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Refugee Entitlements in Egypt

Amira Hetaba
Claire McNally
Elena Habersky

The Center for Migration and Refugee Studies



THE CENTER FOR MIGRATION AND REFUGEE STUDIES (CMRS)

The Center for Migration and Refugee Studies (CMRS) is an interdisciplinary center of the American University in Cairo (AUC). Situated at the heart of the Middle East and North Africa, it aims at furthering the scientific knowledge of the large, long-standing recent refugee and migration movements witnessed in this region. But it also is concerned with questions of refugees and migration in the international system as a whole, both at the theoretical and practical levels. CMRS functions include instruction, research, training, and outreach. It offers a Master of Arts degree and a graduate diploma in Migration and Refugee studies, working with other AUC departments to offer diversified courses to its students. Its research bears on issues of interest to the region and beyond. In carrying its research out, CMRS collaborates with reputable regional and international academic institutions. The training activities that CMRS organizes are attended by researchers, policymakers, bureaucrats and civil society activists from a great number of countries. The center also provides tailor-made training programs on demand. CMRS outreach involves working with individuals and organizations in its environment, disseminating knowledge and sensitization to refugee and migration issues. It also provides services to the refugee community in Cairo and transfers its expertise in this respect to other international institutions.

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CHAPTER 1: INTRODUCTION

1.1. Overview

Situated at the crossroads between Africa, Asia, and Europe, Egypt hosts diverse communities that seek refuge from persecution in their home state (“asylum-seekers”), some of whom are granted refuge (“refugees”), and some of whom ultimately fail to acquire asylum in Egypt (“failed asylum-seekers”).¹ The Egyptian government delegates its power to determine refugee status to the United Nations High Commissioner for Refugees (UNHCR).² In 2019, UNHCR stated that there were over 247,000 refugees and asylum-seekers registered in Egypt, from 56 different countries of origin.³ This does not include the numbers of failed asylum-seekers that are supposed to leave Egypt but nevertheless remain, or migrants that risk persecution if they return home but for various reasons choose not to seek asylum. There is no official statistic for the total number of migrants residing in Egypt and estimates vary widely.⁴ These migrants have different national, religious, and socioeconomic backgrounds.

Many refugees, asylum-seekers, and failed asylum-seekers intend to transit through Egypt and eventually make their way to a third country. Some hope to be selected for one of the very few resettlement slots to Australia, Canada, the United States, or Europe.⁵ Others anticipate making the perilous journey to Europe by crossing the Mediterranean Sea, either directly from Egypt’s northern coast or after entering a neighboring country, or alternatively making the journey by land.⁶ Still others are waiting to return to their country of nationality if the political, social, and economic conditions that prompted their flight improve.⁷ Whether by choice or necessity, a

¹ For terminology definition, see Chapter 3.

² For an explanation of the Memorandum of Understanding between Egypt and UNHCR, see Chapter 3.2.

³ UN High Commissioner for Refugees, *Egypt Fact Sheet* (May 2019), available at https://www.unhcr.org/eg/wp-content/uploads/sites/36/2019/06/UNHCR-Egypt_Fact-Sheet_May-2019.pdf

⁴ Experts have estimated the number of Sudanese migrants alone is anywhere between 700,000 and five million. See, Michael Kagen, *Troublesome Refugee Statistics and the Case of Sudanese in Egypt* RSD Watch (15 January 2014). Available at: https://rsdwatch.files.wordpress.com/2014/01/tally_marks_counting_visitors.jpg. Omer Karapasan, *Who Are the 5 Million Refugees and Immigrants in Egypt* Brookings Institute (4 October 2016). Available at: <https://www.brookings.edu/blog/future-development/2016/10/04/who-are-the-5-million-refugees-and-immigrants-in-egypt/>.

⁵ Mulki Al-Sharmani, *Refugee Migration to Egypt: Settlement of Transit in TRANSIT MIGRATION IN EUROPE* 55-77 (F. Duvell, I. Molodikova & M. Collyer eds. 2014) & Shashikala Perera, *Visions of Life: Resettlement Expectations of Refugees in Cairo*, 2018. Available at: <http://dar.aucegypt.edu/bitstream/handle/10526/5494/Thesis%20Shashikala%20Perera%2009%2009%202018.pdf?sequence=1>

⁶ Tania Spiga, *From Libya to Egypt, The Changing Dynamics of the Migration Route* Mediterranean Affairs (31 October 2017). Available at: <http://mediterraneanaffairs.com/libya-egypt-changing-dynamics-migration-routes/>.

⁷ International Organization for Migration, *Middle East and North Africa, in ASSISTED VOLUNTARY RETURN AND REINTEGRATION: 2017 HIGHLIGHTS* 24 (2018).

considerable number of asylum-seekers, refugees, and failed asylum-seekers remain indefinitely in Egypt.⁸ This situation is not unique to Egypt; Crisp notes that the vast majority of refugees remain permanently unintegrated in a state neighboring their country of nationality.⁹ UNHCR acknowledges that each year it resettles less than 1% of refugees and that a statistically insignificant number repatriate.¹⁰ The difficult situation in countries of nationality and the reluctance of countries in the global North to resettle larger numbers of refugees has resulted in nearly half the world's refugee population residing in their country of asylum for over five years.¹¹ Similarly, the International Organization for Migration's Assisted Voluntary Return and Reintegration program, which assists international migrants in returning to their country of nationality, has repatriated less than 2,500 migrants from Egypt.¹² In light of the likelihood of extended stays, it is helpful for asylum-seekers, refugees, and failed asylum-seekers, Egyptian law and policymakers, and international organizations and non-governmental organizations working with the migrant community to better understand the legal entitlements of refugees in Egypt.

This Report (i) maps the legal entitlements of asylum-seekers, refugees, and failed asylum-seekers in Egypt under international, regional, bilateral, and domestic laws, (ii) examines whether such entitlements are in fact accessible, and (iii) makes recommendations for possible future directions. This process is not straightforward because the interplay between legal regimes creates bundles of entitlements that differ depending on one's immigration status and nationality. Even when laws clearly address the entitlements of asylum-seekers, refugees, and failed asylum-seekers, there is often a gap between entitlements on paper and communities' ability to access these entitlements. This Report adopts a rights-based approach, assessing asylum-seekers', refugees', and failed asylum-seekers' lived experiences against the backdrop of the legal mapping, and making recommendations to promote humane and dignified living conditions. The outcomes of the Report allow the Egyptian government, international organizations, donor states, and nongovernmental and community-based organizations to direct their limited resources to the maximum benefit of refugees, asylum-seekers, and failed

⁸ This was a recurring point during focus group discussions with community members. Permanent settlement in Cairo was rarely the goal but often the reality.

⁹ Jeff Crisp, *No Solution in Sight: The Problem of Protracted Refugee Situations in Africa* 75 New Issues in Refugee Research 1, 36 (2003) at 3-5.

¹⁰ UN High Commissioner for Human Rights, *Protracted Refugee Situations: The Search for Practical Solutions*, in STATE OF THE WORLD'S REFUGEES 105, 197 (Oxford University Press 2009).

¹¹ Crisp, *supra* note 9, at 1.

¹² International Migration Organization, Assisted Voluntary Return and Repatriation (2018). Available at: <https://egypt.iom.int/en/assisted-voluntary-return-and-reintegration>.

asylum-seekers. The Report also clarifies the scope of legal entitlements so that refugee and migrant communities can better understand and advocate for their rights. Ultimately, greater knowledge of the entitlements possessed by refugees, asylum-seekers, and failed asylum-seekers enhances local integration and builds a more cohesive community in Egypt based on mutual understanding and respect.

1.2. Terminology

This Report assesses the entitlements owed to refugees, asylum-seekers, and failed asylum-seekers based on immigration status and nationality, and thus it is important to begin by explaining this categorization and terminology. The terms “entitlement” and “rights” are used interchangeably.

Asylum-Seeker

Asylum-seekers are individuals who are outside their country of nationality and seek the protection of another state.¹³ In Egypt, asylum-seekers register with UNHCR, and UNHCR conducts a Refugee Status Determination (RSD) to determine whether an individual is entitled to refugee status. Those with credible claims are given refugee status, while those whose claims UNHCR deems not credible are denied refugee status and expected to leave Egypt.¹⁴ This report uses “asylum-seeker” to encompass both individuals who are awaiting the result of their RSD and those intending to seek asylum and have not yet registered with UNHCR. The RSD process is supposed to be individualized and thus can be lengthy depending on the number of applicants.¹⁵

Refugee

This Report uses the term “refugee” to refer to individuals that UNHCR recognizes to have valid claims to refugee status under the *1951 Convention Relating to the Status of Refugees* (Refugee Convention) or the Organization of African Union’s *1969 Convention Governing Specific Aspects of Refugee Problems in Africa* (OAU Refugee Convention). The Refugee Convention defines a refugee as a 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 his

¹³ International Organization for Migration, *Key Migration Terms*, in INTERNATIONAL MIGRATION LAW SERIES (25 ed. 2011). Available at: <https://www.iom.int/key-migration-terms> [hereinafter, *Key Terms*].

¹⁴ Refugee, asylum-seekers, and failed asylum-seekers entitlements regarding the RSD process are discussed in Chapter 3.3.

¹⁵ See Chapter 3.3. on RSD process.

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁶

The OAU Refugee Convention adopts the same definition as the Refugee Convention but additionally includes

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹⁷

Both Conventions require an individualized RSD process and the opportunity to appeal negative decisions.¹⁸ “Refugee” is also used for individuals who UNHCR has recognized as refugees without conducting an individualized RSD because of the particularly grave situation in their country of nationality.¹⁹ In Egypt, this “*prima facie*” refugee status is granted to Syrians and Yemenis. International refugee law and international human rights law establish specific entitlements for asylum-seekers and individuals recognized as refugees. Many experts critique the refugee definition as too narrow to adequately address the roots of contemporary displacement.²⁰ While this Report acknowledges the importance of this critique, it utilizes the strict legal definition so as to determine existing legal entitlements.

Failed Asylum-Seeker

Failed asylum-seekers are individuals who received a negative RSD and have exhausted their appeals process. Within the failed asylum-seeker population, legal entitlements depend on whether an individual is a regular or irregular migrant. Failed asylum-seekers are regular if they have some other legal basis to remain in Egypt, such as work and residency permissions or a student visa. A failed asylum-seeker who has no other legal basis to remain in Egypt is

¹⁶ Convention Relating to the Status of Refugees, *art. 1*, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

¹⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa, *art. 1*, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974). [Hereinafter, *OAU Refugee Convention*]. Egypt ratified the Convention on 17 November 1980.

¹⁸ Entitlements related to the RSD process and the definitions of “refugee” used in Egypt are further discussed in Chapter 3.2 & 3.3.

¹⁹ This applies to Syrian and Yemeni nationals. RSDs with these communities occur for resettlement purposes only.

²⁰ For discussion on the refugee definition’s potential limitations see, Isabelle Gunning, *Expanding the International Definition of Refugee: A Multicultural View* 13 Fordham Int’l. L. J. 34, 85 (1989); James Hathaway, *Why Refugee Law Still Matters* 8 Melb. J. Int’l. L. 3, 80 (2007) & William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law* 30 Berkeley J. Int’l. L. 94, 160 (2012).

expected to leave once they are notified that their asylum application has been unsuccessful.²¹ Irregular migrants have fewer legal entitlements than regular migrants. In addition to asylum-seekers and refugees, this Report also examines the rights owed to those who sought and failed to receive asylum and remain regularly or irregularly in Egypt.

Country of Asylum

The country of asylum, or the host country, is the state in which an asylum-seeker requests protection. As this Report addresses the entitlements owed to non-nationals in Egypt, this term primarily refers to Egypt. Experts sometimes differentiate between the first country of asylum, country of transit, and countries of destination. Some countries in North America and Europe require asylum-seekers apply for asylum in the first safe country they enter,²² and may deport or refuse refugee status to asylum-seekers that failed to apply in the first safe country they entered.²³ This approach is controversial and its legality is subject to debate.²⁴ UNHCR defines a country of transit as “the country [or countries] that asylum-seekers, refugees, or migrants move through (legally or irregularly) during their journey to a country of destination or back to their country of origin.”²⁵ The country of destination is the asylum-seeker’s actual or intended final destination. Many refugees, asylum-seekers, and failed asylum-seekers consider Egypt a country of transit as opposed to a country of destination.²⁶ Their ultimate goal could be resettlement abroad, eventual return to their country of nationality, or migration to a third state. This Report considers those for whom Egypt is a “country of asylum,” irrespective of whether they intend to remain or eventually pursue further migration.

Country of Nationality

This Report uses “country of nationality” for the state where a refugee, asylum-seeker, or failed asylum-seeker is a national. During the RSD process, UNHCR assesses whether the asylum-seeker has a well-founded fear of persecution in their country of nationality and if they can

²¹ *Key Terms*, *supra* note 13.

²² Morten Kjaerum, *The Concept of Country of First Asylum* 4 IJRL 514, 530 (1992) at 515.

²³ Kjaerum, *supra* note 22, at 518.

²⁴ See, NUALA MOLE, *ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3rd ed. 2003); Sarah Collins, *Visa Requirements, Carrier Sanctions, ‘Safe Third Countries’ and ‘Readmission:’ The Development of an Asylum ‘Buffer Zone’ in Europe*, 21 Transactions of the Institute of British Geographers 76, 90 (1996) & Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 Int’l. J. Refugee L. 568, 677 (2003).

²⁵ UN High Commissioner, *Glossary*, in 10-POINT ACTION PLAN FOR 2016 (UNHCR, 2016) at 2. Available at: <https://www.refworld.org/docid/59e99eb94.html>. [Hereinafter, *UNHCR Glossary*].

²⁶ *UNHCR Glossary*, *supra* note 25, at 2.

avail themselves of this state's protection.²⁷ The International Organization for Migration uses "country of origin" interchangeably with "country of nationality" for "the country that is a source of migratory flows (regular or irregular)."²⁸ This Report draws a distinction between the two terms because an asylum-seeker's country of origin does not necessarily provide their nationality. This would be the case for stateless individuals, who fall outside the scope of this Report. It may also be true for those experiencing intergenerational displacement. In the case of Palestinians displaced for many years into Syria, for example, it may be necessary to differentiate between Syria as the country of origin (from where they were displaced) and Palestine as their country of nationality. For Palestinians, the situation is further complicated by the occupied status of Palestinian territories and the differing mandates of UNHCR and the United Nations Relief and Work Agency for Palestinian Refugees in the Near East (UNRWA).²⁹

1.3. Structure

Chapter 2 presents the Report's methodology. Chapter 2.1 begins by introducing the overall Report structure and the American University in Cairo's Institutional Review Board process. Chapter 2.2 then explains the desk research conducted to map legal entitlements under international, regional, bilateral, and domestic law, and Chapter 2.3 addresses interviews conducted with policymakers and lawyers. Chapter 2.4 outlines the Report's focus group discussions (FGDs) with refugees, asylum-seekers, and failed asylum-seekers from 10 different nationalities as well as interviews with service providers. The fieldwork allowed the Report to assess these communities' ability to access their legal entitlements. Finally, Chapter 2.5 addresses limitations and ethical considerations that impacted the Report's findings.

Chapter 3 discusses the right to leave any country and seek asylum, which serves as the basis for non-nationals to seek Egypt's protection. Chapter 3.2 explains the different refugee definitions UNHCR uses to determine if an asylum-seeker qualifies for refugee status. Chapter 3.3 addresses asylum-seekers' procedural entitlements related to the RSD process. 3.4

²⁷ *Refugee Convention*, *supra* note 16, at Article 1.

²⁸ *Key Terms*, *supra* note 13.

²⁹ The legal status of Palestinian refugees in Egypt and the role of UNHCR and UNRWA are further discussed in Chapter 3.3. For a general overview, *See*, Oroub El Abed, *Palestinian Refugees of Egypt: What Exit Options Are Left for Them* 22 *Refuge* 15, 30 (2005) & Susan Akram, *Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution* 31 *J. Palest. St.* 36, 51 (2002).

summarizes the content of refugee protection and explains the applicability of international conventions signed and ratified by Egypt.

The remainder of the Report is divided into eight chapters addressing specific entitlements: Family Unity and Reunification (Chapter 4), Employment (Chapter 5), Education (Chapter 6), Health (Chapter 7), Housing (Chapter 8), Detention and Expulsion (Chapter 9), Access to Courts (Chapter 10), and Documentation (Chapter 11). Each chapter begins with an analysis of legal entitlements under international law before moving to regional, bilateral, and domestic law. The legal analysis investigates how entitlements differ based on nationality or immigration status. The desk research is supplemented by information gathered from interviews with policymakers and legal experts. The second section of each chapter assesses communities' ability to practically access the entitlements outlined in the first section. It integrates the FGDs' findings within the larger legal framework and points to implementation gaps. This section also draws on the existing literature on human rights in Egypt as well as interviews with service providers to depict the legal terrain. The final section of each chapter offers policy recommendations to enhance the ability of refugees, asylum-seekers, and failed asylum-seekers to access their legal entitlements.

CHAPTER 2: METHODOLOGY

2.1. Introduction

This Report results from a 21-month research period from May 2018 to January 2020. The first phase was desk research and involved identifying, mapping, and analyzing the entitlements owed to refugees, asylum-seekers, and failed asylum-seekers under international, regional, bilateral, and domestic law; and identifying nationalities that may have differing domestic entitlements. The second phase focused on interviews with policymakers and lawyers to fill gaps in the legal mapping that remained after desk research. The third stage of the project involved 33 focus group discussions (FGDs) with community members from nine nationalities of concern, as well as interviews with international and non-governmental organizations working with migrant communities in order to assess community abilities to access their entitlements and identify potential deviations between existing legal entitlements and accessibility. The Report's final section analyzes these deviations and provides policy-recommendations for improvement.

2.2. Ethical Research Procedure

All research was undertaken in accordance with the American University in Cairo's (AUC) Institutional Review Board's (IRB) policies and procedures, which comply with the United States of America's Department of Health and Human Service's regulations for the protection of human subjects involved in research. Researchers utilized the following procedures:

- All researchers completed AUC IRB training for Social and Behavioral Research in the Humanities.
- Before beginning research with human subjects, researchers submitted a research plan with strategies for minimizing research participant risk, which the IRB approved on November 1, 2018. This approval was good one calendar year. A second extension was submitted in November 2019, and was once again approved for one calendar year.
- Prior to beginning research with human subjects, researchers submitted copies of the oral and written informed consent form and draft questions for policymakers, focus groups and service providers. Consent forms contained an explanation of the project's focus; description of potential risk to participants; description of the project's benefits to participants; researchers' contacts; and a statement that participation was voluntary. Consent forms were prepared in English and Arabic and received IRB approval.

- Policymakers, legal experts, and service providers had the option of giving written or oral consent. They also could choose whether they wanted to waive their anonymity. Consent forms are stored in a locked cabinet accessible only by the research team.
- Focus group participants gave oral consent prior to the start of focus group discussion. The identities of all focus groups participants were kept anonymous. Written records of the focus group discussions are stored in a locked cabinet accessible only by the research team. Focus group discussions were held in locations that community members indicated to be safe and comfortable.
- Field researchers underwent a comprehensive training program prior to conducting focus group discussions. This included instructions on how to moderate the sessions, how to take notes, and on the ethical standards to be observed while conducting field work. All field researchers signed a confidentiality agreement to further protect the anonymity of focus group participants. The field researchers assisted with gathering participants from their local communities and choosing locations that were safe and comfortable. Field researchers worked under the supervision of the core research team, who provided assistance in the event of any ethical concerns.
- All project records will be retained for three years after the completion of the research pursuant to IRB policy.

2.3. Desk Research

The Report begins by mapping the legal entitlements of refugees, asylum-seekers, and failed asylum-seekers under international, regional, bilateral, and domestic law. Researchers conducted exploratory interviews with refugee community leaders and service providers to discern their central concerns and ensure that the Report focuses on the most pressing needs. On this basis, the following entitlements were selected: right to seek asylum; right to family unity and reunification; right to employment; right to education; right to health; right to housing; rights during detention and expulsion; right to access courts; and right to documentation.

The second stage of the desk research mapped these entitlements. The research team began by conducting traditional “black-letter” legal research¹ on all relevant international laws (including multilateral, regional, and bilateral laws) and domestic laws. Conducting legal

¹ MIKE MCCONVILLE & WING HONG CHUI, RESEARCH METHODS FOR LAW, 1 (2007).

research across these four different levels illustrates the interplay between different legal regimes. Particular emphasis was placed on assessing differentiation on the basis of immigration status and nationality. With regards to immigration status, the Report examines the entitlements of refugees, asylum-seekers, failed asylum-seekers that remain in Egypt regularly, and failed asylum-seekers that remain in Egypt irregularly.² The Report selected 10 nationalities due to their sizeable communities in Egypt and analyzes whether they are accorded additional entitlements under regional, bilateral, and Egyptian domestic law. The Report examines the entitlements owed to migrants of the following nationalities: Ethiopian, Eritrean, Iraqi, Libyan, Palestinian, Somali, South Sudanese, Sudanese, Syrian, and Yemeni.

To determine entitlements under international, regional, and bilateral frameworks, this Report examined international treaties, international customs, and general principles of international law. These are sources of international law identified in the *Statute of the International Court of Justice* Article 38.³ Judicial decisions and the writings of renowned scholars are subsidiary sources, aiding in the identification and interpretation of primary sources.⁴ This Report uses international customs and general principles when applicable, but draws most heavily on international treaties as the clearest expression of state obligation when it comes to refugee entitlements.⁵ Treaty interpretation is governed by the *Vienna Convention on the Law of Treaties* (VCLT),⁶ which requires that treaties are primarily interpreted according to the ordinary meaning of the terms used (literal interpretation) in light of context (contextual

² These terms are defined in Chapter 1.2.

³ Statute of the International Court of Justice, Article 38(1), available at <https://www.icj-cij.org/en/statute> [Hereinafter, *ICJ Statute*].

⁴ *ICJ Statute*, *supra* note 3, Article 38(1).

⁵ HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW*, 7 (2014)

⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980). [Hereinafter, *VCLT*]. Article 31 reads

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

(b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *There shall be taken into account, together with the context:*

(a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

(c) *any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties so intended*

interpretation) and the treaty's object and purpose (teleological interpretation).⁷ In addition to interpretation of treaty texts, this Report considers treaty preambles, annexes, reservations, and any related agreements, as well as subsequent agreements and practices concerning the application of the treaties.⁸ In situations where a treaty's literal, contextual, and teleological interpretation remained unclear, recourse was made to the treaty's preparatory work (*travaux préparatoires*).⁹ The preparatory works are "all the documents, such as the memoranda, minutes of the conferences, and the drafts of the treaty under negotiation."¹⁰ This report also draws from the General Comments produced by Treaty Committees,¹¹ jurisprudence of international, regional, and domestic courts,¹² and leading scholarly works to supplement treaty interpretation.¹³

The first step of mapping legal entitlements was identifying the international conventions creating obligations for Egypt. The VCLT explains that states can consent to be bound by a treaty through signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.¹⁴ The most common form of consent is through ratification. In this case, State Parties are bound by the treaty after they have signed and ratified it,¹⁵ and the treaty has entered into force as provided in the text.¹⁶ Treaty obligations can be modified by states' reservations, which must be formulated at the time of ratification.¹⁷ This Report identifies and analyzes all international conventions Egypt has signed and ratified. Egypt's Constitution vests international treaties with the force of law after their ratification and

⁷ VCLT, *supra* note 6, Article 31(1).

⁸ *Id.* at Article 31(2)-(3).

⁹ *Id.* at Article 32

¹⁰ LORD MCNAIR, THE LAW OF TREATIES CH. XXIII, 411-23 (1961), at 411.

¹¹ The International Court of Justice explains the weight it gives to Treaty Committees as follows: "The Court observes that it is no way obliged, in the exercise of its judicial function, to model its own interpretation of the Covenant [*International Covenant on Civil and Political Rights*] on that of the Committee [*Human Rights Committee*], it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty." [Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo) Merits, Judgment, I.C.J. Reports 639 (2010) at para. 66.

¹² ICJ Statute, *supra* note 3, Article 38.

¹³ *Id.* at Article 38.

¹⁴ VCLT, *supra* note 6, Article 11.

¹⁵ *Id.* at Article 14.

¹⁶ *Id.* at Article 24.

¹⁷ *Id.* at Article 19. States may formulate reservations prior to ratification except in the following circumstances:

- a) The reservation is prohibited by the treaty;
- b) The treaty provides that only specified reservations, which do not include the reservation question, may be made;
- c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

publication in the official gazette.¹⁸ If the state signs but does not ratify a treaty, or the treaty has not yet entered into force, State Parties' obligations differ. In such cases, VCLT obliges states to refrain from acts that would defeat the object and purpose of the treaty,¹⁹ but does not require full adherence. This Report also analyzes entitlements codified regional and bilateral agreements, as well as relevant Egyptian domestic law. Egyptian legislation is mostly accessible through online databases Tashre'at and Eastlaws but is published only in Arabic. The Report made use of unofficial translations produced by the Constitution Project, National Council for Motherhood and Childhood, United Nations High Commissioner for Refugees, and Middle East Library for Economic Services, in addition to translations made by the research team. English versions of all domestic legislation used in the Report are included as an Annex, with the translator specified.

2.4. Interviews with Law and Policymakers

After the desk research, gaps in the legal mapping were filled wherever possible through interviews with Egyptian law and policymakers. Interviewees had the option of remaining anonymous and could choose between providing written or oral consent. Interviews were conducted with the Ministry of Foreign Affairs, Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Investment, and the National Council for Childhood and Motherhood. The Report also reflects the input of numerous practitioners in the international human rights and migration fields. Researchers interviewed lawyers at the Egyptian Foundation for Refugee Rights, United Lawyers, or practicing on their own. The Report also conducted interviews with migration scholars and practitioners at the American University in Cairo, International Organization for Migration, League of Arab States, and United Nation

¹⁸ Constitution of the Arab Republic of Egypt, 18 January 2014. Article 151 applies to all international conventions and reads:

The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution.

Article 93 specifically addresses incorporation of international human rights treaties into domestic law and reads:

The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions.

The text creates procedural differences for when international human rights law treaties become domestic law as opposed to other international treaties. See, Ali Moussa, *The Judicial Resolution of Tensions between Human Rights Treaties and Shari'a Law Reservations under the 2014 Constitution*, 2018, 11-13,

<http://dar.aucegypt.edu/bitstream/handle/10526/5423/LLM%20Thesis%20Ali%20Moussa.pdf?sequence=3>

¹⁹ VCLT, *supra* note 6, 18.

High Commissioner for Refugees. All of those interviewed were considered experts in their fields of study and work, and were analyzed as such.

2.5. Mapping Implementation of Laws

2.5.1. Focus Groups with Refugee Communities

The third stage of research involved hosting 33 focus group discussions (FGDs) with refugees, asylum-seekers, and failed asylum-seekers from nine out of the ten nationalities of concern. Due to the situation in Egypt, it was not possible to conduct FGDs with the Libyan community at the time of publishing this Report. FGDs were chosen as the mode of research as a qualitative approach to obtain information on a social issue, in this case entitlements, from chosen groups of individuals to obtain a more in-depth understanding of the issue, rather than to statistically gain a representative sample from the broader refugee, asylum-seeker and failed asylum-seeker populations.²⁰ FGDs were the best option for this first phase of the project as they allow for multiple experiences and insights from participants, with the ability to compare and contrast both in the sessions themselves, and during the analysis phase. This would not have been possible with questionnaires, which are limiting in their response, and in depth-interviews, which would have required more time to reach the same number of participants. In addition, the structure of the FGDs allowed for the moderator and note taker to take part on the sidelines of a larger discussion, rather than to lead and steer the conversation, which a researcher may do in a one-on-one, in-depth interview. The FGDs were conducted in places of comfort both to the moderators and note takers, as well as the participants. FGDs lasted two hours in length and went over 38 questions chosen by the research team and approved by the IRB of AUC. These questions covered the entitlements presented in the Report, and included key demographic questions. In these two hours, FGD participants share their lived experiences and the challenges they face in accessing their legal entitlements. This allowed the research team to gain an overview of the communities' experiences, determine the accessibility of legal entitlements in general, and identify the main gaps in implementation. It also allowed the Report to evaluate to what extent individuals' immigration status and/or nationality impacted their ability to access their legal entitlements.

²⁰ CHRIS HAYWARD, LYN SIMPSON, & LEANNE WOOD, STILL LEFT OUT IN THE COLD: PROBLEMATISING PARTICIPATORY RESEARCH AND DEVELOPMENT 44, 95–108 (2004).

For the next phase of the project, the research team came to the conclusion that greater in-depth knowledge on the issues communities have when accessing their entitlements would be useful. Understanding the implementation issues in more detail will increase the quality and effectiveness of the trainings, workshops and community events to be held during the second and third phase of the project, which will focus on awareness-raising and capacity-building. Several one-on-one interviews with a range of participants from the nine different communities interviewed for the initial Report findings will be conducted by the Project Leader, along with the moderators and note takers of the FGDs, who will act as interpreters when necessary. In-depth, ethnographic interviews are used as a mode of qualitative research when the topic at hand is complicated and complex.²¹ Utilizing a social science researcher who has the time to observe and interact with the participants in their own environments is crucial to understanding whatever topic is being researched.²² Therefore, such interviews allow for a deeper understanding of the topic at hand, namely, the communities intimate experience with entitlements in Egypt that goes beyond a surface level of analyzing the gaps between law and practice. An in-depth qualitative report of the findings from the one-on-one interviews will be added to the initial Report as a supplement.

Identifying Communities of Concern

Nationalities of concern for this research are Ethiopian, Eritrean, Iraqi, Libyan, Palestinian, Somali, South Sudanese, Sudanese, Syrian, and Yemeni. These 10 communities have a long history of migration to Egypt and have established community networks in Cairo and Alexandria. According to the United Nation's High Commissioner for Refugees (UNHCR), Eritrean, Ethiopian, Somali, South Sudanese, Sudanese, and Syrians are the largest refugee and asylum-seeking populations in Egypt. UNHCR provides Syrian and Yemeni refugees with *prima facie* refugee status, while asylum-seekers from all other nationalities undergo individualized refugee status determinations. Until the late 1980s, Palestinians were Egypt's largest displaced population,²³ and their numbers continue to grow as displaced Palestinians flee widespread violence in Syria and Iraq. Palestinians are normally excluded from UNHCR's *Memorandum of Understanding with Egypt*, and thus face specific vulnerabilities.²⁴ The

²¹ MARGARET LECOMPTE, JEAN SCHENSUL, *DESIGNING AND CONDUCTING ETHNOGRAPHIC RESEARCH: AN INTRODUCTION* (2010).

²² *Id.*

²³ Oroub El Abed, *The Forgotten Palestinians: How Palestinian Refugees Survive in Egypt* 20 FMR 29, 31 (2004) at 29. Egypt initially accepted Palestinians fleeing the 1948, 1967, and 1973 wars with Israel.

²⁴ The legal status of Palestinian refugees in Egypt is discussed in Chapter 3.3.

number of Iraqis in Egypt has decreased over the last few years as the situation in Iraq has stabilized, but there remains a sizeable community. Egypt also witnessed an increase in the number of Yemeni and Libyan migrants following the military interventions into both countries.

Number of Refugee and Asylum-Seekers in Egypt

Nationality	Refugees and Asylum-Seekers ²⁵
Eritrean	16,341
Ethiopian	15,898
Iraq	6,731
Libya ²⁶	n/a
Palestine	70,000 ²⁷
Somalia	6,658
Sudan	43,003
South Sudan	16,137
Syria	132,473
Yemen	9,067

Source: UNHCR Egypt (2019)²⁸

Developing Research Design and Data Tools

After identifying communities of concern, the research team developed a focus group discussion guide for FGD moderators and note-takers. The guide included a short demographic survey and questions for participants about access to employment, education, healthcare, housing, documentation, access to justice, and the RSD process. The research team also designed a FGD note-taking template. Using this template, moderators provided researchers with an accurate record of FGDs. A fieldwork coordinator was hired from the refugee community to assist with the selection, training, and supervision of moderators and note-takers.

²⁵ UNHCR's statistics do not include failed asylum-seekers. Since Syrian and Yemeni nationals have *prima facie* status, there are no failed asylum-seekers. However, considerable numbers of failed asylum-seekers from Eritrea, Ethiopia, Iraq, Somalia, Sudan, and South Sudan are not included in this statistic.

²⁶ UNHCR does not have an official estimate of Libyan refugees and asylum-seekers, reflecting the relatively small number that approach UNHCR as asylum-seekers. A representative from the Psychosocial Services and Training Institute in Cairo confirmed that few Libyans formally seek asylum. However, Libyan scholars estimate that there are between 350,000 and 820,000 Libyan migrants living in Egypt, primarily in Alexandria and Marsa Matrouh [See, Amr Emam, *Libyans in Egypt Losing Hope of Returning Home*, Arab Weekly (2016), available at: <https://thearabweekly.com/libyans-egypt-losing-hope-returning-home>].

²⁷ This reflects the total number of Palestinians estimated to reside in Egypt as of the early 2000s. No subsequent research has been undertaken to determine current demographics. Thus, the statistic does not include recent waves of Palestinians who arrived in Egypt after fleeing Syria or Iraq. (Interview with Dr. Ayman Zohry, professor of Sociology at the American University in Cairo, May 2019)

²⁸ UN High Commissioner for Refugees, *Egypt Fact Sheet* (May 200), available at https://www.unhcr.org/eg/wp-content/uploads/sites/36/2019/06/UNHCR-Egypt_Fact-Sheet_May-2019.pdf

A total of 17 FGD moderators and note-takers were selected to act as gatekeepers to their communities, conduct FGDs, and provide a record of the results. They were hired because of their relationship with communities of concern for the Report and worked under the direct supervision of the lead researcher and field coordinator. All moderators received training prior to beginning their outreach and met regularly with project staff for feedback after each FGD. Their training introduced them to the focus group discussion guide and note-taking template, set expectations for their deliverables, and ensured FGDs were conducted consistently with the highest levels of scientific and ethical standards. The FGD moderators:

- Served as interlocutors between researchers and their communities. Those hired were trusted members of their community whose presence would ensure FGD participants were confident of their anonymity.
- Identified participants for the FGDs. Their support was essential for gathering FGD participants and guaranteeing that the fieldwork reflects the diverse refugee, asylum-seeker, and failed asylum-seeker voices present in each community.
- Conducted FGDs in their native language. As a result, participants could speak comfortably without need for interpretation or translation services. Focus groups were conducted in the following languages: Oromo, Arabic, Fur, Tigrinya, and Juba Arabic

Focus Groups' Composition

33 focus groups were conducted in Cairo between April 2019 and January 2020. Due to language barriers, each focus group consisted of participants from the same country of nationality. The research used the snowballing technique, with initial participants recommending family members and friends for subsequent FGDs. Each participant partook in only one focus group meeting. Participants included refugees, asylum-seekers, failed asylum-seekers who were regular migrants, and failed asylum-seekers who were irregular migrants. FGDs included male and female participants to ensure results included the input and experiences of both genders. In most cases, male and female participants attended the same FGDs, however the Syrian community preferred FGDs separated by gender.

All participants were over the age of 18, with individuals ranging from their early 20s to mid-60s. The standard time for an individual Focus Group Discussion was approximately two hours in length, allowing for critical discussion, but as not to tire the participants. While the

moderators asked specific questions chosen by the research team, prior training allowed them to hold discussions with participants based on their answers and interests, allowing for more in-depth and deeper conversations to be held among community members. This gave the field team more rich data from which to work with for the implementation sections of individual chapters. As previously noted, all FGDs were held in community centers where the participants felt safe and comfortable. This trust granted both the moderator and note taker, and, likewise, the research team to obtain crucial and sensitive data in an ethical manner.

2.5.2. Interviews with Service Providers

The research team conducted interviews with service providers working with refugees, asylum-seekers, and failed asylum-seekers. Interviews with service providers began after completion of the legal mapping and occurred concurrently with the FGDs. This phase included discussions with a broad range of international and intergovernmental organizations, nongovernmental organizations (NGO), community based organizations (CBOs), and faith-based organizations. Interviews with service providers allowed the research team to assess the forms of assistance provided and whether their services differed on the basis of nationality or immigration status. Service providers' input was essential because these organizations:

- Provided access to failed asylum-seekers whose cases had been closed by UNHCR. This ensured the research team representatively included failed asylum-seekers, the most vulnerable and hard to reach population, in its FGDs.
- Provided a safe location for conducting focus groups. Many failed asylum-seekers lacked the identification necessary to enter the university where the research team is located. Others felt unsafe traveling to unfamiliar areas. Thus, spaces that were already familiar served as locations for the FGDs.
- Provided services to refugees, asylum-seekers, and failed asylum-seekers that bridge the gap between existing legal entitlements and individuals' ability to practically access these entitlements. Often, it was these organizations, as opposed to the government, which allowed refugees, asylum-seekers, and failed asylum-seekers to access entitlements.

Researchers met with representatives of the following service provider organizations: Care International, Caritas, Fard Foundation, International Organization for Migration, Plan International, Psycho-Social Services and Training Institute in Cairo, Refuge Egypt, Save the Children, and St. Andrew's Refugee Services.

2.6. Challenges and Limitations

Four challenges were faced while conducting this research. First, Egypt does not have a complete and regularly updated database of domestic legislation and case law. As a result, an exhaustive survey of domestic laws and jurisprudence remains uncertain. Second, failed asylum-seekers may be staying in Egypt irregularly, and this made participation in FGDs riskier for them in comparison with other populations because they need to avoid visibility. To minimize risks, researchers ensured participant anonymity and recruited trusted gatekeepers from local communities. These gatekeepers recruited participants and held FGDs in locations that were safe. Third, the research was limited to Greater Cairo. The largest refugee, asylum-seeker, and failed asylum-seeker populations are based in Cairo, but there are sizeable established communities throughout Egypt. The communities outside of Cairo may have different experiences accessing their legal entitlements, which this Report could not discern due to financial and time constraints. Finally, similar constraints also limited the number of FGDs to only four with each nationality, and one for Palestinians due to the number residing in Egypt. There is significant ethnic, religious, tribal, economic and linguistic diversity within refugee, asylum-seeker, and failed asylum-seeker communities. This diversity impacts their ability to access their legal entitlements and thus more FGDs may have better ascertained their varied experiences.

CHAPTER 3: ASYLUM AND REFUGEE STATUS

3.1. Refugee Definition

3.1.1. Legal Instruments¹

- 1951 Convention Relating to the Status of Refugees²
- 1967 Protocol Relating to the Status of Refugees³
- Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa⁴

3.1.2. Refugee Definition

An individual becomes a refugee as soon as their situation meets the international law definition of refugee. The Refugee Status Determination (RSD) simply recognizes this fact, but the person was a refugee from the moment the requisite situation commenced.⁵ Egypt has delegated its RSDs to UNHCR, which conducts RSDs using the 1951 Refugee Convention and its 1967 Protocol, as well as the OAU Refugee Convention.⁶ In normal circumstances, RSD process must be undertaken through individual, case-by-case interviews, where each component of the stipulated definition is considered and checked meticulously. In cases of mass-influx, if circumstances in a specific county are readily apparent, *prima facie* refugee status may be given.⁷ Unlike an individual RSD, *prima facie* status is deployed only in certain group situations where it is impractical, impossible, or unnecessary to resort to individual interviews due to a large scale displacement.⁸ This section explains the 1951 Convention refugee definition, the OAU Convention refugee definition, Egypt's use of *prima facie* status, and the special case of Palestine.

¹ Full text of the following legal instruments can be found in Annex A.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ Protocol Relating to the Status of Refugees, (adopted on 16 December 1966, entered into force 4 October 1967) 189 U.N.T.S. 137 [hereinafter, *1967 Protocol*]. Egypt acceded to the Convention and its Protocol on 22 May 1981

⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974). [Hereinafter, *OAU Refugee Convention*]. Egypt ratified the Convention on 17 November 1980.

⁵ HATHAWAY, *infra* note 115, at 11.

⁶ See Chapter 1.2. on Terminology for a summary of the refugee definition under the different conventions.

⁷ GOODWIN-GILL & MCADAMS, *infra* note 91, at 341. See Chapter 1.2. on Terminology referring to the concept of *prima facie*.

⁸ UN High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status* HCR/GIP/15/11 (2015), at para. 2. [Hereinafter, *UNHCR Guidelines No. 11*].

When the Refugee Convention was drafted in 1951, its purpose was to address the significant number of persons displaced within Europe by World War II who were unable to be repatriated or resettled.⁹ As a result, the text of the Refugee Convention was limited to exclude those displaced after 1 January 1951. The Convention also left it up to individual State Parties to decide whether they would apply the Convention globally or to geographically confine its application to solely individuals displaced by events in Europe.¹⁰ Later, the 1967 Protocol removed the geographic and temporal constraints of the Refugee Convention¹¹ without altering the refugee definition in any other way. Therefore, states such as Egypt that ratified both the 1951 Refugee Convention and its 1967 Protocols, use Article 1(b) of the Refugee Convention, which defines a refugee as an individual who

... [o]wing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²

In order to qualify for refugee status, an individual's circumstances must fulfill all elements of Article 1(b)'s definition. First, that individual must be outside their country of nationality.¹³ An individual is not required to have fled their country for the purpose of seeking asylum or as a result of persecution. International refugee law recognizes that individuals may leave their country for a variety of reasons and later develop a well-founded fear of persecution, a situation known as refugee *sur place*.¹⁴ Therefore, migrants who initially enter Egypt for a purpose other than seeking asylum may still qualify as refugees under the 1951 Refugee Convention if the situation in their country of nationality changes.

The second element of the refugee definition is that the individual has a "well-founded fear." Assessing fear, an unquantifiable and subjective emotional response, is challenging. Thus, UNHCR guidelines advise the presence of both a subjective fear and an objective assessment

⁹ HATHAWAY, *supra* note 115, at 91.

¹⁰ *Id.* at 97.

¹¹ 1967 Protocol, *supra* note 3, at Article 1.

¹² Refugee Convention, *supra* note 2, at Article 1.

¹³ UN HIGH COMMISSIONER FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES HCR/IP/4/ENG/REV. 3 (2011) at para. 88. [Hereinafter, UNHCR Handbook]. The Handbook states that "[i]t is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule."

¹⁴ UNHCR Handbook, *supra* note 13, at para. 95.

of the fear.¹⁵ The fear of persecution need not be *probable*; it is sufficient to establish that there is a *possibility* of persecution.¹⁶ The Refugee Convention considers the risks of future harm in the particular individual's circumstance.¹⁷ It is therefore unnecessary for an individual to prove past suffering, as long as the threat of future harm is well-founded. Some states increasingly deny the well-foundedness of claims if asylum-seekers happened to transit through a safe third country where they could have sought asylum but chose not to.

The third element of the refugee definition is that the individual is fleeing persecution. As with "well-founded fear," there is no international consensus on the definition of "persecution". Threats against one's life or freedom, threat of torture, violation of the prohibition on cruel, inhuman, or degrading treatment, and sustained discrimination are examples of actions that amount to persecution.¹⁸ The Refugee Convention is forward looking and assesses the possibility of future persecution. An asylum-seeker does not need to have suffered persecution if they can prove that others sharing their same attributes [race, religion, and so on] have experienced persecution.¹⁹

The fourth element is that the individual must demonstrate that said persecution occurred on the grounds of race, nationality, religion, membership of a particular social group, or political opinion. The Refugee Convention declares that individuals facing such harm are in need of special protection. Conversely, individuals whose situation results from generalized violence, general human rights abuses, famine, or other forms of harm do not fall within the scope of the Convention.²⁰

The final element of the refugee definition is that the individual's country of nationality is unable or unwilling to provide protection from the well-founded fear of persecution. A state may be unwilling to protect the individual because the state is itself the persecutory agent, because it condones the persecution, or because it lacks the capacity to prevent the persecution.²¹ Traditionally, RSDs assessed whether domestic machinery for redress existed in

¹⁵ *Id.* at paras 38 and 95.

¹⁶ Mark Gibney, *A "Well-Founded" Fear of Persecution* 10 Human Rights Quarterly 109, 121 (1988) at 110.

¹⁷ James Hathaway, *Refugees and Asylum-Seekers in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW* 177, 204 (B. Opeskin, R. Perruchoud, & J. Redpath-Cross 1 ed. 2012) at 186.

¹⁸ GOODWIN-GILL & MCADAMS, *supra* note 91.

¹⁹ UNHCR Handbook, *supra* note 13, at para. 43.

²⁰ HATHAWAY, *supra* note 115, at 188.

²¹ UNHCR Handbook, *supra* note 13, at para. 98 & 100.

the country of nationality, but today there is consensus that RSDs have to focus on the realities of whether an individual can actually access such redress in practice.²²

In addition to fulfilling the aforementioned criteria, an asylum-seeker must not fall under the Refugee Convention's exclusion clause.²³ The exclusion clause recognizes that states have the sovereign right to withhold refugee status from those they credibly believe have committed grave crimes,²⁴ and "to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable."²⁵ The Convention excludes individuals who:

- Have committed a crime against peace, a war crime, or a crime against humanity
- Have committed a serious non-political crime outside the country of refuge prior to admission to the country
- Have been guilty of acts contrary to the purposes and principles of the United Nations

The list is exhaustive, and there is a high burden of proof needed in order to exclude an individual from refugee status.²⁶ "Crimes against peace", "war crimes", and "crimes against humanity," are all defined with reference to international criminal law,²⁷ and thus have a clear legal content. "Acts contrary to the purposes and principles of the United Nations" is a broad term that is applicable in only the most serious of cases, and therefore employed infrequently.²⁸

²² Hathaway, *supra* note 17, at 187.

²³ *Refugee Convention*, *supra* note 2, at Article 1(F), reading

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) *He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*

(b) *He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

(c) *He has been guilty of acts contrary to the purposes and principles of the United Nations.*

²⁴ Tarek Badawy, *The Protection of Refugees between Obligations under the United Nations Charter and Specific Treaty Obligations: The Case of Egypt*, 16 Af. Y.B. Int'l. & Comp. L. 151, 196 (2010), at 156.

²⁵ UN High Commissioner for Refugees, *GUIDELINES ON INTERNATIONAL PROTECTION: Application of the Exclusion Clause: Article 1F of the 1951 Convention Relating to the Status of Refugees* HCR/GIP/03/05 (2003), at para. 2. [Hereinafter, *UNHCR Exclusion Guidelines*].

²⁶ Geoff Gilbert, *Current Issues in the Application of the Exclusion Clause*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 425, 478 (E. Feller, V. Turk, & F. Nicholson, eds. 2002), at 457. [Gilbert states that the standard of proof should be "near certainty" to invoke the exclusion clause.]

²⁷ The terms are defined by the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, four 1949 *Geneva Conventions for the Protection of Victims of War* and the two 1977 *Additional Protocols*, the Rome Statute of the International Criminal Court, Statute of the International Criminal Tribunal for Rwanda, Statute of the International Criminal Tribunal for the Former Yugoslavia, and the 1945 Charter of the International Military Tribunal. [*UNHCR Exclusion Guidelines*, *supra* note 25, at para. 10].

²⁸ Gilbert, *supra* note 26, at 447. [He recommends Article 1(F)c only be invoked for acts committed by a person high ranking in a state's government or a rebel movement that controls territory within a state.]

“Serious non-political crime” raises the most interpretive questions. UNHCR assesses whether an act is a serious non-political crime by examining harm caused by the act, whether most jurisdictions consider the act a grave crime, circumstances surrounding the crime, and proportionality of the act to the intended outcome (if applicable).²⁹ In most situations, “terrorist” acts are considered serious, non-political crimes for the purpose of exclusion from the Convention’s protection, regardless of the individual’s political or ideological intentions.³⁰ An individual excluded from the Refugee Convention’s protection would be deprived of the right to remain in the country of asylum (unless they had another form of visa or permission) and be required to return to their country of nationality.

Recognized refugees are entitled to the durable solutions outlined in the Refugee Convention: voluntary repatriation, resettlement in a third country, or local integration.³¹ The Convention’s drafters premised it on the refugee’s agency to choose their own solution, although in reality this is seldom the case.³² UNHCR has stated that less than 5% of refugees and those in refugee-like situations voluntarily repatriate each year,³³ and less than 1% are ultimately resettled in a third country.³⁴ Local integration is considered as “creating the circumstances in which the local population of the country of asylum and the refugees can co-exist, participating in the social and economic life of the country with no bigger friction than already exists in the country.”³⁵ In Egypt, most refugees do not view local integration as potential durable solution. They do not have the opportunity to fully participate in social and economic life,³⁶ and feel alienated or marginalized by their Egyptian neighbors. Most do not intend to remain in Egypt,³⁷ instead viewing their residence here as a temporary situation before eventual further migration, resettlement or repatriation.

²⁹ *UNHCR Exclusion Guidelines*, *supra* note 25, at para. 14-16.

³⁰ *See id.* at para. 15 &

³¹ UN General Assembly, *The Statute of the Office of the United Nations High Commissioner for Refugees* Resolution 428(v) 14 December 1950 at Article 1.

³² Hathaway, *supra* note 17, at 188.

³³ UN High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015* 1, 66 (2016). Resettlement occurs as the discretion of third countries. Refugees do not have a legal entitlement to resettlement.

³⁴ UN High Commissioner for Refugees, *Protracted Refugee Situations: The Search for Practical Solutions in STATE OF THE WORLD’S REFUGEES* 105, 197 (Oxford University Press 2016).

³⁵ BARBARA HARRELL-BOND, *IMPOSING AID: EMERGENCY ASSISTANCE TO REFUGEES* 7 (1 ed. 1986).

³⁶ The Chapters 5-8 discuss refugees’ limited access to Employment (Chapter 5), Education (Chapter 6), Healthcare (Chapter 7), and Housing (Chapter 8).

³⁷ *See*, Mulki Al-Sharmani, *Refugee Migration to Egypt: Settlement of Transit in TRANSIT MIGRATION IN EUROPE* 55-77 (F. Duvell, I. Molodikova & M. Collyer eds. 2014) & Shashikala Perera, *Visions of Life: Resettlement Expectations of Refugees in Cairo*, 2018. Available at:

<http://dar.aucegypt.edu/bitstream/handle/10526/5494/Thesis%20Shashikala%20Perera%2009%2009%202018.pdf?sequence=1>.

The OAU Refugee Convention augments the Refugee Convention's definition. Article 1(a) mirrors the definition provided in the Refugee Convention and recognizes refugees as persons facing a well-founded fear of persecution on the grounds of race, nationality, religion, membership in a particular social group, or political opinion. In addition to this, OAU Refugee Convention Article 1(b) reads

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.³⁸

Hence, unlike the 1951 Convention, the OAU Refugee Convention provide refugee status to individuals fleeing generalized violence or other serious threats to public order.³⁹

Scholarly work addresses the drafting history of Article I(b) and attempts to define the terms not used in the Refugee Convention. "Aggression" and "occupation" are defined with reference to international criminal law but remain undefined in international refugee law.⁴⁰ "Foreign domination" and "events seriously disturbing public order" are more open-ended because they lack an agreed upon legal definition. "Foreign domination" could encompass colonialism and neocolonialism in the form of economic or political domination by foreign governments and international organizations.⁴¹ The scope of "events seriously disturbing public order" is even more contested because it hinges on a situational analysis of a state's relationship with its nationals.⁴² It could include transnational or domestic unrest, provided it is severe enough.⁴³ There is also debate about whether disturbance to the public order covers environmental events, such as drought or famine.⁴⁴

³⁸ *OAU Refugee Convention*, *supra* note 4, at Article 1.

³⁹ UNHCR Handbook, *supra* note 13, at para. 164.

⁴⁰ SHARPE, *supra* note 162, at 43-45. [She adopts the African Union's Non-aggression and Common Defense Pact's definition of aggression as "The use intentionally or knowingly of armed force or any hostile act by a State a group of States or by any foreign or external agent against the sovereignty, political independence, territorial integrity and human security of the population." (Adopted on 31 January 2005; entered into force 18 December 2009). Sharpe uses the Hague Convention (IV)'s definition of occupation: occupied land is that which "is actually placed under the control of a hostile army." (*Hague Convention (IV) Respecting the Law and Customs of War on Land and Its Annex: Regulations Concerning the Law and Customs of War on Land*, entered into force 18 October 1907, 187 CTS 227).]

⁴¹ SHARPE, *supra* note 162, at 46 & Alice Edwards, *Refugee Status Determination in Africa* 14 African J. Int'l. & Comp. L. 204, 233 (2006) at 216.

⁴² Macah Rankin, *Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Convention Thirty Years On* 21 S. Afr. J. Hum. Rts. 406 (2005) at 423.

⁴³ SHARPE, *supra* note 162, at 46.

⁴⁴ See, Edwards, *supra* note 41, at 216; JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 19 (1991) [both arguing environmental disturbances could fall within the scope of OAU Refugee Convention Article I(b)];

Like the Refugee Convention, the OAU Refugee Convention outlines situations in which an individual may be excluded from the Convention's protection because of past behavior.⁴⁵

Exclusion can occur if an individual:

- Has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- Has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- Has been guilty of acts contrary to the purposes and principles of the Organisation of African Unity;
- Has been guilty of acts contrary to the purposes and principles of the United Nations;

As with the Refugee Convention, a high burden of proof is required to exclude someone under the OAU Refugee Convention Article I(5).⁴⁶

In the early 2000s, UNHCR Egypt began to consider claims for refugee status using the OAU Refugee Convention alongside the 1951 Refugee Convention. The frequency with which UNHCR recognizes refugee status only under the OAU Refugee Convention is unclear. The Euro-Mediterranean Human Rights Network found that the use of the OAU Refugee Convention drastically increased the number of positive RSDs.⁴⁷ However, interviews with former UNHCR employees indicated that the OAU Refugee Convention is rarely the only basis for a positive RSD.⁴⁸ UNHCR's use of the OAU Refugee Convention, even if it increases the number of positive RSDs, raises two challenges for refugees. First, countries that resettle refugees from Egypt, namely Australia, Canada, and the US, are not party to the OAU Refugee

SHARPE, *supra* note 162, at 4649-51 & Tamara Wood, *Protection and Disasters in the Horn of Africa: Norms and Practices for Addressing Cross-Border Displacement in Disaster Contexts* Nansen Initiative Technical Paper 7, 52 (2015) [both argue that the OAU Refugee Convention requires the root of displacement be man-made].

⁴⁵ OAU Refugee Convention, *supra* note 84, at Article I.

⁴⁶ SHARPE, *supra* note 162, at & UNHCR Exclusion Guidelines, *supra* note 25, at para. 1

⁴⁷ Leila Hilal & Shahira Samy, *Asylum and Migration Country Fact Sheet: Egypt*, Euro-Mediterranean Human Rights Network 1, 17 (2017) at 6. They found that positive RSDs increased by 85% after 2003, when UNHCR began to decide claims based on the OAU Refugee Convention.

⁴⁸ Interview held on February 1st, 2019. They explained that Protection Officers were required to obtain special permission from the head of the unit before acknowledging the refugee status of someone who fulfilled the OAU Definition but not the Refugee Convention. They said that in an 18-month time period, this occurred only twice.

Convention and do not recognize refugee status determinations based on this Convention.⁴⁹ Given the limited number of resettlement places even for refugees recognized under the 1951 Convention, the possibility of being resettled is in any case a remote one. Nevertheless, OAU Convention refugees do not have resettlement options, leaving them only with repatriation or indefinitely remaining in Egypt. Second, the Egyptian government and UNHCR have failed to agree on whether the OAU Refugee Convention applies to nationals of non-African countries. This question became of particular importance in the aftermath of the US invasion of Iraq in 2003, because many Iraqi asylum-seekers asserted that they fled generalized violence rather than persecution.⁵⁰ The OAU Refugee Convention would have recognized their refugee status though the Refugee Convention did not, and this would have had substantial political costs for Egypt.⁵¹ Egypt argued that the OAU Refugee Convention only applied to nationals of African countries, despite considerable legal interpretation and evidence to the contrary.⁵² Rather than resolve this issue, UNHCR initially granted Iraqi refugees *prima facie* refugee status under the Refugee Convention.⁵³

UNHCR's protection framework for mass influx attempts to address the impracticality of individualized assessments in mass influx situations. It permits *prima facie* status either in cases of large-scale influx from a specific country or in cases involving groups of similarly situated individuals facing a common threat.⁵⁴ Long delays with the RSD process violates asylum-seekers' human rights because it limits their enjoyment of other legal entitlements. The OAU Refugee Convention's expanded refugee definition is particularly effective for responding to mass influx and does not have to rely on the concept for *prima facie* recognition like the Refugee Convention does.⁵⁵

UNHCR outlines how states should employ *prima facie* status. First, the determination must be "based on 'objective information' known to State A about conditions in place B during

⁴⁹ Badawy, *supra* note 24, at 11.

