore acknowledge North Korean nationality.[486] However, as a matter of international law, the 'two Koreas' possess similar international legal personality; North Korean residents are therefore non-citizens, at least from the perspective of international human rights law.[487] The significance of this is that the *North Korean Refugees Protection and Settlement Support Act* provides substantial protections to those found to be genuine

[483] 99 Hun-Ma 494 (29 November 2001). Translation provided in Seokwoo Lee and Hee Eun Lee, *The Making of International Law in Korea: From Colony to Asian Power* (Brill Nijhoff, 2016), 285.
[484] Venice Commission (2001), 22.
[485] Although the English title of the Act denotes its subject as 'North Korean refugees,' direct translation of the Korean title is closer to 'resident escaping from North Korea,' indicating differences in conception within South Korea's domestic context.
[486] See 95 Hun-Ka 2 (4 October 1996) and 97 Hun-Ka 12 (31 August 2000) 663. The Act defines 'residents escaping from North Korea' as 'persons who have their residence, lineal ascendants and descendants, spouses, workplaces, etc. in the area north of the Military Demarcation Line, and who have not acquired any foreign nationality after escaping from North Korea': Article 2.
[487] Both North and South Korean governments were admitted to the UN simultaneously: United Nations General Assembly, 'Admission of the Democratic People's Republic of Korea and the Republic of Korea to membership in the United Nations,' A/RES/46/1 (17 September 1991).

North Korean refugees, in the spirit of 'humanitarianism';[488] the legislation provides status comparable to that of citizens in education, employment, accommodation, social security benefits, and in limited cases the right to be appointed as public officials.[489] This political distinction has effectively created two separate categories of 'refugee' within domestic law.

The anomalous status of "co-ethnic non-citizens" presents challenges for assessing consistency with international human rights law against other categories of non-citizens. The plain intent of South Korean legislation on 'overseas Koreans' and 'residents escaping North Korea' is to bring these non-citizen groups closer to the citizen population, rather than to maintain distinctions; it is therefore appropriate to compare these two groups to the human rights position of citizens, rather than other non-citizen categories. From the perspective of rights claimability, 'overseas Koreans' and 'residents escaping North Korea' lack full political participation rights. However, they are able to claim the full range of rights that require provision of benefits by the state, including social and economic rights. The apparent danger of this category of "co-ethnic non-citizens" arises when claimability of (economic and social) rights enshrined in international human rights law is not shared across different categories of non-citizens. In this case, the sole differentiating factor appears to be ethnic, a distinction that is contrary to international human rights law.

[488] *North Korean Refugees Protection and Settlement Support Act* (1999), Article 4.
[489] Ibid, Articles 4-2, 17, 18, 26. See especially the multiple exceptions to other legislation specified in Article 26.

4.7 Mapping Major Categories of Non-Citizens against International and National Frameworks

Multiple categories of non-citizens exist in domestic jurisdictions. The ability of a state to construct, through its domestic law, categories of non-citizens with differing levels of status and rights claimability is accompanied by 'enormous discretion' granted to state immigration authorities, increasing the difficulty of assessing compliance with international (human rights) law standards.[490] These multiple categories may be conceived according to a hierarchical spectrum, whereby the rights claimability of non-citizens diverges not just from the citizens of a state, but also among different categories of non-citizens.

This chapter has examined how the maintenance of multiple categories of non-citizenship impact rights claimability from an individual perspective. In sections one, two and three of this chapter, domestic implementation of international human rights law obligations frustrates claimability of the human rights that relevant conventions intend to bestow on them. In the case of irregular non-citizens, exclusion from the operation of domestic law, except for the operation of state immigration power, defeats the availability of rights altogether. Recognized refugees, although legally entitled to resources and protection, are frequently subject to state practice that renders realisation of this status illusory. Migrant workers, on the one hand, and investors and expatriates, on the other, are separated by a discursive gap reinforced by their regulation through

[490] Tiburcio (2001) xix; Oberoi and Taylor-Nicholson (2013), 173.

separate areas of international law. This tends to obscure the vast differences in rights claimability between them, despite objective similarities in their position vis-à-vis the state of jurisdiction. Fragmentation into separate categories through domestic legislation (section six) or regional mechanisms (section five), while bolstering claimability for these groups, further compound unevenness between different non-citizen populations. This serves to reinforce the gap in rights claimability by non-citizens in domestic jurisdictions.

Chapter 5: Interaction Between International and Domestic Levels

Chapter three of this study analysed international human rights law provisions on non-citizens. Chapter four examined state practice in domestic jurisdictions with respect to major categories of non-citizens. This chapter turns to mechanisms in between the domestic and international dimensions, with a focus on UN human rights treaty bodies, national constitutions, national human rights institutions and transnational coalitions. The chapter concludes with a discussion of the way in which these mechanisms generate a vocabulary for individual non-citizens to advance human rights claims, while suggesting limitations to the current apparatus.

5.1 Inter-Level Dialogue: Interpretation of Existing Treaty Provisions and State Responses

General Comments

As set out in chapter three, the non-citizen is generally invisible in the core treaties of international human rights law. When they appear in specific provisions, the scope is generally limited. UN treaty body committees have, as such, assumed the role of threading the needle of formal provisions, as well as connecting and augmenting the treaties. A key principle of interpretation governing distinctions between citizens and non-citizens has developed as follows:

> All persons should, by virtue of their essential humanity, enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective.[491]

In the absence of explicit textuality, many of the UN Committees have articulated or 'read in' coverage of non-citizens into the core human rights treaties through general comments.

Initial activity in this direction was led by the Human Rights Committee in 1986. In a general comment issued, perhaps not coincidentally, a year after the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,[492] the Committee underscores that Article 2(1) of the ICCPR is addressed to 'all individuals' present in a territory or 'subject to… jurisdiction.'[493] It asserts on this basis a 'general rule' that all Covenant rights 'must be guaranteed without discrimination' to

[491] Cited in OHCHR (2006), 5. Similar formulations are found in Human Rights Committee, 'General Comment No. 18: Non-discrimination,' (10 November 1989), para 13, available in United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume I), HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), 197-200; Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),' E/C.12/GC/20 (2 July 2009), para 13; Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX on discrimination against non-citizens' (5 August 2004), para 4, available in available in United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume II), HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008), 301-6; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families,' CMW/C/GC/2 (28 August 2013), para 18.

[492] Discussed in Chapter 3.2.

[493] Human Rights Committee, 'General Comment No. 15: The position of aliens under the Covenant' (11 April 1986), para 1, available in United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (Volume I), HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), 191-93 (observing that state reporting has 'often failed to take [this provision] into account').

both citizens and non-citizens, 'irrespective of reciprocity, and irrespective of his or her nationality or statelessness.'[494] The Committee identifies a disconnect between international and domestic law in this respect:

> In many States… constitutions are drafted in terms of citizens only when granting relevant rights. Legislation and case law may also play an important part in providing for the rights of aliens… In certain cases, however, there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens.[495]

The Committee seeks to strengthen the protection of the rights of non-citizens, in effect, by foregrounding another norm textually implied in the Covenant, yet not obvious on its face: while the principle that a state may 'decide who it will admit to its territory' is conceded (although the text pointedly does not use the word 'right' to describe this state power), 'once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.'[496] The result of this interpretation is a radical narrowing of states' ability to discriminate lawfully outside of the immigration sphere; there is no 'right… to enter or reside' in a state,[497] but the mere fact of territorial presence is a source of *individual* rights that transcend the status of non-citizen, immigrant, or

[494] Ibid, paras 1-2. See also para 4, calling on states to observe the requirements of the ICCPR with respect to non-citizens 'in their legislation and in practice as appropriate.'
[495] Ibid, para 3.
[496] Ibid, paras 5-6.
[497] Ibid, para 5. Of additional relevance is that the Committee contemplates 'certain circumstances' in which a non-citizen may even enjoy 'protection… in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.'

foreigner. The comment further deduces a prohibition against discrimination between different categories of non-citizen.[498]

In a subsequent general comment addressing the nature of legal obligations under the ICCPR,[499] the Committee reiterated its individual-centred interpretation of the Covenant. As individuals are the 'beneficiaries of the rights recognized by the Covenant,' states are required to respect and ensure that rights are 'not limited to citizens' but available 'regardless of nationality or statelessness,' it held.[500] Interpretation of jurisdiction in Article 2(1) was expanded further to encompass 'anyone within the power or effective control of that State Party, even if not situated within [its] territory.'[501] States were reminded that any 'inconsistencies between domestic law [or practice] and the Covenant' require rectification 'to meet the standards imposed by the Covenant's substantive guarantees.'[502] The Committee similarly dismissed any 'political, social, cultural or economic considerations' as justification not to give effect to rights with 'unqualified' and 'immediate effect' to all individuals.[503] State obligations in this regard correspond to the right of individuals to access 'effective remedies.'[504] As affirmed by the Committee in a 2007 comment, this necessitates 'right of access to courts and tribunals and equality

[498] Ibid, para 8 ('Differences in treatment [with respect to freedom of movement] between aliens and nationals, or between different categories of aliens, need to be justified'); para 9 ('Discrimination may not be made between different categories of aliens in the application of article 13 [regulating expulsion]').
[499] Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' CCPR/C/21/Rev.1/Add.13 (26 May 2004).
[500] Ibid, paras 2-3, 9-10.
[501] Ibid, para 10. On this basis, the international law norm of non-refoulement was read into the Covenant 'where there are substantial grounds for believing that there is a real risk of irreparable harm': para 12. See also HRC, 'General Comment No. 36' (2018), para 63, stating that jurisdiction extends outside state territory to cover individuals impacted by 'other [state] activities in a direct and reasonably foreseeable manner.'
[502] HRC, 'General Comment No. 31' (2004), para 13.
[503] Ibid, para 14.
[504] Ibid, para 15.

before them… [for] all individuals, regardless of nationality or statelessness, or whatever their status.'[505] Distinctions based on any status, including nationality or citizenship, in '[p]rocedural laws or their application' were held to violate the right to equality before the law.[506] The right to freedom of movement has also been interpreted expansively, to 'embrace, *at the very least*,' individuals 'who, because of [their] special ties to or claims in relation to a given country, cannot be considered to be a *mere alien*.'[507]

The Committee on Economic, Social and Cultural Rights, for its part, has endeavoured in its commentary to harmonise the provisions and compatibility of the two covenants. In a general comment on the nature of state obligations under the ICESCR, the Committee argued:

> While great emphasis has sometimes been placed on the difference between the formulations used in [article 2] and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities… Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these… is the "undertaking to guarantee" that relevant rights

[505] Human Rights Committee, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,' CCPR/C/GC/32 (23 August 2007), paras 2, 9.
[506] Ibid, para 65.
[507] Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement),' CCPR/C/21/Rev 1/Add/9 (2 November 1999), para 20. Emphasis added. This interpretation was justified on the basis that the phrase '[one's] own country,' which appears in Article 12(4), is broader than the concept of country of nationality.

> "will be exercised without discrimination"… The other is the undertaking… "to take steps", which in itself, is not qualified or limited by other considerations.[508]

The Committee subsequently decried the 'assumption' that economic, social and cultural rights are 'beyond the reach of the courts,' labelling this 'incompatible with the principle that the two sets of human rights [as set out in the ICCPR and ICESCR, respectively] are indivisible and interdependent.'[509] The Committee concluded, accordingly, that judicial remedies for violations of economic, social and cultural rights are 'essential,' especially for 'the most vulnerable and disadvantaged groups in society.'[510]

The relevance of this approach for non-citizens is set out in a 2009 general comment, in which the Committee broadly interpreted Covenant rights to ensure equality and non-discrimination.[511] National origin, a prohibited ground of discrimination under Article 2(2), was held to cover 'a person's State, nation or place of origin,' while the comment urged a 'flexible approach' towards the ground of 'other status.'[512] Elsewhere, the comment states that '[t]he ground of nationality should not bar access to Covenant rights,' and that all rights 'apply to everyone including non-nationals… regardless of

[508] Committee on Economic, Social and Cultural Rights, 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant),' E/1991/23 (14 December 1990), paras 1-2. The view that the ICESCR is less favourable to non-citizens than the ICCPR was expressed by Lillich (1984), 47-48.
[509] Committee on Economic, Social and Cultural Rights, 'General comment No. 9: The domestic application of the Covenant,' E/C.12/1998/24 (3 December 1998), para 10.
[510] Ibid, paras 9-10.
[511] Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),' E/C.12/GC/20 (2 July 2009).
[512] Ibid, paras 24, 27. In this vein, see also Committee on Economic, Social and Cultural Rights, 'General Comment No. 9' (1998), para 15, which concludes: 'Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.'

legal status and documentation.'[513] The prominent exception for developing countries in granting economic rights to non-citizens (Article 2(3)) is minimised through this interpretation, mentioned only once in a footnote.[514] The Committee urges states to 'adopt specific legislation' prohibiting 'formal and substantive discrimination' by both public and private actors, and allow access to 'courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons' to address violations.[515] The significance of this expansive position is readily apparent in a context in which states continue to restrict, or at least prioritise citizens, in the distribution of economic and social rights.[516]

The Committee on the Elimination of Racial Discrimination has, in its recommendations, similarly read down the exception for 'distinctions, exclusions, restrictions or preferences' made between citizens and non-citizens under Article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination.[517] Again, this entails parsing the specific provision in the light of international human rights law as an integral whole: the Committee holds, as such, that the provision 'must be construed so as to avoid undermining the basic prohibition of discrimination' or 'detract[ing] in any way from the rights and freedoms recognized and enunciated' in other human rights

[513] Committee on Economic, Social and Cultural Rights, 'General Comment No. 20' (2009), para 30.
[514] Ibid, note 22: 'This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant.'
[515] Ibid, paras 37, 40.
[516] Yoon Jin Shin, 'Non-Citizens' Rights, Constitutional Review and an Inclusive Democracy: A Case Study of South Korea,' 91 *Journal of Korean Law* (2020), 95-96; Lillich (1984), 47.
[517] Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX' (2004).

treaties.[518] Proceeding on this basis, the Committee affirms that 'human rights are, in principle, to be enjoyed by all persons,' and states are obliged 'to guarantee equality between citizens and non-citizens' in human rights 'to the extent recognized under international law;'[519] presumably this includes rights recognised under the ICERD. Recommendations in this area comprise a long list of impediments faced by non-citizens and states' duty to address them. The duties include: ensuring that implementation of legislation does not have a discriminatory effect on non-citizens, 'regardless of their immigration status,' with immigration policy and naturalisation singled out in particular;[520] removing obstacles that prevent equal enjoyment of economic, social and cultural rights;[521] countering xenophobia and violence targeting non-citizens or groups of non-citizens, including through impartial investigations and access to effective remedies;[522] preventing arbitrary detention, and the prohibition against refoulement.[523] Asserting a high degree of congruity between racial discrimination and citizenship or immigration status, the Committee contends that 'differential treatment' on the latter grounds '*will* constitute discrimination' under the Convention unless it is 'applied pursuant to a legitimate aim' and 'proportional' to its achievement.[524]

[518] Ibid, para 2: UDHR, ICESCR and ICCPR are identified 'in particular.' Paragraph 3 of 'General recommendation XI on non-citizens,' A/48/18 (1993), which General Recommendation XXX replaced, is worded almost identically.
[519] Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX' (2004), para 3.
[520] Ibid, paras 7, 9, 13.
[521] Ibid, para 29: education, housing, employment and health are named specifically. See also para 33, on 'tak[ing] measures to eliminate discrimination… in relation to working conditions and work requirements,' and para 34, on prevention and redressal of 'serious problems commonly faced by non-citizen workers, in particular… domestic workers.'
[522] Ibid, paras 11-12, 18, 23.
[523] Ibid, paras 19, 27.
[524] Ibid, para 4. Emphasis added.

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has also issued a limited number of general comments. With respect to migrant workers in an irregular situation and members of their families, the Committee holds that the rights guaranteed in international human rights treaties 'generally apply to everyone, including migrants and other non-nationals, without discrimination of any kind… including immigration status'[525] (that is, irrespective of whether states have ratified the Migrant Worker Convention or not). The comment also makes the following statement in the context of arbitrary arrest and detention:

> The Committee considers that crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.[526]

This appears to go beyond the textual provisions of the Convention, although it corresponds to the deliberations of the Working Group on Arbitrary Detention on deprivation of liberty of migrants.[527] Nevertheless, the Committee does not follow this

[525] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General comment No. 2' (2013), para 8. This paragraph also notes that protection under other treaties generally have 'a wider scope' than those found in the Convention.
[526] Ibid, para 24.
[527] 'Revised deliberation No. 5 on deprivation of liberty of migrants' (23 November 2017), stating in paragraph 10 that 'the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows;' text available in United Nations General Assembly, 'Report of the Working Group on Arbitrary Detention,' A/HRC/39/45 (2 July 2018), 31-37. The Working Group is not a human rights treaty body, but is constituted pursuant to a resolution of the Human Rights Council.

with any specific recommendations, for example for states to refrain from treating irregular non-citizens through criminal (or so-called 'crimmigration') paradigms. Circumventing comparatively low ratification of the Migrant Worker Convention, the Committee has issued two joint comments with the Committee on the Rights of the Child,[528] a further indicator of attempts to harmonise international human rights law across treaties.

Even outside of the treaties that may be thought directly applicable to non-citizens, UN Committees have been active in extending their coverage to non-citizens. The Committee on the Elimination of Discrimination against Women has developed commentary on how non-citizenship may compound gender discrimination.[529] Describing core obligations under the CEDAW, the Committee writes that eliminating discrimination requires 'identify[ing] women within the jurisdiction of the State party (including non-citizen, migrant, refugee, asylum-seeking and stateless women) as rights-bearers,'[530] stating further that '[a]lthough both men and women migrate, migration is not a gender-neutral phenomenon.'[531] The Committee has also reminded states on several occasions that while

[528] These two joint general comments are cited in the paragraph below.
[529] The Committee has delivered general recommendations to date on women migrant workers (no. 26, 5 December 2008); gender-related dimensions of refugee status, asylum, nationality and statelessness (no. 32, 14 November 2014); and trafficking in women and girls in the context of global migration (no. 38, 20 November 2020).
[530] Committee on the Elimination of Discrimination against Women, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,' CEDAW/C/GC/28 (16 December 2010), para 26; see also para 12, which underscores that 'obligations of States parties apply… without discrimination both to citizens and non-citizens… within their territory or effective control, even if not situated within the territory.'
[531] Committee on the Elimination of Discrimination against Women, 'General recommendation No. 26' (2008), para 5: 'The position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof.'

they are 'entitled to control their borders and regulate migration, they must do so in full compliance with their obligations' under human rights treaties.[532] The Committee on the Rights of the Child has reiterated that rights in the corresponding Convention are 'not limited to children who are citizens and must therefore… be available to all children' who come within state jurisdiction, irrespective of the citizenship, immigration status or statelessness of the child or their parents.[533] This has been held to include access to education, healthcare, material assistance and social security on an equal basis with citizens.[534] The Committee on the Rights of Persons with Disabilities has also recognised national origin and 'migrant, refugee or asylum status' as potential elements of intersectional discrimination prohibited by the Convention on the Rights of Persons with Disabilities.[535]

---

[532] Ibid, para 3; Committee on the Elimination of Discrimination Against Women, 'General recommendation No. 38' (2020), para 23. The Committee has, in this respect, read complementarity between the provisions of CEDAW, the 1951 Refugee Convention and 1967 Protocol, and the 1954 and 1961 conventions on statelessness: Committee on the Elimination of Discrimination Against Women, 'General recommendation No. 32' (2014), para 10.

[533] Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin,' CRC/GC/2005/6 (1 September 2005), para 12; Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration,' CRC/C/GC/22 and CMW/C/GC/3 (16 November 2017), paras 9, 12; Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,' CRC/C/GC/23 and CMW/C/GC/4 (16 November 2017), para 53.

[534] Committee on the Rights of the Child, 'General Comment No. 6' (2005), paras 41, 44, 46; Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Joint general comment Nos. 4 and 23' (2017), paras 47, 55, 59, 62.

[535] Committee on the Rights of Persons with Disabilities, 'General comment no. 6 (2018) on Equality and Non-Discrimination,' CRPD/C/GC/6 (26 April 2018), paras 18-19, 21. The Committee writes that the Convention 'take[s] into account the experiences offered by the other conventions, and its equality and non-discrimination principles represent the evolution of the United Nations tradition and approach' (para 5). The comment also

This survey of the commentaries issued by human rights treaty committees demonstrates that these bodies have emphasised *intertextuality* between core human rights treaties, to support the *interdependency* of international human rights law. Cognisant of the 'multiple discrimination' experienced by non-citizens,[536] the committees have synthesised treaty provisions and extrapolated necessary implications, going beyond the black letter text to advocate a more universal protection of human rights, while implicitly answering state claims of prerogative with respect to sovereignty and immigration control. The following sections, in turn, examine dialogue between the human rights treaty bodies and states in practice.

Individual Communications

International human rights law achieved a major breakthrough in international law with the advent of optional protocols to the core human rights treaties. Although it remains a little heralded feature of the international architecture, this innovation allowed an individual to bring a claim directly against a state alleging violations of its international obligations for the first time in the history of the discipline. Since the adoption of the first Optional Protocol to the International Covenant on Civil and Political Rights (coterminous with the ICCPR, on 16 December 1966), individuals have been able to contribute in their own capacity to claim-making in international human rights law.[537]

---

recommends that states 'that receive a high number of asylum seekers, refugees or migrants should put in place formal, legally defined procedures to ensure accessibility for persons with disabilities': para 73(p).

[536] This phrase is from Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX' (2004), para 8.

[537] See also the assessment in Marc Limon 'Reform of the UN Human Rights Petition System: An assessment of the UN human rights communications procedures and proposals for a single integrated system,' Universal

The individual communications system has gradually expanded to embrace all of the core human rights treaties, an implicit recognition of the model's normative success. The individual, in an international forum, advances the right to justification[538] from the state with respect to a domestic practice, catalysing jurisgenerative practices[539] vis-à-vis the international treaty.

This practice of formulating international rights claims by individuals depends for success on making the particular circumstances of their experience legible in international human rights law. To borrow a phrase from the realm of constitutional litigation: 'every good… advocate *appeals to these understandings* [of the broader, social context] by *formulating doctrinal claims* consistent with them. The understandings are sometimes explicit, sometimes implicit, and often contested.'[540] This discourse under the individual communications process is not unidirectional: states, in responding with their justifications, must equally frame (or, in some instances, learn to frame) their (in)action in specific instances as consonant with potentially neglected international obligations.[541] Such exchanges between the treaty body committees and states, with individual non-citizens empowered to participate throughout the process by responding

Rights Group policy report (January 2018), describing individual communications as 'one of the human rights system's most important tools' (6). Note that although an individual communications procedure was adopted in ICERD (Article 14), the year before ICCPR, the Optional Protocol (and, hence, the Committee) under the former did not enter into force until 1982: Limon (2018), 12.

[538] Forst (2010), 711-40.

[539] Benhabib (2004), 181 *passim.*

[540] Aleinikoff (1990), 26, note 62. Emphasis added.

[541] One striking example is provided by a 1999 individual communication against the Philippines. The state submitted that it could not 'adequately respond' to allegations of torture, 'as they require further investigation': Human Rights Committee, *Albert Wilson v. The Philippines*, Communication No. 868/1999 (30 October 2003), para 4.2. Unsurprisingly, the Committee found a violation of Article 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR.

to state submissions and furnishing further evidence, narrow the distance between domestic and international law interfaces. Through providing a platform for non-citizens to claim their rights against states to whose jurisdiction they are subject, individual communications concretise international human rights provisions with respect to non-citizens and render them less abstract. The requirement to exhaust domestic remedies respects state jurisdictions while implicitly anticipating the shortcomings of domestic mechanisms, including constitutions.[542] Committees constituted under the conventions rely on precedent in interpreting claims, referring to both the general comments discussed above as well as previous cases, which the committees describe using the term 'jurisprudence.'[543] On the normative character of views, the position of the Human Rights Committee is that:

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the Views issued by the Committee under the Optional Protocol *exhibit some of the principal characteristics of a judicial decision*… A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.[544]

[542] The oft-stated position in this respect is that 'doubts about the effectiveness of domestic remedies do not absolve [the author] from exhausting them': see for example Human Rights Committee, *J.B. v. Australia,* Communication No. 2798/2016 (21 July 2017), para 7.5.
[543] For example, in Human Rights Committee, *D.V. and H.V. v. The Czech Republic*, Communication No. 1848/2008 (23 July 2012), recalling at para 6.2 its 'established jurisprudence' that domestic remedies need not be exhausted 'when these remedies are known to be ineffective.'
[544] Human Rights Committee, 'General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights,' CCPR/C/GC/33 (25 June 2009), paras 11, 15.

By invoking the principle of *pacta sunt servanda*,[545] the Committee strongly suggests that state duty to 'cooperate' in the process and in implementing the outcome is a binding obligation under the Covenant itself, ascribing its views a quasi-judicial status.[546]

The ability of non-citizens, therefore, to submit communications against a state holding jurisdiction over them is a powerful affirmation *in form* of the universality of human rights, centring on the *individual*. It is important to note significant practical limitations in utilising this mechanism: ratification of the optional protocols is uneven, both across regions and among the core treaties; there are obvious language, not to mention procedural, barriers for the majority of the world's population;[547] the requirement to exhaust domestic remedies may be used as a shield to formalistically delay or deny complaints; the amount of time between receipt of a communication and issuance of findings has steadily increased;[548] and inadequate follow-up to committee

[545] Ibid, para 15, citing Article 26, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[546] Human Rights Committee, 'General Comment No. 33' (2009), paras 13-15; this position is reiterated in 'Concluding observations on the fourth periodic report of Czechia,' CCPR/C/CZE/CO/4 (6 December 2019), reminding the state party at paragraph 5 that it 'regards the implementation of the remedies indicated in its Views as an important part' of obligations under the Covenant and Optional Protocol. OHCHR describes the 'guidance' of treaty bodies as 'legally binding to the extent that it is based on binding international human rights law': OHCHR, 'A Human Rights-Based Global Compact for Safe, Orderly and Regular Migration' (Undated submission to the Human Rights Council), available at https://refugeesmigrants.un.org/sites/default/files/stocktaking_ohchr.pdf, 2, note 6 (accessed 5 June 2022). *Contra* Limon (2018) describes an interview with a diplomat, dismissing the 'Views' as 'not even 'decisions'' and entailing no legal obligation (at 28).

[547] The general practice in individual communications, as stated at the end of each document, is to issue views in English, French and Spanish, then translate them subsequently into Arabic, Chinese and Russian for annual publication. In practice, communications submitted in Arabic, Chinese or Russian incur delays: Limon (2018), 25.

[548] In 2016, it took an average of three and a half years for committees to issue views, and up to seven years in certain cases: ibid, 25-27. This is a matter of increasing frustration to governments. There is, furthermore, a large backlog of cases across the majority of committees, as a small OHCHR team is responsible for processing thousands of communications per year.

recommendations is a problem in many states. Mindful of these limitations, this section examines jurisprudence in individual communications and state responses for their explicatory potential. It also attempts to discern key themes relating to the human rights of non-citizens that emerge through the exchanges. The table below sets out data on individual communications among the 30 states reviewed in this study, organised as follows: total number of communications received; number and proportion submitted by non-citizens; and number and proportion of non-citizen communications upheld.

Table 3: Individual communications[549]

State	Total	Non-citizen complaints (#)	Non-citizen complaints (%)	Upheld (#)	Upheld (%)
Australia	191	125	65.5	27	21.6
Belize	0	0	0	0	0
Canada	248	181	73	25	13.9
Chile	8	1	12.5	0	0
Costa Rica	3	3	100	0	0
Czech Republic	58	43	74.2	24	55.9
Djibouti	1	0	0	0	0
Ecuador	14	5	35.8	3	60
El Salvador	0	0	0	0	0
Equatorial Guinea	3	1	33.4	1	100

[549] Totals were calculated by a manual review of OHCHR data at https://tbinternet.ohchr.org (accessed 5 May 2022), removing duplicates and incorrectly coded entries. Communications were also considered if they were submitted by dual citizens, as long as they raised matters traditionally regarded as falling within the immigration purview. N/A indicates that the state has not ratified any optional protocol that would allow the submission of individual communications. A full list of communications considered is in Appendix D.

Estonia	7	6	85.8	1	16.7
Gabon	0	0	0	0	0
Germany	33	18	54.6	3	16.7
Hungary	19	11	57.9	2	18.2
Indonesia	0	0	0	0	0
Italy	19	8	42.2	2	25
Kazakhstan	59	8	13.6	7	87.5
Kenya	N/A	-	-	-	-
Kuwait	N/A	-	-	-	-
Latvia	7	3	42.9	0	0
Libya	18	4	22.3	3	75
Mexico	11	1	9.1	1	100
New Zealand	37	10	27	0	0
Philippines	21	3	14.3	3	100
Poland	10	2	20	0	0
Qatar	0	0	0	0	0
Slovakia	11	3	27.3	0	0
South Africa	3	0	0	0	0
South Korea	24	8	33.4	3	37.5
Turkey	8	2	25	0	0

Among the states under review in this study, there are wide variations among the number of individual communications, as well as the proportion submitted by non-citizens. In

total, the majority of individual communications submitted to UN treaty bodies concern non-citizens, constituting just under 55 percent of the total,[550] while violations were found in slightly under a quarter of these communications (23.6%, comprising 105 views in total) by the relevant committee. Significantly, communications concerning states in the WEOG (Western Europe and Others) regional group outnumbered all other regions combined, both overall and with respect to non-citizens.[551] This is predominantly attributable to the high number and proportion of communications submitted by non-citizens concerning the traditional destination states of Australia and Canada. By contrast, New Zealand, another long-standing immigration destination, has been the subject of significantly fewer communications (ten from non-citizens, out of 37 in total), none of which have been upheld. It is important to note that as the findings of this study pertain to the thirty states under review, as set out in Table 3, they may not necessarily be applicable to the individual communications system as a whole.

Three key themes may be discerned from individual communications submitted by non-citizens before treaty bodies. The first is an assertion of equality with respect to human rights: the Human Rights Committee, in particular, has repeatedly recognised citizenship and nationality as prohibited grounds of discrimination. Second, committees have demonstrated a concern for the personhood of non-citizens, through consideration of

[550] Non-citizen communications comprised 446 out of a total of 813. This aligns with other scholarship: Atak and Giffin (2019) observe that 78.3% of petitions concerning Canada in the period 2008 and 2018 were submitted by non-citizens (at 300).
[551] In this study, Australia, Canada, Germany, New Zealand and Turkey belong to the WEOG regional grouping. The total number of communications submitted concerning these states was 536 of a total of 813 (65.9%, compared to 277 for all other regions); this proportion was even higher for communications submitted by non-citizens, at 334 out of a total 446 (74.9%, compared to 112 for all other regions).

their individual circumstances in each communication. The final theme, most contentious for states, is in the form of tentative inroads into eroding the immigration power itself, through a mediation with human rights provisions.