⁵⁰ *Id.* at 16.

⁵¹ *Id.* Badawy explains the Egyptian government's concerns that they would be obliged recognize former militia members' asylum-claims (on the grounds that they had fought against the occupying Multinational Forces). Egypt would also have the obligation to accept all Iraqis at their frontiers.

⁵² Badawy, *supra* note 24.

⁵³ Iraqi refugees no longer receive *prima facie* status and most undergo an individualized RSD. Syrian and Yemeni nationals are considered *prima facie* refugees by UNHCR.

⁵⁴ *UNHCR Guidelines No. 11*, *supra* note 8, at para. 9 & 10.

⁵⁵ *UNHCR Guidelines No. 11*, *supra* note 8, at para. 5.

period C.”⁵⁶ It should reflect the particular conditions in an individual’s country of nationality that are well established by credible sources. Second, UNHCR conceptualizes *prima facie* status as a complementary protection measure. This framework allows for the use of *prima facie* status or other forms of temporary protection only as necessary for guaranteeing these asylum-seekers’ protection when the situation requires. States are prohibited from issuing *prima facie* status in lieu of the traditional RSD process.⁵⁷ It is an interim measure to facilitate mass influxes of refugees at a time when individualized RSDs would take too long. Third, states are obliged to afford *prima facie* refugees the same legal entitlements as refugees who completed an individualized RSD process.⁵⁸ Finally, states may only make use of *prima facie* status to recognize an asylum-seeker’s refugee status, never to deny it. An individualized RSD is still required before denial of refugee status can be determined.⁵⁹

Palestinian refugees have a special status in international law. In response to the Arab-Israeli conflict and the displacement that followed, the United Nations Relief and Works Agency for Palestine (UNRWA) was founded as a relief agency to register and assist Palestinian refugees.⁶⁰ UNRWA developed an operational definition of who qualifies as a Palestinian refugee: “[P]ersons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict. The descendants of Palestine refugee males, including legally adopted children, are also eligible for registration.”⁶¹ During the 1967 war, the UN General Assembly extended this mandate to include those who were displaced by the 1967 conflict. However, these refugees were not registered as “Palestine refugees” but as “displaced persons” and were eligible for the same services provided.⁶² In any case, UNRWA’s mandate is geographically limited, as it only

⁵⁶ Matthew Albert, *Prima Facie Determination of Refugee Status: An Overview and Its Legal Foundations* 55 RSC Working Paper Series 1, 66 (2010) at 9.

⁵⁷ UN High Commissioner for Refugees, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework* EC/GC/01/4 (2004) at para. 15-16. [Hereinafter, *UNHCR Protection Framework*].

⁵⁸ *UNHCR Guidelines No. 11*, *supra* note 8, at para. 11.

⁵⁹ *Id.* at para. 6 & *UNHCR Protection Framework*, *supra* note 58, at para. 9.

⁶⁰ Jasmin Fritzsche, *Displacing the Displaced: Challenging the International Framework for Palestinian Refugees in light of the Syria Crisis*, Center for Migration and Refugee Studies Paper No. 8, 2014, 10. The UN General Assembly Resolution 302 constitutes UNRWA to “(a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission; (b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available”, *see* UN General Assembly, *Resolution 302: Assistance to Palestinian Refugees* A/Res/302(IV) 8 December 1949, at para. 7. [UNRWA’s mandate included Gaza, Jordan, Lebanon, Syria, and the West Bank].

⁶¹ Jasmin Fritzsche, *Displacing the Displaced: Challenging the International Framework for Palestinian Refugees in light of the Syria Crisis*, Center for Migration and Refugee Studies Paper No. 8, 10 (2014).

⁶² *Id.* at 11.

operates in Syria, Jordan, Lebanon, the West Bank, and Gaza.⁶³

UNRWA's mandate is of importance in relation to the Refugee Convention, as the latter in Article 1D excludes persons receiving protection or assistance from other UN agencies or organizations from receiving refugee status.⁶⁴ In 2002, UNHCR altered its stance on this issue to acknowledge the reality that many displaced Palestinians lacked the effective protection of UNRWA. Article 1D was reinterpreted as a "contingent inclusion clause" rather than an exclusionary provision.⁶⁵ Thus, UNHCR will recognize the claims of Palestinians outside UNRWA's areas of operation if they fled under one of the following circumstances:

- Termination of the mandate of UNRWA;
- Inability of UNRWA to fulfill its protection or assistance mandate;
- Threat to the applicant's life, physical integrity, security, or liberty or other serious protection-related reasons; or
- Practical, legal, and/or safety barriers preventing an applicant from (re)availing him/herself of the protection or assistance of UNRWA.⁶⁶

UNHCR interprets this as a possibility to give protection to two types of Palestinians: Firstly, those who do not fall under UNRWA's definition of "Palestine refugees" or "displaced persons" but fulfil the requirements of the Refugee Convention. For this it is necessary to be outside of the Palestinian territories occupied by Israel, owing to a well-founded fear of being persecuted for one or more of the Convention's grounds and unable or unwilling to return there. Secondly, those who are "Palestine refugees" or "displaced persons" according to UNRWA's definition but are outside of UNRWA's territorial scope of operation and fall under one of the above listed circumstances.⁶⁷

As mentioned, UNRWA's mandate only includes Syria, Jordan, Lebanon, the West Bank, and Gaza, and it has never operated in Egypt.⁶⁸ Therefore, after the re-interpretation of Article 1D this would enable Palestinians to benefit from the Refugee Convention's protection if they

⁶³ *Id.* at 10.

⁶⁴ *Refugee Convention*, *supra* note 2, at Article 1D.

⁶⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, HCR/GIP/16/12 (2017), at para. 12. [Hereinafter, *UNHCR Guidelines No. 13*]

⁶⁶ *Id.* at para. 22.

⁶⁷ Jasmin Fritzsche, *Displacing the Displaced: Challenging the International Framework for Palestinian Refugees in light of the Syria Crisis*, Center for Migration and Refugee Studies Paper No. 8, 2014, 13.

⁶⁸ UNRWA maintains a liaison office in Egypt that works primarily on communication with the League of Arab States and the regional offices of other international organizations based in Cairo. However, it is not a field office that provides services to Palestinians.

fulfil the abovementioned requirements. However, the Egyptian government did not extend UNHCR's mandate in Egypt to include Palestinians in their RSD procedures.⁶⁹ This corresponds to the general approach of the League of Arab States to grant Palestinian refugees a wide range of benefits, such as travel documents or access to employment,⁷⁰ but with certain limitations: Arab states were urged not to grant citizenship to Palestinians to not provide Israel an "excuse to evade their plight."⁷¹ Similarly, including Palestinians in UNHCR's mandate was seen as immersing them into a large number of refugees of many categories, and thus diminishing the special status of Palestinians.⁷²

Since most Palestinians in Egypt do not receive protection under the Refugee Convention, their primary claims for protection stem from other international human rights law treaties and Egyptian domestic law. Palestinians have the same entitlements as other non-nationals under international and regional human rights law.⁷³ Their entitlements under domestic law changed over the course of the past decades. For example, from the 1950s on Palestinians were treated equal to Egyptians by being allowed to work, attend school, and access university education for free. However, in the late 1970s politics caused a change in this attitude. Palestinians were no longer treated as nationals but as foreigners, subject to all their restrictions and limitations.⁷⁴ Nowadays they enjoy specific benefits under Egyptian law bilateral agreements Egypt concluded with the Palestinian national authority government, or regional agreements which will be discussed in detail in the following chapters.

3.2. The Right to Seek Asylum

3.2.1. Legal Instruments⁷⁵

- *Convention Relating to the Status of Refugees* (Refugee Convention)⁷⁶
- *International Covenant on Civil and Political Rights* (ICCPR)⁷⁷

⁶⁹ Information obtained in an interview with Ashraf Milad, asylum lawyer and lecturer, September 2019.

⁷⁰ The specific benefits the League of Arab States established in The Protocol for the Treatment of Palestinians in Arab States (adopted 11 September 1965) will be discussed in detail in the following chapters.

⁷¹ LEX TAKKENBERG, STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 145 (1998).

⁷² Oroub El Abed, *Palestinian Refugees of Egypt: What Exit Options Are Left for Them?*, 22 *Canada's Journal on Refugees* 15, 27 (2005).

⁷³ Palestinian's legal entitlements under international and regional law are discussed throughout each chapter.

⁷⁴ Oroub El Abed, *The Palestinians in Egypt: An Investigation of Livelihoods and Coping Strategies*, The Forced Migration and Refugee Studies Program American University in Cairo, 5 (2003).

⁷⁵ Full text of the following legal instruments can be found in Annex A.

⁷⁶ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

⁷⁷ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982 with the following

- *Convention on the Rights of the Child (CRC)*⁷⁸
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁷⁹
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*⁸⁰
- *Convention on the Rights of Persons with Disabilities (CRPD)*⁸¹
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*⁸²
- *Convention against Torture and Other Forms of Cruel Inhuman, or Degrading Treatment or Punishment (CAT)*⁸³
- *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)*⁸⁴
- *African Charter on Human and People's Rights*⁸⁵
- *African Charter on the Rights and Welfare of the Child*⁸⁶
- *African Youth Charter*⁸⁷
- *Constitution of the Arab Republic of Egypt*⁸⁸

declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁷⁸ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990).

[Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

⁷⁹ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 U.N.T.S. 13 (*entered into force* 3 September 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁸⁰ International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969). [Hereinafter, *ICERD*]. Egypt ratified the Convention on 1 May 1967.

⁸¹ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 U.N.T.S. 3 (*entered into force* May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

⁸² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (*entered into force* July 1, 2003). [Hereinafter, *CMW*]. Egypt's accession to the Convention occurred on 19 February 1993.

⁸³ Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 19, 1984, 1465 U.N.T.S. 85 (*entered into force* 26 June 1987). [Hereinafter, *CAT*]. Egypt ratified the Convention on 25 June 1986.

⁸⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (*entered into force* 20 June 1974). [Hereinafter, *OAU Refugee Convention*]. Egypt ratified the Convention on 17 November 1980.

⁸⁵ African Charter on Human and Peoples' Rights, June 1, 1981, 21 I.L.M 58 (*entered into force* Oct. 21, 1986). [Hereinafter, *African Charter*]. Egypt ratified the Charter on 20 March 1984.

⁸⁶ African Charter on the Rights and Welfare of the Child, July 1, 1990, CAB/LEG24.9/49 (*entered into force* Nov. 29, 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

⁸⁷ African Youth Charter, July 2, 2006 (*entered into force* 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

⁸⁸ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

- *Memorandum of Understanding between Egypt and UNHCR*⁸⁹

3.2.2. International Law

The basis of refugee protection is the human right to seek and enjoy asylum.⁹⁰ Asylum is best understood as “protection granted to a foreign national against the exercise of jurisdiction of another State... [it] also connotes protection against harm, specifically violations of fundamental human rights, and is implicitly linked to the goal of solution.”⁹¹ The right to seek asylum was first incorporated into modern international law in the *Universal Declaration of Human Rights* (UDHR). Passed by United Nations’ General Assembly resolution, the UDHR is not in itself a direct primary source of international law.⁹² However, states,⁹³ international judicial bodies,⁹⁴ and experts accept the UDHR as reflecting customary international law.⁹⁵ UDHR creates two interrelated rights related to asylum. First, Article 13 provides individuals with the right to freely leave their country of nationality.⁹⁶ The ability to leave one’s country of nationality is a prerequisite for seeking asylum. Second, Article 14 stipulates that individuals have the right to seek and enjoy asylum from persecution in other countries.⁹⁷ It only provides individuals with the right to *seek* asylum, not a right to *obtain* asylum. Drafters refused a proposal to include the right to obtain asylum because it would infringe on states’ sovereignty

⁸⁹ Memorandum of Understanding between Egypt and the United Nations High Commissioner for Refugees, Feb. 10, 1954. Available at http://carim-south.eu/databases/legal/Egypt/Bilateral%20Agreements/LE3EGY1054_844.pdf. [Hereinafter, *MoU*]. (Official translation provided by UNHCR.)

⁹⁰ UN General Assembly, *Universal Declaration of Human Rights* Resolution 27A(III) of 10 December 1948, at Article 13. [Hereinafter, *UDHR*]. The concept of asylum has a long history dating back to the Roman Empire and has been supported by the practices of various religious and cultural traditions. See, Alice Edwards, *Human Rights, Refugees, and the Right to ‘Enjoy’ Asylum* 2 IJRL 293, 330 (2005) at 296-297.

⁹¹ GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (Oxford University Press 3 ed. 2011) at 356.

⁹² Roman Boed, *The State of the Right to Seek Asylum in International Law* 5 Duke J. Comp. & Int’l. L 1, 33 (1994), at 6.

⁹³ *Proclamation of Teheran*, Final Act of the International Conference on Human Rights 3, 23 U.N. GAOR, U.N. Doc. A/CONF. 32141 (1968), at 4, para. 2. [Stating that UDHR reflects “the inalienable and inviolable rights of all members of the human family and [creates] an obligation for the members of the international community.”]

⁹⁴ See, *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 I.C.J. 4, 63 (Second Phase) (Judgment of Apr. 6) (Guggenheim, ad-hoc J., dissenting); *United States Diplomatic and Consular Staff in Tehran Case (United States v. Iran)* 1980 I.C.J. 3, (Ammoun, separate opinion) at 76.

⁹⁵ Boed, *supra* note 92, at 6, Hurst Hannum, *The Status of the Universal Declaration on Human Rights in National and International Law* 25 GA. J. Int’l. & Comp. L. 287, 397 (1995), at 353-354, & Bruno Sima & Philip Alston, *The Sources of International Human Rights Law: Custom, Jus Cogens, and General Principles* 1989 Aust. YBIL 82, 108 (1989) at 107-108’ [They stop short of calling the entirety of the UDHR customary international law, but opine that the UDHR is authoritative either as a general principle of international law or as the binding interpretation of the human rights provisions included in the UN Charter].

⁹⁶ *UDHR*, *supra* note 90, at Article 13.

⁹⁷ *Id.* at Article 14.

over their territory.⁹⁸ Thus, the Declaration creates a paradox in which individuals have the right to leave their country and seek asylum, but no corollary obligation for states to grant the claim of asylum.⁹⁹

3.2.2.1. Right to Leave Any Country

Many international human rights conventions address the first aspect of the right to seek asylum: the right to leave one's country of nationality.¹⁰⁰ However, it is not discussed in the *1951 Convention Relating to the Status of Refugees* (Refugee Convention). *International Covenant on Civil and Political Rights* (ICCPR) codifies the right of an individual to freely leave any country, including their country of nationality, subject only to the constraints to "protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others."¹⁰¹ Neither the ICCPR nor the Committee on Civil and Political Rights (CCPR) has defined these terms,¹⁰² leaving states considerable room to determine their exit policies. However, any such limitations must be consistent with other rights described in the Covenant and provided for by domestic legislation. The CCPR advocates for a limited reading that further restricts the circumstances in which a state can prevent its national from exiting. The CCPR stated

Article 12 Paragraph 3, clearly indicates that it is not sufficient that the restrictions serve permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principles of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.¹⁰³

Subject to these conditions, it is permissible for states to restrict exit from their territory. The right to leave any country is central to the right to seek asylum and the international refugee

⁹⁸ UN doc. A/C.3/285/Rev.1 in UNGAOR Part 1 (3rd Session, 1948), "Annexes," 24.

⁹⁹ GOODWIN-GILL & MCADAMS, *supra* note 91, at 358.

¹⁰⁰ See, ICCPR, *supra* note 77, at Article 12; CRC, *supra* note 78, at Article 10; CEDAW, *supra* note 79, at Article 15; CMW, *supra* note 82, at Article 8.

¹⁰¹ ICCPR, *supra* note 77, at Article 12.

¹⁰² The CCPR has provided few illustrative examples differentiating between permissible and impermissible exit policies. Preventing anyone who may have knowledge of state secrets or requiring women receive permission of a male guardian before traveling abroad would be illegal. However, states may legitimately prevent military conscripts or defendants in court proceedings from leaving the country. [See, UN Committee on Civil and Political Rights, *General Comment No. 27: Article 12 (Freedom of Movement)* CCPR/C/21/Rev.1/Add.9 (2009) at para. 16 & 18]. [Hereinafter, *CCPR Comment No. 27*].

¹⁰³ *CCPR Comment No. 27*, *supra* note 102, at para. 14.

law framework because an individual must be outside their country of nationality to seek asylum.¹⁰⁴

Other international human rights conventions reinforce traditionally vulnerable or marginalized groups' right to leave any country, including their own. *Convention on the Rights of the Child* (CRC) grants children the right to leave their country of nationality for the purpose of family reunification,¹⁰⁵ in accordance with CRC Article 9's prohibition of the separation of children from parents. CRC, like ICCPR, allows for the limitation of the right to exit for reasons of national security, public order, public health or morals, or to protect the rights and freedom of others.¹⁰⁶ In addition, any decision to separate a child from their parent, including restrictions on the right to freely leave any country for reunification,¹⁰⁷ must be made in the best interest of the child and, wherever possible, with the participation of the child involved.¹⁰⁸ *Convention to End All Forms of Discrimination against Women* (CEDAW) provides women with equal rights to men regarding freedom of movement.¹⁰⁹ This is particularly important given the CCPR's finding that the ICCPR cannot be used to justify policies which condition women's international movement on the permission of male relatives.¹¹⁰ *International Convention to End All Forms of Racial Discrimination* (ICERD) prohibits policies that discriminate on the basis of race, color, or ethnic or national nationality and guarantees equal rights to leave and enter one's country.¹¹¹ Persons with disabilities' right to freely leave any country is taken up in the *Convention on the Rights of Persons with Disabilities* (CRPD).¹¹² Migrants have fewer entitlements to freedom of movement than they would in their country of nationality,¹¹³ and the freedom of movement provision in the *International Convention on the Rights of All Migrant Workers and Members of Their Family* (CMW) only pertains to their movement

¹⁰⁴ *Refugee Convention*, *supra* note 76, at Article 1.

¹⁰⁵ Entitlements to family unification are discussed in Chapter 4.

¹⁰⁶ *CRC*, *supra* note 78, at Article 10.

¹⁰⁷ *Id.* at Articles 9 & 10.

¹⁰⁸ *Id.* at Articles 3 & 12. [Scholars have indicated that the CRP's four core principles are the best interest of the child, child's participation, non-discrimination, and the right to life, survival and development.]

¹⁰⁹ *CEDAW*, *supra* note 79, at Article 15. *See*, Christoph Bierwirth, *The Protection of Refugee and Asylum-Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child* 24 *Refugee Survey Quarterly* 98, 124 (2005) at 116.

¹¹⁰ *CCPR Comment No. 27*, *supra* note 102, at para. 18.

¹¹¹ *ICERD*, *supra* note 80, at Article 5.

¹¹² *CRPD*, *supra* note 81, Article 18.

¹¹³ The right to freedom of movement for refugees, asylum-seekers, and failed asylum-seekers is further discussed in Chapter 9 "Detention and Expulsion".

within the country of migration. However, CMW provides all migrants with the right to leave any country, including their own, subject to the same constraints outlined in ICCPR.¹¹⁴

3.2.2.2. Right to Seek Asylum

The right to seek asylum as stated in UDHR Article 14 is not explicitly mentioned in subsequent international human rights conventions. ICCPR Article 12(4) provides individuals the right to leave their country of nationality for any purpose,¹¹⁵ but not explicitly a right to seek and enjoy asylum. Drafters decided to exclude the right to seek asylum from the final text because they did not believe the right to seek asylum was a fundamental human right, and there was disagreement about the class of individuals to who could be owed this right.¹¹⁶ However, the right to seek asylum is addressed, albeit not explicitly, in the CRC and the Convention against Torture and Other Inhumane, Cruel, and Degrading Treatment (CAT). CRC Article 22 extends all CRC rights to refugee and asylum-seeking children¹¹⁷ and recognizes all children's right to seek asylum.¹¹⁸ CAT Article 3 prohibits State Parties from "returning, refouling, or extraditing a person to a state where there is substantial grounds for believing he would be in danger of being subjected to torture."¹¹⁹ For states to fulfill this obligation, they must allow individuals an opportunity to request asylum and provide an individualized, independent, and impartial process to determine the substantive merits of their claim.¹²⁰ Though this Provision only applies to individuals capable of proving the likelihood they will face torture, experts note that it buttresses the right to seek asylum enshrined in the UDHR.¹²¹

Most importantly, the Refugee Convention, which predates all the other human rights conventions, is premised on the human right to seek asylum and implicitly requires states to respect this right.¹²² During the drafting process, the French delegate highlighted the relationship between the right to seek asylum and the Refugee Convention, stating "the right to seek asylum was implicit in the Convention, even if it was not explicitly proclaimed therein,

¹¹⁴ CMW, *supra* note 82, at Article 8.

¹¹⁵ JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 309 (Cambridge University Press 2005).

¹¹⁶ Official Records of the Economic and Social Council, Sixth Session, Supplement I, pp. 36 and 57 [as cited in Felice Morgenstern, *The Right to Seek Asylum* 26 Brit. Y.B. Int'l. L. 327, 357 at 335.

¹¹⁷ CRC, *supra* note 78, at Article 22.

¹¹⁸ Bierwirth, *supra* note 108, at 103.

¹¹⁹ CAT, *supra* note 83, at Article 3

¹²⁰ UN Committee against Torture, *General Comment 4 (2017) on the implementation of Article 3 of the Convention in the Context of Article 22 CAT/C/GC/4* (2018) at para. 13.

¹²¹ See, Edwards, *supra* note 90, at 301 & Boed, *supra* note 92, at 18.

¹²² HATHAWAY, *supra* note 115, at 901.

for the very existence of refugees depends on it.”¹²³ If an individual did not have the right to approach a state for asylum, the Convention would serve no purpose. However, it is important to note that there is no corresponding obligation for the state to provide asylum. The United Nations High Commissioner for Refugees (UNHCR) has noted that the Refugee Convention does not address the granting of asylum. Instead, it focuses on providing the definition of a refugee, outlining the legal status of a refugee, and administratively implementing the instrument.¹²⁴

Furthermore, the Refugee Convention is narrow in scope. It only grants refugee status to those outside their country of nationality with a well-founded fear of fleeing persecution on grounds of their religion, race, nationality, membership in a particular social group, or political opinion.¹²⁵ All individuals have the right to seek asylum, but those fleeing violence or deprivation not caused by the specific types or levels of persecution listed in the Convention have no entitlements under the Refugee Convention. The individualized nature of the Convention and the need to demonstrate specific types and levels of persecution limits individuals’ access to asylum.¹²⁶ Second, even those who qualify for refugee status may not receive permanent asylum. The Refugee Convention ceases to apply if an individual re-avails themselves of their country of nationality’s protection or if the circumstances which prompted their recognition as a refugee cease to apply.¹²⁷ Many states thus view refugee status as temporary and do not believe it confers a right to permanent residence.¹²⁸

3.2.2.3. Protection against Refoulement

Refugee Convention Article 33 prohibits the return (refoulement) of individuals to a territory where their life or liberty would be threatened.¹²⁹ Article 42 prohibits any reservation to Article

¹²³ PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS (UN High Commissioner for Refugees 1990), at 215.

¹²⁴ UN HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) at para. 12.

¹²⁵ *Refugee Convention*, *supra* note 76, at Article 1.

¹²⁶ MATTHEW PRICE, RETHINKING ASYLUM: HISTORY, PURPOSES, AND LIMITS (Cambridge University Press 2009) at 103-106.

¹²⁷ *Refugee Convention*, *supra* note 76, at Article 1.

¹²⁸ James Hathaway & Alexander Neve, *Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection* 10 Harv. Hum. Rts. J 115, 211 (1997) at 126.

¹²⁹ *Refugee Convention*, *supra* note 76, at Article 33. Refugees, asylum-seekers, and failed asylum-seekers non-refoulement rights are further discussed in Chapter 9.

33, cementing the centrality of the prohibition of refoulement in international refugee law.¹³⁰ An asylum-seeker who does not fulfill the refugee definition outlined in Article 1 may still be accorded protection if their expulsion would result in the likelihood of imprisonment or death. In these situations, asylum-seekers are entitled to remain in the country of asylum but do not receive the rights and privileges accorded by refugee status as provided under the Refugee Convention.¹³¹ To comply with their obligations under Article 33, states must have “a process for distinguishing a refugee entitled by law to enter and remain from an ordinary migrant subject to domestic discretionary rules.”¹³² They are obliged, at minimum, to provide asylum-seekers access to refugee status determination processes.¹³³ Though Article 33 uses the term “refugees,” the prohibition on refoulement is a customary international law right applicable to all individuals,¹³⁴ if they can credibly prove the likelihood they would face threats to life or liberty. In this regard, a failed asylum-seeker is entitled to remain in the country of asylum if they can prove that they face these threats.¹³⁵ This right is not absolute. Article 33(2) states that individuals can be refouled despite likelihood of imprisonment or death if they are a security risk to the country of asylum or convicted of serious crime.¹³⁶

States’ obligations to protect against refoulement begin the moment an individual enters their territory or control and remain until a final judicial decision establishes individuals are unlikely to face imprisonment or death if returned.¹³⁷ States have no obligations towards individuals not physically present in their territory or within their control.¹³⁸ The Refugee Convention and customary international law’s prohibition on refoulement require states to allow asylum-

¹³⁰ *Id.* at Article 42. See, UN High Commissioner on Refugees, *Introductory Note to the 1951 Convention related to the Status of Refugees and Its 1967 Protocols* (2010), at 3: “[T]he Convention contains various safeguards against the expulsion of refugees. The principle of non-refoulement is such that no reservation or derogation may be made to it.”

¹³¹ Goodwin Gill, *supra* note 91, at 121.

¹³² James Hathaway & Thomas Gammeltoft-Hansen, *Non-refoulement in a World of Corporate Deterrence* 53 Colum. J. Transnat’l L. 235, 284 (2015), at 239.

¹³³ Edwards, *supra* note *supra* note 90, at 301.

¹³⁴ See, Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (2003) at 78; Phil Chan, *The Protection of Refugees and Internally Displaced Persons under Customary International Law?* 10 Int’l. J. Hum. Rts. L. 231, 234 (2006); & UN High Commissioner for Refugees, *Note on Non-refoulement*, EC/SCP/02 (1977) at para. 11.

¹³⁵ The circumstances under which states may permissibly exclude an alien from non-refoulement protection are discussed in Chapter 9.

¹³⁶ *Refugee Convention*, *supra* note 76, Article 33.

¹³⁷ GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (Oxford University Press, 1 ed. 1983) at 121. Goodwin-Gill explains “[By] and large, States, in their practice and in their recorded views, have recognized [the duty of non-refoulement] applies to the moment at which an asylum-seeker presents themselves for entry... the concept encompasses both non-return and non-rejection.”

¹³⁸ HATHAWAY, *supra* note 115, at 310.

seekers to remain in their territory, provide careful evaluation of their claims, and ensure fulfillment of their fundamental human rights.¹³⁹ States are concerned with a perceived increase in the number of asylum-seekers due to misuse of the asylum system by economic migrants.¹⁴⁰ This has led states to enact policies that minimize asylum-seekers' access to their territory as well as efforts to diffuse the content of the right to seek asylum and protection against refoulement.¹⁴¹ International attention most often frames these policies as wealthy countries' attempts to minimize the number of asylum-seekers arriving from poorer countries.¹⁴² However, migrants in developing countries like Egypt also face policies which infringe on their rights to seek asylum and protection against refoulement. Policy measures designed to keep refugees from entering a state's territory are often referred to as *non-entrée* regimes.¹⁴³ The legality of *non-entrée* regimes and other interception policies are debatable and vary depending on the specific policy and legislation enacted.

One *non-entrée* policy that impacts migration to Egypt is visa regimes.¹⁴⁴ Visa control is usually enforced in the country of origin, as well as through carrier sanctions on airlines and other modes of transport, thereby preventing these certain nationals from accessing Egyptian territory. This is a common policy practiced by many countries, including the European Union. In such cases, "Article 33 [of the Refugee Convention] is incapable of invalidating the classic tool of *non-entrée* visa controls imposed on the nationals of refugee-producing states,"¹⁴⁵ because states have no obligations towards would-be asylum-seekers not yet within their territory or control. This is one of the chief shortcomings of non-refoulement protection.¹⁴⁶ Another *non-entrée* policy commonly practiced and also impacting asylum-seekers in Egypt is rejection at the frontiers or ports of entry.¹⁴⁷ States do have obligations to admit asylum-seekers

¹³⁹ Hathaway & Gammeltoft-Hansen, *supra* note 132, at 239.

¹⁴⁰ PRICE, *supra* note 126, at 9.

¹⁴¹ Hathaway & Gammeltoft-Hansen, *supra* note 132, at 239.

¹⁴² See, Hathaway & Neve, *supra* note 128, at 123; Hathaway & Gammeltoft-Hansen, *supra* note 132, at 241; Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 Int'l. J. Refugee L. 568, 677 (2003).

¹⁴³ Hathaway & Gammeltoft-Hansen, *supra* note 132, at 242.

¹⁴⁴ UN HIGH COMMISSIONER FOR REFUGEES, EGYPT REGIONAL REFUGEE & RESILIENCE PLAN 2018-2019: IN RESPONSE TO THE SYRIAN CRISIS 4 (2018). Egypt requires all nationals of the following countries to obtain an authorized visa in their country of origin prior to travel: Eritrea, Ethiopia, Palestine, and Somalia. Libyan and Sudanese males are also required to obtain a visa. Egypt requires nationals of Iraq, Syria, and Yemen to obtain a visa and clearance from State Security Authorities prior to travel. South Sudanese nationals may obtain a visa on arrival.

¹⁴⁵ HATHAWAY, *supra* note 115, at 310.

¹⁴⁶ *Id.* at 311-312.

¹⁴⁷ Focus discussion group participants stated that they knew asylum-seekers that were turned away at the borders between Sudan and Egypt because they did not have the required visa despite attempts to claim asylum.

who have already arrived at their frontiers.¹⁴⁸ The prohibition of rejecting asylum-seekers at borders is evidenced by judicial decisions,¹⁴⁹ as well as state practice.¹⁵⁰ Reinforcing this, Refugee Convention prohibits imposing penalties on refugees who enter or are present irregularly in a state's territory for the purpose of seeking asylum.¹⁵¹ While it refers to refugees already present in a state party's territory, the duty to not penalize asylum-seekers' entry begins at the moment the state assumes control over the individual.¹⁵² Therefore asylum-seekers attempting to enter the state without valid travel documents, the requisite visa, or through unofficial ports of entry have the right to protection from refoulement.¹⁵³

3.2.3. Regional Law

The African regional human rights framework recognizes the right to leave one's country and the right to seek and obtain asylum. By addressing individuals' right to "obtain" asylum, African regional law offers more expansive rights than international law. Similarly, the *Organization on African Unity's Convention Governing the Specific Aspects of Refugee Problems in Egypt* (OAU Refugee Convention) significantly broadens the refugee definition and the scope of non-refoulement protection. The OAU Refugee Convention applies to persons outside their country of nationality who face well-founded fear of persecution, in addition to those outside their country of nationality owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of.¹⁵⁴

3.2.3.1. Right to Leave Any Country

However, none of the participants had experienced this themselves. Thus, this Report cannot confirm rejection at the border is an official policy or the frequency of such incidents.

¹⁴⁸ HATHAWAY, *supra* note 115, at 315.

¹⁴⁹ See, *R. (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport (UNHCR Intervening)* [2005] 2 AC 1, [2004] UKHL 55, para. 26 (Lord Bingham) [

¹⁵⁰ GOODWIN-GILL & MCADAM, *supra* note 91, at 210. [They survey state practice and conclude "State practice, individually and within international organizations, has contributed to further progressive development of the law. By and large, States in their practice and in their recorded views, have recognized that *non-refoulement* applies to the moment at which asylum-seekers present themselves for entry, either within a State or at its border."]

¹⁵¹ The scope of Refugee Convention Article 32 and its applicability to refugees, asylum-seekers, and failed asylum-seekers is further discussed in Chapter 9.

¹⁵² Andrew Brouwer & Judith Kuman, *Interception and Asylum: When Migration Control and Human Rights Collide* 21 Refuge 6, 24 at 15.

¹⁵³ GOODWIN-GILL & MCADAM, *supra* note 91, at 370-380.

¹⁵⁴ *OAU Refugee Convention*, *supra* note 84, at Article I.

The *African Charter of Human and People's Rights* (African Charter) provides individuals the right to leave any country and the right to freely return to their country of nationality.¹⁵⁵ States may limit the right to leave “only subject to restrictions, provided for by law for the protection of national security, law and order, public health, or morality.”¹⁵⁶ These limitations are similar to ICCPR Article 12 with one exception. ICCPR stipulates that restrictions on the freedom to exit must be consistent with other rights recognized in the Covenant.¹⁵⁷ The African Commission on Human and People's Rights (ACHPR) has not yet defined Article 12's operative terms.¹⁵⁸ However, when interpreting other provisions of the Charter, ACHPR and the African Court of Human and People's Rights (ACtHPR) have consistently made reference to the CCPR and Committee on Economic, Social, and Cultural Rights' interpretive comments.¹⁵⁹ It is therefore likely that future ACHPR's communications will interpret permissible restrictions on the right to exit in light of existing international norms.

The *African Youth Charter* (AYC) provides that all youth, defined by the Charter as persons between the ages of 15 and 35,¹⁶⁰ have the right to leave any country, including their own. The *African Charter on the Rights and Welfare of the Child* (ACRWC) does not explicitly address the right to leave; however, Article 22 provides child refugees and asylum-seekers all Charter rights.¹⁶¹ The ACRWC's treaty monitoring body has not yet issued a decision pertaining to

¹⁵⁵ *African Charter*, *supra* note 85, Article 12.

¹⁵⁶ *Id.* at Article 12.

¹⁵⁷ *ICCPR*, *supra* note 77, Article 12.

¹⁵⁸ The African Commission's General Comments address Article 12(1) and the right to internal freedom movement but does not interpret the Article's other provisions. *See*, U.O. Umozurike, *The African Charter on Human and People's Rights* 77 *AJIL* 902, 912 (1983).

¹⁵⁹ The Court references the CCPR's General Comments in its judgments in *African Commission on Human and People's Rights vs. Kenya*, African Court of Human and People's Rights Application No. 006/2012 (Judgment) 26 May 2017, at para. 163 [in reference to CCPR General Comment No. 22] & *Tanganyika Law Society & The Legal and Human Rights Centre v. The United Republic of Tanzania* African Court on Human and People's Rights, Application No. 009/2011, 14 June 2013, at para. 153 [in reference to CCPR General Comments No. 10]. The Commission endorses the CESC's General Comments in its decisions in the following cases: *Centre for Minority Rights Development (Kenya) & Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, African Commission on Human and People's Rights, Communication No. 276/03, 25 November 2009 at para. 200 [in reference to CESC's General Comment No. 4 & General Comment No. 7]; *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESCR) vs. Nigeria*, African Commission on Human and Peoples Rights, Communication No. 155/96, 27 October 2001 at paras. 51 & 63 [in reference to CESC's General Comment No. 14 & General Comment No. 7]; & *Sudan Human Rights Organisation & Centre on Housing Rights & Evictions (COHRE) v. Sudan*, African Commission on Human and People's Rights, Communication No. 279/03-296/05 27 May 2009 at para. 118 [in reference to CESC's General Comment No. 4]. *See*, Manisuli Ssenyonjo, *Analysing the Economic, Social, and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* 293 *NQHR* 358, 397 (2011) at 377.

¹⁶⁰ *AYC*, *supra* note 87, at Preamble.

¹⁶¹ *ACRWC*, *supra* note 86, at Article 22.

refugee and asylum-seeking children or the right to leave any country,¹⁶² but this Article implicitly accepts that children have the right to seek asylum, which necessitates leaving their country of nationality. It also makes special provisions for family reunification that also requires the right to leave a country.

3.2.3.2. The Right to Seek and Obtain Asylum

The African Charter provides persecuted individuals with the right “to seek and obtain asylum.”¹⁶³ The text of the treaty broadens the right to asylum in two ways. First, this is the only international human rights convention that explicitly recognizes the right to seek asylum. Hence, State Parties such as Egypt recognize through this treaty the right to seek asylum, independent of its existence under customary international law.¹⁶⁴ Second, the African Charter recognizes the right to *obtain* asylum, which is broader than other international human rights treaties.¹⁶⁵ ACHPR and scholars caution that, while more concrete than its international counterpart, African Charter does not recognize a right to receive asylum.¹⁶⁶ African Charter provides the right to seek and obtain asylum only to persons fulfilling the requirements of persecution, as interpreted with reference to the OAU Refugee Convention.

OAU Refugee Convention, although stopping short of obliging states to grant asylum, broadens the scope of state responsibilities towards asylum-seekers.¹⁶⁷ Countries of asylum are obliged to ensure asylum-seekers can gain access to asylum procedures.¹⁶⁸ States are not obliged to grant all asylum claims but must use their best endeavors to receive refugees and secure their

¹⁶² MARINA SHARPE, *THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA* (Oxford University Press 2018) at 139.

¹⁶³ *African Charter*, *supra* note 85, at Article 12.

¹⁶⁴ Conversely, other states could argue that the right to seek asylum was omitted from the ICCPR; that the entirety of the UDHR is not customary international law; and that there is a difference between asylum and refoulement to claim it is not customary international law.

¹⁶⁵ SHARPE, *supra* note 162, at 133.

¹⁶⁶ *Organisation Mondiale Contre La Torture, Association Internationales des Juristes Démocrates, Commission Internationales des Juristes, & Union Interafricaine des Droits de L'Homme v. Rwanda*, African Commission on Human and People's Rights, Communication Nos. 27/89-46/91-49/91-99/93, October 1996, [regarding the expulsion of Ugandan refugees from Rwandan territory]. [Hereinafter, *OTM*]. ACHPR reaffirmed the limited scope of asylum-related rights and that there is no individual right to receive asylum.

¹⁶⁷ *OAU Refugee Convention*, *supra* note 84, at Article II.

¹⁶⁸ CHARLOKA BEYANI, *PROTECTION OF THE RIGHT TO SEEK AND OBTAIN ASYLUM UNDER THE AFRICAN HUMAN RIGHTS SYSTEM* (Martinus Nijhoff 2013) at 44. Beyani draws on the Inter-American Commission on Human Rights' jurisprudence and applies to the African regional framework. [See, *The Haitian Centre for Human Rights, et al v. United States* Inter-American Commission on Human Rights, Case No. 10.675 13 March 1997 at para. 154-159 addressing the right to seek and enjoy asylum under Article XXVII of the American Declaration on the Rights and Duties of Man].

settlement.¹⁶⁹ Unlike the Refugee Convention, this creates obligations for State Parties even before would-be refugees arrive at their borders and prohibits *non-entrée* policies.¹⁷⁰ The OAU Refugee Convention also codifies states' sovereign right to grant asylum to refugees, with Article II stating that "the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by Member States."¹⁷¹ Recognizing the political nature of a state's decision to grant asylum, the Convention acknowledges the need to, in so far as possible, divorce these political motivations from the humanitarian principles.¹⁷²

ACRWC Article 22 extends the right to seek and obtain asylum to children. The African Committee of Experts on the Rights and Welfare of the Child clarifies the ACRWC compliments the right to seek asylum as found in other international instruments.¹⁷³ This Provision obliges states to implement a functioning asylum process for children, particularly unaccompanied or separated minors.¹⁷⁴ It recognizes state's duty to enact policies that recognize children's specific vulnerabilities and safeguards their rights.¹⁷⁵

3.2.3.3. Protection against Refoulement

The OAU Refugee Conventions provides the strongest protection against refoulement. Article II reads

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.¹⁷⁶

This Provision broadens the protection against refoulement. However, Sharpe explains that experts often overestimate the scope of refoulement protection based on this Article and illustrates three expanded rights it creates.¹⁷⁷ First, it prohibits return to a territory where a person's life, physical integrity, or liberty would be threatened. While the terms "liberty" and

¹⁶⁹ *OAU Refugee Convention*, *supra* note 84, at Article II.

¹⁷⁰ Rainer Hofmann, *Refugee Law in the African Context* 52 Heidelberg J. Int'l. L. 318, 333 (1992), at 324.

¹⁷¹ *OAU Refugee Convention*, *supra* note 84, at Article II.

¹⁷² Hofmann, *supra* note 170, at 318.

¹⁷³ African Committee of Experts on the Rights and Welfare of the Child, *General Comment No.6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin* (2005) at para. 64-67. [Hereinafter, *ACERWC General Comment No. 6*]

¹⁷⁴ The term "unaccompanied minor" is used for child migrants separated from and not cared for by parents, guardians, and relatives. Separated minors are child migrants separated from parents and guardians but cared for by relatives. [See, *ACERWC*, *supra* note 173, at para. 7&8].

¹⁷⁵ *ACERWC General Comment No. 6*, *supra* note 173, at para. 64.

¹⁷⁶ *OAU Refugee Convention*, *supra* note 84, at Article II.

¹⁷⁷ SHARPE, *supra* note 162, at 72.

“freedom” (as used in Refugee Convention Article 33) are synonymous, only the OAU Refugee Convention uses the term “physical integrity”.¹⁷⁸ Thus, if an individual’s return threatened an individual’s physical integrity but not their life or liberty, the OAU Refugee Convention would provide protection.¹⁷⁹ Second, the OAU Refugee Convention also prohibits rejection at the frontiers.¹⁸⁰ Though most states understand the Refugee Convention as also implicitly creating this obligation,¹⁸¹ the OAU Refugee Convention is explicit. Finally, it does not allow refoulement even in the interests of national security. However, the Convention’s protection may cease to apply if an individual commits a serious, non-political crime outside the country of refuge after receiving refugee status or if their actions seriously violate the Convention’s object and purpose.¹⁸²

African Charter prohibits torture and other forms of cruel, inhuman, or degrading treatment. The ACHPR found that returning an individual to where they would face torture or death violated the Charter, even though the Article does not mention death.¹⁸³ The ACHPR’s approach has been inconsistent on return to cruel, inhuman, or degrading treatment. Their *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, or Degrading Treatment or Punishment* only prohibits return to torture.¹⁸⁴ However, the ACHPR’s subsequent decision in *Institute for Human Rights and Development in Africa v. The Republic of Angola* prohibits return to cruel, inhuman, or degrading treatment.¹⁸⁵ The African Charter also confers procedural rights to individuals at risk of refoulement. States may not expel an individual legally present in their territory without a judicial decision.¹⁸⁶ The ACHPR explains that “[t]his provision should be read as including a general protection of all those who

¹⁷⁸ SHARPE, *supra* note 162, at 72. She explains that experts often overestimate the scope of refoulement protection this Article affords but acknowledges the expanded rights it provides.

¹⁷⁹ Return to a place where one’s physical integrity would be threatened would likely also be prohibited by the Convention against Torture Article 3. Chapter 9 discusses the protection from refoulement to torture.

¹⁸⁰ *OAU Refugee Convention*, *supra* note 84, at Article II.

¹⁸¹ GOODWIN-GILL & MCADAMS, *supra* note 91, at 208.

¹⁸² *OAU Refugee Convention*, *supra* note 84, at Article I.

¹⁸³ *John K. Modise v. Botswana*, African Commission on Human and People’s Rights Communication No. 97/93 (2000) at para. 92 [finding that the forced statelessness, deportation, and confinement of Mr. Modise violated Botswana’s Charter obligations].

¹⁸⁴ African Commission on Human and People’s Rights, *Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, or Degrading Treatment or Punishment in Africa*, 32ND ORDINARY SESSION (2002), at Article 15.

¹⁸⁵ *Institute for Human Rights and Development in Africa v. Republic of Angola*, African Commission on Human and People’s Rights Communication No. 294/2004 (2008) at para. 84. [The case addresses Angola’s violations of the African Charter during the deportation of Gambian nationals legally working and residing in Angola].

¹⁸⁶ *African Charter*, *supra* note 85, at Article 12. Article 12(5), which addresses the mass expulsion of non-nationals, is discussed in Chapter 9.

are subject to persecution, that they may seek refuge in another state.”¹⁸⁷ ACRWC Article 17 and AYC Article 18 prohibit torture, cruel, inhuman, and degrading treatment. Neither instrument incorporates a prohibition of refoulement to places where an individual would be at risk of experiencing such treatment but it is likely the ACHPR and AYC would be interpreted to identical Provisions in the African Charter.

3.2.4. Domestic Law

Article 91 of the Egyptian Constitution is the only provision specifically addressing non-nationals. It stipulates that Egypt “shall grant political asylum to any foreigner who has been persecuted for defending the interests of peoples, human rights, peace or justice.”¹⁸⁸ This Article serves two important functions. First, it allows foreigners in Egypt the right to seek asylum. The state must grant asylum if Constitutional criteria are fulfilled. Second, “defending the interests of peoples, human rights, peace or justice” is in some ways broader than the definitions the Refugee Convention and OAU Refugee Convention adopted. The Egyptian Constitution does not include a prohibition on refoulement but prohibits the extradition of political refugees.¹⁸⁹

While the Constitution provides protection for political refugees, it does not specify procedures for granting refugee status.¹⁹⁰ In theory, the procedures would be established by the Refugee Status Determination (RSD) Committee of the Ministry of Foreign Affairs.¹⁹¹ However, despite its name, this Committee (which was formed in 1984 and subsequently incorporated into the Ministry of Foreign Affairs’ Refugees, Migration, & Human Trafficking Department in the 2000s) does not conduct RSDs.¹⁹² The Egyptian government has granted political asylum under domestic law only in the rare cases of deposed heads of state and allied political leaders.¹⁹³ Egypt has not developed a national asylum infrastructure,¹⁹⁴ and the government delegates all responsibility to UNHCR for determining asylum claims.¹⁹⁵ UNHCR relies on

¹⁸⁷ *OTM*, *supra* note 166, at para. 31.

¹⁸⁸ *Constitution*, *supra* note 88, at Article 91.

¹⁸⁹ *Constitution*, *supra* note 88, at Article 91.

¹⁹⁰ Ionel Zamfir, *Refugee policies in Africa: Open borders but limited integration*, 1,10 European Parliament (2017) at 9.

¹⁹¹ Badawy, *supra* note 24, at 172.

¹⁹² *Id.*

¹⁹³ Sherifa Shafie, *FMO Research Guide: Egypt*, Forced Migration Online 1,33 (2005) at 10.

¹⁹⁴ George Sadeq, *Refugee Law and Policy: Egypt* U.S. Library of Congress (2016). Available at: <https://www.loc.gov/law/help/refugee-law/egypt.php#Steps>.

¹⁹⁵ *MoU*, *supra* note 89, Article 1 & Article 2.

refugee definitions in the Refugee Convention and OAU Refugee Convention (not with reference to Egyptian Constitution Article 91).¹⁹⁶ Therefore, Egypt's domestic law, while technically stipulating asylum-related entitlements, provides few rights in practice. The right to seek asylum and protection against refoulement are considerably stronger under international and regional law and thus grant better protection for asylum-seekers and refugees.

3.3. Refugee Status Determination Process

3.3.1. Legal Instruments¹⁹⁷

- *Memorandum of Understanding between the Egyptian Government and the United Nations High Commissioner for Refugees*¹⁹⁸

3.3.2. Procedure

To determine which asylum-seekers fulfill the refugee definition, there needs to be some kind of procedure in place to identify refugees, as well as protection with regard to the laws applicable on admission, residence and approval.¹⁹⁹ In Egypt, UNHCR identifies those eligible for refugee status through RSDs. It is common for states to sign a Memorandum of Understanding (MoU) with UNHCR that UNHCR will carry out RSDs on behalf of the state. This system exists in over sixty states, and Egypt entered a MoU in 1954, long before acceding to the Refugee Convention.²⁰⁰ After UNHCR performs RSDs, Egypt grants residence permits to refugees and travel documents with a return visa of sufficient duration.²⁰¹

The UNHCR Statute outlines the mandate of the organization and defines who is to be recognized as a refugee. The Statute uses a very similar definition to the Refugee Convention,²⁰² however with two differences: The Statute adopted the temporal limitation of events occurring before 1 January 1951, but not the geographical limitation to events occurred in Europe of the 1951 Refugee Convention. Also, the Statute does not offer protection to those

¹⁹⁶ Sadeq, *supra* note 194.

¹⁹⁷ Full text of the following legal instrument can be found in Annex A.

¹⁹⁸ Translation retrieved from Tarek Badawy, *The Memorandum of Understanding between Egypt and the Office of the United Nations High Commissioner for Refugees: Problems and Recommendations*, CARIM AS 2010/07, 4 (2010). [Hereinafter, *MoU Egypt UNHCR*]

¹⁹⁹ GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (Oxford University Press 3 ed. 2011) at 528.

²⁰⁰ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, *entered into force* April 22, 1954. [Hereinafter, *Refugee Convention*] Egypt acceded to the Convention on 22 May 1981. Tarek Badawy, *supra* note 24, at 4.

²⁰¹ *MoU Egypt UNHCR*, *supra* note 198, Articles 6-7.

²⁰² See Chapter 3.1. for a detailed analysis on the refugee definition.

persecuted for being members of a particular social group.²⁰³ However, the mandate of UNHCR is dynamic and open to evolution through subsequent General Assembly resolutions or international agreements.²⁰⁴ Paragraph 8(a) of the UNHCR Statute refers to UNHCR's responsibility to supervise the application of international conventions for the protection of refugees. Accordingly, UNHCR is not limited to the protection of refugees as per their own definition, but also applies the definitions of the Refugee Convention, its Protocol, and the OAU Refugee Convention.²⁰⁵ Therefore, considering Egypt is party to the Refugee Convention as well as to the OAU Refugee Convention, UNHCR grants refugee status based on both these conventions in Egypt.²⁰⁶ All persons seeking refugee status in Egypt need to file an application with UNHCR. Applicants asking for RSD receive a yellow card from UNHCR confirming their status as asylum-seekers.²⁰⁷ Subsequently, an interview is scheduled during which the applicants have the opportunity to present their case. When the RSD ends with a positive decision, applicants receive a blue card to confirm their refugee status. The possibility of appealing a negative decision is described in section 2.2.4.

Generally, every RSD has to be decided for each applicant individually, objectively and impartially.²⁰⁸ However, there are exceptions to this rule. The procedures in place for determining the refugee status of individual asylum-seekers is not suitable in the situation of a mass influx and fails to absorb high numbers of applicants at the same time.²⁰⁹ In this situation, the so-called *prima facie*²¹⁰ approach has proven to be more effective. The state or UNHCR may recognize that every person belonging to a certain displaced group falls under the refugee definition based on the circumstances that caused their flight.²¹¹ This has been a common

²⁰³ Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(v), U.N. Doc. A/RES/428(v), (Dec. 14, 1950), para 6 (A)(ii): “Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.”

²⁰⁴ Volker Türk, *UNHCR's Supervisory Responsibility*, New Issues in Refugee Research, Working Paper No. 67, 2 (2002).

²⁰⁵ Türk, *supra* note 204, at 4.

²⁰⁶ Badawy, *supra* note 200, at 11.

²⁰⁷ See Chapter 11 on Documentation.

²⁰⁸ RAINER HOFMANN & TILLMANN LÖHR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1119 (Andreas Zimmermann ed., 2010).

²⁰⁹ GOODWIN-GILL & MCADAMS, *supra* note 199, at 528.

²¹⁰ *Prima facie* means “at first appearance”.

²¹¹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status* HCR/GIP/15/11 (2015), at para. 1. [Hereinafter, *UNHCR Guidelines No. 11*].

practice for over 60 years.²¹² This kind of group assessment may only be used in favor of the asylum-seekers; whereas a decision to reject an asylum claim needs to be issued following an individual assessment.²¹³ In Egypt, Syrians and Yemenis are currently exempted from RSD procedures and are considered *prima facie* refugees. Only if they seek resettlement²¹⁴ to a third country do they need to undergo the RSD.²¹⁵

Another instance in which the system deviates from having individual RSDs for each applicant are situations of derivative status. Derivative status means that an individual may be granted refugee status on the basis of a close family member having successfully passed their RSD.²¹⁶ Those who receive derivative status enjoy the same rights and entitlements as other recognized refugees and retain their refugee status even if the relationship between them and the family member who received the original refugee status somehow dissolves.²¹⁷ It is to be noted that derivative status only works in favor of recognition of refugee status; derivative rejection is prohibited. Therefore, if an applicant's refugee claim is rejected, it does not automatically result in the rejection of the applicants' family members' claims. Instead, they are entitled to a RSD in their own right if they wish to seek asylum.²¹⁸

The UNHCR Executive Committee, which was established to advise UNHCR in the exercise of its functions and to review funds and programs,²¹⁹ provided certain basic procedural requirements states are required to adopt in their asylum proceedings.²²⁰

²¹² *UNHCR Guidelines No. 11*, *supra* note 211, para 3.

²¹³ *Id.* at para 6.

²¹⁴ Resettlement refers to the transfer of refugees from the state where they sought asylum, to a third state that agreed to accept them as refugees. This concept serves as a durable solution and follows the idea of burden sharing between states. See *UNHCR Resettlement Handbook* (2011), available at: <https://www.unhcr.org/46f7c0ee2.pdf>.

²¹⁵ UNHCR Egypt Fact Sheet June 2018, 2. Available at: <http://reporting.unhcr.org/sites/default/files/UNHCR%20Egypt%20Fact%20Sheet%20-%20June%202018.pdf> (accessed on 28 June 2018)

²¹⁶ See Chapter 4 for Family Unity and Reunification

²¹⁷ UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003), Unit 5, 1. Available at: <https://www.unhcr.org/4317223c9.pdf> [Hereinafter, UNHCR Procedural Standards] Chapters updated between 2016 and 2017 can be accessed under: <https://www.refworld.org/rsdproceduralstandards.html>.

²¹⁸ Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection*, in UNHCR'S CONSULTATIONS ON INTERNATIONAL PROTECTION 555, 603 (Erika Feller, Volker Türk, Frances Nicholson eds. 2003), at 572.

²¹⁹ For more information on the UNHCR Executive Committee's creation and mandate see <https://www.unhcr.org/executive-committee.html>

²²⁰ GOODWIN-GILL & MCADAMS, *supra* note 199, at 530.

- ensuring the competent official receiving the asylum-seeker at the border has clear instructions how to handle the situation in accordance with international law, while respecting the principle of *non-refoulement*;²²¹
- giving asylum-seekers all information necessary to apply for asylum;
- establishing a clearly identified authority responsible for RSD;
- assisting asylum-seekers through providing them with interpreters;
- issuing identity documents for recognized refugees evidencing their refugee status;
- the possibility of appealing negative RSD decisions at an administrative or judicial authority;
- allowing asylum-seekers to stay in the country while their RSD or appeal is being processed.²²²

These procedural requirements are not binding but rather function as recommendation for the necessary minimum standard. It is left to each state to determine the exact procedures, which often depends on the local practices concerning due process.²²³ The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*²²⁴ was prepared upon request of the UNHCR Executive Committee to promote consistency in the applied minimum standards among states.²²⁵ The rules in the Handbook are clearly formulated and provide assistance with the challenges faced by examiners and decision-makers during the RSD process.²²⁶ The most important rules will be shortly summarized below. In Egypt, UNHCR is responsible to implement these procedural safeguards to ensure a fair and high-quality RSD process. Core standards include:

- Asylum-seekers approaching UNHCR should receive necessary information and support from staff to file their asylum claim;
- procedures should be in place to identify the most vulnerable asylum-seekers and assist them;
- RSDs must be non-discriminatory, fair, transparent, and timely;
- RSD staff must be qualified, trained, and supervised;

²²¹ See Chapter 3.2. on the principle of non-refoulement.

²²² GOODWIN-GILL & MCADAMS, *supra* note 199, at 531.

²²³ GOODWIN-GILL & MCADAMS, *supra* note 199, at 533.

²²⁴ *UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (2003), available at: <https://www.unhcr.org/4317223c9.pdf> [Hereinafter, *UNHCR Procedural Standards*] Chapters updated between 2016 and 2017 can be accessed here: <https://www.refworld.org/rsdproceduralstandards.html>

²²⁵ GOODWIN-GILL & MCADAMS, *supra* note 199, at 542.

²²⁶ *Id.* at 542.

- all applicants should have an individual RSD interview with a qualified RSD officer;
- in case of rejection, applicants have the right to review by a different officer;
- all RSD procedures should be consistent with UNHCR policies regarding confidentiality, treatment of vulnerable asylum-seekers, and gender and age sensitivity.²²⁷

3.3.2.1. Confidentiality

To create an environment of trust and security, UNHCR may not disclose any information they receive about an asylum-seeker, including the fact that an individual has claimed asylum. This non-disclosure policy extends to interpreters, security staff, counsellors, medical consultants, and implementing partners.²²⁸ Applicants must be informed of this right and be made aware if there are information sharing arrangements with the host country or resettlement countries. It is essential that UNHCR does not contact their country of nationality nor share any information with it unless there is an explicit authorization by the applicant.²²⁹ If information is disclosed to third parties, the following requirements must be met:

- the disclosure is necessary for a legitimate purpose;
- it does not endanger the security of the applicant, her/his family members, or other persons s/he is associated with;
- it does not jeopardize security of UNHCR;
- it is consistent with UNHCR's mandate and non-political character.²³⁰

3.3.2.2. Interpreters

All asylum-seekers may access trained and qualified interpreters during all stages of the RSD process and be given the choice whether to communicate through a female or male interpreter.²³¹ Interpreters need to present adequate language and interpreting skills, sufficient experience, and undergo special training on RSD procedures.²³² Only when no UNHCR interpreters are available may other persons be exceptionally relied upon, if their skills are found sufficient by the staff member conducting the interview. This can include an interpreter

²²⁷ *UNHCR Procedural Standards*, *supra* note 224, Unit 1, page 2.

²²⁸ *Id.* at Unit 2, page 1.

²²⁹ *Id.* at Unit 2, page 1.

²³⁰ *Id.* at Unit 2, page 2.

²³¹ Updated chapter 2.5 of *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 2. [Hereinafter, *Updated Chapter 2.5*]

²³² *Id.* at 3.

provided by the applicant, other asylum-seekers or refugees, other UNHCR staff, or interpreters provided through arrangements with external institutions.²³³ In general, other asylum-seekers and refugees may only assist in the first stage of receiving an asylum-seeker's application, not during the RSD interview or any other counseling.²³⁴ The legal representative of an applicant may never serve as an interpreter, and using a family member as interpreter should be avoided due to the difficulty of assessing whether the applicant is willing to disclose all information in the presence of a relative.²³⁵ The asylum-seeker needs the opportunity to voice any concerns they have with an interpreter to a UNHCR staff member in confidence. The impartiality and neutrality of the interpreter must be maintained at all times. More details on what this entails can be found in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.²³⁶

3.3.2.3. Legal Representation

Asylum-seekers have the right to legal representation during all stages of the RSD process. The legal representative can provide advice and assistance in completing the RSD application form, preparing oral and written submissions, collecting and submitting supporting evidence, as well as attend RSD interviews and assist during appeal procedures. This right does not entitle the applicant to legal assistance free of charge. UNHCR should facilitate access to legal representation by providing information on legal representatives and legal aid services but is not obliged to provide funding.²³⁷ The role of the legal representative is to ensure that asylum-seekers' claims are accurately presented, that their rights are respected during the RSD process, and to provide legal advice.²³⁸ However, the representative should not interrupt the RSD interview except if necessary to record a violation of procedural fairness and may not testify in place of the applicant. This need for restraint is based on the non-adversarial character of the RSD and other UNHCR procedures.²³⁹ The applicant and the RSD officer are not adversaries.

²³³ *Id.* at 4.

²³⁴ *Id.* at 5.

²³⁵ *Id.*

²³⁶ Updated Chapter 2.5, *supra* note 231, at 10. Interpreters may not be asked to assess the credibility of the applicant; may not engage with asylum-seekers outside UNHCR except with prior authorization from the relevant staff member; have to notify UNHCR if there is a personal conflict of interest; have to report any received threats or bribes; may not have an active role in choosing the applicants they assist; and may not disclose any information obtained during the RSD interview even after their work with UNHCR has ended.

²³⁷ Updated Chapter 2.7 of Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 2. [Hereinafter, *Updated Chapter 2.7*]

²³⁸ *Id.* at 5.

²³⁹ *Id.* at 6.

Rather, the purpose of the RSD is to gather information and come to a valid decision based on facts.

UNHCR evaluates whether individuals are qualified to serve as legal representatives in the RSD process.²⁴⁰ Regardless of qualifications or accreditation, UNHCR may reject a legal representative if there is a conflict of interest, and exploitative relationship with the applicant, or other misconduct or serious ethical concerns.²⁴¹ Asylum-seekers may appoint a legal representative at any stage of the RSD process by submitting the *Authorization to Act as Legal Representative Form*. The representation can be full, or partial if the applicant wishes to introduce any limitations, and UNHCR needs to be informed of this.²⁴²

3.3.2.4. Appeals

Applicants who received a negative RSD decision on their application for refugee status or derivative refugee status, or who received a decision on cessation or cancellation of refugee status, have the right to appeal. The scope of the appeal includes a review of findings of fact and application of the refugee criteria under the UNHCR mandate, as well as any new information arising after procedures of first instance.²⁴³ Therefore, filing an appeal is not limited to reasons connected to procedural irregularities. Throughout the appeals process, the appellant continues to enjoy the above discussed rights of asylum-seekers.²⁴⁴

The applicant must be informed of the right to appeal at several stages during the RSD process.²⁴⁵ The time limit to file an appeal should not be less than 30 days from the date of notification of the RSD decision. However, there is room for flexibility if the applicant has a

²⁴⁰ *Id.* at 3. It is assumed that individuals are qualified to serve as legal representatives if they hold a lawyer's license as in a UN member state; if they work in a reputable organization that provides free or low-cost legal services to asylum-seekers or refugees that has a partnership arrangement with UNHCR; or if they have been previously authorized by UNHCR to act as legal representative. In all other cases they need: a working understanding of international refugee law and UNHCR procedures, experience in assisting asylum-seekers, a thorough understanding of the applicant's claim, and a binding code of ethics or professional responsibility. As example for a code of ethics, the Procedural Standards refer to the Model Rules of Ethics for Legal Advisors in Refugee Cases ("Nairobi Code")

²⁴¹ Updated Chapter 2.7, *supra* note 237, at 4.

²⁴² *Id.* at 4.

²⁴³ Updated Chapter 7 of Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 2. [Hereinafter, *Updated Chapter 7*]

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.* at 3. At the end of the RSD interview, the officer should provide information on how the asylum-seeker will be notified of the RSD decision and the relevant appeal procedures and deadlines. At the time the asylum-seeker receives the notification of a negative RSD decision, all the necessary information to file an appeal must be provided, as well as the *Appeal Application Form*.

valid reason to submit the appeal after the deadline, for example for health reasons or needing time to obtain legal representation. In any case, the RSD file should not be closed until six weeks have passed from the end of the appeal deadline. If an appeal is submitted after file closure, it should be considered a request to reopen the file.²⁴⁶ The appeal decision must be issued in writing and the applicant needs to be notified thereof. It is not necessary to include reasons for the appeal decision.²⁴⁷

3.3.2.5. Complaints

Apart from the right to appeal, asylum-seekers also have the right to lodge complaints on irregularities in the RSD process. UNHCR has procedures to receive and respond to complaints. Asylum-seekers are informed at the earliest stage possible about how to report serious misconduct or procedural unfairness. For example, if any staff member requests monetary compensation or other favors, this misconduct should be immediately reported. Safeguards are established so complaints cannot be intercepted by the concerned staff member. For example, a secure complaint box emptied once a week by a supervisor who reviews complaints is the recommended procedure. Asylum-seekers are informed that lodging a complaint can in no way influence the decision of their RSD.²⁴⁸

3.3.2.6. Other Rights

All applicants have the right to present their asylum claim in person during a RSD interview. A decision of refugee status may never be rendered in the first instance based only on reviewing written submissions.²⁴⁹ The applicants are also allowed to bring witnesses to the RSD interview as a means of providing supporting evidence of their asylum claim. However, the witness should give testimony separately from the applicant.²⁵⁰

The RSD decisions should be issued in a timely manner. The general timeline for issuing a decision is one month from the start of the RSD interview. In complex situations, this deadline may be extended to a maximum of two months. If further extension is necessary, approval from the RSD supervisor is required.²⁵¹ An accelerated RSD process with lesser waiting periods and

²⁴⁶ Updated Chapter 7, *supra* note 243, at 4.

²⁴⁷ *Id.* at 9.

²⁴⁸ *UNHCR Procedural Standards*, *supra* note 224, Unit 2, pages 22-23.

²⁴⁹ *Id.* at Unit 4, page 6.

²⁵⁰ *Id.* at Unit 4, page 7.

²⁵¹ *Id.* at, Unit 4, page 20.

faster decisions should be provided for applicants with special protection needs, such as: persons at immediate risk of refoulement or arbitrary arrest; victims of torture or trauma; women at risk in the host country; elderly asylum-seekers or disabled asylum-seekers without support; asylum-seekers requiring urgent medical assistance; and unaccompanied children.²⁵²

Asylum-seekers have the right to be notified in writing about their first instance RSD decision. This notification should be issued to the applicant in person; only if this is not possible may other reliable and confidential methods of notification be considered.²⁵³ The decision should be issued in English or French. Where RSD procedures were held in a different language, the applicant should receive an accurate translation of the notification, or at least have the opportunity to obtain an oral translation by an interpreter. To accommodate illiterate applicants or those requiring other assistance, there should be the possibility of meeting with UNHCR to obtain all necessary information on the decision.²⁵⁴

Positive RSD decisions should include clear instructions for the refugee on which further steps have to be taken with UNHCR or the authorities in the host state, while in a negative decision, the applicant needs to be notified of the reasons for the rejection and their right to appeal.²⁵⁵ A summary explanation should be given on evidence considered and reasons why the applicant was not granted refugee status. This should enable rejected applicants to evaluate whether an appeal is appropriate.²⁵⁶

In cases where the RSD process, including any available appeals, has ended with a negative decision, re-opening of a file is usually not possible except in the following circumstances: if there is clear evidence that personal circumstances of the asylum-seeker have substantially changed and might warrant a different decision, if there is serious reason to believe that the claim was not correctly decided, or new evidence appears which indicates this.²⁵⁷ In addition to a negative RSD decision, there are several situations in which the file of an asylum-seeker is closed:

- if applicants miss their RSD interview and do not reschedule within six weeks;

²⁵² *Id.* at Unit 4, page 22.

²⁵³ These notification procedures may include mail delivery or delivery through a person authorized by the applicant.

²⁵⁴ *UNHCR Procedural Standards*, *supra* note 224, Unit 6, page 1.

²⁵⁵ *Id.* at Unit 6, page 1.

²⁵⁶ *Id.* at Unit 6, page 2.

²⁵⁷ *Id.* at, Unit 9, page 2.

- if applicants officially withdraw their claim for refugee status,
- after a negative RSD decision and the applicant refrains from using their right to appeal within the respective timeframe,²⁵⁸ or their appeal is rejected;
- if the applicant is deceased;
- if the applicant has obtained the nationality of another state.²⁵⁹

UNHCR staff are urged to be flexible concerning the re-opening of closed files. For example, rescheduling a missed interview should be permitted, unless the applicant misses several appointments without valid explanation and seems to be acting in bad faith.²⁶⁰

3.4. Determining the Content of Refugee Protection

If one is seeking asylum in Egypt, is granted refugee status, or is denied refugee status, how does one determine what one's legal entitlements are? While human rights conventions confer rights on all human beings, regardless of nationality or legal status, international refugee law confers additional special entitlements for asylum-seekers and refugees. It is also worth noting that international human rights conventions may in some instances permit states to differentiate in their treatment of nationals and non-nationals. The following section explains these cross-cutting laws, which apply across the entire breadth of this Report and guide the determination of entitlements in the following individual Chapters on family unity and reunification, employment, education, health, housing, detention and expulsion, access to courts, and documentation.

3.4.1. Refugee Convention

Entitlements in the 1951 Refugee Convention differ depending on the level of attachment the refugee or asylum-seeker has towards the country of refuge. Those who have just arrived in a state's territory are granted fewer rights than those who have already established themselves in the country.²⁶¹ At the outset, two challenges are apparent. First, the Convention refers only to refugees as right holders. As the RSD process merely recognizes the pre-existence of one's refugee status,²⁶² if the Convention's rights are only provided after successful RSDs, and not to asylum-seekers, the rights of genuine refugees awaiting completion of their RSD will be

²⁵⁸ There is some flexibility concerning filing an appeal after file closure, *see* the section on Right to Appeal.

²⁵⁹ *UNHCR Procedural Standards*, *supra* note 224, Unit 9, page 1.

²⁶⁰ *Id.* at Unit 9, page 1.

²⁶¹ HATHAWAY, *supra* note 115, at 178.

²⁶² *See* HATHAWAY, *supra* note 115, at Goodwin-Gill, Adams

violated in the meantime.²⁶³ Thus, states are obliged to grant asylum-seekers many of the same rights as refugees, under the assumption that they may ultimately be found to have been refugees all along.²⁶⁴ Second, it is necessary to differentiate between the different levels of attachment to which the Refugee Convention refers in order to identify which rights an individual may claim: physical presence, lawful presence, and lawful residence.²⁶⁵ Some rights granted in the Refugee Convention are applicable to all asylum-seekers and refugees regardless: non-discrimination,²⁶⁶ the right to movable and immovable property,²⁶⁷ access to courts,²⁶⁸ rationing,²⁶⁹ education,²⁷⁰ fiscal charges,²⁷¹ prohibition of refoulement²⁷² and the promotion of naturalization.²⁷³

3.4.1.1. Physically Present

Being “physically present” is the lowest level of attachment and applies to all refugees or asylum-seekers within the territory or control of a State Party. Some articles of the Refugee Convention refer to this simple presence by using phrases such as “country in which he finds himself”, or “any refugee in/within their territory”.²⁷⁴ Under this category, it does not matter whether a refugee is lawfully or unlawfully within the territory of a state, they are entitled to certain basic rights under the Refugee Convention.²⁷⁵

Hathaway introduces an additional differentiation within this category by adding the criterion of being subject to a state’s jurisdiction. This should apply to situations where refugees fall under the control and authority of a State Party even if they are not physically present in its territory.²⁷⁶ This could be the case if a state invades and takes authority over the territory of another state without having a valid claim to lawful jurisdiction, or in connection with authority over a part of the *res communis*, such as the high seas.²⁷⁷ The latter is a situation more likely

²⁶³ HATHAWAY, *supra* note 115, at 158-9.

²⁶⁴ GOODWIN-GILL & MCADAM, *supra* note 91, at 524.

²⁶⁵ *Id.*

²⁶⁶ *Refugee Convention*, *supra* note 200, Article 3.

²⁶⁷ *Id.* at Article 13.

²⁶⁸ *Id.* at Article 16(1).

²⁶⁹ *Id.* at Article 20.

²⁷⁰ *Id.* at Article 22.

²⁷¹ *Id.* at Article 29.

²⁷² *Id.* at Article 33.

²⁷³ *Id.* at Article 34. HATHAWAY, *supra* note 115, at 160.

²⁷⁴ GOODWIN-GILL & MCADAM, *supra* note 91, at 524.

²⁷⁵ HATHAWAY, *supra* note 115, at 157.

²⁷⁶ *Id.* at 160.

²⁷⁷ *Id.* at 160-1.

to be of relevance with regard to refugee law. States have the right to extend their jurisdiction into the high seas for up to 12 miles beyond their territorial sea. This contiguous zone, however, is not an area of sovereign authority but rather a zone of special jurisdiction where states can enforce their customs or immigration laws.²⁷⁸ Those who find themselves in such a zone may claim the aforementioned rights.²⁷⁹

Once refugees are physically present in a state's territory, they enjoy additional rights to the ones listed above: the right to freedom of religion,²⁸⁰ to receiving identity papers,²⁸¹ to freedom from penalization for illegal entry,²⁸² and to be subject to only necessary and justifiable constraints on freedom of movement.²⁸³ Being in the state's territory in this context does not only refer to a state's mainland, but also includes refugees being present on its islands, reefs, waterways or territorial sea.²⁸⁴

3.4.1.2. Lawfully Present

The category of being lawfully present entitles refugees to more rights than those only physically present. In addition to all the rights stated above,²⁸⁵ the Refugee Convention gives them the right to self-employment,²⁸⁶ to freedom of movement,²⁸⁷ and to protection against expulsion.²⁸⁸ Refugees are considered to be lawfully present in three situations. Firstly, they are lawfully present after registering as an asylum-seeker. From the moment they are registered as asylum-seekers, for the length of their RSD procedures, including during time spent on exhausting any appeals of decisions rendered, they are considered to be lawfully staying in the country.²⁸⁹ Secondly, when a refugee's presence in the territory of a State Party is legally sanctioned. This applies, for example, if a refugee is admitted to the territory of a state other than their state of asylum for a fixed period of time through various types of visas or permits, even if the permission lasts only a few hours.²⁹⁰ This is also the case if a person's application

²⁷⁸ *Id.* at 170.

²⁷⁹ *Id.* at 171.

²⁸⁰ *Refugee Convention*, *supra* note 200, Article 4.

²⁸¹ *Id.* at Article 27.

²⁸² *Id.* at Article 31(1).

²⁸³ *Id.* at Article 31(2). HATHAWAY, *supra* note 115, at 171.

²⁸⁴ HATHAWAY, *supra* note 115, at 172.

²⁸⁵ Meaning the rights granted without the requirement of a certain level of attachment, and the rights granted to those physically present.

²⁸⁶ *Refugee Convention*, *supra* note 200, Article 18.

²⁸⁷ *Id.* at Article 26.

²⁸⁸ *Id.* at Article 32. HATHAWAY, *supra* note 115, at 173.

²⁸⁹ HATHAWAY, *supra* note 115, at 175.

²⁹⁰ *Id.* at 174.

for asylum was rejected, but the state concerned refrains from enforcing the expulsion order for humanitarian reasons. In this situation, their status has been regularized and fulfills the requirements for being lawfully present as long as the permission to remain lasts.²⁹¹ Thirdly, the presence of refugees is also considered lawful if a state has no mechanism for determining refugee status, or decides to set aside the formal procedures.²⁹²

3.4.1.3. Lawfully Staying

This category enjoys the highest numbers of rights under the Refugee Convention. In addition to all the previously mentioned entitlements, refugees lawfully staying in the territory of a state party have the right to freedom of association,²⁹³ to engage in wage-earning employment,²⁹⁴ to practice a profession,²⁹⁵ to access public housing and welfare,²⁹⁶ to be protected by labor and social security legislation,²⁹⁷ to intellectual property rights,²⁹⁸ and to travel documentation.²⁹⁹ This category covers all those who can provide evidence of an ongoing, legally sanctioned stay in the territory of a state party. It is not necessary to have successfully completed the refugee status determination, nor to have obtained a permanent residence permit or to have established a habitual residence.³⁰⁰ Thus, refugees who receive temporary protection also qualify as lawfully staying in the territory of a State Party.³⁰¹ According to the Michigan Guidelines, this category encompasses recognized refugees who completed their RSD or were accepted as *prima facie* refugees, asylum-seekers in states that fail to comply with a RSD system or where the procedures are unduly prolonged, and those awaiting resettlement in another state.³⁰²

3.4.2. Relationship between International Human Rights and International Refugee Law

The Refugee Convention specifically addresses the unique situation of refugees and asylum-seekers, and provides the minimum standards for their treatments. It creates the foundation of the protection for non-nationals, and in some cases provides the strongest legal entitlements.³⁰³

²⁹¹ *Id.* at 183.

²⁹² *Id.* at 184.

²⁹³ *Refugee Convention*, *supra* note 200, Article 15.

²⁹⁴ *Id.* at Article 17.

²⁹⁵ *Id.* at Article 19.

²⁹⁶ *Id.* at Articles 21 and 23.

²⁹⁷ *Id.* at Article 24.

²⁹⁸ *Id.* at Article 14.

²⁹⁹ *Refugee Convention*, *supra* note 200, Article 28. HATHAWAY, *supra* note 115, at 186.

³⁰⁰ HATHAWAY, *supra* note 115, at 189.

³⁰¹ *Id.* at 188.

³⁰² *Michigan Guidelines*, para 8.

³⁰³ Edwards, *supra* note 90, at 303.

However, it is not the only legal instruments that confers entitlements. The non-discriminatory basis of international human rights law guarantees its Conventions apply to all persons within a state party's territory,³⁰⁴ regardless of immigration status. The Human Rights Committee indicates that "[t]hus the general rule is that each one of the rights [of international human rights conventions] must be guaranteed without discrimination between citizens and aliens."³⁰⁵ Refugees, asylum-seekers, and failed asylum-seekers have entitlements arising out of human rights treaties in addition to the entitlements of the Refugee Convention, and accessing these entitlements is an important aspect of fulfilling their right to "enjoy asylum."³⁰⁶

Questions arise when the standards set forth in the Refugee Convention conflict with those contained in other international instruments. Since the Refugee Convention predates the other international human rights treaties that incorporated a wide variety of rights, it does not always reflect the subsequent developments in the field of human rights law.³⁰⁷ Thus, other international and regional human rights treaties may provide stronger entitlements or broader rights than the Refugee Convention. Refugee Convention Article 5 states that nothing in the Convention impairs on rights granted apart from the Convention.³⁰⁸ Drafters included this Provision to ensure refugees and asylum-seekers could access "both rights and benefits granted prior to the Convention and those granted subsequently to its entry into force."³⁰⁹ They also intended the Provision to address rights granted by international and domestic law.³¹⁰ Therefore, when other human rights treaty provides more comprehensive rights than the Refugee Convention, the maximum, not the minimum standard should apply.³¹¹ This Report analyzes the entitlements owed to refugees, asylum-seekers, and failed asylum-seekers under all international and regional human rights conventions signed and ratified by Egypt and addresses any permissible differentiation between the rights owed to nationals and those owed to non-nationals.

3.4.3.1. Implementation of the International Covenant on Civil and Political Rights

³⁰⁴ *Id.* at 304. [There are some exceptions to this statement in which rights are premised on citizenship of lawful presence. They will be discussed in Sub-Chapter 4.3.3 & 4.3.4.]

³⁰⁵ Human Rights Commission, *General Comment No. 15: The Position of Aliens under the Covenant*. UN doc. CCPR/C/21/Rev.1, 19 May 1989, at para. 10.

³⁰⁶ Edwards, *supra* note 90, at 304.

³⁰⁷ *Id.* at 303.

³⁰⁸ *Refugee Convention*, *supra* note 2, at Article 5.

³⁰⁹ WEIS, *supra* note 123, at 38.

³¹⁰ *Id.*

³¹¹ Edwards, *supra* note 90, at 303.

ICCPR obliges developed and developing states to immediately fulfill their duty under the Covenant.³¹² This interpretation reflects the Human Rights Committee's understanding that fulfillment of civil and political rights does not carry the same financial costs as realizing social, economic, and cultural rights, so all states – rich and poor – can grant them equally. In addition, the ICCPR does not allow State Parties to differentiate between nationals and non-nationals, with the exception of Articles 12 and 25. Article 12(1) conditions the right to freedom of movement and choice of residence on lawful presence within a state's territory.³¹³ Article 25 premises on citizenship the right to vote on and take part in the conduct of public affairs.³¹⁴ Article 13 differentiates between lawfully present aliens (who cannot be expelled unless pursuant to a judicial order) and aliens not lawfully present (to whom less procedural rights are owed). The rest of the Convention's entitlements are applicable on the basis of presence in the territory of a state party, and therefore applicable to all non-nationals regardless of immigration status. Other international instruments, including the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention to End All Forms of Racial Discrimination*, and the *Convention on the Rights of Persons with Disabilities*, also require the immediate realization of civil and political rights for the persons they address.

3.4.3.2. Implementation of the International Covenant on Social, Cultural, and Economic Rights

The implementation of economic, social and cultural rights in the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR)³¹⁵ is a duty that states may progressively realize in certain circumstances, unlike the civil and political rights in the ICCPR that require states to comply with their obligations as soon as becoming party to the treaty.³¹⁶ ICESCR

³¹² Human Rights Committee, *General Comment No. 31: The Nature of General Legal Obligations under Imposed on State Parties to the Covenant* CCPR/C/21/Rev. 1/Add. 13 (2004).

³¹³ ICCPR, *supra* note 77, at Article 12(1): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

³¹⁴ ICCPR, *supra* note 77, at Article 26:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

(c) *To have access, on general terms of equality, to public service in his country.*

³¹⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982.

³¹⁶ ICCPR, *supra* note 2.

Article 2(1) stipulates that states can realize the Covenant's rights progressively if they lack economic resources for immediate implementation. The Article takes into account the difficulties such states would face if obliged to immediately realize all rights outlined in the ICESCR. However, a progressive realization standard could potentially weaken the position of individuals demanding the fulfillment of their rights if states unduly rely on this standard to justify the absence of rights that they are in fact economically capable of providing. The Committee on Economic, Social and Cultural Rights (CESCR) addressed this dilemma by creating the so-called core content of essential rights,³¹⁷ clarifying that a "state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant."³¹⁸ Other international human rights conventions, such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, include progressive realization standards for certain social, economic, and cultural rights. They consistently differentiate between the core elements of specific rights, which must be immediately recognized, and those that developing states can progressively realize. CESCR General Comments provide further details on the core content of specific ICESCR rights and these are discussed under the relevant Chapters of this Report.

ICESCR Article 2(3) allows developing countries to determine to what extent they would grant economic rights to non-nationals, with due regard for human rights and their national economy.³¹⁹ The preparatory works indicate that this provision was intended for cases in which non-nationals exercise unequal influence over a developing state's economy, and such a state wishes to limit the economic rights of these non-nationals so as to give nationals equal economic opportunities.³²⁰ Article 2(3) makes allowance only for developing countries because

³¹⁷ Rüdiger Wolfrum, *Obligation of Result versus Obligation of Conduct: Some Thoughts about the Implementation of International Obligations in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 363, 384 (M. Arsanjan, J. Cogan, R. Sloane, & S. Weissner eds) at 364:

An obligation of result is "an international obligation that requires the state to ensure the obtainment of a particular situation – a specified result – and leaves it to that state to achieve such a situation or result by its own choice."

³¹⁸ UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. E/C.12/2000/4, August 11, 2000, para 10. [Hereinafter, *General Comment No. 14*]

³¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3 [hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982.

³²⁰ BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS* 214 (2014). Available at <http://opil.ouplaw.com>.

these are often countries that experienced colonial rule and live with the economic legacy of foreign domination.³²¹ The provision is limited to economic rights; however, the Covenant does not distinguish clearly between economic, social and cultural rights. For example, the right to education has been classified as an economic right, social right, and cultural right.³²² The preparatory works clarify that Article 2(3) intended to cover only those rights directly concerning economic activity and other processes connected to earning a living. Thus, only the right to work (Articles 6 and 7), the right to form a trade union, and the right to strike (Articles 8(a) and (b)) are encompassed by this provision.³²³

Unlike the ICCPR, ICESCR allows developing states to progressively realize economic, social, and cultural rights. The prohibition on discrimination still applies, but non-nationals do not enjoy the same entitlements as nationals *per se*. With regard to implementing these rights, State Parties may not discriminate on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³²⁴ This provision prohibits both direct and indirect discrimination.³²⁵ Direct discrimination refers to treating an individual less favorably than another person in a similar situation based on one of the prohibited grounds. Indirect discrimination occurs when laws, policies, or practices appear neutral but have a disproportionate impact on specific groups.³²⁶ As human rights law is grounded on the premise that persons have fundamental rights by virtue of their humanity, equal treatment between nationals and non-nationals is the norm.³²⁷ This is reflected in CESCR General Comment No. 20, which interprets of “other status” to include nationality. It states that “the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-

³²¹ *Id.* at 216 [Citing the Limburg Principle on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex, paras. 43, 44: “43. *The purpose of Article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in Article 2(3) should be interpreted narrowly.* 44. *This narrow interpretation of Article 2(3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.*”]

³²² *Id.* at 217, referring to UN Committee on Economic, Social and Cultural Rights, “General Comment No. 11: Plans of Action for Primary Education (Art.14)” (1999), UN Doc. E/C.12/1999/4, May 10, 1999.

³²³ SAUL, KINLEY & MOWBRAY, *supra* note 320, at 217.

³²⁴ ICESCR, *supra* note 319, at Article 2. Similar non-discrimination provisions are found in ICCPR Article 2(1), ICERD Article 1(1), CEDAW Article 1(1), CRC Article 2(1), CRPD Article 2, and CMW Article 1(1).

³²⁵ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights” (2009), UN Doc. E/C.12/GC/20, July 2, 2009, para 10. [Hereinafter, *General Comment No. 20*]

³²⁶ SAUL, KINLEY & MOWBRAY, *supra* note 320, at 183.

³²⁷ David Weissbrodt, *The Protection of Non-Citizens in International Human Rights in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* 221, 236 (R. Cholewinski, R. Perruchoud & E. MacDonald eds. 2007) at 222.

seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation.”³²⁸

The equality of nationals and non-nationals under international human rights law is not absolute. Most states treat citizens and migrants differently with regard to political rights, such as the right to vote, and economic rights, such as the right to work. This is because human rights treaties sometimes provide room for differences concerning the rights of non-nationals.³²⁹ For example, the ICCPR confers voting rights only to “citizens”,³³⁰ and freedom of movement is applicable only to “everyone lawfully within the territory”.³³¹ ICESCR Article 4 allows states to limit Covenant rights provided that such limitations are determined by law and “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”³³² The CESCR states that differential treatment on the grounds enunciated in Article 2(2) is prohibited unless (i) there is a reasonable and objective justification for it, and (ii) its implementation is limited to achieve this justified goal. Unfortunately, there is no clear definition of what would count as a reasonable justification. The Committee requires an assessment “as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society”, mirroring the wording of Article 4. In addition, the aim a state seeks to achieve must be in reasonable proportionality to the effect of a discriminatory measure.³³³ On this basis, it is clear that differentiation between nationals and non-nationals should be narrow in scope and occur as a measure of last resort. However, state practice has varied, and diverse interpretation allows the possibility of misuse.

Other international bodies using similar standards provide additional guidance on when distinctions between nationals and non-nationals meet conditions of legitimacy,

³²⁸ *General Comment No. 20*, *supra* note 325, at para. 30.

³²⁹ Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/Rev.1 (1994) at para. 2 & Joan Fitzpatrick, *HR of Migrants*, 3.

³³⁰ *ICCPR*, *supra* note 77, at Article 25.

³³¹ *Id.* at Article 12.

³³² *ICESCR*, *supra* note 324, Article 4: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

³³³ *General Comment No. 20*, *supra* note 325, para 13.

reasonableness, and proportionality.³³⁴ Examples of when a distinction is considered lawful can be found in the case law of the European Court of Human Rights and decisions by the Human Rights Committee, which follow the same reasoning as the CESCR. In the *Belgian Linguistics* case, the European Court of Human Rights held that differential treatment is not discriminatory if there is an “objective and reasonable justification” and “a reasonable relationship of proportionality between the means employed and the aims sought to be realized.”³³⁵ In addition, the Court clarified that if a state confers an “advantage” or “privilege” to a particular group or an individual, this does not constitute discrimination. The question of whether a distinction is legitimate only arises when a “hardship” is inflicted on certain people.³³⁶

In *Love et al v. Australia*, the Human Rights Committee dealt with the dismissal of airline employees at the age of 60. The Committee considered maximizing the safety of passengers and crew during flights as a reasonable justification for discrimination based on age, due to existing aviation safety standards issued by the International Civil Aviation Organization. Therefore, introducing a mandatory retirement age in this context was considered a lawful distinction.³³⁷ In *Gueye et al v France*, the Human Rights Committee assessed a situation where Senegalese soldiers who had served in the French Army before Senegal’s independence received their pensions based on a fixed amount from January 1975, while the pensions of French veterans were still subject to occasional increases. For 14 years, veterans of French and Senegalese nationality were treated alike, as the basis for their pension was the service they provided. Thus, introducing a differentiation on the basis of nationality was not considered reasonable and objective, and deemed unlawful discrimination.³³⁸

In *Gaygusuz v. Austria*, the European Court of Human Rights decided the case of a Turkish national who had lived and worked temporarily in Austria but was later denied emergency

³³⁴ SAUL, KINLEY & MOWBRAY, *supra* note 320, at 179.

³³⁵ Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, Eur. Ct. H.R., 23 July 1968, 31. [Hereinafter, *Belgian Linguistics*]

SAUL, KINLEY & MOWBRAY, *supra* note 320, at 178. The same definition is used in several European Court of Human Rights cases: ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008, para. 60; ECtHR, *Guberina v. Croatia*, No. 23682/13, 22 March 2016, para. 69.

³³⁶ *Belgian Linguistics*, *supra* note, 26.

³³⁷ SAUL, KINLEY & MOWBRAY, *supra* note 320, at 279.

³³⁸ *Id.* at 180.

assistance on the grounds that he is not an Austrian citizen.³³⁹ The Austrian government justified this differential treatment by emphasizing that “the State has special responsibility for its own nationals and must take care of them and provide for their essential needs.”³⁴⁰ The Court rejected this argument. Mr. Gaygusuz had made contributions to the unemployment insurance fund on the same basis as Austrian employees and thus differentiating based on nationality was not an objective and reasonable justification.³⁴¹

In *Luczak v. Poland*, a French national of Polish origin moved to Poland where he was employed for more than ten years and contributed to the general social security scheme. He then bought a farm and requested admission to the Farmers’ Social Security Fund, which was denied based on his foreign nationality. As a consequence, Mr. Luczak had no insurance in the case of sickness, occupational injury or invalidity, and was unable to continue paying contributions towards his retirement fund.³⁴² Poland argued that the Farmers’ Social Security Fund was created to protect the particularly vulnerable group of Polish farmers and was to 95% financed from the budget. Excluding foreigners would pursue the legitimate aim of protecting this specific group.³⁴³ The European Court of Human Rights admitted that states have a “margin of appreciation” in justifying differential treatment.³⁴⁴ However, even if there are reasonable and objective grounds, the principle of proportionality needs to be considered. An exclusion from social insurance schemes may never leave an individual “in a situation in which he is denied any social insurance cover, whether under a general or specific scheme, thus posing a threat to his livelihood.” Leaving Mr. Luczak without any social security cover, despite his self-employment, is against the current trends in European social security legislation.³⁴⁵ The Court ruled that even taking the state’s margin of appreciation into consideration, in this case there was no reasonable and objective justification for discriminating based on nationality.³⁴⁶

Though the ECtHR’s jurisprudence does not bind Egypt, it demonstrates the balance between permitted differential treatment between nationals and non-nationals and the reasonable and

³³⁹ Emergency assistance is a payment given in Austria as part of the social security system. Once an individual no longer receives unemployment money, emergency assistance is given to ensure nobody falls below the absolute minimum standard of living.

³⁴⁰ *Gaygusuz v. Austria*, Eur. Ct. H.R., Application No. 17371/90, 16 September 1996, para. 45.

³⁴¹ *Id.* at para. 43.

³⁴² *Luczak v. Poland*, Eur. Ct. H.R., Application No. 77782/01, 27 November 2007, paras. 9-12.

³⁴³ *Id.* at para. 43.

³⁴⁴ *Id.* at para. 47.

³⁴⁵ *Id.* at 52.

³⁴⁶ *Id.* at 59.

objective grounds necessary to permit such policies. The permissibility of Egyptian domestic legislation that differentiates between nationals and non-nationals depends on the same calculus of whether or not it negatively impacts a core obligation, and whether it is a reasonable measure to achieve a necessary outcome. Since Egypt is a developing country, it has an argument for policies that differentiate between nationals and non-nationals provided they do not infringe on the previously discussed core obligations and are reasonable and proportional.

3.4.3. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

CMW provides specific legal entitlements for migrant workers and their families. Article 2(1) defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”³⁴⁷ It further clarifies that “family member” includes spouses, persons in a relationship that creates an effect equivalent to marriage, dependent children, and other dependent persons as defined by domestic legislation.³⁴⁸ Among the classes of migrant workers that Article 3 excludes from the scope of the CMW are refugees and stateless persons.³⁴⁹ Drafters intended the Convention to address the protection gap that existed between refugees and migrants.³⁵⁰ Previous human rights conventions had focused on the former, resulting in divergent state practice with regard to rights owed to migrants.³⁵¹ The Convention creates few new rights for migrant workers and their family.³⁵² Instead, “it provides a more precise and specific interpretation of the way human rights should be applied to migrant workers. This corresponds to other treaties, which also target other potentially vulnerable groups (women, children, and, more recently, disabled persons).”³⁵³ CMW differentiates between entitlements owed to all migrants and more expansive rights owed to regular migrants on the basis of their legal presence.³⁵⁴ The rights owed to irregular migrants include most civil rights and basic social, economic, and cultural rights. Regular migrants have additional rights to political participation and higher access to

³⁴⁷ *CMW*, *supra* note 82, at Article 2.

³⁴⁸ *Id.* at Article 4.

³⁴⁹ *CMW* *Id.* at Article 3.

³⁵⁰ Ryszard Cholewinski, *The Human Rights of Migrants: The Dawn of a New Era* Geo. 24 Immigr. L. J. 585, 614 (2010) at 586.

³⁵¹ *Id.* at at 586.

³⁵² For example, Article 32 entitles regular and irregular migrants to transfer their earnings and Article 68 protects migrant workers from misleading information related to emigration or immigration.

³⁵³ Antoine Pecoud, *The Politics on the UN Convention on Migrant Workers' Rights* 5 GROJIL 57, 72 (2017) at 58.

³⁵⁴ *CMW*, *supra* note 82, at Article 36.

social security and labor participation. This reflects the general division between immediately obtainable civil and political rights and the progressive realization standards and permissible differentiation allowed for realizing social, economic, and cultural rights, as discussed in the subsequent two sections

Subsequent Chapters apply the laws herein described, in addition to regional, bilateral and domestic law, to determine the content of refugee protection when it comes to specific issues such as family life, employment, education, health, housing, detention and expulsion, access to courts, and documentation.

CHAPTER 4: FAMILY UNITY AND REUNIFICATION

4.1. LEGAL FRAMEWORK

4.1.1. International Law

4.1.1.1. International Instruments¹

- *1951 Convention Relating to the Status of Refugees* (Refugee Convention)²
- *International Covenant on Civil and Political Rights* (ICCPR)³
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁴
- *Convention on the Rights of the Child* (CRC)⁵
- *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (CAT)⁶
- *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)⁷
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)⁸
- *Convention on the Rights of Persons with Disabilities* (CPRD)⁹
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW)¹⁰

¹ Full text of the following legal instruments can be found in Annex B.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982 with the following reservation: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁴ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). [Hereinafter, *ICESCR*] Egypt ratified the Covenant on Jan. 14, 1982 with the following declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990). [Hereinafter, *CRC*] Egypt ratified the Convention on July 6, 1990.

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, 1465 U.N.T.S. 85 (entered into force June 26, 1987). [Hereinafter, *CAT*] Egypt acceded on June 25, 1986.

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). [Hereinafter, *ICERD*] Egypt ratified the Convention on May 1, 1967.

⁸ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 U.N.T.S. 13 (entered into force Sept. 3, 1981). [Hereinafter, *CEDAW*] Egypt ratified the Convention on Oct. 18, 1981.

⁹ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*] Egypt acceded to the Convention on Sept. 18, 1981.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*] Egypt acceded to this Convention on Feb. 19, 1993.

- *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention)¹¹
- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts* (Protocol I)¹²
- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts* (Protocol II)¹³
- *Vienna Convention on the Law of Treaties* (VCLT)¹⁴

4.1.1.2. Analysis of International Instruments

4.1.1.2.1. The Definition of Family

The family is recognized under international law as the fundamental unit of society, entitled to respect and protection by the state.¹⁵ Under international law, the right to family life includes the right to marry, start a family, and the protection of family life from arbitrary interference by the state. Families must be able to stay together to enjoy these rights, and also have the opportunity to reunite in case of separation. Thus, there are two important aspects to consider in the context of refugees: the right to family unity and the right to family reunification. To implement this, states must not only refrain from any actions that could disrupt intact families,¹⁶ but also take the necessary actions to allow families to reunite if they were separated through international borders.¹⁷ The right to family unity and reunification competes with states' right to control their borders. An argument sometimes made by those wishing to reduce the number of incoming asylum-seekers or refugees, is that so-called "anchor children" are used to undermine immigration policies. This term refers to the accusation that families deliberately send children ahead to the country of refuge, counting on the fact that unaccompanied minors

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950). [Hereinafter, *Fourth Geneva Convention*] Egypt ratified the Convention on Nov. 10, 1952.

¹² Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978). [Hereinafter, *Additional Protocol I*] Egypt ratified the Protocol on Oct. 9, 1992.

¹³ Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978). [Hereinafter, *Additional Protocol I*] Egypt ratified the Protocol on Oct. 9, 1992.

¹⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Egypt's accession of the treaty occurred on Feb. 11, 1982.

¹⁵ Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection*, in UNHCR'S CONSULTATIONS ON INTERNATIONAL PROTECTION 555, 603 (Erika Feller, Volker Türk, Frances Nicholson eds. 2003), at 556.

¹⁶ Jastram & Newland, *supra* note 15, at 557.

¹⁷ *Id.* at 576.

seeking asylum have better chances of being granted refugee status than adults. Once the children's RSD has been successfully completed, the rest of the family may follow under the auspice of family unity.¹⁸ Regardless of this fear that families may abuse this entitlement, such an argument may not be an impediment to reuniting separated family members. Family unity and reunification remains an international obligation, which will be discussed in detail below.¹⁹

One of the difficulties with implementing the right to family unity and reunification lies in the lack of a clear definition of family under international law. It is undisputed that this right applies to the nuclear family consisting of parents and minor children. However, when it comes to aged parents, dependent siblings who are no longer minors, adoption, more distant relatives, fiancés, same sex-marriages, or other relationships, experts and jurisprudence provide divergent opinions.²⁰ Jurisprudence encourages states to adopt "a flexible approach which takes account of cultural variations, and economic and emotional dependency factors."²¹ The Human Rights Committee states that domestic law can be a useful point of reference. If a certain family constellation is protected or acknowledged under domestic law, then it shall without doubt receive protection under international law.²² The absence of formal marriage bonds does not absolve states from their obligation to protect family life,²³ and a long-term bond between applicants, which had resulted in the birth of a son, can be considered a "de facto relationship

¹⁸ *Id.* at 560. MATEJA SEDMAK, BIRGIT SAUER & BARBARA GORNIK, UNACCOMPANIED CHILDREN IN EUROPEAN MIGRATION AND ASYLUM PRACTICES 89 (2018). The concept of anchor children is mostly used by right-winged political parties in Europe who seek to minimize the number of incoming migrants or especially asylum-seekers and refugees.

¹⁹ *Jastram & Newland*, *supra* note 15, at 560.

²⁰ *Id.* at 563.

²¹ *Summary Conclusions on Family Unity* (2001), following Geneva Expert Roundtable Organized by U.N. High Commissioner for Refugees (UNHCR) and the Graduate Institute of Geneva, Nov. 8-9, 2001. at para. 8. [Hereinafter, *Conclusions on Family Unity*] Available at: <http://briguglio.asgi.it/immigrazione-e-asilo/2002/marzo/unhcr-tav.-rot.-famiglia.html>

²² *CCPR General Comment No. 19*, *supra* note 59 at para. 2: "[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and [...] it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. [...] Where diverse concepts of the family, "nuclear" and "extended", exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, state parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice."

²³ *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, U.N. Human Rights Committee (HRC), July 16, 2004, available at: <http://www.refworld.org/cases,HRC,4162a5a46.html> [accessed July 10, 2018], at para. 6.4: "The term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations"

akin to marriage.”²⁴ The Committee on the Rights of the Child includes “biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.”²⁵ And a broad understanding of the family is also reflected in *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*:

For the purposes of the present Convention the term “members of the family” refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.²⁶

Other legal frameworks correspond to this wide definition. For example, the Inter-American Court of Human Rights has clarified that the definition of family includes much more than just the nuclear family. Not only extended family but not blood-related persons who have close ties to a child count as family.²⁷ Humanitarian law utilizes a broad definition of the family too: “While neither the Geneva Conventions of 1949 nor the Additional Protocols of 1977 contain exact and authoritative definitions of family, there is recognition that a family is, in its broadest sense, considered to be objectively a group of people living together, and subjectively, a group of people wanting to live together.”²⁸

²⁴ *Hendrick Winata and So Lan Li v. Australia*, U.N. Human Rights Committee (HRC), CCPR/C/72/D/930/2000, (2001), at para. 2.1. Available at: <http://www.refworld.org/docid/3f588ef67.html>

²⁵ Committee on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (art. 3, para. 1) CRC /C/GC/14 (May 29, 2013) at para. 59.

²⁶ *CMW*, *supra* note 10, Article 5.

²⁷ Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, IACtHR, Aug. 19, 2014, available at:

<http://www.refworld.org/docid/54129c854.html>, (footnotes omitted), para. 272: “[T]he family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State. Nevertheless, the Court recalls that there is no single model for a family. Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes.”

²⁸ Annual Tripartite Consultations on Resettlement, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, Background Note for the Agenda Item: Family Reunification in the Context of Resettlement and Integration (2001), [Hereinafter, *Protecting the Family*] at para. 11. Available at:

http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf. In the *Commentary to the Additional Protocols* of the Geneva Conventions of 1949, the family is defined as “in the narrow sense, the family covers persons related by blood and living together as one household.” Furthermore, it states “it would be wrong to opt for an excessively rigid or precise definition: common sense must prevail. Thus, the word ‘family’ here of course covers relatives in a direct line – whether their relationship is legal or natural – spouses, brothers and sisters, uncles, aunts, nephews and nieces, but also less closely related relatives, or even unrelated

UNHCR assesses family through the principle of dependency between family members. Dependency is presumed for the nuclear family. This is especially important for the Refugee Status Determination conducted by UNHCR as family members are considered eligible for derivative refugee status under the right to family unity. Derivative status means that an individual (who may or may not be entitled to refugee status in their own right) is granted refugee status purely on the basis of a close family member having received it.²⁹ The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* lists the family members who always qualify for derivative status:

- the spouse of the asylum-seeker (including those engaged to be married);
- all unmarried children of the asylum-seeker who are under 18 years;
- parents or primary caregivers of an asylum-seeker under 18 years of age, as well as the dependents of the adult parent or caregiver;
- the minor siblings of an asylum-seeker who is under 18 years old.³⁰

Other family members and certain other individuals may also be eligible for derivative refugee status under the right to family unity, if it is established, on balance, that a relationship of social, emotional or economic dependency exists. These family members can include:

- Dependent parents of an adult asylum-seeker;
- married children of the refugee status applicant who remain dependent on the applicant;
- dependent children of the asylum-seeker who are over 18;
- other dependent relatives, including brothers, sisters, aunts, uncles, cousins, who are part of the household of the asylum-seeker;
- any other individuals who are not related to the asylum-seeker, but have a dependency relationship that is similar to the categories of family members.³¹

Furthermore, it is to be noted that derivative status only works in favor of recognition of the asylum-seekers, there cannot be a derivative rejection. Therefore, if the main applicant's

persons, belonging to it because of a shared life or emotional ties." The conclusion of the Commentary is that "In short, all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family."

²⁹ See Chapter 3 for Refugee Status Determination.

³⁰ UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003), Unit 5, 2. Available at: <https://www.unhcr.org/4317223c9.pdf> [Hereinafter, UNHCR Procedural Standards] Chapters updated between 2016 and 2017 can be accessed here: <https://www.refworld.org/rsdproceduralstandards.html>

³¹ *UNHCR Procedural Standards*, *supra* note 29 at 5.

refugee claim was rejected, this does not automatically mean that their family members are to be rejected too. Instead, they are entitled to a RSD in their own right.³²

The numerous international legal instruments establishing the right to family unity and reunification render this right applicable to all people, including refugees, asylum-seekers, and failed asylum-seekers. However, refugees and asylum-seekers are more likely to need to rely on this right because “an almost universal consequence of refugee experiences is the destruction of the family unit.”³³ During their flight the nuclear family is often separated, instead more distant family members bond and continue their journey together. The element of dependency used by UNHCR is thus most relevant to the experiences of refugees.³⁴ Since refugees cannot return to their home countries, the right to family life and unity is only possible through reunification in the country of asylum. For them, the right to family unity does not only entail a negative obligation on states to abstain from taking actions that would result in family separation, but also a positive obligation to take action to preserve the unity of the family and reunite family members who have been separated.³⁵ The right to family unity and family reunification is explained in three parts: Its limited scope under the *1951 Convention Relating to the Status of Refugees*; its broader scope under international human rights treaties; and its content under international humanitarian law treaties applicable to refugees, asylum-seekers and failed asylum-seekers.

4.1.1.2.2. Right to Family Unity and Reunification under Refugee Law

There is no specific provision guaranteeing family unity and reunification in the Refugee Convention, however, Articles 12 and 25 imply such a right. Article 12 obliges states to respect refugees’ rights relating to personal status, in particular marriage rights previously acquired in

³² Jastrom & Newland, *supra* note 15, at 572.

³³ Brooke Wilmsen, *Family Separation: The Policies, Procedures, and Consequences for Refugee Background Families*, 30 Refugee Survey Quarterly 44, 63 (2011) at 45.

³⁴ *Protecting the Family*, *supra* note 28, 1(c): “The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific. Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family (husband, wife and minor children). In some cases, the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process”

³⁵ Jastrom & Newland, *supra* note 15, at 581: “Despite problems in implementation of this right, it is generally accepted in State practice.”

the country of nationality. Recognition of pre-existing rights attached to marriage can be used to strengthen refugees' claims to family unity and reunification.³⁶ Article 25 requires states to provide assistance to refugees residing in the state through their own authorities or to arrange for the assistance through an international authority.³⁷ Administrative assistance includes "any right to which an individual refugee is lawfully entitled, whether under domestic or international law,"³⁸ thus including rights associated with family unity. States are required to provide refugees with "documents or certifications as would normally be delivered to aliens by or through their national authorities."³⁹ The term "documents or certification" refers not only to professional or educational certificates, but also includes all documents relating to family status, for example birth, marriage, adoption, divorce or death.⁴⁰ These documents and certifications are usually needed to access the right to family unity and must be given "credence in the absence of proof to the contrary."⁴¹ Fees for acquiring these documents must be "moderate" and not higher than fees for nationals.⁴²

While the Refugee Convention does not contain specific provisions on the right to family unity, the drafters recognized the "essential right" to family unity through a Recommendation approved unanimously by the Conference of Plenipotentiaries that adopted the final text of the 1951 Convention. States have to ensure that the family unity of refugees is maintained, and that the rights granted to refugees are extended to members of their family.⁴³ Even though the Recommendation is not binding, it indicates the drafters' understanding of family unity as an essential right of refugees.⁴⁴ This is also affirmed by UNHCR Executive Committee's

³⁶ Alice Edwards, *Human Rights, Refugees, and The Right 'To Enjoy' Asylum* 17 OUP 293-330, (2005) at 310.

³⁷ *Refugee Convention*, *supra* note 2, Article 25(1).

³⁸ A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press (OUP), 2011, at 1138.

³⁹ *Refugee Convention*, *supra* note 2, Article 25(2).

⁴⁰ *Zimmerman*, *supra* note 38, at 1143.

⁴¹ *Refugee Convention*, *supra* note 2, Article 25.

⁴² *Id.* at Article 25(4).

⁴³ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951), U.N. Doc. A/CONF.2/108/Rev.1, Nov. 26, 1952, at Recommendation B:

"Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family, Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

1. Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

2. The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

⁴⁴ *Jastram & Newland*, *supra* note 15, at 570.

(ExCom) numerous Conclusions on the right to family unity and reunification. In its first Conclusion, the Committee “emphasized that, in keeping with the fundamental principles of family unity, members of refugee families should be given every opportunity to be reunited by being allowed to leave their country of origin.”⁴⁵ The Committee also encouraged states, to develop legislation that provides the “right to family unity for all refugees, taking into account the human rights of the refugees and their families.”⁴⁶ On family reunification, the Committee stated that “every effort should be made to ensure the reunification of separated refugee families.” This includes facilitation of family reunification by countries of nationality “by granting exit permission to family members of refugees to enable them to join the refugee abroad,”⁴⁷ and for countries of asylum the application of a “liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.”⁴⁸ However, the term “liberal criteria” is not further defined.

For practical reasons, host states prefer to postpone questions of family reunification until after the RSD is completed. Unfortunately, this means that asylum-seekers may undergo a time-consuming RSD process before enjoying their right to family life, unity, and reunification. Families may “spend years apart in sometimes precarious and even dangerous situations before they are able to reunite, if at all.”⁴⁹ To ensure asylum-seekers can also benefit from their right to family, countries must provide an RSD process that is not lengthy and based from the beginning on unifying the family.⁵⁰ An understanding of the experience of asylum-seekers is particularly important when evidence of family unity/family reunification is requested and

⁴⁵ U.N. High Commissioner for Refugees (UNHCR), Conclusion No. 1 (XXVI) Establishment of the Sub-Committee and General (1975), in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (Conclusion No. 1-109) UN General Assembly Doc. No. 12A (A/10012/Add.1) at (f). Available at: <http://www.refworld.org/docid/4b28b1f2.html>

⁴⁶ U.N. High Commissioner for Refugees (UNHCR), Conclusion No. 85 (XLIX) – Conclusion on International Protection (1998), in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (Conclusion No. 1-109) United Nations General Assembly Document No. 12A (A/53/12/Add.1) at (x). Available at: <http://www.refworld.org/docid/4b28b1f2.html>

⁴⁷ U.N. High Commissioner for Refugees (UNHCR), No. 24 (XXXII) – Family Reunification (1981), in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (Conclusion No. 1-109) United Nations General Assembly Document No. 12A (A/37/12/Add.1) at (x). [Hereinafter, *ExCom Conclusion 24*]. Available at: <http://www.refworld.org/docid/4b28b1f2.html>

⁴⁸ *ExCom Conclusion 24*, *supra* note 47.

⁴⁹ Frances Nicholson, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, United Nations High Commissioner for Refugees (January 2018) at 134. Available at: <https://www.refworld.org/pdfid/5a902a9b4.pdf>

⁵⁰ *Conclusions on Family Unity*, *supra* note 21, at para. 13: Stated must “expedite decision-making particularly in cases where separation causes particular hardship, where the “best interests” of the child come into play, or where there is a likelihood of a positive determination being made. Preparation for possible family reunification in the event of recognition should, in any event, begin in the early stages of an asylum claim, for instance, by ensuring that all family members are listed on the interview form.”

assessed by states. Many asylum-seekers have lost essential documents during flight, and consequently might face great danger in the attempting to retrieve them from the country of nationality, due to the possibility of persecution there. Consequently, in their RSD process and family unity/reunification procedures, states must take into account their obligations to administrative assistance.⁵¹

When the required documents are irretrievable, states must not prevent asylum-seekers to enjoy their right to family life, under their obligation to the right to family unity and family reunification, and pursuant to the objective and purpose of the Refugee Convention. UNHCR Executive Committee stated that “when deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not *per se* be considered as an impediment.”⁵² Similarly, the European Court of Human Rights stated that in family reunification the disruption and disorganization in family life of asylum-seekers must be taken into consideration.⁵³ Accordingly, the Court acknowledged in *R.C. v. Sweden* “owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.”⁵⁴ Requesting documentation from beneficiaries of international protection, like asylum-seekers, that is impossible to obtain, either due to the danger of retrieving from the State of nationality or because the State is unable to issue it, may amount to indirect discrimination when compared to non-nationals who do not face the same difficulties.⁵⁵ Consequently, RSD and family unity procedures that do not take into account the difficult circumstances of asylum-seekers, whether in terms of time or required documents, are consequently disproportionately more challenging for asylum-seekers than other non-nationals.