Non-citizens are particularly vulnerable to arbitrary exercises of state power, as vividly illustrated by the following communication concerning the Philippines:

> On 22 December 1999, on [the author's] release from death row, the Bureau of Immigration lifted a Hold Departure Order, on condition that the author paid fees and fines amounting to P22,740 for overstaying his tourist visa. The order covered the entirety of his detention, and if he had not paid, he would not have been allowed to leave the country … On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist. When he inquired why the conviction should have such effect after it had been quashed, he was informed that to secure travel certification he would have to attend the Bureau of Immigration in the Philippines itself.[552]

In this case, the complainant's status as a non-citizen was decisive. His deportation foreclosed his ability to obtain remedies in the domestic jurisdiction for breaches of his human rights, leading to his communication to the Committee. In one relatively early communication by a non-citizen, the respondent state (Equatorial Guinea) expressed outrage: as the author was not a citizen, he was not 'subject to [the state's] own

[552] Human Rights Committee, *Wilson v. The Philippines* (2003), paras 2.7, 2.9.

jurisdiction,' and the communication was a violation of 'elemental norms of international law and… an interference into domestic affairs.'[553] Unsurprisingly, the Committee 'strongly reject[ed]' this argument.[554] Yet the Committee was also more deferential towards states in its early years, holding in one 1989 decision that it was not its role 'to test a sovereign State's evaluation of an alien's security rating.'[555] Communications between treaty bodies and states have since developed into a more sophisticated dialogue; committees have demonstrated more of a healthy scepticism and willingness to measure policy assertions against individual circumstances.

As seen in chapter three, nationality and citizenship are not, with the exception of ICMW, explicitly recognised as grounds of discrimination in the core human rights treaties. Treaty bodies have nonetheless actively affirmed that these are prohibited grounds of discrimination.[556] Faced with submissions from destination states that attempt to minimise incompatible 'claims to residence by unlawfully present aliens,' or rely on broad discretion under international law to control entry to their territory, the Human Rights Committee has not been persuaded: although non-citizens do not have a right of entry or residence, states must nevertheless 'respect and ensure all their rights under the

[553] Human Rights Committee, *Primo José Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990 (28 May 1990), paras 4.1-4.2.
[554] Ibid, paras 5.1, 6.3. The Committee went on to find multiple violations: para 7.
[555] Human Rights Committee, *J.R.C. v. Costa Rica*, Communication No. 296/1988 (30 March 1989), para 8.4, accepting 'reasons of national security' as a basis for declining to find a violation.
[556] In the case of the ICCPR, admissible claims are generally based on Article 26 (equality before the law): Human Rights Committee, *Andrea Vandom v. Republic of Korea*, Communication No. 2273/2013 (12 July 2018), para 8.4; with respect to ICERD, the Committee has interpreted Article 1(2) in the light of Article 5 and General recommendation XXX (2004) to admit claims based on citizenship status: Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, Communication No. 42/2008 (14 August 2009), para 6.3; *L.G. v Republic of Korea*, Communication No. 51/2012 (1 May 2015), para 7.4.

Covenant' during *both* processes.[557] Discrimination on the grounds of citizenship (or residence) in the operation of law have also been found to be incompatible with the ICCPR.[558] A particularly challenging area concerns access by non-citizens to citizenship status or permanent residence, as none of the treaties recognise this as a right.[559] Of the nine communications submitted by non-citizens in this position, none were upheld.[560] The Committee's reasoning has nonetheless been nuanced: in a complaint brought by a stateless individual denied citizenship by Estonia, the Committee declared the complaint admissible, holding that the author did not advance 'a free-standing right to citizenship' but made claims intersecting with rights in the Covenant.[561] It further emphasised that the invocation of national security concerns 'does not, ipso facto, remove an issue wholly from the Committee's scrutiny,' although it ultimately found that the author had not shown that the denial of citizenship 'was not based on reasonable and objective grounds.'[562] Finally, treaty bodies have also asserted equality between non-citizens and citizens in crucial but controversial areas of rights. The Human Rights Committee found

[557] HRC, *Vandom v. Republic of Korea* (2018), paras 4.3 and 8.4, in relation to entry and extension of stay; *Hendrick Winata and So Lan Li v. Australia*, Communication No. 930/2000 (26 July 2001), para 6.3, in relation to residence.

[558] HRC, *Alina Simunek, Dagmar Hastings Tuzilova and Josef Prochazka v. The Czech Republic*, Communication No. 516/1992 (19 July 1995), paras 11.5-11.6; see also *Miroslav Blazek, George A. Hartman and George Krizek v. The Czech Republic*, Communication No. 857/1999 (12 July 2001), para 5.8. These communications concerned laws passed by Czechia providing restitution or compensation for property confiscated during the communist period.

[559] As discussed in Chapter 3.1.

[560] All were submitted under the ICCPR Optional Protocol: see Appendix D.

[561] Human Rights Committee, *Vjatšeslav Borzov v. Estonia*, Communication No. 1136/2002 (26 July 2004), para 6.6.

[562] Ibid, paras 7.3, 7.4. The same conclusions were reached in *Vjatseslav Tsarjov v. Estonia*, Communication No. 1223/2003 (26 October 2007) and *Gennadi Šipin v. Estonia*, Communication No. 1423/2005 (9 July 2008), communications concerning the same state party and similar circumstances. Interestingly, the Committee's view in *Borzov v. Estonia* (at para 7.3) was that 'considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a *newly independent state* invokes national security concerns;' this suggests there may be occasions in which justifications of national security would not be reasonable.

in 2018 that the denial of essential healthcare by Canada to an irregular migrant had violated her right to life, overruling decisions of the Canadian courts that 'denying financial coverage for health care' to irregular migrants was 'consistent with fundamental justice' and 'a permissible means to discourage defiance of Canada's immigration laws.'[563] The Committee held that the right to life did not permit distinctions between regular or irregular status.[564] Unfortunately, its views were ignored by the state.[565]

Treaty body committees have conveyed concern for the personhood of non-citizens. Contrary to the minimalist position urged by states – one typical submission argues that 'the Covenant is designed to ensure and protect the *basic* human rights of all persons'[566] – review of individual circumstances is of potential great value against immigration policies directed towards deterrence or punishment.[567] Consideration of individual circumstances assumes a special role where non-citizens are facing deportation to third countries where they are at risk of human rights violations that would cause 'irreparable harm.'[568] The Committee Against Torture has consistently required an 'individualized risk assessment' of each non-citizen prior to repatriation, finding breaches of the

[563] Human Rights Committee, *Nell Toussaint v. Canada*, Communication No. 2348/2014 (24 July 2018), paras 2.10, 11.5, 11.8; see discussion in Atak and Giffin (2019), 315-316.
[564] Human Rights Committee, *Toussaint v. Canada* (2018), para 11.7.
[565] Canada stated in a follow-up communication that it was 'unable to agree with the Committee's Views,' and would 'not take any further measures to give [them] effect': Human Rights Committee, 'Follow-up progress report on individual communications,' CCPR/C/127/3 (8 July 2021), 3-4.
[566] Human Rights Committee, *Soo Ja Lim, Seon Hui Lim and Hyung Joo Scott Lim v. Australia*, Communication No. 1175/2003 (25 July 2006), para 4.6. Emphasis added.
[567] See also Atak and Giffin (2019), 327: 'specific circumstances of each case play a significant role in the decision-making process... The UN committees have shown remarkable capacity to critically analyze, and challenge, the findings and the reasoning of national authorities.'
[568] Human Rights Committee, *X. v. Republic of Korea*, Communication No. 1908/2009 (25 March 2014), para 11.3.

Convention where this has not occurred.[569] In one classic case, in which a family of irregular, stateless non-citizens were facing deportation from Australia, the Human Rights Committee placed considerable reliance in its findings on a psychologist report on their son, an Australian citizen, which portrayed him as:

> … an Inner Western Sydney multicultural Chinese Australian boy, with all the best characteristics of that culture and subculture [who] would be completely at sea and at considerable risk if thrust into Indonesia.[570]

In another similar case, the Committee held *sua sponte* that a communication against New Zealand could 'raise issues under article 16 of the Covenant,' since members of the family 'were not treated as persons in their own right but rather as addenda' to the petition's author, who was considered a 'prohibited migrant.'[571] In communications alleging arbitrary or unlawful deprivation of liberty, particularly in the context of immigration detention, the Committee apparently applies a stringent standard; of the communications reviewed in this study, sixty percent were upheld, a higher proportion than for any other alleged violation.[572] In cases in which the mental or physical health of the non-citizen has been affected, the Committee has additionally found detention to constitute cruel, inhuman or degrading treatment.[573]

---

[569] Committee against Torture, *Khairullo Tursunov v. Kazakhstan*, Communication No. 538/2013 (8 May 2015), para 9.9; Committee against Torture, *X. v. Kazakhstan*, Communication No. 554/2013 (3 August 2015), para 12.7. See also Committee against Torture, *Ke Chun Rong v. Australia*, Communication No. 416/2010 (5 November 2012), para 7.5, where the Committee held that deportation, in the absence of 'effective, independent and impartial review' of the complainant's allegations and evidence, would constitute a violation of Article 3 of the Convention.

[570] Human Rights Committee, *Winata and Li v. Australia* (2001), para 3.4.

[571] Human Rights Committee, *Simalae Toala et al v. New Zealand*, Communication No. 675/1995 (2 November 2000), para 6.4.

[572] As set out in Appendix D.

[573] Human Rights Committee, *C. v. Australia*, Communication No. 900/1999 (28 October 2002), paras 2.8, 8.4.

A majority of non-citizen communications considered in this study allege that their deportation would violate human rights.[574] Although deportation as such is not a violation of human rights,[575] the Human Rights Committee has held that the 'obligation not to extradite, deport or otherwise transfer' where there is 'a real risk of irreparable harm' may be broader than the *non-refoulement* principle, 'since it may also require the protection of aliens not entitled to refugee status.'[576] In cases where an additional confluence of factors compatible with human rights provisions justify restraint, the Human Rights Committee has also repeatedly held that individual circumstances override general invocations of immigration power by the state. Perhaps the most influential among these cases is *Winata*.[577] The position of the respondent state, Australia, was that 'the authors' allegations [did] not come within the terms of any right recognized by the Covenant;' that their 'unlawful establishment of a family in [the] State [was] a factor weighing heavily in favour' of removal; and that the Covenant upheld the right of states 'to regulate the entry of aliens into their territories.'[578] The Committee disagreed; while recognising 'significant scope for States parties to enforce their immigration policy,' including through requiring 'departure of unlawfully present persons,' such discretion is 'not unlimited.' In the present case, considering the length of

[574] Constituting 65% of the total (289 communications), out of which 15.6% (45 in total) were upheld (see Appendix D).
[575] Human Rights Committee, *J.G. v. New Zealand*, Communication No. 2631/2015 (2 November 2015), para 4.4. The author of this communication had attempted to argue that deportation subsequent to serving a criminal conviction violated the *ne bis in idem* principle in Article 14(7) of the ICCPR.
[576] Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016 (24 October 2019), para 93.
[577] Human Rights Committee, *Winata and Li v. Australia* (2001).
[578] Ibid, paras 4.4, 4.16.

time the parents had been present in Australia (14 years), as well as the situation of their son, who was a citizen and had lived his whole life in the state, it was 'incumbent on the State party to demonstrate additional factors justifying the removal,' going beyond '*a simple enforcement of its immigration law* in order to avoid a characterisation of arbitrariness.'[579] Australia did not accept the Committee's views in this case, but it ultimately did not deport the couple, who were eventually granted permanent residency.[580] The conclusions in this case continued to be invoked by non-citizen claimants before the Human Rights Committee.[581] In addition to family life (Articles 17 and 23 of ICCPR) and the best interests of children (Article 24), duration of residence and engagement with the community have also emerged as key factors against deportation.[582]

Treaty body committees have, in recent years, adjudicated boundary-pushing cases that challenge the adaptability of international human rights law in conjunction with non-citizenship status. One such case was a communication to the Committee on the Rights of the Child on climate change, submitted by a multinational youth coalition.[583] The authors argued that the states had violated their right to life, health and culture; that they

[579] Ibid, para 7.3. Emphasis added.
[580] Remedy Australia, 'Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)' (11 April 2014), 44.
[581] Not always successfully: see Human Rights Committee, *Mohammed Sahid v. New Zealand*, Communication No. 893/1999 (28 March 2003) (the Committee found at para 8.2 that there were no 'exceptional factors' mitigating against removal); Human Rights Committee, *Moleni Fa'aaliga and Faatupu Fa'aaliga v. New Zealand*, Communication No. 1279/2004 (28 October 2005) (in which the state party explicitly addressed *Winata*). For a recent case in which the Committee found violations, see Human Rights Committee, *Thileepan Gnaneswaran v. Australia*, Communication No. 3212/2018 (27 October 2021).
[582] Atak and Giffin (2019), 319.
[583] Two of the respondent states include Germany (Committee on the Rights of the Child, *Chiara Sacchi et al. v. Germany*, Communication No. 107/2019 (22 September 2021)) and Turkey (Committee on the Rights of the Child, *Chiara Sacchi et al. v. Germany*, Communication No. 108/2019 (22 September 2021)).

were subject to the jurisdiction of the state with respect to foreseeable, real and significant harm caused by climate change; and that the urgency of the issue justified instituting proceedings before an international forum.[584] Their status as non-citizens was integral to the claim that they were subject to the states' jurisdiction: the communication against Germany cited a Constitutional Court judgment holding that obligations to foreigners 'were limited and less protective' than obligations to citizens, in support of their argument that domestic remedies would be ineffective.[585] The case was ultimately held inadmissible by the Committee for non-exhaustion of domestic remedies,[586] yet all of the other arguments – including, pertinently, that they were subject to the state party's jurisdiction – were accepted. A related case, submitted by a Kiribati citizen who had unsuccessfully applied for refugee status in New Zealand, alleged that his expulsion to the low-lying Pacific Island state violated his right to life, due to the precarious situation of the islands caused by climate change.[587] The domestic tribunal, grappling with the application of the Refugee Convention to 'the effects of environmental change and natural disasters,' concluded that he 'did not objectively face a real risk of being persecuted if returned to Kiribati,' although it left open the possibility of recognising refugees in future based on those grounds.[588] The Committee ultimately concurred, while acknowledging the potential for the right to life to be affected by climate change.[589] Finally, in a view issued in 2021, the Committee on the Rights of Persons with

[584] Ibid paras 1.1., 2.5, 3.1.
[585] Committee on the Rights of the Child, *Sacchi et al. v. Germany* (2019), para 7.3. See also *Sacchi et al. v. Turkey* (2019), para 7.8, in which Turkey submitted that its constitution 'does not distinguish between nationals and non-nationals.'
[586] Ibid, para 9.19.
[587] Human Rights Committee, *Teitiota v. New Zealand* (2019), para 2.1.
[588] Ibid, para 2.8.
[589] Ibid, paras 9.13, 10.

Disabilities held that non-citizens are subject to jurisdiction during immigration proceedings, including the visa application process.[590] An individual with multiple sclerosis failed to satisfy the health requirements for a work visa, as her condition was deemed to likely result in 'significant cost to the Australian authorities or prejudice the access of an Australian citizen or permanent resident to health care.'[591] The state, while denying that the individual had ever been subject to its jurisdiction, contended that the requirement was 'legitimate differential treatment,' based on 'reasonable and objective criteria' and 'proportionate to the aim to be achieved,' by preserving 'access by Australian citizens and permanent residents to health care and community services that may be in short supply.'[592] The Committee recalled the principle that 'failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification,'[593] while holding that the state had discriminated on the basis of disability, with the effect of impairing the right to use the state's immigration proceedings on an equal basis with others.[594] This finding reflects the reality that 'border management functions,' and therefore potential human rights violations, are increasingly 'spatially detached from territorial borders.'[595]

[590] Committee on the Rights of Persons with Disabilities, *Grainne Sherlock v. Australia*, Communication No. 20/2014 (19 March 2021), para 7.4.
[591] Ibid, para 2.3
[592] Ibid, paras 4.2; 4.15.
[593] Ibid, 8.7
[594] Ibid, 8.8.
[595] Oberoi and Taylor-Nicholson (2013), 172.

Compliance of states with the views of treaty bodies is described at best as inconsistent,[596] at worst as 'very poor.'[597] The Human Rights Committee concluded that just 22% of views were being satisfactorily implemented in a recent report.[598] If they are not disregarded altogether, findings may take a long time to be implemented: Atak and Giffin identify one communication, submitted to the Committee against Torture on non-refoulement, which Canada took twenty-three years to comply with.[599] In situations where a precedent is created due to persistent violations that the state takes no action to correct, this can lead to further communications concerning similar circumstances being upheld. In the case of Czechia, the vast majority of individual communications against the state were submitted by former Czech citizens concerning its 1991 restitution law, which imposed barriers on non-citizens to obtain restitution for property lost or confiscated during the communist period. Beginning in 1995,[600] the Committee found violations of Article 26 of the ICCPR (equal protection of the law); the most recent violation was found in 2020.[601] This has led to exchanges between the Committee and the state deadlocking: the Committee observes that its earlier views had remained 'unimplemented,' constantly reiterating that the State 'should review its legislation' to ensure equality before the law,[602] while Czechia insists that 'it does not intend to change

[596] Alek and Giffin (2019), 294.
[597] Limon (2018), 27.
[598] Human Rights Committee, 'Follow-up progress report on individual communications,' CCPR/C/118/3 (15 February 2017); see also ibid. State compliance with interim measures was higher, at 69%: Limon (2018), 26.
[599] Limon (2018), 325.
[600] Human Rights Committee, *Simunek et al v. Czech Republic* (1995).
[601] Human Rights Committee, *Karel Malinovsky, Vladimir Malinovsky, Alexander Malinovsky and Katerina Malin v. Czechia*, Communication No. 2839/2016 (6 November 2020).
[602] Human Rights Committee, *Blazek et al v. Czech Republic* (2001); Human Rights Committee, *D.V. and H.V. v. Czech Republic* (2012).

its position.'[603] A similar trend is observable in multiple communications by non-citizens subject to Australia's long-standing mandatory immigration detention regime.

Individual communications hold normative importance, as an avenue for non-citizens to make individual claims under international human rights law and establish discriminatory treatment by states. State engagement during the submission process (that is, contesting whether human rights have been violated) is generally high.[604] However, notwithstanding the consistent position of committees on state duty to cooperate in good faith with their findings, follow-up and enforcement remain significant challenges. The particular role of individual communications in enhancing rights claimability is considered further in chapter six.

State Reporting

Periodic state reporting to the human rights treaty bodies is the only avenue to evaluate the domestic law and practice of states that have not accepted optional protocols. An obvious drawback of reporting is that it is a more performative, polished exercise that lacks the specificity of individual circumstances entailed by individual communications. A recent government report to the Human Rights Committee commenced as follows:

> Kuwait attaches the utmost importance to the protection and promotion of human rights and constantly seeks to pursue their advancement. In this endeavour, it draws on a significant cultural heritage and well-established principles, which

[603] Human Rights Committee, *Zdenek Kríž v. The Czech Republic*, Communication No. 1054/2001 (1 November 2005), para 4.3.
[604] An analysis in Limon (2018) found that 87% of states made submissions during consideration of individual communications: 27.

> have been adopted by national institutions and which have made the evolution of human rights a bedrock that will not be shaken [...][605]

Such rhetoric is fairly common. Another observable trend is that treaty body recommendations become stuck in a cycle of perpetual 'study': Indonesia's standard response to consistent requests to accede to optional protocols (it has currently ratified only the Optional Protocol to CEDAW) is that 'the [government] is still in the process of reviewing and assessing [ratification].'[606] Likewise, Qatar's report to the Human Rights Committee states that, 'the State firmly believes [that human rights treaties and optional protocols] are vital for the protection and promotion of human rights. Nonetheless… the approach to accession must be unhurried.'[607] There is also the potential for states to either ignore or outright deny identified concerns. Responding to inquiries concerning 'xenophobia and repressive policies against undocumented migrants,' Kenya stated that 'the [government] has not received any reports of xenophobia and repressive policies against undocumented migrants.'[608] Indonesia's engagement with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families during evaluation of its initial report was yet more blunt: 'The Committee's assessment,' it retorted, is 'not factual.'[609]

[605] CCPR/C/KWT/4, para 2.
[606] CCPR/C/IDN/QPR/2, para 1; government response at para 13, p3.
[607] CCPR/C/QAT/RQ/1, para 8.
[608] CCPR/C/KEN/Q/4, para 18; CCPR/C/KEN/RQ/4, para 92.
[609] Permanent Mission of the Republic of Indonesia to the United Nations, WTO and International Organizations in Geneva, 'Comments by the Government of Indonesia on the Concluding Observations on the Initial Report of Indonesia by Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,' 25 September 2017, paras 6, 9; responding to CMW/C/IDN/CO/1.

Nevertheless, human rights treaty bodies exercise important oversight of state practice with respect to non-citizens. In the most recent cycle of recommendations made to states under review in this study, all states received multiple recommendations concerning non-citizens. Appendices B and C of this study set out ratification of human rights instruments by states under review and recommendations received relating to various categories of non-citizens, respectively. Recurring themes pertinent to the human rights of non-citizens in periodic reporting and ensuing dialogue may be categorised as follows:

1. Non-discrimination: Committees urge states to concretise constitutional principles or proclaimed national values of non-discrimination into comprehensive anti-discrimination laws. Discrimination against non-citizens, or various sub-groups among them, is commonly cited as a rationale for enactment of such laws.[610]
2. Irregular migrants: Criminalisation of irregular entry or stay, together with indefinite detention of irregular migrants in practice, was flagged as a concern by a range of committees.[611]
3. Migrant workers: Committees urged states to take action against the stigmatisation, exploitation and deaths of migrant workers, including through providing effective legal remedies.[612]

[610] See, for example, the Human Rights Committee's concluding observations on the reports of Belize (CCPR/C/BLZ/CO/1/Add.1, para 7); Equatorial Guinea (CCPR/C/GNQ/CO/1, para 24) Kenya (CCPR/C/KEN/CO/4, paras 10-11); Qatar (CCPR/C/QAT/CO/1, para 12); and El Salvador (CCPR/C/SLV/CO/7, paras 9-10).
[611] Human Rights Committee concluding observations on the reports of Belize (CCPR/C/BLZ/CO/1/Add.1, paras 27 and 41); and Kenya (CCPR/C/KEN/CO/4, para 37); Migrant Workers Committee concluding observations on Indonesia (CMW/C/IDN/CO/1, para 30).
[612] Human Rights Committee list of issues on Gabon (CCPR/C/GAB/QPR/3, para 13); closing observations on Kuwait (CCPR/C/KWT/CO/3, paras 32-33); and Qatar (CCPR/C/QAT/CO/1, paras 23, 25).

4. Trafficking: In states where the non-citizen population has grown significantly as a proportion of the overall total, including Equatorial Guinea and Gabon,[613] trafficking was frequently identified as a concern. Although most states had passed anti-trafficking laws, low levels of enforcement were problematic.[614]
5. Refugees: The Human Rights Committee expressed concern at non-existent or insufficient refugee protection provisions, undue delay in status determinations, and non-observance of the *non-refoulement* norm.[615]

Reporting has identified shortcomings with respect to harmonisation of human rights between the international and domestic levels in practice, particularly as this pertains to non-citizens. Kenya provides a typical example: the state finalised an ambitious constitutional reform in 2010, following the violent aftermath of disputed elections and an international mediation led by a former UN Secretary-General.[616] The 2010 constitution incorporates 'robust commitment to the principles of equity, equality, inclusiveness, equality, non-discrimination and protection of the marginalized,' coupled with an enforceable Bill of Rights,[617] catalysing 'epochal strides' forward in implementing human rights, according to the state.[618] The National Human Rights

[613] Human Rights Committee, concluding observations on the report of Equatorial Guinea, noting allegations that 'smuggling and trafficking is on the rise because of the country's economic appeal' (CCPR/C/GNQ/Q/1, para 14); and Gabon, expressing concern about large numbers of persons trafficked for sexual exploitation and forced labour (E/C.12/GAB/CO/1, para 23).
[614] Committee on Racial Discrimination concluding observations on Belize (CERD/C/BLZ/CO/1, para 12); concluding observations on the report of Equatorial Guinea (CCPR/C/GNQ/CO/1, para 42).
[615] Human Rights Committee concluding observations on the reports of Belize (CCPR/C/BLZ/CO/1/Add.1, para 40); El Salvador (CCPR/C/SLV/CO/7, paras 31-32); Kenya (CCPR/C/KEN/CO/4, para 37); and Kuwait (CCPR/C/KWT/CO/3, para 36).
[616] Detailed background on the negotiation and transition process is provided in Kofi Annan, *Interventions* (Penguin, 2012) 191-204.
[617] CCPR/C/KEN/4, paras 7, 17.
[618] CESCR/C.12/KEN/2-5, para 3.

Commission of Kenya, however, contextualises these claims with its report, providing evidence that there is an extensive backlog of cases in the Kenyan court system, while the government 'perennial[ly]' disregards court orders.[619] Discrimination is 'manifest in most spheres' of government operations, including with respect to citizenship and access to economic, social and cultural rights.[620] The government itself acknowledges that it preferences citizens in the allocation of 'limited resources,'[621] and has not enacted an anti-discrimination law. Despite an advanced domestic legal framework that adopts international human rights standards, the gap in this case arises with implementation in practice.

Committees have also exercised their oversight to integrate the core human rights treaties, creating links between different legal categories of non-citizens. This facilitates the adoption of 'workarounds' by treaty bodies, so that states that have not ratified certain treaties may not evade scrutiny. In this way, state reporting processes provide a platform to reinforce the interpretation set out in the treaty body general comments. In recent years, treaty bodies have made recommendations concerning 'migrants, asylum seekers and refugees' collectively, implicitly recognising the fluidity that exists between these categories.[622] An example of this in practice is provided by Indonesia's engagement with the treaty bodies. In recent years, the country has stepped up its advocacy for its migrant worker population, proudly describing itself as 'the only state that provides

[619] National Human Rights Commission of Kenya, 6. In the 2018-19 period, the backlog was a reported 341,056 cases.
[620] National Human Rights Commission of Kenya, ICERD report, para 12.
[621] CERD/C/KEN/5-7, para 13.
[622] As seen in Appendix C.

shelter for its migrant workers' inside its diplomatic premises abroad.[623] The Migrant Workers Committee, while commending these efforts, concentrated instead on domestic law and practice, noting that Indonesia 'is increasingly becoming a country of transit and destination' for non-citizens, while immigration law authorises detention for up to ten years for undocumented migrants and asylum seekers.[624] The Committee recommended that Indonesia amend its immigration law and make further efforts to guarantee 'due process on an equal basis with nationals' to irregular non-citizens 'in administrative and judicial proceedings.'[625] This drew a sharply worded response: Indonesia 'is not a destination country for refugees and asylum seekers,' it asserted, nor was it party to the Refugee Convention. 'As Indonesia is not the destination country, local integration is currently not [the government's] policy,' it declared, adding that it 'does not relate or link the [ICMW] with the 1951 Refugee Convention, since the two issues fall under two different regime[s] of international law.'[626] Despite state objections, the committees have affirmed the universality of human rights across different legal categories of non-citizens, and different terminology used by states at the domestic level.

[623] Permanent Mission of the Republic of Indonesia to the United Nations, WTO and International Organizations in Geneva, 'Comments by the Government of Indonesia on the Concluding Observations on the Initial Report of Indonesia by Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,' 25 September 2017, para 20.
[624] CMW/C/IDN/CO/1, paras 4, 34.
[625] Ibid, para 35.
[626] Permanent Mission of the Republic of Indonesia to the United Nations, WTO and International Organizations in Geneva, 'Comments by the Government of Indonesia on the Concluding Observations on the Initial Report of Indonesia by Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,' 25 September 2017, paras 15, 17, 18.

Other Mechanisms

Finally, the Global Compacts for Migration and Refugees establish periodic follow-up mechanisms to discuss and review implementation of the Global Compacts 'through a State-led approach and with the participation of all relevant stakeholders.'[627] The first Global Refugee Forum was held in 2019; the initial International Migration Review Forum is scheduled for 2022. Review mechanisms, in the medium to long term, provide an opportunity to diversify the Compacts from a model centring on 'member states'[628] and towards non-citizens as rights holders. This could be achieved by 'strengthening linkages' between the core human rights treaties and the provisions of the Compact, as called for by the Secretary-General in 2021,[629] ideally empowering non-citizens to invoke both in the pursuit of rights claims. Establishing regular, periodic and independent review 'with an explicit human rights protection mandate,' as called for by OHCHR prior to conclusion of the Global Compacts,[630] would also be meaningful in ensuring accountability, promoting adherence to international human rights law and creating avenues for access to justice.

5.2 The Role of National Constitutions

State practice with respect to non-citizens, along with any possible configuration of non-citizenship status in relation to the state, can only be maintained through the presumption of constitutional validity. In one of the earliest judicial decisions on the correlation

[627] Global Compact for Migration, paras 48-49; Global Compact for Refugees, para 101.
[628] The language of International Migration Review Forum 2022: Background information,' primarily addresses 'Member States' of the General Assembly.
[629] United Nations General Assembly, 'Secretary-General report' (2021), para 19.
[630] OHCHR (2017), 1, 5.

between constitutionally enumerated rights and the position of non-citizens, the US government argued in 1886 before the Supreme Court that the Constitution 'was not made nor intended for all humanity… but was ordained and established by the people of the United States for their own benefit and the benefit of those lawfully within their Territory.'[631] The Supreme Court ultimately rejected the contention that non-citizens were beyond the ambit of the Constitution.[632] In doing so, the Court illuminated an endemic tension in the operation of constitutions as, first and foremost, domestic law, encapsulated as follows:

> All modern constitutions offer membership according to a schedule of rights, and these rights are justified in terms of universal, rather than merely local or parochial, attributes of members… Modern constitutions therefore tend to make normative claims that they cannot possibly fulfil… The normative force of democratic constitutions coherently demands the extension of inclusion to all persons while simultaneously retracting that inclusion to all members of a set of arbitrarily designated persons in order to actually succeed in *constituting* a polity.[633]

Certainly, it is not difficult to envisage the absurd legal consequences that would result if constitutionally enshrined rights were withheld from one group of the population based solely on one aspect of their identity. Constitutionalism has also evolved markedly as a

---

[631] *Wong Wing v. United States*, 163 U.S. 228 (1886), United States brief at 19, cited in Bosniak (2006), 53.
[632] Bosniak (2006), 53. In the same judgement, however, it did uphold the lawfulness of entry restrictions and expulsions of 'aliens whose race or habits render them undesirable as citizens': *Wong Wing v. United States*, 163 U.S. 228, 237 (1886).
[633] Max Pensky, 'Constitutional Exclusion? EU Constitution, Human Rights, and the Problem of Scope,' paper delivered at the European Constitutionalism Conference, Johann-Wolfgang Goethe University, Frankfurt, June 2002 (emphasis in original); cited in Benhabib (2004), 176.

doctrine since 1886; most national constitutions were adopted (or amended) subsequent to the advent of international human rights law. The existence and prominence of universal human rights as a 'common moral language' of 'peacetime global society,' in Beitz' characterisation,[634] makes it harder to justify exclusion or mistreatment of non-citizens.