⁵¹ *Id.* at para. 12: “The requirement to provide documentary evidence of relationships for the purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences.”

⁵² *ExCom Conclusion 24*, *supra* note 47, at para. 6.

⁵³ *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, July 10 2014, above fn. 20, para. 73. Available at: <https://www.refworld.org/cases,ECHR,53be80094.html>; *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, July 10, 2014, above fn. 85, para. 52. Available at: <https://www.refworld.org/cases,ECHR,53be81784.html>

⁵⁴ *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010, at para. 50. Available at: <https://www.refworld.org/cases,ECHR,4b98e11f2.html>.

⁵⁵ *Nicholson*, *supra* note 49, at 71-72.

4.1.1.2.3. The Right to Family Unity and Reunification under International Human Rights Law

The Refugee Convention states “nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”⁵⁶ Therefore, refugees’ right to family unity and reunification must be understood in light of subsequent developments in international law, including related treaties and agreements, and customary international law. This entitlement is incorporated into several international agreements, which apply not specifically to refugees but everyone, including asylum-seekers and failed asylum-seekers.

The *International Covenant on Civil and Political Rights* (ICCPR) provides that the family is the “natural and fundamental group unit of society” entitled to the protection of society and the state,⁵⁷ and guarantees the right to marry and form a family.⁵⁸ The Human Rights Committee (HRC) interprets this right to found a family to include family unity and reunification:

The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.⁵⁹

Furthermore, the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) requires that the “widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”.⁶⁰ Developing states are permitted progressive realization of economic rights to the maximum of their available resources, but are required to fulfill the minimum core obligations outlined by the

⁵⁶ *Refugee Convention*, *supra* note 2, Article 5.

⁵⁷ *ICCPR*, *supra* note 3, Article 23(1).

⁵⁸ *Id.* at Article 23(2).

⁵⁹ U.N. Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family), Protection of the Family, the Right to Marriage and Equality of the Spouses* (July 27, 1990) at 5.

⁶⁰ *ICESCR*, *supra* note 4, Article 10.

Committee on Economic, Social, and Cultural Rights (CESCR).⁶¹ Thus, ICESCR confirms the importance of family unity but does not enunciate clear state obligations.

Protection of the family, as an aspect to the right to privacy, is also guaranteed under the ICCPR which prohibits arbitrary or unlawful interference with family.⁶² States are obliged “to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”⁶³ Furthermore, children are entitled to receive, without any discrimination, from their family, society and the state the protection required by their status as a minor.⁶⁴ This obliges states to adopt special measures to protect the child, including assisting the family to ensure such protection, and intervening to restrict parental authority in cases of neglect or ill-treatment.⁶⁵ Together these obligations require states to respect the unity of the family through the protection of family from separation, whether conducted through arbitrary or unlawful interference, and ensuring reunification of families that have been separated.

The *Convention on the Rights of the Child* provides the strongest and most expansive legal basis for right to family unity and family reunification. Its Preamble states that the family is the “natural environment for the growth and well-being of all its members and particularly children” and a family environment, characterized by an atmosphere of “happiness, love and understanding”, is necessary for the “full and harmonious development of his or her personality.”⁶⁶ Furthermore, the Convention grants every child the right to “know and be cared for by his or her parents,”⁶⁷ and provides the “right of the child to preserve his or her identity, including [...] family relations without unlawful interference,”⁶⁸ echoing the provisions of the ICCPR. Children have the right to be protected from being separated from their parents against their will, with the exception of separation in the best interests of the child, for example in

⁶¹ U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant)* (14 December 1990) UN Doc E/1991/23 [Hereinafter, *CESCR Comment 3*], at 1. See Chapter 3 on right to seek asylum for a more detailed discussion of progressive realization.

⁶² *ICCPR*, *supra* note 3, Article 17.

⁶³ U.N. Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (8 April 1988), [Hereinafter, *CCPR Comment 16*] at para. 1.

⁶⁴ *ICCPR*, *supra* note 3, Article 24.

⁶⁵ *CCPR Comment 16*, *supra* note 63, at para. 6.

⁶⁶ *CRC*, *supra* note 5.

⁶⁷ *Id.* at Article 7(1).

⁶⁸ *Id.* at Article 8(1).

cases of abuse and neglect by parents or “where the parents are living separately and a decision must be made as to the child’s place of residence”. Any decision of this kind needs to be subject to judicial review.⁶⁹ In determining the best interest of the child, full consideration must be given to the child’s opinion.⁷⁰ All interested parties shall have the opportunity to participate in the proceedings.⁷¹ Children separated from one or both parents have the right to maintain personal relations and direct contact on a regular basis unless it is not in the child’s best interests. If the child is separated from parents against their will, by a state party through acts that include detention, imprisonment, exile, deportation, or death, the state must upon request provide essential information to the child, parents, or another member of the family if appropriate, on the absent family member(s) unless such information is detrimental to the well-being of the child.⁷²

The CRC guarantees both children and parents the right to family reunification,⁷³ as it obliges states to deal with family reunification applications “in a positive, humane and expeditious manner” and ensure that the “submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.”⁷⁴ Even though this provision does not explicitly require states to approve reunification applications, it uses stronger language than the frequently used vague terms of “consider favorably” or to “take appropriate measures.”⁷⁵ This call for affirmative action “clearly contemplates that there is at least a presumption in favour of approval,” with the only qualifier being the child’s best interests.⁷⁶ The reference to the necessity of considering the best interest of the child shows that the standards and obligations states have to follow concerning family unity within their borders, also apply to cross-border cases.⁷⁷

The CRC specifically recognizes the right to family unity and reunification for refugees. States are obliged to “trace the parents or other members of the family of any refugee child in order

⁶⁹ *Id.* at Article 9.

⁷⁰ *Id.* at Articles 9 and 12.

⁷¹ *Id.* at, Article 9(2).

⁷² *Id.* at Article 9.

⁷³ *Jastrom & Newland, supra* note 15, at 578.

⁷⁴ *CRC, supra* note 5, Article 10.

⁷⁵ *Jastrom & Newland, supra* note 15, at 578.

⁷⁶ Cynthia S. Anderfuhren-Wayne, *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, 8(3) Int’l J. Refugee L. 347- 382 (1996), at 123 (as cited in *Jastrom & Newland, supra* note 15, at 578).

⁷⁷ *Jastrom & Newland, supra* note 15, at 579.

to obtain information necessary for reunification with his or her family.”⁷⁸ It should not be argued by states that it is in the best interest of the children to reunite them with their family in the country they just fled, if there is a reasonable risk that they would face violation of their rights or other harm. Once children have received refugee status, returning them to their country of nationality for family reunification can never be a possible option, as it would breach *non-refoulement*⁷⁹ obligations.⁸⁰

Based on several human rights instruments, the right to family unity and family reunification must be applied without discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸¹ This is confirmed by the different human rights monitoring bodies. For example, the Committee for the Elimination of All Forms of Discrimination against Women stated that “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.”⁸² Also states need to ensure that seemingly neutral laws or regulations do not *de facto* discriminate women in this regards.⁸³

⁷⁸ CRC, *supra* note 5, Article 22.

⁷⁹ See Chapter 3 for more details on non-refoulement.

⁸⁰ Committee on the Rights of the Child (CRC), *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, (2005) at 83: “Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations ... Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.”

⁸¹ ICCPR, *supra* note 3, Articles 2(2) and 26; ICESCR, *supra* note 4, Article 2; CRC, *supra* note 5, Article 2; ICERD, *supra* note 7, Article 2; CEDAW, *supra* note 8, Articles 2, 15, 16; CRPD, *supra* note 9, Article 4, 5, 22 and 23.

⁸² U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 21: Equality in Marriage and Family Relations*, (1994). Available at: <https://www.refworld.org/docid/48abd52c0.html>.

⁸³ See Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *Concluding Observations on the Eighth Periodic Report of Denmark*, CEDAW/C/DNK/CO/8 (2015). In its concluding observations on the 8th Periodic Report of Denmark, the Committee commented on the policy to increase the age limit for spousal reunification to 24 years of age to combat forced marriage. The state’s policy was *de jure* gender neutral but the Committee recommended the State monitor and follow up to ensure the law does not result in *de facto* gender discrimination, and urged the State to “explore alternatives to the minimum age requirement as a means of combating forced marriage”.

The Committee on the Elimination of Racial Discrimination also affirmed states' obligations to guarantee family reunification without discrimination based on race or nationality.⁸⁴

Another important aspect of family unity is related to protection against expulsion. States' obligation not to expel any person to a territory where their life or liberty is at risk (*non-refoulement*) is augmented by states' negative duty not to separate families.⁸⁵ Where expulsion of refugees, asylum-seekers or failed asylum-seekers results in family separation, this may be a violation of the right to family unity. However, states are permitted to deport aliens.⁸⁶ To resolve these competing claims, committees and courts have established balancing tests. On cases of expulsion, the Human Rights Committee examines firstly whether the deported family member has a long-settled family life (length of stay in host country, link of family with country, social relationships and working conditions) and secondly whether family life can be enjoyed in the country of nationality instead.⁸⁷ On this basis, the Committee found states in breach of their obligations under family unity when they decided to deport persons who had spent significant time in the country and integrated well.⁸⁸ Regarding the second element, the Committee found states in breach when they prioritized their interest to deport aliens regardless

⁸⁴ See Committee on Racial Discrimination (CRD), *Prevention of Racial Discrimination, Including Early Warning Measures and Urgent Action Procedures: Decision 2 (63) on Israel*, CERD/C/63/Dec.2 (2003). For example, the Committee on the Elimination of Racial Discrimination issued a decision expressing concern regarding Israeli legislation which suspends, for a renewable one-year period, the possibility of family reunification, subject to limited and discretionary exceptions, in the cases of marriages between an Israeli citizen and a person residing in the West Bank or Gaza. The Committee stated that Israel must "revoke this law, and reconsider its policy with a view to facilitating family unification on a non-discriminatory basis."

⁸⁵ See Chapter 9 for details on expulsion and non-refoulement of refugees.

⁸⁶ See Laura Bacon, *To What Extent Can the Right to Asylum Be Limited by a State's Sovereign Right to Control Its Borders? A Comparative Assessment of the Lawfulness of European Asylum Law and Procedure*, 22 Auckland U. L. Rev. 69 (2016), at 76.

⁸⁷ See *Nicholson* *supra* note 49, at 7-9.

⁸⁸ See *Hendrick Winata and So Lan Li v. Australia*, U.N. Human Rights Committee (HRC) U. N. Doc. CCPR/C/72/D/930/2000. Available at: <https://www.refworld.org/cases,HRC,3f588ef67.html>. "There is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The author's son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationship inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family." See also *Madaferri v. Australia*, U.N. Doc. CCPR/C/72/D/930/2000, Communication No. 930/2000, (2001). In *Madaferri v. Australia*, HRC found the deportation of the father of a family long settled in Australia to be an arbitrary interference with family life: "in the present case ... a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered 'interference' with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case" and considered that the removal of Mr. Madaferri would, if implemented, constitute arbitrary interference with the family.

of the fact that the persons concerned would not be able to enjoy their right to family unity in their country of nationality.⁸⁹ The situation of refugees and asylum-seekers in this regard is especially difficult. Unlike other migrants they are unable to enjoy their right to family unity in their country of nationality due to the risk of being persecuted.⁹⁰ Thus in a balancing test, the decision can never be rendered in favor of deporting a refugee or asylum-seeker in order to re-unite with their family. This would be a violation of several human rights treaties, as well as the prohibition of *refoulement*.

In contrast to the above described legal provisions, which apply to refugees, asylum-seekers and failed asylum-seekers alike, the CMW only confers rights to regular and irregular migrants who are engaged in a remunerated activity.⁹¹ Already from the title onward, the inseparability of the worker and members of their family in the wording of the Convention, reflects the importance to maintain the family unit.⁹² CMW guarantees regular and irregular migrant workers and their families the freedom from unlawful or arbitrary interference with the family,⁹³ and recognizes the right to enjoy family unity by confirming the right of regular and irregular migrant workers on their family to leave any state, including their state of nationality and the right to always enter and remain in their state of nationality.⁹⁴

Regular migrants and their families enjoy additional rights under the CMW, not granted to irregular migrants. States are obliged to take “all appropriate measures to ensure the protection of the unity of the families of migrant workers.” States must also “take measures they deem

⁸⁹ See *Gonzalez v. Republic of Guyana*, U.N. Human Rights Committee (HRC), U.N.Doc. CCPR/C/98/D/1246/2004 (2010), Available at: <https://www.refworld.org/cases,HRC,4c1895262.html>. In this case the Cuban husband of a Guyanese national was denied a residence permit and the HRC found Guyana in violation of Article 17 of the Covenant as the couple could not live in Cuba and the state had “not indicated where else they might live as a couple.”

⁹⁰ *Nicholson*, *supra* note 49, at 17. See also *Tanda-Muzinga c. France*, Requête No. 2260/10. Eur. Ct. H.R. (2014). Available at: <https://www.refworld.org/cases,ECHR,53be80094.html>: “Family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life. It recalls also that it has also recognized that obtaining such international protection constitutes a proof of the vulnerability of the persons concerned. It notes in this respect that the necessity for refugees to benefit from a family reunification procedure that is more favourable than that available to other foreigners is a matter of international and European consensus ... In this context, the Court considers that it was essential for the national authorities to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and for them to rule on the visa request promptly.”

⁹¹ *CMW*, *supra* note 10, Article 2(1).

⁹² See Mark Rohan, *Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence*, 15 Chi. J. Int'l L 347-375 (2014), at 355.

⁹³ *CMW*, *supra* note 10, Article 14.

⁹⁴ *Id.* at Article 8.

appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.”⁹⁵ To protect family unity, regular migrant workers and their families may not be expelled from the state of employment, unless there are exceptional reasons established in the national legislation of that state. When expulsion is considered, then humanitarian consideration shall be given to the length of time the workers and their families have resided in the state of employment.⁹⁶ In the case of the death of a migrant worker, or a divorce, states are obliged to “favourably consider” giving family members authorization to remain in the state based on the right to family reunion. Consideration is also to be given to the length of time the family had already resided in the state of employment.⁹⁷

4.1.1.2.4. The Right to Family Unity and Unification under International Humanitarian Law

The right to family unity and reunification is also well-established in international humanitarian law. International humanitarian law is codified in the Geneva Conventions and only applies in cases of declared war or any other armed conflict between State Parties.⁹⁸ Thus, said Conventions are currently not applicable to Egypt. However, its provisions on family unity and reunification reflect states’ commitment to these rights and evidence the existence of established doctrine. The *Fourth Geneva Convention* obliges states to take necessary measures to ensure that children under fifteen years of age, who are orphaned or separated from their families, are not left on their own and that their education and upbringing is entrusted to a suitable person or authority.⁹⁹ Also, states shall assist the reception of these children in a neutral country for the duration of the armed conflict due to safety reasons.¹⁰⁰ In addition, states have to forward family correspondence “speedily and without delay,”¹⁰¹ facilitate enquiries made by members of families separated “with the object of renewing contact with one another and of meeting, if possible,” and to encourage the work of organizations engaged with this task.¹⁰² Concerning the right to leave a country, it is important to note that all civilians wishing to leave

⁹⁵ *Id.* at Article 44.

⁹⁶ *Id.* at Article 56.

⁹⁷ *Id.* at Article 50.

⁹⁸ *Fourth Geneva Convention*, *supra* note 11, Article 2.

⁹⁹ *Id.* at Article 25.

¹⁰⁰ *Id.* at Article 24.

¹⁰¹ *Id.* at Article 25.

¹⁰² *Id.* at Article 26.

the territory immediately before or during an armed conflict shall be permitted to do so, except if reasons of national security impede this.¹⁰³

Should a state be under occupation and the Occupying Power undertakes a whole or partial evacuation of a territory for security reasons, it has to ensure that “members of the same family are not separated.”¹⁰⁴ Also the Occupying Power is obliged to “take all necessary steps to facilitate the identification of children and the registration of their parentage.”¹⁰⁵ The Convention and the *Additional Protocol I* establish the obligation of the Occupying Power to protect family unity during internment¹⁰⁶ and request the establishment of a Central Information Agency for protected persons, in particular for internees, in a neutral country.¹⁰⁷ States are obliged to “facilitate in every possible way the reunion of families dispersed as a result of armed conflict”, to encourage the work of humanitarian organizations in this respect,¹⁰⁸ and to take all appropriate steps “to facilitate the reunion of families temporarily separated.”¹⁰⁹

4.1.2. Regional Law

4.1.2.1. Legal Instruments¹¹⁰

- *African Charter on Human and People’s Rights*¹¹¹
- *African Charter on the Rights and Welfare of Child*¹¹²
- *African Youth Charter*¹¹³
- *Charter on the Rights of the Arab Child*¹¹⁴ (applicable to Arab children)

4.1.2.2 Analysis of Regional Instruments

4.1.2.2.1. Differing Entitlements on the Basis of Nationality

¹⁰³ *Id.* at, Article 35.

¹⁰⁴ *Id.* at Article 49.

¹⁰⁵ *Id.* at Article 50.

¹⁰⁶ *Id.* at Article 82; *Additional Protocol I*, *supra* note 12, Article 75.

¹⁰⁷ *Fourth Geneva Convention*, *supra* note 11, Article 140.

¹⁰⁸ *Additional Protocol I*, *supra* note 12, Article 74.

¹⁰⁹ *Additional Protocol II*, *supra* note 13, Article 4(3)(b).

¹¹⁰ Full text of the following legal instruments can be found in Annex B.

¹¹¹ African Charter on Human and Peoples’ Rights, 27 June 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

¹¹² African Charter on the Rights and Welfare of the Child, July 1, 1990, CAB/LEG24.9/49 (entered into force Nov. 29, 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

¹¹³ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

¹¹⁴ Charter on the Rights of the Arab Child, *adopted* on 6 June 1983. [Hereinafter, *CRAC*]. Egypt ratified the Charter on 1 January 1993.

The *African Charter on Human and Peoples Rights (African Charter)*, the *African Charter on the Rights and Welfare of the Child (ACRWC)*, and the *African Youth Charter (AYC)* do not confer differing entitlements on the basis of nationality. These Conventions do not require reciprocity and the rights outlined are guaranteed to individuals within the territory of State Parties even if the individual's country of nationality is not party to the African Charter.¹¹⁵ The *Charter on the Rights of the Arab Child (CRAC)* may provide differing entitlements on the basis of nationality and/or ethnicity. The Charter's text refers to each enumerated right as owed to "Arab children" rather than children generally. It is unclear whether entitlements are owed to all Arab children, or only citizens of member states of the League of Arab States.¹¹⁶ Additionally, the Charter leaves the ambiguous socio-ethnic term "Arab" undefined. For this reason, the CRAC was criticized for violating non-discrimination laws,¹¹⁷ and failing to protect non-Arab communities.¹¹⁸

4.1.2.2.2. Entitlements under Regional Law

The African Charter and the AYC address the right to family unity but does not explicitly refer to the right to family reunification. It states that "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."¹¹⁹ The term "family" is not defined in the African Charter, which is consistent with the broader challenges of determining the legal parameters of a culturally fluid concept.¹²⁰ Under regional law the term "family" most likely extends to minor children and elderly or dependent adults.¹²¹ This is consistent with Okon's analysis of domestic legislation in African countries. She notes that states tended to codify broad interpretations of "family" that take into account intergenerational familial bonds and polyamorous familial structures.¹²²

¹¹⁵ U.O. Umzurike, *The African Charter on Human and People's Rights* 77 AJIL 902, 912 (1983) at 908.

¹¹⁶ MERVAT RISHMAWI, *THE LEAGUE OF ARAB STATES HUMAN RIGHTS STANDARDS AND MECHANISMS* (Cairo Institute for Human Rights Studies 2015) at 84.

¹¹⁷ RISHMAWI, *supra* note 116 at 82-84.

¹¹⁸ Juliane Osterhaus, *The Arab Human Rights System ABC of Human Rights for Development Cooperation* 1, 10 (2017) at 3.

¹¹⁹ *African Charter*, *supra* note 111, at Article 18. Jastram & Newland, *supra* note 15, at 566. *AYC*, *supra* note 113, at Article 8.

¹²⁰ Ekanem Okon, *Towards Defining the 'Right to a Family' for the African Child* 12 Afr. Hum. Rts. L. J. 373, 393 (2012), at 376.

¹²¹ *African Charter*, *supra* note 111, at Article 18. African Charter Article 18(3) discusses equality and protection of women and children, and Article 18(4) address state's obligations to offer special protection to the aged and disabled.

¹²² Okon, *supra* note 120, at 391-392. [She notes that African states' willingness to consider the multiplicity of family structures at times prevented courts from acknowledging a child's constitutional right to a family. Rather, they focused on a child's right to familial care to side-step the thorny question of defining "family". She notes this has been a reoccurring question in South African and Kenyan Jurisprudence].

The African Commission on Human and Peoples' Rights (ACHPR) has addressed non-nationals' rights to a family life in a number of cases and found that mass expulsions,¹²³ and expulsion carried out without recourse to judicial appeal violate state's obligations to protect the family.¹²⁴ This is consistent with the prohibition on mass expulsions found in the African Charter,¹²⁵ which prohibits mass or arbitrary expulsion while simultaneously acknowledging states' sovereignty over its borders. States also assume the positive obligation to assist the family.¹²⁶ Experts explain this indicates state's acknowledgement that their duty towards the family extends beyond mere protection. The ACHPR has not taken up determining the scope of this obligation, but it likely extends beyond refraining from forcible separation of families.¹²⁷ Due to the lack jurisprudence defining the obligations arising from states duty to assist families, it is a weaker entitlement than what is available in international human rights instruments.

The strongest African regional entitlements to family unity and family reunification are contained in the *African Charter on the Rights and Welfare of the Child* (ACRWC). The ACRWC builds on similarly-worded obligations in the CRC to create obligations regarding the inviolability of the family unit.¹²⁸ It entitles children to enjoy paternal care and protection and to reside with their parents whenever possible. Children may only be separated from their parents following a judicial decision, and even in such cases, children have the right to maintain a relationship with their parents.¹²⁹ Furthermore, if the state determines separation is in the best interest of the child, it is obliged to provide the child with essential information on the whereabouts of the absent family member and ensure that the process will "not entail any

¹²³ Communication No. 233/99-234/99, *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea v. Ethiopia & Interights (on behalf of Pan African Movement and Inter-African Groups v. Eritrea)* African Commission on Human and People's Rights 29 May 2003 at para. 9 [addressing forcible population transfers committed by the Ethiopian and Eritrean governments against the other's citizens in 1998 and 1999] & Communication No. 159/96, *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme, Rencontre africaine des droits de l'Homme, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme v. Angola*, African Commission on Human and People's Rights 11 November 1997 at para. 20 [addressing nationals of Senegal, Malia, Gambia, and Mauritania expelled from Angola in 1996].

¹²⁴ Communication No. 212/98, *Amnesty International v. Zambia*, African Commission on Human and People's Rights 5 May 1999 [addressing Zambia's forcible expulsion of two Malawian nationals who were drugged and deported without the ability to appeal their expulsion order.]

¹²⁵ *African Charter*, *supra* note 111, at Article 12. Refugees, asylum-seekers, and failed asylum-seekers' rights regarding expulsion are further discussed in Chapter 9 on Detention and Expulsion.

¹²⁶ *African Charter*, *supra* note 111, at Article 18(2).

¹²⁷ In *Amnesty International v. Zambia*, the ACHPR found that forcible expulsion without judicial recourse violated both Articles 18(1) and 18(2) but did not provide further analysis. *Supra* note 124.

¹²⁸ *ACRWC*, *supra* note 112, at Article 18.

¹²⁹ *Id.* at Article 19.

adverse consequences for the person or persons in whose respect it is made.”¹³⁰ Identical to international law, separating children from their parents is only possible if it is in the best interest of the children.¹³¹ This limits states’ ability to enact policies that separate children from their parents as the result of detention or expulsion. The rights enshrined in the ACRWC are applicable to all children regardless of their nationality or immigration status.¹³²

The ACRWC also includes provisions related to the reunification of children with families separated during the migratory process. States are obliged to cooperate with international organizations to protect unaccompanied children. They are also required to assist children searching for parents or other close relatives for the purpose of reunification.¹³³ This creates a clear entitlement for family reunification to, at minimum, children separated from their parents. The Article does not define “close relatives,” leaving the term open for states to determine through domestic legislation. In the event family reunification is not possible, states are required to afford separated refugee children with the same protections as national children deprived of familial care.¹³⁴ All children separated from their family are entitled to protection, including a preference for alternate arrangements of family care or foster placement over institutional settings.¹³⁵ Furthermore, the ACRWC reinforces states’ obligations to reunite families separated by “internal or external displacement arising from armed conflict or natural disaster.”¹³⁶ This would apply to children displaced prior to arriving in the country of asylum or those displaced by armed conflict or a natural disaster in Egypt.

The *Charter on the Rights of the Arab Child* (CRAC) is the only League of Arab States human rights treaty to which Egypt is party. The Charter does not explicitly mention the status of refugees, asylum-seekers, or failed asylum-seekers, therefore raising questions about its application. However, it does include several articles which reaffirm the centrality of the familial unit and children’s right to a family life. Since the family is central to national

¹³⁰ *Id.*

¹³¹ *Id.* at Article 4.

¹³² *ACRWC*, *supra* note 112, at Article 23. Article 23 ensures that refugee and asylum-seeking children receive the full scope of ACRWC’s rights. The Article’s text does not mention regular or irregular migrant children, but the ACHPR and experts interpret Article 23 as including all non-national children. See African Commission on Human and People’s Rights, *Resolution on Migration and Human Rights* No.114 42nd Ordinary Session (2007) & Monette Zard, Chaloka Beyani & Chidi Anslem Odinkalu, *Refugees and the African Commission on Human and People’s Rights*, 16 Foreign Mig. Rev. 33, 35 (2003) at 34.

¹³³ *ACRWC*, *supra* note 112, at Article 23.

¹³⁴ *Id.* at Article 23(3).

¹³⁵ *Id.* at Article 25.

¹³⁶ *Id.* at Article 25(2).

development, the state is obliged to protect the family and provide the family with assistance and adequate basic services.¹³⁷ CRAC does not define “adequate basic services,” but in the context of Article 5, states assume a duty for assisting families with obtaining core social and economic rights. CRAC stipulates the rights owed to children *vis-à-vis* their families and emphasizes equal treatment regardless of gender.¹³⁸ These provisions do not explicitly refer to a right to family unity, but their fulfillment is contingent on a child’s ability to be with their family. The Charter also provides that a child should be raised by their natural families unless obstructed, in which case foster families are preferable to incisional care¹³⁹. The Provision does not define “obstructed” or explicitly indicate its applicability to refugee, asylum-seeking, or failed asylum-seeker children.

4.1.3. Bilateral Law

4.1.3.1. Bilateral Instruments

4.1.3.2. Analysis of Bilateral Instruments

No bilateral agreements concerning family unity and reunification could be found.

4.1.4. Domestic Law

4.1.4.1. Domestic Instruments¹⁴⁰

- *Constitution of the Arab Republic of Egypt 2014*¹⁴¹
- *Law Number 12 of the year 1996 promulgating the Child Law*¹⁴²
- *Executive Regulation for the Law of the Child Number 12 of the year 1996, issued by Prime Minister Decree Number 2075 of the year 2010*¹⁴³

4.1.4.2. Analysis of Domestic Instruments

¹³⁷ CRAC, *supra* note 114, at Articles 4 and 5.

¹³⁸ *Id.* at Article 8.

¹³⁹ *Id.* at Article 6.

¹⁴⁰ Full text of the following legal instruments can be found in Annex B.

¹⁴¹ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

¹⁴² Law No. 12 of 1996 (Promulgating the Child Law as amended by Law No. 126 of 2008 and Law No. 7 of 2015), *Al-Jarida Al-Rasmiyya*, 15 June 2008, No. 24 bis (Egypt) [Hereinafter, *Child Law*]. Unofficial translation provided by the National Council for Childhood and Motherhood.

¹⁴³ Executive Regulation to Law No. 12 of 1996 (Child Law), Prime Minister Decree No. 2075 of 2010, *Al-Jarida Al-Rasmiyya*, 22 July 1996 (Egypt). [Hereinafter, *Executive Regulation Child Law*]

According to the Egyptian Constitution, family is the basis of society and the state protects its cohesion and stability.¹⁴⁴ The importance of family is also reflected in the Egyptian Child Law which stipulates that children have the right to life, survival and development in a supportive family environment and that the best interest of the child has to be the primary consideration by all authorities or courts in their decision making.¹⁴⁵ Furthermore, all children have the right to be cared for by their parents. When this is not possible, the state shall ensure alternative care is given.¹⁴⁶ The law simply defines “children” as all individuals who have not reached the age of 18 years yet, without reference to Egyptian nationality. Thus, the entitlements of the Child Law are applicable to the children of asylum-seekers, refugees, and failed asylum-seekers, but are not as extensive as the rights granted under international law. This is remedied by the Executive Regulation for the Law of the Child, which confirms that Egypt guarantees the rights enshrined in the CRC and all other ratified international legal instruments.¹⁴⁷ Therefore, the right to family reunification under the CRC is incorporated into domestic law. However, laws, decrees or other internal regulations establishing a clear system how to implement family reunification in practice could not be located. This creates a situation of uncertainty, where individuals seeking family reunification are unaware which authority they should approach and which steps should be taken. In conversations with practitioners and members of the refugee and migrant community, it appeared that the immigration authorities decide on a case by case basis whether to assist a family member of the applicant in entering Egypt for the purpose of family reunification.

4.1.5. Overall Legal Framework in Egypt

The importance of the family as the fundamental unit of society, and the need for its protection from any unlawful or arbitrary interference is clearly established under international law. Therefore, states are obliged to protect family unity by refraining from separating family members, as well as to actively promote family reunification by assisting family members who were separated by borders.¹⁴⁸ The difficulty in implementing these obligations lies in the definition of who constitutes family, as it differs between countries. Service providers or international organizations such as UNHCR also operate on their own definitions. It is

¹⁴⁴ Egyptian Constitution, *supra* note 141, Article 10.

¹⁴⁵ Child Law, *supra* note 142, Article 3.

¹⁴⁶ *Id.* at Article 4.

¹⁴⁷ Executive Regulation Child Law, *supra* note 143, Article 2. *See* 4.1.1. above for a detailed description on the rights granted under international law.

¹⁴⁸ *Jastram & Newland*, *supra* note 15, at 556 and 576.

undisputed that the nuclear family, consisting of parents and underage children, is always covered by the right to family unity and reunification. However, the inclusion of more distant relatives or sons and daughters who passed 18 years of age is less clear.¹⁴⁹

Family members of refugees can be given refugee status based on the fact that their relative was granted protection, this is called derivative status. UNHCR's RSD Procedural Standards outline who should be able to benefit from this. In addition to spouses and unmarried minor children, UNHCR accepts fiancés of asylum-seekers as qualifying for derivative status. If asylum-seekers are under the age of 18, their parents or primary caregivers, as well as their minor siblings, qualify as well.¹⁵⁰ For all other relatives the criterion of social, emotional and economic dependency is examined. If this criterion is fulfilled, then also parents of adult asylum-seekers, their married children, siblings, aunts, cousins and other members of their household may benefit from derivative status.¹⁵¹ Refugees and asylum-seekers are entitled to receive administrative assistance if they are unable to produce the necessary documents proving their family status or degree of kinship, as they are unable to rely on the authorities of their state of nationality.

Apart from the specific experiences of refugees and asylum-seekers, all children have the right to know their parents and be cared for by them. They may not be separated from them except if at risk of abuse and then only if the process takes place under judicial review and is in the best interest of the child. States are obliged to deal with family reunification applications "in a positive, humane and expeditious manner", which gives children an entitlement to family reunification provided it is in their best interest. When it comes to family reunification across borders, states often argue that family unity can be preserved best by sending an individual back to the country of nationality to join their family members. However, this decision can only be an outcome of a balancing test: weighing the pros and cons of returning someone to their country of nationality, as opposed to granting them to stay. In addition to the best interest of the child in the concerned family, it has to be considered how long the person has already stayed in the host country and the degree of integration that took place, and weighed against whether a family life can be better enjoyed in the country of nationality.

¹⁴⁹ *Id.* at 563.

¹⁵⁰ UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003), Unit 5, 2. Available at: <https://www.unhcr.org/4317223c9.pdf> [Hereinafter, UNHCR Procedural Standards] Chapters updated between 2016 and 2017 can be accessed under: <https://www.refworld.org/rsdproceduralstandards.html>.

¹⁵¹ *UNHCR Procedural Standards*, *supra* note 29 at 5.

4.2. IMPLEMENTATION

In the Focus Groups Discussions, the participants' experiences with regard to family unity and reunification varied widely. The majority was either unaware of how their family members abroad could join them in Egypt, or were of the opinion that it is impossible to be reunited with their families in Egypt. Only few participants attempted to bring their relatives to Egypt and submitted a petition at the Immigration Authority to grant them entry. Mostly these requests for an entry visa for family members were denied, but in some rare cases they succeeded in securing the authority's approval.¹⁵² Thus, close relatives such as parents or spouses are sometimes allowed to come to Egypt. The lack of information on the required documents and costs, however, makes it very unlikely that asylum-seekers and refugees apply for family reunification. And even if they decide to apply, no domestic laws or regulations which they could rely on to enforce their right to family unity could be located in the course of this research. In an interview with an expert in the field, it was confirmed that the Egyptian authorities decide on requests for family reunification on a case by case basis and most applications are denied. This leads refugees to consider illegal border crossing as an alternative in order to bring their families to Egypt.¹⁵³ In some cases, UNHCR attempts to advocate in favor of an applicant to increase the chances of family reunification, however, the authorities decide based on internal regulations which makes it impossible to predict a certain outcome of the case.¹⁵⁴

Attention was drawn to the particular family situation of Syrian refugees. In an interview with Fard Foundation,¹⁵⁵ it was recounted that many families fleeing from Syria in 2013 were separated. It was common for grandparents to come to Cairo with their grandchildren, while the parents continued to work in Syria or dealt with selling businesses or property before leaving. Once the parents completed the tasks they set out to do in Syria and wanted to join their families in Egypt, most of them were unable to come to Cairo.¹⁵⁶ This created particularly

¹⁵² During the Focus Group Discussions, it was not possible to discern a pattern whether certain nationalities are more likely to succeed in their request for family unity. The participants who stated that they were able to reunite with family members in Egypt were of Yemeni and Syrian nationality. But to draw any conclusions concerning a correlation between nationality and chances for family unity, it would be necessary to interview a larger group of individuals or conduct a survey.

¹⁵³ Information obtained in an interview with Ashraf Milad, asylum lawyer and lecturer, September 2019.

¹⁵⁴ Information obtained in an interview with UNHCR Egypt, January 2020.

¹⁵⁵ Fard Foundation is an independent non-profit organization which assists Syrian refugees in Egypt.

¹⁵⁶ Information obtained in an interview with Fard Foundation, May 2019.

vulnerable family constellations of elderly Syrians, who are often unable to work and sometimes limited in their mobility due to health problems, being responsible for minors who are still too young to work and require assistance.

4.3. RECOMMENDATIONS

The lack of clear domestic legislation to implement individuals' right to family unity and reunification is the biggest hindrance in the enjoyment of this right. Thus, the main recommendation in this context is to establish a transparent system, that allows asylum-seekers and refugees to follow clear steps in their applications for family reunification. This measure is necessary to ensure Egypt's compliance with its international obligations, and to improve the awareness of the concerned communities. Especially in the above described example of Syrian families consisting of only the very young and the very old, enabling the parents to join the children and grandparents is essential. Ideally, the parents will be able to obtain work and sustain the family's livelihood. This in turn will render them independent from the financial support of service providers, NGOs or the state.

CHAPTER 5: EMPLOYMENT

5.1. LEGAL FRAMEWORK

5.1.1. International Law

5.1.1.1. International Instruments¹

- *The 1951 Convention Relating to the Status of Refugees* (Refugee Convention)²
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³
- *International Covenant on Civil and Political Rights* (ICCPR)⁴
- *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)⁵
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)⁶
- *Convention on the Rights of Persons with Disabilities* (CRPD)⁷
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW)⁸
- *Convention on the Rights of the Child* (CRC)⁹
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*¹⁰

¹ Full text of the following legal instruments can be found in Annex C.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982.

⁴ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982.

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). [Hereinafter, *ICERD*]. Egypt ratified the Convention on 1 May 1967.

⁶ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 U.N.T.S. 13 (entered into force Sept. 3, 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁷ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*]. Egypt's accession to the Convention occurred on 19 February 1993.

⁹ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

¹⁰ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force 25 December 2003). [Hereinafter, *Trafficking Protocol*]. Egypt ratified the Protocol on 5 March 2004.

- *Convention Concerning Forced or Compulsory Labour, 1930 (C029)*¹¹
- *Convention Concerning the Abolition of Forced Labour, 1957 (C105)*¹²
- *Convention Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (C087)*¹³
- *Convention Concerning the Right to Organise and Collective Bargaining, 1949 (C098)*¹⁴
- *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951 (C100)*¹⁵
- *Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 (C111)*¹⁶
- *Convention Concerning Minimum Age, 1973 (C138)*¹⁷
- *Convention Concerning the Worst Forms of Child Labour Convention, 1999 (C182)*¹⁸
- *Vienna Convention on the Law of Treaties (VCLT)*¹⁹

5.1.1.2. Analysis of International Instruments

The survival and protection of refugees, asylum-seekers and migrants in their host countries is dependent on the realization of their right to work. This right is enshrined in many international human rights and international labor law instruments and includes the right to work,²⁰ the right

¹¹ Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) [Hereinafter, *C029*]. Egypt ratified the Convention on 29 November 1955.

¹² Convention Concerning the Abolition of Forced Labour, Jan. 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959). [Hereinafter, *C105*]. Egypt ratified the Convention on 23 October 1958.

¹³ *Convention concerning Freedom of Association and Protection of the Right to Organise*, July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950). [Hereinafter, *C087*]. Egypt ratified the Convention on 6 November 1957.

¹⁴ *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951). [Hereinafter, *C098*]. Egypt ratified the Convention on 3 July 1954.

¹⁵ *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953). [Hereinafter, *C100*]. Egypt ratified the Convention on 26 July 1960.

¹⁶ Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960) (1958). [Hereinafter, *C111*]. Egypt ratified the Convention on 10 May 1960.

¹⁷ Convention Concerning Minimum Age, June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976). [Hereinafter, *C138*] Egypt ratified the Convention on 9 June 1999.

¹⁸ The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 7, 1999 2133 U.N.T.S. (entered into force Nov. 19, 2000). [Hereinafter, *C182*]. Egypt ratified the Convention on 6 May 2002.

¹⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). [Hereinafter, *VCLT*]. Egypt's accession to the treaty occurred on 11 February 1982.

²⁰ *Refugee Convention*, *supra* note 2, Article 17-18; *ICESCR*, *supra* note 3, Article 6; *ICERD* *supra* note 5, Article 5; *CEDAW* *supra* note 6, Article 11; *CRPD* *supra* note 7, Article 27.

to just and favorable conditions of work,²¹ the right to join trade unions as well as to form and operate them freely,²² the right not to be deprived of work on discriminatory basis,²³ and the right to be protected from forced labor.²⁴ The fundamental rights at work are established and protected under eight fundamental ILO Conventions Egypt ratified,²⁵ which oblige states to respect, protect and fulfill four core principles: freedom of association and the right to collective bargaining; elimination of all forms of forced or compulsory labor; the abolition of child labor; and elimination of discrimination in employment. According to the ILO, the rights embodied in these Conventions “apply to all categories of workers, and represent minimum standards of protection, which should also be applicable to refugees and other forcibly displaced persons.”²⁶

The below sections consider respectively the right of refugees, asylum-seekers, and failed asylum-seekers to work in the light of the Refugee Convention alongside “the complementary and mutually reinforcing instruments” of international human rights law.²⁷

5.1.1.2.1. International Entitlements for Refugees and Asylum-Seekers

5.1.1.2.1.1. Entitlements under the Refugee Convention

The possibility for refugees to work is essential for their protection, survival and preservation of their dignity and is recognized by the *1951 Convention Relating to the Status of Refugees* (Refugee Convention) and other international human rights law instruments. Under the Refugee Convention, the rights of refugees, and consequently their host countries’ obligations, expand as the refugees’ attachment to the state deepens.²⁸ The attachment is measured by the nature and duration of the refugee’s stay in the host state.²⁹ The categories of attachment that determine the right to work of refugees are: *lawfully staying in* and *lawfully in*.³⁰ Under the

²¹ *Refugee Convention*, *supra* note 2, Articles 19(1) and 24; *ICESCR*, *supra* note 3, Article 7.

²² *Refugee Convention*, *supra* note 2, Article 15; *ICESCR*, *supra* note 3, Article 8.

²³ *ICCPR*, *supra* note 4, Article 26; *ICERD*, *supra* note 5, Article 5; *CEDAW*, *supra* note 6, Article 11; *CRPD*, *supra* note 7, Article 27.

²⁴ *ICCPR*, *supra* note 4, Article 8(3)(a); *CRC*, *supra* note 9, Article 32; *Trafficking Protocol*, *supra* note 10, Articles 2-3; *C029*, *supra* note 11, Articles 1-2(1); *C105*, *supra* note 12, Article 1.

²⁵ *C029*, *supra* note 11; *C087* *supra* note 13; *C098*, *supra* note 14; *C100* *supra* note 15; *C111*, *supra* note 16; *C105*, *supra* note 12; *C138*, *supra* note 17; *C182*, *supra* note 18.

²⁶ INTERNATIONAL LABOR ORGANIZATION, THE ACCESS OF REFUGEES AND OTHER FORCIBLY DISPLACED PERSONS TO THE LABOUR MARKET (Background Note) TMARLM/2016 (2016).

²⁷ Colloquium on Challenges in International Refugee Law, University of Michigan, *The Michigan Guidelines on the Right to Work*, 31 Mich. J. Int’l L. 293, 306 (2010) at 3.

²⁸ JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (Cambridge University Press 2005) at 154.

²⁹ HATHAWAY, *supra* note 28, at 156

³⁰ See Chapter 3 for a further explanation on the levels of attachment to the host country.

Refugee Convention, the right to wage-employment,³¹ the practice of liberal professions,³² social assistance,³³ and freedom of association³⁴ are granted to refugees with the highest attachment in the host country: refugees *lawfully staying in the country*.³⁵ This category includes refugees who were recognized through a positive RSD procedure, *prima facie* refugees,³⁶ and asylum-seekers in a country that fails to implement a RSD system or unduly prolongs the RSD procedure and thus makes it impossible for asylum-seekers to be recognized as refugees in a timely manner.³⁷ A lower level of attachment is required for the right to self-employment for refugees who are *lawfully in the state* and thus applies not only to refugees but also to asylum-seekers.³⁸

The right to engage in wage-earning employment grants refugees the “most favorable treatment accorded to nationals of a foreign country in the same circumstances”.³⁹ This means they need to fulfill the requirements placed upon the most favored foreigner in a state to enjoy the right to work.⁴⁰ However, once a refugee has resided in the host country for three years, or has a spouse or children holding the nationality of the country of residence, any restrictions imposed on the employment of foreigners may no longer be applied to them.⁴¹ Also, refugees may not be expected to fulfill requirements that they are incapable of fulfilling due to their situation as refugees.⁴² States are encouraged to give “sympathetic consideration” to assimilating the rights of refugees to the employment related rights of nationals.⁴³ This reflects the purpose of the Convention to provide durable solutions for refugees through gradual integration of refugees in their host countries with the expansion of rights as their attachment to the state grows.

Refugees wishing to practice a liberal profession shall receive the best possible treatment, but never less favorable treatment than granted to aliens in the same circumstances.⁴⁴ This

³¹ *Refugee Convention*, *supra* note 2, Article 17.

³² *Id.* at Article 19.

³³ *Id.* at Article 24.

³⁴ *Id.* at Article 15.

³⁵ See Chapter 3 for more details on “lawfully staying”.

³⁶ *Prima facie* refers to receiving refugee status in situations of mass influx without having to undergo RSD procedures. See Chapter 3, under 3.1.2. Refugee Definition.

³⁷ *Michigan Guidelines*, *supra* note 27, at para. 8.

³⁸ *Refugee Convention*, *supra* note 2, Article 18.

³⁹ *Id.* at Article 17.

⁴⁰ *Michigan Guidelines*, *supra* note 27 at para. 11.

⁴¹ *Refugee Convention*, *supra* note 2, Article 17(2).

⁴² *Id.* at, Article 6.

⁴³ *Id.* at Article 17(3).

⁴⁴ *Id.* at Article 19.

entitlement is only applicable to refugees lawfully staying in the territory of a state party, asylum-seekers cannot benefit from it. Both refugees and asylum-seekers who wish to engage in agriculture, industry, handicrafts and commerce or to establish commercial and industrial companies, are entitled to treatment as favorable as possible, but never less favorable as awarded to aliens in general in these situations.⁴⁵ These rights to engage in wage-earning employment and self-employment are complemented by the right to take part in and form “non-political and non-profit-making associations and trade unions” under the same requirements as aliens granted the most favorable treatment.⁴⁶ However, this entitlement is once again only applicable to refugees, not asylum-seekers. In addition, the Refugee Convention obliges to grant refugees (not asylum-seekers) the same treatment as nationals with regard to remuneration and working conditions, as well as social security.⁴⁷ However, Egypt has made a reservation to this provision, stating that it will not put refugees on an equal footing with nationals but rather preserve its discretion to decide on a case-by-case basis.⁴⁸ Thus, Egypt may decide to which extent they grant this right to refugees under the Refugee Convention. However, other instruments of international human rights law create this same obligation, as discussed in the next section.

5.1.1.2.1.2. Entitlements under other Human Rights Instruments

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) establishes the legal framework for states’ obligations to respect, protect, and fulfill the right of everyone to work freely. The “right of everyone” has been defined by the Committee on Economic, Social, and Cultural Rights (CESCR) to include “non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”⁴⁹ Accordingly, refugees and asylum-seekers in Egypt can

⁴⁵ *Id.* at Article 18.

⁴⁶ *Id.* at Article 15.

⁴⁷ *Id.* at Article 24. The Refugee Convention refers to matters such as remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the enjoyment of the benefits of collective bargaining; See Chapter 7 on Health for details on social security.

⁴⁸ Egypt’s reservation: “Concerning articles 20, 22 (paragraph 1), 23 and 24 of the Convention of 1951, the competent Egyptian authorities had reservations because these articles consider the refugee as equal to the national. We made this general reservation to avoid any obstacle which might affect the discretionary authority of Egypt in granting privileges to refugees on a case-by-case basis.” retrieved from the United Nations Treaty Collection Website: https://treaties.un.org/PAGES/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en#EndDec.

⁴⁹ Committee on Economic, Social, and Cultural Rights, *General Comment 20: Non-Discrimination in Economic, Social, and Cultural Rights* (Art. 2, para. 2 of the *International Covenant on Economic, Social, and*

invoke the right to work under the ICESCR. Work, under the Covenant, includes all forms of work, whether self-employment or wage-earning employment, that fall under the category of *decent work*. Decent work is defined by CESCR as work that “respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration.”⁵⁰ That is to say, inherent in the concept of *decent work* is respect of the worker.

The ICESCR also grants everyone the right to enjoy just and favorable conditions of work,⁵¹ which includes fair and equal remuneration enabling workers to provide a decent life for themselves and their families; safe and healthy working conditions; as well as rest, leisure and reasonable working hours. In its General Comment, the CESCR stated that the reference to “everyone” highlights the fact that the right applies to all workers in all settings and includes refugee workers.⁵² “Because of their often precarious status, they [refugees] remain vulnerable to exploitation, discrimination and abuse in the work place, may be less well paid than nationals, have longer working hours and more dangerous working conditions. State Parties should enact legislation enabling refugees to work and in conditions no less favourable than for nationals.”⁵³ The right to social security obliges State Parties to grant the right to social security, which includes social insurance, to everyone.⁵⁴ Refugees and asylum-seekers shall enjoy equal treatment in accessing the non-contributory social security schemes.⁵⁵ The CESCR also advises State Parties to give special attention to “individuals and groups who traditionally face difficulties in exercising this right”, in particular refugees and asylum-seekers.⁵⁶

However, the ICESCR takes into account the difficulties states with limited economic resources would face if obliged to immediately realize all rights outlined in the Covenant. It thus allows for progressive realization of the stipulated rights, while only an essential core

Cultural Rights) Forty-second session of the Committee on Economic, Social, and Cultural Rights E/C.12/GC.20 (2009) [Hereinafter, *CESCR Comment No. 20*] at para. 30.

⁵⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)* (6 February 2006) UN Doc E/C.12/GC/18, at para 7. [Hereinafter, *CESCR Comment No. 18*]

⁵¹ *ICESCR*, *supra* note 3, at Article 7.

⁵² Committee on Economic, Social and Cultural Rights, *General Comment No. 23: The Right to Just and Favourable Conditions of Work (Art. 7 of the Covenant)* (27 April 2016) UN Doc E/C.12/GC/23 [Hereinafter, *CESCR Comment No. 23*] at para. 5.

⁵³ *CESCR Comment No. 23*, *supra* note 52, at para. 47(ix).

⁵⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)* (4 February 2008) UN Doc E/C.12/GC/19. [Hereinafter, *CESCR Comment No. 19*] at Article 28; *CESCR Comment No. 23*, *supra* note 52, at para. 18. See Chapter 7 on Health for more details.

⁵⁵ *CESCR Comment No. 19*, *supra* note 54, at para. 38.

⁵⁶ *Id.* at para. 31.

needs to be fulfilled immediately.⁵⁷ It allows developing countries to determine to what extent they would grant economic rights to non-nationals, with due regard for human rights and their national economy.⁵⁸ Though, as a minimum, all states are obliged to at least “ensure non-discrimination and equal protection of employment.”⁵⁹ This includes the right of access to employment especially for disadvantaged individuals, to avoid measures that discriminate disadvantaged and marginalized individuals or groups in the private and public sector, and to adopt a national employment strategy targeting those disadvantaged and marginalized groups.⁶⁰ Also the right to just and favorable working conditions and the right to social security have to be granted without any discrimination. States need to establish a system to combat gender discrimination at work; enact legislation introducing a non-discriminatory minimum wage to ensure a decent living for workers and their families; to adopt a national policy on occupational safety and health; ensure appropriate complaints procedures against sexual harassment at work; and to enforce minimum standards with regard to rest, leisure, working hours, paid leaves and public holidays.⁶¹ Furthermore, everyone needs to be granted access to a social security system which provides at least essential health care, basic shelter, housing, water, sanitation, food, and most basic forms of education.⁶² There is no binding minimum standard for the right to form and join trade unions.

In conclusion, if there is a lack of resources, states may progressively realize the rights in the ICESCR, except for the core obligations described above that must be provided immediately. Therefore, states should ensure there is no discrimination in terms of access to work, just and favorable working conditions, and social security. If a state enacts different rules for non-nationals, this distinction needs to have a reasonable and objective justification that is in proportion with the effect of the measures taken. Even though distinction between nationals

⁵⁷ See Chapter 3 on Right to Seek Asylum for a more detailed discussion of progressive realization. To ensure that states do not use progressive realization as an excuse to entirely neglect their obligations under the Covenant, the Committee created the so-called core content of essential rights,⁵⁷ clarifying that a “state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.” See Rüdiger Wolfrum *Obligation of Result versus Obligation of Conduct: Some Thoughts about the Implementation of International Obligations in LOOKING TO THE FUTURE : ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 363, 384 (M. Arsanjan, J. Cogan, R. Sloane, & S. Weissner eds) at 364; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), UN Doc. E/C.12/2000/4, August 11, 2000 [Hereinafter, *CESCR Comment No. 14*] at para. 10.

⁵⁸ *ICESCR*, *supra* note 3, at Article 2(3).

⁵⁹ *CESCR Comment No. 18*, *supra* note 50, at para. 31.

⁶⁰ *Id.* at para. 31(a)-(c).

⁶¹ *CESCR Comment No. 23*, *supra* note 52, at para. 65.

⁶² *CESCR Comment No. 19*, *supra* note 54, at para 59.

and non-nationals can be made under the Covenant following these conditions, “where a distinction is made between a citizen and an alien in respect of a basic economic right and such a distinction would have the effect of undermining their other basic rights and their human dignity, such a denial of that right would not be legitimate.”⁶³ The denial of the right to work and social security for refugees and asylum-seekers would threaten their existence and human dignity, and risks violating many basic human rights, including the Covenant right to an adequate standard of living,⁶⁴ the right to health,⁶⁵ as well as more fundamentally the right to life and prohibition of inhumane and degrading treatment under the *International Covenant on Civil and Political Rights* (ICCPR),⁶⁶ and the customary law principle of non-refoulement.⁶⁷ The latter would be violated if refugees or asylum-seekers are indirectly forced to return to their country of nationality by being prevented from earning money for a decent standard of living. Several other human rights instruments confirm the prohibition of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with regard to employment.⁶⁸ In addition, the ILO Conventions have established the principle of equality and non-discrimination regarding employment and occupation and the principle of equal remuneration for men and women.⁶⁹

Furthermore, the right to decent work under the ICESCR also includes a collective dimension, obliging states to protect, respect and fulfill the right of everyone to form trade unions and join the trade union of her/his choice, as well to guarantee that trade unions operate freely within the state.⁷⁰ This is confirmed by the ILO Conventions which grant the right of workers to establish as well as to join organizations of their own choosing, without distinction, and without previous authorization.⁷¹ States are obliged to take “all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.”⁷² The ILO has highlighted the importance of granting these rights to refugees

⁶³ Alice Edwards, *Human Rights, Refugees, and The Right “To Enjoy” Asylum*, 17 IJRL 293-330, (2005) at 307.

⁶⁴ ICESCR, *supra* note 3, at Article 11.

⁶⁵ *Id.* at Article 12.

⁶⁶ ICCPR, *supra* note 4, Articles 6-7.

⁶⁷ See Edwards, *supra* note 63, at 322-323, 325-326; CESCR Comment No. 18, *supra* note 50, at para. 31; CESCR Comment No. 19, *supra* note 54, at paras. 28, 31; CESCR Comment No. 23, *supra* note 52, at para. 47(i); Michigan Guidelines, *supra* note 27, at 295.

⁶⁸ ICCPR, *supra* note 4, Article 26; ICERD, *supra* note 5, Article 5; CEDAW, *supra* note 6, Articles 3 and 11; CRPD, *supra* note 7, Article 27.

⁶⁹ C111, *supra* note 16, Article 2; C100, *supra* note 15.

⁷⁰ ICESCR, *supra* note 3, at Article 8.

⁷¹ C098, *supra* note 14.

⁷² C087, *supra* note 13, Article 11.

and asylum-seekers in particular.⁷³

5.1.1.2.1.3. Protection against Forced Labor and Prohibition of Child Labor

The right to work necessitates that work must be freely chosen and accepted. States have an obligation to “abolish, forbid and counter all forms” of forced or compulsory labor, defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁷⁴ This protection is established in several human rights treaties and the ILO Conventions,⁷⁵ but it does not apply to compulsory military service or other services to be provided as part of the civic obligations of citizens, nor to any work or service order by a court of law based on a conviction.⁷⁶

International labor law also protects children from any economical exploitation. According to the ILO Convention the minimum age to enter employment is 15 years, developing countries may set it at 14 years. If the work is “likely to jeopardise the health, safety or morals of young persons”, then this minimum age is raised to 18 years.⁷⁷ In general, states are obliged to protect children from “economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development” and to eliminate urgently the worst forms of child labor.⁷⁸

5.1.1.2.2. International Entitlements for Failed Asylum-Seekers

When an asylum-seeker's application for refugee status is rejected, their right to work is no longer determined by the Refugee Convention. However, they are still protected under

⁷³ “To ensure greater equality of refugees and other forcibly displaced persons with nationals and to give them the opportunity to negotiate terms and conditions of work, it is of fundamental importance that refugees and other forcibly displaced persons have the right to join and form trade unions. Both the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98), protect trade union rights.” International Labour Organization, *The Access of Refugees and Other Forcibly Displaced Persons to the Labour Market* (14 June 2016). Available at: http://www.ilo.org/global/topics/labour-migration/publications/WCMS_490753/lang--en/index.htm.

⁷⁴ C029, *supra* note 11.

⁷⁵ C029, *supra* note 11; C105, *supra* note 12; ICCPR, *supra* note 4, Article 8(3)(a); CRC, *supra* note 9, Article 32; *Trafficking Protocol*, *supra* note 10, Articles 2 and 3.

⁷⁶ C029, *supra* note 11, Article 2.

⁷⁷ C138, *supra* note 17, at Article 3.

⁷⁸ CRC, *supra* note 9, Article 32; C182, *supra* note 18, at Article 1. Worst forms of child labor include: all forms of slavery (including trafficking of children, debt bondage, serfdom, compulsory or forced labor); the use, procuring or offering of a child for prostitution and pornography; the use, procuring or offering for illicit activities (particularly drug trafficking); and “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.” See C182, *supra* note 18, at Article 3.

international human rights and labor law instruments, as described in the above section.⁷⁹ Additional to those entitlements, once failed asylum-seekers enter a work relationship, they enjoy the protection of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW).⁸⁰

The CMW protects both regular and irregular migrants, provided that they are, or have been, engaged in a remunerated activity in a State of which he or she is not a national.⁸¹ Together with their families they enjoy numerous entitlements which shall be applied “without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”⁸²

The following rights are applicable to regular and irregular migrants alike: The right to be protected from slavery, servitude, forced or compulsory labor;⁸³ the right to enjoy just and favorable remuneration and working conditions in a way not “less favourable than that which applies to nationals”;⁸⁴ the right to take part in trade union meetings, freely join trade unions, and seek their assistance;⁸⁵ the right to social security with an obligation on migrant workers and their families to fulfill associated legal requirements;⁸⁶ and the right to transfer their earnings, savings, and personal effects and belongings upon termination of employment.⁸⁷

Regular migrants and their families enjoy more detailed entitlements.⁸⁸ In addition to stipulating the right to just and favorable working conditions for all migrant workers, the CMW specifies that regular migrant workers and their families are entitled to the same protection as nationals in relation to protection against dismissal, unemployment benefits, access to public

⁷⁹ These entitlements include the right to access labor market without discrimination, to just and favorable working conditions, and to the minimum standards for social security. Additionally, they are protected from forced labor, economic exploitation, and from child labor.

⁸⁰ *CMW*, *supra* note 8.

⁸¹ *CMW*, *supra* note 8, Article 2(1).

⁸² *Id.* at Article 7.

⁸³ *Id.* at Article 11.

⁸⁴ *Id.* at Article 25.

⁸⁵ *Id.* at Article 26.

⁸⁶ *Id.* at Article 27.

⁸⁷ *Id.* at Articles 32 and 47.

⁸⁸ According to *CMW*, *supra* note 8, Article 5, migrant workers are only considered documented or in a regular situation “if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party”. Consequently, if failed asylum-seekers have established an authorized legal status that allows them to stay and engage in remunerated activity, then the labor rights under the CMW apply to them.

work schemes intended to combat unemployment; access to alternative employment in the event of loss of work or termination of other remunerated activity; and finally, in case of violation in conditions of employment, “the right to address his or her case to the competent authorities of the State of employment”.⁸⁹ Regular migrants do not only have the right to join trade unions but also to form them.⁹⁰ Also, they have the right to freely choose their remunerated activity, though certain conditions apply: States may limit the access to certain categories of employment if it is in the interest of the state and regulated through national legislation. Restrictions may also be imposed concerning the acknowledgment of qualifications obtained abroad if they are necessary for a certain field of work.⁹¹ Most importantly, states are allowed to limit access to the labor market if they follow a policy giving priority to nationals or specific nationalities based on bilateral or multilateral agreements. Thus, states implementing legislation that gives citizens priority in certain fields of employment are not in violation of the CMW. However, if the regular migrant has been lawfully residing in the country for the purpose of work for several years, this limitation is no longer applicable. This is to be implemented by states by enacting legislation determining that a regular migrant may not be denied access to employment in favor of a national after residing in its territory for a certain amount of years.⁹² States are free to decide how many years of residency they require up to a maximum of five years.

5.1.2. Regional Law

5.1.2.1. Regional Instruments⁹³

- *African Charter on Human and People’s Rights*⁹⁴
- *African Youth Charter (AYC)*⁹⁵
- *African Charter on the Rights and Welfare of the Child (ACRWC)*⁹⁶

⁸⁹ *CMW*, *supra* note 8, Article 54.

⁹⁰ *Id.* at Article 40.

⁹¹ *Id.* at Articles 52-53.

⁹² *CMW*, *supra* note 8, Article 52(3).

⁹³ Full text of the following legal instruments can be found in Annex C.

⁹⁴ The African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 U.N.T.S. 217 [Hereinafter, *African Charter*]. Egypt ratified the Charter on 3 April 1984.

⁹⁵ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

⁹⁶ African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG 24.9/49, entered into force 29 November 1999. [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

- *Protocol for the Treatment of Palestinians in Arab States*⁹⁷ (applicable only to Palestinians)

5.1.2.2. Analysis of Regional Instruments

5.1.2.2.1. Differences on the basis of nationality

The *African Charter for Human and Peoples' Rights* (African Charter) grants "every individual" the right to work in equitable and satisfactory conditions, as well as the freedom of association. As a result, non-Africans in the territory of a state party also fall under the protection of the African Charter. The *African Youth Charter* (AYC) and the *African Charter on the Rights and Welfare of the Child* (ACRWC) also apply to all nationalities on the territory of a state party. However, the *Protocol for the Treatment of Palestinians in Arab States* (Casablanca Protocol), applies to Palestinians and gives them the right to work at the same level as nationals in all Arab countries.⁹⁸

5.1.2.2.2. Regional Entitlements for Refugees, Asylum-Seekers and Failed Asylum-Seekers

The Organization of African Unity (OAU) adopted a regional refugee convention, the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, but the Convention does not explicitly address the social and economic rights of refugees.⁹⁹ As a result, refugees' right to work, including just and favorable conditions of work and freedom of association, is addressed on the regional level under the general regional human rights framework, which also applies to asylum-seekers and failed asylum-seekers.

Under the African Charter, everyone is granted the right to work under equitable and satisfactory conditions, including equal pay for equal work.¹⁰⁰ This entitlement is understood as an obligation on African states to take steps towards making employment accessible to all.¹⁰¹ This interpretation is affirmed by the African Commission:

⁹⁷ The Protocol for the Treatment of Palestinians in Arab States (adopted 11 September 1965). [Hereinafter, *Casablanca Protocol*]. Ratified by Egypt on 11 September 1965.

⁹⁸ *Casablanca Protocol*, *supra* note 97.

⁹⁹ The Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 U.N.T.S. 45 [Hereinafter, *OAU Refugee Convention*]. Egypt ratified the Convention on 3 June 1980.

¹⁰⁰ *African Charter*, *supra* note 94, Article 15.

¹⁰¹ Amnesty International, *A Guide to the African Charter on Human and Peoples' Rights*, 2 November 2007, at para. 20, available at: <http://web.amnesty.org/library/index/engior630052007>; Nsongurua J. Udombana, *Social Rights are Human Rights: Actualizing the Rights to Work in Africa* 39 ILJ 181, 188 (2006) at 188, 198-204.

The right to work should not be understood as an absolute and unconditional right to obtain employment. Rather, the State has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. The right to work includes the right to freely and voluntarily choose what work to accept.¹⁰²

Therefore, the African Charter does not explicitly grant the right to obtain work, but equal access to the labor market without discrimination of any kind¹⁰³ and guarantees everyone who is employed certain rights and protection from exploitation and unfair labor practices. Under regional law the right to work and all other entitlements connected to it contain the following minimum core obligations of states: the prohibition of slavery and forced labor; the prohibition of all forms of economic exploitation of children and other vulnerable groups; the protection of the right to freedom of association including the rights to collective bargaining, to strike and other related organizational and trade union rights; the protection of workers against unfair labor practices including unfair or unjustified dismissal.¹⁰⁴ Even though the right to join a trade union is not specifically addressed under regional law, the trade union rights are still covered under the minimum core obligations of the right to work, and fall under the right to freedom of association and assembly under the African Charter.¹⁰⁵ States are required to send reports on their laws, regulations and court decisions that protect or regulate trade union rights to the African Commission to review their implementation.¹⁰⁶

The AYC mirrors these rights for young persons between the ages of 15 and 35 years: Every young person shall have the right to gainful employment, and to be protected from economic exploitation and from performing any work that might endanger their education or health. States are obliged to take steps towards the full realization of these rights by ensuring equal access to employment and equal pay without any discrimination.¹⁰⁷ The special protection necessary for children is highlighted again in the ACRWC, which protects children from all

¹⁰² The African Commission on Human and Peoples' Rights, *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, at para 58, available at: <http://www.achpr.org/instruments/economic-social-cultural/>.

¹⁰³ *Id.* at para 59(i).

¹⁰⁴ *Id.* at para. 59(a-c).

¹⁰⁵ *Id.* at para. 58; *Amnesty International supra* note 101, at 20-21; *Udombana, supra* note 101, at 191-192; *African Charter, supra* note 94, Article 10.

¹⁰⁶ *Amnesty International supra* note 101, at 20-21.

¹⁰⁷ *AYC, supra* note 95, at Article 15.

forms of economic exploitation and from performing work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral or social development.¹⁰⁸

The Casablanca Protocol grants displaced Palestinians in Egypt the right to work under the same conditions as nationals. The Protocol targets Palestinians but also offers insight into Egypt's "most favorable treatment accorded to nationals of a foreign country", the standard demanded by the Refugee Convention when it comes to refugees' right to wage-earning employment.¹⁰⁹ Accordingly, both Palestinian and non-Palestinian refugees could potentially claim the right to work to wage-earning employment on equal basis to Egyptian nationals under the Protocol. However, there is uncertainty whether the Protocol is currently being fully implemented in Egypt.

5.1.3. Bilateral Law

5.1.3.1. Bilateral Instruments¹¹⁰

- *Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan* (Four Freedoms Agreement)¹¹¹
- *Agreement between Egypt and Greece for the Promotion of Bilateral Cooperation Concerning Labor Matters*¹¹²
- *Agreement between Egypt and Jordan concerning the Cooperation in Work Force Matters*¹¹³

5.1.3.2. Analysis of Bilateral Instruments

Under the *Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan*

¹⁰⁸ ACRWC, *supra* note 96, at Article 15.

¹⁰⁹ *Refugee Convention*, *supra* note 2, Article 17. See 1.1.2 for more details on

¹¹⁰ Full text of the following legal instruments can be found in Annex C.

¹¹¹ Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan ("Four Freedoms Agreement"), Apr. 4, 2004, ratified by Egypt and entered into force 9 September 2004. [Hereinafter, Four Freedoms Agreement] (unofficial translation) The Agreement was published in the Official Gazette through Decree No. 76 of 2004 by the Foreign Minister, Al-Jarida Al-Rasmiyya, 9 September 2004 (Egypt).

¹¹² Agreement between the Government of the Arab Republic of Egypt and the Government of the Hellenic Republic for the Promotion of Bilateral Cooperation Concerning Labor Matters, Apr. 18, 1981. [Hereinafter, *Labor Agreement Egypt-Greece*]

¹¹³ Agreement between the Government of the Arab Republic of Egypt and the Government of the Hashemite Kingdom of Jordan concerning the Cooperation in Work Force Matters, March 26, 1985. [Hereinafter, *Labor Agreement Egypt-Jordan*]

(Four Freedoms Agreement), Sudanese are entitled to the right to work “in any profession, crafts, and other works”. This is a very high standard which allows Sudanese to enter the labor market under the same conditions as Egyptians and also has an effect on the entitlements of refugees in general. The Refugee Convention obliges states to grant refugees the “most favorable treatment accorded to nationals of a foreign country” with regard to the right to wage-earning employment.¹¹⁴ Accordingly, refugees can potentially claim the entitlement to wage-earning employment at the same privileged level as Sudanese. However, there has been a lack of domestic legislation implementing the provisions of the Four Freedoms Agreement on both sides. This has led to political tensions between the two parties but the Agreement has not been officially terminated.¹¹⁵ Therefore, Sudanese nationals in Egypt have the right to employment under this Agreement, but in practice may have difficulties to access it.

Two other bilateral agreements concerning labor matters could be located, one entered between Egypt and Greece, the other between Egypt and Jordan. The agreement with Greece grants Greek workers the right to be treated the same as Egyptian workers. Their entry into the country shall be free, however they are still obliged to fulfill all requirements for foreigners to be employed in Egypt, such as having a valid passport and a valid employment visa.¹¹⁶ This is reflected in Egyptian domestic law by exempting Greek nationals from work permit fees.¹¹⁷ Thus, Greek refugees, asylum-seekers and failed asylum-seekers may benefit from this exemption, however nowadays it is very uncommon for Greek nationals to seek asylum in Egypt. The only group who in practice benefit from this provision are regular migrants. The Agreement between Egypt and Jordan grants Jordanian workers the same treatment as Egyptian nationals, but does not stipulate any exemptions concerning the process of obtaining a work permit and visa. Thus, Jordanian refugees, asylum-seekers, and failed asylum-seekers still need to follow the domestic regulations on employment of foreigners. Once they obtained a work permit and are employed, they are to be treated the same as the local work force.¹¹⁸ This Agreement is primarily beneficial for Jordanian regular migrants, as there are hardly any Jordanian asylum-seekers or refugees in Egypt, if any. Thus, in practice, these two agreements are primarily aimed at Egyptian migrant workers in Greece or Jordan.

¹¹⁴ *Refugee Convention*, *supra* note 2, Article 17.

¹¹⁵ Salah Khalil, *The Four Freedoms Agreement and the Egyptian-Sudanese Relations*, AL-AHRAM CENTER FOR POLITICAL AND STRATEGIC STUDIES, available at <http://acpss.ahram.org.eg/Media/News/2018/4/1/2018-636581863398725357-872.pdf>

¹¹⁶ Labor Agreement Egypt – Greece, *supra* note 112, Articles 3 and 4. Decree No. 305 of 2015, *infra* note 122, Article 10(5).

¹¹⁷ See domestic law section of this chapter.

¹¹⁸ Labor Agreement Egypt-Jordan, *supra* note 113, Article 5.

5.1.4. Domestic Law

5.1.4.1. Domestic Instruments¹¹⁹

- Egyptian Constitution 2014¹²⁰
- Labor Code (Law No. 12 of 2003)¹²¹
- Decree of the Ministry of Manpower and Migration No. 305 of the Year 2015 on the Rules and Implementing Measures Surrounding Work Permits for Foreigners¹²²
- Ministry of Manpower and Migration Decree No. 485 of 2010 concerning Foreigners Work Licensing Rules and Executive Procedures¹²³
- Law No.159 of the year 1981 on Joint Stock Companies, Partnerships Limited by Shares & Limited Liability Companies¹²⁴
- Investor's Guide - Obtaining a Residence for Non-Egyptians¹²⁵
- Investment Law No. 72 of 2017¹²⁶
- Executive Regulation to the Investment Law¹²⁷
- Trade Union Law No 213 of the year 2017¹²⁸
- Penal Code Law No. 59 of the year 1937¹²⁹

5.1.4.2. Analysis of Domestic Instruments

5.1.4.2.1. Domestic entitlements that differ on the basis of nationality

¹¹⁹ Full text of the following legal instruments can be found in Annex C.

¹²⁰ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*].

¹²¹ Law No. 12 of 2003 (promulgating the Labor Law), *Al-Jarida Al-Rasmiyya*, 7 April 2003 (Egypt). [Hereinafter, *Labor Law*].

¹²² Ministry of Manpower and Migration Decree No. 305 of 2015, *Al-Jarida Al-Rasmiyya*, 14 September 2015 (Egypt). [Hereinafter, *Decree No. 305 of 2015*].

¹²³ Ministry of Manpower and Migration Decree No. 485 of 2010 (Foreigners Work Licensing Rules and Executive Procedures), *Al-Jarida Al-Rasmiyya*, 9 December 2010 (Egypt). [Hereinafter, *Decree No. 485 of 2010*].

¹²⁴ Law No. 159 of 1981 (Promulgating the Law on Joint Stock Companies, Partnerships Limited by Shares & Limited Liability Companies) *Al-Jarida Al-Rasmiyya*, October 1981 (Egypt). [Hereinafter, *Companies Law*].

¹²⁵ Investor's Guide – Issued by the General Authority for Investment and Free Zones, English translation provided by MELES (Middle East Library for Economic Services) in Foreigners Laws, October 2017.

¹²⁶ Law No. 72 of 2017 (Promulgating the Investment Law), *Al-Jarida Al-Rasmiyya*, 31 May 2017 (Egypt). [Hereinafter, *Investment Law*].

¹²⁷ Prime Minister Decree No. 2319 of 2017 (Promulgating the Executive Regulations of the Investment Law), *Al-Jarida Al-Rasmiyya*, Oct. 28, 2017 (Egypt). [Hereinafter, *Executive Regulation Investment Law*].

¹²⁸ Law No. 213 of 2017 (Promulgating the Law on Labor Trade Union Organization), *Al-Jarida Al-Rasmiyya*, 17 Dec. 2017 (Egypt). [Hereinafter, *Trade Union Law*].

¹²⁹ Law No. 59 of 1937 (Penal Code), *Al-Wakaye Al-Masreya*, 5 August 1937 (Egypt). [Hereinafter, *Penal Code*].

The Egyptian Labor Code states that the conditions for employing aliens in all sectors are subject to the principle of reciprocity.¹³⁰ The principle of reciprocity means that work entitlements for foreigners are contingent on their states of nationality granting Egyptians the same entitlements. Consequently, conditions for employment of aliens in Egypt can differ depending on the legislation in place in the country of nationality. In general, the Egyptian labor law includes detailed regulations and requirements foreigners need to fulfill to access the labor market. However, different Ministerial Decrees and laws exempt certain nationalities, namely Palestinians, Greek, Italians, Lebanese and Sudanese, from some of these requirements, as will be discussed in detail below.

5.1.4.2.2. Domestic Entitlements for Refugees, Asylum-Seekers, and Failed Asylum-Seekers

There is no specific domestic legislation for refugees and asylum-seekers. Their right to work, as well as the right to work for failed asylum-seekers, is governed under the same legislative framework applicable to other non-citizens, which includes the Labor Code, the Ministry of Manpower and Migration Decrees on work permits for foreigners, the Companies Law, and the Investment Law.

5.1.4.2.2.1. The Right to Work

Under Egyptian law, the right to work of non-citizens is constricted and highly regulated. The most important requirements are the necessity of a work permit, to receive authorization of entry and residency for work purposes,¹³¹ and the requirement that the percentage of foreign employees should not constitute more than 10 per cent at any workplace.¹³² In addition, the following conditions need to be considered to obtain a work permit:

- the foreigner's qualifications match the work requirements and amount to a work experience of at least three years;
- if a professional license is required to practice a certain profession in Egypt, the foreigner needs to acquire said license;
- the foreigner must not compete with Egyptians for work opportunities;
- the economic need and benefit of hiring a foreigner has to be considered;

¹³⁰ *Labor Law*, *supra* note 121, at Article 27.

¹³¹ *Labor Law*, *supra* note 121, at Article 28; *Decree No. 305 of 2015*, *supra* note 122, at Article 1.

¹³² *Decree No. 305 of 2015*, *supra* note 122 at Article 4; *Companies Law*, *supra* note 124, at Article 174.

- for each foreign expert hired, two Egyptian assistants have to be assigned to the foreigner for training;
- priority in job vacancies is to be given to foreigners born in and permanently living in Egypt.¹³³

The work permit is issued for the duration of one year, subject to renewal. It is to be noted that the fees for a work permit are very high: 3000 Egyptian Pounds per year for the first three years, then the fee rises to 5000 Egyptian Pounds for the fourth year with a yearly increase by 1000 Egyptian Pounds, up to a maximum fee of 12000 Egyptian Pounds.¹³⁴ Furthermore, foreigners are prohibited from working in the sector of import, export and custom clearance, and from working as tour guides.¹³⁵ Generally, the work permit can also be revoked before its expiry for listed reasons including if “there is an opposition from security agencies for reasons related to the country's economic interests, social and national security, or any other reason”.¹³⁶ The lack of specificity leaves all foreigners susceptible to possible arbitrariness.

However, there are exceptions from these rules for specific groups. Certain categories are exempted from the principle of non-competition with the Egyptian labor force:

- foreigners married to Egyptians;
- persons without specified nationality residing continuously and permanently in the country;
- political refugees upon approval of the Political Refugees Office at the Presidency of the Republic;
- individuals born in the country and residing there for at least fifteen years without leaving the country for more than three months per year;
- those holding an ordinary residence permit of five years or a special residence permit of ten years;
- Palestinians holding passports issued from the Palestinian National Authority and a temporary residence permit for a purpose other than tourism, or a Jordanian passport valid for two years issued from Gaza, in addition to the Palestinians obtaining travel documents issued from the Arab Republic of Egypt, Lebanon, Syria and Jordan.¹³⁷

¹³³ *Decree No. 305 of 2015, supra* note 122, at Article 5.

¹³⁴ *Id.* at Article 6.

¹³⁵ *Id.* at Article 14.

¹³⁶ *Id.* at Article 12(c).

¹³⁷ *Decree No. 485 of 2010, supra* note 123, at Article 19.

The above exemption from the non-competition requirement for refugees only applies to political refugees determined by the Presidency, not refugees who received their status by virtue of UNHCR's delegated authority to apply the Refugee Convention. Thus, it is not applicable to most refugees in Egypt and shows a discrepancy between refugees' entitlements under international law and the domestic legal framework.

It is to be noted that the Refugee Convention grants refugees the most favorable treatment accorded to nationals of a foreign country in the same circumstances with regard to the right to engage in wage earning employment.¹³⁸ In this context, benefits awarded to certain nationalities within Egypt should automatically also apply to refugees. As Palestinians are exempted from the principle of non-competition with the Egyptian labor market, refugees should also benefit from this exception. Furthermore, work permit fees do not have to be paid by Sudanese, Palestinians, Lebanese, Greeks, and Italians staying no longer than five years in Egypt.¹³⁹ Based on the most favorable treatment provision of the Refugee Convention, refugees should thus also be exempted from paying the fees for work permits. Lastly, Palestinian nationals are exempted from the prohibition of foreigners working in customs clearance,¹⁴⁰ another exemption to be applied to refugees according to international law. However, none of these exemptions are implemented through domestic laws as they do not mention any of these specific benefits for refugees. In addition, the Refugee Convention requires that restrictions imposed on foreigners for accessing the labor market do not apply to refugees who have been residing in the state party for at least three years, or if a spouse or children hold nationality of the state of asylum.¹⁴¹ There is also no equivalent domestic legislation in place implementing this special exception, which constitutes a major detriment for refugees in Egypt and hinders them to benefit from this right in practice. The only possible benefit stipulated in the law that a small group of refugees might enjoy, is the exemption from the requirement of non-competition with Egyptians for foreigners married to nationals. Hence, refugees married to an Egyptian national may at least rely on this provision.

Furthermore, the Ministry of Manpower and Migration issued a Decree outlining in detail the paperwork to be submitted by employers seeking to hire foreigners and to bring them into the

¹³⁸ *Refugee Convention, supra* note 2, at Article 17.

¹³⁹ *Decree No. 305 of 2015, supra* note 122, at Article 10.

¹⁴⁰ *Decree No. 485 of 2010, supra* note 123, at Article 18.

¹⁴¹ *Refugee Convention, supra* note 2, at Article 17(2).

country.¹⁴² Palestinians and Sudanese nationals are treated more favorably than other nationalities and exempted from the conditions of this decree.¹⁴³ Thus, refugees should be able to benefit from any advantages those nationalities enjoy in accessing the labor market.

5.1.4.2.2.2. The Right to Just and Favorable Conditions of Work

Concerning the right to just and favorable working conditions without discrimination, as granted through the ICESCR, the Egyptian Labor Code outlines in detail the rights and duties of employees and is applicable to nationals and foreigners alike. Those rights include:

- a written work contract;¹⁴⁴
- minimum wages as set by the National Council for Wages with a minimum annual increase of 7%;¹⁴⁵
- right to non-discrimination in wages on the basis of sex, origin, language, religion or creed;¹⁴⁶
- the employer must not oblige the employee to buy food, goods or services from specific stores;¹⁴⁷
- the right to paid annual leave of at least 21 days (increases to 30 days after several years of employment);¹⁴⁸
- the right to paid sick leave.¹⁴⁹

The Labor Code also sets rules for disciplinary measures the employer may impose, ensuring fair treatment,¹⁵⁰ and regulates working hours and rest periods.¹⁵¹ Furthermore, the law states that all provisions are applicable to women without discrimination and introduces the right to maternity leave.¹⁵² Children under the age of 14 are prohibited from work, and those between the age of 14 and 18 are granted special working conditions for their protection.¹⁵³ Refugees, asylum-seekers and failed asylum-seekers benefit from all these provisions provided they are

¹⁴² *Decree No. 485 of 2010, supra* note 123,

¹⁴³ *Decree No. 485 of 2010, supra* note 123, at Article 1.

¹⁴⁴ *Labor Law, supra* note 121, at Article 32.

¹⁴⁵ *Id.* at Article 34.

¹⁴⁶ *Id.* at Article 35.

¹⁴⁷ *Id.* at Article 42.

¹⁴⁸ *Id.* at Article 47.

¹⁴⁹ *Id.* at Article 54.

¹⁵⁰ *Id.* at Article 58.

¹⁵¹ *Id.* at Article 80.

¹⁵² *Id.* at Articles 88-97.

¹⁵³ *Id.* at Articles 98-103.

officially employed, however, it is to be noted that the Labor Code explicitly excludes domestic work from its applicability.¹⁵⁴

5.1.4.2.2.3. The Right to Organize and the Right to Social Security

Regarding the collective dimension of decent work, the right to join non-political and non-profit-making associations is regulated in the Trade Union Law. This law applies to civil servants of the government, workers in companies of the public sector, workers in the private sector, workers of the investment sector, as well as agricultural and domestic service workers.¹⁵⁵ No differentiation is made between nationals and foreigners, thus refugees, asylum-seekers and failed asylum-seekers working in the above listed sectors are entitled to freely form, join or withdraw from trade unions.¹⁵⁶ They are entitled to enjoy the benefits of trade unions, which aims at providing workers with educational courses; at improving their professional skills; improving their health, economic and social standard; and exercising the right of peaceful strikes without contradicting the provisions of the laws in force in this respect.¹⁵⁷ To join a trade union one has to fulfill the following requirements: to be at least 15 years of age; to not be prohibited from joining; to be working in the profession the trade union is classified for; to not be an employer; to not be member of another trade union of the same level.¹⁵⁸ However, in practice even Egyptians may face difficulties in establishing certain trade unions,¹⁵⁹ in joining them or in exercising their right to strike. Consequently, refugees, asylum-seekers and failed asylum-seekers may also face obstacles in enjoying this entitlement.¹⁶⁰

As for the right to social security, the Egyptian Constitution grants only citizens the right to social security to ensure a decent life, if they are unable to support themselves and their families in the event of incapacity to work, old age or unemployment.¹⁶¹ There are no

¹⁵⁴ *Id.* at Article 4(b).

¹⁵⁵ *Trade Union Law*, *supra* note 128, at Article 2. It is interesting to note that whereas the Labor Law explicitly excludes domestic service workers from its protection, the Trade Union Law includes this sector in its scope of application

¹⁵⁶ *Id.* at Article 4.

¹⁵⁷ *Id.* at Article 14.

¹⁵⁸ *Id.* at Article 21.

¹⁵⁹ In order to form a trade union, the concerned establishment needs to have at least 150 employees, a number which was much lower before the latest trade union law was issued. *Trade Union Law*, *supra* note 128, at Article 11.

¹⁶⁰ See the Implementation section of this chapter.

¹⁶¹ *Constitution*, *supra* note 120, at Article 17: “The state provides social security services. All citizens who have no access to the social security system have the right to social security to ensure a decent life, if they are unable to support themselves and their families in the event of incapacity to work, old age or unemployment. [...]” There seems to be a confusion of the terms “social security” and “social assistance”. In systems of social security by contributions, all workers, irrespective of their nationalities, are beneficiaries if they financially

domestic laws establishing a welfare system for non-nationals.¹⁶² The Refugee Convention would grant refugees (not asylum-seekers) the right to social security under the same conditions as nationals.¹⁶³ However, as outlined in the international section of this chapter, Egypt entered a reservation and only grants this right on a case-by-case basis. Still the minimum standard of the ICESCR should apply to all non-nationals, which is “equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.”¹⁶⁴

5.1.4.2.2.4. Protection from Forced Labor and Child Labor

Finally, in accordance with its obligations under international labor law, Egypt must protect everyone from discrimination, forced labor and exploitation, and protect children from economic and labor exploitation. As described above, the Egyptian Labor Law includes provisions prohibiting discrimination, prohibits child labor under the age of 14,¹⁶⁵ and entitles juvenile workers to receive fair wages and other special protections, such a maximum work day of six hours with no overtime hours permitted.¹⁶⁶ In its report to the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, Egypt stated that “slavery is deemed to be incompatible with the order of society existing in Egypt. Under Egyptian law, no person, regardless of nationality, may be held in slavery. To compel a person to perform forced labour is a criminal offense under article 117 of the Penal Code.”¹⁶⁷ Anyone using unpaid workers, or unjustifiably withholding wages, is liable to a prison sentence. In case the perpetrator is a public official, the punishment is imprisonment with hard labor.¹⁶⁸ The Egyptian Constitution confirms that forced labor is prohibited, except when performing a public service for a defined period of time for a fair wage in accordance with the law.¹⁶⁹ In addition, it highlights the importance of the right to safe and fair working conditions.¹⁷⁰

contribute to the system. The Constitution most likely intends to exclude non-nationals from social welfare, which is provided to citizens in need.

¹⁶² For more details on social security and health insurance, *see* Chapter 7 on Health.

¹⁶³ *Refugee Convention*, *supra* note 2, Article 24.

¹⁶⁴ *CESCR Comment No. 19*, *supra* note 54, at para. 38; *ICESCR*, *supra* note 3, Article 9.

¹⁶⁵ *Labor Law*, *supra* note 121, at Article 99.

¹⁶⁶ *Id.* at Article 101.

¹⁶⁷ Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *Consideration of Reports Submitted by States Parties under Article 73 of the Convention – Egypt*, CMW/C/EGY/1, August 2006, at para. 85.

¹⁶⁸ *Penal Code*, *supra* note 129, at Article 117.

¹⁶⁹ *Constitution*, *supra* note 120, at Article 12. The exception of public services refers to military services or other compulsory services to be provided by citizens.

¹⁷⁰ *Id.* at Article 13.

5.1.4.2.2.5. The Right to Self-Employment

When it comes to opening a business, refugees, asylum-seekers and failed asylum-seekers need to follow the same rules and procedures as foreigners in general, and complete a security clearance.¹⁷¹ In order to receive a license for their business, investors need to submit the following to the Ministry of Investment: the applicant's passport, a power of attorney and identification documents for the representative of the applicant, and a copy of the business plan. The application is then examined in accordance with the applicable guidelines and laws and a recommendation is issued whether to approve or reject the application. In a second step, a security check is conducted and if the applicant passes the security clearance, he/she receives the business license.¹⁷² Common reasons for rejecting the application are either the denial of security clearance, or the lack of financial resources.¹⁷³

In case of a positive decision by the Investment Ministry, it is possible to receive a residence permit for the duration of the project.¹⁷⁴ To obtain such a residency, the foreigner has to be a founder, shareholder, or partner in a company, or be the owner of an establishment.¹⁷⁵ The permit is first given for at least one year, and later renewed for another similar period depending on the seriousness and duration of the investment project.¹⁷⁶ Each period cannot exceed 5 years,¹⁷⁷ and all in all the residency cannot be granted for a longer period of time than the duration of the project.¹⁷⁸ The Ministry of Investment provides investors with assistance and guidance through two information centers, which can be accessed by citizens and non-citizens alike. Thus, refugees, asylum-seekers and failed asylum-seekers may benefit from these services.¹⁷⁹

5.1.5. Overall Legal Framework in Egypt

¹⁷¹ Information obtained in an interview with an official at the Ministry of Investment and International Cooperation, March 2019.

¹⁷² Information obtained in an interview with an expert on the establishment of businesses in Egypt and investment law, April 2019.

¹⁷³ *Id.*

¹⁷⁴ *Investment Law*, *supra* note 126, Article 3.

¹⁷⁵ *Executive Regulation Investment Law*, *supra* note 127, Article 4.

¹⁷⁶ *Id.* at Article 5.

¹⁷⁷ Investor's Guide – Issued by the General Authority for Investment and Free Zones, *supra* note 125: Foreign investors can obtain a 5-year residence permit in Egypt if they are: the owner of a business; the director of a branch; a partner in a joint partnership or a partnership in commendam; the general director or the executive director of a limited liability company; the board chairman, a managing director or a board member in a joint stock company or a partnership limited by shares.

¹⁷⁸ *Investment Law*, *supra* note 126, Article 1

¹⁷⁹ Information obtained in an interview with an official at the Ministry of Investment and International Cooperation, March 2019.

The right to employment encompasses many different entitlements from which refugees, asylum-seekers and failed asylum-seekers may benefit, the most essential being the right to work. The right to work does not entitle everyone to actually receive employment but, as a minimum standard, Egypt is obliged to grant everyone access to work without discrimination of any type.¹⁸⁰ It is possible to have different rules in place for the employment of foreigners, as opposed to the employment of nationals, as long as the distinction is based on a reasonable and objective justification.¹⁸¹ Egypt follows such a policy and puts certain restrictions and requirements on foreign employees. However, if the regular migrant has been lawfully residing in the country for the purpose of work for several years, this limitation is no longer applicable. States need to enact legislation accordingly, determining after how many years (maximum five years) a regular migrant cannot be denied access to employment in favor of a national. Also, refugees residing in Egypt for three years, or are married to an Egyptian, or have a child holding Egyptian nationality, should be entitled to be exempted from the work permit conditions. However, Egypt did not enact corresponding domestic legislation in this regard.

Certain nationalities enjoy additional entitlements with regard to the right to work. Palestinians, Sudanese, Lebanese, Greeks, and Italians staying no longer than five years in Egypt are exempted from paying the work permit fees. Additionally, Palestinians are exempted from the principle of non-competition with Egyptian workers.¹⁸² Based on the most favorable treatment provision of the Refugee Convention, refugees are thus also entitled to benefit from both those exemptions but no domestic legislation was enacted to clarify this for authorities. Furthermore, Palestinians and Sudanese should be entitled to work under the same conditions as nationals but the degree of implementation of the relevant agreements¹⁸³ is currently unclear.

¹⁸⁰ Any discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with regard to employment is prohibited.

¹⁸¹ *CMW*, *supra* note 8, Articles 52-53.

¹⁸² The following categories are exempted from non-competition: foreigners married to Egyptians; persons without specified nationality residing continuously and permanently in the country; political refugees upon approval of the Political Refugees Office at the Presidency of the Republic; individuals born in the country and residing there for at least fifteen years without leaving the country for more than three months per year; those holding an ordinary residence permit of five years or a special residence permit of ten years; Palestinians, holders of passports issued from the Palestinian National Authority to temporary reside for a purpose other than tourism, or a Jordanian passport valid for two years issued from Gaza, in addition to the Palestinians obtaining travel documents issued from the Arab Republic of Egypt, Lebanon, Syria and Jordan

¹⁸³ *Casablanca Protocol*, *supra* note 97, for the Palestinians; Four Freedoms Agreement, *supra* note 111, for the Sudanese.

After having entered the labor market and found employment, refugees, asylum-seekers and failed asylum-seekers are entitled to just and favorable working conditions, which include fair and equal remuneration enabling workers to provide a decent life for themselves and their families, safe and healthy working conditions, as well as rest, leisure and reasonable working hours. They are entitled to be treated no less favorably than nationals and to be free from discrimination of any kind. Regular and irregular migrants (not refugees and asylum-seekers) are specifically entitled to transfer their earnings, savings, and personal effects and belongings to their country of nationality upon termination of employment.

Everyone is entitled to be protected from forced labor. Children under the age of 15 years are not allowed to work, and those beyond this age may not perform any work that is likely to be hazardous, to interfere with the child's education, to be harmful to the child's health or physical, mental, spiritual, moral or social development. From a collective point of view, refugees, asylum-seekers and failed asylum-seekers have the right to form and freely join trade unions just like nationals, but also face the same struggles and barriers Egyptians encounter in practice. Thus, it is highly unlikely for them to join trade unions. Furthermore, everyone is entitled to pursue self-employment and specifically refugees and asylum-seekers are entitled to be treated not less favorably than other foreigners.

5.2. IMPLEMENTATION

5.2.1. Work Permit and Self-Employment

According to the Refugee Convention, refugees should be exempted from any employment restrictions imposed on foreigners if they have completed three years of residence in the host country, or have a spouse or children possessing the nationality of the host country.¹⁸⁴ Although Egypt made no reservations to these provisions of the Convention, no corresponding domestic laws were enacted and refugees are unable to enjoy these entitlements.¹⁸⁵

In practice, the lengthy administrative process to obtain the necessary license and security clearance to start a business, or to obtain a work permit, proves to be too difficult to complete. Thus, the majority of refugees and asylum-seekers instead opt for informal employment and

¹⁸⁴ Refugee Convention, *supra* note 2, Articles 6 and 17(2). Ranya Abdel-Baki, *Refugees' Access to Work in Egypt – Operational Guidance*, (UNHCR 2018), at 23.

¹⁸⁵ Ranya Abdel-Baki, *Refugees' Access to Work in Egypt – Operational Guidance*, Jan. 2018, at 24.

work unofficially without a contract. This makes them vulnerable to exploitation and abuse, as they cannot rely on any protection through Egyptian labor law.¹⁸⁶ Occasionally there are cases where refugees manage to obtain a work permit or the necessary license and accreditation for self-employment, though they remain the exception.¹⁸⁷ This analysis was confirmed by the information shared in the focus group discussions. Throughout the different nationalities, participants stated that it is impossible for them to obtain work permits. This forces them to seek employment in the informal sector. Many resort to working as domestic workers, which is the least protected area of work as it is explicitly excluded from the regulation (and thus the protection) of the Egyptian Labor Code. Others take low-skill jobs as drivers, cleaners, kitchen hands, or street vendors, to name only a few. All of them have in common that the informal sector offers no protection from exploitation and they stated that their working hours are too long and the salaries too low to cover their daily expenses. Many reported abuse through their employers, being accused of stealing, and especially women are at risk of sexual harassment.¹⁸⁸

Self-employment could be an alternative to generate income under better working conditions. According to the Ministry of Investment and International Cooperation, both foreigners and nationals can access the Ministry's help centers which provide information and assistance for founding a business. It was stated that refugees can register businesses without difficulties, under the same requirements imposed on all foreigners. The Ministry voiced concern that some refugees might try to found and register a business only on paper to obtain a longer residence permit.¹⁸⁹ The results of the focus group discussions paint a different picture. Most consider it impossible to open their own business and expect to be rejected if they apply. Instead some individuals operate small businesses without an official license. These businesses are at risk of being closed down if detected by the authorities and thus also not a reliable source of income. Interestingly, many participants stated that having an Egyptian business partner is a legal requirement for opening a business. In fact, this is not one of the legal requirements, but rather a strategy to facilitate the process. The Egyptian business partner acts as the business owner and submits the application at the Ministry of Investment because they are more likely to pass the necessary security clearance than a foreigner. Once the business is opened, the foreign partner usually handles the day-to-day operation, while the Egyptian partner is financially

¹⁸⁶ *Id.* at 24-25.

¹⁸⁷ *Id.* at 26.

¹⁸⁸ Information obtained in the focus group discussions held between 10 May 2019 and 8 August 2019.

¹⁸⁹ Information obtained in an interview with an official at the Ministry of Investment and International Cooperation, March 2019.

benefiting. This can lead to conflicts, and refugees running these types of business partnerships often complain that the Egyptian partner puts in very little effort while demanding the majority of profits.¹⁹⁰ Organizations such as UNHCR work on supporting self-employment and business ideas in different sectors by providing the initial funding for projects that later become self-sustainable.¹⁹¹

Other concerns raised during the focus group discussions included that children drop out of school for the sake of financially supporting their families with informal work. Also, certificates obtained abroad are often not being acknowledged in Egypt which makes it even more difficult to find employment. Lastly, the participants mentioned that service providers do not offer enough assistance with regards to employment. Although there is the possibility of job trainings and skill improvement, they critiqued that this is not sufficient to help them obtain a work permit or actual employment.

With regard to Palestinian and Sudanese nationals, it is to be noted that they should enjoy a privileged status among foreigners, based on the agreements signed by Egypt. As described above, the Casablanca Protocol entitles Palestinian refugees to work under the same conditions as Egyptian nationals. In practice, however, the liberal regulations implemented from the 1950s to the late 1970s were abolished in 1978.¹⁹² Ever since, Palestinians have been required to obtain a work permit like other foreigners. Domestic law exempts them from the prohibition of being in competition with Egyptian workers, but still many opt to work in the informal sector due to bureaucracy issues.¹⁹³ The lack of a work permit is problematic, as it keeps Palestinians from obtaining (or renewing) their residence permits.¹⁹⁴ The participants interviewed in the focus group discussions were of Palestinian origin but only recently came to Egypt from Syria. Those who obtained employment all stated that they work in the informal sector without work permits. Participants also pointed out that high qualifications, such as a degree in medicine or

¹⁹⁰ Information obtained in an interview with Plan International, July 2019.

¹⁹¹ Information obtained in an interview with UNHCR Egypt, January 2020.

¹⁹² OROUB EL-ABED, *UNPROTECTED – PALESTINIANS IN EGYPT SINCE 1948*, 91 (2009).

¹⁹³ See EL-ABED, *supra* note 192, at 94 for a detailed description on the different occupations carried out by Palestinians.

¹⁹⁴ See Chapter 11 on Documentation for more details. Palestinians require a reason for their stay in Egypt to receive a residence permit. Possible reasons can be employment, education, or being married to an Egyptian national.

law, are not accepted in Egypt which hinders individuals from working in their specialized field.¹⁹⁵

Sudanese nationals should be able to rely on the Four Freedoms agreement to enjoy the right to employment, and should be allowed to work under the same conditions as nationals. Despite this, the participants of the focus group discussion stated that they cannot find work. Some of them explained that they would need a work permit they cannot obtain, while others claimed that employers are not accepting UNHCR cards as identification or simply prefer Egyptian employees.¹⁹⁶ It remains unclear if any of the benefits promised in the Four Freedoms Agreement are actually implemented and as such, Sudanese would only require some kind of valid ID to obtain work, or if in practice they need to fulfill all requirements for a work permit.

5.2.2. Labor Rights

The Egyptian Labor Code provides comprehensive legal entitlements for workers, however, the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families criticized that the Egyptian Labor Code explicitly excludes domestic workers from its scope of protection. Considering the rising number of migrant domestic workers, the Committee suggests that this lack of legal protection should be remedied by including them in the law's applicability or by establishing a separate law providing an effective complaint mechanism to deal with abuses and ill-treatment.¹⁹⁷ In its 2016 Trafficking in Person Report on Egypt, the United States Department of State claimed that foreign domestic workers from Indonesia, the Philippines, Sri Lanka, Bangladesh, and Ethiopia often face exploitation in the form of "excessive working hours, confiscation of passports, withheld wages, denial of food and medical care, and physical and psychological abuse."¹⁹⁸ In general, women and men from South and Southeast Asia and East Africa suffer from forced labor in different sectors, such as domestic service, construction, cleaning and begging.¹⁹⁹

¹⁹⁵ Information obtained in focus group discussions held on 2.1.2020 with participants of Palestinian origin who came to Egypt from Syria.

¹⁹⁶ Information obtained in focus group discussions held with Sudanese nationals between 15.5.2019 and 30.5.2019.

¹⁹⁷ Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families – Egypt*, U.N. Doc. CMW/C/EGY/CO/1, May 25, 2007, para 38-39.

¹⁹⁸ United States Department of State, 2016 Trafficking in Persons Report - Egypt, 30 June 2016, at 1, available at: <https://www.refworld.org/docid/577f960ee.html> [accessed 21 March 2019]

¹⁹⁹ *Id.*

Furthermore, the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families was concerned that the Egyptian Labor Code makes the protection awarded to foreign workers subject to reciprocity and recommends to remove this condition.²⁰⁰ It also criticized that foreigners applying for a work permit need to undergo an HIV test and provide a negative result, as this is not in accordance with the ILO Code of Practice.²⁰¹

The right to strike is established in Egyptian law but there are obstacles in its exercise. Striking workers can be charged with “attacking the right to work” if they keep their co-workers from performing their work²⁰² and prosecuted under Article 375 of the Penal Code. The punishment for this crime is a prison sentence not exceeding two years, or a fine up to 100 Egyptian Pounds. Also, Amnesty International reported in 2017 that those taking part in a strike are at risk of being arrested and to face trial, including military trials. In addition to those criminal procedures, they face other disciplinary measures like pay cuts or dismissal from work.²⁰³ The ILO also acknowledged the gaps in implementation and put Egypt on the short list for being in breach of Convention of Freedom of Association No. 87 (1948)²⁰⁴. Considering the difficulties Egyptians face in exercising their right to strike, obviously, foreigners would struggle with the same issues. However, the implementation of the right to strike is rather a minor concern in comparison to more pressing matters, such as the access to employment in general. For asylum-seekers, refugees and failed asylum-seekers the highest priority is clearly to have access to employment in the first place, and to enjoy fair working conditions to be protected from exploitation. Only as a secondary concern the right to strike might become relevant to some workers.

5.3. RECOMMENDATIONS

²⁰⁰ Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families – Egypt*, U.N. Doc. CMW/C/EGY/CO/1, May 25, 2007, para 30-31.

²⁰¹ *Id.* at para 32.

²⁰² Arabic Network for Human Rights Information, Egypt: Question and Answer on the Right to Strike, 2017. Available at: <https://allafrica.com/stories/201706050309.html> (last accessed May 6, 2019)

²⁰³ Amnesty International, *Egypt on Labour Day – relentless assault on labour rights*, MDE 12/6154/2017, April 30, 2017.

²⁰⁴ See *supra* note 14. Egypt’s Trade Union Law was found to be contravening the ILO Convention No. 87, for a detailed discussion of the situation in Egypt see the Individual Case (CAS) Discussion related to the 108th ILC Session (2019), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3962096

The recommendations concerning the right to work all center around the too strict criteria foreigners have to fulfill to obtain a work permit in Egypt. Asylum-seekers and refugees are mostly unable to meet these requirements, and thus are barred from accessing the Egyptian labor market. To allow them to live a self-sustainable life, it is essential to create an exemption for asylum-seekers and refugees from fulfilling the same work permit requirements as regular migrant workers who come to Egypt. The situation of asylum-seekers and refugees is different, because they find themselves in Egypt due to external circumstances beyond their influence and cannot return to their country of nationality. Based on this special vulnerability, the Refugee Convention relieves them from any requirements that they are unable to fulfill due to their forced displacement. Thus, it is recommended that Egypt loosens work permit regulations for asylum-seekers and refugees to allow them access to employment under the same conditions as nationals, ideally from the moment they take up residence in Egypt. As a minimum, all restrictions on employment access have to be removed once refugees have resided in Egypt for three years, or have a spouse or child with Egyptian nationality, following Egypt's obligations under international law.

Furthermore, it is recommended to further promote initiatives where asylum-seekers and refugees are matched with Egyptian employers. This facilitates the job search for them, while employers would receive access to a pool of possible employees they usually might not have been aware of. This way, it can be ensured that valuable skills and high qualifications which some refugees bring with them do not remain unused. In addition to putting employers and possible employees into contact, the accreditation of certificates obtained abroad needs to be improved. For example, highly skilled foreigners who have obtained degrees in medicine, law or engineering, or have completed specific job trainings, add to the pool of knowledge and raise the skill level of the labor force in Egypt. However, they cannot realize their full potential if they are unable to work in their learned professions merely for the reason that their certificates are not accepted by Egyptian authorities and employers.

Considering the ambiguity surrounding the right to employment for Palestinians and Sudanese, it would be advisable to re-commit to the Casablanca Protocol and the Four Freedoms Agreement by clarifying the domestic legislation accordingly. With clear regulations on their specific status, it will be easier for all involved parties to follow the steps necessary to benefit from the right to access employment under the same conditions as nationals. Currently, there seems to be a lot of confusion about the exact legal situation and procedures.

In answer to the difficulties in opening businesses in Egypt, it is suggested to provide more guidance specifically targeted at asylum-seekers and refugees on how to successfully open a business in Egypt. By making it easier for asylum-seekers and refugees to pass the necessary security clearance and to fulfill all other legal requirements, they would be in a position to access formal employment. Running a formally registered business provides them with a more secure income, while it is also in the interest of the state to reduce the number of informally operating businesses.

With regard to the high number of migrants working in the domestic sector, it is recommended to improve their access to legal protection. This can be achieved by either no longer excluding them from the regulations of the Egyptian Labor Law, or by creating a separate legal framework dealing with their protection and providing an effective complaint mechanism to deal with abuses and ill-treatment.²⁰⁵

In conclusion, it is in the best interest of both the migrant communities and the state to take all possible measures to facilitate the access to employment for asylum-seekers and refugees to enable them to live a self-sustainable life without the need for charity or other financial support. This would also reduce the cost borne by the government and UNHCR for hosting refugees and providing for their livelihoods.

²⁰⁵ This recommendation was also given to Egypt by the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families. *See* Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families – Egypt*, U.N. Doc. CMW/C/EGY/CO/1, May 25, 2007, para 38-39.

CHAPTER 6: EDUCATION

6.1. LEGAL FRAMEWORK

6.1.1. International Law

6.1.1.1. Legal Instruments¹

- *Convention relating to the Status of Refugees 1951*²
- *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*³
- *Convention on the Rights Child (CRC)*⁴
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁵
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*⁶
- *Convention on the Rights of Persons with Disabilities (CRPD)*⁷
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*⁸
- *ILO Convention concerning Minimum Age for Admission to Employment (C138)*⁹
- *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (C182)*¹⁰

¹ Full text of the following legal instruments can be found in Annex D.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982.

⁴ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990). [Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

⁵ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 UNTS 13 (entered into force 3 September 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195 (entered into force Jan. 4, 1969). [Hereinafter, *ICERD*]. Egypt ratified the Convention on 1 May 1967.

⁷ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*]. Egypt's accession to the Convention occurred on 19 February 1993.

⁹ International Labour Organization (ILO), Convention Concerning Minimum Age for Employment, June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976). [Hereinafter, *C138*]. Egypt ratified the Convention on 9 June 1999.

¹⁰ The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S.161 (entered into force 19 Nov 2000). [Hereinafter, *C182*]. Egypt ratified the Convention on 6 May 2002.

- *Convention against Discrimination in Education*¹¹

6.1.1.2. Analysis of International Instruments

6.1.1.2.1. Refugees and Asylum-Seekers

Refugees in Egypt have educational entitlements under the Refugee Convention, international human rights conventions, and international labor and education law.¹² Entitlements are primarily owed to children, but adults may benefit from rights to basic education and degree recognition.¹³ Entitlements differ depending on level of education. Primary school students are entitled to more comprehensive rights than secondary or university students. Refugees and asylum-seekers in Egypt have educational entitlements under: *Convention relating to the Status of Refugees*,¹⁴ *International Convention on Economic, Social, and Cultural Rights*,¹⁵ *Convention on the Rights of the Child*,¹⁶ *Convention on the Elimination of All Forms of Discrimination against Women*,¹⁷ *Convention on the Elimination of All Forms of Racial Discrimination*,¹⁸ *Convention on the rights of Persons with Disabilities*,¹⁹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,²⁰ *ILO Convention No. 138 concerning the Minimum Age for Employment*²¹ and *ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*,²² and *Convention against Discrimination in Education*.²³

Primary Education

The Refugee Convention provides refugees the same treatment as nationals regarding primary education.²⁴ Asylum-seekers share this entitlement because the Refugee Convention grants educational entitlements to everyone “lawfully present.” Asylum-seekers are lawfully present

¹¹ *Convention against Discrimination in Education*, Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962). [Hereinafter, *UNESCO Education Convention*] Egypt accepted the treaty on March 28, 1962.

¹² UN High Commissioner for Refugees, *Egypt*, UNHCR GLOBAL APPEAL (2011) at 142. UNHCR handles all activities pertaining to refugee registration, documentation, and status determinations. Refugees, asylum-seekers, and failed asylum-seekers’ entitlements to refugee status procedures (RSD) and documentation are further discussed in Chapter 3 and Chapter 11.

¹³ *Refugee Convention*, *supra* note 2, at Article 22.

¹⁴ *Id.* at Article 22.

¹⁵ *ICCPR*, *supra* note 3 at Article 13 & Article 14.

¹⁶ *CRC*, *supra* note 4 at Article 22, Article 28, Article 29, Article 38, & Article 40.

¹⁷ *CEDAW*, *supra* note 5, at Article 10.

¹⁸ *ICERD*, *supra* note 6, at Article 5 & Article 7.

¹⁹ *CRPD*, *supra* note 7, at Article 24.

²⁰ *CMW*, *supra* note 8, at Article 30, Article 36, Article 43, & Article 46.

²¹ *C138*, *supra* note 9, at Article 3 & Article 7.

²² *C182*, *supra* note 10, at Article 7.

²³ *UNESCO Education Convention*, *supra* note 11, at Article 1 & Article 3.

²⁴ *Refugee Convention*, *supra* note 2 at Article 22.

from the time of registration until they receive the outcome of their status determinations,²⁵ whether they initially entered the country lawfully or irregularly.²⁶ Therefore, the Refugee Convention is applicable to both refugees and asylum-seekers.²⁷ Egypt's Reservation limits what it owes regarding primary education.²⁸ The Reservation preserves Egypt's discretion as to whether it will provide all refugees and asylum-seekers with the same access to primary schools as nationals.²⁹

The Refugee Convention allows refugees and asylum-seekers immediate and unconditional access to public elementary education.³⁰ It does not define elementary education or the content of the curriculum but the drafting history indicates it includes basic education such as literacy, fundamental mathematics, and basic civic education. However, despite these absolutes the exact definition of said concept is to be defined by the States concerned themselves.³¹ The Provision also entitles adult refugees who have not completed primary school to basic education.³² This is particularly important given that refugee migratory journeys are often long, complex, and disruptive to their education.³³ The Refugee Convention does not specify if it is permissible to separate refugee students from nationals.³⁴ These would be the obligations

²⁵ JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 175 (Cambridge University Press 2005). Chapter 3 discusses the Content of Refugee Protection and asylum-seekers entitlements.

²⁶ JAMES HATHAWAY, *supra* note 30, at 597. Hathaway further notes this obligation also arises out of Refugee Convention Article 31(1), which prohibits penalization for the irregular entrance of asylum-seekers. The relationship between these articles is discussed further in Chapter 3.

²⁷ *Id.* at 599-601.

²⁸ *Refugee Convention, supra* note 2 at Egypt's Reservation stating: *Concerning articles 20, 22 (paragraph 1), 23 and 24 of the Convention of 1951, the competent Egyptian authorities had reservations because these articles consider the refugee as equal to the national. We made this general reservation to avoid any obstacle which might affect the discretionary authority of Egypt in granting privileges to refugees on a case-by-case basis.*

²⁹ The validity and enforceability of this reservation is debated. The U.S.-administered World Refugee Survey questioned if this reservation is domestically enforceable because it was never published in the Official Gazette pursuant to Article 225 of the Constitution on the ratification of international treaties. [See, United States Committee for Refugees and Immigrants, *World Refugee Survey 2008-Egypt* (2008)]. Egyptian refugee law expert Tarek Badawy explained that the Reservation does not violate the Refugee Convention's object and purpose and was accepted without objection by other State Parties. Therefore, the Reservation is valid, but Egypt's ratification, without similar reservations, of the CRC and CMW indicates that it is no longer the applicable law. [See, Interview with Tarek Badawy, February 2019].