According to the OHCHR, the position in international human rights law is that:

> Some national constitutions guarantee rights to "citizens," whereas… with the exception of the rights of public participation and [freedom] of movement and economic rights in developing countries [all human] rights [should be provided] to all persons… Furthermore, merely mentioning the general principle of non-discrimination in a constitution is not a sufficient response to the equality requirements of human rights law. States are obliged to have in place effective legislation to fight against all forms of discrimination, as well as effective remedies to obtain compensation for violations of such legislation.[635]

A study conducted in May 2014 found that despite decades of increasing migration flows, only a minority of constitutions worldwide explicitly addressed the rights of non-citizens: just under a quarter (24%; 46 in total) guaranteed equality and non-discrimination to non-citizens; 24 (12%) guaranteed civil rights; while protection of the rights to work, education and health varied between 15 and 17 percent (28-32 texts).[636]

---

[634] Beitz (2009), 1.
[635] OHCHR (2006), 13.
[636] Adèle Cassola, Amy Raub & Jody Heymann, 'Constitutional protections in an era of increased migration: evidence from 193 countries,' 20(3) *The International Journal of Human Rights* (2016), 299, 302-303, 305, 312-314, 316. The study also identified regional variations: generally, constitutions in Europe and Central Asia

Explicit protections for non-citizens and stateless persons peaked in the 1990s, with 41% of constitutions introduced or amended in this decade including such a provision. Although general non-discrimination clauses were far more common (65% of constitutions; 125 in total),[637] the study concludes that it is 'problematic' that national constitutions continue to restrict the exercise of rights guaranteed by international law.[638]

Constitutions have an important role to play in the interface between domestic and international law, including international human rights law. Of the states under review in this study, all except one (Australia) incorporated human rights provisions into their national constitutions.[639] Twenty-seven constitutions also contain constitutional-level provisions on non-citizens; among these, three provide for equality between non-citizens and citizens in constitutional rights,[640] while thirteen contain exceptions in some form.[641] Most progressive with respect to the rights of non-citizens is the constitution of Ecuador, which recognises a right of migration and 'advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries.'[642] However, principles proclaimed in national constitutions may diverge from domestic law or state practice. A number of constitutions provide that

were more likely to protect the rights of non-citizens (close to half [47%] of constitutions in these regions 'explicitly guaranteed some aspect of general equality and non-discrimination,' for example): 302-303, 316.
[637] Ibid, 304.
[638] Ibid, 317.
[639] As detailed in Appendix A, at the time of writing Libya did not have a constitution in force.
[640] Djibouti, Ecuador and Mexico.
[641] Belize, Costa Rica, Czechia, El Salvador, Equatorial Guinea, Estonia, Gabon, Kazakhstan, the Philippines, Poland, Qatar, Slovakia, Turkey.
[642] Constitution of Ecuador, Articles 40, 416(6).

the scope of a constitutional-level role is to be specifically regulated in domestic law. Other states preclude individuals from directly raising constitutional guarantees before domestic courts. A systematic overview of constitutional provisions, and major legislation relevant to non-citizens, in the states under review in this study is included at Appendix A.

Despite evolving against an array of historical backgrounds, political systems and institutional modalities, constitutions establish 'legal space' for the articulation and claiming of human rights by non-citizens. An indicative case study in this respect is presented by South Korea. Initially adopted in 1948, the Constitution of the Republic of Korea was proclaimed in the same year as the Universal Declaration of Human Rights, conforming to what Stone Sweet and Ryan describe as a permeation in 'codification of rights since 1950' through domestic 'charters of rights and guarantees of judicial protection.'[643] Last amended in 1987, in tandem with the country's democratisation, the Constitution is among the world's oldest non-amended constitutions.[644] The country has also since 2000 become increasingly multicultural, reflected in the increase of non-citizens to 3.3% of the total population.[645] The country is also increasingly visible

[643] Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press, 2018), 21-22.
[644] Hannes Mosler, 'Understanding the Politics of Constitutional Resilience in South Korea,' 33(2) *Seoul Journal of Korean Studies* (2020) 459-491. Background on the 1987 amendment is provided specifically at 468-469.
[645] Statistics Korea, '2020 Population and Housing Census (Register-based Census)' (29 July 2021), 4. This figure represented a slight decrease from 3.4% in 2019: Statistics Korea, '2019 Population and Housing Census (Register-based Census)' (28 August 2020), 4. See also Rhee Woo-Young, '인권보장과 체계정합성 관점에서의 외국인 관련 법제의 입법적 분석과 개정방향' [Analysis Of The Laws Concerning Non-Citizen Status And Rights In Korea From The Perspectives Of Human Rights Protection And Legislative Conformity, With Suggestions For Statutory Revisions], *Ipbeophak yeongu* (2019), describing (at 30) an increase in laws regulating non-citizens after 2000.

internationally, with aspirations to serve as a regional leader in constitutional jurisprudence and human rights.[646]

From an initial perspective, the South Korean legal system provides strong mechanisms to protect the human rights of non-citizens. It is in attempting to translate textual provisions into claimability, through legislation and the interpretation of the judicature, that problems are encountered. The Constitution recognises 'treaties' and 'generally recognised rules of international law' as having 'the same effect' as domestic laws, while guaranteeing the 'status' of non-citizens 'as prescribed by international law and treaties.'[647] The significance of these provisions is apparent on several levels. First, in incorporating international law directly into domestic law, South Korea is one of few monist states. International human rights treaties are consequently, in principle, directly enforceable on the domestic level, without the need for separate legislative enactment.[648] Second, this provision establishes a normative equality of domestic and international law. Third, the provision has been held in jurisprudence to establish 'the constitutional principle of respecting international law.'[649]

South Korea is one of several states under review that provides that 'citizens' are the subject of constitutionally enshrined rights: the others are Equatorial Guinea, Gabon,

[646] Soojin Kong, 'The Two Modes of Foreign Engagement by the Constitutional Court of Korea,' 16(2) *Asian Journal of Comparative Law* (2021) 349-50; Wolman (2009), 460.
[647] Constitution of the Republic of Korea, Article 6. The official English translation of the Constitution is provided by the Korean Law Information Center, available at https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=61603&viewCls=engLsInfoR&urlMode=engLsInfoR#0000.
[648] Lee and Lee (2016), 3.
[649] 2007 Hun-Ka 12, Constitutional Court of Korea (30 August 2011), at 155.

Italy, Kuwait and Qatar. Rights are enumerated specifically in a separate chapter of the Constitution, titled 'Rights and duties of citizens.'[650] These rights and freedoms are frequently referred to, by the Constitutional Court as well as in academic literature, as 'fundamental' or 'basic' rights (slightly different translations of the same Korean phrase, '기본권').[651] Generally, the term citizens is used throughout in connection with these rights and duties, although there are exceptions. The first article in this chapter provides as follows:

> *All citizens* shall be assured of human worth and dignity and have the right to pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable *human rights of individuals*.[652]

Remaining provisions in this chapter mirror generally, but not exactly, the content of rights found in the ICCPR and ICESCR.[653] A concluding provision in this chapter provides that 'Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.'[654] This implies a link to the more expansive

[650] Constitution of the Republic of Korea, Articles 10-39.
[651] The term 'fundamental' rights is used in the official English translation of the Constitution, specifically with respect to Article 10 ('It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.'). For the term 'basic rights,' see 93 Hun-Ma 120 (29 December 1994); 2007 Hun-Ma 1083; 2009 Hun-Ma 230; 2009 Hun-Ma 352 (29 September 2011 [consolidated decision]); in academic literature, see for example Jeon Sang Hyeon, '외국인의 기본권보장 방안: 헌법상 근거, 기본권주체성, 기본권제한에 관하여' [A Study on the Protection of Alien's Constitutional Rights], 68(6) *Beobjo* (2019) 59-92.
[652] Ibid, Article 10. Emphasis added. The equivalent terms in Korean are '모든 국민' (all citizens) and '개인이 가지는 불가침의 기본적 인권' (the inviolable (and) fundamental human rights of individuals), respectively.
[653] Regarding this point, Mosler (2020) writes that 'there was no difficulty in agreeing on the rights and freedoms because most of them were already present,' having been articulated at the international level: 471.
[654] Constitution of the Republic of Korea, Article 37(1). The final two provisions in this chapter establish duties for 'citizens' to pay taxes and undertake national defence: Articles 38-39.

rights and freedoms found in international human rights law, as enshrined by the constitutional principle of respecting international law.[655]

The wording of this chapter of the Constitution normatively privileges citizens, presenting a *prima facie* barrier to rights claimability by non-citizens. Scholarship delving into the drafting history has revealed that its scope was not intended to be as exclusionary as it appears textually: the term 'citizen,' which carries republican connotations, was substituted for the original 'people,' which acquired communist overtones in the Korean language due to its association with the rival polity of North Korea.[656] Article 6(2), which guarantees the status of non-citizens in accordance with international law, was inserted as a safeguard against nationalistic readings.[657] Constitutional review therefore assumes an important role in interpreting and clarifying these provisions, with respect to the entitlement of non-citizens to these basic rights. The Constitutional Court of Korea was established consequent to the most recent amendment of the Constitution, in 1987. The implementing act of the Court is structured to allow '[a]ny person whose fundamental rights guaranteed by the Constitution [are] infringed'

[655] As set out in ibid, Article 6(1). Article 37(2) further states: 'The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.' This mirrors the formulation of permissible restrictions in the ICCPR.

[656] Lee Jong-hyeok, '외국인의 법적 지위에 관한 헌법조항의 연원과 의의: 제헌국회의 논의와 비교헌법적 검토를 중심으로' [The Origin and Implication of the Article 7(2) of the 1948 Korean Constitution: A Comparative Constitutional History on the Legal Status of Foreigners in Korea], 55(1) *Seoul daehakgyo beobhak* (2014) 521-571. The Republic of Korea was proclaimed on 15 August 1948, following a transfer of power by the United States Army Military Government in Korea. North Korea, officially the Democratic People's Republic of Korea (조선민주주의인민공화국) was formally proclaimed less than a month later, on 9 September 1948. The term 'people' may be translated in various ways in Korean; one rendering among these is '인민' (*inmin*), which is incorporated into the DPRK's official name. This arguably introduces a complexity in the terminology of human rights law itself not present in other languages.

[657] Ibid. See also Shin (2020), 110.

due to government action or inaction to 'request adjudication on a constitutional complaint.'[658] Owing to this provision, the Court's caseload has steadily grown, as it has become the primary institution for both marginalised individuals and social mobilisations seeking to invalidate oppressive or discriminatory laws on constitutional grounds.[659] The Court has been appraised as highly active in flexibly interpreting the Constitution to advance reform across a range of domains,[660] articulating its cosmopolitan potential through the practice of citing both international human rights and foreign law.[661] Nonetheless, there remains a lingering hesitance in constitutional jurisprudence vis-à-vis applying constitutional provisions directly to the rights of non-citizens. Several years elapsed before the question of the legal status of non-citizens came before the Court, with the first ruling in December 1994. In that case, the Court held that 'a foreigner who has a status similar to that of our citizen can be the bearer of basic rights.'[662] It has been noted that 'the Court has never defined the exact meaning of this phrase and no longer seems to place much significance on this condition.'[663] As the Court's jurisprudence developed in the intervening years, it had several occasions to consider in more substance the relationship between non-citizens and constitutionally mandated rights. It is important to note for contextual clarity, however, that the majority of complaints in this period were

[658] *Constitutional Court Act* (1988), section 68(1).
[659] Shin Yoon Jin, 'Cosmopolitanising Rights Practice: The Case of South Korea,' in Takao Suami, Anne Peters, Dmitri Vanoverbeke and Mattis Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, 2018), 246-247; Shin Yoon Jin, 'Gender Equality, Individual Empowerment, and Constitutional Rights Review: South Korea's Dynamic Development,' in Wen-Chen Chang, Kelley Loper, Mara Malagodi and Ruth Rubio Marín (eds), *Gender, Sexuality, and Constitutionalism in Asia* (Hart Publishing, forthcoming 2022), 4, 6. The overwhelming majority of the Court's caseload has concerned individual constitutional complaints: Shin (2022), 6.
[660] Mosler (2020), 474.
[661] On this point, see Shin (2018) 245, 271-2; (2020), 82; Kong (2021).
[662] 93 Hun-Ma 120, Constitutional Court of Korea (29 December 1994) 479 (English translation).
[663] Shin (2020), 100.

brought by ethnic Koreans, as discussed below. The decisions of the Constitutional Court may therefore reveal attitudes and unconscious biases behind the shaping and enforcement of law vis-à-vis non-citizens. As such, several decisions of the Constitutional Court pertaining to non-citizens are examined below.

In 2000, the Court had occasion to consider the provisions of the *Nationality Act*, based on a claim to citizenship made by an ethnic Korean non-citizen facing deportation. While the decision stands out today primarily for its strident and anachronistic understanding of citizenship,[664] the Court also had occasion to consider the rights afforded to non-citizens generally, and took a restrictive view. Many of the rights listed in the Constitution were held to be unavailable to non-citizens, or available only to a limited extent.[665] The Court did, however, also hold the principle of equality (Article 11 of the Constitution) to be 'a fundamental mandate of the order of [the] rule of law,' such that 'all people bear the same obligations and enjoy the same rights under the laws.'[666] The Court employed the term 'person' in the judgment, as opposed to 'citizen' (as reflected in the Constitution's text), laying the groundwork for the development of this interpretive approach to constitutional rights in future rulings.

[664] 97 Hun-Ka 12, Constitutional Court of Korea (31 August 2000) (English translation). For example, the Court defined nationality as 'a legal union between the State and its members. It means protection and subjugation. It cannot be thought of separately from the State,' further declaring, 'Those who are not nationals are foreigners (foreign nationals, *dual nationals*, those of no nationality, etc.)': 664 (emphasis added).
[665] Ibid, 659, 669 (English translation). Those specifically identified include the freedom to move one's residence, the freedom to choose occupations, the right to property, the right to elect and be elected, the right to petition for the State's compensation, social rights, and access to public office.
[666] Ibid, 667.

In the following year, the Court found discriminatory treatment of 'overseas Koreans,' a term defined by the *Overseas Koreans Act*, to be unconstitutional.[667] The Court ruled in this case that 'a foreigner is entitled to basic rights in principle;' in particular, with respect to human dignity and worth, the right to pursue happiness, and equality.[668] This breakthrough was achieved by identifying a sub-group of 'human rights' within the Constitution's chapter on basic rights, affirming that 'a foreigner can be the bearer of these rights.'[669] A number of questions arise from this ruling, however. Outside of this sub-group of 'human rights,' the Court endorsed the formulation from the earlier 2000 case, that non-citizens are excluded from, or able to 'enjoy [only] in a limited fashion,' the remaining constitutionally enumerated rights.[670] The Court further ruled that equality may be limited by 'the principle of reciprocity,'[671] which is directly at odds with international human rights principles.[672] Finally, the context in which the case was argued was relatively narrow: the complainants, the Court noted, were not asserting equality 'in comparison to Korean nationals,' but only 'between ethnic Koreans with foreign nationalities.'[673] The judgment therefore appears to create a separate class of non-citizens defined by their 'ethnic Korean[ness],' which carries implications for future development of non-citizens' rights.

---

[667] 99 Hun-Ma 494 (29 November 2001) (English translation).
[668] Ibid, 13-14. See also 16: 'The principle of equality prescribed by Article 11(1) [of the Constitution] is the supreme principle in the field of protection of basic rights… Everyone is entitled to the right to claim equal treatment, and the right to equality is the most basic of all basic rights.'
[669] Ibid, 13-14. It would have been preferable, from a human rights perspective, had the Court affirmed that a foreigner *is* the bearer of such rights.
[670] Ibid, 18. These include important internationally recognised rights, including freedom of movement, the right to claim compensation and 'other social rights.'
[671] Ibid, 14.
[672] Human Rights Committee, 'General Comment No. 15' (1986), para 1.
[673] 99 Hun-Ma 494 (29 November 2001), 14.

As Korean society increasingly diversified, a second wave of cases was brought by non-citizens before the Constitutional Court. An interpretative step forward was taken in 2007, when the Court invalidated the so-called foreign industrial trainee system.[674] The right of non-citizens to equality was further extended in this case, to countenance 'minimum working condition[s]' and obtain 'human dignity,' despite the previous association of economic and employment policies with 'social rights.'[675] In making its decision, the Court also referred to international human rights law as relevant to constitutional interpretation.[676] Subsequently, in 2011 a majority of the Court's justices recognised a limited 'freedom to choose workplace' for so-called foreign workers, holding this to be 'closely related to the right to pursue happiness as well as human dignity and value.'[677] In doing so, the Court again upheld the 'human rights' subdivision among constitutional rights, although it otherwise rejected the complaint.[678] Rather than recognising the rights proclaimed in the Constitution as a contextualised, national-level application of international human rights norms, as the ordinary meaning of 'basic rights' would suggest,[679] the Court has persisted in the unrewarding exercise of attempting to distinguish 'human rights' from 'citizen rights' among enumerated constitutional

[674] 2004 Hun-Ma 670 (30 August 2007) (English summary).
[675] Ibid.
[676] Shin (2018), 249.
[677] 2007 Hun-Ma 1083; 2009 Hun-Ma 230; 2009 Hun-Ma 352 (29 September 2011 [consolidated decision]) (English translation), 165-6, 176.
[678] Ibid, 175-177. The reasoning of the majority was as follows: 'Meanwhile, as the matter of recognizing foreigners as bearers of basic rights and the degree of limiting that basic right are separate problems, recognizing that foreigners are entitled to the freedom to choose workplace does not necessarily mean that they also receive the same degree of protection in relation to the freedom to choose occupation as our citizens.'
[679] The general provision of article 6 declares the constitutional principle of respecting international law, while Article 37(1) refers to additional 'freedoms and rights' that are 'not enumerated in the Constitution,' providing grounds to invoke international human rights law.

rights.[680] As the text of the Constitution itself offers no interpretative aids to maintain such a distinction, this artificial standard has been critiqued as 'both uncertain and incoherent.'[681] Nonetheless, another scholar points out that there has to date been a lack of opportunity for the Court to issue a clear ruling on the rights of non-citizens.[682]

Human rights rely on constitutions to fortify their effect in a domestic order. In asserting themselves as constitutional subjects – specifically, by claiming human dignity and equality, despite being outside the *demos* – non-citizens effectively assert the congruence between constitutional rights provisions and international human rights law. In doing so, they face the barrier of highly formalist interpretations; partly this is textual, but partly also due to lack of a human rights-based approach. Benhabib identifies one such example in a 1990 German Constitutional Court decision on voting rights for non-citizens. The Court declared:

> The people, which the Basic Law of the Federal Republic of Germany recognizes to be the bearer of the authority from which issues the constitution, as well as the people which is the subject of the legitimation and creation of the state, is the German people. Foreigners do not belong to it… Citizenship in the state constitutes a fundamentally indissoluble personal right between the citizen and the state... By contrast, foreigners, regardless of how long they may have resided in the territory of the state, can always return to their homeland.[683]

[680] 99 Hun-Ma 494, 29 November 2001; 2004 Hun-Ma 670, 30 August 2007, discussed in Shin (2020) 100-103. Shin (2020) also notes at 103 that 'Only a small number of scholars in Korea have expressed support for the idea that non-citizens are in principle bearers of basic rights under the Constitution.'
[681] Shin (2020), 102.
[682] Rhee (2019), 11-13.
[683] BVerfG 83, 37, Nr. 3 (31 October 1990), 39-40, translated in Benhabib (2004), 203-204.

Benhabib writes that only a decade after this 'swan song to a vanishing ideology of nationhood,' citizenship rights in Germany were disaggregated through membership in the European Union.[684] National constitutions are not a normative universe; the possibility of regional or supra-national developments – as in the case of the European Union – or legislation that implements and enforces human rights norms, at the domestic level, may enable alternative sources of claimability by individuals. However, a constitution's status as supreme law imbues it with both symbolic and practical importance,[685] especially for non-citizens subject to its jurisdiction; the ability to make and have claims upheld consistent with international human rights law is likely to contribute to democratic iterations[686] within that society.

5.3 National Human Rights Institutions

As documented above, national constitutions provide a normative framework from above within the borders of a (nation-)state. As all laws and state action must conform, their significance as a site of human rights mobilisations is readily apparent. Alternatively, national human rights institutions (NHRIs) act as intermediaries from below, seeking to harmonise domestic and international legal obligations and resolve tensions between

[684] Benhabib (2004), 207-208.
[685] Cassola, Raub and Heymann (2016), 317.
[686] Benhabib (2004), 21, 177-78.

them.[687] This 'unique bridging role,'[688] as an institution created through legislation yet formally independent of government,[689] has been assessed in scholarship as reinforcing human rights protection and accountability while allaying sovereignty concerns.[690] This section evaluates the significance of NHRIs for non-citizens from three different perspectives: states, transnational networks and individuals.

The proliferation of NHRIs worldwide has been attributed to the post-Cold War diffusion of international human rights norms, accompanying both a renewed emphasis on institutionalisation into domestic structures and development of local human rights cultures.[691] The activities of many NHRIs address the position of non-citizens, *inter alia* through recommending policy reform, providing capacity-building for state officials, and inspecting immigration detention centres.[692] The Australian Human Rights Commission has leveraged its status as an NHRI to undertake periodic inspections of onshore and

[687] 'Principles relating to the Status of National Institutions,' commonly known as the Paris Principles, stipulate that: 'A national institution shall… have the following responsibilities… To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation' ('Competence and responsibilities,' paras 3, 3(b)). The Paris Principles were formally adopted by the UN General Assembly in 'National institutions for the promotion and protection of human rights,' A/RES/48/134 (4 March 1994).
[688] GANHRI, 'Input to the UN Secretary-General's report on the global compact for safe, orderly and regular migration' (12 September 2017), 1.
[689] Statutory independence is a condition for an accreditation of NHRIs under the Paris Principles: 'Competence and responsibilities,' para 2, United Nations General Assembly (1994).
[690] Noha Shawki, 'A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions,' in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate, 2009), 52.
[691] Sonia Cardenas, 'Sovereignty Transformed? The Role of National Human Rights Institutions,' in Shawki and Cox (2009), 32, 38; Wolman (2009), 461, noting that establishment of the National Human Rights Commission of Korea resulted from 'years of lobbying by human rights activists, … academics and lawyers.'
[692] The Paris Principles recognise 'migrant workers' and 'refugees,' in particular, as 'particularly vulnerable groups' that should be protected ('Methods of operation,' paragraph (g), United Nations General Assembly (1994)). GANHRI (2017) provides a selection of case studies of the work of NHRIs worldwide in this area.

offshore immigration detention facilities.[693] In a domestic context in which independent access (for example, by media organisations) is heavily curtailed and legislation criminalises whistleblowing on detention conditions,[694] the Commission has substantiated the serious impact of prolonged and indefinite detention on the mental health of detainees, evidenced by 'high rates of self-harm, a number of suicides and serious unrest in immigration detention.'[695] The Commission has consistently held that Australia's mandatory offshore detention regime violates its international human rights obligations, while urging reduction of the number of detainees.[696] The National Human Rights Committee of Qatar, as a state with a majority non-citizen population, holds potential for advocacy as well as reconciliation between international human rights treaties and domestic practice. A nationwide investigation into the legal and policy framework governing migrant workers documented the inadequacy of working and living conditions.[697] Recommendations to the government were eventually reflected in reform to the labour law and abolition of the *kafala* sponsorship system.[698] Although NHRIs lack power to issue binding recommendations to states, exposing them to

[693] Recent reporting includes Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019: Report* (3 December 2020), 7 available at https://humanrights.gov.au/sites/default/files/document/publication/ahrc_immigration_detention_inspections_2019_.pdf. For a report on offshore detention facilities, see Australian Human Rights Commission, *Australian Human Rights Commission Inspection of Christmas Island Immigration Detention Centre: Report* (19 November 2018), available at https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/australian-human-rights-commission-inspection-1.

[694] Claudia Tazreiter, 'The unlucky in the 'lucky country': asylum seekers, irregular migrants and refugees and Australia's politics of disappearance,' 23(2) *Australian Journal of Human Rights* (2017), 250. The relevant legislation is *Australian Border Force Act* (2015), Part 6 ('Secrecy and disclosure provisions').

[695] GANHRI (2017), 7.

[696] Australian Human Rights Commission (2020), 5.

[697] GANHRI (2017), 4.

[698] As documented in chapter 4.3. See also CCPR/C/QAT/RQ/1, para 54: 'Qatar has abolished exit permits and has recognized the right of migrant workers to depart the country freely. This means that the *kafalah* system has been dismantled and abolished once and for all.'

criticism that their findings may effectively be ignored,[699] Cardenas nonetheless contends that NHRI investigation powers 'inevitably challenge state sovereignty.'[700] A further, complex outcome of the legitimacy bestowed by legislation is that advocacy may target disaggregated state actors: recommendations may attempt to influence a government department responsible for a particular human rights violation, while the reasoned, 'quasi-jurisdictional' element of NHRI decisions may subsequently be taken up by courts.[701]

Domestic advocacy of national human rights institutions is complemented by the international character of their activities. All NHRIs are members of the Global Alliance of National Human Rights Institutions (GANHRI), which accredits their status based on compliance with international standards,[702] in addition to a regional network.[703] Individual NHRIs have been supported since 2011 through a tripartite partnership between GANHRI, the OHCHR and the United Nations Development Programme.[704] NHRIs leverage these transnational networks to 'translate [human rights] principles into

[699] Cardenas (2009), 35, acknowledging 'no shortage of evidence to support [a] critical view' of NHRIs, and 'no conclusive evidence' that they improve state human rights practices.
[700] Ibid, 33. Cardenas adds that 'The degree… will depend on the institution's effectiveness, with more effective NHRIs posing a greater challenge.'
[701] Ibid, 36. The phrase 'quasi-jurisdictional competence' is employed by the Paris Principles, United Nations General Assembly (1994).
[702] Further information on the accreditation process is provided at OHCHR, 'GANHRI Sub-Committee on Accreditation (SCA),' https://www.ohchr.org/EN/Countries/NHRI/Pages/GANHRISSubCommitteeAccreditation.aspx, accessed on 22 August 2021.
[703] The four regional networks are the Asia Pacific Forum of National Human Rights Institutions; the European Coordinating Committee of National Human Rights Institutions; the Network of African National Human Rights Institutions; and the Network of National Human Rights Institutions of the Americas. Asia Pacific Forum, *A Manual on National Human Rights Institutions* (May 2015, updated May 2018), 287.
[704] United Nations General Assembly, 'National institutions for the promotion and protection of human rights: Report of the Secretary-General,' A/76/246 (29 July 2021), 12, note 1. The partnership commits to supporting NHRIs at the 'global, regional and national levels.'

local policies and practices that are compatible with local cultures and values.'[705] This role assumes particular importance in states where no regional-level human rights protection mechanisms are available, or the government has declined to accept optional protocols allowing individual communications to UN human rights treaty bodies.[706] In these circumstances, NHRIs are likely to be the only venue allowing individuals to advance claims of the inconsistency between domestic law or state practice and international human rights law obligations. The feedback loop between domestic and international levels is further consolidated through NHRI participation and reporting rights in UN human rights mechanisms.[707] This membership in a transnational network facilitates the sharing of best practices and contributes to the development of a rights-claiming vocabulary.

As an institution entrusted with the protection and promotion of human rights in accordance with international norms, NHRIs extend protection equally to citizens and non-citizens.[708] NHRIs commonly have the competence to investigate individual complaints of human rights violations, based on dual, overlapping authority: domestic and international.[709] Enabling legislation generally empowers NHRIs to investigate

[705] Shawki (2009), 53.
[706] Wolman (2009), 458.
[707] United Nations General Assembly, 'National institutions for the promotion and protection of human rights: Report of the Secretary-General,' A/76/246 (29 July 2021), para 89. See also Asia Pacific Forum (2018), Chapter 22.
[708] See for example *National Human Rights Commission of Korea Act* (2001), Article 4, defining the scope of application as 'all citizens of the Republic of Korea and foreigners residing therein.'
[709] The Paris Principles provide only that NHRIs '*may* be authorized to hear and consider complaints and petitions concerning individual situations': 'Additional principles concerning the status of commissions with quasi-jurisdictional competence,' A/RES/48/134 (emphasis added). Wolman (2009) finds that all of the NHRIs in the Asia-Pacific region are statutorily empowered to receive individual complaints and issue recommendations, although these recommendations are not binding in any jurisdiction: 462, n29, 463.

alleged breaches of both constitutional rights *and* the provisions of international human rights agreements.[710] In fulfilling this responsibility, institutions may require cooperation of respondents in an investigation, initiate mediation between the parties and recommend remedies for human rights violations.[711] The complaints procedure of NHRIs differs qualitatively from other legal processes. Specifically, unlike the judgment of a court, the recommendations of an NHRI are not legally binding. Although admittedly without the 'sharp edge' of hard law, the process has the complementary purpose of protecting human rights in tandem with their promotion. Seen in this light, the investigation process is itself an opportunity to engage with potential violators, educating them on their human rights obligations. This contributes to raising awareness among domestic populations of international human rights law principles, especially non-discrimination and normative equality. From another angle, the work of the National Human Rights Commission provides an avenue for claimants to seek justification for actions that 'deviate from global norms or practice,'[712] and to do so in a setting less formal, time-consuming and costly than litigation.

[710] For example, the *Australian Human Rights Commission Act* (1986) defines human rights as incorporating 'rights and freedoms recognised in the [ICCPR]… or recognised or declared by any relevant international instrument' (Article 3). The Kenya National Commission on Human Rights is recognised both in the Kenyan Constitution and in legislation. The latter provides that one of the functions of the Commission is to 'act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights' (*Kenya National Commission on Human Rights Act* (2011), Article 8(f)). The *National Human Rights Commission of Korea Act* (2001) defines human rights as 'any rights and freedoms… guaranteed by the Constitution and Acts of the Republic of Korea, recognized by international human rights treaties entered into and ratified… or protected under international customary law' (Article 2).
[711] For example, *National Human Rights Commission of Korea Act* (2001), Articles 36, 42, 44 and 45, respectively. Recommendations may also be made on urgent relief measures: Article 48.
[712] Shin (2018), 270.