³⁰ JAMES HATHAWAY, *supra* note 25, at 175. The Convention's *travaux préparatoires* indicate intent to include access to all government-funded institutes of elementary education. [See, PAUL WEIS, *THE REFUGEE CONVENTION 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS* 123 (UN High Commissioner for Refugees 1990).]

³¹ A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 1035 (Oxford University Press 2011).

³² JAMES HATHAWAY, *supra* note 30, at 599.

³³ Marissa Ensoura, *Education and Self-Reliance in Egypt*, 34 *Forced Migration Rev.* 25, 26 (2010) at 25.

³⁴ JAMES HATHAWAY, *supra* note 30, at 588. [There are some benefits to educating refugees separately (e.g. maintaining their traditional language in preparation for repatriation), integration into local public schools is in the best interest of refugee and asylum-seeking children.]

arising from the Refugee Convention in the cases where Egypt allows refugees and asylum-seekers equal treatment as nationals.

Considering Egypt's Reservation to the Refugee Convention, it is important to consider educational entitlements under other international human rights law instruments. The Refugee Convention does not limit refugees' rights to those listed in the Convention.³⁵ When other legal instruments provide additional rights, refugees are entitled to the more expansive rights.³⁶ ICESCR Articles 13 and 14 address the right to education. These provisions require that states provide compulsory and free primary education to all.³⁷ Compulsory education means neither the state nor parents may treat primary education as optional.³⁸ This is a particularly important right for female students.³⁹ The right to free primary education is equally unequivocal, "so as to ensure the availability of primary education without charge to the child, parent, or guardian."⁴⁰ This entitlement to free and compulsory basic primary education is owed regardless of nationality.⁴¹ The Committee on Economic Social and Cultural Rights' (CESCR) General Comments state that domestic legislation should regulate content of primary education, but that all students are entitled to an education that fulfills basic learning needs.⁴²

³⁵ *Refugee Convention*, *supra* note 2, at Article 5.

³⁶ Alice Edwards, *Human Rights, Refugees, and the Right to 'Enjoy' Asylum* 17 Int'l. J. Refugee L. 293, 330 (2005). Refer to Chapter 3 for further explanation on the relationship between international refugee law and international human rights law.

³⁷ *ICCPR*, *supra* note 3 at Article 13.

³⁸ UN Committee on Economic, Social, and Cultural Rights, *General Comments No. 11: Plans of action for primary education (Article 14 of the International Covenant on Economic, Social, and Cultural Rights)*, E/C.12/1999/4 (1999) at para. 6. [Hereinafter, *CESCR Comment No. 11*]

³⁹ *CESCR Comment No. 11*, *supra* note 38, at para. 6. ICESCR Article 3 obliges State Parties ensure women have equal right to men to access and enjoy economic, social, and cultural rights.

⁴⁰ *Id.* at para. 7.

⁴¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* UN Doc. E/C.12/GC/20, 2 July 2009, para 30. [Hereinafter, *CESCR Comment No. 20*] at para. 30. The CESCR further describes the attributes of primary education, as the term is not defined by the ICESCR. It explains that education is fundamental to the realization of other human rights. It explains the attributes of primary education with reference to the World Declaration on Education for All, which states primary education should include:

Educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decision, and to continue learning. [UN Educational, Scientific, and Cultural Organization, *World Declaration on Education for All and Framework for Meeting to Meet Basic Learning Needs* art. 1, adopted on 9 March 1990.

⁴² UN Committee on Economic, Social, and Cultural Rights, *General Comment No. 13 on the Right to Education* E/C.12/1999/10 (1999) at para 9. [Hereinafter, *CESCR Comment No. 13*].

Egypt's has a general reservation to the ICESCR.⁴³ The Reservation states that Egypt will implement all provisions of the ICESCR provided they do not contradict Islamic Sharia. The Reservation does not impact the right to education. In 1990, Egypt joined members of the Organization of Islamic Conference to issue the Cairo Declaration on Human Rights in Islam. The Cairo Declaration says that education is a right owed to every human being,⁴⁴ indicating that education is also a religious entitlement. Unlike the Refugee Convention or ICESCR, the Cairo Declaration does not differentiate based on levels of education and specifies that all human beings have a right to education, not just nationals.

ICESCR accounts for the economic challenges developing states face in realizing socioeconomic and cultural rights and allows developing states to progressively realize these rights.⁴⁵ The CESCR articulated the "core content" of essential rights a state must meet regardless of its level of development. It includes the right to basic education as a "core content" all states must meet.⁴⁶ While progressive realization is applicable to secondary and tertiary education, basic primary education is an essential right that must be realized more quickly.⁴⁷ Progressive realization also requires that "states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization" of social, economic, and cultural rights.⁴⁸ CESCR explains that a state can meet its minimum core obligation if its education system is non-discriminatory and it is moving to provide universal primary education.⁴⁹

As a developing country, Egypt's education policies may permissibly differentiate between nationals and non-nationals provided the aim of these policies is legitimate and narrow, and

⁴³ ICCPR, *supra* note 3, at Egyptian Declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁴⁴ Organization of Islamic States Conference, *Cairo Declaration on Human Rights in Islam*, art. 9 adopted on 5 August 1990. [Hereinafter, *Cairo Declaration*]. While the *Cairo Declaration* is not a source of law, it indicates Egypt's understanding of the right to education and its relationship to Islamic law.

⁴⁵ ICESCR, *supra* note 3, at Article 2.

⁴⁶ UN 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/C.14/12/90 (1990) at para. 10. [Hereinafter, *CESCR Comment No. 3*]. The Committee posits that a "State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant."

⁴⁷ This is reflected in ICESCR Article 14, which requires states to submit a detailed plan on how to realize free and compulsory education that within two years of ratifying the Covenant. See, ICESCR, *supra* note 3, at Article 14.

⁴⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health* UN Doc. E/C.12/2000/4 (2002), at para 8.

⁴⁹ CESCR Comment 13, *supra* note 42, at para. 43.

that they still meet non-nationals' essential rights.⁵⁰ Because basic primary education is an essential right, Egypt may not differentiate between nationals and non-nationals access even though it is a developing country.⁵¹ Since Egypt ratified the ICESCR in 1990, the Ministry of Education has published numerous strategic plans that rarely address the needs of refugees or asylum-seekers. The most recent education policy, created in cooperation with UNESCO, reaffirmed Egypt's commitment to universal primary education but only referred to Egyptian students.⁵²

The right to universal primary education is also found in the CRC and requires states to make primary education free and compulsory for all.⁵³ Rights conferred by the CRC are not usually subjected to a progressive realization standard, but "the right to education can be progressively implemented, in accordance with available resources."⁵⁴ However, UN Educational, Cultural, and Scientific Organization (UNESCO) indicated that universal and available primary education is a core obligation that states must immediately implement.⁵⁵ Unlike ICESCR, CRC does not permit any differentiation between nationals and non-nationals, regardless of the state's level of development. CRC Article 22 addresses the situation of refugees, and extends to them all rights found in the Convention.⁵⁶ It further obliges signatories to formulate and enforce domestic legislation with the best interest of the child in mind.⁵⁷ The Committee on the Rights of the Child held that differentiation between refugee and asylum-seeking children and national children violated states' obligations under the CRC.⁵⁸ With regard to education specifically, the Committee indicated that it is always in the best interest of the child to receive

⁵⁰ *CESCR Comment No. 20*, *supra* note 41, at para. 30.

⁵¹ *Id.* at para 30.

⁵² Ministry of Education, *Strategic Plan for Pre-University Education 2014-2030: Education, Egypt's National Project* (2014) at 59-60.

⁵³ *CRC*, *supra* note 4, at Article 28.

⁵⁴ UN EDUCATIONAL, CULTURAL, AND SCIENTIFIC ORGANIZATION (UNESCO), *THE RIGHT TO EDUCATION: LAW AND POLICY REVIEW GUIDELINES* (2014) at 12.

⁵⁵ UNESCO, *supra* note 54 at 12. The CRC does not define the content of primary education, but Article 29 outlines the guiding principles concerning education at all levels: development of the child's mind and personality; human rights and the principles enshrined in the UN Charter; development of respect for the child's family, heritage, and culture, country of origin, and country of residence; development of tolerance and non-discrimination; the respect for the natural environment. Within this framework, states may regulate the content of their own education system [e.g. the number of years required for primary education]. [See, SHARON DETRICK, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* (Martinus Nijhoff 1999), at 479.]

⁵⁶ Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin* CRC/GC/2005/6 (2005) at para 12. [Hereinafter, *CRC Committee Comment No. 6*]

⁵⁷ *CRC*, *supra* note 4, at Article 3.

⁵⁸ *CRC Committee Comment No. 6*, *supra* note 56, at 18.

an education. Therefore, states must ensure that access to education is maintained throughout displacement.⁵⁹

CRC also prohibits children from engaging in labor that impedes their primary education. It further mandates that State Parties must establish a minimum working age and regulate the working hours of persons under the age of 18.⁶⁰ Though the CRC does not define the number of years required to complete primary education, it does make educational attainment at this level a precondition for joining the labor market. CRC and the Committee on the Rights of the Child's interpretive work reiterates specific educational entitlements owed to disabled children,⁶¹ detained children,⁶² and unaccompanied or separated children.⁶³

Other international human rights treaties reinforce the right to education. CEDAW obliges states to ensure the equality of men and women in education.⁶⁴ ICERD prohibits discrimination on the grounds of race, color, national, or ethnic origin. It states that the domestic legislation for education must be non-discriminatory.⁶⁵ ICERD obliges State Parties "to ensure public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party."⁶⁶ Unlike ICESCR, ICERD obliges State Parties to take immediate and effective steps to combat views and systems that lead to discrimination and

⁵⁹ *Id.* at para 41.

⁶⁰ *CRC*, *supra* note 4, at Article 32

⁶¹ *Id.* at Article 23:

"Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development."

⁶² *Id.* at Article 40:

"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

⁶³ *CRC Committee Comment No. 6* at *supra* note 56, at para 41-44. Unaccompanied minors are defined as child migrants separated from and not cared for by parents, guardians, and relatives, while separated minors are child migrants separated from parents and guardians but cared for by relatives

⁶⁴ *CEDAW*, *supra* note 5, at Article 10. The General Comments of the Committee to End Discrimination against Women's explain that the rights guaranteed by CEDAW apply equally to all women within a state's territory, including refugee and asylum-seeking women. [See, 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 to End All Forms of Discrimination against Women* CEDAW/C/GC/28 (2010), at para. 12.] [Hereinafter, *CEDAW Committee Recommendation No. 28*].

⁶⁵ *ICERD*, *supra* note 6, at Article 5.

⁶⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation XXX on Discrimination against Non-citizens* (2004), at para. 30. [Hereinafter, *CERD Committee Recommendation XXX*].

does not allow for progressive realization.⁶⁷ CRPD prohibits the exclusion of children with disabilities from primary education.⁶⁸ The Special Rapporteur on the Rights of Persons with Disabilities has stated that securing refugees' and asylum-seekers' rights is a current priority.⁶⁹

International labor law regulates the relationship between educational attainment and employment. It prohibits children's participation in the labor force during primary and secondary school and requires compulsory primary education. ILO Convention No. 138 prescribes that the minimum age for entering the work force is 15, and 14 in developing countries.⁷⁰ This is mentioned in Article 3(2), which allows developing countries to lower the minimum employment age to 14, provided the child has finished compulsory education. This is allowed only as a transitional measure while developing countries strengthen their economy and educational system.⁷¹ ILO Convention No. 138 allows children between the ages of 13 and 14 to perform light labor if it does not interfere with the child's education.⁷² ILO Convention No. 182 prohibits persons under 18 from partaking in hazardous occupations. While the purpose of the Convention is to regulate child labor, it calls for universal education as a means of combatting child labor.⁷³ It requires that states provide free basic education to formerly employed children.⁷⁴ However, while free, universal education is established and binding, the realization of the Convention itself is progressive.⁷⁵

UNESCO Education Convention provides some of the strongest legal entitlements to education. The treaty's purpose is to eliminate all forms of discrimination in the education system.⁷⁶ It covers primary, secondary, and tertiary school and prohibits legal and

⁶⁷ ICERD, *supra* note 6, at Article 7.

⁶⁸ CRPD, *supra* note 7, at Article 24. Article 2 defines reasonable accommodation as the means "necessary and appropriate modification and adjustments not imposing disproportionate or undue burden" to ensure disabled persons enjoy the same rights as others, subject to fiscal and feasibility constraints.

⁶⁹ Catalina Devandas Aguilar, "Migrants and Refugees with Disabilities Must be New Priority in New Global Compact on Migration," *Office of the High Commissioner for Human Rights* 12 April 2017.

⁷⁰ C138, *supra* note 9, Article 3. Article 6 exempts labor performed in schools, labor performed towards the completion of an educational degree, and labor performed for the purposes of vocational training.

⁷¹ International Labor Organization, *ILO Convention No. 138 At a Glance* (2018) at 3.

⁷² C138, *supra* note 9, Article 7. The ILO acknowledges that light labor can allow children to assist outside or within their household and supplement formal education. However, the Convention requires states closely regulate this form of labor lest it adversely impact children's physical or educational development. [See, International Labor Organization, *supra* note 71, at 2-3].

⁷³ Pins Brown, *supra* note 75, at 10.

⁷⁴ C182, *supra* note 10, at Article 7.

⁷⁵ Pins Brown, *The New ILO Worst Forms of Child Labour Convention of 1999*, Geneva NGO Group for the Convention on the Rights of the Child Sub-Group on Child Labour 1, 29 (2000) at 10.

⁷⁶ UNESCO Education Convention, *supra* note 11, at Article 1.

administrative discrimination.⁷⁷ The Convention requires that states provide free and compulsory primary education. It also stipulates that states “give foreign national residents within their own territory the same access to education as they give nationals.”⁷⁸

Secondary Education

The Refugee Convention allows refugees and asylum-seekers to access secondary school under conditions “not less favorable than accorded aliens generally in the same circumstances.”⁷⁹ Some differentiation between non-nationals is permissible.⁸⁰ Refugees and asylum-seekers are afforded more favorable treatment relating to tuition fees.⁸¹ The Refugee Convention prohibits states from charging refugees and asylum-seekers higher fees than nationals for duties, taxes, or charges of any kind. It “contains a general provision on the imposition of fees which, notwithstanding its heading ‘Fiscal Charges,’ applies [to tuition fees], given its wording, to charges of ‘any description’.”⁸²

ICESCR posits that all forms of secondary education should be generally available and accessible to all.⁸³ Secondary education is “generally available” if all students can enroll regardless of their perceived academic capacity and if schools are distributed throughout the state.⁸⁴ CESCR indicates that “accessible” means education must be physically and economically available without discrimination.⁸⁵ In this regard, secondary school need not be

⁷⁷ YVES DAUDET & PIERRE EISEMANN, COMMENTARY ON THE CONVENTION AGAINST DISCRIMINATION IN EDUCATION (UN Educational, Scientific, and Cultural Organization 2005) at 9. Article 3 obliges states to take legislative and administrative action to eliminate discrimination from their education system.

⁷⁸ UNESCO Education Convention, *supra* note 11, at Article 3. Drafters did not decide whether “the same access” allows the state to charge foreigners higher fees than nationals for education. Primary education, however, is required to be free, so this debate is not applicable. [See, YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21.]

⁷⁹ Refugee Convention, *supra* note 2, at Article 22. Convention drafters engaged in a lengthy debate about the content of educational obligations. While they accepted refugees’ and asylum-seekers’ unconditional access to elementary education, they disagreed about secondary education. Some felt refugees were entitled to equal access as nationals, while others thought it should remain the state’s prerogative. See, PAUL WEIS, *supra* note 30, at 121-123.

⁸⁰ Restrictions on access to secondary education are permissible when applied to all aliens, but impermissible if applied solely to refugees or asylum-seekers populations. However, states may maintain special relationships through diplomatic reciprocity, allowing aliens of certain nationalities additional access as part of an affiliated economic or political union. [See, JAMES HATHAWAY, *supra* note 30, at 197].

⁸¹ Refugee Convention, *supra* note 2, at Article 29.

⁸² ANDREAS ZIMMERMAN & JONAS DORSCHNER, *supra* note 31, at 1040. They note that the French version of the Refugee Convention uses the term *droits* in both Article 22 and 29 (unlike the English version which uses fees in Article 22 and charges in Article 29). As such, they apply this standard *mutatis mutandis* to both articles.

⁸³ ICESCR *supra* note 3, at Article 13. Article 13(2)(b) reads “[s]econdary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”

⁸⁴ CESCR Comment 13, *supra* note 42, at para 13

⁸⁵ *Id.* at para 6.

free, but the cost should not be financially prohibitive, especially for the most vulnerable students.⁸⁶ Like with primary school, ICESCR does not define secondary education other than that it may include technological or vocational programs. The state's domestic legislation is the appropriate forum for establishing the number of years and curriculum for secondary schools.⁸⁷ ICESCR further prohibits discrimination in access to education as well as use of discriminatory curricula.⁸⁸ It also obliges states to progressively introduce free secondary education. At minimum, this requires states to adopt a national education strategy that "move[s] as expeditiously and effectively as possible" toward free secondary education.⁸⁹

ICESCR's progressive realization standard partially impacts Egypt's obligations to provide secondary education. Primary education is considered an element of the core content of essential rights that each state must immediately realize;⁹⁰ secondary education is not considered part of this core content. Therefore, developing states are allowed time to implement generally available and accessible secondary education.⁹¹ In some cases, it is permissible for developing states to differentiate between nationals and non-nationals, subject to certain constraints. CESCR only permits differential treatment when there is a reasonable and objective justification⁹² and its implementation is limited and proportional to achieve this justified goal.⁹³ However, with regards to education, CESCR considers any differentiation between nationals and non-nationals discriminatory. It states, "[t]he Committee... confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status."⁹⁴ States

⁸⁶ *Id.*

⁸⁷ *Id.* at para 12. CESCR encourages states to adopt secondary school curriculum that "includes completion of basic education and consolidation of the foundations of life-long learning and human development. It prepares students for vocational and higher educational opportunities."

⁸⁸ UN Educational, Scientific, and Cultural Organization, *Protecting the Right to Education for Refugees* 4 Working Papers on Educational Policy 2, 32 (2017) at 14.

⁸⁹ *CESCR Comment No. 13*, *supra* note 42, at para. 43-45. States are further obligated to evidence progress made implementing free secondary education and avoid enacting policies that limit access to secondary education.

⁹⁰ *CESCR Comment No. 20*, *supra* note 41, at para. 30.

⁹¹ *CESCR Comment 13*, *supra* note 42, at para. 14. [CESCR notes that while states must prioritize implementing free primary education, they must not ignore the obligation concretely move towards free secondary education.]

⁹² *CESCR Comment No. 20*, *supra* note 41, para 13.

⁹³ David Weissbrodt, *The Protection of Non-Citizens in International Human Rights in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* 221, 236 (R. Cholewinski, R. Perruchoud & E. MacDonald eds. 2007) at 224. The CESCR considers a justification "reasonable and objective" if it is compatible with the Covenant's nature and implemented solely to promote public welfare. [See, *CESCR Comment No. 20*, *supra* note 44, at para. 30].

⁹⁴ *CESCR Comment 13*, *supra* note 42, at para. 34. [CESCR stresses that the "prohibition against discrimination is subject neither to progressive realization nor the availability of resources. It applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. (para. 31)].

may progressively realize the right to generally available and accessible secondary education but not through policies that differentiate between nationals and non-nationals. Thus, refugees and asylum-seekers are entitled to the same secondary education rights as nationals. However, States can require that non-nationals meet different financial or administrative obligations to enroll in secondary education.⁹⁵ Therefore, Egypt may charge non-nationals higher fees for secondary education, even if this prevents some students from attending. States could also require non-nationals complete entrance examinations, language tests, or other forms of assessment not required of nationals.

CRC encourages states to develop different forms of secondary education that are available and accessible to all children and to take appropriate measures towards making education free, such as providing financial assistance.⁹⁶ Refugee and asylum-seekers' entitlements under the CRC substantively differ from other conventions in two ways. First, CRC only applies to children,⁹⁷ while ICESCR and the Refugee Convention apply based on level of education rather than age.⁹⁸ Second, CRC Article 22 explicitly extends the Convention's rights to refugee children.⁹⁹ CRC Committee has noted that this Article is equally applicable to asylum-seekers.¹⁰⁰ CRC's *Committee Guidelines for Periodic Reporting* indicate that policies that differentiate between refugee and national children generally, and with regard to education specifically, breach the CRC.¹⁰¹ In this regard, the entitlement of children seeking asylum and refugee children to secondary education is stronger under the CRC because the prohibition on discriminating between nationals and non-nationals is in both the Convention's text and interpretive body's work.¹⁰²

CRC provisions regulating child labor market also apply to those enrolled in secondary school. It protects children from work that is hazardous or would interfere with their education.¹⁰³ CRC

⁹⁵ ICESCR, *supra* note 3, at Article 13. Similarly, UNESCO Convention is unclear on the permissibility of assessing higher fees on non-nationals [See, YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21].

⁹⁶ CRC, *supra* note 4, at Article 28.

⁹⁷ *Id.* at Article 1. [It defines "child" as a person under 18 years of age].

⁹⁸ Neither Refugee Convention Article 22 nor ICESCR Article 13 mention the age of secondary students. It is thereby implied that adult learners seeking secondary education would have equal entitlement. The CESCR has indicated this to be the case but noted separate facilities may be necessary. See, *supra* note 42.

⁹⁹ CRC, *supra* note 4, at Article 22.

¹⁰⁰ CRC Committee Comment No. 6, *supra* note 56.

¹⁰¹ UN Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted under Article 44, Paragraph 1(b), of the Convention* CRC/C/58 (1996) at para. 25.

¹⁰² SHARON DETRICK, *supra* note 55, at 481.

¹⁰³ CRC, *supra* note 4, at Article 32.

Commission has interpreted this Article with reference to the ILO's work on child labor and calls for a minimum employment age between 15 and 18.¹⁰⁴ Though CRC does not state at what age employment can supersede education, the Commission prohibits work that impedes secondary education. CRC also provides specific secondary educational entitlements to vulnerable children.¹⁰⁵ As with primary education, CRC reinforces educational entitlements for disabled children,¹⁰⁶ detained children,¹⁰⁷ and unaccompanied and separated children.¹⁰⁸

The provisions of CEDAW,¹⁰⁹ ICERD,¹¹⁰ and CRPD¹¹¹ that create entitlements for refugees' and asylum-seekers' access to primary education are also applicable to secondary education, because they do not differentiate between educational levels. However, international labor law does not address secondary education as clearly as primary education. ILO Conventions 138 and 182 refer to both the minimum age and the minimum level of education completed before a child enters the labor force. ILO Convention 138 mandates 15 as the minimum working age. However, it makes an exception for developing states, which can allow 14-year-olds to enter the labor market provided they have finished their compulsory education.¹¹² C182 obliges states to ensure universal primary education to all children removed from child labor.¹¹³ Both ILO Conventions entitle children to primary education but do not clearly extend to secondary education. UNESCO Education Convention entitles refugees and asylum-seekers access to generally available secondary education without discrimination and obliges states to "make secondary school in its different forms generally available."¹¹⁴ Drafters did not define "generally available" but UNESCO's current work considers both primary and secondary education together to be "basic education" and advocates for free and universal secondary education.¹¹⁵

Tertiary Education

¹⁰⁴ SHARON DETRICK, *supra* note 55, at 560-562. [The ILO's conventions are discussed in further detail in Subsection 1.2.1.2.]

¹⁰⁵ SHARON DETRICK, *supra* note 55, at 481.

¹⁰⁶ CRC, *supra* note 4, at Article 23.

¹⁰⁷ *Id.* at Article 40.

¹⁰⁸ CRC Comment No. 6, *supra* note 56, at para 41-44.

¹⁰⁹ CEDAW, *supra* note 5, at Article 10.

¹¹⁰ ICERD, *supra* note 6, at Article 5.

¹¹¹ CRPD, *supra* note 7, at Article 24.

¹¹² C138, *supra* note 9, at Article 3.

¹¹³ C182, *supra* note 10, at Article 7.

¹¹⁴ UNESCO Education Convention, *supra* note 11 at Article 4.

¹¹⁵ UN Educational, Scientific, and Cultural Organization, EDUCATION FOR ALL GLOBAL MONITORING REPORT (2008) at 56.

The Refugee Convention entitles refugees and asylum-seekers to access tertiary education under the same conditions as other aliens.¹¹⁶ As with secondary education, states may reserve certain privileges for aliens from countries with which they share arrangements. However, the state cannot treat refugees or asylum-seekers less favorably than aliens generally with regards to access and scholarships.¹¹⁷ Refugees and asylum-seekers are also entitled to pay the same tuition fees as nationals pay for tertiary education.¹¹⁸ Refugee Convention recognizes refugees' and asylum-seekers' certificates, diplomas, and degrees on par with other non-nationals entering tertiary education.¹¹⁹

ICESCR posits that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education."¹²⁰ As with secondary education, it requires that higher education is generally available and physically and financially accessible. This does not mean higher education must necessarily be free, but the financial costs should not be prohibitive.¹²¹ CESCR states that the entitlement to tertiary education differs from secondary education because access is determined on the basis of capacity.¹²² Thus, the entitlement to higher education can be legitimately limited based on an individual's perceived academic capacity. However, this determination cannot be reached on a discriminatory basis. CESCR indicates denying refugees or asylum-seekers access to any form of education due to their immigration status would amount to discrimination.¹²³

¹¹⁶ *Refugee Convention*, *supra* note 2, at Article 22. Under Egyptian domestic law, non-nationals need to possess the required academic qualifications to enter university and pay tuition fees. [Presidential Decree Promulgated by Law No. 49 (1972) (Concerning the Universities' Organization), *Al-Jarida Al-Rasmiyya*, 5 October 1972 (Egypt) [hereinafter *University Organization Law*].

¹¹⁷ *Refugee Convention*, *supra* note 2, at Article 22.

¹¹⁸ *Id.* at Article 29 [See, ANDREAS ZIMMERMAN & JONAS DORSCHNER, *supra* note 31, at 1040 for interpretation].

¹¹⁹ *Refugee Convention*, *supra* note 2, at Article 22. Recognition of foreign school certificates, diplomas, and degrees only applies to education. Recognition of degrees for the purpose of professional practice is addressed in Refugee Convention Article 19:

(1) *Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.*

(2) *The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.*

[See, ANDREAS ZIMMERMAN & JONAS DORSCHNER, *supra* note 31, at 1039].

¹²⁰ *ICESCR*, *supra* note 3, at Article 13.

¹²¹ *CESCR Comment No. 13*, *supra* note 42, at para. 12.

¹²² *Id.* at para. 19.

¹²³ *Id.* at para. 16.

States are not obliged to immediately provide free tertiary education; ICESCR creates an obligation to take steps towards realizing this goal. There is an immediate obligation to adopt and implement a national education strategy increasing the accessibility and availability of higher education.¹²⁴ CESCR requires countries to evidence their progress towards ICESCR standard.¹²⁵ States must “move as expeditiously and effectively as possible” and avoid adopting any measures which retrogressively impede access to education.¹²⁶ Furthermore, tertiary education is not part of the core content of the right to education. Developing states are only required to move towards providing tertiary education and refrain from retroactively limiting access.¹²⁷ In certain circumstances it is also permissible for developing states to differentiate between nationals and non-nationals’ access to tertiary education. CESCR allows differentiated treatment only when there is a reasonable and objective justification,¹²⁸ and when its implementation is limited to achieve this justified goal.¹²⁹ States can also require non-nationals meet different financial or administrative obligations to enroll in tertiary programs.¹³⁰

Other international human rights laws and education law do not explicitly address tertiary education but contain overarching principles that apply. CRC obliges states to make all higher education accessible on the basis of capacity.¹³¹ CRC Committee has not produced a significant body of work on tertiary education because it usually begins after the age of 18. However, they expressed concern about differentiation by states’ higher education admissions programs on the basis of immigration status or other prohibited grounds.¹³² CRC and CRC Committee outline the entitlement of disabled children,¹³³ detained children,¹³⁴ and unaccompanied or

¹²⁴ *Id.* at para. 52.

¹²⁵ *Id.* at para. 9.

¹²⁶ *Id.* at para. 43-45.

¹²⁷ SHARON DETRICK, *supra* note 55, at 560-562.

¹²⁸ *CESCR Comment No. 20*, *supra* note 41, at para 13.

¹²⁹ Weissbrodt, *supra* note 93, at 224.

¹³⁰ YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21. For example, states could require non-nationals complete entrance examinations, language tests, or other forms of assessment not required of nationals.

¹³¹ *CRC*, *supra* note 4, at Article 28. CRC entitlements are fully extended to refugees and asylum-seekers by CRC Article 22 and the CRC Committee prohibits any differentiation between nationals and non-nationals. Therefore, while CRC does allow developing states to progressively realize the right to accessible higher education, states cannot do so by privileging nationals’ access at the expense of non-nationals’ access. [See, *CRC Committee Comment No. 6*, *supra* note 56, at para 12.]

¹³² (Democratic People’s Republic of Korea) CRC/C/15/Add.239, para. 54 & (Islamic Republic of Iran) CRC/C/15/ Add.254, para. 59 as cited in UN Children’s Fund, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (3rd ed. 2007) at 425. CRC Article 2(1) prohibits discrimination on the grounds of “the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

¹³³ *CRC*, *supra* note 4, at Article 23.

¹³⁴ *Id.* at Article 40.

separated children¹³⁵ to access tertiary education on equal standing with the rest of the population. CEDAW, ICERD, and CRDP do not explicitly address access to tertiary education. However, their general education and non-discrimination provisions also extend to tertiary education.¹³⁶ UNESCO Convention prohibits discrimination in the education system. It also entitles refugees and asylum-seekers to equal access to tertiary education, although ambiguity remains over whether the state may charge non-nationals higher fees than nationals.¹³⁷

6.1.1.2.2. Failed Asylum-Seekers

Failed asylum-seekers do not have educational entitlements under the Refugee Convention. However, migrant children are entitled to many of the same primary, secondary, and tertiary educational rights as refugees and asylum-seekers under human rights treaties and international labor law, because these entitlements are not contingent on citizenship or status. These treaties confer rights on all individuals physically present in state's territory.¹³⁸ Convention on the Protection of the Rights All of Migrant Workers and Their Families (CMW) provides additional educational entitlements to regular migrants and their families.¹³⁹ UNESCO Convention provides regular migrants educational entitlements but might not apply to irregular migrants.

All migrants are entitled to free and compulsory primary education under the ICESCR and CRC.¹⁴⁰ These provisions also provide entitlements for generally accessible and available secondary education and equal access to higher education on the basis of capacity. The Conventions' Committees indicate that these articles apply to non-nationals.¹⁴¹ There are three

¹³⁵ *CRC Committee Comment No. 6*, *supra* note 56, at para 41-44.

¹³⁶ *See, CEDAW*, *supra* note 5, at Article 2 & Article 10; *ICERD*, *supra* note 6, at Article 1 & Article 5; *CRPD*, *supra* note 7, at Article 6 & Article 24.

¹³⁷ YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21.

¹³⁸ JAMES HATHAWAY, *supra* note 30, at 157. Physically present applies to any individual in a state's territory regardless of whether they entered the state regularly or irregularly.

¹³⁹ *CMW*, *supra* note 8 at Article 3. The Article precludes refugees and stateless persons from the scope of the Convention unless a State Parties' domestic legislation provide for their inclusion. This is not the case in Egypt; thus, the Convention is only applicable to failed asylum-seekers.

¹⁴⁰ *ICCPR*, *supra* note 3, at Article 13 & *CRC*, *supra* note 4, at Article 28.

¹⁴¹ CESCR explains that within the non-discriminatory spirit of the Convention, Article 13(2)'s obligations include programs for the children of migrants. It entitles "all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status" to access education [*See, CESCR Comment No. 20*, *supra* note 41, at para. 30 & 34]. CRC Committee states that access to education must be maintained throughout the displacement cycle. Though failed asylum-seeker children do not fall within the scope of CRC Article 22, they do have educational entitlements pursuant to Article 28. They explained that migrant children should enjoy the entitlements outlined in the CRC regardless of their immigration status or the immigration status of their parents or guardians. *CRC Committee Comment No. 6*, *supra* note 56, at para. 12 & 18].

main limitations to regular migrants' access to education under the ICESR and CRC. First, secondary and tertiary education are impacted by the ICESCR's progressive realization standard.¹⁴² Second, neither the CESCRC nor the CRC Committee addressed the permissibility of charging migrants higher fees than nationals for secondary and tertiary education. Thus, even if non-nationals can access public secondary and tertiary education, they may be subject to significantly higher fees that render it out of reach for some.¹⁴³ Third, ICESCR and CRC do not provide an obligation to recognize regular migrants' certificates or diplomas, as often needed for advanced education.¹⁴⁴

Children of regularly and irregularly employed migrants also have educational entitlements pursuant to the CMW.¹⁴⁵ CMW Committee confirms that this obligation covers all levels of education, including vocational training and pre-school,¹⁴⁶ which is a broader entitlement than other conventions. Furthermore, CMW Committee and CRC Committee require host states remove barriers to migrant education. This involves an obligation to recognize internationally obtained certificates and diplomas.¹⁴⁷ Regular migrant workers and their children receive additional entitlements to access educational institutions and services subject to the same admissions requirements as nationals.¹⁴⁸

¹⁴² *CESCRC Comment No. 13*, *supra* note 42, at para. 52.

¹⁴³ YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21.

¹⁴⁴ UN HIGH COMMISSIONER FOR REFUGEES, MISSING OUT: REFUGEES EDUCATION IN CRISIS (UN Publication 2016) at 24. [Refugees and asylum-seekers have this entitlement pursuant to Refugee Convention Article 22(2), and the CMW includes an equivalent for migrants. However, UNHCR notes that enrollment in secondary or higher education often requires proof of degree attainment. This could prevent migrant children, particularly those whose education cycle is interrupted during migration, from entering the correct level of education]

¹⁴⁵ *CMW*, *supra* note 8, at Article 30:

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment

¹⁴⁶ Committee on the Protection of the Rights of All Migrant Workers and Their Families & The Committee on the Rights of the Child, *Joint Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and No. 23 (2017) 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, Transition, Destination, and Return* CMW/C/GC/4-CRC/C/GC/23 (2017) at para. 59. [Hereinafter, *CMW Committee Comment No. 4*] CMW Article 30 only applies to the children of migrant workers, not all migrant children and adults.

¹⁴⁷ *CMW Committee No. 4*, *supra* note 146, at para. 61.

¹⁴⁸ *CMW*, *supra* note 8, at Article 43 & Article 45. CMW Committee call on states to provide additional language classes if the language of instruction differs and foster intercultural dialogue in schools [See, *CMW Committee Comment No. 4*, *supra* note 146, at para. 60-63.]

Irregular and regular migrants are entitled to access primary, secondary, and tertiary education on an equal level with nationals under CEDAW, ICERD, and CRPD. Child migrants are protected from employment that impinges upon their education according to ILO Conventions. These Conventions confer entitlements to non-nationals physically present, and thus the entitlements above-described with regard to refugees and asylum-seekers apply equally to migrants. Regular migrants also have the same entitlements as refugees and asylum-seekers under the UNESCO Convention. However, the UNESCO Convention uses the term “resident,” casting doubts on its applicability for irregular migrants.¹⁴⁹

6.1.2. Regional Law

6.1.2.1. Legal Instruments¹⁵⁰

- *African Charter on Human and Peoples’ Rights* (African Charter)¹⁵¹
- *African Charter on the Rights and Welfare of the Child* (ACRWC)¹⁵²
- *African Youth Charter* (AYC)¹⁵³
- *Charter on the Rights of the Arab Child* (CRAC)¹⁵⁴

6.1.2.2. Analysis of Regional Instruments

6.1.2.2.1. Differing entitlements on the basis of nationality

African Charter on Human and Peoples’ Rights (African Charter), *African Charter on the Rights and Welfare of the Child* (ACRWC), and *African Youth Charter* (AYC) recognize the human rights of all individuals within a state party’s territory, whether they are nationals or non-nationals.¹⁵⁵ African Charter prohibits any discrimination based on “other status.”¹⁵⁶ There are no available *travaux préparatoires* for the African Charter, but scholars have interpreted

¹⁴⁹ YVES DAUDET & PIERRE EISEMANN, *supra* note 77, at 21.

¹⁵⁰ Full text of the following legal instruments can be found in Annex D.

¹⁵¹ The African Charter on Human and Peoples Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force 21 October 1986). [Hereinafter, *African Charter*]. Ratified by Egypt in 3 April 1984.

¹⁵² African Charter on the Rights and Welfare of the Child, July 1, 1990, CAB/LEG24.9/49 (entered into force 29 November 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

¹⁵³ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

¹⁵⁴ Charter on the Rights of the Arab Child, June 6, 1983, [Hereinafter, *CRAC*]. Egypt ratified the Charter on 1 January 1993.

¹⁵⁵ Monette Zard et al., *Refugees and the African Commission on Human and Peoples’ Rights*, 16 Forced Migr. Rev. 33, 34 (2003).

¹⁵⁶ *African Charter*, *supra* note 151, Article 2: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

“other status” with reference to a similar provision in the ICESCR.¹⁵⁷ CESCR held that “other status” includes discrimination based on nationality.¹⁵⁸ The African Commission on Human and People’s Rights (ACHPR) further confirmed that Charter rights apply to refugees, asylum-seekers, regular migrants, and irregular migrants regardless of their nationality.¹⁵⁹ ACRWC and AYC also contain identical prohibitions on discrimination based on “other status.”¹⁶⁰ ACRWC obliges states to provide refugee children with protection and humanitarian assistance.¹⁶¹

Refugees, asylum-seekers, and failed asylum-seekers have the same educational entitlements under the African regional human rights frameworks. The African Charter prohibits discrimination on the basis of “other status,” which encompasses immigration status.¹⁶² Child refugees and asylum-seekers are additionally provided for under the ACRWC.¹⁶³ With regard to migrants, “governments are thus accountable before this [African Charter and the ACHPR] system for how they treat not only refugees but also IDPs and migrants generally.”¹⁶⁴ This approach was affirmed in the ACHPR’s 2016 *Resolution on the Right to Education in Africa*, which listed migrant children as a vulnerable populations requiring specialized education programs.¹⁶⁵

The *Charter on the Rights of the Arab Child* (CRAC) may provide differing entitlements on the basis of nationality and/or ethnicity. CRAC’s text refers to each enumerated right as owed to “Arab children” rather than children generally but leaves the ambiguous socio-ethnic term

¹⁵⁷ ICESCR, *supra* note 3, Article 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹⁵⁸ CESCR Comment No. 20, *supra* note 41, para 30.

¹⁵⁹ MARINA SCHARPE, THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA (2018), at 130.

¹⁶⁰ ACRWC, *supra* note 152, Article 3: “Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status” & AYC, *supra* note 153, Article 2(1): “Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

¹⁶¹ *Id.* at Article 22: “Refugee Children should receive appropriate protection and humanitarian assistance.”

¹⁶² Daniel Turak, *The African Charter on Human and Peoples’ Rights: Some Preliminary Thought*, 17 Akron L. Rev. 365, 381 (1984) at 380.

¹⁶³ ACRWC, *supra* note 152, Article 22

¹⁶⁴ Monette Zard, Chaloka Beyani & Chidi Anslem Odinkalu, *Refugees and the African Commission on Human and People’s Rights*, 16 Foreign Mig. Rev. 33, 35 (2003) at 34.

¹⁶⁵ *Right to Education in Africa*, *supra* note 171, at para. i.

“Arab” undefined.¹⁶⁶ For this reason, the CRAC was criticized for violating non-discrimination laws,¹⁶⁷ and failing to protect non-Arab communities.¹⁶⁸ However, Egypt subsequently participated in non-binding declarations committing to guarantee children’s rights without reference to ethnicity.¹⁶⁹ CRAC does not differentiate between refugees, asylum-seekers, and failed asylum-seekers.

2.2.2. Refugees, Asylum-Seekers, and Failed Asylum-Seekers

The African Charter provides that “every individual shall have the right to education.”¹⁷⁰ ACHPR indicated that the content of this broadly worded provision is similar to other international educational entitlements. *Resolution on the Right to Education in Africa* outlines the level-specific obligations arising from the African Charter: assurances that all children enjoy free and compulsory primary education without distinction and provisions for pre-school, secondary, tertiary, and vocational education.¹⁷¹ The Resolution does not oblige states to offer free secondary, tertiary, or vocational education. States must ensure their educational system serves the needs of all society, non-nationals included.¹⁷² The progressive realization standard applies to the African Charter’s right to education and gives developing states additional time for implementation.¹⁷³ The Resolution focuses on children’s education, but also encourages states to adopt adult education programs as needed.¹⁷⁴

ACRWC addresses educational entitlements in more detail. All children have the right to free and compulsory primary education, free secondary education, and access to higher education based on their capacity.¹⁷⁵ ACRWC does not adopt a progressive realization standard, and thus requires states to immediately realize these educational entitlements.¹⁷⁶ It requires curricula

¹⁶⁶ MERVAT RISHMAWI, *THE LEAGUE OF ARAB STATES HUMAN RIGHTS STANDARDS AND MECHANISMS* (Cairo Institute for Human Rights Studies 2015) at 84.

¹⁶⁷ RISHMAWI, *supra* note 166, at 82-84.

¹⁶⁸ Juliane Osterhaus, *The Arab Human Rights System ABC of Human Rights for Development Cooperation* 1, 10 (2017) at 3.

¹⁶⁹ See, *Cairo Declaration on Development Challenges and Population Dynamics*, Regional Conference on Population and Development in the Arab States (ICPD Beyond 2014), 2013 & *Rabat Declaration on Children in the Islamic World*, Organization of Islamic Conferences, 2003.

¹⁷⁰ *African Charter*, *supra* note 151, at Article 17.

¹⁷¹ African Commission on Human and People’s Rights, *Resolution on the Right to Education in Africa*, ACHPR/Res.346 (LVIII) (2016) at para. i. [Hereinafter, *Right to Education in Africa*]

¹⁷² *Right to Education in Africa*, *supra* note 171, at para i.

¹⁷³ *Id.* at para. iii.

¹⁷⁴ *Right to Education in Africa*, *supra* note 171

¹⁷⁵ ACRWC, *supra* note 152, at Article 11. The Article requires that states “shall take all appropriate measures with a view to achieving the full realization of this right.”

¹⁷⁶ *Id.*

directed at child development, rooted in human rights and the principles of the United Nations, reflective of African culture and social values, and promoting tolerance and national independence.¹⁷⁷ ACRWC obliges states to enact special measures for disadvantaged, gifted, and female children. Finally, it entitles pregnant children to accommodation for continuing their education.¹⁷⁸ ACRWC also prohibits children from engaging in work that interferes with their physical, mental, or social development.¹⁷⁹ Work that prevents a child from obtaining or completing an education interferes with their social development.¹⁸⁰ ACRWC requires states enact legislation regulating the minimum wage, oversee working hours and conditions for child workers, and provide penalties for non-enforcement. States are permitted to set their own minimum working age, but work cannot interfere with children's primary education.¹⁸¹

AYC entitles youth to free and compulsory primary education, progressive implementation of free secondary education, and equally accessible higher education on the basis of personal capacity.¹⁸² Unlike other regional and international instruments, it includes an obligation to minimize direct and indirect costs, which should preclude unreasonably high tuition fees.¹⁸³ AYC also recommends adapting education systems to meet the needs of youth learners.¹⁸⁴ These are recommendations, not obligations, but it indicates youth educational entitlements should be interpreted expansively. AYC also explicitly prohibit young persons from work that interferes with their education.¹⁸⁵

¹⁷⁷ *Id.* Drafters included this provision to underscore the diversity of African cultures and their equal worth, because they found non-discrimination provisions in other international instruments insufficient for the African educational context. [See, Osifunke Ekundayo, *Does the African Charter on the Rights and Welfare of the Child (ACRWC) Only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions? Examining the Similarities and Differences between the ACRWC and CRC* 5 Int'l. J. Human. & Soc. Sci. 143, 158 (2015) at 150.]

¹⁷⁸ ACRWC, *supra* note 152, at Article 11 & Ekundayo, *supra* note 177, at 150. This provision entitles pregnant children to accommodations both during and after pregnancy, as "pregnancy does not extinguish the child's opportunity of having access to education." This entitlement is not in the African Charter or international human rights instruments and reflects the drafters' commitment to enhancing the status of girl children through education.

¹⁷⁹ ACRWC, *supra* note 152, at Article 15.

¹⁸⁰ Emma Charlene Lubaale, *The Recognition of the Right of Children to Freedom from Child Labor in Africa: Is It Enough?* 28 Afrika Focus 23, 43, at 24.

¹⁸¹ Lubaale, *supra* note 180, at 26.

¹⁸² AYC, *supra* note 153, at Article 13. AYC's Preamble defines youth as individuals between the ages of 15 and 35.

¹⁸³ *Id.*

¹⁸⁴ Recommendation include distance learning centers, programs for students with interrupted educational lifecycles, and fellowships and scholarships for disadvantaged students that might not otherwise continue their education.

¹⁸⁵ AYC, *supra* note 153, at Article 15. Like ACRWC, AYC obliges states to enact legislative and administrative measures to prevent and enforce the prohibition on child labor that interferes with the right to education.

Egypt has ratified only one of the League of Arab States' human rights conventions, the Charter on the Rights of the Arab Child. CRAC stipulates a minimum of free preschool and basic education.¹⁸⁶ CRAC's applicability is limited because the text does not indicate whether entitlements are owed to non-nationals. Entitlements are further obscured by the lack of clarity surrounding the term "Arab," an ethnic classification with numerous definitions and interpretations.

6.1.3. Bilateral Law

6.1.3.1. Bilateral Instruments¹⁸⁷

- Ethiopia: Agreement on Economic and Technical Cooperation between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia¹⁸⁸
- Palestine: Agreement on Cooperation in the Field of Education between the Government of the Arab Republic of Egypt and the Palestinian Liberation Organization representing the Palestinian National Authority (Education Cooperation Agreement)¹⁸⁹
- Yemen: Program of Cooperation in Higher Education between the Government of the Arab Republic of Egypt and the Republic of Yemen¹⁹⁰

6.1.3.2. Analysis of Bilateral Instruments

Palestinian nationals are entitled to have their educational certificates considered equal to those issued by Egyptian schools.¹⁹¹ This would ease the challenges of enrolling in Egyptian schools without needing to sit for the multiple assessment exams required for other non-nationals under Egyptian law.¹⁹² It would also facilitate entrance into Egyptian universities and the labor

¹⁸⁶ CRAC, *supra* note 154, at Article 11.

¹⁸⁷ Full text of the following legal instruments can be found in Annex D.

¹⁸⁸ Agreement on Economic and Technical Cooperation between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia, *adopted* on 17 April 2005.

¹⁸⁹ Agreement on Cooperation in the Field of Education between the Government of the Arab Republic of Egypt and the Palestinian Liberation Organization representing the Palestinian National Authority, Egy.-Pal. arts. 6, 8 *adopted* on 7 July 1999 [hereinafter, *Education Cooperation Agreement*]

¹⁹⁰ Program of Cooperation in the Field of Higher Education between the Arab Republic of Egypt and the Republic of Yemen Egy.-Yem. Preamble *adopted* on 21 August 2010.

¹⁹¹ *Education Cooperation Agreement*, *supra* note 189, at Article 8. The purpose of this Agreement is to improve Egypt and Palestine's education system through a cooperative measures and mutual capacity building. Article 6 requires Egypt to assist Palestine with preparation of exams, creation of test, and scoring of certificate exams.

¹⁹² Ministry of Education Decree No. 284 of 2014 (concerning the Rules of Incoming Students to Egyptian Universities, Scholarships for Incoming Students, and Egyptian Students Studying in Egyptian Schools Abroad), *Al-Jarida Al-Rasmiyya*, 7 July 2014 (Egypt) [hereinafter, *Decree No. 284/2014*].

market. The Agreement does not differentiate based on legal status and would apply to refugees, asylum-seekers, and migrants. However, there are a number of challenges. The Agreement does not exclude irregular migrants, and parties are only required to work towards establishing equivalency rather than achieve it. Even if achieved, it would only help Palestinians who have studied in Palestinian schools, not Palestinians who studied in a third country like Syria or Iraq. This does not address Palestinian's protracted and multilayered displacement experiences. Finally, there is no indication that Egypt has implemented this Agreement.¹⁹³

Egypt has also concluded education cooperation agreements with Ethiopia and Yemen. The agreements do not confer specific entitlements to refugees, asylum-seekers, or failed asylum-seekers from these countries. However, the agreements indicate Egypt and their country of nationality's desire to cooperate on education, and may impact these populations access to public schools.

6.1.4. Domestic Law

6.1.4.1. Domestic Instruments¹⁹⁴

- Constitution of the Arab Republic of Egypt (2014)¹⁹⁵
- Law No. 12 of 1996 Promulgating the Child Law (Child Law)¹⁹⁶
- Law No. 139 of 1981 Promulgating Education Law (Education Law)¹⁹⁷
- Presidential Decree Promulgated by Law No. 49 of 1972 Concerning the Universities' Organization¹⁹⁸

¹⁹³ During interviews with officials from the Ministry of Foreign Affairs and the Ministry of Education, officials were not aware of this Agreement's status.

¹⁹⁴ Full text of the following legal instruments can be found in Annex D.

¹⁹⁵ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

¹⁹⁶ Law No. 12 of 1996 (Child Law), *Al-Jarida Al-Rasmiyya*, 28 March 1996 (Egypt). As amended by Law No. 126 of 2008 and Law No. 6 of 2015. English translation provided by the National Council for Childhood and Motherhood (an entity established by Presidential Decree under the Ministry of State for Family and Population), amended version of 2008. Retrieved from http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf [hereinafter, *Child Law*].

¹⁹⁷ Law No. 139 of 1981 (Promulgating Education Law), *Al-Jarida Al-Rasmiyya*, 20 August 1981 (Egypt) [hereinafter, *Law No. 139/1981*].

¹⁹⁸ Presidential Decree Promulgated by Law No. 49 (1972) (Concerning the Universities' Organization), *Al-Jarida Al-Rasmiyya*, 5 October 1972 (Egypt) [hereinafter *University Organization Law*].

- Ministry of Education Decree No. 284 of 2014 concerning the Rules of Incoming Students to Egyptian Universities, Scholarships for Incoming Students, and Egyptian Students Studying in Egyptian Schools Abroad¹⁹⁹
- Ministry of Education Decree No. 420 of 2014 concerning Private Education²⁰⁰
- Signed Administrative Order on Treating Syrian and Yemeni Students as Egyptian for the Year 2018/2019²⁰¹

6.1.4.2. Analysis of Domestic Instruments

6.1.4.2.1. Differences on the Basis of Nationality

Egyptian domestic law contains contradicting provisions regarding access to education for non-nationals. Egypt's Constitution confines the right to citizens,²⁰² as does Law No. 139 Promulgating Education.²⁰³ However, Egypt's Child Law indicates that education is an entitlement owed to all children regardless of nationality.²⁰⁴ Despite the inclusive terminology of the Child Law, non-nationals' entitlements to education are limited by Decree No. 284 of 2014. It generally prohibits non-nationals from accessing the public school system but does allow access to private school. Depending on nationality, some non-nationals are allowed to enroll in public schools for an additional fee.²⁰⁵ The Decree permits Sudanese and Libyan students,²⁰⁶ students enrolled in a scholarship from the UN Office of Refugee Affairs,²⁰⁷ and children of Palestinians who are employed in or retired from the government, the public sector, or the armed forces in Egypt to access public primary and secondary education; it does not address tertiary education.²⁰⁸ A 2018 Administrative Order from the Ministry of Education stipulates that Syrian and Yemeni students be treated the same as Egyptian students.²⁰⁹ It allows Syrian and Yemeni students to access public primary and secondary schools subject to the same fees and conditions as nationals, not the higher fees assessable under Decree No. 284 of

¹⁹⁹ Ministry of Education Decree No. 284 of 2014 (concerning the Rules of Incoming Students to Egyptian Universities, Scholarships for Incoming Students, and Egyptian Students Studying in Egyptian Schools Abroad), *Al-Jarida Al-Rasmiyya*, 7 July 2014 (Egypt) [hereinafter, *Decree No. 284/2014*].

²⁰⁰ Ministry of Education Decree No. 420 of the Year 2014 (Concerning Private Education), 29 September 2014 *Al-Jarida Al-Rasmiyya*, 29 September 2014 (Egypt) [hereinafter, *Private Education Law*].

²⁰¹ Signed Administrative Order on Treating Syrian and Yemeni Students as Egyptian for the Year 2018/2019 [Hereinafter, Administrative Order on Syrian and Yemeni Students].

²⁰² *Egyptian Constitution*, *supra* note 195, at Article 19.

²⁰³ *Law No. 139/1981*, *supra* note 197, at Article 3 & Article 15.

²⁰⁴ *Child Law*, *supra* note 196, at Article 54.

²⁰⁵ *Decree No. 284/2014*, *supra* note 199, Article VI.

²⁰⁶ The Decree also includes Jordanian and Saudi Arabian students, but they are not part of the communities of concern for this Report. Thus, they are excluded in the analysis.

²⁰⁷ Term used by Article 6 of Decree No. 284 of 2014, referring to UNHCR.

²⁰⁸ *Decree No. 284/2014*, *supra* note 199, Article VI.

²⁰⁹ *Administrative Order on Syrian and Yemeni Students*, *supra* note 201.

2014.²¹⁰ The directive is a continuation of this policy from the previous year and covers the 2018-2019 academic year.

As a developing state, Egypt has some leeway for differentiating between nationals and non-nationals' access to public secondary and tertiary education. However, as discussed in Sub-Section 1.3, the progressive realization standard does not apply to primary education.²¹¹ States are not allowed to discriminate between non-nationals on the basis of nationality²¹²; however, they are permitted preferential treatment to nationals of states with which they have close ties.²¹³ Egyptian law effectively bars non-nationals who are not Sudanese, Libyan, Syrian, or Yemeni from accessing public primary school. This violates Egypt's obligations under ICESCR,²¹⁴ CRC,²¹⁵ CMW,²¹⁶ African Charter,²¹⁷ ACRWC,²¹⁸ and AYC.²¹⁹

6.1.4.2.2. Refugees, Asylum-Seekers and Failed Asylum-Seekers

The Child's Law stipulates education as an entitlement owed to all children.²²⁰ According to its preamble, it is premised on the CRC's minimum standards. The minimum standard contained in the CRC obliges states to provide free and compulsory primary education and accessible secondary education to all children within their territory.²²¹ Despite the educational entitlement in the Child's Law, the Egyptian Constitution states "[e]very citizen has the right to education with the aim of building the Egyptian character, maintaining national identity"²²² The Constitution correlates education with enhancing national capacity and makes no reference to non-nationals.

²¹⁰ Egypt's position towards Syrian has remained consistent since then-President Mohamed Morsi committed to allowing Syrian refugee students equal access to education as Egyptian nationals in a 2012 speech before the League of Arab States. The inclusion of Yemen is newer and likely reflects the increasing number of Yemenis arriving in Egypt as the humanitarian crisis and ongoing war worsen. [See, Maysa Ayoub & Shaden Khallaf, *Syrian Refugees in Egypt: Challenges of a Politically Changing Environment* 7 Cairo Studies on Migration and Refugees (2014) at 11.]

²¹¹ *CESCR Comment No. 20*, *supra* note 41, at para. 30.

²¹² *Id.* at para. 30.

²¹³ JAMES HATHAWAY, *supra* note 30, at 197.

²¹⁴ *ICESCR*, *supra* note 3, at Article 13.

²¹⁵ *CRC*, *supra* note 4, at Article 28.

²¹⁶ *CMW*, *supra* note 8, at Article 30.

²¹⁷ *African Charter*, *supra* note 151, at Article 17.

²¹⁸ *ACRWC*, *supra* note 152, at Article 11.

²¹⁹ *AYC*, *supra* note 153, at Article 13.

²²⁰ *Child Law*, *supra* note 196, at Article 54.

²²¹ *Supra* note 53.

²²² *Egyptian Constitution*, *supra* note 195, at Article 19.