Overall, national human rights institutions may be conceptualised with respect to the human rights of non-citizens as a matter of recourse: the greater the shortfall between effective application of international human rights law in domestic jurisdictions, the greater the corresponding role of NHRIs. Consistent, reasoned advocacy disaggregated state actors, bolstered by the legitimacy conferred by legislation, allows NHRIs to address situations in domestic law and state practice that do not conform to the requirements of international human rights law. Where this is ineffective, the transnational character of NHRIs creates a feedback loop through regional and international networks. Finally, the ability of individuals to submit petitions holds normative significance, activating the right to justification in individual circumstances, while simultaneously contributing to democratic iterations that narrow the distance between citizens and non-citizens in the state of jurisdiction. Each of these dimensions, in turn, reinforces the role of NHRIs as a site to stake rights claims, as set out below in Figure 2.

5.4 Transnational Coalitions

The realisation of human rights in transnational environments is a dilemma that has traditionally been at the limits of scholarship. The leading work in this area is by Keck and Sikkink, who define transnational advocacy networks as complex interactions between states, diverse nonstate actors and international organisations across the 'increasingly artificial divide' between domestic and international realms.[713] Cohen

[713] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in Transnational Politics* (Cornell University, 1998), 1-4.

observes that the availability of such discourses 'allows the marginalized and the excluded to claim inclusion,' particularly through the 'universalist dimension of human rights discourses.'[714] Fraser, writing in 2007, remarked that the world is defined by 'dispersed interlocutors' debating 'inherently trans-territorial problems;' as such, 'current mobilizations of public opinion seldom stop at the borders of territorial states.'[715] These emergent trends have intensified in recent years. Bosniak, for example, observes that 'increasing numbers of people are engaged in democratic political practices across national boundaries,' holding that such political activity 'arguably fulfils the normative criteria of republican and participatory democratic conceptions of citizenship.'[716] Such spontaneous, issue-oriented coalitions are even more readily observable in the 2020s, as is 'direct transnational communication, bypassing state controls.'[717] Increasing political activity on a global scale is a feature of the new normal, while generating pressure on domestic governments as well.

This raises the subsequent question as to whether it is possible to extend transnational theory, or even 'citizenship,' into transnational coalitions that would meaningfully uphold the rights of non-citizens. To have validity as a project in the case of non-citizens, transnational coalitions would ideally be characterized by some of the functions of a substitute polity, a reliable mechanism capable of compensating, at least in part, for status-related vulnerabilities of non-citizens within a domestic jurisdiction. This is vital, in the context of non-citizens, to stimulate mobilisations at the domestic level for

[714] Cohen (1999), 259, 261.
[715] Fraser (2007), 14, 19.
[716] Bosniak (2001), 242-243.
[717] Fraser (2007), 18.

implementation of human rights obligations,[718] in addition to access to complex legal procedures.[719] Keck and Sikkink adopt the term 'transnational networks' to emphasise structural elements in the activities of complex actors and imply a degree of institutional stability.[720] This study, however, prefers the term coalitions, to connote more spontaneous, concentrated and issue-based activities needed to address violations of human rights across the diverse spectrum of non-citizen identities. Each case should provide human rights as a framework and normative basis for action, focusing on the nexus between individual and human rights, rather than the fact of non-citizenship status. Providing a pointer in this direction, a number of transnational networks and NGOs have represented non-citizens before human rights mechanisms,[721] incorporating 'supranational recourse into their litigation practice' and interceding to request urgent interim measures that 'can mean the difference, literally, between life and death.'[722] Transnational coalitions would, of course, need to move beyond individual communications to operationalise the human rights of non-citizens in society more generally. Benhabib warns against an exclusively legal approach to this endeavour, emphasising that 'social transformation' and 'new vocabularies of claim making' – extending what Owen terms the global 'political imaginary'[723] – are equally valid and

[718] Won (2019), 2-3.
[719] Limon (2018), 42, assessing that access to a support network of lawyers and NGOs with human rights expertise is essential in making international human rights law claims.
[720] Keck and Sikkink (1998), 4.
[721] These include the Fiery Hearts Club, International Network for Economic, Cultural and Social Rights (ECSR-Net) and, in destination states, various refugee advocacy organisations.
[722] Atak and Giffin (2019), 305-306; Limon (2018), 26.
[723] Owen (2017), 259.

influential roles for transnational movements.[724] Of note in this context are issue-oriented mobilisations, such as the transnational coalition of NGOs supporting domestic calls for the South Korean government to enact an anti-discrimination law,[725] as well as the growing role of cities in promoting adherence to the Global Compact on Migration.[726] Support from transnational coalitions across the social, political and legal spheres is required to allow non-citizens to claim rights.

5.5 The Role of Individuals

The most acute question for an individual-centred conception of international human rights law is how to genuinely empower the individual within that system. Not coincidentally, it is also the most intractable. Writing at the close of the twentieth century, the UN Secretary-General wrote that it was possible to observe a historic shift: from norms of *state* sovereignty to *individual* sovereignty.[727] This theme has subsequently been taken up by several authors: Peters argues that sovereignty is undergoing ongoing reconstruction into a form that is 'from the outset determined and qualified by humanity,' with 'legal value only to the extent that it respects human rights,

[724] Benhabib (2009) 692. This view is echoed from a different quarter by Philip Alston, a former UN special rapporteur, who cautions against 'privileg[ing] justiciability over all other means by which to uphold human rights': 'Against a World Court for Human Rights,' 28(2) *Ethics & International Affairs* (2014) 205.
[725] People's Solidarity for Participatory Democracy, 'South Korean Assembly must enact the Anti-Discrimination Act Now' (2 May 2022), assembling 84 international and regional civil society organisations. Available at https://www.peoplepower21.org/English/1881428 (accessed 1 August 2022).
[726] United Nations General Assembly, 'Secretary-General report' (2021), para 58, describing the 'It Takes a Community' campaign convened by the Mayors Mechanism of the Global Forum on Migration and Development, Canada and Ecuador to promote balanced narratives on migration; see also the 2017 submission of the Global Policy Initiative, on the role of cities in providing access to justice, issuance of identity documents and political representation (at 1).
[727] Kofi Annan, 'Two concepts of sovereignty,' *The Economist* (16 September 1999), available at https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty (accessed 6 May 2022).

interests and needs.'[728] However, her account is preoccupied with the conditions under which external intervention is acceptable to protect human needs, 'notably of potential victims of mass atrocities.'[729] Benhabib has written that international civil society has reached a point of evolution 'from international to cosmopolitan norms of justice,' which would 'accrue to individuals considered as moral and legal persons in a worldwide civil society.'[730] Unfortunately, the language of international human rights law is itself embedded within a discipline – international law – in which state-centricity is embedded. Appraising the human rights of non-citizens is symptomatic of, and brings into sharper relief, the constant normative struggle to transcend international law's own systemic defects.

Applying the rubric of rights claimability, individual non-citizens are indispensable actors in advancing claims to equality and non-discrimination in line with international human rights law. This study argues that a vocabulary of claim-making by individual non-citizens, predicated on the right to justification and the textual and interpretive norms of international human rights law, is the most likely to make a difference to the quotidian, lived reality of individuals subject to the jurisdiction of states of which they are not a citizen. This chapter has examined four 'in-between' mechanisms that traverse the domestic and international level: human rights treaty bodies, national constitutions, National Human Rights Institutions and transnational coalitions. Even where all four mechanisms are deployed sequentially, however, the result may still be a failure to obtain

[728] Peters (2009), 514.
[729] Ibid, 535.
[730] Benhabib (2009), 695.

access to the contested human right, as demonstrated by the following case study. Between 2007 and 2017, South Korea imposed mandatory HIV/AIDS tests on an annual basis for foreign language instructors, measures that reportedly enjoyed widespread public support.[731] Tests were not required of either citizens or of ethnic Korean non-citizens.[732] Two non-citizens subject to the requirements brought domestic legal challenges through varying avenues. The first petitioner complained to the National Human Rights Commission, along with approximately 50 other non-citizens.[733] The complaint was dismissed as 'inappropriate,' without further reasoning.[734] The first petitioner also commenced proceedings before the Korean Commercial Arbitration Board, which eventually ruled that:

> … the "petitioner's insistence" on being treated in an identical manner to native Korean teachers was unjustifiable, as the two categories of teachers did not have the same legal status and they could therefore be evaluated on the basis of different standards… [Moreover,] there was no obligation to inform the petitioner about [the medical] tests [conducted without consent or knowledge] as, under the law of the Republic of Korea, only nationals… had the right to receive sufficient explanations and information from health and medical personnel regarding medical treatment and to decide on that basis whether or not to agree to the treatment.[735]

[731] The government cited a public survey showing 80.7% support for HIV testing as a reason to retain the measures: *Korea JoongAng Daily*, 'Work visas getting easier for teachers' (12 July 2010), available at https://koreajoongangdaily.joins.com/2010/07/12/socialAffairs/Work-visas-getting-easier-for-teachers/2923110.html?detailWord= (accessed 5 May 2022).
[732] Committee on the Elimination of Racial Discrimination, *L.G. v Republic of Korea* (2015), para 2.2.
[733] Ibid, para 2.13, note 18.
[734] Ibid, para 2.13.
[735] Ibid, paras 2.14-2.15.

The second petitioner brought a claim for violations of fundamental rights before the Constitutional Court of Korea.[736] The complaint alleged that an imputed requirement to submit drugs and AIDS test results as a condition for visa renewal constituted unreasonable discrimination on the basis of being a non-citizen, in addition to violation of the right to equality, privacy and human dignity.[737] The complaint was unanimously dismissed; the essence of the Court's reasoning was that the complaint was not actionable because the documentation submitted by the applicant merely constituted evidence of a summons to a meeting at the immigration office, not a requirement to submit medical tests, even though it was conceded that the purpose of the meeting was clearly to impose the testing requirement.[738] Both cases were therefore dismissed at the domestic level on highly formalistic grounds. The two petitioners subsequently brought individual communications before UN human rights committees: the first petitioner's complaint was heard by the Committee for the Elimination of Racial Discrimination, the second complaint by the Human Rights Committee. Both communications were upheld; the committees found the testing to be discriminatory and recommended compensation.[739] In follow-up communications, the government submitted that compensation would be provided 'when the victim has filed a case for State reparation and received a final ruling in his or her favour.'[740] Subsequent domestic practice was, inconsistent, however; in their attempts to secure compensation in litigation, the first

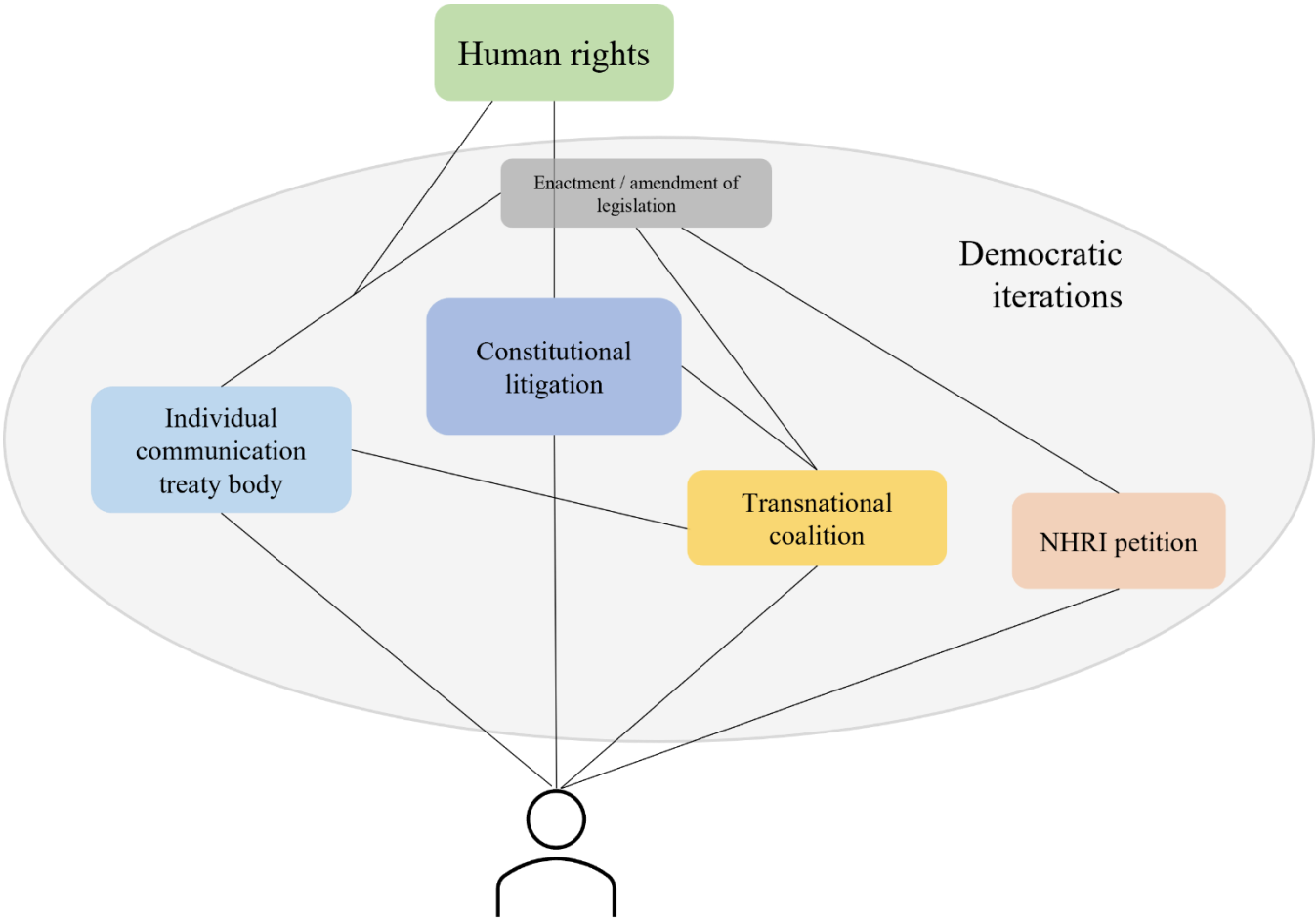
[736] 2009 Hun-Ma 358, Constitutional Court of Korea (29 September 2011).
[737] Ibid, 682-683 (author translation).
[738] Ibid, 686-7.
[739] Committee on the Elimination of Racial Discrimination, *L.G. v Korea*, (2015), paras 8-9; Human Rights Committee, *Vandom v. Korea* (2018), paras 9-10.
[740] Human Rights Committee, 'Follow-up progress report' (2021), 10-11. The Human Rights Committee evaluated follow-up action by the Korean government as not satisfactory, with respect to compensation, and partially satisfactory, regarding non-repetition: 12.

petitioner was successful, while the second petitioner's suit was dismissed.[741] This pattern aligns with previous findings made against South Korea in individual communications.[742]

As seen in section 5.1 above, most states no longer contest that non-citizens are legally entitled to the rights set out in the international human rights corpus. The equation therefore becomes a matter of securing meaningful access by non-citizen individuals to the right. The complexity of the current system creates barriers to accessibility; moreover, the length of procedures mitigates against securing protection for non-citizens vulnerable to human rights abuses. These considerations must inform an optimisation of the system. A streamlined summary of the *lex lata* mechanisms available to non-citizens is presented in the figure below. To be effective, this model would satisfy the following two criteria: (a) it would allow non-citizens to *identify* the rights that are applicable to their situation; and (b) it would allow them to *claim* the rights within the particular domestic context. Proposals as to *lex ferenda* are presented in the next chapter.

[741] 2018 Ga-Dan 5125207, Seoul Central District Court (29 October 2019) (the first petitioner); 2020 Ga-Dan 5322063, Seoul Central District Court (19 August 2021) (second petitioner).
[742] Won (2019), 115; Kyoto Human Rights Research Institute, 'Effectiveness of the Human Rights Committee's Follow-up Procedure: Case Study of Some Asian Countries' Concluding Observations and Individual Communications,' International Symposium (31 January 2010), 35.

Figure 2: Human rights claiming mechanisms from an individual non-citizen perspective



Chapter 6: Conclusion

Chapter five outlined a variety of avenues – domestic courts, National Human Rights Institutions, individual communications to human rights treaty bodies, and transnational coalitions – for individuals to claim their rights in international human rights law, and access remedies for violations. Nevertheless, the gap created through the interaction of domestic and international dimensions of law, as discussed systematically in chapters three, four and five, continues to circumscribe human rights claims for non-citizens in practice.

At the domestic level, non-citizens may be precluded from accessing genuine merits review by restrictive legislation or overly formalistic judicial reasoning. At the international level, non-citizens are able to access merits review consonant with a claim in international human rights law, but are then unable to enforce the decision within the jurisdiction that violated their rights. Development of a new legal instrument is not likely to remedy this shortfall. Negotiations for the Global Compacts provided a clear indication that there is no appetite among states for a binding treaty on migrants.[743] There is no foreseeable reason to expect that these parameters will change in future. Moreover, previous efforts at codification in the area of non-citizens' rights have been marred by protracted negotiations and limited effectiveness. This is demonstrated by the

[743] A particularly forceful objection along these lines was advanced by the US delegate: 'We are concerned about the possibility that the compact's supporters, recognizing the lack of widespread support for a legally binding international migration convention, are seeking to use the compact and its outcomes and objectives as a long-term way to build international customary law, or so-called soft law, in the area of migration.' A/73/PV.60 (19 December 2018).

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live and the International Covenant on Migrant Workers. Acknowledging this resistance on the part of states, this study proposes three recommendations, in ascending order of ambition, to optimise existing configurations towards a new normative frame of reference. The first is to *syncretise* actors and provisions between domestic and international levels. The second is to *narrow distances* between categories of non-citizens. The third and final recommendation is to *enhance claim-making potential* of human rights by non-citizens, to secure effectiveness in practice.

Syncretising Actors and Provisions

In the lead-up to negotiations for the Global Compact, OHCHR quietly reminded the international community that 'the existing international human rights framework is itself a protection framework directly applicable to migrants.'[744] Human rights recognised in the core international treaties apply to everyone within the jurisdiction of a state; distinctions between citizens and non-citizens may only be made in very limited circumstances. The human rights treaty bodies, through a body of general comments, have enhanced the integration and interdependency of human rights provisions, particularly with respect to their applicability to non-citizens. Committee views in individual communications have steadily extended the reach of jurisdiction, to cover non-citizens whose rights are affected by the actions of a state party.

[744] OHCHR (undated submission to the Human Rights Council), 1.

These developments, accruing at the international level over the course of several decades, create the groundwork for action at the domestic level. Many constitutions explicitly contain human rights clauses that invoke the principles of international human rights law. Quantitative international human rights law analysis has also demonstrated that fluid engagement between the domestic and international levels, including through domestic courts that are enabled to (re-)evaluate domestic legal action in line with international law, national human rights institutions and the acceptance of individual communication procedures to human rights treaty bodies, are associated with stronger implementation of human rights recommendations.[745] The objective of syncretisation is to mobilise actors in states in pursuit of conformity, allowing internalisation of international human rights law into constitutional provisions and domestic law. Success in this endeavour would be judged by its ability to move beyond human rights minimalism,[746] widening the expansion of substantive rights to those currently most controversial with respect to non-citizens, in particular economic and social rights.

What would this look like in practice? National Human Rights Institutions already advocate for the rights of non-citizens through their activities, as set out in section 5.3 above. In an individual communication submitted to the Committee on the Elimination of Racial Discrimination against Germany, the country's NHRI provided an *amicus curiae* submission attesting that the contested speech met all the elements of racist speech,

[745] Won (2019), 5-6.
[746] Borrowing a term from Stone Sweet and Ryan (2018), 3, describing the development of the ECHR's jurisprudence.

including through diminishing the individuality of human beings and also their dignity.[747] While the Committee does not disclose how persuasive this submission was on their findings, which upheld the complaint that there had been a violation of the Convention, it broadened the evidentiary basis for its findings, adding a corroborating voice beyond the contraposing positions of non-citizen petitioner and respondent state.[748] Contributions from NHRIs in this *amicus curiae* capacity could be extended to support non-citizens in legal action at the domestic level. A similar role was, in fact, requested by the Global Alliance of National Human Rights Institutions in the leadup to the Global Compact.[749]

Transnational coalitions, in particular NGOs, should leverage their knowledge of existing international human rights provisions in their engagement with non-citizens seeking to claim their human rights or receive remedies for violations. Where the application of a human right entails contentious elements at the domestic level, creative application of principles through strategic litigation could aim for judicial affirmation of the applicability of standards required by international human rights law.[750] Scholarship has remarked that a limited number of legal counsel integrate recourse to individual complaints mechanisms into their litigation practice.[751] However, as discussed in chapter five, even a finding against a state by a human rights treaty body committee is

[747] Committee on the Elimination of Racial Discrimination, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010 (26 February 2013), para 8.3.
[748] Of significance in this respect is that treaty committees do not have the ability to undertake independent fact-finding in the issuance of views: Atak and Giffin (2019), 311.
[749] GANHRI (2017) requested the ability 'to monitor, assess and advise on the design and implementation of' migration-related policies in accordance with the Paris Principles: 8.
[750] On the role of strategic litigation, see in particular Ilker Ataç, 'Gaygusuz v. Austria: Advancing the rights of non-citizens through litigation,' 46(1) *OZP – Austrian Journal of Political Science* (2017) 21-31.
[751] Atak and Giffin (2019), 305-6. The authors continue, however, that the overall 'limited number of these actors points to a general lack of awareness of, or interest in, the UN individual complaints mechanisms.'

statistically unlikely to be complied with. To overcome state resistance, transnational coalitions may need to continue mobilisations within the domestic jurisdiction, on the basis of the findings contained within the views and the normative pull of international human rights law. Ataç provides the example of a dispute concerning the right of non-citizens to stand for election to work councils in Austria, which progressed through litigation in a regional court, the Austrian Constitutional Court and the European Court of Human Rights, until the UN Human Rights Committee found that the restrictions violated the right to equality under the ICCPR.[752] However, another campaign was required, coupled with a subsequent ruling by the European Court of Justice, to achieve legal revision.[753] Won observes a similar dynamic at play in South Korea in terms of court engagement with reasoning in individual communications.[754] Ongoing syncretisation of actors and provisions between domestic and international levels, although it requires resilience and flexibility, would ultimately bring closer the realisation of all individuals as bearers of universal human rights.

Narrowing Distances between Categories of Non-Citizen

The second component involves narrowing the distance between *categories* of non-citizens. Since its inception, international human rights law has been accustomed to separating non-citizens into various categories. A great many more varieties of non-citizen exist at the level of domestic law. This study suggests that continuing to maintain such rigid distinctions may no longer serve its intended purpose. Evidence of recent

[752] Human Rights Committee, *Mümtaz Karakurt v. Austria,* Communication No. 965/2000 (4 April 2002).
[753] Ataç (2017), 28.
[754] Won (2019), 138. However, the example cited is conscientious objection to military service, which does not relate to non-citizens.

years has demonstrated that mixed migration flows may overwhelm the logistical capacities of responding states. The requirement to process the protection eligibility of each individual, imposed by the Refugee Convention, constitutes an undeniable additional burden in this context. Both the UN Secretary-General and IOM have stated that large-scale movements of people will continue or even accelerate in coming years.[755] A number of states and agencies have recognised the need to establish legal pathways allowing for movement in the case of environmental disasters and climate change.[756] As seen above, treaty bodies have also held in individual communications that the *non-refoulement* principle is applicable under the ICCPR, and potentially broader than its Refugee Convention counterpart;[757] OHCHR's position is similar.[758] From this perspective, separation of the Global Compacts into distinct and independent processes – one covering migration, the other covering refugees – may have represented a missed opportunity.

Accordingly, this study suggests bringing the several different categories of non-citizens in international human rights law under one rubric in practice. This does *not* advocate legal reform; protection obligations under the Refugee Convention, for example, should continue to be applied. Rather, it is premised on accepting the osmosis of different principles in international human rights law, as well as the access of non-citizens to

[755] UN Secretary-General, 'Background note: Meeting the challenge of large movements of people,' accessed at http://refugeesmigrants.un.org/sites/default/files/gcm_background_note_4.pdf; IOM, *Annual Report 2020*, C/112/INF/1 (7 July 2021), paras 18-19.
[756] United Nations General Assembly, 'Secretary-General report' (2021), para 64, citing practices of the USA, Pacific Islands Forum Secretariat and Intergovernmental Authority on Development.
[757] Human Rights Committee, *Teitiota v. New Zealand* (2019), para 9.3.
[758] OHCHR (2017), 1, stating that migrants in vulnerable situations may fall outside the protections of the Refugee Convention but nonetheless be entitled to protections under international human rights law.

human rights on a universal basis.[759] Reform in this direction would also require the removal of categories of non-citizen from domestic law that are inconsistent with international human rights law. The practice of UN human rights treaty bodies already provides pointers in this direction, as discussed in Chapter 5.1. OHCHR propounds a concept along these lines in the form of a 'migrant in a vulnerable situation': an individual facing a range of intersecting, coexisting factors, both internal and external, that influence and exacerbate each other.[760] The term 'migrant' carries potential stigma, however,[761] while 'non-citizen,' although standard in international human rights law, depends too heavily on the negative binary it creates through its prefix. Terminology deployed to describe non-citizens needs to again evolve; this study tentatively proposes 'co-residents' as an acceptable alternative. The term is open to critique for not capturing individuals in a transient situation; reality may dictate that this group of individuals be referred to as migrants strictly during period/s of transit between state territories. However, for the vast majority of non-citizens present on a territory, it has the advantage of indicating the relationship between individual and jurisdiction that is central to international human rights law. The prefix implies more positive connotations than mere lack of citizenship, while simultaneously acknowledging citizenship practices as distinct and legitimate. Finally, it avoids stigmatising groups (as 'illegal,' or 'economic

[759] This model conforms with Weissbrodt's (2008) earlier recommendation to 'mobilize and implement human rights norms and techniques that already apply across the various categories of non-citizens' (244).
[760] OHCHR (2017), 4. Similarly, see the call of the Secretary-General for states to create 'credible pathways for migrants who do not qualify for refugee status but face insurmountable obstacles to returning to their countries of origin': SG background note, 2. Oberoi and Taylor-Nicholson (2013) observe along similar lines that 'a wide spectrum of legal categories of people' arrive at borders, many of whom require protection, but not all of whom are able to 'define their protection needs' according to 'conventionally accepted legal definitions' (176).
[761] Weissbrodt (2008), 2.

migrants') while equally avoiding privileging any group (such as 'expatriates'[762]). It stipulates, in short, that all non-citizens subject to jurisdiction of a state are equal bearers of human rights.

Enhancing Claim-Making Potential

This final set of recommendations targets enhancing the claim-making potential of human rights from the perspective of non-citizens. A basic recommendation in this regard, frequently reiterated by treaty bodies, is to encourage states to ratify human rights treaties and optional protocols and to ensure they are implemented in the domestic jurisdiction. However, the current system entails significant confusion for individuals without detailed knowledge of international human rights law.[763] Complexity of legal procedures is compounded by the lack of accessible interfaces.[764] This study endorses the need for a single, streamlined system for individual communications that would generate a claim-making human rights vocabulary for non-citizens. Under an ideal model, a non-citizen would submit a complaint, the secretariat would identify the potential violations of international human rights law and applicable treaty body committee/s, and forward the communication accordingly. Reform in this area could be accomplished through administrative and operational initiatives, without the need for a new treaty.[765] A streamlined system would also strengthen coordination between treaty bodies, potentially

[762] Nicole Chui, 'How the language of migration puts expats on a pedestal – and left immigrants in the dust,' *The Independent* (17 April 2020), available at https://www.independent.co.uk/voices/immigrant-migrant-expat-hong-kong-singapore-uk-brexit-a9470171.html (accessed 5 May 2022).
[763] Limon (2018), 4.
[764] Ibid, 25, detailing the lack of user friendliness of the OHCHR's complaint submission mechanism. See also Laura Collier, 'Communications and the Public Sphere in the UN Human Rights System' (MA thesis, American University of Paris, 2013), 25-6, observing that even OHCHR staff struggle to navigate its website.
[765] Similar recommendations are put forward in Limon (2018), 5.

allowing for the development of more balanced jurisprudence addressing diverse areas of rights, including those most contentious for non-citizens, such as health and access to social services.

The Global Compacts ushered in an era of increased attention to migration processes at the multilateral level. Less visible in these discussions has been the role of the UN's 'migration agency,' the International Organization for Migration (IOM). The organisation formally joined the UN system in 2016, following expedited negotiations amidst the 2015 'perceived global migration crisis.'[766] IOM's membership and budget have rapidly increased in recent years,[767] as it has continuously invested in its own 'institutional development.'[768] IOM already provides a range of services to migrants, some of which overlap with the functions of the UN refugee agency, UNHCR.[769] Although the organisation's cooperation with states in enforcing domestic migration laws and lack of a normative mandate have, in the past, been the subject of concern among both UN agencies and scholars, its use of human rights discourse has become more pronounced since 2016.[770]

Ongoing reform to the IOM presents opportunities to equip the organisation with a stronger human rights mandate to assist non-citizens who are not recognised refugees.

[766] Megan Bradley, 'Joining the UN Family? Explaining the Evolution of IOM-UN Relations,' 27 Global Governance (2021) 251-52.
[767] Ibid, 253-54.
[768] IOM (2021), para 11.
[769] These include supporting internally displaced populations (IDPs), shelter and settlements, cash-based interventions and other livelihood services: ibid, paras 20, 39, page 10.
[770] Bradley (2021), 265-66, 268, 270. The author writes at 254 that IOM's deference to member states and reliance on project funding have 'fostered mistrust and conflict' with UN agencies.

IOM should, for example, play a more active advocacy role for the human rights of non-citizens in domestic jurisdictions. Two immediate avenues include capacity-training for government officials and providing *amicus curiae* submissions in court proceedings to inform decision-making, as UNHCR already does.[771] IOM is also invested in follow-up and review of the Global Compacts, through serving as the coordinator and secretariat of the UN Network on Migration. The terms of reference for this network include 'promot[ing] coherence on migration within the UN system,' in tandem with objectives to promote the protection of the human rights of migrants and 'engage with external partners,' including migrants.[772] Leveraging these objectives to implement and interpret the Global Compacts from more human rights-based approaches represents another long-term opportunity. The presence of an international actor dedicated to the human rights of non-citizens would enhance rights claimability and contribute to narrowing distance between categories of non-citizens, as elaborated in recommendation two above.

The most ambitious set of reforms concerns making human rights claims by non-citizens more enforceable. Despite the important role played by individual communications, compliance is acknowledged to be unsatisfactory. Looking sideways at other international dispute resolution mechanisms may provide guidance towards a solution. As one example, National Contact Points (NCPs) established under the OECD

[771] See for example *T.I. v United Kingdom* (ECHR admissibility decision of 7 March 2000); UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2020KuDan17245 before the Seoul Administrative Court' (31 August 2021), available at: https://www.refworld.org/docid/61dea41b4.html.
[772] United Nations Network on Migration, 'Terms of Reference for the UN Network on Migration' (23 May 2018), 1-2, 4. The terms of reference do not, however, specify the intended purpose of engagement with external partners.

Guidelines for Multinational Enterprises utilise more informal 'good offices' dispute resolution settings. The reported agreement rate of 40% is higher than compliance with individual communications.[773] In another domain, bilateral investment treaties allow individuals to obtain compensation awards that are enforceable through domestic court systems.[774] Contrasting these mechanisms implicates an economic critique of international justice with which this study does not intend to engage;[775] it is sufficient to note, for the purposes of this section, that it is evidently possible for international treaties to provide enforceable rights, including compensation, to non-citizen individuals. From a human rights-based approach, equality before the law would require that an enforceable right to compensation for one group of non-citizens should be accessible to all.

This study argues that extending the reach of international human rights law to non-citizens, through allowing them to claim and access their human rights, represents a major unfinished project of the discipline. Chapter one surveyed the acceleration of movement worldwide and the growth of the non-citizen population. Notwithstanding these burgeoning transborder flows, non-citizens have traditionally existed in a conceptual and theoretical gap in citizenship theory and international law, as explored in chapter two. Chapter three examined the codification process of international human rights law, seeking to locate the status of the non-citizen in relation to the texts of the

[773] OECD, *National Contact Points for Responsible Business Conduct: Providing access to remedy: 20 years and the road ahead* (2020), 22. In addition, 47% of concluded cases were reported to result in company policy change. Non-engagement rates were higher than individual communications, however, at 27%: ibid, 32.
[774] Van Harten (2020), 7.
[775] Along these lines, however, see Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press, 2018), in particular at xii, charging human rights movements with an 'intensification of material hierarchy' globally.

treaties. Non-citizens benefit from the norms of universality and non-discrimination in the International Bill of Rights. However, efforts at further codification of the human rights of non-citizens generally, or of specific groups, have – with the possible exception of the Refugee Convention – undergone cyclical efforts that end up reaffirming the original ambiguity with regard to non-citizens. This chapter concludes that the most recent such endeavour of the international community in this regard, the Global Compacts for Migration and Refugees, fall into this same pattern. International human rights standards depend, in practice, on states for their respect, protection and fulfilment. For this reason, chapter four presented case studies of state practice at the domestic level, mapping these practices across different categories of non-citizens against international human rights law. Chapter five analysed the *interaction* between these two dimensions of law, domestic and international. The focus of this chapter was on institutions – national constitutions, UN human rights treaty bodies, National Human Rights Institutions and transnational coalitions – that mediate international human rights standards in relation to their application in a particular (nation-)state, and therefore are of particular relevance to non-citizens. UN human rights treaty bodies receive particular attention, in recognition of their devotion to extending equality and non-discrimination to non-citizens across all domains of human rights.

This study closes with three recommendations centred on realising human rights in practice for the individual non-citizen. These are: syncretising actors and provisions between domestic and international levels; narrowing distances between categories of non-citizens; and enhancing claim-making by non-citizens. It does not recommend

development of a new legal instrument, arguing that actions that make internationally recognised human rights more practically available to non-citizens through existing provisions and mechanisms is likely to be more productive. Advancing these recommendations to secure the meaningful access of non-citizens to human rights represents a daunting challenge, but also an opportunity to enhance the genuine universality of international human rights law.

Bibliography

A Legal materials

International instruments

Agreement between the United States of America, the United Mexican States, and Canada, 10 December 2019 (entered into force 1 July 2020)

Arrangement relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, LXXXIX LNTS 53

Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, 5 July 1922, XIII LNTS 237

Charter of the United Nations, 24 October 1945, 1 UNTS XVI

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018 (entered into force 30 December 2018)

Comprehensive Economic and Trade Agreement, 30 October 2016 (not in force)

Convention concerning the Status of Refugees coming from Germany, 10 February 1938, CXCII LNTS 59

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975)

Convention on Rights and Duties of States (26 December 1933), 165 LNTS 19

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Convention on [the] Status of Aliens (20 February 1928), 132 LNTS 301

Convention relating to the International Status of Refugees, 28 October 1933, CLIX LNTS 199

Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

Convention relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960)

Convention Relative to the Rights of Aliens (29 January 1902), 32 OASTS 58

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44), Article 11(4)

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12)

Declaration by United Nations, 1 January 1942

European Union–South Korea Free Trade Agreement, 6 October 2010 (entered into force 13 December 2015)

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969)

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003)

Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, ILO No. 143, 17426 UNTS 1120 (entered into force 9 December 1978)

Migration for Employment Convention (Revised), July 1, 1949, ILO No. 97, 1616 UNTS 120 (entered into force 22 January 1952)

Minorities Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles, 28 June 1919

Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

Regional Comprehensive Economic Partnership, 15 November 2020 (entered into force 1 January 2022)

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01 (entered into force 1 December 2009)

Treaty on European Union, 7 February 1992, 2002/C 325/5 (entered into force 1 November 1993)

United Nations General Assembly, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,' A/RES/63/117 (5 March 2009)

United Nations General Assembly, 'Universal Declaration of Human Rights,' A/RES/3/217A (10 December 1948)

Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967)

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

International cases

Grzelczyk, Case C-184/99, EU:C:2001:458 (20 September 2001)

'Juridical Condition and Rights of Undocumented Migrants,' Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights

Mavrommatis Palestine Concessions (*Greece v. United Kingdom)*, Judgment, PCIJ Series A No. 2 (1924)

Nottebohm Case (Liechtenstein v. Guatemala) (second phase), Judgment of 6 April 1955, ICJ Reports 1955

T.I. v United Kingdom, 43844/98, Admissibility Decision of 7 March 2000, European Court of Human Rights

Trojani, C-456/02, EU:C:2004:488 (7 September 2004)

Zambrano, C-34/09, EU:C:2011:124 (8 March 2011)

International resolutions

European Council, 'Tampere European Council: Presidency Conclusions' (15-16 October 1999)

'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,' 25 July 1951, 189 UNTS 137

United Nations Commission on Human Rights, 'Human rights of migrants,' E/CN.4/RES/1999/44 (26 April 1999)

United Nations General Assembly, 'Admission of the Democratic People's Republic of Korea and the Republic of Korea to membership in the United Nations,' A/RES/46/1 (17 September 1991)

United Nations General Assembly, ‘Declaration on Territorial Asylum,’ A/RES/2312(XXII) (14 December 1967)

United Nations General Assembly, ‘Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,’ A/RES/40/144 (13 December 1985)

United Nations General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration,’ A/RES/73/195 (19 December 2018)

United Nations General Assembly, ‘Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration,’ A/RES/71/280 (6 April 2017)

United Nations General Assembly, ‘National institutions for the promotion and protection of human rights,’ A/RES/48/134 (4 March 1994)

United Nations General Assembly, ‘New York Declaration for Refugees and Migrants,’ A/RES/71/1 (19 September 2016)

United Nations General Assembly, ‘Office of the United Nations High Commissioner for Refugees,’ A/RES/50/152 (9 February 1996)

United Nations General Assembly, ‘Office of the United Nations High Commissioner for Refugees,’ A/RES/73/151 (17 December 2018)

United Nations General Assembly, ‘United Nations Declaration on the Rights of Indigenous Peoples,’ A/RES/61/295 (13 September 2007)

United Nations General Assembly, ‘World Conference on Human Rights,’ A/RES/48/121 (14 February 1994)

Treaty body documents

Committee against Torture, *Ke Chun Rong v. Australia*, Communication No. 416/2010 (5 November 2012)

Committee against Torture, *Khairullo Tursunov v. Kazakhstan*, Communication No. 538/2013 (8 May 2015)

Committee against Torture, *X. v. Kazakhstan*, Communication No. 554/2013 (3 August 2015),

Committee on Economic, Social and Cultural Rights, ‘Combined second to fifth periodic reports of States parties due in 2013: Kenya,’ E/C.12/KEN/2-5 (1 July 2013)

Committee on Economic, Social and Cultural Rights, 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant),' E/1991/23 (14 December 1990)

Committee on Economic, Social and Cultural Rights, 'General comment No. 9: The domestic application of the Covenant,' E/C.12/1998/24 (3 December 1998)

Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),' E/C.12/GC/20 (2 July 2009)

Committee on the Elimination of Discrimination against Women, 'General recommendation No. 26 on women migrant workers,' CEDAW/C/2009/WP.1/R (5 December 2008)

Committee on the Elimination of Discrimination against Women, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,' CEDAW/C/GC/28 (16 December 2010)

Committee on the Elimination of Discrimination against Women, 'General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women,' CEDAW/C/GC/32 (14 November 2014)

Committee on the Elimination of Discrimination against Women, 'General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration,' CEDAW/C/GC/38 (20 November 2020)

Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, Communication No. 42/2008 (14 August 2009)

Committee on the Elimination of Racial Discrimination, 'General recommendation XI on non-citizens,' A/48/18 (1993)

Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX on discrimination against non-citizens' (5 August 2004), available in available in United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume II), HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008) 301-6

Committee on the Elimination of Racial Discrimination, 'Information received from the Republic of Korea on follow-up to the concluding observations on its combined seventeenth to nineteenth periodic reports,' CERD/C/KOR/FCO/17-19 (7 October 2020)

Committee on the Elimination of Racial Discrimination, *L.G. v Republic of Korea*, Communication No. 51/2012 (1 May 2015)

Committee on the Elimination of Racial Discrimination, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010 (26 February 2013),

Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, 'General comment No. 1 on migrant domestic workers,' CMW/C/GC/1 (23 February 2011)

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families,' CMW/C/GC/2 (28 August 2013)

Committee on the Rights of Persons with Disabilities, 'General comment no. 6 (2018) on Equality and Non-Discrimination,' CRPD/C/GC/6 (26 April 2018)

Committee on the Rights of Persons with Disabilities, *Grainne Sherlock v. Australia*, Communication No. 20/2014 (19 March 2021)

Committee on the Rights of the Child, *Chiara Sacchi et al. v. Germany*, Communication No. 107/2019 (22 September 2021)

Committee on the Rights of the Child, *Chiara Sacchi et al. v. Germany*, Communication No. 108/2019 (22 September 2021)

Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin,' CRC/GC/2005/6 (1 September 2005)

Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration,' CRC/C/GC/22 and CMW/C/GC/3 (16 November 2017)

Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,' CRC/C/GC/23 and CMW/C/GC/4 (16 November 2017)

Human Rights Committee, *Albert Wilson v. The Philippines*, Communication No. 868/1999 (30 October 2003)

Human Rights Committee, *Alina Simunek, Dagmar Hastings Tuzilova and Josef Prochazka v. The Czech Republic*, Communication No. 516/1992 (19 July 1995)

Human Rights Committee, *Andrea Vandom v. Republic of Korea*, Communication No. 2273/2013 (12 July 2018)

Human Rights Committee, *C. v. Australia*, Communication No. 900/1999 (28 October 2002)

Human Rights Committee, 'Concluding observations on the fourth periodic report of Czechia,' CCPR/C/CZE/CO/4 (6 December 2019)

Human Rights Committee, 'Concluding observations on the initial report of Qatar,' CCPR/C/QAT/CO/1 (30 March 2022)

Human Rights Committee, *D.V. and H.V. v. The Czech Republic*, Communication No. 1848/2008 (23 July 2012)

Human Rights Committee, 'Follow-up progress report on individual communications,' CCPR/C/118/3 (15 February 2017)

Human Rights Committee, 'Follow-up progress report on individual communications,' CCPR/C/127/3 (8 July 2021)

Human Rights Committee, 'Fourth periodic report submitted by Kuwait under article 40 of the Covenant, due in 2020,' CCPR/C/KWT/4 (18 November 2020)

Human Rights Committee, 'General Comment No. 15: The position of aliens under the Covenant' (11 April 1986), available in United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume I), HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) 191-93

Human Rights Committee, 'General Comment No. 18: Non-discrimination,' (10 November 1989), available in United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume I), HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) 197-200

Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement),' CCPR/C/21/Rev 1/Add/9 (2 November 1999)

Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' CCPR/C/21/Rev.1/Add.13 (26 May 2004)

Human Rights Committee, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,' CCPR/C/GC/32 (23 August 2007)

Human Rights Committee, 'General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights,' CCPR/C/GC/33 (25 June 2009)

Human Rights Committee, 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life,' CCPR/C/GC36 (3 September 2019)

Human Rights Committee, *Gennadi Šipin v. Estonia*, Communication No. 1423/2005 (9 July 2008)

Human Rights Committee, *Hendrick Winata and So Lan Li v. Australia*, Communication No. 930/2000 (26 July 2001)

Human Rights Committee, 'Initial report submitted by Qatar under article 40 of the Convention, due in 2019,' CCPR/C/QAT/1 (21 August 2019)

Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016 (24 October 2019)

Human Rights Committee, *J.B. v. Australia*, Communication No. 2798/2016 (21 July 2017)

Human Rights Committee, *J.G. v. New Zealand*, Communication No. 2631/2015 (2 November 2015)

Human Rights Committee, *J.R.C. v. Costa Rica*, Communication No. 296/1988 (30 March 1989)

Human Rights Committee, *Karel Malinovsky, Vladimir Malinovsky, Alexander Malinovsky and Katerina Malin v. Czechia*, Communication No. 2839/2016 (6 November 2020)

Human Rights Committee, *Miroslav Blazek, George A. Hartman and George Krizek v. The Czech Republic*, Communication No. 857/1999 (12 July 2001)

Human Rights Committee, *Mohammed Sahid v. New Zealand*, Communication No. 893/1999 (28 March 2003)

Human Rights Committee, *Moleni Fa'aaliga and Faatupu Fa'aaliga v. New Zealand*, Communication No. 1279/2004

Human Rights Committee, *Mümtaz Karakurt v. Austria*, Communication No. 965/2000 (4 April 2002)

Human Rights Committee, *Nell Toussaint v. Canada*, Communication No. 2348/2014 (24 July 2018)

Human Rights Committee, *Primo José Essono Mika Miha v. Equatorial* Guinea, Communication No. 414/1990 (28 May 1990)

Human Rights Committee, *Simalae Toala et al v. New Zealand*, Communication No. 675/1995 (2 November 2000)

Human Rights Committee, *Soo Ja Lim, Seon Hui Lim and Hyung Joo Scott Lim v. Australia*, Communication No. 1175/2003 (25 July 2006)

Human Rights Committee, *Thileepan Gnaneswaran v. Australia*, Communication No. 3212/2018 (27 October 2021)

Human Rights Committee, *Vjatšeslav Borzov v. Estonia*, Communication No. 1136/2002 (26 July 2004)

Human Rights Committee, *Vjatseslav Tsarjov v. Estonia*, Communication No. 1223/2003 (26 October 2007)

Human Rights Committee, *X. v. Republic of Korea*, Communication No. 1908/2009 (25 March 2014)

Human Rights Committee, *Zdenek Kríž v. The Czech Republic*, Communication No. 1054/2001 (1 November 2005)

Domestic legislation

Act LXII of 2001 on Hungarians Living in Neighbouring Countries

Act on the Immigration and Legal Status of Overseas Koreans (2013)

Australian Border Force Act (2015)

Australian Human Rights Commission Act (1986)

Constitutional Court Act of the Republic of Korea (1988)

Framework Act on Treatment of Foreigners Residing in the Republic of Korea (2007)

Immigration Act of the Republic of Korea (2022)

Kenya Citizenship and Immigration Act (2011)

Kenya National Commission on Human Rights Act (2011)

Kenya Refugees Act (2006)

Kenya Refugees Act (2021)

Migration Act of the Commonwealth of Australia (1958)

Multicultural Families Support Act of the Republic of Korea (2013)

National Human Rights Commission of Korea Act (2001)

North Korean Refugees Protection and Support Act of the Republic of Korea (1999)

Refugee Act of the Republic of Korea (2013)

Domestic cases

93 Hun-Ma 120, Constitutional Court of Korea (29 December 1994)

95 Hun-Ka 2, Constitutional Court of Korea (4 October 1996)

97 Hun-Ka 12, Constitutional Court of Korea (31 August 2000)

99 Hun-Ma 494, Constitutional Court of Korea (29 November 2001)

2007 Hun-Ka 12, Constitutional Court of Korea (30 August 2011)

2007 Hun-Ma 1083; 2009 Hun-Ma 230; 2009 Hun-Ma 352, Constitutional Court of Korea (29 September 2011 [consolidated decision])

2009 Hun-Ma 358, Constitutional Court of Korea (29 September 2011)

2015 Hun-Ma 1149, Constitutional Court of Korea (23 April 2020)

2018 Ga-Dan 5125207, Seoul Central District Court (29 October 2019)

2020 Ga-Dan 5322063, Seoul Central District Court (19 August 2021)

BVerfG 83, 37, Nr. 3, Federal Constitutional Court of Germany (31 October 1990)

Johnson v. Eisentrager, 339 U.S. 763 (1950)

Wong Wing v. United States, 163 U.S. 228 (1886)

B Academic materials

Aleinikoff, T. Alexander, 'Citizens, Aliens, Membership and the Constitution,' 7(9) *Constitutional Commentary* (1990) 9-34

Alston, Philip, 'Against a World Court for Human Rights,' 28(2) *Ethics & International Affairs* (2014) 197-212

Annan, Kofi, *Interventions* (Penguin, 2012)

Arendt, Hannah, *The Origins of Totalitarianism* (Schocken, 1951)

Ataç, Ilker, 'Gaygusuz v. Austria: Advancing the rights of non-citizens through litigation,' 46(1) *OZP – Austrian Journal of Political Science* (2017) 21-31

Atak, Idil and Lorielle Giffin, 'Canada's Treatment of Non-Citizens through the Lens of the United Nations Individual Complaints Mechanisms,' 56 *The Canadian Yearbook of International Law* (2019) 292-327

Bauböck, Rainer, ‘How migration transforms citizenship: international, multinational and transnational perspectives,’ *IWE Working Paper Series No. 24* (2002)

Bauböck, Rainer, ‘The Three Levels of Citizenship within the European Union,’ 15(5) *German Law Journal* (2014) 751-763

Beaulac, Stéphane, *The Power of Language in the Making of International Law* (Martinus Nijhoff Publishers, 2004)

Beitz, Charles, *The Idea of Human Rights* (Oxford University Press, 2009, 2011 ed)

Bellino, Michelle J., ‘Education, merit and mobility: Opportunities and aspirations of refugee youth in Kenya’s Kakuma refugee camp,’ 47(4) *British Educational Research Journal* (2021) 817-835

Bellino, Michelle J., and Sarah Dryden-Peterson, ‘Inclusion and exclusion within a policy of national integration: refugee education in Kenya’s Kakuma Refugee Camp,’ 40(2) *British Journal of Sociology of Education* (2019) 222-238

Beneš, Eduard, ‘The Organization of Postwar Europe,’ 20(2) *Foreign Affairs* (1942) 226-242

Benhabib, Seyla, ‘Claiming Rights across Borders: International Human Rights and Democratic Sovereignty,’ 103(4) *American Political Science Review* (2009) 691-704

Benhabib, Seyla, ‘The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights,’ 2 *Jus Cogens* (2020) 75-100

Benhabib, Seyla, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004)

Bosniak, Linda, ‘Denationalizing Citizenship,’ in T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 237-252

Bosniak, Linda, ‘Exclusion and Membership: The Dual Identity of the Undocumented Workers under United States Law,’ 6 *Wisconsin Law Review* (1988) 955-1042

Bosniak, Linda, ‘Status Non-Citizens,’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 314-336

Bosniak, Linda, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006)

Boucher, François, and Johanna Gördemann, ‘The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique,’ 23(2) *Interventions* (2021) 227-249

Bradley, Megan, 'Joining the UN Family? Explaining the Evolution of IOM-UN Relations,' 27 *Global Governance* (2021) 251-274

Brankamp, Hanno, ''Occupied Enclave': Policing and the underbelly of humanitarian governance in Kakuma refugee camp, Kenya,' 71 *Political Geography* (2019) 67-77

Cardenas, Sonia, 'Sovereignty Transformed? The Role of National Human Rights Institutions,' in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate, 2009) 27-40

Cassese, Antonio, 'A Plea for a Global Community Grounded in a Core of Human Rights,' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 136-143

Cassola, Adèle, Amy Raub & Jody Heymann, 'Constitutional protections in an era of increased migration: evidence from 193 countries,' 20(3) *The International Journal of Human Rights* (2016) 298-320

Cohen, Jean L., 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos,' 14(3) *International Sociology* (1999) 245-268

Collier, Laura, 'Communications and the Public Sphere in the UN Human Rights System' (MA thesis, American University of Paris, 2013)

Costello, Cathryn, 'On Refugeehood and Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 717-742

Cover, Robert M., 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,' 97 *Harvard Law Review* (1983) 4-68

Crisp, Jeff, 'UNHCR at 70: An Uncertain Future for the International Refugee Regime,' 26 *Global Governance* (2020) 359-368

Debeljak, Julie, 'Rights and Democracy: A Reconciliation of the Institutional Debate,' in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 135-157

Etinson, Adam, 'Human Rights, Claimability and the Uses of Abstraction,' 25(4) *Utilitas* (2013) 463-486

Fisch, Jörg, 'Peoples and Nations,' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 27-48

Forst, Rainer, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,' 120 *Ethics* (2010) 711-740

Fraser, Nancy, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World,' 24(4) *Theory, Culture & Society* (2007) 7-30

Gabisa, Henok, 'The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?,' 48(2) *The International Lawyer* (2014) 153-167

Georgiou, Myria, 'Does the subaltern speak? Migrant voices in digital Europe,' 16(1) *Population Communication* (2018) 45-57

Glendon, Mary Ann, 'John P. Humphrey and the Drafting of the Universal Declaration of Human Rights,' 2 *Journal of the History of International Law* (2000) 250-260

Habermas, Jürgen, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity, 1989 [1962])

Hansen, Randall, 'The poverty of postnationalism: citizenship, immigration, and the new Europe,' 31(1) *Theory and Society* (2009) 1-24

Hilpold, Peter, 'Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018,' 26 *European Law Journal* (2021) 226-244

Horn, Rebecca, 'A Study of the Emotional and Psychological Well-being of Refugees in Kakuma Refugee Camp, Kenya,' 5(4) *International Journal of Migration, Health and Social Care* (2009) 20-32

Iglesias, Teresa, 'Bedrock Truths and the Dignity of the Individual,' 4(1) *Logos: A Journal of Catholic Thought and Culture* (2001) 114-134

Jeon Sang Hyeon, '외국인의 기본권보장 방안: 헌법상 근거, 기본권주체성, 기본권제한에 관하여' [A Study on the Protection of Alien's Constitutional Rights], 68(6) *Beobjo* (2019) 59-92

Jouannet, Emmanuelle, 'Emer de Vattel (1714-1767),' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1118-1121

Kant, Immanuel, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (ed Pauline Kleingeld, trans David L. Colclasure, Yale University Press, 2006 [1795])

Keck, Margaret E. and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in Transnational Politics* (Cornell University, 1998)

Kim, Jaeeun, *Contested Embrace: Transborder Membership Politics in Twentieth-Century Korea* (Stanford University Press, 2016)

Kleingeld, Pauline, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012)

Kong, Soojin, 'The Two Modes of Foreign Engagement by the Constitutional Court of Korea,' 16(2) *Asian Journal of Comparative Law* (2021) 338-355

Lee, Chulwoo, 'How can you say you're Korean? Law, governmentality and national membership in South Korea,' 16(1) *Citizenship Studies* (2012) 85-102

Lee Jong-Hyeok, '외국인의 법적 지위에 관한 헌법조항의 연원과 의의: 제헌국회의 논의와 비교헌법적 검토를 중심으로' [The Origin and Implication of the Article 7(2) of the 1948 Korean Constitution: A Comparative Constitutional History on the Legal Status of Foreigners in Korea], 55(1) *Seoul daehakgyo beobhak* (2014) 521-571

Lee, Seokwoo and Hee Eun Lee, *The Making of International Law in Korea: From Colony to Asian Power* (Brill Nijhoff, 2016)

Lillich, Richard B., *The human rights of aliens in contemporary international law* (Manchester University Press, 1984)

Lyon, Beth, 'The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm,' 42(2) *New York University Journal of International Law and Politics* (2010) 389-500

Maas, Willem, 'Migrants, states, and EU citizenship's unfulfilled promise,' 12(6) *Citizenship Studies* (2008) 583-596

Maas, Willem, 'Multilevel Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 644-668

Mazower, Mark, 'The Strange Triumph of Human Rights, 1933-1950,' 47(2) *The Historical Journal* (2004) 379-398

Mosler, Hannes, 'Understanding the Politics of Constitutional Resilience in South Korea,' 33(2) *Seoul Journal of Korean Studies* (2020) 459-491

Moyn, Samuel, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press, 2018)

Mutua, Makau, 'Savages, Victims, and Saviors: The Metaphor of Human Rights,' 42(1) *Harvard International Law Journal* (2001) 201-246

Nagel, Thomas, 'The Problem of Global Justice,' 33(2) *Philosophy and Public Affairs* (2005) 113-147

Newman, David, 'On borders and power: A theoretical framework,' 18(1) *Journal of Borderlands Studies* (2003) 13-25

Ng, Yee-Fui, 'Alie(n)ation: The Parched Rights of Non-Citizens in the Oasis of Globalisation,' 1(2) *Journal of Migration and Refugee Issues* (2005) 67-86

Nyabola, Nanjala, 'The End of Asylum,' *Foreign Affairs* (10 October 2019), available at https://www.foreignaffairs.com/articles/2019-10-10/end-asylum

Oberoi, Pia and Eleanor Taylor-Nicholson, 'The Enemy at the Gates: International Borders, Migration and Human Rights,' 2 *Laws* (2013) 169-186

Oelgemöller, Christina, 'The Global Compacts, Mixed Migration and the Transformation of Protection,' 23(2) *Interventions* (2021) 183-190

Oka, Rahul Chandrashekhar, 'Coping with the Refugee Wait: The Role of Consumption, Normalcy, and Dignity in Refugee Lives at Kakuma Refugee Camp, Kenya,' 116(1) *American Anthropologist* (2014) 23-37

O'Neill, Onora, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996)

Owen, David, 'Citizenship and Human Rights,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 247-267

Panizzon, Marion, 'Temporary Movement of Workers and Human Rights Protection: Interfacing the "Mode 4" of GATS with Non-Trade Bilateral Migration Agreements,' 104 *Proceedings of the Annual Meeting (American Society of International Law)* (2010) 131-139

Paul, Annie, 'The enigma of survival: Traveling beyond the expat gaze,' 62(1) *Art Journal* (2003) 48-65

Pensky, Max, 'Constitutional Exclusion? EU Constitution, Human Rights, and the Problem of Scope,' paper delivered at the European Constitutionalism Conference, Johann-Wolfgang Goethe University, Frankfurt, June 2002

Perry, Michael J., 'Modern Equal Protection: A Conceptualization and Appraisal,' 79(6) *Columbia Law Review* (1979) 1023-1084

Peters, Anne, 'Humanity as the A and Ω of Sovereignty,' 20(3) *The European Journal of International Law* (2009) 513-544

Portes, Alejandro, 'Global Villagers: The Rise of Transnational Communities,' 25 *American Prospect* (1996) 74-77

Rettig, Cristián, 'The Claimability Condition: Rights as Action-Guiding Standards,' 51(2) *Journal of Social Philosophy* (2020) 322-340

Rhee Woo-Young, '인권보장과 체계정합성 관점에서의 외국인 관련 법제의 입법적 분석과 개정방향' [Analysis Of The Laws Concerning Non-Citizen Status And Rights In

Korea From The Perspectives Of Human Rights Protection And Legislative Conformity, With Suggestions For Statutory Revisions] 16(1) *Ipbeophak yeongu* (2019) 1-37

Roosevelt, Eleanor, 'The Promise of Human Rights,' 26(3) *Foreign Affairs* (1948) 470-477

Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2008)

Schabas, William A. (ed), *The Universal Declaration of Human Rights: The* travaux préparatoires (Cambridge University Press, 3 volumes, 2013)

Schechtman, Joseph B., *Postwar Population Transfers in Europe, 1945-1955* (University of Pennsylvania Press, 1955)

Seol, Dong-Hoon, 'The citizenship of foreign workers in South Korea,' 16(1) *Citizenship Studies* (2012) 119-133

Shachar, Ayelet, Rainer Bauböck, Irene Bloemraad and Maarten Vink, 'Introduction: Citizenship—*Quo Vadis*?,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 3-11

Shachar, Ayelet, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017)

Shawki, Noha, 'A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions,' in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate, 2009) 41-58

Shelton, Dinah, *Remedies in International Human Rights Law* (Oxford University Press, 2010 edition)

Shin, Yoon Jin, 'Cosmopolitanising Rights Practice: The Case of South Korea,' in Takao Suami, Anne Peters, Dmitri Vanoverbeke and Mattis Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, 2018) 245-273

Shin, Yoon Jin, 'Gender Equality, Individual Empowerment, and Constitutional Rights Review: South Korea's Dynamic Development,' in Wen-Chen Chang, Kelley Loper, Mara Malagodi and Ruth Rubio Marín (eds), *Gender, Sexuality, and Constitutionalism in Asia* (Hart Publishing, forthcoming 2022)

Shin, Yoon Jin, 'Non-Citizens' Rights, Constitutional Review and an Inclusive Democracy: A Case Study of South Korea,' 91 *Journal of Korean Law* (2020) 81-118

Simma, Bruno, 'Foreign Investment Arbitration: A Place for Human Rights?,' 60(3) *International and Comparative Law Quarterly* (2011) 573-596

Simmons, A. John, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001)

Slaughter, Amy, and Jeff Crisp, 'A surrogate state? The role of UNHCR in protracted refugee situations,' *New Issues in Refugee Research*, Research Paper No. 168 (January 2009)

Song, Jiewuh, 'Migration as a Matter of International Concern,' *Res Publica* (2021)

Song, Sarah, 'Democracy and noncitizen voting rights,' 13(6) *Citizenship Studies* (2009) 607-620

Soysal, Yasemin Nuhoğlu, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994)

Special Supplement to the American Journal of International Law 23 (1929) 133-242

Stone Sweet, Alec, and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press, 2018)

Strumia, Francesca, 'Supranational Citizenship,' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 669-693

Tamir, Yael, *Why Nationalism* (Princeton University Press, 2019)

Tazreiter, Claudia, 'The unlucky in the 'lucky country': asylum seekers, irregular migrants and refugees and Australia's politics of disappearance,' 23(2) *Australian Journal of Human Rights* (2017) 242-260

Tiburcio, Carmen, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers, 2001)

Trindade, Antônio Augusto Cançado, 'Uprootedness and the protection of migrants in the International Law of Human Rights,' 51(1) *Revista Brasileira de Política Internacional* (2008) 137-168

Van Harten, Gus, *The Trouble with Foreign Investor Protection* (Oxford University Press, 2020)

Vattel, Emer de, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008 [1758])

Waldron, Jeremy, 'Democracy,' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (Oxford University Press, 2012) 187-203

Weissbrodt, David, *The Human Rights of Non-Citizens* (Oxford University Press, 2008)

Wells Sheffer, Megan, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights?,' 39(3) *Denver Journal of International Law & Policy* (2011) 483-521

Western, Shaina D., Sarah P. Lockhart & Jeannette Money, 'Does anyone care about migrant rights? An analysis of why countries enter the convention on the rights of migrant workers and their families,' 23(8) *The International Journal of Human Rights* (2019) 1276-1299

Wimmer, Andreas and Nina Glick Schiller, 'Methodological nationalism and the study of migration,' 43(2) *European Journal of Sociology* (2002) 217-240

Wolman, Andrew, 'Protecting Victim Rights: The Role of the National Human Rights Commission of Korea,' 2(2) *Journal of East Asia and International Law* (2009) 457-480

Won, Yoomin, 'Why Human Rights Treaty Bodies Make a Difference: An Empirical Study of the Human Rights Committee's Monitoring System and Domestic Implementation' (PhD dissertation, Stanford University, 2019)

C Other materials

APEC, 'APEC Business Travel Card (ABTC)' (April 2022), available at https://www.apec.org/groups/committee-on-trade-and-investment/business-mobility-group/abtc

APEC, 'Business Mobility Group' (December 2021), available at https://www.apec.org/groups/committee-on-trade-and-investment/business-mobility-group

Al Mulla, Yasmena, 'Kuwait: Expat quota bill discussed in parliament,' *Gulf News* (8 September 2020)

Annan, Kofi, 'Two concepts of sovereignty,' *The Economist* (16 September 1999), available at https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty (accessed 6 May 2022).