Non-nationals' limited entitlement to public education stem from Ministry of Education's Decree No. 284 of 2014. Non-nationals may apply for scholarships jointly administered by the Ministry of Education and the Ministry of Foreign Affairs or may qualify for scholarships provided by United Nations Office of Refugee Affairs.²²³ Those selected may register in public schools for free at no personal cost to them. In addition to scholarship students, children of political refugees accredited by the Ministry of Foreign Affairs and President's Office may access public school.²²⁴ As discussed in the previous subsection, Sudanese, Libyan, Syrian, and certain Palestinian refugees are entitled to enroll in Egyptian public schools for an additional cost.²²⁵ Only non-nationals with an Egyptian mother may petition the Ministry of Education for fee exemption.²²⁶ As a result, even the non-nationals permitted to enroll in public schools may be unable to access these entitlements because of the differentiated cost.

Furthermore, students must produce a valid birth certificate or similar document, proof of legal residency, and permission from their embassy to enroll in Egyptian public schools.²²⁷ The procedure for placement in Egyptian schools varies based on educational background. The Ministry of Education facilitates the placement of children with a recent academic certificate recognized by Egyptian authorities.²²⁸ Interviews with Ministry of Education officials indicated that these administrative requirements are often waived for those fleeing war. However, the Ministry considers this a humanitarian policy rather than a legal entitlement, and individual administrators still bar students without valid paperwork from enrolling in public schools.²²⁹ Those without school certificates or whose education has been interrupted for two years face a lengthy and complicated examination process.²³⁰

Law No. 139 permits private primary and secondary schools with fees to operate under the supervision of the Ministry of Education and each Governorates' educational directorate.²³¹

²²³ *Decree No. 284/2014*, *supra* note 199 at Articles XIII-XXIII.

²²⁴ *Id.* at Article VI. The text of the Decree does not indicate whether the term "political refugee" refers to all UNHCR registered refugees or the rare and specific cases in which the Egyptian government directly grants political refugee status. For example, in 1979 the Shah of Iran sought and received political asylum in Egypt. This process was independent of UNHCR's refugee status determination. *See*, Manar Heikel, *The Egypt-Iran Relations: Strange Bedfellows* Int'l. Assoc. Pol. Sci. (28 November 2013).

²²⁵ *Decree No. 284/2014*, *supra* note 199 at Article VI.

²²⁶ *Id.* at Article XI.

²²⁷ *Id.* at Article IV. Interviews with Ministry of Education officials indicated that the requirement for embassy permission was rarely enforced in practice and was waived for refugees.

²²⁸ *Id.* at Article VII.

²²⁹ Interview with Ministry of Education official, April 2019.

²³⁰ *Decree No. 284/2014*, *supra* note 199, at Article VIII.

²³¹ *Law No. 139/1981*, *supra* note 197, at Article 56.

The Private Education Law defines the characteristics of a private school. Private schools may accept students of any nationality and should conform to the analogous curriculum in public schools.²³² This would provide refugee students with an academic certificate recognized in Egypt. However, the cost of private education is prohibitive to most refugee families.²³³ Additionally, Law No. 139 requires that the owner of a private school be “a juridical person enjoying the nationality of the Arab Republic of Egypt.”²³⁴ Numerous refugee communities in Egypt have established community schools, often teaching their country of nationality’s curriculum. These schools are rarely officially accredited by the Egyptian government; oftentimes because of the nationality of the schools’ owners.²³⁵ This limits recognition of community schools’ degrees for employment and higher education in Egypt and elsewhere.

Egyptian law does not make provisions for non-national students seeking vocational or tertiary education. Presidential Decree 49 (1972) provides non-nationals legally in Egypt with the right to enroll in Egyptian universities subject to the fees imposed by the Ministry of Higher Education.²³⁶

Asylum-seekers and failed asylum-seekers that have legal permission to reside in Egypt have access to educational rights because they have proof of residency.²³⁷ Sudanese, Libyan, Syrian, Yemeni, certain Palestinian asylum-seekers, and regular migrants can enroll in public schools.²³⁸ Asylum-seekers and regular migrants of other nationalities would be unlikely to have the right to access public schools but may enroll in private schools or university provided they can afford the associated cost.²³⁹ These policies violate Egypt’s obligations under the CMW, which obliges states to provide the children of all regular migrant workers with equal access as nationals to public education and prohibits discrimination on the basis of nationality.²⁴⁰

²³² *Private Education Law*, *supra* note 200, at Article 1 & Article 2.

²³³ For example, the Regional Refugee Resilience Plan (2017) estimates that less than 30% of Syrian refugee children enroll in private schools. This number is believed to be considerably higher than the percentage of refugees of other nationalities enrolled in private schools. *See, supra* note 366.

²³⁴ *Law No. 139/1981*, *supra* note 197, at Article 58.

²³⁵ *Id.* at Articles 13-21 [governing access to scholarships].

²³⁶ *University Organization Law*, *supra* note 197, at Article 139.

²³⁷ *Decree No. 284/2014*, *supra* note 199, at Article XI.

²³⁸ *Administrative Order on Syrian and Yemeni Students*, *supra* note 201.

²³⁹ *Law No. 139/1981*, *supra* note 197, at Article 58 & *University Organization Law*, *supra* note 197, at Article 139.

²⁴⁰ *CMW*, *supra* note 8, at Article 30 & Article 45.

Most failed asylum-seekers who remain in Egypt irregularly do not have educational entitlements because they lack legal residency status. Proof of residency is required to enroll in schools,²⁴¹ and irregular migrants are unable to produce this paperwork. This practice violates Egypt's international obligations under CMW Article 30, which requires states provide education for the children of irregular migrant workers.²⁴² Irregular migrants who are Syrian or Yemeni nationals may be able to access the education system under the 2018 Ministry of Education Administrative Order because it does not preface this entitlement on legal status.²⁴³

Table

Nationality	Refugee	Asylum-Seeker	Regular Migrant	Irregular Migrant
Libyan	Decree No. 284 Art. VI	Decree No. 284 Art. VI	Decree No. 284 Art. VI	
Palestinian	Education Agreement Decree No. 284	Education Agreement Decree No. 284	Education Agreement Decree No. 284	Education Agreement
South Sudanese	Decree No. 284	Decree No. 284	Decree No. 284	
Sudanese	Law No. 284	Law No. 284	Law No. 284	
Syrian	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students
Yemeni	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students	Administrative Order for Syrian and Yemeni Students
Arabs	CRAC Art. 11	CRAC Art. 11	CRAC Art. 11	CRAC Art. 11

6.1.5. Analysis of Overall Legal Framework

Under international and regional law, refugees, asylum-seekers, and failed asylum-seekers should have access to free and compulsory primary education, generally available and accessible secondary education, and tertiary education that is generally available and accessible

²⁴¹ *Decree No. 284/2014*, *supra* note 199, at Article XI & *University Organization Law*, *supra* note 197, at Article 139.

²⁴² *CMW*, *supra* note 8, at Article 30.

²⁴³ *Administrative Order on Syrian and Yemeni Students*, *supra* note 201.

on the basis of capacity. Only primary education needs to be free; secondary and tertiary schooling may have associated fees provided they are not prohibitive or discriminatory. It is permissible for the state to differentiate between nationals' and non-nationals fees' if these policies do not discriminate on the basis of nationality status or other prohibited grounds. However, preferential treatment to nationals of countries with which the state has specialties is permitted. States may also require non-nationals to provide documentation of educational attainment or sit for placement exams that are not required of nationals. Refugees, asylum-seekers, and failed asylum-seekers are entitled to the same treatment with regard to the awarding of scholarships and the recognition of academic certificates for the purpose of study. Children are protected against labor that would impede primary or secondary education. All persons should enjoy freedom from educational discrimination, and special educational accommodations for women, persons with disabilities, detained children, and separated or unaccompanied minors.

In Egypt, refugees, asylum-seekers, and failed asylum-seekers' educational entitlements differ on the basis of immigration status and nationality in a manner that likely violates some of Egypt's international obligations. Enrollment in any school requires a valid residence permit, which prevents irregular migrants from accessing education. Refugees, asylum-seekers, and regular migrants are entitled to enroll in private schools and universities but the cost of tuition is often prohibitive. Egypt allows nationals of Libya, Sudan, and Palestinian nationals whose parents worked in the Egyptian armed forces or government to enroll in public schools but pay higher fees than nationals. Syrian and Yemeni students can enroll in Egyptian public schools at the same cost and subject to the same conditions as nationals. Children of other nationalities do not have access to public schools and are often forced to forgo education or enroll in unaccredited community schools.

6.2. IMPLEMENTATION

The situation of educational enrollment in Egypt is complicated and oftentimes depends on one's nationality or legal status in the country. The following implementation section breaks down findings from interviews with stakeholders and FGDs based on nationality.

Access to education is dependent on one's nationality. Sudanese, Libyan, Syrian, and Yemeni nationals, and certain Palestinian students are allowed to enroll in Egyptian public schools.

Other nationalities, namely, Eritreans, Ethiopians, Iraqi, Somali, and South Sudanese nationalities are not explicitly allowed to enroll their children in Egyptian public schools. Language is a deterrent for a majority of the aforementioned nationalities, as many children of these nationalities do not speak Arabic as a native language, making it difficult to matriculate into the public school system. UNHCR acknowledges that Ethiopians, Eritreans, and Somalis have no access to public schools. UNHCR continues to advocate with the Egyptian authorities to allow children access public schools as par with other refugee children. They support children who have no access to public schools with education grants that facilitate their enrollment in private schools.²⁴⁴

Plan International is one organization which works on child education. Currently, Plan works with Syrian refugees and is working on receiving accreditation to work with African migrant populations. Plan mentioned that Syrian parents who enroll their children in public schools receive the subsidiary, provided by Save the Children, and food vouchers, provided by World Food Program. These children will later become eligible to sit for the Egyptian annual exams and receive a certificate of completion. Because most Syrian children enroll in SLCs (Syrian Learning Centers), rather than the public school system, they are part of Plan's educational strategy, in which they conduct capacity building, for staff and infrastructure, with SLC and government school teachers.²⁴⁵

Fard, a local Syrian organization, conducted a 2013 needs assessment, which identified education as one of the two main challenges Syrians faced, the other being economic empowerment. At that time, over 400 Syrian children in 6th of October did not regularly attend school, though they might be enrolled. Male students normally dropped out for economic reasons and worked to assist their families. Female students usually dropped out because the schools were in unsafe neighborhoods where they faced sexual harassment. Fard used to run a community school in a rented villa, but it stopped operating in 2018. It was closed partially because of funding and logistical challenges and partially because there was less need. Fard continues to pay for 120 children's tuition at Syrian community schools.²⁴⁶

²⁴⁴ Information obtained in an interview with UNHCR Egypt, January 2020.

²⁴⁵ Information obtained in an interview with Plan International Egypt, July 2019.

²⁴⁶ Information obtained in an interview with Fard, May 2019.

Fard also mentioned that families often register their children in public schools and a Syrian community school at the same time. Many of the community schools do not hold classes on Thursday so that the children can attend the public school one day a week. If they attend once a week, they can sit for the exams each year and have a recognized educational certificate. Also, students and their immediate family, which is constituted as parents and siblings under the age of 18, are eligible for a yearlong residence permit instead of the six month one refugees receive. Enrolling in schools is fairly simple for Syrian children, but it can depend on the municipality and individual administrator. A few years ago, administrators often required Syrian parents “give the school a gift” before they would enroll their children. This “gift” can range from examples of purchasing cleaning supplies like brooms, something like printer cartridges. This has become less and less common, though, as there are not many recent arrivals and children are already enrolled.²⁴⁷

Oftentimes, the needed paperwork proves to be confusing for those wishing to enroll their children into the public school system. A government manager explained that the documentation requirement differs based on status. Children considered refugees by the Ministry of Education are not required to have transcripts or previous certificates owing to the precarity of their situation. Instead, they can sit for a placement exam in lieu of producing paperwork. Incoming students are expected to produce the forms stipulated in Article IV of Decree 284 of 2014 because they can approach their embassies easily.²⁴⁸ This manager outlined the main challenges of working with refugees, one being stretching limited resources and insufficient space. Another issue is that refugees want to send their kids to the government language schools because they provide better education than regular public schools at a fraction of private schools’ costs. Unfortunately, there is only space for 30% of Egyptian students at government language schools, so they cannot accommodate refugees’ demands. Another challenge is the proliferation of community schools because they are in an irregular status with the Ministry of Education.²⁴⁹ According to UNHCR, Community Learning Centers are not the best option for a child’s education as the majority do not offer referral pathways if there is a complaint, unlike the government-sanctioned public schools, they are not always in the safest

²⁴⁷ *Id.*

²⁴⁸ Information obtained in an interview with a government manager, April 2019.

²⁴⁹ *Id.*

locations or in safe building structures, nor do many have a solid source of long-term funding, and oftentimes need to shut down.²⁵⁰

6.3. RECOMMENDATIONS

In order to fulfill its international obligations, it is recommended that Egypt allows all refugees, asylum-seeker, and failed asylum-seekers to have access to free and compulsory primary education, generally available and accessible secondary education, and tertiary education that is generally available and accessible on the basis of capacity. In addition, the difference in the nature of the obligation between the three levels should be made clearer. One thing that the Focus Group Discussions showed was that many people were asked for different paperwork during the enrollment process. An established process for all communities would allow for less confusion and an easier registration for all. With respect to bribes, respect and enforcement of the law should be of utmost importance. Signs should be placed at all registration sites with the following information in a variety of languages: papers needed to register, a reminder that registration itself is free, and a hotline or email to receive any complaints.

The Ministry of Education should coordinate with community based learning centers which are taking some of the burden off the crowded school system. By doing this, accreditation would be easier and certificates could be given to facilitate access to higher education in the country. In addition, those who do not understand Arabic would have a place to still receive an education, as well as be provided with mandatory Arabic lessons to later matriculate into the public school system. Finally, this would allow for community members to have a place of employment, as well to allow INGOs to provide financial assistance to those who cannot otherwise afford such centers.

Naturally, there are issues that both Egyptian and foreign students face in the current system, namely overcrowding and low teacher salaries forcing educators to give private lessons to make ends meet. While these are large structural issues, they should nevertheless be addressed in a forward looking process. Greater investment into building new schools and increasing teachers' salaries should not be taken lightly. Educating the youth is key to building healthy

²⁵⁰ Information obtained in an interview with UNHCR Egypt, January 2020.

and sustainable societies. Such investment would be a win-win situation for both Egypt and the refugees, asylum-seekers, and failed asylum-seekers who seek protection within its borders.

CHAPTER 7: HEALTH

7.1. LEGAL FRAMEWORK

7.1.1. International Law

7.1.1.1. International Instruments¹

- *Convention Relating to the Status of Refugees 1951*²
- *International Covenant on Civil and Political Rights (ICCPR)*³
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁵
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*⁶
- *Convention Against Torture (CAT)*⁷
- *Convention on the Rights of the Child (CRC)*⁸
- *Convention on the Rights of Persons with Disabilities (CRPD)*⁹
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*¹⁰

¹ Full text of the following legal instruments can be found in Annex E.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982 with the following reservation: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁴ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982 with the following declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁵ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 UNTS 13 (entered into force 3 September 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195 (entered into force Jan. 4, 1969). [Hereinafter, *ICERD*]. Egypt ratified the Convention on 1 May 1967.

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4 February 1985, 1465 U.N.T.S. 85 (entered into force June 26, 1987). [Hereinafter, *CAT*] Egypt acceded on 25 June 1986.

⁸ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

⁹ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 UNTS 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*]. Egypt's accession to the Convention occurred on 19 February 1993.

- *ILO Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, 1962*¹¹

7.1.1.2. Analysis of International Instruments

Several international instruments contain provisions regarding health. The provided rights can be divided into three categories: Firstly, the right to social security which includes health insurance but might be connected to specific prerequisites, such as employment or paying contributions into a social fund.¹² Secondly, the right to enjoy the highest attainable standard of physical and mental health. Lastly, the right to access medical services without discrimination. It is to be noted that the right to health is closely intertwined with the fulfillment of other basic needs, such as food, housing or employment. For example, the lack of sufficient shelter and food can cause disease and physical weakness, which in turn needs to be remedied with adequate access to health care.¹³

7.1.1.2.1. International Entitlements for Refugees and Asylum-seekers

The *Convention Relating to the Status of Refugees 1951* grants refugees who are lawfully staying in the territory of a Contracting State the same treatment as is accorded to nationals in respect to social security.¹⁴ The right to social security includes insurance for “employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment and family responsibilities”.¹⁵ To enjoy this right, a refugee has to be “lawfully staying”, which applies to recognized refugees that completed the RSD or were granted *prima facie* refugee status, refugees awaiting resettlement, and asylum-seekers in countries that do not provide an effective RSD process.¹⁶ Asylum-seekers are not “lawfully staying in” the host state but are

¹¹ *International Labour Organization (ILO), Equality of Treatment (Social Security) Convention, C118*, 28 June 1962 (entered into force 25 April 1964). Egypt ratified the Convention on 12 January 1993 and accepted branches (a) to (h). [Hereinafter, *ILO Convention C118*]

¹² Social security is included in this chapter on the right to health, because the ILO Convention 118 (*see supra* note 11) lists medical care, sickness benefit and maternity benefit as part of social security.

¹³ The following legal instruments provide for the right to social security: Article 24 of the Refugee Convention, Article 9 of the ICESCR, Article 26 of the CRC, Article 27 of the CMW and Article 3 of the ILO Convention C118. The right to a certain standard of physical and mental health and the protection thereof is prescribed in Article 12 of the ICESCR, Article 7 of the ICCPR, Article 2 of the CAT, Articles 19, 24 and 25 of the CRC and Article 25 of the CRPD. And the right to be able to receive health care services is enshrined in Article 12 of the CEDAW, Article 5 of the ICERD and Articles 28, 43 and 45 of the CMW.

¹⁴ *Refugee Convention, supra* note 2, at Article 24 (b).

¹⁵ *Id.*

¹⁶ *Michigan Guidelines on the Right to Work*, 31 MICH. J. INT’L L., 293, 298 (2010). *See* Chapter 3 for more details on “lawfully staying”, “lawfully present”, and “*prima facie*”.

“lawfully present”.¹⁷ Therefore, the right to social security does not apply to asylum-seekers, but only to recognized refugees.

The Refugee Convention also allows for special arrangements concerning benefits paid entirely out of public funds.¹⁸ It enables states to limit to what extent refugees may enjoy the same treatment as nationals, in the case that they have not yet earned their right to certain benefits under the applicable domestic laws.¹⁹ The purpose of this limitation was to “protect the State from an unqualified obligation to pay social security benefits where those benefits are paid entirely out of public funds.”²⁰ However, states have to make special arrangements for refugees who do not qualify under the usual arrangements to provide them with coverage otherwise.²¹

The right to social security under the Refugee Convention is closely connected to the Convention’s provisions on rationing,²² housing,²³ and public relief,²⁴ which together form a system of welfare applicable to refugees.²⁵ As social security is mostly interpreted in the narrow sense of being income based and as receiving benefits in exchange of contributions made through employment,²⁶ Article 23 on public relief was intended to fill the gaps and provide refugees with social assistance regardless of whether they are employed or not.²⁷ However, the scope of “public relief” is left open to State Parties,²⁸ it exclusively applies to those lawfully staying in the country,²⁹ and only creates an obligation if the state provides the

¹⁷ JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 658 (Cambridge University Press 2005). According to Hathaway a refugee is lawfully present “for the duration of any period of time for which his or her admission is authorized, even if only for a few hours.” Secondly, while the claim for refugee status is being verified. And thirdly, when the host state decides to suspend the usual refugee status determination and instead grants temporary protection.

¹⁸ *Refugee Convention*, *supra* note 2, at Article 24 (b)(ii).

¹⁹ EVE LESTER, *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 1072-3 (Andreas Zimmermann ed., 2010).

²⁰ LESTER, *supra* note 19, at 1072.

²¹ *Id.* at 1073.

²² *Refugee Convention*, *supra* note 2, Article 20: “Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.”

²³ *Id.* at Article 21: “As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

See also Chapter 8 on Housing.

²⁴ *Id.* at Article 23: “The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.”

²⁵ LESTER, *supra* note 19, at 1063.

²⁶ *Id.* at 1065, citing Scheinin.

²⁷ See LESTER, *supra* note 19, at 1066.

²⁸ HATHAWAY, *supra* note 17, at 810.

²⁹ See *Michigan Guidelines on the Right to Work*, *supra* note 16, at 298.

same relief for its citizens.³⁰ Therefore, states without social welfare systems are not required to provide them for refugees.³¹

It is important to note that Egypt made a reservation to Article 24 on social security and Article 23 on public relief.³² The government opposed the idea of granting refugees the same privileges as nationals and reserved the right to decide on a case-by-case basis. However, the Refugee Convention is not the only source for these rights for refugees under international human rights law.³³ Other treaties can fill the gap, as confirmed by Article 5 of the Refugee Convention, which states that “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.” The Preamble of the Refugee Convention declares its intent to “assure refugees the widest possible exercise of these fundamental rights and freedoms.”³⁴ The Refugee Convention is superseded by more generous obligations to which states may have committed subsequently. Given the nature of human rights, in case of differences, the higher standard always prevails.³⁵ Concerning the applicability of human rights treaties on non-nationals, the Committee on the Elimination of Racial Discrimination confirmed that states are obliged to guarantee equality between citizens and non-citizens in their enjoyment of their civil, political, economic, social and cultural rights. The *International Covenant on Civil and Political Rights* (ICCPR), and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are thus applicable to refugees (as well as to asylum-seekers and failed asylum-seekers).³⁶

The ICESCR recognizes the right of everyone (including refugees and asylum-seekers) to “social security including social insurance”.³⁷ The Covenant gives no definition of social

³⁰ HATHAWAY, *supra* note 17, at 808.

³¹ *Id.* at 809.

³² Egypt made reservations in respect of Articles 12(1), 20, 22 (1), 23 and 24. Concerning Articles 20, 22 (paragraph 1), 23 and 24 of the Convention of 1951, the competent Egyptian authorities had reservations because these articles consider the refugee as equal to the national and made this general reservation to avoid any obstacle which might affect the discretionary authority of Egypt in granting privileges to refugees on a case-by-case basis. Reservation obtained from the UN Treaties Series Website: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en#EndDec (accessed on 4 June 2018).

³³ Alice Edwards, *Human Rights, Refugees, and The Right “To Enjoy” Asylum*, 17 INTERNATIONAL JOURNAL OF REFUGEE LAW 293, 303 (2005).

³⁴ *Refugee Convention*, *supra* note 2, Preamble.

³⁵ Edwards, *supra* note 33, at 306.

³⁶ Committee on the Elimination of Racial Discrimination, “General Recommendation XXX on Discrimination Against Non-Citizens”, (2004), CERD/C/64/Misc.11/rev.3 (2004), para. 3. [Hereinafter, *General Recommendation XXX*]

³⁷ ICESCR, *supra* note 4, Article 9.

security because there were already ILO standards,³⁸ which the ICESCR reporting guidelines refer to.³⁹ Egypt is party to this *ILO Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security* and has accepted to provide nationals of other State Parties in their territory equal treatment to its own nationals in the areas of medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivor's benefit, employment injury benefit, and unemployment benefit.⁴⁰ Generally, the ILO Convention conditions these benefits on reciprocity (i.e. it only applies to nationals of a state that also ratified this Convention and accepted the same obligations). However, refugees are specifically exempted from the requirement of reciprocity⁴¹ and are always entitled to receive the same benefits in the above-mentioned areas as citizens. Asylum-seekers are not included under this special exemption. Therefore, they are only entitled to the same treatment as nationals provided their country of nationality is also party to the Convention and grants reciprocal benefits to citizens of the host country.⁴²

Apart from the right to social security, the ICESCR provides a right for everyone “to the enjoyment of the highest attainable standard of physical and mental health.”⁴³ This is not a right to be “healthy”, but is rather divided into numerous rights such as the right to control one's body and health,⁴⁴ freedom from torture as established in the *Convention against Torture*,⁴⁵ freedom from medical or scientific experimentation or treatment without prior consent as provided in ICCPR,⁴⁶ as well as access to health care.⁴⁷ The ICESCR provides steps to be taken by states to realize the right to health, which include: measures for “the reduction of stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment

³⁸ *ILO Convention C118*, *supra* note 11.

³⁹ Martin Scheinin, *The Right to Social Security in ECONOMIC, SOCIAL AND CULTURAL RIGHTS – A TEXTBOOK*, 162 (Asbjorn Eide et al. eds., 1995).

⁴⁰ *ILO Convention C118*, *supra* note 11, Article 3 in connection with Article 2(1) sub-paragraphs (a)-(h). Egypt did not accept branch (i) on family benefit.

⁴¹ *Id.* at Article 10.

⁴² *Id.* at Article 3. In specific paragraph 3 of Article 3: “Nothing in the preceding paragraphs of this Article shall require a Member to apply the provisions of these paragraphs, in respect of the benefits of a specified branch of social security, to the nationals of another Member which has legislation relating to that branch but does not grant equality of treatment in respect thereof to the nationals of the first Member.”

⁴³ ICESCR, *supra* note 4, Article 12.

⁴⁴ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The right to the highest attainable standard of health” (2000), UN Doc. E/C.12/2000/4, August 11, 2000, para 8. [Hereinafter, *General Comment No. 14*]

⁴⁵ CAT, *supra* note 7, Article 2.

⁴⁶ ICCPR, *supra* note 3, Article 7.

⁴⁷ *General Comment No. 14*, *supra* note 44, para 8.

and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.”⁴⁸ The Committee on Economic Social and Cultural Rights provides further guidelines for states on implementation. First, the availability of essential services and goods, such as drinking water, sanitation facilities, hospitals and trained doctors needs to be guaranteed. Second, these available services and goods have to be physically and economically accessible without discrimination. Third, facilities and services must be respectful of the culture of individuals or vulnerable groups, and be scientifically and medically of adequate quality.⁴⁹

Other international legal instruments also take up non-discrimination in health care. *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) envisions the elimination of discrimination against women in the field of health care and state provision of appropriate services for pregnancy and childbirth.⁵⁰ In accordance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), states undertake to prohibit and eliminate racial discrimination in the enjoyment of the right to public health, medical care and social security.⁵¹ CEDAW and ICERD are both applicable to refugees, asylum-seekers and other aliens. The Committee on the Elimination of Discrimination against Women discussed the gender-related dimensions of refugee status and asylum of women,⁵² as well as the situation of women migrant workers,⁵³ while the Committee on the Elimination of Racial Discrimination also issued a general recommendation on the discrimination against non-citizens.⁵⁴

The ICESCR right to physical and mental healthcare applies to everyone within the state’s jurisdiction, not just citizens.⁵⁵ The Committee on Economic Social and Cultural Rights emphasized that refugees and asylum-seekers are typically among those vulnerable groups who

⁴⁸ ICESCR, *supra* note 4, Article 12 (2) (a)-(d).

⁴⁹ *General Comment No. 14*, *supra* note 44, para 12.

⁵⁰ CEDAW, *supra* note 5, Article 12.

⁵¹ ICERD, *supra* note 6, Article 5(e)(iv).

⁵² UN Committee on the Elimination of Discrimination against Women, “General recommendation No. 32 on the gender-related dimension of refugee status, asylum, nationality and statelessness of women” (2014), UN Doc. CEDAW/C/GC/32, November 14, 2014. [Hereinafter, *CEDAW General Recommendation No. 32*]

⁵³ UN Committee on the Elimination of Discrimination against Women, “General recommendation No. 26 on women migrant workers” (2008), UN Doc. CEDAW/C/2009/WP.1/R, December 5, 2008. [Hereinafter, *CEDAW General Recommendation No. 26*]

⁵⁴ *General Recommendation XXX*, *supra* note 36.

⁵⁵ HATHAWAY, *supra* note 17, at 499.

have difficulties exercising their rights and should therefore be granted special attention.⁵⁶ “States Parties have a joint and individual responsibility [...] to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.”⁵⁷ Thus, states have a duty to work together to help the most vulnerable in times of need.

Concerning the applicability of ICESCR in Egypt, Egypt made the following general reservation to the ICESCR: “Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.”⁵⁸ The right to social security and the right to health are not in conflict with Islamic Sharia.⁵⁹

ICESCR Article 2 states that State Parties can realize the Covenant’s rights progressively, instead of immediate realization.⁶⁰ This provision takes into account the difficulties of states that lack economic resources. However, a progressive realization standard can weaken the position of individuals demanding the fulfillment of their rights. The Committee on Economic, Social and Cultural Rights addressed this dilemma by creating the so-called core content of essential rights, which is “treated as an obligation of result”.⁶¹ As a consequence, a “state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”⁶² The Committee lists the minimum obligations State Parties need to fulfill. Based thereon, states must ensure the right of access to health facilities on a non-discriminatory basis, access to essential food to be free

⁵⁶ LESTER, *supra* note 19, para 19.

⁵⁷ *General Comment No. 14*, *supra* note 44, para 40.

⁵⁸ Reservation retrieved from the UN Treaties Series Website:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en#EndDec (accessed on 9 June 2018).

⁵⁹ Social security, health and public relief are present in Islamic law, under which the state is obliged to collect *zakat*, which is tax for the specific purpose of spending it on those in need. The state is obliged under Sharia law to maintain human happiness and dignity by providing the necessary economic welfare. Islamic states evidenced social security arrangements for many centuries. To promote both mental and physical health, it was a duty of Islamic states to train medical personnel and establish hospitals. See MASHOOD BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 189, 191, 207-8 (2003). (Citing MUHAMMAD ASAD, *THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM* 87 (1980)).

⁶⁰ See Chapter 3 *Right to Seek Asylum* for a more detailed discussion of progressive realization.

⁶¹ HATHAWAY, *supra* note 17, at 489.

⁶² *General Comment No. 14*, *supra* note 44, at 15, para 10.

from hunger, access to basic shelter and sanitation, access to essential drugs, to adopt a public health strategy and to ensure the equitable distribution of resources concerning health.⁶³

Progressive realization also means “states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of Article 12.”⁶⁴ With regard to the right to health, this obligation is constituted of three levels. First, the obligation to “respect”, meaning not to negatively influence, directly or indirectly, enjoyment of the right to health. Second, to “protect”, meaning to keep third parties from interfering with the right to health. Third, to “fulfil”, meaning to take the necessary “legislative, administrative, budgetary, judicial” measures to realize the right to the highest attainable standard of physical and mental health.⁶⁵ If a state claims to be unable to fully comply with these obligations due to limited resources, it has to prove that all available resources were used to the maximum extent possible to fulfill its obligations.⁶⁶ The most cost-effective way of using these available resources to meet the required objectives must be identified in a state’s national health strategy plan.⁶⁷ Nevertheless, a state may never justify, under any circumstances whatsoever, the non-compliance with its core obligations.⁶⁸ The Committee enunciates the core obligations arising from Article 12, which every state has to fulfill regardless of its resources:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.⁶⁹

⁶³ *Id.* at para 43.

⁶⁴ *Id.* at para 31.

⁶⁵ *Id.* at para 33.

⁶⁶ *Id.* at para 47.

⁶⁷ *Id.* at paras 47 and 53.

⁶⁸ *Id.* at para 47.

⁶⁹ *Id.* at para 43.

The *Convention on the Rights of the Child* (CRC) emphasized that children seeking asylum or who have received refugee status should receive appropriate protection and assistance in enjoying the rights granted in the CRC.⁷⁰ The UN Committee on the Rights of the Child highlights certain provisions especially important for refugee children, among them Article 24 on health and health services, and requires states “to indicate the number of asylum-seeking and refugee children covered by health services.”⁷¹ Mirroring the ICESCR, the CRC gives children the right to enjoy the highest attainable standard of health and access to health care.⁷² CRC lists steps that should be undertaken by states, similar to ICESCR; for instance, to diminish infant and child mortality. The CRC includes more detailed measures such as ensuring provision of necessary health care to all children, combating disease and malnutrition, providing adequate nutritious food and clean drinking-water, focusing on pre-natal and post-natal healthcare for mothers, ensuring that society is informed about child health, nutrition, hygiene and advantages of breastfeeding, and developing preventive health care.⁷³ Furthermore, states are required to take measures to abolish traditional practices harmful to the health of children.⁷⁴

Under the CRC, children are entitled to benefit from social security, including social insurance.⁷⁵ According to the *travaux préparatoires*, the phrase “the right to benefit from social security” and not “the right to social security” was intentionally chosen to reflect that children usually receive social security through their parent or legal guardian.⁷⁶ The CRC requires states to take active legislative, administrative and social measures to protect children from all forms of physical or mental violence, injury, abuse, maltreatment, negligent treatment or exploitation.⁷⁷ Mentally or physically disabled children are entitled to special care in order to live a decent life of dignity, self-reliance and integrated in the community.⁷⁸ If a child has been placed in a public institution for the treatment of her/his physical or mental health, then the child has a right to a periodic review of the treatment and all other circumstances relevant to

⁷⁰ CRC, *supra* note 8, Article 22.

⁷¹ SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 367 (1999).

⁷² CRC, *supra* note 8, Article 24 (1).

⁷³ *Id.* at Article 24 (2).

⁷⁴ *Id.* at Article 24 (4).

⁷⁵ *Id.* at Article 26.

⁷⁶ DETRICK, *supra* note 71, at 447.

⁷⁷ CRC, *supra* note 8, Article 19.

⁷⁸ *Id.* at Article 23.

the placement.⁷⁹ The Committee on the Rights of the Child clarified that states obligations under the CRC apply to all children within a state's territory or within its jurisdiction, irrespective of their nationality, immigration status or statelessness. Thus, the rights enunciated in the CRC are to be enjoyed also by refugee children, as well as asylum-seeker or failed asylum-seeker children.⁸⁰

The *Convention on the Rights of Persons with Disabilities* (CRPD)⁸¹ entitles every person with disabilities to enjoy the highest attainable standard of health without discrimination on the basis of disability. The following are measures refugees and asylum-seekers with disabilities benefit from: same standard of free or affordable health care as everyone else, health services tailored for persons with disabilities, care on the basis of free and informed consent, prohibition of discrimination in health and life insurance under national law, and prohibition of denial of health care, food or fluids based on disability.⁸² The CRPD prohibits all discrimination on the basis of disability,⁸³ which takes into account all possible grounds of discrimination, including but not limited to migrant, refugee or asylum status and is thus applicable to non-nationals.⁸⁴

In conclusion, refugees should in theory be entitled to the same treatment as Egyptian nationals with regard to social security. Although Egypt made a reservation to the Refugee Convention and reserved itself the right to decide on a case-by-case basis whether they grant social security benefits to refugees, the ILO Convention C118 and the ICESCR oblige Egypt to nevertheless treat refugees equal to Egyptian nationals. Based on the human rights instruments ratified by Egypt, refugees are entitled to the highest attainable standard of health and access to health care facilities without discrimination. Refugee children and refugees with disabilities are granted special protection through the CRC and the CRPD. The ICESCR leaves room for states to differentiate between nationals and non-nationals but under the above discussed conditions of legitimacy and proportionality. Thus, whether any differentiations made by Egypt are in accordance with international law will be discussed below in the sub-chapter on domestic law.

⁷⁹ *Id.* at Article 25.

⁸⁰ UN Committee on the Rights of the Child, "General comment No. 6: Treatment of unaccompanied and separated children outside their country of origin" (2005), September 1, 2005, para 12. [Hereinafter, *CRC General Comment No. 6*]

⁸¹ *CRPD*, *supra* note 9.

⁸² *Id.* at Article 25 (a)-(f).

⁸³ *Id.* at Article 5.

⁸⁴ UN Committee on the Rights of Persons with Disabilities, "General comment No. 6 on equality and non-discrimination" (2018), UN Doc. CRPD/C/GC/6, April 26, 2018. [Hereinafter, *CRPD General Comment No. 6*]

7.1.1.2.2. International Entitlements for Failed Asylum-Seekers

The rights owed to failed asylum-seekers differ based on whether the individual is a regular or irregular migrant. The Refugee Convention no longer applies to a rejected asylum-seeker. The rights deriving from other human rights instruments discussed above apply to migrants in the same way as they do to asylum-seekers and refugees, because according to the general recommendations or comments of the different human rights treaty bodies, they are granted to all non-nationals in the territory of the state regardless of their legal status.⁸⁵ Thus, all migrants are entitled to the right to social security under the ICESCR and the ILO Convention C118, provided the requirement of reciprocity with their host state is fulfilled under the latter. All migrants have the right to the highest attainable standard of health and access to health facilities without discrimination as discussed above for refugees and asylum-seekers.⁸⁶ If a failed asylum-seeker is employed, whether regularly or irregularly, s/he is additionally protected under the *Convention on the Protection of the Rights of All Migrant Workers and their Families* (CMW).⁸⁷

CMW applies to migrants who are working in a state of which they are not a national, as well as their families.⁸⁸ Regular migrants are those authorized to enter, to stay and to take up employment in accordance with the law of the host state.⁸⁹ Irregular migrants are those who do not fulfill these requirements, and thus are not documented and not authorized to enter, stay or work in the host state.⁹⁰ Both categories, together with their families, are entitled to the same social security benefits as nationals of the host state, provided that they meet the requirements on national legislation or any applicable bilateral treaties.⁹¹ In addition, migrant workers and their families have the right to receive medical treatment which is necessary to prevent death or irreparable damage to health.⁹² Despite holding these entitlements, irregular migrants are at risk of deportation whenever they attempt to claim them. Migrant workers and families in a regular migration situation can access their entitlements without this risk and in addition enjoy

⁸⁵ *General Recommendation XXX*, *supra* note 36; *CRC General Comment No. 6*, *supra* note 80; *CEDAW General Recommendation No. 32*, *supra* note 52; *CEDAW General Recommendation No. 26*, *supra* note 53; *CRPD General Comment No. 6*, *supra* note 84.

⁸⁶ *See above* under refugees and asylum-seekers

⁸⁷ *CMW*, *supra* note 10.

⁸⁸ *Id.* at Article 1.

⁸⁹ *Id.* at Article 5.

⁹⁰ *Id.* at Article 5 (b).

⁹¹ *Id.* at Article 27.

⁹² *Id.* at Article 28.

equal treatment as nationals with regard to access to social and health services, as long as they fulfill the requirements of the national schemes.⁹³

7.1.2. Regional Law

7.1.2.1. Regional Instruments⁹⁴

- *African Charter on Human and Peoples' Rights*⁹⁵
- *African Charter on the Rights and Welfare of the Child (ACRWC)*⁹⁶
- *African Youth Charter (AYC)*⁹⁷
- *Charter on the Rights of the Arab Child*⁹⁸ (applicable only to Arab Children)

7.1.2.2. Analysis of Regional Instruments

The *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa* does not include any provisions concerning the right to health.⁹⁹ Regional instruments conferring entitlements on health care and social security are the *African Charter on Human and Peoples' Rights* (African Charter),¹⁰⁰ the *African Charter on the Rights and Welfare of the Child* (ACRWC),¹⁰¹ the *African Youth Charter* (AYC),¹⁰² and the *Charter on the Rights of the Arab Child*.¹⁰³ All except the latter apply to everyone in the territory equally without differentiation based on nationality. The African Charter obliges states to provide all individuals in their jurisdiction with the protection of the Charter, whether they are nationals or non-nationals.¹⁰⁴ This is based on Article 2 of the Charter, which prohibits any discrimination based on several grounds, including "other status".¹⁰⁵ There are no

⁹³ *Id.* at Article 43 (e) and Article 45 (c).

⁹⁴ Full text of the following legal instruments can be found in Annex E.

⁹⁵ African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

⁹⁶ African Charter on the Rights and Welfare of the Child, July 1, 1990, CAB/LEG24.9/49 (entered into force Nov. 29, 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

⁹⁷ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*] Egypt ratified the Charter on 1 April 2015. [Hereinafter, *AYC*]

⁹⁸ Charter on the Rights of the Arab Child, 6 June 1983 (entered into force on Jan. 11, 1994). Egypt ratified the same day. [Hereinafter, *Arab Child Charter*]

⁹⁹ Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974). [Hereinafter, *OAU Refugee Convention*] Egypt ratified the Convention on 17 November 1980.

¹⁰⁰ *African Charter*, *supra* note 95.

¹⁰¹ *African Charter for the Child*, *supra* note 96.

¹⁰² *AYC*, *supra* note 97.

¹⁰³ *Arab Child Charter*, *supra* note 98.

¹⁰⁴ Monette Zard et al., *Refugees and the African Commission on Human and Peoples' Rights*, 16 *Forced Migr. Rev.* 33, 34 (2003).

¹⁰⁵ *African Charter*, *supra* note 95, Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race,

available *travaux préparatoires* for the African Charter, but scholars have interpreted Article 2 with reference to a similar provision in the ICESCR.¹⁰⁶ The CESCR interprets prohibited discrimination on the grounds of “other status” in ICESCR Article 2(2) as including discrimination based on nationality.¹⁰⁷ Additionally, the African Commission confirmed that rights of the Charter apply to refugees, asylum-seekers, regular migrants and irregular migrants regardless of their nationality.¹⁰⁸ The same provisions against discrimination based on “other status” are included in the ACRWC¹⁰⁹ and the AYC.¹¹⁰ Following the aforementioned reasoning, this prohibits any discrimination among non-nationals based on nationality, and makes these legal instruments applicable to refugees, asylum-seekers and failed asylum-seekers alike. However, the *Charter on the Rights of the Arab Child* may provide differing entitlements on the basis of nationality and/or ethnicity. The Charter’s text refers to each enumerated right as owed to “Arab children” rather than children generally. It is unclear whether entitlements are owed to all Arabs, or only citizens of Arab League states, as the Charter leaves the ambiguous socio-ethnic term “Arab” undefined.

As aforementioned, the applicable regional legal instruments are not specifically created for refugees, but rather provide human rights for all individuals within the territory of a state party. Therefore, there is no differentiation between the rights of refugees, asylum-seekers, regular migrants, and irregular migrants. Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter state that the right to health consists of two components. First is the right to health care which requires states to establish an accessible and effective health care system.¹¹¹ Second, the underlying determinants of health, which include “access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and

ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

¹⁰⁶ ICESCR, *supra* note 4, Article 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹⁰⁷ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights” (2009), UN Doc. E/C.12/GC/20, July 2, 2009, para 30.

¹⁰⁸ Marina Scharpe, *The Regional Law of Refugee Protection in Africa* 130 (2018).

¹⁰⁹ *African Charter for the Child*, *supra* note 96, Article 3: “Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

¹¹⁰ AYC, *supra* note 97, Article 2(1): “Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

¹¹¹ African Commission on Human and People’s Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, para 62. [Hereinafter, *Guideline African Charter*]

housing, healthy occupational and environmental conditions.”¹¹² This provision includes freedom from unwanted interference, such as non-consensual medical treatment; and full control over body and health, including sexual and reproductive freedom.¹¹³

The African Charter states that every individual has the right to enjoy the best attainable state of physical and mental health.¹¹⁴ In contrast to the ICESCR, the African Charter does not address states in this provision but rather puts the focus on the individual rights-holder.¹¹⁵ However, this does not diminish the states’ accountability, as in the second paragraph of the relevant provision their obligation is directly mentioned: “*State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*”¹¹⁶ This suggests that the African Charter puts a stronger emphasis on curative medical care rather than preventive. Also, it does not include a detailed list of steps to be taken by states as included in the ICESCR¹¹⁷ and does not mention specific issues, such as maternal and infant mortality or prevention of epidemics.¹¹⁸ However, the African Commission on Human and Peoples’ Rights outlines measures, national policies and programs states should undertake to guarantee that individuals are able to enjoy their right to health to the fullest.¹¹⁹ Similar to ICESCR, the African Charter follows the principle of progressive realization concerning economic, social and cultural rights.¹²⁰ States are obliged to move constantly toward the full realization of Charter rights using available resources.¹²¹ However, there are certain minimum core obligations that must be immediately fulfilled:

- a. Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- b. Ensure the provision of essential drugs to all those who need them, as periodically defined under the WHO Action Programme on Essential Drugs, and particularly anti-retroviral drugs;
- c. Ensure universal immunization against major infectious diseases;
- d. Take measures to prevent, treat and control epidemic and endemic diseases;
- e. Provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.¹²²

¹¹² *Guideline African Charter*, *supra* note 111, para 63.

¹¹³ *Id.* at para 64.

¹¹⁴ *African Charter*, *supra* note 95, Article 16 (1).

¹¹⁵ Ebenezer Durojaye, *The approaches of the African Commission to the right to health under the African Charter*, 17 LAW DEMOCRACY & DEV. 393, 397 (2013).

¹¹⁶ *African Charter*, *supra* note 95, Article 16 (2).

¹¹⁷ ICESCR, *supra* note 4, Article 12 (2).

¹¹⁸ Durojaye, *supra* note 115, at 397.

¹¹⁹ *Guideline African Charter*, *supra* note 111, para 67 (a)-(rrr).

¹²⁰ *Id.* at para 13.

¹²¹ *Id.* at para 13.

¹²² *Id.* at para 67.

Consequently, everyone is entitled to access to health facilities free from discrimination, provision of essential drugs, immunization against major infectious diseases and epidemic control measures, as well as the access to information concerning health. Unlike the ICESCR, which leaves room for differentiating between nationals and non-nationals under certain conditions,¹²³ the core obligation under the African Charter prohibits any discrimination with regard to the right to access health facilities and medical services.

The African Charter does not explicitly include the right to social security. However, the African Commission on Human and Peoples' Rights interprets several Articles of the Charter as implying the right to social security.¹²⁴ The rights to life, dignity, liberty, work, health, food, protection of the family, and protection of the aged and disabled, are together interpreted as creating the core obligation for states to provide social security for "essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education consistent with human life, security and dignity."¹²⁵ Even if states consider this interpretation too wide, the Charter explicitly confers a duty to take care and protect the physical health and morals of the family and to grant special protection to the aged and disabled with regard to their physical or moral needs.¹²⁶

The *African Youth Charter* entitles young people between the age of 15 and 35 years to enjoy the best attainable state of physical, mental and spiritual health.¹²⁷ Based on this legal instrument, states are obliged to make medical assistance available to young refugees, asylum-seekers and failed asylum-seekers alike. This includes health services and programs that meet reproductive health needs, provide antenatal and postnatal care and assist in the fight against drug abuse.¹²⁸ Mentally and physically challenged youth have the right to receive equal access to health care services,¹²⁹ and states have to recognize the right of young persons to benefit from social security, including social insurance.¹³⁰

¹²³ See Sub-Chapter 1.2.1 on legitimate discrimination of non-nationals under Article 2 ICESCR.

¹²⁴ *Guideline African Charter*, *supra* note 111, refers to Article 4, 5, 6, 15, 16, 18 (1) (2) and (4) of the African Charter.

¹²⁵ *Guideline African Charter*, *supra* note 111, paras 81 and 82(a).

¹²⁶ *African Charter*, *supra* note 95, Article 18 (1) and (4).

¹²⁷ *AYC*, *supra* note 97, Article 16.

¹²⁸ *Id.* at Article 16(2).

¹²⁹ *Id.* at Article 24.

¹³⁰ *Id.* at Article 14(3).

In addition, the *African Charter on the Rights and Welfare of the Child* grants specific rights to those under 18 years of age and explicitly states that refugee children should receive appropriate protection and humanitarian assistance.¹³¹ Apart from emphasizing the special vulnerability and needs of refugee children, this Charter entitles every child to enjoy the best attainable state of physical, mental and spiritual health, which includes being provided with nutritious food, safe drinking water and adequate health care,¹³² and being protected from torture, inhumane treatment, physical or mental injury or abuse and neglect or maltreatment.¹³³ Similar to the previously discussed legal instruments, the ACRWC includes a special provision granting mentally or physically disabled children the right to special protection to ensure their dignity, self-reliance and active participation in the community.¹³⁴

The *Charter on the Rights of the Arab Child* gives Arab children the right to social insurance, to grow up in a healthy environment, and health care in preventive and remedial aspects for the child and the mother from the first day of pregnancy.¹³⁵ The Arab Child Charter also mentions social insurance as a goal.¹³⁶ However, this obligation is to be fulfilled by providing job opportunities, and thus social insurance is dependent on employment.¹³⁷

7.1.3. Bilateral Law

7.1.3.1. Bilateral Instruments¹³⁸

- *Cooperation Protocol in the Field of Health and Medicine between the Government of the Arab Republic of Egypt and the State of Palestine*¹³⁹
- *Cooperation Protocol between the Ministry of Public Health of the Republic of Yemen and the Ministry of Health and Population in the Arab Republic of Egypt*¹⁴⁰
- *Executive Program between the Ministry of Public Health and Population in the Republic of Yemen and the Ministry of Health and Population in the Arab Republic of*

¹³¹ ACRWC, *supra* note 96, Article 23.

¹³² *Id.* at Article 14.

¹³³ *Id.* at Article 16.

¹³⁴ *Id.* at Article 13.

¹³⁵ *Arab Child Charter*, *supra* note 98, Article 9. Same is mentioned as a goal the Charter is aiming at fulfilling in Article 20.

¹³⁶ *Id.* at Article 19.

¹³⁷ *Id.* at Article 19.

¹³⁸ Full text of the following legal instruments can be found in Annex E.

¹³⁹ *Cooperation Protocol in the Area of Health and Drugs between the Government of the Arab Republic of Egypt and the State of Palestine*, signed on 1 July 1996 in Cairo.

¹⁴⁰ *Cooperation Protocol between the Ministry of Public Health of the Republic of Yemen and the Ministry of Health and Population in the Arab Republic of Egypt*, signed between both sides on 21 August 1996.

*Egypt concerning the Procedures and Control of Medical Tourism in the Hospitals and Clinics in the Arab Republic of Egypt*¹⁴¹

- *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Government of the Arab Republic of Egypt and the Governments of the Kingdom of Swaziland*¹⁴²
- *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Ministry of Health and Population of the Arab Republic of Egypt and the Ministry of Health of the Republic of Armenia*¹⁴³

7.1.3.2. Analysis of Bilateral Instruments

Egypt entered several bilateral agreements with other states concerning cooperation on health care matters. According to the Ministry of Foreign Affairs, Egypt concluded such agreements with Armenia, Bahrain, Guinea, Gabon, Mexico, Peru, Turkey, Swaziland, Yemen and Palestine.¹⁴⁴ The majority of these instruments only establish general cooperation between the two parties, for example in the field of medical education or the exchange of scientific research, and do not create any rights for individuals. However, the bilateral agreements with Palestine, Yemen, Swaziland and Armenia include benefits for individuals requiring medical treatment.

The agreement between Egypt and Palestine discusses educating Palestinian doctors in Egypt and exchange of information in the areas of health insurance, healthcare administration, and medical scientific research. In addition, Egypt offers treatment of difficult cases from Palestine in Egyptian hospitals.¹⁴⁵ Thus, Palestinians in Egypt may be able to benefit from this agreement. However, no details on the execution of the agreement were included. Therefore, it is unclear whether Palestinians can simply apply for treatment at governmental hospitals or if Health Ministry representatives from the two countries need to agree in advance on the cases.

¹⁴¹ *Executive Program between the Ministry of Public Health and Population in the Republic of Yemen and the Ministry of Health and Population in the Arab Republic of Egypt concerning the Procedures and Control of Medical Tourism in the Hospitals and Clinics in the Arab Republic of Egypt*, signed between both sides on 6 March 2005.

¹⁴² *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Government of the Arab Republic of Egypt and the Governments of the Kingdom of Swaziland*, date signed not included in the agreement. (Next to the signature of the party from Swaziland it says 16 November 1999.)

¹⁴³ *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Ministry of Health and Population of the Arab Republic of Egypt and the Ministry of Health of the Republic of Armenia*, signed by both parties on 1 May 1997.

¹⁴⁴ List of bilateral agreements and Arabic texts available at:

<https://www.mfa.gov.eg/English/Ministry/TreatiesAndDocs/Pages/default.aspx>

¹⁴⁵ Cooperation Protocol between Egypt and Palestine, *supra* note 139, Article 5.

The Health Ministries of Egypt and Yemen signed two bilateral agreements: A Cooperation Agreement on health and an Executive Program on health tourism. Egypt committed itself to treat 30 Yemeni nationals suffering from intractable medical conditions for free in Egyptian hospitals each year.¹⁴⁶ Yemen is responsible for travel and accommodation. As the Yemeni government is involved, it is unlikely that a Yemeni national who applies for asylum in Egypt, successfully or otherwise, would contact the Yemeni government for arranging such treatment. However, they could benefit from another provision providing Yemeni patients the same treatment as Egyptians in Egyptian hospitals at the same price. The second agreement confirms this equal treatment, and states that Egypt will provide a list of the best hospitals and doctors to welcome Yemeni patients in Egypt.¹⁴⁷ This agreement is tailored for medical tourism, aiming at patients located in Yemen, but aspects of it could benefit those who have sought asylum in Egypt.

The Agreement between Egypt and Swaziland entitles nationals of Swaziland who are temporarily staying in Egypt to access the necessary medical care in cases of emergency, under the same system in place for Egyptians, until their medical condition is well enough to be transported back to their home country.¹⁴⁸ The same applies to nationals of Armenia based on the agreement with the Armenian government.¹⁴⁹

7.1.4. Domestic Law

7.1.4.1. Domestic Instruments¹⁵⁰

- Constitution of the Arab Republic of Egypt 2014¹⁵¹
- Law Number 2 of the year 2018 on Comprehensive Health Insurance Scheme¹⁵²

¹⁴⁶ Cooperation Protocol between the Ministry of Public Health of the Republic of Yemen and the Ministry of Health and Population in the Arab Republic of Egypt, *supra* note 140.

¹⁴⁷ Cooperation Protocol between Egypt and Palestine, *supra* note 139.

¹⁴⁸ *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Government of the Arab Republic of Egypt and the Governments of the Kingdom of Swaziland*, *supra* note 142, Article 7(1).

¹⁴⁹ *Cooperation Agreement in the Area of Public Health, Medical Sciences and Medicine between the Ministry of Health and Population of the Arab Republic of Egypt and the Ministry of Health of the Republic of Armenia*, *supra* note 143, article 6(1).

¹⁵⁰ Full text of the following legal instruments can be found in Annex E.

¹⁵¹ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

¹⁵² Law No. 2 of 2018 (Law on the Comprehensive Health Insurance Scheme), *Al-Jarida Al-Rasmiyya*, 11 January 2018 (Egypt).

- Executive Regulation for Law No. 2 of 2018, issued by Prime Minister Decree Number 909 of the year 2018¹⁵³
- Law Number 79 of the year 1975 promulgating the Social Insurance Law¹⁵⁴
- Law Number 12 of the year 1996 promulgating the Child Law, as amended by Law Number 126 of the year 2008¹⁵⁵
- Executive Regulation for the Law of the Child Number 12 of the year 1996, issued by Prime Minister Decree Number 2075 of the year 2010¹⁵⁶
- Law Number 82 of the year 2016 issuing the Law on Combating Illegal Migration and Smuggling of Migrants¹⁵⁷
- Law Number 64 of the year 2010 regarding Combating Human Trafficking¹⁵⁸
- Law Number 23 of the year 2012, regarding Health Insurance System for Unsupported Women¹⁵⁹
- Law No. 127 of 2014, regarding regulation Health Insurance System for Farmers and Agrarian Workers¹⁶⁰
- Law No. 86 of 2012, regarding Health Insurance System for Pre-school Children¹⁶¹
- Law Number 99 of the year 1992, regarding the Health Insurance System for Students¹⁶²
- Ministry of Health and Population Decree Number 239 of the year 1997, promulgating the Basic Regulations for Hospitals and Medical Units belonging to Local Administrative Units¹⁶³

¹⁵³ Executive Regulation to Law No. 2 of 2018 (Law on the Comprehensive Health Insurance Scheme), Prime Minister Decree No. 909 of 2018, *Al-Jarida Al-Rasmiyya*, 8 May 2018 (Egypt). [hereinafter, *Executive Regulation to Law 2/2018*]

¹⁵⁴ Law No. 79 of 1975 (Social Insurance Law), *Al-Jarida Al-Rasmiyya*, 28 August 1975 (Egypt).

¹⁵⁵ Law No. 12 of 1996 (Child Law), *Al-Jarida Al-Rasmiyya*, 28 March 1996 (Egypt).