Arab Finance, 'Saudi Arabia relaxes restrictions on expats' (4 November 2020)

Asia Pacific Forum, *A Manual on National Human Rights Institutions* (May 2015, updated May 2018)

Australian Human Rights Commission, *Australian Human Rights Commission Inspection of Christmas Island Immigration Detention Centre: Report* (19 November 2018), available at https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/australian-human-rights-commission-inspection-1

Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019: Report* (3 December 2020), available at

https://humanrights.gov.au/sites/default/files/document/publication/ahrc_immigration_detention_inspections_2019_.pdf

Boese, Vanessa A., Nazifa Alizada, Martin Lundstedt, Kelly Morrison, Natalia Natsika, Yuko Sato, Hugo Tai, and Staffan I. Lindberg, *Autocratization Changing Nature? Democracy Report 2022,* Varieties of Democracy Institute (V-Dem) (2022)

Chui, Nicole, 'How the language of migration puts expats on a pedestal – and left immigrants in the dust,' *The Independent* (17 April 2020), available at https://www.independent.co.uk/voices/immigrant-migrant-expat-hong-kong-singapore-uk-brexit-a9470171.html

'Conclusions of a sub-committee, communicated to various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law,' C.196.M.70.1927.V (29 January 1926)

East African Community, 'Overview of EAC,' https://www.eac.int/overview-of-eac

Federal Statistical Office of Germany (Destatis), 'Well over one in four people in Germany had a migrant background in 2021' (12 April 2022), available at https://www.destatis.de/EN/Press/2022/04/PE22_162_125.html

Fortune, 'Fortune Global 500 2021,' available at https://fortune.com/global500/2021/search/

GANHRI, 'Input to the UN Secretary-General's report on the global compact for safe, orderly and regular migration' (12 September 2017)

Human Rights Watch, *"You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi* (May 2013)

International Labour Organization, *ILO Global Estimates on International Migrant Workers* (2021)

International Labour Organization, *Seasonal worker schemes in the Pacific through the lens of international human rights and labour standards: A summary report* (2021)

International Law Commission, *Yearbook of the International Law Commission, Vol. II* (United Nations, 1956)

IOM, *Annual Report 2020*, C/112/INF/1 (7 July 2021)

IOM, 'Missing Migrants Project,' available at https://missingmigrants.iom.int/

IOM, 'Regional offices,' available at https://www.iom.int/regional-offices

IOM, 'Where we work,' available at https://www.iom.int/where-we-work

IOM, *World Migration Report 2020* (2019)

Karlsen, Elibritt, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources,' *Parliament of Australia Research Paper Series,* 19 December 2016, available at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf

Korea JoongAng Daily, 'Work visas getting easier for teachers' (12 July 2010), available at https://koreajoongangdaily.joins.com/2010/07/12/socialAffairs/Work-visas-getting-easier-for-teachers/2923110.html?detailWord=

Kuwait Times, 'Keep out of politics, Kuwait warns expats' (11 April 2010)

Kyoto Human Rights Research Institute, 'Effectiveness of the Human Rights Committee's Follow-up Procedure: Case Study of Some Asian Countries' Concluding Observations and Individual Communications,' International Symposium (31 January 2010)

League of Nations, *Protection of Linguistic, Racial or Religious Minorities by the League of Nations*, C.24.M.18.1929.1 (January 1929)

Lee, M.H., 'Migrant Workers Account for 10 pct of All Industrial Accident Deaths in S. Korea: Lawmaker,' *The Korea Bizwire* (26 January 2022), available at http://koreabizwire.com/migrant-workers-account-for-10-pct-of-all-industrial-accident-deaths-in-s-korea-lawmaker/210004

Limon, Marc, 'Reform of the UN Human Rights Petition System: An assessment of the UN human rights communications procedures and proposals for a single integrated system,' Universal Rights Group policy report (January 2018)

MacDonald, Euan, and Ryszard Cholewinski, 'The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives,' UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS-2007/WS/7 (2007)

Ministry of Justice of the Republic of Korea, '출입국통계' [Immigration statistics], available at https://www.moj.go.kr/moj/2417/subview.do

National Human Rights Commission of Korea, '단속과정에서의 이주노동자 사망사건 직권조사' [Investigation into the death of a migrant worker during a crackdown], 2019.1.16. 18 *Jikgwon* 0001800 (16 January 2019)

National Human Rights Commission of Korea, *이주인권 정책 결정례집: 2011.1.1-2021.12.31* [Decisions on policies concerning the human rights of migrants, 2011-2021] (March 2022)

National Human Rights Committee of Qatar, 'Shadow Report: In conjunction with submitting the country's preliminary national report in implementation of the provisions

of the International Covenant on Economic, Social and Cultural Rights' (17 August 2021)

National Human Rights Committee of Qatar, 'Shadow Report submission: On The State's initial national report on implementation of the International Covenant on Civil and Political Rights' (October 2019)

OCHA, 'Rohingya Refugee Crisis,' available at https://www.unocha.org/rohingya-refugee-crisis

Ock Hyun-ju, 'Thai worker's death raises questions over migrant crackdown,' *The Korea Herald* (21 October 2019), available at http://www.koreaherald.com/view.php?ud=20191018000558

OECD, *National Contact Points for Responsible Business Conduct: Providing access to remedy: 20 years and the road ahead* (2020)

Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-citizens*, HR/PUB/06/11 (2006)

OHCHR, 'A Human Rights-Based Global Compact for Safe, Orderly and Regular Migration' (Undated submission to the Human Rights Council), available at https://refugeesmigrants.un.org/sites/default/files/stocktaking_ohchr.pdf

OHCHR, 'Committee on Migrant Workers Holds Panel Discussion on Global Migration, with the Participation of States' (6 October 2021), available at https://www.ohchr.org/en/press-releases/2021/10/committee-migrant-workers-holds-panel-discussion-global-migration

OHCHR, 'GANHRI Sub-Committee on Accreditation (SCA),' https://www.ohchr.org/EN/Countries/NHRI/Pages/GANHRISSubCommitteeAccreditation.aspx

OHCHR, 'Statement on the Adoption of the Global Compact on Migration - Global Compact on Migration, Plenary Debate, Marrakesh' (11 December 2018), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24020&LangID=E

OHCHR, 'Status of Ratification' (2022), available at https://indicators.ohchr.org/

OHCHR, 'UN Treaty Body Database,' available at https://tbinternet.ohchr.org

Pape, Utz and Theresa Beltramo, 'After three decades, how are refugees in Kenya's Kakuma refugee camp faring?,' *World Bank Blogs* (12 April 2021), available at https://blogs.worldbank.org/africacan/after-three-decades-how-are-refugees-kenyas-kakuma-refugee-camp-faring

People's Solidarity for Participatory Democracy, 'South Korean Assembly must enact the Anti-Discrimination Act Now' (2 May 2022), available at https://www.peoplepower21.org/English/1881428

Piper, Nicola, and Robyn Iredale, 'Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective,' UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, SHS/2003/MC/1 REV (October 2003)

Remedy Australia, 'Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)' (11 April 2014)

Saleh, A, 'Kuwait mulling cancellation of kafala system for expats,' *Kuwait Times* (15 January 2019)

Seon Jeong-su, '[팩트체크] 6 년 동안 한국에서 숨진 태국 노동자 522 명?' [Fact-check: 522 Thai workers died in South Korea over six years?], *Newstof*, 8 January 2021, http://www.newstof.com/news/articleView.html?idxno=11604

Statistics Korea, '2019 Population and Housing Census (Register-based Census)' (28 August 2020), available at http://kostat.go.kr/portal/eng/pressReleases/8/7/index.board?bmode=download&bSeq=&aSeq=386088&ord=3

Statistics Korea, '2020 Population and Housing Census (Register-based Census)' (29 July 2021), available at http://kostat.go.kr/portal/eng/pressReleases/8/7/index.board?bmode=download&bSeq=&aSeq=391585&ord=1

The Economist, 'Abuse in the name of security' (29 May 2013), available at https://www.economist.com/baobab/2013/05/29/abuse-in-the-name-of-security

The Economist, 'At 70, the global convention on refugees is needed more than ever' (4 August 2021), available at https://www.economist.com/international/at-70-the-global-convention-on-refugees-is-needed-more-than-ever/21803326

The Economist, 'From here to eternity' (28 May 2016), https://www.economist.com/special-report/2016/05/26/from-here-to-eternity

The Economist, 'Global democracy has a very bad year' (2 February 2021), available at https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year

The Economist, 'The Gulf states offer citizenship to a select group of foreigners' (11 December 2021), https://www.economist.com/middle-east-and-africa/2021/12/09/the-gulf-states-offer-citizenship-to-a-select-group-of-foreigners

The Economist, 'Welcome, up to a point' (26 May 2016), available at https://www.economist.com/special-report/2016/05/26/welcome-up-to-a-point

TradeArabia News Service, 'Saudi Arabia labour reforms offer more expat rights' (4 November 2020)

Triggs, Gillian, 'Hotung Fellowship Public Lecture 2016' (6 April 2016), available at https://humanrights.gov.au/about/news/speeches/hotung-fellowship-public-lecture-2016

UK Home Office, 'World first partnership to tackle global migration crisis,' 14 April 2022, https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis

UNESCO, *Human Rights: Comments and Interpretations* (25 July 1948)

UNHCR, 'Asylum and Migration,' available at https://www.unhcr.org/asylum-and-migration.html

UNHCR, *Global Trends: Forced Displacement in 2020* (2021)

UNHCR, 'Joint statement by the Government of Kenya and the United Nations High Commissioner for Refugees: Dadaab and Kakuma Refugee Camps Roadmap' (29 April 2021), available at https://www.unhcr.org/news/press/2021/4/608af0754/joint-statement-government-kenya-united-nations-high-commissioner-refugees.html

UNHCR, 'Kenya: UNHCR presents sustainable and rights-based solutions for refugees residing in camps' (9 April 2021), available at https://www.unhcr.org/ke/19945-kenya-unhcr-presents-sustainable-and-rights-based-solutions-for-refugees-residing-in-camps.html

UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2020KuDan17245 before the Seoul Administrative Court' (31 August 2021), available at: https://www.refworld.org/docid/61dea41b4.html

UNHCR, 'UNHCR Statement on the Government of Kenya's intention to close Dadaab and Kakuma refugee camps' (24 March 2021), https://www.unhcr.org/ke/19849-unhcr-statement-on-the-government-of-kenyas-intention-to-close-dadaab-and-kakuma-refugee-camps.html

UNHCR, 'UNHCR welcomes Kenya High Court decision on urban refugee rights' (30 July 2013), https://www.refworld.org/docid/51f8b8804.html

UNHCR Lebanon, 'Shelter,' available at https://www.unhcr.org/lb/shelter (accessed 26 April 2022)

United Nations Department of Economic and Social Affairs, Population Division, 'International Migrant Stock 2020' (2020), available at https://www.un.org/development/desa/pd/content/international-migrant-stock

United Nations Department of Economic and Social Affairs, Population Division, *International Migration 2020 Highlights*, ST/ESA/SER.A/452 (2020)

United Nations Department of Economic and Social Affairs, Population Division, 'Population Facts: Changing Landscape of International Migration Policies' (No. 2013/5, September 2013)

United Nations Department of Economic and Social Affairs, Population Division, 'World Population Policies 2019: International Migration Policies and Programmes,' available at https://www.un.org/en/development/desa/population/theme/policy/wpp2019.asp

United Nations Department for General Assembly and Conference Management, 'Regional groups of Member States,' available at https://www.un.org/dgacm/en/content/regional-groups

United Nations General Assembly, 'General Assembly official records, 73rd session: 60th plenary meeting, Wednesday, 19 December 2018, New York,' A/73/PV.60 (19 December 2018)

United Nations General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General,' A/76/642 (27 December 2021)

United Nations General Assembly, 'National institutions for the promotion and protection of human rights: Report of the Secretary-General,' A/76/246 (29 July 2021)

United Nations General Assembly, 'Provisional verbatim record of the 116th meeting, held at Headquarters, New York, on Friday, 13 December 1985,' A/40/PV.116 (17 December 1985)

United Nations General Assembly, 'Report of the United Nations High Commissioner for Refugees, Part II: Global Compact on Refugees,' A/73/12(II) (2 August 2018)

United Nations Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Mission to Qatar,' A/HRC/26/35/Add.1 (23 April 2014)

United Nations Human Rights Council, 'Sub-Commission on the Promotion and Protection of Human Rights,' available at https://www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx

United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume I), HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008)

United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (Volume II), HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008)

United Nations Network on Migration, 'Terms of Reference for the UN Network on Migration' (23 May 2018)

United Nations Office of the High Commissioner for Human Rights, 'Countries,' available at https://www.ohchr.org/en/countries

United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Commission resolution 2000/104 and Economic and Social Council decision 2000/283,' E/CN.4/Sub.2/2003/23 (26 May 2003)

United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'The rights of non-citizens: Preliminary report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103,' E/CN.4/Sub.2/2001/20 (6 June 2001)

Venice Commission, 'Report on the Preferential Treatment of National Minorities by their Kin-State' (22 October 2001)

Wongsamuth, Nanchanok, and Grace Moon, 'Hundreds of Thai workers found dying in South Korea with numbers rising,' *Reuters* (22 December 2020), available at https://www.reuters.com/article/us-thailand-southkorea-workers-idUSKBN28W033

Working Group on Arbitrary Detention, 'Revised deliberation No. 5 on deprivation of liberty of migrants' (23 November 2017), available in United Nations General Assembly, 'Report of the Working Group on Arbitrary Detention,' A/HRC/39/45 (2 July 2018)

Appendix A: Constitutional Provisions and Major Legislation in States under Review

State	Year (amendment)	Human rights provisions	Provisions with respect to non-citizens	Relevant legislation
Australia	1901 (1977)	No	51: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: […] (xix) naturalization and aliens.	Australian Human Rights Commission Act (1986) Migration Act (1958) Racial Discrimination Act (1975)
Belize	1981 (2021)	Yes (Part II, titled 'Protection of Fundamental Rights and Freedoms')	*A number of provisions in Chapter II contain exceptions for non-citizens:* 10: (1) A person shall not be deprived of his freedom of movement, that is to say, the right to move freely throughout Belize, the right to reside in any part of Belize, the right to enter Belize, the right to leave Belize and immunity from expulsion from Belize. (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision … (d) for the imposition of restrictions on the freedom of	Aliens Act (2000) Anti-Trafficking Act (2003) Immigration Act (2000) Refugees Act (1991) United Nations Resolutions and Convention (Enforcement) Act (2003)

			movement of any person who is not a citizen of Belize … 15: (1) No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts … (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision … (c) for the imposition of restrictions on the right to work of any person who is not a citizen of Belize. 16: (1) Subject to the provisions of subsections (4) … of this section, no law shall make any provision that is discriminatory either of itself or in its effect. (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision … (b) with respect to persons who are not citizens of Belize …	
Canada	1867 (2022)	Yes (separate charter enacted in 1982)	91: It shall be lawful for the Queen… to make Laws for the Peace, Order, and good Government of Canada… [with respect to] 25. Naturalization and Aliens.	Canadian Human Rights Act (1985) Immigration and Refugee Protection Act (2001)

Chile	1980 (2021)	Yes (Chapter III, titled 'Constitutional Rights and Duties')	14: Foreigners who have resided in Chile for more than five years, and who meet the requirements stated in the first paragraph of article 13 [eighteen years old and never sentenced to afflictive punishment], may exercise the right to vote in the circumstances and manners prescribed by law. 19: (16) Every person has the right to freely contract and to the free choice of work with a fair retribution. Any discrimination that is not based on personal skills or capability is forbidden, notwithstanding that the law may require Chilean citizenship… in certain cases.	Act No. 20507 (2011) on the smuggling of migrants and trafficking in persons Act No. 20609 (2012) on non-discrimination Act No. 21325 (2021) on migration and foreigners
Costa Rica	1949 (2020)	Yes (Titles IV [Individual Rights on Guarantees], V [Social Rights and Guarantees], VII [Education and Culture], VIII [Political Rights and Duties])	14: *providing naturalisation processes for non-citizens* 19: Foreigners have the same individual and social rights and duties as Costa Ricans, with the exceptions and limitations that this Constitution and the laws establish. They may not intervene in the political affairs of the country, and they are submitted to the jurisdiction of the tribunals of justice and of the authorities of the Republic, without recourse through the diplomatic way, except for that provided by international agreements. 31: The territory of Costa Rica will be asylum to anyone persecuted for political reasons. If	Migration and Foreign Nationals Act (No. 8764) of 2009 Trafficking in Persons Act (No. 9095) of 2012

			because of legal imperative their expulsion is decreed, they can never be sent to the country where they are persecuted. 60: It is prohibited to foreigners to exercise directive [roles] or authority in the trade unions. 68: No discrimination may be made with respect to salary, advantages or conditions of work between Costa Ricans and foreigners, or with respect to some group of workers. In equal conditions the Costa Rican worker must be preferred.	
Czechia	1993 (2021)	Yes (separate Charter of Fundamental Rights and Freedoms, enacted in 1991)	*Charter provisions:* 14(5): An alien may be expelled only in cases specified by the law. 26(4): Different statutory rules [with respect to the right to work] may apply to aliens. 42(2): While in the Czech and Slovak Federal Republic, aliens enjoy the human rights and fundamental freedoms guaranteed by this Charter, unless such rights and freedoms are expressly extended to citizens alone. 43: The Czech and Slovak Federal Republic shall grant asylum to aliens who are being persecuted for the assertion of their political rights and freedoms. Asylum may be denied to a	Act No. 221/2003 Coll., on Temporary Protection for Aliens Act No. 325/1999 Coll., on Asylum Act No. 326/1999 Coll., on the Residence of Foreign Nationals

			person who has acted contrary to fundamental human rights and basic freedoms.	
Djibouti	1992 (2010)	Yes (Title II, titled 'The Rights and Duties of the Human Person')	18: Any foreigner who is found regularly on the national territory enjoys, for his person and for his assets, the protection of the law.	Act No. 40 of 2019 on conditions of entry and stay of foreigners Act No. 133 of 2016 on combatting human trafficking and migrant smuggling Act No. 159 of 2017 on the status of refugees Act No. 210 of 2007 combating trafficking in human beings
Ecuador	2008 (2021)	Yes (Title II, 'Rights')	9: Foreign persons in Ecuadorian territory shall have the same rights and duties as those of Ecuadorians, in accordance with the Constitution. 11(2): All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of … migratory status … or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.	Law on Foreigners (2004) Migration Law (2005) Organic Law on Human Mobility (2017)

			40: The right to migrate of persons is recognized. No human being shall be identified or considered as illegal because of his/her migratory status. 41: Their rights to asylum and sanctuary are recognized, in accordance with the law and international human rights instruments. Persons who have been granted asylum or sanctuary shall benefit from special protection guaranteeing the full exercise of their rights. The State shall respect and guarantee the principle of non-return, in addition to humanitarian and legal emergency assistance. Persons requesting asylum or sanctuary shall not be penalized or prosecuted for having entered the country or for remaining in a situation of irregularity. The State, in exceptional cases and when the circumstances justify it, shall recognize the refugee status of [a] collective group, in accordance with the law. 61: Foreign persons shall enjoy these rights [of political participation] to the extent that they are applicable. 63: Foreign persons residing in Ecuador have the right to vote as long as they have resided legally in the country for at least five years.	

			66(14): Foreigners cannot be returned or expelled to a country where their lives, liberty, safety or well-being or those of their families are in danger because of their ethnic belonging, religion, nationality, ideology, belonging to a given social group or political opinions. The expulsion of groups of foreigners is forbidden. Migratory processes must be singled out. 77: In any criminal proceedings where a person has been arrested and detained, the following basic guarantees shall be observed: … (5) If the arrested person is a foreigner, whoever carries out the arrest shall immediately inform the consular representative of the detainee's country. 261: The central State shall have exclusive jurisdiction over: … (3) The registration of persons, naturalization of foreigners and immigration control … 392: The State shall safeguard the rights of persons with respect to human mobility and shall exercise leadership of migration policy through the competent body, in coordination with the different levels of government. The State shall design, adopt, implement, and evaluate policies, plans, programs, and projects and shall coordinate the action of its bodies with that of other States and civil society organizations that	

			work on human mobility at the national and international levels. 405: Foreign natural persons or legal entities will not be able to acquire any land deeds or concessions in areas of national security or protected areas, in accordance with the law. 416: (6) [Ecuador] advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South. (7) It demands observance of human rights, especially the rights of migrant persons, and promotes their full enjoyment by complying with the obligations pledged with the signing of international human rights instruments. 423: Integration, especially with Latin American and Caribbean countries, shall be a strategic objective... In all integration bodies and processes, the Ecuadorian State shall pledge: … (5) To propitiate the creation of Latin American and Caribbean citizenship; the free circulation of persons in the region; the implementation of policies that guarantee human rights of the people living along borders and refugees; and	

			the common protection of Latin American and Caribbean citizens in countries of migratory transit and destination.	
El Salvador	1983 (2014)	Yes (Title II)	3: All persons are equal before the law. For the enjoyment of civil rights, no restrictions shall be established that are based on differences of nationality, race, sex or religion. 28: El Salvador concedes asylum to the foreigner who desires to reside in its territory, except in cases provided for by the laws and by international law. These exceptions shall not include anyone persecuted only for political reasons. 96: Foreigners, from the instant they arrive in the territory of the Republic, shall be strictly bound to respect the authorities and obey the laws, and shall acquire the right to be protected by them. 97: The laws shall establish the cases and the form in which a foreigner may be refused entry or sojourn in the national territory. Foreigners who directly or indirectly participate in the internal politics of the country shall lose the right to reside in it. 99: Foreigners shall not resort to diplomatic channels except in case of denial of justice and	Act on Refugee Status Determination (2002) Special Act on Migration and Foreigners (2019) Special Act on the Protection and Advancement of Salvadoran Migrants and Their Families (2001)

			after exhausting the legal recourses they have available. 100: Foreigners shall be subject to a special law.	
Equatorial Guinea	1991 (2012)	Yes (Articles 13-14, 17, 24, 26)	*Most rights provisions specify their subjects as 'every citizen'* 12: (1) The law determines the legal regime applicable to the right of nationality, citizenship and the condition of foreigner[s]. 49: … [T]he Council of Ministers has the following attributions: … f. Grant[s of] territorial asylum …	Act No. 1/2004 on the smuggling of migrants and trafficking in persons Act No. 3/2010 on foreigners
Estonia	1992 (2015)	Yes (Chapter II, titled 'Fundamental Rights, Freedoms and Duties')	9: The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia. 28: … An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need… Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law … 29: An Estonian citizen has the right to freely choose his or her area of activity, profession and place of work… Citizens of foreign states and stateless persons who are in Estonia have this	Act on Granting International Protection to Aliens (2006) Aliens Act (2010) Citizen of the European Union Act (2006)

			right equally with Estonian citizens, unless otherwise provided by law. 30: Positions in state agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These positions may, as an exception, be filled by citizens of foreign states or stateless persons, in accordance with law. 31: Estonian citizens have the right to engage in enterprise and to form commercial undertakings and unions... Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law. 44: Citizens of foreign states and stateless persons who are in Estonia have the rights [to information] equally with Estonian citizens, unless otherwise provided by law. 55: Citizens of foreign states and stateless persons who are in Estonia have a duty to observe the constitutional order of Estonia.	
Gabon	1991 (2020)	Yes ('Preliminary Title of Fundamental	*The majority of rights enumerated in the relevant title stipulate 'citizens' as their subjects* 47: Besides cases expressly provisioned by the Constitution, the law fixes the rules concerning: … The constraints imposed on	Act No. 5/86 setting out rules on admission and residence for foreigners

		Principles and Rights')	Gabonese citizens and foreigners, over their person and their possessions, in view of public utility and in particular, national security; The conditions of nationality… and the status of foreigners and immigration …	Act No. 05/98 on the status of refugees Act No. 09/2004 on combating and preventing child trafficking Act No. 19/2005 on the establishment and structure of the National Human Rights Commission
Germany	1949 (2020)	Yes (Section I)	16a: (1) Persons persecuted on political grounds shall have the right of asylum. (2) Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the European Communities to which the conditions referred to in the first sentence of this paragraph apply shall be specified by a law... In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.	Act on Benefits for Asylum Applicants (1993; revised 2015) Asylum Procedure Act (2008) Freedom of Movement Act for EU Citizens (2004) Residence Act (2008) Skilled Immigration Act (2020)

			(3) By a law requiring the consent of the Bundesrat, states may be specified in which… it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that… he is persecuted on political grounds. 73: (1) The Federation shall have exclusive legislative power with respect to: … 3. freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition … 74: (1) Concurrent legislative power shall extend to the following matters: … 4. the law relating to residence and establishment of foreign nationals … 6. matters concerning refugees and expellees ... 119: In matters relating to refugees and expellees, especially as regards their distribution among the *Länder*, the Federal Government, with the consent of the Bundesrat, may issue statutory instruments having the force of law, pending settlement of the matter by a federal law. In this connection the Federal Government may be authorised to issue individual	

			instructions in particular cases. Unless time is of the essence, such instructions shall be addressed to the highest Land authorities.	
Hungary	2011 (2020)	Yes (section titled 'Freedom and Responsibility')	*Within the section on 'Freedom and Responsibility':* XIV: (1) … Foreigners staying in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited. (2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment. (3) Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country. XXIII: (3) Every adult person who is recognised as a refugee, immigrant or resident of Hungary	Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals Act LXXX of 2007 on Asylum Act LXXXIX of 2007 on the State Border Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger

			shall have the right to be a voter in the elections of local representatives and mayors.	
Indonesia	1945 (2002)	Yes (Chapter XA)	26: (2) Residents shall consist of Indonesian citizens and foreign nationals living in Indonesia. (3) Matters concerning citizens and residents shall be regulated by law.	Law No. 6/2011 on Immigration Law No. 18/2017 on the Protection of Indonesian Migrant Workers Law No. 21/2007 on the trafficking of migrant workers Law No. 26/2000 on Human Rights Court Law No. 29/1999 on the Elimination of all Forms of Racial Discrimination Law No. 39/1999 on Human Rights Presidential Regulation No. 125/2016 on the Handling of Refugees
Italy	1947 (2022)	Yes (Part I, 'Rights and Duties of Citizens')	*Many rights provisions in Part I specify 'citizens' as subjects* 10: … The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right	Act No. 132/2018 on immigration and security Unified Text of Provisions on Immigration and the Status of Foreign Citizens (1998)

			of asylum under the conditions established by law. A foreigner may not be extradited for a political offence. 117: Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. The State has exclusive legislative powers in the following matters: a) … right of asylum and legal status of non-EU citizens; b) immigration […]	
Kazakhstan	1995 (2019)	Yes (Section II, titled 'The Individual and Citizen')	12(4): Foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for the citizens unless otherwise stipulated by the Constitution, laws and international treaties. 44(1): The President… shall: … 14. resolve issues of citizenship of the Republic, and political asylum […]	Law No. 216-IV of 2009 on Refugees Law No. 477-IV of 2011 on Migration[776] Law No. 1017-XII on Citizenship Law No. 2337 of 1995 on the legal status of foreigners
Kenya	2010	Yes (Chapter 4)	65(1): A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years […]	Citizenship and Immigration Act 2011 Counter-Trafficking in Persons Act 2010

[776] Also referred to as the Population Migration Act: see e.g. E/C./12/KAZ/FCO/2, para 21.

				National Cohesion and Integration Act 2009 National Commission on Human Rights Act 2011 Refugee Act 2021
Kuwait	1962	Yes (Part III)	*Many constitutional rights define 'Kuwaitis' as their subject* 46: Extradition of political refugees is prohibited.	Act Establishing the National Bureau for Human Rights No 67/2015 Domestic Workers Law No 68/2015 Nationality Act No 15/1959 Prevention of Trafficking in Persons and Smuggling of Migrants Act No. 91 of 2013 Residence of Aliens Act No. 17 of 1959
Latvia	1922 (2018)	Yes (Chapter VIII, titled 'Fundamental Human Rights')	N/A	Asylum Act (2002) Law on Immigration (2002) Law on Stateless Persons (2004) Law on the Discontinuation of Non-Citizen Status for Children (2019)

Libya	N/A (2017 draft)[777]	N/A	N/A	Law No. 6 of 1987 regulating the entry, residence and exit of foreign nationals [amended by Law No. 2 of 2004] Law No. 10 of 1989 concerning the rights and duties of Arab citizens Law No. 19 of 2010 on combating irregular migration
Mexico	1917 (2020)	Yes (Title I, Chapter I, titled 'Human Rights and Guarantees')	11: Every person has the right to enter and leave the country, to travel through its territory and to move house without the necessity of a letter of safe passage, passport, safe-conduct or any other similar requirement… Relating to limitations imposed by the laws on immigration and public health, or in respect to undesirable aliens residing in the country, the exercise of this right shall be subject to the administrative authority. In case of political persecution, any person has the right to seek political asylum, which will be provided for humanitarian reasons. The law shall regulate the cases in which political asylum should be provided, as well as the exceptions.	General Act on the Prevention, Punishment and Eradication of Trafficking in Persons and the Provision of Protection and Assistance to Trafficking Victims 2012 Migration Act 2011 Refugees, Complementary Protection and Political Asylum Act 2010

[777] The 1969 Constitution of Libya was abrogated following the overthrow of the Libyan government in 2011. A 2017 draft constitution developed by the transnational government had not yet been adopted at the time of writing.

			18: … Foreigners who are serving imprisonment penalties may be transferred to their countries, in accordance with international treaties. 27: … (I) Only Mexicans by birth or naturalization and Mexican companies have the right to own lands and waters, and to obtain exploitation licenses for mines and waters. The State may grant the same right to foreigners, provided that they agree before the Ministry of Foreign Affairs to consider themselves as Mexicans regarding such property and not to invoke the protection of their governments in reference to said property, under penalty of forfeiting the property in favor of the country. Foreigners cannot acquire properties within the zone that covers one hundred kilometers along the international borders and fifty kilometers along the beach … (IV) … the law shall establish the requirements for the participation of foreigners in [share-based] corporations. 32: During peacetime, foreigners shall neither serve in the Army nor in the police or security bodies… Mexicans shall have priority over foreigners, under equal circumstances, for all kind of concessions, employments, positions or	

			commissions of the government in which the status of citizenship is not indispensable. Title I, Chapter III, titled 'The Foreigners': 33: The individuals that do not meet the criteria [on Mexican nationality] determined by Article 30 shall be considered as foreigners. They shall be entitled to the human rights and guarantees conferred by this Constitution. The President of the Republic shall have the power to expel from national territory any foreigner, according to the law and after a hearing. The law shall establish the administrative procedure for this purpose, as well as the place where the foreigner should be detained and the time that the detention lasts. Foreigners may not in any way participate in the political affairs of the country. 73: The Congress shall have the power to: … (XVI) Enact laws on nationality, legal status of foreigners, citizenship, naturalization, colonization, immigration and public health …	
New Zealand	Uncodified	Bill of Rights Act 1990	*None in Bill of Rights Act*	Human Rights Act 1993 Immigration Act 2009 Race Relations Act 1971
Philippines	1987	Yes (Article III, 'Bill of Rights')	Article XII, Section 14: The practice of all professions in the Philippines shall be limited to	Alien Registration Act 1950 Alien Social Integration Act of 1995

			Filipino citizens, save in cases prescribed by law. Article XIV, Section 4(2): No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.	Expanded Anti-Trafficking in Persons Act 2013 Immigration Act 1940 Magna Carta of Overseas Migrant Workers Act 2010 (amending the 1995 Migrant Workers Act)
Poland	1997 (2009)	Yes (Chapter II, titled 'The Freedoms, Rights and Obligations of Persons and Citizens')	37: (1) Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution. (2) Exemptions from this principle with respect to foreigners shall be specified by statute. 56: (1) Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute. (2) Foreigners who, in the Republic of Poland, seek protection from oppression, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.	Act of 2003 granting protection to aliens in the territory of the Republic of Poland Act of 2003 on aliens Act of 2012 concerning the effect of employing foreigners residing illegally on the territory of the Republic of Poland

Qatar	2003	Yes (Chapter III)	19: The State shall preserve the underpinnings of society and guarantee security, stability and equal opportunities for citizens. 34: *Citizens* are equal in public rights and duties.	Act No. 10 of 2018 on permanent residence Act No. 11 of 2018 on political asylum Act No. 13 of 2018 on entry, exit and residency of non-nationals, abolishing the requirement for an exit permit[778] [see also Decree-Law No 19 of 2020 on the entry, exit and residency of foreigners] Act No. 15 of 2017 on domestic workers Act No. 38 of 2005 on Nationality
Slovakia	1992 (2019)	Yes (Chapter Two, titled 'Basic Rights and Freedoms')	23(5): A foreign national may be deported only in cases laid down by law. 30(1): Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. Foreigners with a permanent residence on the territory of the Slovak Republic have the right to vote and be elected in the self-administration bodies of municipalities and… superior territorial units.	Act No. 82/2005 on Illegal Work and Employment Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination Act No. 404/2011 Coll. on Residence of Foreigners Act No. 480/2002 on Asylum

[778] Replacing Act No. 21 of 2015 on entry, exit and residence of migrant workers: CCPR/C/QAT/1, para 18.

			35(4): A different regulation of rights [concerning the right to work] may be laid down by law for foreign nationals. 52(2): Foreign nationals enjoy in the Slovak Republic basic human rights and freedoms guaranteed by this Constitution, unless these are expressly granted only to citizens. 53: The Slovak Republic grants asylum to foreign nationals persecuted for upholding political rights and freedoms. Asylum may be denied to those who acted in violation of basic human rights and freedoms. Details shall be laid down by law.	
South Africa	1996 (2013)	Yes (Chapter 2, titled 'Bill of Rights')	37: (8) *provides that international humanitarian law applies to non-citizens detained without trial during international armed conflict*	Immigration Act 13 of 2002 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Refugees Act 130 of 1998
South Korea	1948 (1987)	Yes (Chapter II, titled 'Rights and Duties of Citizens')	6: (2) The status of aliens shall be guaranteed as prescribed by international law and treaties. *Most rights in Chapter II define their subjects as 'All citizens'*	Act on the Employment of Foreign Workers (2003) Act on the Immigration and Legal Status of Overseas Koreans (1999)

				Framework Act on the Treatment of Foreigners Residing in the Republic of Korea (2007) Immigration Act (1992) Multicultural Families Support Act (2008) National Human Rights Commission of Korea Act (2001) North Korean Refugees Protection and Settlement Support Act (1999) Refugee Act (2013)
Turkey	1982 (2017)	Yes (Part Two, titled 'Fundamental Rights and Duties')	16: The fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law. 74: Citizens and foreigners resident in Turkey, with the condition of observing the principle of reciprocity, have the right to apply in writing to the competent authorities and to the Grand National Assembly of Turkey with regard to the requests and complaints concerning themselves or the public.	Act on Foreigners and International Protection (No. 6458) of 2013 Act on International Labour Force (No. 6735) of 2016 Act on work permits for foreigners (No. 4817) of 2003

Appendix B: Ratification of Relevant Human Rights Instruments in States under Review

o indicates treaty ratification

# indicates additional ratification of Optional Protocol or procedure allowing individual communications

State	ICCPR	ICESCR	CAT	ICERD	ICMW	Refugee Convention and Protocol	Statelessness Conventions	Global Compact
Australia	#	o	#	#		o	o	Abstained
Belize	o	o	o	o	o	o	o	Absent
Canada	#	o	#	o		o	1961 Convention only	In favour
Chile	#	#	#	#	o	o	o	Abstained
Costa Rica	#	#	#	#		o	o	In favour
Czechia	#	o	#	#		o	o	Against
Djibouti	#	o	o	o		o		In favour
Ecuador	#	#	#	#	#	o	o	In favour

El Salvador	#	#	o	#	#	o	1954 Convention only	In favour
Equatorial Guinea	#	o	o	o		o		In favour
Estonia	#	o	o	#		o		In favour
Gabon	o	#	o	o	o	o		In favour
Germany	#	o	#	#		o	o	In favour
Hungary	#	o	#	#		o	o	Against
Indonesia	o	o		o	o			In favour
Italy	#	#	#	#		o	o	Abstained
Kazakhstan	#	#	#	#		o		In favour
Kenya	o	o	o	o		o		In favour
Kuwait	o	o	o	o				In favour
Latvia	#	o	o	o		o	o	Abstained
Libya	#	o	o	o	o		o	Abstained
Mexico	#	o	#	#	#	o	1954 Convention only	In favour

New Zealand	#	o	#	o		o	1961 Convention only	In favour
Philippines	#	o	o	o	o	o	o	In favour
Poland	#	o	#	#		o		Against
Qatar	o	o	o	o				In favour
Slovakia	#	#	#	#		o	o	Absent
South Africa	#	o	#	#		o		In favour
South Korea	#	o	#	#		o	1954 Convention only	In favour
Turkey	#	o	#	o	o	o[779]	1954 Convention only	In favour

[779] Turkey restricts the application, through declaration, of the Convention and its Protocol to 'persons who have become refugees as a result of events occurring in Europe.'

Appendix C: Human Rights Treaty Body Reporting on Categories of Non-Citizens

References below are drawn from questions, observations and recommendations made by human rights treaty bodies to states under review, during the state's most recent reporting cycle. CO = Concluding observations; Q / QPR = Questions to the state party.

State	Irregular migrants	Refugees and asylum seekers	Migrant workers	Non-citizens generally	Other status[780]
Australia	ICCPR (CO 6, paras 37-38)	ICCPR (CO 6, 2017, paras 33-36) ICESCR (CO 5, 2017, paras 17-18, 31-32, 37-38, 43, 45-46, 51-52)	ICESCR (CO 5, 2017, paras 27-28, 60)	ICCPR (CO 6, paras 19-20)	
Belize	ICCPR (CO 1, 2018, paras 41-42) ICMW (CO 1, 2014, paras 26-31)	ICCPR (CO 1, 2018, paras 40, 42)	ICMW (CO 1, 2014, paras 9, 18-23, 34-35)		Victims of trafficking: CERD (CO 1, 2013, para 12)
Canada	ICCPR (QPR 7, 2021, para 18; CO 6, 2015, para 12)	ICCPR (QPR 7, 2021, paras 18-19; CO 6, 2015, paras 12-13)	ICESCR (QPR 7, 2020, para 16; CO 6, 2016, paras 27-28)	ICCPR (QPR 7, 2021, para 4)	

[780] Includes multi-layered citizenship, investors, stateless persons, trafficked non-citizens and anomalies in international human rights law.

	ICESCR (QPR 7, 2020, para 13; CO 6, 2016, paras 49-50)	ICESCR (QPR 7, 2020, paras 14, 20)		ICESCR (QPR 7, 2020, para 20)	
Chile		ICCPR (QPR 7, 2019, para 21)	ICCPR (QPR 7, 2019, para 21; CO 6, 2014, para 23)	ICCPR (QPR 7, 2019, para 21; CO 6, 2014, para 23) CESCR (QPR 5, 2020, paras 10, 26; CO 4, 2015, paras 12, 28)	Stateless children: ICCPR (QPR 7, 2019, para 23) Victims of trafficking: ICCPR (QPR 7, 2019, para 19; CO 6, 2014, para 20)
Costa Rica	ICCPR (CO 6, 2016, paras 13-14, 29-30)	ICESCR (CO 5, 2016, paras 42-43)	ICESCR (CO 5, 2016, para 66)	ICCPR (CO 6, 2016, paras 9-10) ICESCR (CO 5, 2016, paras 19, 25-26, 33-34)	Victims of trafficking: ICCPR (CO 6, 2016, paras 23-24)
Czechia	ICESCR (CO 3, 2022, para 49)	ICCPR (CO 4, 2019, paras 28-29) ICESCR (CO 3, 2022, paras 16-17, 28-29)	ICESCR (CO 3, 2022, paras 53)	ICCPR (CO 4, 2019, paras 9-10, 16-17) ICESCR (CO 3, 2022, paras 13, 21, 36-39, 48-49)	Statelessness: ICCPR (CO 4, 2019, paras 44-45 – statelessness) Victims of trafficking: ICCPR (CO 4, 2019, paras 31 – victims of trafficking, 44-45 – statelessness)

Djibouti		ICCPR (CO 1, 2013, para 20) ICESCR (CO 1-2, 2013, para 12) ICERD (CO 1-2, 2017, para 23) CAT (CO 1, 2011, para 16)	ICERD (CO 1-2, 2017, para 32)	ICERD (CO 1-2, 2017, paras 7, 18)	Child statelessness: ICESCR (CO 1-2, 2013, paras 23-24) Victims of trafficking: CAT (CO 1, 2011, para 22); ICCPR (CO 1, 2013, para 22); ICERD (CO 1-2, 2017, paras 26-27)
Ecuador	ICESCR (CO 4, 2019, para 28)	ICCPR (QPR 7, 2021, para 22)	ICESCR (CO 4, 2019, para 38)	ICCPR (QPR 7, 2021, paras 22-23) ICESCR (CO 4, 2019, paras 25-28, 30, 57-58)	Victims of trafficking: ICCPR (QPR 7, 2021, para 19)
El Salvador		ICCPR (CO 7, 2018, paras 31-32)		ICCPR (CO 7, 2018, paras 9-10)	
Equatorial Guinea			ICESCR (CO 1, 2012, para 19)		Victims of trafficking: ICCPR (CO 1, 2019, para 42)
Estonia		ICCPR (CO 4, 2019, paras 27-28) ICESCR (CO 3, 2019, para 16-17)	ICESCR (CO 3, 2019, para 55)		Statelessness: ICCPR (CO 4, 2019, paras 35-36); ICESCR (CO 3, 2019, paras 14-15, 50-51)

Gabon		ICCPR (QPR 3, 2020, para 13)	ICCPR (QPR 3, 2020, para 13; CO 1, 2000, para 16) ICESCR (CO 1, 2013, paras 12, 16, 33)		Victims of trafficking, including children: ICCPR (CO 1, 2000, para 18); ICESCR (CO 1, 2013, para 23)
Germany	ICCPR (CO 7, 2021, paras 12-13) ICESCR (CO 6, 2018, paras 26-27)	ICCPR (CO 7, 2021, paras 38-39) ICESCR (CO 6, 2018, paras 28-29, 58-61)	ICESCR (CO 6, 2018, paras 42-43, 62)	ICCPR (CO 7, 2021, paras 8-11, 16-17)	
Hungary	ICCPR (CO 6, 2018, paras 45-46)	ICCPR (CO 6, 2018, paras 45-48) ICESCR (CO 3, 2008, paras 21, 44) ICERD (CO 18-25, 2019, paras 22-25)	ICESCR (CO 3, 2008, para 55) ICERD (CO 18-25, 2019, para 28)	ICCPR (CO 6, 2018, paras 17-18, 55) ICERD (CO 18-25, 2019, paras 6-7, 9, 16-17)	Victims of trafficking: ICCPR (CO 6, 2018, paras 27-28)
Indonesia	ICMW (CO 1, 2017, paras 29-31, 34-35)	ICCPR (QPR 2, 2020, para 16)	ICESCR (QPR 2, 2022, para 16) ICMW (CO 1, 2017, paras 10, 27, 29)		
Italy	ICCPR (CO 6, 2017, paras 24-25)	ICCPR (CO 6, 2017, paras 24-25)	ICESCR (QPR 6, 2020, para 18; CO 5, 2015, paras 24-25)	ICCPR (CO 6, 2017, paras 9, 12-13, 30-31)	Non-citizen students: ICESCR (QPR 6, 2020, para 26)

	ICESCR (QPR 6, 2020, para 7)	ICESCR (CO 5, 2015, paras 18-19)		ICESCR (QPR 6, 2020, paras 3, 22, 27; CO 5, 2015, paras 41, 56-57)	Stateless persons: ICCPR (CO 6, 2017, paras 22-23); ICESCR (QPR 6, 2020, para 14) Victims of trafficking: ICCPR (CO 6, 2017, paras 28-29)
Kazakhstan	ICESCR (CO 2, 2019, para 48)	ICCPR (CO 2, 2016, paras 43-44)	ICCPR (CO 2, 2016, paras 35-36) ICESCR (CO 2, 2019, paras 29-30, 42-43)	ICESCR (CO 2, 2019, paras 10-11, 34-35)	Victims of trafficking: ICCPR (CO 2, 2016, paras 33-34)
Kenya		ICCPR (CO 4, 2021, paras 36-37) ICERD (CO 5-7, 2017, paras 37-38)		ICERD (CO 5-7, 2017, para 30)	Stateless persons: ICERD (CO 5-7, 2017, para 28)
Kuwait		ICCPR (CO 3, 2016, paras 36-37)	ICCPR (CO 3, 2016, paras 32-33)	ICCPR (CO 3, 2016, para 42)	Stateless persons: ICCPR (CO 3, 2016, para 10)
Latvia	ICESCR (CO 2, 2021, paras 46-47)	ICCPR (CO 3, 2014, para 14) ICESCR (CO 2, 2021, paras 18-19)		ICESCR (CO 2, 2021, paras 12-13, 22-23, 32-33)	Stateless persons: ICCPR (CO 3, 2014, para 7); ICESCR (CO 2, 2021, paras 16-17)

					Victims of trafficking: ICCPR (CO 3, 2014, para 8)
Libya	ICCPR (QPR 5, 2021, para 14-18, 22-23) ICMW (CO 1, 2019, paras 34, 40-41)	ICCPR (QPR 5, 2021, para 21; CO 4, 2007, para 18) ICESCR (CO 2, 2006, paras 13, 30) ICMW (CO 1, 2019, paras 52-53)	ICMW (CO 1, 2019, paras 4, 10-13, 29, 31, 33-34, 45, 56)	ICCPR (QPR 5, 2021, paras 5, 22) ICMW (CO 1, 2019, paras 48-49)	Child statelessness: ICCPR (QPR 5, 2021, para 29) Victims of trafficking: ICCPR (QPR 5, 2021, para 19); ICMW (CO 1, 2019, paras 26-27, 51)
Mexico	ICCPR (CO 6, 2019, paras 32-33) ICMW (CO 3, 2017, paras 37-42, 47-50, 53-54)	ICCPR (CO 6, 2019, paras 32-33) ICMW (CO 3, 2017, paras 43-44)	ICMW (CO 3, 2017, paras 10, 29-32)	ICESCR (CO 5-6, 2018, paras 19, 24, 65-66) ICMW (CO 3, 2017, paras 25-26)	Leave to remain on humanitarian grounds: ICMW (CO 3, 2017, paras 27-28) Migrant activists: ICMW (CO 3, 2017, paras 21-22) Migrants in transit: ICMW (CO 3, 2017, paras 35-36)
New Zealand	ICCPR (CO 6, 2016, paras 37-38)	ICCPR (CO 6, 2016, paras 35-36)	ICESCR (CO 4, 2018, paras 27-28, 52)		Victims of trafficking: ICCPR (CO 6, 2016, paras 39-40)

Philippines			ICCPR (CO 4, 2012, para 22) ICMW (CO 2, 2014, paras 10-11, 22-29, 36-37, 40-41)	ICESCR (CO 5-6, 2016, paras 19-20)	Stateless children: ICESCR (CO 5-6, 2016, para 36) Victims of trafficking: ICCPR (CO 4, 2012, para 18); ICESCR (CO 5-6, 2016, paras 41-42); ICMW (CO 2, 2014, paras 46-47)
Poland	ICCPR (CO 7, 2016, paras 31-32) ICESCR (CO 6, 2016, paras 55-56)	ICCPR (CO 7, 2016, paras 31-32) ICESCR (CO 6, 2016, paras 55-56)	ICESCR (CO 6, 2016, paras 21-22, 61)	ICCPR (CO 7, 2016, paras 15-18) ICESCR (CO 6, 2016, para 35)	Victims of trafficking: ICCPR (CO 7, 2016, paras 27-28)
Qatar		ICCPR (CO, 2022, para 32) ICERD (CO 17-21, 2019, paras 29-30)	ICCPR (CO 1, 2022, paras 23-25) ICESCR (Q 1, 2021, paras 10, 12-13, 15-17, 20, 22-23) ICERD (CO 17-21, 2019, paras 11-12, 15-18, 35)	ICESCR (Q, 2021, paras 10, 14, 18, 26-27) ICERD (CO 17-21, 2019, paras 12, 23-24)	Discrimination against naturalised citizens: ICCPR (CO, 2022, para 12); ICERD (CO 17-21, 2019, paras 21-22) Statelessness: ICERD (CO 17-21, 2019, paras 27-28)
Slovakia	ICESCR (CO 3, 2019, paras 46-47)	ICCPR (CO 4, 2016, paras 30-31)	ICESCR (CO 3, 2019, paras 24-25)	ICCPR (CO 4, 2016, paras 12-13)	

		ICESCR (CO 3, 2019, paras 12-13, 20-21) ICESCR (CO 3, 2019, paras 24-25)		ICESCR (CO 3, 2019, paras 12-13, 20)	
South Africa	ICCPR (CO 1, 2016, paras 36-37) ICESCR (CO 1, 2018, paras 72-73)	ICCPR (CO 1, 2016, paras 34-35) ICESCR (CO 1, 2018, paras 25-26)	ICESCR (CO 1, 2018, para 79)	ICCPR (CO 1, 2016, paras 14-15)	Victims of trafficking: ICCPR (CO 1, 2016, para 33)
South Korea	ICCPR (QPR 5, 2019, para 18; CO 4, 2015, paras 38-39) ICERD (CO 17-19, 2019, paras 7-8, 15-18)	ICCPR (QPR 5, 2019, para 26) ICERD (CO 17-19, 2019, paras 7-8, 13-14)	ICESCR (CO 4, 2017, paras 36-37, 70) ICERD (CO 17-19, 2019, paras 9-10, 12, 19-20, 35)	ICCPR (QPR 5, 2019, para 5; CO 4, 2015, para 13) ICESCR (CO 4, 2017, paras 22-23, 26-27, 65-66) ICERD (CO 17-19, 2019, paras 5-8, 29-34)	Child statelessness: ICCPR (CO 4, 2015, paras 56-57); ICERD (CO 17-19, 2019, paras 27-28) Humanitarian status holders: ICCPR (QPR 5, 2019, para 26) Marriage migrants: ICERD (CO 17-19, 2019, paras 21-24) North Korean defectors: ICCPR (QPR 5, 2019, paras 5, 12; CO 4, 2015, paras 36-37)

					Statelessness: ICCPR (QPR 5, 2019, para 26); ICERD (CO 17-19, 2019, para 35) Victims of trafficking: ICCPR (QPR 5, 2019, para 14; CO 4, 2015, paras, 40-41); ICERD (CO 17-19, 2019, paras 25-26)
Turkey	ICMW (CO 1, 2016, paras 33, 37-40, 47-50, 52, 63-64, 67-68, 85-86)	ICCPR (QPR 2, 2021, para 15; CO 1, 2012, para 20) ICESCR (CO 1, 2011, para 12) ICMW (CO 1, 2016, paras 21-22, 42, 53-54)	ICESCR (CO 1, 2011, paras 12, 19) ICMW (CO 1, 2016, paras 11-12, 37-40, 52, 57-60, 67-68)	ICCPR (QPR 2, 2021, para 3) ICMW (CO 1, 2016, para 24)	Victims of trafficking: ICCPR (CO 1, 2012, para 15); ICMW (CO 1, 2016, paras 83-84)

Appendix D: Individual Communications by Non-Citizens

Note: Individual communications generally allege violations of multiple rights, corresponding to various provisions of the relevant treaty. The classification below presents the factual circumstance that forms the *primary basis* of the complaint, as argued in submissions by the parties and expressed in the views of the committee, in order to identify the nexus between claimed rights violation/s and non-citizenship status.

Primary factual matter	Number	% total	# upheld	% upheld
Deportation	289	64.9	45	15.6
Deportation contrary to non-refoulement principle	248	85.8	35	14.2
Deportation contrary to protection of family, family life, or children	21	7.3	8	38.1
Other / unknown	20	6.9	2	10
Equality before the law	101	22.6	38	37.7
Fair treatment in criminal proceedings	21	20.8	11	52.4
Fair treatment in civil proceedings	11	10.9	1	9.1
Discrimination on basis of non-citizenship status in domestic law or policies	66	65.3	26	39.4
Other / unknown	3	3	0	0
Arbitrary or unlawful deprivation of liberty	20	4.5	12	60
Criminal detention	1	5	0	0

Immigration detention	15	75	10	66.7
Other / unknown	4	20	2	50
Other	10	2.2	2	20
Torture or cruel, inhuman or degrading treatment	9	2	5	55.6
Committed by or within state of jurisdiction	7	77.7	5	71.5
Committed by extraterritorial actors	2	22.3	0	0
Access to permanent residency or citizenship	9	2	0	0
Access to or revocation of citizenship	7	77.7	0	0
Access to permanent residency	2	22.3	0	0
Discriminatory entry or residence requirements	8	1.8	3	37.5
Discriminatory entry requirements	5	62.5	1	20
Discriminatory residence requirements	3	37.5	2	66.7
Total	**446**	100	105	23.6

Deportation

Deportation Contrary to Non-Refoulement Principle

Treaty body	Communication	Country	Date adopted	Result
CAT	106/1998	Australia	6/05/1999	Not upheld
CAT	120/1998	Australia	14/05/1999	Upheld
CAT	138/1999	Australia	30/04/2002	Not upheld
CAT	148/1999	Australia	5/05/2004	Not upheld

CAT	153/2000	Australia	11/11/2003	Not upheld
CAT	154/2000	Australia	23/11/2001	Not upheld
CAT	162/2000	Australia	23/11/2001	Not upheld
CAT	177/2001	Australia	1/05/2002	Not upheld
CAT	211/2012	Australia	3/05/2005	Inadmissible
CAT	316/2007	Australia	26/11/2008	Not upheld
CAT	324/2007	Australia	30/04/2009	Not upheld
CAT	387/2009	Australia	14/11/2013	Upheld
CAT	416/2010	Australia	5/11/2012	Upheld
CAT	417/2010	Australia	23/11/2012	Not upheld
CAT	434/2010	Australia	14/11/2013	Not upheld
CAT	455/2011	Australia	2/05/2014	Inadmissible
CAT	591/2014	Australia	25/11/2015	Not upheld
CAT	600/2014	Australia	11/08/2016	Not upheld
CAT	603/2014	Australia	30/11/2016	Discontinued
CAT	609/2014	Australia	11/08/2016	Not upheld
CAT	614/2014	Australia	9/08/2017	Not upheld
CAT	618/2014	Australia	10/05/2018	Inadmissible
CAT	624/2014	Australia	3/05/2019	Discontinued
CAT	626/2014	Australia	30/11/2016	Discontinued
CAT	633/2014	Australia	15/11/2016	Not upheld
CAT	646/2014	Australia	15/11/2019	Discontinued
CAT	649/2015	Australia	23/11/2016	Not upheld
CAT	652/2015	Australia	6/12/2016	Not upheld
CAT	666/2015	Australia	1/12/2016	Not upheld

CAT	669/2015	Australia	28/11/2017	Inadmissible
CAT	680/2015	Australia	9/08/2018	Not upheld
CAT	681/2015	Australia	10/05/2017	Upheld
CAT	701/2015	Australia	10/05/2017	Upheld
CAT	707/2015	Australia	6/11/2017	Discontinued
CAT	713/2015	Australia	3/08/2017	Not upheld
CAT	714/2015	Australia	10/11/2017	Discontinued
CAT	716/2015	Australia	11/05/2017	Not upheld
CAT	718/2015	Australia	22/11/2019	Not upheld
CAT	720/2015	Australia	9/08/2017	Not upheld
CAT	723/2015	Australia	2/08/2019	Not upheld
CAT	725/2016	Australia	11/08/2017	Not upheld
CAT	737/2016	Australia	27/04/2018	Discontinued
CAT	740/2016	Australia	30/12/2020	Discontinued
CAT	745/2016	Australia	26/04/2018	Discontinued
CAT	746/2016	Australia	15/11/2019	Discontinued
CAT	748/2016	Australia	27/04/2018	Discontinued
CAT	749/2016	Australia	3/05/2019	Inadmissible
CAT	751/2016	Australia	12/11/2021	Discontinued
CAT	752/2016	Australia	27/04/2018	Discontinued
CAT	753/2016	Australia	27/04/2018	Discontinued
CAT	754/2016	Australia	22/07/2021	Not upheld
CAT	756/2016	Australia	14/11/2018	Inadmissible
CAT	761/2016	Australia	23/11/2018	Not upheld
CAT	763/2016	Australia	15/11/2019	Discontinued

CAT	766/2016	Australia	3/05/2019	Discontinued
CAT	772/2016	Australia	3/05/2019	Discontinued
CAT	788/2016	Australia	3/05/2019	Discontinued
CAT	789/2016	Australia	27/07/2021	Not upheld
CAT	799/2017	Australia	16/05/2018	Discontinued
CAT	802/2017	Australia	21/07/2021	Not upheld
CAT	803/2017	Australia	3/08/2018	Discontinued
CAT	806/2017	Australia	26/07/2019	Discontinued
CAT	815/2017	Australia	15/11/2019	Discontinued
CAT	830/2017	Australia	27/04/2018	Discontinued
CAT	855/2017	Australia	5/12/2019	Not upheld
CAT	856/2017	Australia	12/11/2021	Not upheld
CAT	884/2018	Australia	21/07/2021	Not upheld
CAT	895/2018	Australia	25/05/2018	Discontinued
CAT	932/2019	Australia	30/12/2020	Discontinued
CAT	944/2019	Australia	12/11/2021	Not upheld
CAT	961/2019	Australia	28/04/2021	Discontinued
CAT	119/1998	Canada	12/11/2002	Not upheld
CAT	123/1998	Canada	15/05/2001	Not upheld
CAT	133/1999	Canada	23/11/2004	Upheld
CAT	15/1994	Canada	15/11/1994	Upheld
CAT	163/2000	Canada	24/11/2004	Inadmissible
CAT	166/2000	Canada	14/11/2001	Not upheld
CAT	183/2001	Canada	12/05/2004	Not upheld
CAT	22/1995	Canada	3/05/1995	Inadmissible

CAT	245/2004	Canada	16/11/2005	Not upheld
CAT	258/2004	Canada	23/11/2005	Upheld
CAT	26/1995	Canada	20/11/1995	Inadmissible
CAT	273/2005	Canada	15/05/2006	Inadmissible
CAT	282/2005	Canada	7/11/2006	Not upheld
CAT	284/2006	Canada	17/11/2006	Inadmissible
CAT	293/2006	Canada	9/05/2008	Not upheld
CAT	297/2006	Canada	16/11/2007	Upheld
CAT	298/2006	Canada	18/05/2007	Not upheld
CAT	304/2006	Canada	8/11/2007	Inadmissible
CAT	307/2006	Canada	4/11/2009	Inadmissible
CAT	319/2007	Canada	30/05/2011	Upheld
CAT	331/2007	Canada	5/11/2009	Not upheld
CAT	333/2007	Canada	15/11/2010	Not upheld
CAT	343/2008	Canada	18/05/2012	Upheld
CAT	35/1995	Canada	22/11/1995	Inadmissible
CAT	370/2009	Canada	21/05/2012	Not upheld
CAT	392/2009	Canada	24/05/2013	Not upheld
CAT	395/2009	Canada	23/05/2011	Inadmissible
CAT	42/1996	Canada	20/11/1997	Inadmissible
CAT	47/1996	Canada	19/05/1998	Inadmissible
CAT	488/2012	Canada	11/05/2018	Not upheld
CAT	49/1996	Canada	15/05/2001	Not upheld
CAT	505/2012	Canada	13/08/2015	Not upheld
CAT	512/2012	Canada	28/07/2015	Inadmissible

CAT	515/2012	Canada	10/08/2017	Discontinued
CAT	520/2012	Canada	26/11/2014	Not upheld
CAT	529/2012	Canada	6/05/2016	Inadmissible
CAT	562/2013	Canada	23/11/2015	Upheld
CAT	568/2013	Canada	15/11/2019	Inadmissible
CAT	57/1996	Canada	17/11/1997	Not upheld
CAT	581/2014	Canada	30/11/2016	Not upheld
CAT	582/2014	Canada	1/12/2016	Not upheld
CAT	583/2014	Canada	9/05/2016	Not upheld
CAT	588/2014	Canada	30/11/2016	Discontinued
CAT	590/2014	Canada	6/03/2014	Discontinued
CAT	597/2014	Canada	6/11/2017	Discontinued
CAT	604/2014	Canada	20/11/2015	Inadmissible
CAT	615/2014	Canada	3/08/2018	Inadmissible
CAT	617/2014	Canada	31/07/2017	Discontinued
CAT	621/2014	Canada	11/05/2018	Inadmissible
CAT	630/2014	Canada	11/11/2016	Discontinued
CAT	656/2015	Canada	3/08/2018	Discontinued
CAT	659/2015	Canada	10/08/2017	Not upheld
CAT	66/1997	Canada	13/11/1998	Inadmissible
CAT	665/2015	Canada	26/07/2019	Discontinued
CAT	679/2015	Canada	15/11/2018	Discontinued
CAT	684/2015	Canada	30/12/2020	Discontinued
CAT	687/2015	Canada	11/08/2017	Inadmissible
CAT	689/2015	Canada	3/08/2018	Discontinued

CAT	694/2015	Canada	3/08/2018	Discontinued
CAT	695/2015	Canada	28/11/2017	Inadmissible
CAT	699/2015	Canada	12/05/2017	Not upheld
CAT	702/2015	Canada	14/11/2017	Inadmissible
CAT	705/2015	Canada	30/12/2020	Discontinued
CAT	711/2015	Canada	6/11/2017	Discontinued
CAT	715/2015	Canada	28/11/2017	Inadmissible
CAT	728/2016	Canada	30/12/2020	Discontinued
CAT	739/2016	Canada	15/11/2018	Discontinued
CAT	741/2016	Canada	30/12/2020	Discontinued
CAT	767/2016	Canada	17/05/2018	Inadmissible
CAT	777/2016	Canada	3/05/2019	Discontinued
CAT	784/2014	Canada	15/11/2018	Inadmissible
CAT	786/2016	Canada	26/07/2019	Discontinued
CAT	787/2016	Canada	26/07/2019	Discontinued
CAT	791/2016	Canada	5/08/2019	Inadmissible
CAT	798/2017	Canada	23/07/2020	Inadmissible
CAT	809/2017	Canada	28/04/2021	Discontinued
CAT	838/2017	Canada	30/12/2020	Discontinued
CAT	848/2017	Canada	15/11/2019	Discontinued
CAT	849/2017	Canada	26/07/2019	Discontinued
CAT	86/1997	Canada	18/11/1999	Inadmissible
CAT	873/2018	Canada	30/12/2020	Discontinued
CAT	877/2018	Canada	30/12/2020	Discontinued
CAT	898/2018	Canada	3/12/2021	Inadmissible

CAT	95/1997	Canada	19/05/2000	Inadmissible
CAT	99/1997	Canada	16/05/1999	Not upheld
CAT	214/2002	Germany	12/05/2004	Not upheld
CAT	430/2010	Germany	21/05/2013	Upheld
CAT	636/2014	Germany	6/11/2017	Discontinued
CAT	727/2016	Germany	9/08/2018	Inadmissible
CAT	62/1996	Hungary	10/05/1999	Inadmissible
CAT	671/2015	Hungary	8/12/2015	Inadmissible
CAT	444/2010	Kazakhstan	1/06/2012	Upheld
CAT	475/2011	Kazakhstan	14/05/2014	Upheld
CAT	538/2013	Kazakhstan	8/05/2015	Upheld
CAT	554/2013	Kazakhstan	3/08/2015	Upheld
CAT	519/2012	South Korea	21/11/2014	Not upheld
CCPR	1069/2002	Australia	29/10/2003	Upheld
CCPR	1291/2004	Australia	20/10/2006	Not upheld
CCPR	1429/2005	Australia	1/04/2008	Inadmissible
CCPR	1442/2005	Australia	23/10/2009	Upheld
CCPR	1938/2010	Australia	25/03/2013	Inadmissible
CCPR	1957/2010	Australia	21/03/2013	Not upheld
CCPR	2049/2011	Australia	18/07/2014	Not upheld
CCPR	2053/2011	Australia	16/10/2014	Not upheld
CCPR	2090/2011	Australia	13/03/2020	Discontinued
CCPR	2116/2011	Australia	28/07/2017	Discontinued
CCPR	2208/2012	Australia	25/07/2019	Discontinued
CCPR	2380/2014	Australia	13/03/2020	Discontinued

CCPR	692/1996	Australia	28/07/1997	Not upheld
CCPR	706/1996	Australia	4/11/1997	Not upheld
CCPR	1040/2001	Canada	9/07/2004	Inadmissible
CCPR	1051/2002	Canada	29/03/2004	Upheld
CCPR	1234/2003	Canada	20/03/2007	Inadmissible
CCPR	1302/2004	Canada	25/07/2006	Inadmissible
CCPR	1315/2004	Canada	30/03/2006	Inadmissible
CCPR	1455/2006	Canada	30/10/2008	Inadmissible
CCPR	1465/2006	Canada	25/03/2010	Upheld
CCPR	1544/2007	Canada	18/03/2010	Upheld
CCPR	1551/2007	Canada	27/03/2009	Inadmissible
CCPR	1578/2007	Canada	30/10/2008	Inadmissible
CCPR	1580/2007	Canada	30/10/2008	Inadmissible
CCPR	1763/2008	Canada	25/03/2011	Upheld
CCPR	1792/2008	Canada	28/07/2009	Upheld
CCPR	1816/2008	Canada	26/03/2012	Inadmissible
CCPR	1819/2008	Canada	31/10/2011	Inadmissible
CCPR	1827/2008	Canada	23/07/2012	Inadmissible
CCPR	1872/2009	Canada	26/07/2010	Inadmissible
CCPR	1881/2009	Canada	24/07/2013	Upheld
CCPR	1898/2009	Canada	28/10/2013	Upheld
CCPR	1912/2009	Canada	31/10/2012	Upheld
CCPR	1959/2010	Canada	21/07/2011	Upheld
CCPR	2060/2011	Canada	11/03/2016	Not upheld
CCPR	2091/2011	Canada	25/03/2015	Upheld

CCPR	2238/2013	Canada	29/03/2019	Inadmissible
CCPR	2261/2013	Canada	28/03/2017	Discontinued
CCPR	2262/2013	Canada	1/04/2015	Discontinued
CCPR	2263/2013	Canada	28/03/2017	Discontinued
CCPR	2276/2013	Canada	24/10/2019	Not upheld
CCPR	2280/2013	Canada	22/07/2015	Not upheld
CCPR	2284/2013	Canada	5/11/2015	Not upheld
CCPR	2292/2013	Canada	27/03/2018	Not upheld
CCPR	2314/2013	Canada	22/03/2016	Not upheld
CCPR	2323/2013	Canada	29/03/2019	Inadmissible
CCPR	236/1987	Canada	18/07/1988	Inadmissible
CCPR	2366/2014	Canada	5/11/2015	Not upheld
CCPR	2387/2014	Canada	15/07/2016	Not upheld
CCPR	2484/2014	Canada	24/10/2019	Not upheld
CCPR	2487/2014	Canada	8/11/2017	Not upheld
CCPR	2613/2015	Canada	27/03/2017	Upheld
CCPR	2623/2015	Canada	27/10/2021	Not upheld
CCPR	2732/2016	Canada	8/11/2019	Inadmissible
CCPR	2810/2016	Canada	2/07/2021	Not upheld
CCPR	2838/2016	Canada	17/03/2021	Not upheld
CCPR	2948/2017	Canada	14/03/2019	Inadmissible
CCPR	2957/2017	Canada	13/03/2020	Inadmissible
CCPR	2970/2017	Canada	23/07/2020	Inadmissible
CCPR	3016/2017	Canada	23/07/2021	Inadmissible
CCPR	3041/2017	Canada	19/03/2019	Not upheld

CCPR	469/1991	Canada	5/11/1993	Upheld
CCPR	470/1991	Canada	30/07/1993	Not upheld
CCPR	486/1992	Canada	29/07/1992	Inadmissible
CCPR	539/1993	Canada	31/10/1994	Not upheld
CCPR	603/1994	Canada	18/07/1997	Inadmissible
CCPR	604/1994	Canada	18/07/1997	Inadmissible
CCPR	654/1995	Canada	18/07/1997	Inadmissible
CCPR	743/1997	Canada	28/03/2003	Inadmissible
CCPR	829/1998	Canada	5/08/2002	Upheld
CCPR	982/2001	Canada	31/10/2006	Inadmissible
CCPR	2768/2016	Hungary	19/07/2018	Inadmissible
CCPR	2901/2016	Hungary	29/03/2019	Inadmissible
CCPR	2923/2016	Hungary	15/03/2019	Not upheld
CCPR	2570/2015	Italy	26/07/2019	Inadmissible
CCPR	2024/2011	Kazakhstan	31/10/2011	Upheld
CCPR	2104/2011	Kazakhstan	17/03/2014	Upheld
CCPR	2728/2016	New Zealand	24/10/2019	Not upheld
CCPR	1908/2009	South Korea	25/03/2014	Upheld
CEDAW	25/2010	Canada	24/02/2012	Inadmissible

Deportation Contrary to Protection of the Family or Children

Treaty body	**Communication**	**Country**	**Date adopted**	**Result**
CCPR	1011/2001	Australia	26/07/2004	Upheld
CCPR	1012/2001	Australia	21/10/2005	Inadmissible
CCPR	1127/2002	Australia	21/07/2005	Inadmissible

CCPR	1175/2003	Australia	25/07/2006	Inadmissible
CCPR	1557/2007	Australia	18/07/2011	Upheld
CCPR	1875/2009	Australia	26/03/2015	Upheld
CCPR	1937/2010	Australia	26/03/2015	Upheld
CCPR	3212/2018	Australia	27/10/2021	Upheld
CCPR	930/2000	Australia	26/07/2001	Upheld
CCPR	2081/2011	Canada	15/07/2016	Upheld
CCPR	2196/2012	Canada	28/07/2017	Inadmissible
CCPR	2264/2013	Canada	6/04/2018	Upheld
CCPR	538/1993	Canada	1/11/1996	Not upheld
CCPR	558/1993	Canada	3/04/1997	Not upheld
CCPR	1543/2007	Germany	22/07/2008	Inadmissible
CCPR	1279/2004	New Zealand	28/10/2005	Inadmissible
CCPR	2197/2012	New Zealand	25/03/2014	Inadmissible
CCPR	2769/2016	New Zealand	24/07/2020	Inadmissible
CCPR	820/1998	New Zealand	6/08/2003	Inadmissible
CCPR	893/1999	New Zealand	28/03/2003	Not upheld
CEDAW	26/2010	Canada	18/11/2011	Inadmissible

Other / Unknown

Treaty body	**Communication**	**Country**	**Date adopted**	**Result**
CCPR	2118/2011	Canada	3/11/2016	Upheld
CCPR	2195/2012	Canada	3/11/2016	Inadmissible
CCPR	2303/2013	Canada	8/11/2017	Discontinued
CCPR	2382/2014	Canada	6/11/2020	Discontinued

CCPR	2450/2014	Canada	6/11/2020	Discontinued
CCPR	2453/2014	Canada	1/04/2015	Discontinued
CCPR	2466/2014	Canada	8/11/2017	Discontinued
CCPR	2466/2014	Canada	8/11/2017	Discontinued
CCPR	2501/2014	Canada	8/11/2017	Discontinued
CCPR	2511/2014	Canada	28/07/2017	Discontinued
CCPR	2927/2017	Canada	8/11/2017	Discontinued
CCPR	3030/2017	Canada	13/03/2020	Discontinued
CCPR	3186/2018	Canada	13/03/2020	Discontinued
CCPR	319/1988	Ecuador	5/11/1991	Upheld
CCPR	2973/2017	Germany	28/07/2017	Discontinued
CCPR	2631/2015	New Zealand	2/11/2015	Inadmissible
CCPR	2061/2011	South Korea	23/07/2015	Discontinued
CCPR	2735/2016	South Korea	28/03/2017	Discontinued
CEDAW	49/2013	Canada	27/10/2014	Inadmissible
CEDAW	83/2015	Ecuador	29/10/2018	Discontinued

Equality before the Law

Fair Treatment in Criminal Proceedings

Treaty body	Communication	Country	Date adopted	Result
CCPR	1154/2003	Australia	31/10/2006	Inadmissible
CCPR	2015/2010	Australia	30/03/2015	Inadmissible
CCPR	579/1994	Australia	27/03/1997	Inadmissible
CCPR	1638/2007	Canada	30/10/2008	Inadmissible
CCPR	27/1977	Canada	29/10/1981	Upheld

CCPR	341/1988	Canada	11/04/1991	Inadmissible
CCPR	480/1991	Ecuador	12/07/1996	Upheld
CCPR	2040/2011	Estonia	4/11/2015	Upheld
CCPR	521/1992	Hungary	16/03/1994	Upheld
CCPR	852/1999	Hungary	14/10/2002	Upheld
CCPR	266/1987	Italy	23/03/1989	Inadmissible
CCPR	378/1989	Italy	26/03/1990	Inadmissible
CCPR	699/1996	Italy	15/07/1999	Upheld
CCPR	650/1995	Latvia	30/03/1998	Not upheld
CCPR	1755/2008	Libya	19/03/2012	Upheld
CCPR	1880/2009	Libya	20/03/2012	Upheld
CCPR	1089/2002	Philippines	25/07/2005	Upheld
CCPR	1421/2005	Philippines	24/07/2006	Upheld
CCPR	868/1999	Philippines	30/10/2003	Upheld
CCPR	1517/2006	Poland	28/03/2011	Not upheld
CCPR	644/1995	South Korea	13/07/1999	Not upheld

Fair Treatment in Civil Proceedings

Treaty body	**Communication**	**Country**	**Date adopted**	**Result**
CCPR	2279/2013	Australia	5/11/2015	Upheld
CCPR	646/1995	Australia	25/11/1998	Inadmissible
CCPR	659/1995	Australia	8/11/1996	Inadmissible
CCPR	751/1997	Australia	7/04/1999	Inadmissible
CCPR	901/1999	Australia	9/07/2004	Inadmissible
CCPR	1639/2007	Canada	28/07/2009	Inadmissible

CCPR	1003/2001	Germany	22/10/2003	Inadmissible
CCPR	991/2001	Germany	30/10/1999	Inadmissible
CCPR	1037/2001	Poland	22/07/2005	Inadmissible
CCPR	876/1999	Slovakia	31/10/2002	Inadmissible
CCPR	935/2000	Slovakia	23/07/2001	Inadmissible

Discrimination on Basis of Non-Citizenship Status in Domestic Law or Policies

Treaty body	**Communication**	**Country**	**Date adopted**	**Result**
CCPR	1336/2004	Australia	25/07/2005	Inadmissible
CCPR	2216/2012	Australia	28/03/2017	Upheld
CCPR	1506/2006	Canada	30/10/2008	Inadmissible
CCPR	1562/2007	Canada	22/07/2008	Inadmissible
CCPR	2771/2016	Canada	3/11/2016	Inadmissible
CCPR	953/2000	Canada	27/07/2003	Inadmissible
CCPR	740/1997	Chile	23/07/1999	Inadmissible
CCPR	1034-1035/2001	Czechia	28/10/2005	Inadmissible
CCPR	1054/2001	Czechia	1/11/2005	Upheld
CCPR	1445/2006	Czechia	24/07/2007	Upheld
CCPR	1448/2006	Czechia	17/07/2008	Upheld
CCPR	1452/2006	Czechia	27/07/2007	Inadmissible
CCPR	1463/2006	Czechia	25/10/2007	Upheld
CCPR	1479/2006	Czechia	24/03/2009	Upheld
CCPR	1484/2006	Czechia	25/03/2008	Upheld
CCPR	1485/2006	Czechia	10/07/2008	Upheld

CCPR	1488/2006	Czechia	25/03/2008	Upheld
CCPR	1491/2006	Czechia	27/10/2010	Upheld
CCPR	1497/2006	Czechia	17/07/2008	Upheld
CCPR	1508/2006	Czechia	17/03/2009	Upheld
CCPR	1515/2006	Czechia	1/04/2008	Inadmissible
CCPR	1533/2006	Czechia	31/10/2007	Upheld
CCPR	1546/2007	Czechia	19/07/2011	Inadmissible
CCPR	1563/2007	Czechia	24/10/2011	Upheld
CCPR	1573/2007	Czechia	27/10/2009	Inadmissible
CCPR	1574/2007	Czechia	20/07/2009	Upheld
CCPR	1575/2007	Czechia	27/03/2009	Inadmissible
CCPR	1581/2007	Czechia	27/10/2010	Upheld
CCPR	1582/2007	Czechia	21/07/2009	Inadmissible
CCPR	1583/2007	Czechia	25/10/2010	Inadmissible
CCPR	1586/2007	Czechia	13/07/2011	Upheld
CCPR	1614/2007	Czechia	28/07/2009	Inadmissible
CCPR	1615/2007	Czechia	27/10/2010	Upheld
CCPR	1742/2007	Czechia	27/07/2010	Upheld
CCPR	1748/2007	Czechia	28/10/2010	Inadmissible
CCPR	1844/2008	Czechia	23/07/2012	Inadmissible
CCPR	1847/2008	Czechia	1/11/2011	Upheld
CCPR	1848/2008	Czechia	23/07/2012	Inadmissible
CCPR	1849/2008	Czechia	29/10/2012	Inadmissible
CCPR	1850/2008	Czechia	26/10/2011	Inadmissible
CCPR	1961/2010	Czechia	2/04/2015	Inadmissible

CCPR	1967/2010	Czechia	2/04/2015	Inadmissible
CCPR	2839/2016	Czechia	6/11/2020	Upheld
CCPR	516/1992	Czechia	19/07/1995	Upheld
CCPR	586/1994	Czechia	23/07/1996	Upheld
CCPR	857/1999	Czechia	12/07/2001	Upheld
CCPR	945/2000	Czechia	26/07/2005	Upheld
CCPR	2499/2014	Estonia	8/11/2019	Inadmissible
CCPR	2682/2015	Estonia	13/03/2020	Inadmissible
CCPR	1188/2003	Germany	2/11/2004	Inadmissible
CCPR	1106/2002	Hungary	31/03/2004	Inadmissible
CCPR	520/1992	Hungary	7/04/1994	Inadmissible
CCPR	566/1993	Hungary	23/07/1996	Not upheld
CCPR	735/1997	Hungary	7/11/1997	Inadmissible
CCPR	1229/2003	Italy	25/07/2006	Inadmissible
CCPR	475/1991	New Zealand	31/03/1994	Inadmissible
CCPR	643/1995	Slovakia	14/07/1997	Inadmissible
CEDAW	92/2015	Turkey	9/07/2018	Inadmissible
CERD	6/1995	Australia	26/08/1999	Not upheld
CERD	7/1995	Australia	14/08/1997	Inadmissible
CERD	8/1996	Australia	12/03/1999	Not upheld
CERD	39/2006	Australia	22/02/2008	Not upheld
CERD	42/2008	Australia	14/08/2009	Not upheld
CERD	48/2010	Germany	26/02/2013	Upheld
CESCR	3/2014	Ecuador	20/06/2016	Inadmissible
CRPD	29/2015	Germany	30/09/2020	Discontinued

Other / Unknown

Treaty body	Communication	Country	Date adopted	Result
CCPR	1612/2007	Costa Rica	28/10/2013	Inadmissible
CCPR	1292/2004	Germany	22/07/2005	Inadmissible
CCPR	755/1997	Germany	29/07/1997	Inadmissible

Arbitrary or Unlawful Deprivation of Liberty

Criminal Detention

Treaty body	Communication	Country	Date adopted	Result
CCPR	1365/2005	Canada	24/07/2007	Inadmissible

Immigration Detention

Treaty body	Communication	Country	Date adopted	Result
CAT	67/1997	Canada	17/11/1998	Inadmissible
CAT	598/2014	Italy	29/04/2016	Inadmissible
CCPR	1014/2001	Australia	6/08/2003	Upheld
CCPR	1050/2002	Australia	11/07/2006	Upheld
CCPR	1255/2004 et al	Australia	20/07/2007	Upheld
CCPR	1324/2004	Australia	31/10/2006	Upheld
CCPR	2094/2011	Australia	26/07/2013	Upheld
CCPR	2136/2012	Australia	25/07/2013	Upheld
CCPR	2365/2014	Australia	8/07/2021	Upheld
CCPR	560/1993	Australia	3/04/1997	Upheld
CCPR	772/1997	Australia	17/07/2000	Inadmissible

CCPR	900/1999	Australia	28/10/2002	Upheld
CCPR	1341/2005	Canada	20/03/2007	Inadmissible
CCPR	296/1988	Costa Rica	30/03/1989	Inadmissible
CCPR	2290/2013	Ecuador	9/10/2018	Upheld

Other / Unknown

Treaty body	Communication	Country	Date adopted	Result
CCPR	1020/2001	Australia	7/08/2003	Upheld
CCPR	1897/2009	Australia	24/07/2013	Inadmissible
CCPR	1973/2010	Australia	21/10/2014	Upheld
CCPR	2939/2017	South Korea	13/03/2020	Inadmissible

Other

State Responsibility for Extraterritorial Effects of Climate Change

Treaty body	Communication	Country	Date adopted	Result
CRC	107/2019	Germany	22/09/2021	Inadmissible
CRC	108/2019	Turkey	22/09/2021	Inadmissible

Freedom of Expression

Treaty body	Communication	Country	Date adopted	Result
CRC	60/2018	Germany	4/02/2020	Inadmissible

Freedom of Religion

Treaty body	Communication	Country	Date adopted	Result
CCPR	2661/2015	Kazakhstan	30/10/2020	Upheld

Right of Children to an Identity

Treaty body	Communication	Country	Date adopted	Result
CRC	5/2016	Costa Rica	17/01/2017	Inadmissible

Right of Persons with Disabilities to Work on an Equal Basis

Treaty body	Communication	Country	Date adopted	Result
CRPD	2/2010	Germany	4/04/2014	Upheld

Violation of Extraterritorial Human Rights Obligations

Treaty body	Communication	Country	Date adopted	Result
CCPR	2285/2013	Canada	26/07/2017	Inadmissible

Other / Unknown

Treaty body	Communication	Country	Date adopted	Result
CED	2/2017	Czechia	30/05/2018	Discontinued
CEDAW	27/2010	Italy	18/10/2011	Inadmissible
CRC	82/2019	Germany	4/02/2021	Discontinued

Torture or Cruel, Inhuman or Degrading Treatment

Committed by or within State of Jurisdiction

Treaty body	Communication	Country	Date adopted	Result

CAT	759/2016	Mexico	23/07/2021	Upheld
CCPR	2348/2014	Canada	24/07/2018	Upheld
CCPR	414/1990	Equatorial Guinea	8/07/1994	Upheld
CCPR	3042/2017	Italy	4/11/2020	Upheld
CCPR	1935/2010	Latvia	19/03/2014	Inadmissible
CCPR	2006/2010	Libya	21/03/2014	Upheld
CCPR	457/1991	Libya	7/11/1991	Inadmissible

Committed by Extraterritorial Actors

Treaty body	Communication	Country	Date adopted	Result
CAT	511/2012	Australia	26/11/2014	Inadmissible
CAT	536/2013	Canada	2/12/2015	Inadmissible

Access to Permanent Residency or Citizenship

Access to or Revocation of Citizenship

Treaty body	Communication	Country	Date adopted	Result
CCPR	1124/2002	Canada	19/03/2007	Not upheld
CCPR	669/1995	Czechia	21/10/1998	Inadmissible
CCPR	670/1995	Czechia	21/10/1998	Inadmissible
CCPR	1136/2002	Estonia	26/07/2004	Not upheld
CCPR	1423/2005	Estonia	9/07/2008	Not upheld
CCPR	1224/2003	Latvia	26/03/2007	Inadmissible
CCPR	675/1995	New Zealand	2/11/2000	Not upheld

Access to Permanent Residency

Treaty body	Communication	Country	Date adopted	Result
CCPR	2454/2014	Canada	26/07/2019	Inadmissible
CCPR	1223/2005	Estonia	26/10/2007	Not upheld

Discriminatory Entry or Residence Requirements

Discriminatory Entry Requirements

Treaty body	Communication	Country	Date adopted	Result
CCPR	978/2001	Australia	28/03/2003	Inadmissible
CCPR	68/1980	Canada	31/03/1981	Inadmissible
CCPR	2567/2015	New Zealand	3/11/2016	Inadmissible
CRC	35/2017	Germany	31/05/2018	Discontinued
CRPD	20/2014	Australia	19/03/2021	Upheld

Discriminatory Residence Requirements

Treaty body	Communication	Country	Date adopted	Result
CCPR	2140/2012	Kazakhstan	28/03/2017	Inadmissible
CCPR	2273/2013	South Korea	12/07/2018	Upheld
CERD	51/2012	South Korea	1/05/2015	Upheld

초록

국제인권법상 비시민 권리의 실질화 방안 연구

인권은 오직 인간이라는 이유로 모든 사람들에게 인정되는 권리로서 보편적•불가분적•상호의존적인 성격을 띤다. 그러나 동시에 인권 발전의 역사는 다양한 '타인'(others)을 인권 주체로 포함시키기 위한 지속적인 투쟁의 과정이기도 하였다. 본 논문은 법이 비시민(즉, 한 국가의 관할권 하의 시민이 아닌 모든 개인)의 '인간임'(humanity)을 어떻게 고려해야 하는지에 대한, 국제인권법의 본격적 등장 이전부터 지속적으로 논의되어왔지만 여전히 해결되지 않은 문제를 다룬다. 이 문제의 핵심은 두 가지 차원에서 작용한다. 첫번째 차원은, 국제인권법 체계가 가지는 국가 중심적 성격으로 인해 발생하는, 국제인권규범과 개별 국가의 실제적 관행 사이의 불일치에 따른 것이다. 두 번째 차원은, 단순한 법적 지위와 문서상의 권리 보유 여부와 구별되는, 권리를 당사자가 실제로 주장하고 접근, 향유할 수 있는 실질적 가능성으로서 본 논문에서 정의하고 있는 개념인 "rights claimability" (권리의 주장 및 실현 가능성)가 여러 비시민 집단 사이에 위계적으로 계층화된 구조를 나타내는 데 따른 것이다. 각 비시민 집단에 대한 국제법과 국내법의 불균등한 적용으로 발생하는 '권리 프레임워크의 패치워크'(patchwork of rights frameworks)는, 권리의 주장 및 실현 가능성의 차등과 차별을 초래한다. 본 논문은 비시민의 인권 주장과 실현에서 규범 간의, 그리고 규범과 현실 간의 간극을 초래하고 강화하는

것은 이 두 차원의 상호작용이라고 주장한다.

본 논문의 각 장을 요약하면 다음과 같다. 제 1 장은 초국경적 이주 흐름의 증가 속도와 복합성으로 특징지어지는, 오늘날 지구사회가 당면하고 있는 이주 문제에 대한 개관을 제시한다. 제 2 장은 '비시민'의 인권을 둘러싼 논의가 이론과 법학 실무 분야의 교차점에 어떻게 위치하는지 살펴보고, 선행연구 검토를 통하여 논문의 이론적 기반을 제시한다. 제 3 장은 1920 년대 외국인 ("alien")의 권리를 성문화하기 위한 국제사회의 초기 시도에서부터 2018 년 유엔에서 이주와 난민을 위한 글로벌 컴팩트(Global Compacts for Migration and Refugees)가 채택되기까지, 국제인권법이 비시민의 인권을 다루어온 과정을 분석, 평가한다. 구속력 있는 국제인권 조약은 세계시민주의적(cosmopolitan) 지향성을 지니지만, 역설적으로 그 실질적인 적용에서는 국가의 통제력를 강화하여 비시민들이 경험하는 인권 문제를 악화시키기도 하였다. 제 4 장에서는 국제법상 비시민의 다양한 범주를 개별 국가의 국내법 실행과 비교하며 살펴보면서, 여러 범주의 비시민 집단 간 권리의 위계화 문제에 대해 살펴본다. 제 5 장은 유엔 인권조약 각 위원회, 개별 국가의 헌법, 국가인권위원회, 그리고 여러 형태의 초국적 연대를 포함한 다양한 층위에서, 비시민의 "rights claimability" 강화를 위한 국내법과 국제법의 상호작용에 대해 논의한다. 이상의 논의를 바탕으로 본 연구는 비시민의 "rights claimability" 강화를 위한 새로운 규범적 프레임을 제시하였다. 첫째, 국제인권법 조항을 개인의 구체적 상황에서 실질화하기 위해 비시민의 주장 어휘(claim-making vocabulary)가 필요하다. 유엔

인권조약위원회의 개인통보제도 등 개별 사안 심사 제도와 활동은 이러한 방향에 대한 예시적 지침을 제공한다. 다음으로, 현재 여러 법적 제도와 범주에 걸친 비시민에 대한 파편화된 접근이 보다 포괄적이고 통일된 개념과 규범틀로 수렴되어야 할 필요가 있다. 이를 위해 본 논문은 개별 국가의 비시민에 대한 차등적 법적 처우보다 국제인권법상 평등한 권리 보유자로서 비시민이 가지는 규범적 지위가 더 중요하게 다루어져야 한다고 주장한다.

주요어: 비시민; 권리의 주장 및 실현 가능성 (rights claimability); 외국인; 인권; 국제인권법; 이주; 시민권

학번: 2020-28500