¹⁵⁶ Executive Regulation to Law No. 12 of 1996 (Child Law), Prime Minister Decree No. 2075 of 2010, *Al-Jarida Al-Rasmiyya*, 22 July 1996 (Egypt).

¹⁵⁷ Law No. 82 of 2016 (Law on Combating Illegal Migration and Smuggling of Migrants), *Al-Jarida Al-Rasmiyya*, 7 November 2016 (Egypt).

¹⁵⁸ Law No. 64 of 2010 (regarding Combating Human Trafficking), *Al-Jarida Al-Rasmiyya*, 9 May 2010 (Egypt).

¹⁵⁹ Law No. 23 of 2012 (regarding Health Insurance System for Unsupported Women), *Al-Jarida Al-Rasmiyya*, 31 May 2012 (Egypt).

¹⁶⁰ Law No. 127 of 2014 (regarding Health Insurance System for Farmers and Agrarian Workers), *Al-Jarida Al-Rasmiyya*, 17 September 2014 (Egypt).

¹⁶¹ Law No. 86 of 2012 (regarding Health Insurance System for Pre-school Children), *Al-Jarida Al-Rasmiyya*, 2 September 2012 (Egypt).

¹⁶² Law No. 99 of 1992 (Health Insurance System for Students), *Al-Jarida Al-Rasmiyya*, 30 July 1992 (Egypt).

¹⁶³ Ministry of Health and Population Decree No. 239 of 1997 (Basic Regulations for Hospitals and Medical Units belonging to Local Administrative Units), *Al-Jarida Al-Rasmiyya*, 23 September 1997 (Egypt).

- Ministerial Decree Number 674 of the year 2010, promulgating the Basic Regulations for Hospitals and Primary Health Care Centers and Family Health of the Local Administration Units¹⁶⁴ (*currently suspended*)
- Ministry of Health and Population Decree Number 334 of the year 2011¹⁶⁵
- Memorandum of Understanding between the Ministry of Health Arab Republic of Egypt and the Office of the United Nations High Commissioner for Refugees on Enhancing Access of Persons of Concern to UNHCR to Public Primary Health Care and Referral Curative Care Services¹⁶⁶ (*applicable to refugees, asylum-seekers*)

7.1.4.2. Analysis of Domestic Instruments

For the most part, domestic laws do not specifically address the rights of refugees. Also, no differentiation is made between the rights of refugees, asylum-seekers, and regular migrants based on their legal status or nationality. In general, certain rights are conferred to citizens and not applicable to non-nationals. The Egyptian Constitution states that only citizens have the right to social security and comprehensive health care.¹⁶⁷ However, the Constitution also stipulates that “denying any form of medical treatment to any human in emergency or life-threatening situations is a crime.”¹⁶⁸ Therefore, all refugees, asylum-seekers, regular migrants and irregular migrants are entitled to medical treatment in emergency situations and cannot be denied access to clinics or hospitals. Children are granted additional health rights under the Constitution. Free compulsory vaccinations, health care and basic nutrition, and special care for those with disabilities are guaranteed to all children regardless of citizenship or legal status.¹⁶⁹

The Egyptian Child Law creates entitlements specifically for children regardless of their nationality,¹⁷⁰ and thus applies to all non-nationals under the age of 18, even irregular migrants.

¹⁶⁴ Ministerial Decree No. 674 of 2010 (Basic Regulations for Hospitals and Primary Health Care Centers and Family Health of the Local Administration Units), *Al-Jarida Al-Rasmiyya*, 9 December 2010 (Egypt).

¹⁶⁵ Ministry of Health and Population Decree No. 334 of 2011 (On the Suspension of the Basic Regulation for Hospitals), *Al-Jarida Al-Rasmiyya*, 22 May 2011 (Egypt).

¹⁶⁶ Memorandum of Understanding between the Ministry of Health Arab Republic of Egypt and the Office of the United Nations High Commissioner for Refugees on Enhancing Access of Persons of Concern to UNHCR to Public Primary Health Care and Referral Curative Care Services, 2016. (*A copy of the MoU was provided to the research team by UNHCR*) [Hereinafter, *Health MoU*]

¹⁶⁷ *Egyptian Constitution*, *supra* note 151, Articles 17 and 18.

¹⁶⁸ *Id.* at Article 18.

¹⁶⁹ *Id.* at Article 80.

¹⁷⁰ According to Article 1 of the *Executive Regulation to Law 12/1996*, *supra* note 156, the definition of a child is as follows: “All those who have not attained the age of 18 years, according to the means of evidence established in Article 2 of this law”.

It explicitly states that Egypt is obliged to guarantee as a minimum the rights stated in the Convention of the Rights of the Child.¹⁷¹ In addition, children have the right to access health care services and to receive treatment for any illness,¹⁷² to receive vaccination according to the Health Ministry's schedule,¹⁷³ and to receive a healthcare card from the health office.¹⁷⁴ Furthermore, the Child Law obliges the state to ensure the protection of the life of the child through a safe and secure upbringing away from armed conflicts.¹⁷⁵ This provision is not directly related to healthcare but emphasizes Egypt's responsibility in protecting refugee children from growing up in armed conflicts in their countries of nationality. The weak point in this law is the lack of regulation around the funding of comprehensive health insurance or access to medical care. Thus, it is not clear how non-national children can benefit from healthcare under this Law.

Under the newly issued Law Number 2 of 2018, Egypt is working on establishing a comprehensive health insurance scheme to be implemented in several steps over the coming 14 years.¹⁷⁶ This scheme is primarily aimed at Egyptians, but includes the possibility of rendering the services to foreigners who reside in or visit Egypt under the condition of reciprocity.¹⁷⁷ The related Executive Regulation provides further clarification, stating that authorities must setup a health program that covers several types of foreign nationals: permanent residents, foreigners residing in Egypt for work, those entering the country on short-term basis for business, tourism or educational purposes, as well as refugees.¹⁷⁸ It is rare for domestic laws to explicitly address refugees and it would be highly beneficial for refugees to be included in the new scheme. However, this entitlement is limited by the prerequisite of reciprocity. Foreigners could only be included in the scheme if their country of nationality offers the same possibility to Egyptian nationals in its territory. Whether refugees may be exempted from the requirement of reciprocity, as would be required under international law, has not yet been stipulated in the law. The Executive Regulation for the Law does not explicitly

¹⁷¹ CRC, *supra* note 8. As discussed above under 1.2.1, under this Convention children are entitled to benefit from social security, including social insurance and have the right to the highest attainable standard of health.

¹⁷² Law No. 12 of 1996, *supra* note 155, Article 7-bis.

¹⁷³ *Id.* at Article 25.

¹⁷⁴ *Id.* at Article 27.

¹⁷⁵ *Id.* at Article 7-bis(b)

¹⁷⁶ "What you need to know about Egypt's universal health insurance law?", Egypt Today, online portal, 19 December 2017. <https://www.egypttoday.com/Article/2/37507/What-you-need-to-know-about-Egypt's-universal-health-insurance> (accessed on 3 July 2018)

¹⁷⁷ Law No. 2 of 2018, *supra* note 152, Article 59.

¹⁷⁸ Executive Regulation to Law No. 2 of 2018, *supra* note 178, Article 68.

refer to asylum-seekers, but as they are lawfully in the country while their application is being processed, they have the same legal status as refugees or foreign nationals residing for work in Egypt, which are categories listed in the law. However, they might also only be able to benefit from this law on the basis of reciprocity until further clarification is provided.¹⁷⁹ Regular migrants fall under the categories enumerated in the law's Executive Regulations, as they are often in the country on a study or work visa and the law applies to those residing in Egypt for work, as well as those being in Egypt on a short-term basis for business trips, tourism or education, for instance.¹⁸⁰ Irregular migrants cannot benefit from this planned comprehensive health insurance scheme, as it only encompasses foreign nationals with a permanent or temporary residence permit for work, tourism or educational purposes.¹⁸¹

The comprehensive health insurance scheme is not yet in force. It will be implemented in six phases divided by governorates,¹⁸² as such, nationals will only benefit once the scheme has entered into force in their area of residence; the date from which it will be applied to foreigners is yet to be determined. Once in place in the respective governorates, the system will be funded through different channels: The insured has to pay a certain percentage of their income, as well as for any dependent children or unemployed spouse.¹⁸³ All employers pay four percent of their employees' wages into the insurance fund. The insured have to carry part of the treatment costs through copayments, except in the case of the poor whose insurance contributions are covered by the Public Treasury. Furthermore, donations or other external contributions are accepted into the fund. Lastly, the government collects taxes on every pack of cigarettes sold, on the renewing of driver's licenses or vehicle licenses, and on the licenses issued to hospitals or other clinics, which are used to fund the health insurance scheme.¹⁸⁴

Once Law No. 2 of 2018 is implemented, the existing laws on health insurance will be automatically cancelled, and all provisions of previous laws contradicting this new law are

¹⁷⁹ Law No. 2 of 2018, *supra* note 152, Article 59.

¹⁸⁰ Executive Regulation to Law No. 2 of 2018, *supra* note 178, Article 68.

¹⁸¹ Law No. 2 of 2018, *supra* note 152, Article 59. Executive Regulation to Law No. 2 of 2018, *supra* note 178, Article 68.

¹⁸² Table (5) annexed to Law No. 2 of 2018, *supra* note 152: 1st phase: Port Said, Suez, Ismailia, South Sinai, North Sinai; 2nd phase: Aswan, Luxor, Qena, Matrouh, the Red Sea; 3rd phase: Alexandria, Beheira, Damietta, Sohag, Kafr El Sheikh; 4th phase: Assiut, New Valley, Fayoum, Menia, Bani Suef; 5th phase: Dkhaliya, Sharqia, Gharbiya, Monofiya; 6th phase: Cairo, Giza, Qalyubiya.

¹⁸³ Law No. 2 of 2018, *supra* note 152, Article 40.

¹⁸⁴ *Id.* at Article 40.

abrogated.¹⁸⁵ Until this is the case, the following laws are in force: Law Number 79 of the year 1975 provides for social insurance, including medical insurance, for workers who are subject to the provisions of Egyptian Labor Law, are over 18 years old and in a regular work relation with their employer.¹⁸⁶ The social insurance as provided for in this law is based on two funds (one for public sector employees, the other for private sector employees) which, among others, takes its resources from contributions to be paid by the employers on behalf of their workers, contributions made by the workers through deduction from their salaries and from contributions made by the Public Treasury.¹⁸⁷ Thus, if a refugee, asylum-seeker, or regular migrant is employed under Egyptian Labor Law, he/she is entitled to receive social insurance.¹⁸⁸ However, the Social Insurance Law is not applicable to irregular migrants, as they cannot fulfill the requirement of employment according to Egyptian Labor Law: being in a regular work relation between employee/migrant and employer.¹⁸⁹

In addition, there are specific health insurance laws for women supporting themselves, for farmers and agrarian workers, for children of pre-school age, and for students. Law No. 23 of 2012 applies to women supporting themselves and/or their families and do not fall under the health insurance system of any other law.¹⁹⁰ Under this insurance they can receive medical and rehabilitation services needed in the case of illness or accident.¹⁹¹ The annual subscription fee is one percent of the woman's income, with a minimum annual fee of 12 Egyptian Pounds per year. The rest of the insurance is funded through an annual contribution of 200 Egyptian Pounds per unsupported woman by the Public Treasury, and through other forms of aid or donations given to the General Authority for Health Insurance.¹⁹² Law No. 127 of 2014 applies to farmers and agrarian workers who work professionally in agriculture and have this as their main source of income.¹⁹³ They can receive medical service in the designated treatment center

¹⁸⁵ *Id.* at Preamble Article 3: The insured shall continue to benefit from health insurance services under the laws currently in force, until the provisions of Law No. 2 of 2018 come into force according to the geographically phased application. Among others the following law cease to apply:

- Law No. 99 of the year 1992 regarding Health Insurance Scheme for Students;
- Law No. 23 of the year 2012 regarding Health Insurance Scheme for Single Mothers;
- Law No. 86 of the year 2012 regarding Health Insurance Scheme for Preschool Children;
- Law No. 3 of the year 2012 regarding Health Insurance Scheme for Farmers and Agricultural Laborers.

¹⁸⁶ Law No. 79 of 1975, *supra* note 154, Article 2 (b).

¹⁸⁷ *Id.* at Articles 6 and 7.

¹⁸⁸ For more information on the possibility for refugees, asylum-seekers or regular migrants to be employed, see Chapter 5 on Employment.

¹⁸⁹ Law No. 79 of 1975, *supra* note 154, Article 2 (b). See Chapter 5 on Employment for details.

¹⁹⁰ Law No. 23 of 2012, *supra* note 159, Article 1.

¹⁹¹ *Id.* at Article 3.

¹⁹² *Id.* at Article 4.

¹⁹³ *Id.* at Article 1.

of the General Authority for Health Insurance in case of illness or after accidents.¹⁹⁴ The system is funded through the annual subscription fees of the farmers and agrarian workers, which is a maximum of 120 Egyptian Pounds per year; by annual contributions of the Public Treasury, which is 200 Egyptian Pounds per beneficiary; by the Ministry of Agriculture and Land Reclamation, which provides two percent of the medical services rendered; and by any other financial aid or donations made in favor of this health insurance scheme.¹⁹⁵ Those two laws are not explicitly limited to nationals, thus non-nationals including refugees, asylum-seekers and failed asylum-seekers should be able to benefit from these insurances if they fall within the categories of unsupported women or farmers and agrarian workers.

Law No. 86 of 2012 regulates the health insurance for children below the schooling age and provides them with medical care in the designated treatment centers of the General Authority for Health Insurance.¹⁹⁶ The guardians of the children need to pay eight Egyptian Pounds for every child per year, the Public Treasury contributes 12 Egyptian Pounds per year for every child, and other financial aids and donations made are used for funding the system.¹⁹⁷ In the designated treatment facilities, children can benefit from the medical services provided by general and specialized practitioners, X-rays, laboratory tests and other medical examinations, treatment in hospitals, and obtaining necessary medication and other therapeutic appliances. In addition, children are also entitled to receive preventive medical services.¹⁹⁸ Once the child enters school, or turns seven years old and is not enrolled in school, this insurance ceases to apply.¹⁹⁹ Once again, there is no reference to citizenship as a requirement to the benefit from this insurance scheme. Therefore, children of refugees, asylum-seekers and failed asylum-seekers are able to benefit from this law. Law No. 99 of 1992 provides health insurance for students in all levels and types of schools, from kindergarten age until the end of high school.²⁰⁰ The annual contributions are shared between the students and the state. Four Egyptian Pounds are paid by every student in public schools, or ten percent of the yearly tuition fees of students attending private schools or kindergartens, though with a maximum limit of 50 Egyptian Pounds. The Public Treasury contributes 12 Egyptian Pounds per student in state owned

¹⁹⁴ *Id.* at Articles 2-3.

¹⁹⁵ *Id.* at Article 4.

¹⁹⁶ Law No. 86 of 2012, *supra* note 161, Articles 1-2.

¹⁹⁷ *Id.* at Article 3.

¹⁹⁸ *Id.* at Article 4.

¹⁹⁹ *Id.* at Article 6.

²⁰⁰ Law No. 99 of 1992, *supra* note 162, Article 1.

schools or subsidized private schools.²⁰¹ The scheme is not limited to citizens, thus children of refugees, asylum-seekers and failed asylum-seekers can benefit from this insurance, provided they attend school.²⁰²

All those not falling under the specific categories of the above described insurance laws²⁰³ have to finance their medical care and necessary treatment on their own, at least until the Comprehensive Health Insurance Scheme of Law No. 2 of 2018 is actually applied in all governorates of Egypt. Nevertheless, UNHCR states that refugees and asylum-seekers have access to public primary, secondary and emergency health care equally with citizens.²⁰⁴ Through Ministerial Decree Number 601 of 2012,²⁰⁵ the Egyptian Ministry of Health and UNHCR work together in making preventive and curative medical care in public health facilities available to refugees.²⁰⁶ In addition, a Memorandum of Understanding was concluded between Egypt and UNHCR in 2016, in order to establish a framework of collaboration concerning the access to primary and referral medical care, including emergency services, for refugees, asylum-seekers and other persons of concern.²⁰⁷ The Ministry of Health undertakes to ensure that refugees and asylum-seekers benefit from essential health services in government facilities under the same conditions as Egyptians, and facilitate access for the women among them and their newborn children to specialized maternal and children hospitals in 25 Ministry hospitals, with the support of UNHCR. Mental health care services for refugees shall be improved in the mental health hospitals Abbasseya and Helwan in Cairo, and Ma'amoura in Alexandria. In addition, the Ministry shall enhance the critical and emergency care at their hospitals for refugees and Egyptian citizens.²⁰⁸ UNHCR's obligations under the MoU consist mostly of financial contributions. Four selected primary health facilities in Cairo shall be provided with necessary resources in the amount of 80.000 USD to improve the health care for nationals, refugees, and asylum-seeker women and their newborn children. UNHCR is to

²⁰¹ *Id.* at Article 3.

²⁰² See Chapter 6 on Education concerning the problematic of refugees, asylum-seekers, regular migrants, and especially irregular migrants attending school.

²⁰³ The categories are: working under the provisions of Egyptian Labor Law; unsupported women; farmers and agrarian workers; pre-school children; students-

²⁰⁴ UNHCR Egypt Fact Sheet June 2018, 3, available at:

<http://reporting.unhcr.org/sites/default/files/UNHCR%20Egypt%20Fact%20Sheet%20-%20June%202018.pdf> (accessed on 28 June 2018).

²⁰⁵ The original version of this decree could unfortunately not be located in the official Egyptian legal database *Tashre'at*.

²⁰⁶ UNHCR, Primary Health Care Mainstreaming of Syrian Refugees in Egypt, 2006. Available at: <https://reliefweb.int/report/egypt/primary-health-care-mainstreaming-syrian-refugees-egypt>.

²⁰⁷ *Health MoU*, *supra* note 166, Article 1.

²⁰⁸ *Id.* at Article 3.

sponsor incubators to improve neonatal intensive care services in the amount of 600.000 USD and to support Mounira Hospital in Cairo, and other hospitals in the governorates, with medical equipment for their intensive care units at the cost of 420.000 USD.²⁰⁹ Failed asylum-seekers, whether regular or irregular migrants, cannot benefit from the content of this MoU.

The Smuggling Law protects the rights of smuggled migrants, who typically do not have permission to remain in Egypt; however, while they remain within the territory, the state must protect their right to livelihood, humane treatment, physical, moral and psychological safety and healthcare.²¹⁰ The Anti-Trafficking law obliges the state to guarantee the protection of victims of trafficking and to work to provide them with the appropriate health care, as well as psychological and social care.²¹¹

Domestic law states that generally, foreigners pay different hospital fees than Egyptians, which can be determined by the hospital's Board of Directors, unless a decision or Ministerial Decree was issued declaring that certain Non-Egyptians are to receive medical treatment under the same conditions as Egyptians.²¹² The relevant decree also included a price list for Egyptians and Non-Egyptian for who such a decision to be treated like nationals was issued. However, in 2011 these provisions were suspended pending further re-evaluation.²¹³

7.1.5. Overall Legal Framework in Egypt

As discussed above, the right to health consists of different aspects: Firstly, the right to social security, which includes health insurance but may be dependent on specific prerequisites, such as obtaining employment and paying contributions into the social fund of the state, or attending school in Egypt. Secondly, the right to enjoy the highest attainable standard of physical and

²⁰⁹ *Id.* at Article 4.

²¹⁰ Law No. 82 of 2016, *supra* note 157, Article 25.

²¹¹ Law No. 64 of 2010, *supra* note 158, Article 22.

²¹² Ministerial Decree No. 239 of 1997, *supra* note 163, Article 20. Ministerial Decree No. 674 of 2010, *supra* note 164, Article 20.

²¹³ Ministerial Decree No. 334 of 2011, *supra* note 165, Article 1. It was not possible to locate a newer decree on this matter, which leaves unclear what hospital fees currently are for Egyptians and Non-Egyptians. Furthermore, some sources claim that in 2004, a decree concerning medical treatment for the same price as for Egyptians was issued by the Ministry of Health to allow all Sudanese refugees to access governmental health clinics, which was replaced in 2005 by a decree granting this access to all foreign nationalities. However, these decrees could not be located in any databases, nor verified through interviews with policymakers and experts. Therefore, the legal framework concerning the access to hospitals and the related fees remains ambiguous. *See* HILARY INGRAHAM, BRIDGING THE RELIEF-DEVELOPMENT GAP AMONG REFUGEES IN CAIRO: THE NEED FOR GREATER LINKS BETWEEN THE MACRO AND MICRO LEVELS 66-67 (2005).

mental health. Lastly, the right to access medical services without discrimination of any kind. Those rights are granted in different legal instruments, and are often overlapping. Thus, the same right might be granted by more than one international agreement, though with a slightly different content.

Refugees enjoy all these aspects of the right to health. Whether they can benefit from their right to receive the same treatment as nationals with regard to social security and public relief under the Refugee Convention is decided by Egypt on a case-by-case basis. However, based on other international, regional and domestic legal instruments, refugees, as well as asylum-seekers and failed asylum-seekers, have the right to social security and to the highest attainable standard of physical and mental health. Egypt is obliged to fulfill at least the following core obligations in this context: To ensure the right of access to health facilities, without discrimination of any kind; to provide the essential minimum amount of food, basic shelter, housing, sanitation, adequate supply of water, and essential drugs; to adopt a national public health strategy plan of action addressing the health concerns of the whole population;²¹⁴ to ensure universal immunization against the main infectious diseases; to take measures to prevent, treat and control epidemics; and to provide education and access to information concerning health problems.²¹⁵

Under international and regional law, children shall benefit from social security and enjoy the right to the highest attainable standard of mental and physical health. Domestic law implements this through referring to the CRC in the Egyptian Child law and granting children the same rights established therein. Also, according to the Egyptian Constitution, children have the right to free compulsory vaccination, health care and basic nutrition regardless of citizenship or legal status.

In the area of social security, it is legally possible for Egypt to treat nationals and non-nationals differently, as long as there is a legitimate aim and any measures taken are proportional for reaching this aim. The Egyptian Constitution indeed grants the core right of receiving emergency treatment to everyone, but reserves the constitutional right to social security and health care to citizens. The current health insurance law provides medical insurance to

²¹⁴ *General Comment No. 14, supra* note 44, para 43.

²¹⁵ *Guideline African Charter, supra* note 111, para 67.

everyone working under the Egyptian Labor Code.²¹⁶ Also, all students can access health insurance on equal terms with nationals, assuming that there is no discrimination in the access to education for non-nationals.²¹⁷ Furthermore, individuals falling under the categories of unsupported women, or farmers and agrarian workers, or children below school age have access to health insurance at the same term as nationals. The newly issued law on comprehensive health insurance applies primarily to citizens, but also plans to make health insurance available to foreigners and especially refugees. According to this law, no discrimination based on nationality would take place, once implemented.

Based on international law, the access to health care for refugees, asylum-seekers and failed asylum-seekers is to be granted free from discrimination of any kind, including based on gender, race or disability. Based on the MoU between the Ministry of Health and UNHCR, refugees and asylum-seekers have indeed access to public primary, secondary and emergency health care on a par with citizens, in compliance with Egypt's international obligations. With regard to failed asylum-seekers, there are currently no domestic laws or special agreements in force that would clearly guarantee all foreigners the access to public hospitals under the same conditions as citizens. Some nationalities enjoy additional benefits based on bilateral agreements entered by Egypt, however it is unclear under which conditions, or procedures, persons are selected for treatment.

7.2. IMPLEMENTATION

Even if the law in theory gives refugees, asylum-seekers and failed asylum-seekers the right to health, the problem often lies in the lack of implementation and accessibility. Generally, there are three scenarios in which individuals are hindered from enjoying their rights: Firstly, when the responsible administrators are not aware of the entitlement's existence and the corresponding laws. Secondly, if there is an abundance of laws and regulations contradicting each other which makes it hard for officials to identify the applicable law. And thirdly, if a state lacks the necessary resources to actually implement their legal obligations and cannot provide the services individuals should be entitled to. This section examines how the different nationalities access their right to health in Egypt in practice.

²¹⁶ See Chapter 5 on Employment.

²¹⁷ See Chapter 6 on Education.

7.2.1. Access to Health Care by Different Nationalities

7.2.1.1. Syrian Nationals

Syrian refugees enjoy special status in Egypt when it comes to health care, as there are many projects specifically targeted to support Syrians. UNHCR and the Ministry of Health worked together to include Syrian refugees in the Ministry's primary health care system which includes the following preventive and curative care services:

- birth registration and certificates issuing;
- issuing of health cards; premarital care;
- antenatal care and referral for natal care;
- access to routine immunization;
- infant feeding counseling and health checks for under 5 years old;
- treatment of childhood illnesses;
- adolescent care (iron supplement, laboratory services, health education);
- chronic illnesses treatment in some clinics (diabetes and hypertension);
- dental treatment;
- referral services.²¹⁸

UNHCR provides services for:

- treatment of chronic illnesses;
- women with high-risk pregnancies;
- all cases referred by the Ministry of Health facilities for specialized care and examinations.²¹⁹

Furthermore, based on information obtained from experts in the health sector, a Ministerial Decree exists giving Syrian refugees access to health care under the same conditions as Egyptians.²²⁰ This would mean that they can benefit from any free treatment or financial assistance offered to Egyptian nationals. However, the actual decree could not be located in the legal databases for verification. It was reported that Syrians receive a yellow card and their names are registered in a manual database enabling them to access these services, but unfortunately the Ministry of Health faces difficulties in keeping this manual database up to

²¹⁸ UNHCR, *Primary Health Care Mainstreaming of Syrian Refugees in Egypt*, 2016, at 14.

²¹⁹ *Id.*

²²⁰ Information obtained in an interview with a public health expert, February 2019.

date and the database is not shared with hospitals.²²¹ Also, there is a lack of awareness for the possibility of free treatment in public hospitals. For example, only 18% of Syrian refugees access governmental health facilities, mostly because they have not been informed that they could receive free or subsidized health care at those facilities. Instead, 64% rely on private doctors, clinics or hospital despite the high costs. Of the Syrian refugee families who took part in the Health Access Utilization Survey carried out by UNHCR in 2016, three quarters spend in average 735 Egyptian Pounds per month on health care.²²²

Despite their right to access health care, in practice Syrian refugees face two different challenges when accessing health care. Firstly, the staff working in hospitals and clinics might not be aware of this entitlement and refuse to give Syrian refugees access to hospitals under the same conditions as Egyptians. Secondly, having the same access as Egyptians also means facing the same difficulties as Egyptians. Even nationals often fail to find a free bed in government hospitals or to receive treatment free of charge. There are long waiting periods before necessary procedures or even ordinary doctor visits, and the quality of medical care is often very low.²²³ Members of the Syrian community confirmed that public hospitals are cheap but entail long waiting periods, lack of cleanliness and discrimination. They also expressed their concern about the bad quality of medical treatment and resulting possibility of inaccurate diagnosis which can have dangerous consequences or even lead to death. Furthermore, they often fail to be admitted to public hospitals in case of emergency because no free beds are available.²²⁴ As an alternative to the low-quality care of public hospitals, they prefer to resort to private hospitals. There, they can enjoy better health care but are faced with high costs. Often they cannot afford the necessary examinations, treatments or surgeries and have to rely on assistance from family or friends, if available. Thus, despite the possible existence of a Decree improving Syrians' access to health care, in practice they face many difficulties. Support can be found if there are aid programs targeting especially Syrian migrants. Such a joint program was for example operated by the Ministry of Health and UNICEF, which provided free vaccinations, neonatal and postnatal medical care and mental health clinics. Also, the Ministry of Health used to host monthly meetings for new asylum-seekers where more established community members introduced them to the available health facilities. Despite this good

²²¹ Information obtained in an interview with a government official, March 2019.

²²² UNHCR, Vulnerability Assessment of Syrian Refugees in Egypt 2016, at 19.

²²³ EMILY EIDENIER, PROVIDING HEALTH CARE INFORMATION TO REFUGEES IN CAIRO: QUESTIONS OF ACCESS AND INTEGRATION 21 (American University in Cairo, 2006).

²²⁴ Information obtained in focus group discussions held on 16.6.2019, 21.6.2019, and 5.7.2019.

outreach, it was difficult to provide services to failed asylum-seekers or those who chose not to register with UNHCR, because the computer systems in clinics would require an identification or visa number to be entered into the hospital records.²²⁵ Syrian community members confirmed that sometimes they receive assistance from service providers, for example through being referred to a specific hospital by UNHCR or by receiving urgent medicine from Caritas.²²⁶

7.2.1.2. Other Nationalities

For migrants of other nationalities,²²⁷ it was stated that no reservations or limitations were given on their access to health care. Thus, refugees and asylum-seekers also have the same access to primary, secondary and emergency health care as Egyptians. In case of a costly medical treatment or an operation, they resort to the financial assistance of NGOs.²²⁸ Theoretically, foreigners and nationals should pay the same fees at hospitals but no law could be located determining these fees. It has been reported that fees differ from institution to institution and often it is a decision made by each clinic manager how much is charged.²²⁹ UNHCR assists asylum-seekers and refugees to access certain primary health care services. This is done in coordination with the Ministry of Health and other UN agencies such as WHO, UNICEF and UNFPA.²³⁰ Assistance is also provided for secondary and tertiary health care and emergency cases and includes hospitalization for emergencies in need for intensive care, ambulance services to access the Ministry's emergency room care; and hospitalization for elective care interventions.²³¹ Equal access to these services means that the fees to be paid are similar to those Egyptian nationals pay for the same services. Primary health care and emergency services are usually at an affordable nominal fee. However, hospitalization results in higher costs which Egyptian nationals can cover through their health insurance, if available,²³² or through a fund from the state aimed at supporting non-insured vulnerable

²²⁵ Information obtained in an interview with a former health sector employee, April 2019.

²²⁶ Information obtained in focus group discussions held on 16.6.2019, 21.6.2019, and 5.7.2019.

²²⁷ See Chapter 2 Methodology: Besides Syrians, the nationalities focused on are Eritrean, Ethiopian, Iraqi, Libyan, Palestinian, Somali, South Sudanese, Sudanese, Yemeni.

²²⁸ Information obtained in an interview with EFRR's legal team, March 2019.

²²⁹ Information obtained in an interview with a government official, March 2019.

²³⁰ Information obtained in an interview with UNHCR Egypt, January 2020. The primary health care services include: participation in national programs against Hepatitis, TB or HIV; health awareness; reproductive health care; monitoring and management of childhood illnesses; early detection and intervention for disabilities; vaccinations for newborns, infants and children through the Ministry's Immunization Program; management of acute and chronic diseases.

²³¹ Information obtained in an interview with UNHCR Egypt, January 2020.

²³² See 7.1.4.2. Analysis of Domestic Instruments for a description of the available health insurance schemes in Egypt. Due to the lack of formal employment, asylum-seekers and refugees usually cannot benefit from health

citizens.²³³ Asylum-seekers and refugees need to rely on service providers and their support to cover these costs.

During the Focus Group Discussions, participants of all nationalities confirmed that they are theoretically able to access public hospitals at a relatively low fee. However, they were highly dissatisfied with the services provided there. Throughout their time in Egypt they had experienced very low quality of care and stated the following problems: there is a severe lack of cleanliness; hospitals are over-crowded; there are very long waiting periods for treatments and surgeries; inaccurate examinations lead to dangerous misdiagnoses; asylum-seekers, refugees, and failed asylum-seekers often face discrimination (Eritrean and Ethiopian participants especially highlighted this difficulty); and the non-Arab communities identified the language barrier as a major obstacle to obtaining medical care. The Focus Group participants from the South-Sudanese and Ethiopian community were very concerned about being victim of organ trafficking in public hospitals and had heard stories from people barely escaping such forced operations. Based on these problems, risks and fears, participants would prefer to visit private hospitals which offer services of better quality, but can mostly not afford the high costs. The Focus Group participants of Palestinian origin stated that most of them received treatment at Mustafa Mahmoud Hospital, which is supported by UNRWA and the Red Cross, either for free or in exchange of a very small fee. There are special services and medical care available for pregnant women provided by the WFP (United Nations World Food Programme) until their newborn turns two years old.²³⁴

The interviewed communities listed as their biggest health concerns: gynecological issues and child birth, medical care for newborns and infants, psychological issues, chronic illnesses such as diabetes or cancer, Hepatitis, Tuberculosis, malnutrition in children, high cost of medicine and medical examinations such as X-rays. The most severe problem reported is the treatment of emergency cases at public hospitals. The participants who sought urgent care in medical emergencies were all rejected at the public hospitals because there were no free beds available. This forces them to reach out to expensive private hospitals, provided it is not too late after the loss of valuable time trying to get admitted at different hospitals. In general, all participants

insurance through employment, but students enrolled in formal schools are able to take part in the insurance scheme for students.

²³³ Information obtained in an interview with UNHCR Egypt, January 2020.

²³⁴ Information obtained in focus group discussions held on 2.1.2020 with participants of Palestinian origin who came to Egypt from Syria.

would prefer to go to private hospitals to receive medical care, but this is only possible if they have the necessary financial means for the more expensive treatment, or receive funds from service providers.

The Focus Group participants' experience regarding service providers differ. Some stated that there are no health-related services offered by NGOs, others were aware of some service providers and their programs but found them insufficient, and few had successfully used their assistance and were satisfied with them. As examples, the following service providers were mentioned: Caritas, Catholic Relief Services (CRS), Médecins Sans Frontières (MSF), All Saints Church in Zamalek, International Organization for Migration (IOM), Psycho-Social Services and Training Institute in Cairo (PSTIC), CARE, UNHCR, and Save the Children. These organizations assist in different ways. Some arrange referrals to hospitals, co-fund or fund the treatment of persons seeking help, provide free medicine for those with chronic illnesses, or offer counselling to help with mental health disorders. For failed asylum-seekers with closed files, these service providers are the only option to receive medical care, as hospitals will not accept them without an ID. One of the programs run by Caritas Egypt, for instance, has a focus on chronic illnesses. It covers 85% of the medicine price and assists approximately 4.000 patients with chronic illnesses. In addition to that, Caritas operates three clinics in different areas of Cairo (Garden City, Nasr City and 6th of October) and has their own referral system. Through the cooperation between Caritas, UNHCR, and the Ministry of Health and Population, patients are referred to government hospitals, where they pay the same price as Egyptians. For surgeries, Caritas covers between 70% and 100% of the costs.²³⁵ Caritas also assists unaccompanied minors, mostly from Eritrea and Ethiopia, and provides them with free medical care due to their precarious situation.²³⁶ The third group supported by Caritas Egypt are persons with specific needs, such as the elderly or disabled. There are around 600-700 people in this support group. They do not receive cash assistance, per se, but are referred to the cash assistance project, where they will undergo a needs-based assessment. The project itself provides home visits, organizes social events and covers all healthcare payments.²³⁷

7.2.2. Structural Challenges

²³⁵ Information obtained in an interview with Caritas Egypt, July 2019.

²³⁶ *Id.*

²³⁷ *Id.*

The biggest challenge in the structure of the health care system for refugees, asylum-seekers and failed asylum-seekers is fragmentation. Health care is not provided by one centralized institution such as the Ministry of Health, but is divided between the Ministry and several NGOs funding different projects. The Ministry is aiming to align the fragmented services, as can be seen in the attempt to create a new comprehensive health insurance system. In addition, they are working on expanding government health projects to actively include foreigners. For example, the public Hepatitis C screening never explicitly excluded foreigners, but in practice only Egyptian nationals made use of it. It was decided to promote awareness for this health screen among foreigners and especially refugees.²³⁸ These attempts are laudable but still far from providing a comprehensive health care system for asylum-seekers, refugees and failed asylums-seekers. The new health insurance plan for everyone will take many more years to be implemented and it is yet unclear at which stage it will be applicable to foreigners. In the meantime, being covered by health insurance is tied to employment or school attendance. As asylum-seekers, refugees and failed asylum-seekers are usually unable to obtain a work permit,²³⁹ and are thus barred from being officially employed under an employment contract, they do not have a chance to enjoy health insurance.

Some nationalities are given special privileges under the bilateral agreements discussed above under 7.1.3., but it is unclear how they are incorporated into the organizational framework of the Ministry of Health and implemented in practice. Generally, such bilateral agreements are vaguely phrased on purpose as their implementation depends on the current political situation. It leaves room for the Ministry to decide how many cases they will approve and grant the benefits established in the agreement.²⁴⁰ An area where implementation appears to be more successful is medical care for newborns. According to the law, all children receive a health card upon birth which allows them to access medical services and vaccination for free, regardless of the children's nationality. In an interview with a government official, this information was confirmed. Thus, in practice, children of refugees, asylum-seekers and failed asylum-seekers do have access to the health card they are entitled to.²⁴¹ Participants of the Focus Group Discussions have confirmed that it is possible for children to be vaccinated in

²³⁸ Information obtained in an interview with a government official, March 2019.

²³⁹ See Chapter 5 on Employment for more details.

²⁴⁰ Information obtained in an interview with a government official, March 2019. The interviewee shared the experience that the implementation of bilateral agreements like this one usually depends on the political relations between the respective countries. Once there is some tension between them, more cases get denied.

²⁴¹ Information obtained in an interview with a government official, March 2019.

health centers or schools but that they need to provide their child's birth certificate. Participants reported that if they fail to submit this document, they are unable to access the vaccination.

7.3. RECOMMENDATIONS

From a legal perspective, Egypt has implemented its international obligations into domestic law. Foreigners are not excluded from enjoying social security under the same conditions as nationals; they have the right to access health facilities without discrimination, which is the minimum requirement under the ICESCR; children can receive free compulsory vaccinations; and the insurance schemes currently in force do not discriminate against foreigners. Nevertheless, there is a big gap between law and implementation in most of these areas. Having access to public hospitals at the same low fee as Egyptians is meaningless if the quality of care and hygiene standards are so low that they pose a danger to the patients' health. However, this problem is not unique to asylum-seekers, refugees or failed asylum-seekers. Egyptians face the same struggles. Therefore, the solution to this does not lie in enacting legislation eliminating any kind of discrimination, but requires heavy reform and investment in the public health sector to improve government hospitals. Most importantly, the number of beds available for emergency cases needs to be increased drastically to avoid patients being turned away. Whether such reform is possible depends on the financial resources available to Egypt. In the meantime, asylum-seekers, refugees and failed asylum-seekers have to rely on the assistance of service providers. To make this help more effective, vulnerable groups need to be better informed about the available support. Thus, it is suggested to create awareness raising campaigns which would give an overview on all the different programs run by service providers in Egypt to make them more accessible. Another recommendation is to minimize the current fragmentation and start offering health services at specific identifiable institutions to which the service providers refer and direct their funds for this matter.

Administrative steps that could be taken concerning government hospitals include anti-discrimination trainings held for employees of hospitals to ensure that refugees and migrants seeking are not turned away and are treated with respect throughout their stay in hospital. Furthermore, any campaigns Egypt is running against organ trafficking need to be intensified, and specifically, claims concerning organ trafficking in public and private hospitals have to be investigated meticulously. Another big protection gap that needs to be addressed urgently is the access to public hospitals by failed asylum-seekers who are illegally staying in the country.

Without valid identification they are unable to receive medical care, which is fatal in the case of emergencies. An internal directive should be issued to ensure that all individuals are accepted for emergency care, even if they cannot present a valid ID.

CHAPTER 8: HOUSING

8.1. LEGAL FRAMEWORK

8.1.1. International Law

8.1.1.1. International Instruments¹

- *1951 Convention Relating to the Status of Refugees*²
- *International Convention on Economic, Social, and Cultural Rights (ICESCR)*³
- *International Covenant on Civil and Political Rights (ICCPR)*⁴
- *Convention on the Rights of the Child (CRC)*⁵
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁶
- *International Convention on the Rights of Persons with Disabilities (CRPD)*⁷
- *Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*⁸
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*⁹

8.1.1.2. Analysis of International Instruments

¹ Full text of the following legal instruments can be found in Annex F.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*].

³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982.

⁴ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982 with the following declaration: “Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.”

⁵ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

⁶ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 UNTS 13 (entered into force Sept. 3, 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁷ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 UNTS 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

⁸ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 UNTS 319 (entered into force 25 December 2003). [Hereinafter, *Trafficking Protocol*]. Egypt ratified the Protocol on 5 March 2004.

⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*]. Egypt’s accession to the Convention occurred on 19 February 1993.

Refugee Convention confers differing housing entitlements to refugees and asylum-seekers based on their level of attachment to the host state.¹⁰ These entitlements include the right to freely choose their residence, own immovable property, and benefit from public housing assistance. However, the Refugee Convention does not provide an explicit right to housing. Other international human rights conventions create important additional housing entitlements.¹¹ The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides for the right to available and adequate housing and prohibits arbitrary or forced evictions.¹² The International Covenant on Civil and Political Rights (ICCPR) forbids arbitrary or unlawful interference with home and family life.¹³ In addition to the above, international human rights law enforces the housing rights of children,¹⁴ women in rural areas,¹⁵ persons with disabilities,¹⁶ and trafficked persons.¹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) provides housing entitlements to regular and irregular migrant workers.¹⁸

Refugee Convention

The Refugee Convention provides refugees and asylum-seekers the same housing entitlements because they are both considered “lawfully present.” Asylum-seekers are lawfully present once they begin the asylum process regardless of how they entered the country.¹⁹ Failed asylum-seekers do not have housing entitlements under the Refugee Convention because their negative Refugee Status Determination excludes them from the Convention’s scope.²⁰

The Refugee Convention allows refugees and asylum-seekers to move freely within the state and choose their place of residence subject to regulations governing the movement of other

¹⁰ *Refugee Convention*, *supra* note 2, at Articles 13, 21, 23, & 26.

¹¹ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 822 (Cambridge University Press 2005).

¹² *ICESCR*, *supra* note 3, at Article 11.

¹³ *ICCPR*, *supra* note 4, at Article 17.

¹⁴ *CRC*, *supra* note 5, at Article 27.

¹⁵ *CEDAW*, *supra* note 6, at Article 14.

¹⁶ *CRPD*, *supra* note 7, at Article 28.

¹⁷ *Trafficking Protocol*, *supra* note 8, at Article 16.

¹⁸ *CMW*, *supra* note 9, at Article 14 & Article 36.

¹⁹ The Convention’s drafters considered any person who had applied for residence as lawfully present. It did not matter whether they entered the country regularly or irregularly. “Only those who had not applied or whose application had been refused were in an irregular position.” [UN Doc. E/AC.32/SR. 15 Jan. 27 1950 at 15 (as cited in HATHAWAY, *supra* note 11, at 175)]. For further explanation on required levels of attachment to the state see Chapter 1.4.

²⁰ There is an exception to this statement: Failed asylum-seekers do have entitlements under Refugee Convention Article 33 (protection against refoulement). For further information, see Chapter 7.1.1.

aliens.²¹ The Convention's preparatory works indicate that states may regulate alien's movement in certain circumstances like to secure military installations.²² Such restrictions are permissible when applied to all aliens but cannot be used solely to restrict the movement of refugees or asylum-seekers. Restrictions on movement should be narrow and necessary,²³ as opposed to merely administratively or economically convenient.²⁴

States must to accord refugees lawfully present at least the same treatment as aliens generally when it comes to housing matters controlled by law, regulations, or public authorities.²⁵ All registered refugees, individuals with temporary protection status, and asylum-seekers are considered legally present.²⁶ This Provision does not require that refugees enjoy the same housing entitlements as nationals, but discrimination between aliens on the basis of refugee or asylum-seeker status is prohibited. States are responsible for ensuring public officials and private actors treat refugees and asylum-seekers at least equal to other non-aliens.²⁷ Few contemporary housing schemes operate outside the state's legal or administrative control. For example, this provision covers rent control policies, landlord-tenant relations, and the construction and purchase of homes.²⁸ Refugees in Egypt do not have the right to public housing assistance and public relief,²⁹ because Egypt made a reservation to Refugee Convention Article 23.³⁰

²¹ *Refugee Convention*, *supra* note 2, at Article 26. For further information on the right to freedom of movement under international law, see Chapter 7.1.2.

²² PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY* BY DR. PAUL WEIS (UN High Commissioner for Refugees 1990), at 146-148. The *travaux préparatoires* are the official record of the Convention's drafting process. For further explanation see Chapter 2.3.

²³ *Refugee Convention*, *supra* note 2, at Article 31: "[T]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary." This Article addresses asylum-seekers awaiting registration and applies in at least equal measure to regularized refugees. [See, ATLE GRAHL-MADSEN, GÖRAN MELANDER, & ROLF RING, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* (Gudmundur Alfredsson and Asbjørn Eide, eds. 1999) at 272.]

²⁴ GRAHL-MADSEN, MELANDER, & RING, *supra* note 24, at 272.

²⁵ *Refugee Convention*, *supra* note 2, at Article 23.

²⁶ HATHAWAY, *supra* note 11, at 189.

²⁷ *Id.* at 824.

²⁸ *Id.*

²⁹ *Refugee Convention*, *supra* note 2, at Article 23. The Article does not specifically refer to housing but would include government subsidized housing. [See, HATHAWAY, *supra* note 11, at 824]

³⁰ Egypt's Reservation reads: "The competent Egyptian authorities had reservations because these articles consider the refugee as equal to the national. We made this general reservation to avoid any obstacle which might affect the discretionary authority of Egypt in granting privileges to refugees on a case-by-case basis."

Refugees and asylum-seekers have the right to acquire, dispose, and lease property to the same extent as other aliens.³¹ This includes equality in contractual relations, exchange of lease, and access to rent control schemes.³² While states cannot accord refugees lesser treatment than other non-nationals, states may prohibit all non-nationals from owning property.

ICESCR

The Refugee Convention does not limit refugees' rights to those listed in the Convention.³³ When other legal instruments provide additional rights, refugees are entitled to the more expansive rights.³⁴ ICESCR includes a right to an adequate standard of living, including adequate housing.³⁵ Numerous UN agencies and experts have recognized that the right to housing is central for realizing human rights.³⁶ The Committee on Economic, Social, and Cultural Rights (CESCR) states that the right to housing applies regardless of immigration status.³⁷ However, Egypt's housing obligations generally, and towards non-nationals specifically, are limited by the progressive realization standard.

ICESCR allows developing states to progressively realize social, economic, and cultural rights because of the perceived cost.³⁸ CESCR differentiates between the core rights, which must be immediately realized, and rights that can be progressively realized. It explains "[a] state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is,

³¹ *Refugee Convention*, *supra* note 2, at Article 13.

³² WEIS, *supra* note 22, at 85.

³³ *Refugee Convention*, *supra* note 2, at Article 5.

³⁴ Alice Edwards, *Human Rights, Refugees, and the Right to 'Enjoy' Asylum* 17 Int'l. J. Refugee L. 293, 330 (2005). For further explanation on the relationship between international refugee law and international human rights law see Chapter 1.4.

³⁵ ICESCR, *supra* note 3, at Article 11.

³⁶ See, UN General Assembly, *Realization of the Right to Adequate Housing*, 42/146 (7 December 1987) [Hereinafter, *UNGA Realization the Right to Housing*]; UN High Commissioner for Human Rights and UN Human Settlements Programme, *The Right to Adequate Housing*, Fact Sheet No. 21 (Rev. 1) (2009). [Hereinafter, *OHCHR Right to Adequate Housing*]; Cristophe Golay & Melik Ozden, *The Right to Housing*, Human Rights Programme of the Europe-Third World Center (2007); Rachel G. Pratt, Michael Stone, & Chester Hartman (eds 2007.) A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA (Temple University Press 2006); Chester Hartman, *The Case for a Right to Housing*, 9 Policy Housing Debate 223, 246 (1998).

³⁷ UN Committee on Economic, Social, and Cultural Rights, *General Comment No. 4: The right to adequate housing (Article 11(1) of the Convention*, E/1993/23 (1991). [Hereinafter, *CESCR Comment No. 4*]. In specific, Paragraph 6 reads "the right to housing applies to everyone...Further, individuals, and families, are entitled to adequate housing regardless of age, economic status, group, or other affiliation or status or other such factors."

³⁸ ICESCR, *supra* note 3, at Article 2.

prima facie, failing to discharge its obligations under the Covenant.”³⁹ Progressive realization also requires that states expediently move towards the realization of social, cultural and economic rights.⁴⁰ Therefore, ICESCR obliges states to provide at least basic shelter for persons in its territory and take steps to realize the full scope of housing entitlements.

Human rights law is grounded on the premise that persons have fundamental rights by virtue of their humanity, and equal treatment between nationals and non-nationals is the norm.⁴¹ However, in limited cases, differentiation between nationals and non-nationals is permissible. CESCR stated that differential treatment is discriminatory and thus prohibited, unless there is a reasonable and objective justification,⁴² and its implementation is limited to achieve this justified goal.⁴³ There is no clear definition of what is a reasonable justification. CESCR requires an assessment “as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society.”⁴⁴ In addition, the state’s intended aim must be in reasonable proportionality to the effect of discriminatory policies.⁴⁵ Any differentiation between nationals and non-nationals should be narrow in scope and occur as a measure of last resort.⁴⁶ Developing countries may determine the extent of economic rights granted non-nationals, with due regard for human rights and their national economy.⁴⁷ However, this does not apply to noneconomic entitlements like the right to adequate housing.

³⁹ UN 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/C.12/12/90 (1990) at para. 10. [Hereinafter, *CESCR Comment No. 3*].

⁴⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health* UN Doc. E/C.12/2000/4 (2002), at para 8. [“States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization”].

⁴¹ David Weissbrodt, *The Protection of Non-Citizens in International Human Rights in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* 221, 236 (R. Cholewinski, R. Perruchoud & E. MacDonald eds. 2007) at 222. This is reflected in CESCR General Comment No. 20, which interprets of “other status” to include nationality. It states that “the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation.” UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20 (July 2, 2009), at para 30. [Hereinafter, *CESCR Comment No. 20*].

⁴² *CESCR Comment No. 20*, *supra* note 41, para 13.

⁴³ Weissbrodt, *supra* note 41, at 224.

⁴⁴ *CESCR Comment No. 20*, *supra* note *supra* note 41, para 13.

⁴⁵ *Id.*

⁴⁶ Joan Fitzpatrick, *The Human Rights of Migrants in MIGRATION AND INTERNATIONAL LEGAL NORMS* 169, 184 (T. Alienikoff & V. Chetail eds. 2003) at 172.

⁴⁷ *ICESCR*, *supra* note 3, Article 2(3). The *travaux préparatoires* indicates that this Provision was intended for a very specific situation: When the state seeks to limit the economic rights of these dominant non-nationals to give their nationals equal economic opportunities. [See, BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS* 217 (2014). Available at <http://opil.ouplaw.com>.]

ICESCR's text does not detail the content of the right to adequate housing. At minimum, developing states must guarantee a right to basic housing and a right to protection from forced eviction.⁴⁸ CESCR notes a state in which a significant portion of the population lacks basic housing is *de facto* violating its obligations.⁴⁹ It does not oblige the state to provide universal subsidized housing or eradicate all homelessness.⁵⁰ However, it does require the state play an active role in the fulfillment of housing rights.

The state is also obliged to respect housing rights and protect them from unlawful interference. Respecting housing rights includes prohibiting forced eviction and preventing non-state actors from violating housing rights.⁵¹ All forced evictions are assumed to breach this obligation,⁵² whether or not the eviction is punitive or discriminatory and whether carried out by state or private actors.⁵³ Exceptions include rare and specific circumstances, such as when a person persistently fails to pay rent or for certain national development projects.⁵⁴ In these cases, forced eviction must be carried out in accordance with domestic law.⁵⁵ Domestic laws must include certain procedural guarantees: consultation with those affected; adequate and reasonable notice; presence of government officials carrying proper identification; prohibition on carrying out evictions at night or when the evicted would be rendered homeless or vulnerable to human rights violations; and availability of legal remedies and legal aid to those seeking redress.⁵⁶

States are required to progressively realize the multifaceted right to housing, and ultimately fulfill all seven elements of the right to housing.⁵⁷ CESCR defines "adequate housing" as "a

⁴⁸ Scott Leckie, *The Right to Housing in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK* 107-123 (A. Eide, C. Krause, & A. Rosas eds. 1995).

⁴⁹ *CESCR Comment No. 3*, *supra* note 39, at para. 10.

⁵⁰ Leckie, *supra* note 48, at 115.

⁵¹ *Id.* at 113-114.

⁵² *CESCR Comment No. 7*, *supra* note 71, at para. 24. They define forced evictions as "the permanent or temporary removal against their will of individuals, families, and/or communities from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection" (para.3).

⁵³ *OHCHR Right to Adequate Housing*, *supra* note 36, at 4.

⁵⁴ UN Committee on Economic, Social, and Cultural Rights, *General comment No. 7: The right to adequate housing (Art. 11(1) of the Convention): Forced eviction* E/1998/22 (1997) at para. 39. [Hereinafter, *CESCR Comment No. 7*]

⁵⁵ *CESCR Comment No. 7*, *supra* note 54, at para. 15.

⁵⁶ *CESCR Comment No. 7*, *supra* note 54, para. 15.

⁵⁷ Leckie, *supra* note 48, at 113-114.

right to live somewhere in security, peace and dignity.”⁵⁸ This entails more than a right to “four walls and a roof.”⁵⁹ Adequate housing is contingent on the availability of services, materials, facilities, and infrastructure needed for health, security, comfort, and nutrition.⁶⁰ CESCE outlines seven identifiable aspects of the right to housing: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.⁶¹ Security of tenure requires a degree of certainty as to the legality of their housing arrangement and protection against forced eviction.⁶² CESCR requires sustainable access to community provisions such as safe drinking water, fuel sources for heating, lighting, and cooking, refuse disposal and emergency services, and sanitation facilities.⁶³ Housing needs to be affordable, which is to say household costs should not require the sacrifice of other basic needs.⁶⁴ If the cost of housing requires the sacrifice of other basic needs, states are obliged to establish housing subsidies and protect tenants from unreasonable rent costs or increases.⁶⁵ Housing needs to be habitable, and inhabitants should have adequate space and protection against extreme weather conditions, disease, and structural hazards.⁶⁶ Thus, overcrowding, unsanitary conditions, and makeshift housing violate the right to adequate housing.⁶⁷ CESCR additionally recommends that states also take steps to implement the World Health Organization’s *Health Principles of Housing* to combat the risk of infectious diseases.⁶⁸ Finally, housing should be near employment opportunities, schools, and health services and not in unsafe or polluted areas.⁶⁹

Since these elements of the right to housing are not core obligations, developing states are under an obligation to progressively take steps towards their realization. Refugees and asylum-seekers share nationals’ entitlement to the full spectrum of housing-related rights. Additionally,

⁵⁸ CESCR Comment No. 4, *supra* note 37, at para. 7.

⁵⁹ OHCHR *Right to Adequate Housing*, *supra* note 36, at 3.

⁶⁰ CESCR Comment No. 4, *supra* note 37, at para. 8(b).

⁶¹ *Id.* at para. 8. These attributes are detailed further in the *Global Strategy for Shelter to the Year 2000* [UN General Assembly, *Global Strategy for Shelter to the Year 2000*, A/Res/43/181 (1988)] and *Report on the Commission on Human Settlement* [UN General Assembly, *Report of the Commission on Human Settlement* A/56/8 (2001)].

⁶² CESCR Comment No. 4, *supra* note 37, at para. 8.

⁶³ *Id.* at para. 8(b).

⁶⁴ OHCHR *Right to Adequate Housing*, *supra* note 36, at 3.

⁶⁵ CESCR Comment No. 4, *supra* note 37, at para. 8 (c).

⁶⁶ *Id.* at para. 8(d).

⁶⁷ HATHAWAY, *supra* note 11, at 479.

⁶⁸ CESCR Comment No. 4, *supra* note 37, at para. 8(d). The CESCR’s General Comment indicates that implementing the *Health Principles of Housing* is a recommendation not an obligation for states. The *Health Principles of Housing* are available at: <http://apps.who.int/iris/handle/10665/39847>. Refugees, asylum-seekers, and failed asylum-seekers’ entitlements to health are discussed in Chapter 7.

⁶⁹ OHCHR *Right to Adequate Housing*, *supra* note 36, at 4.

states have special obligations towards non-nationals because of their vulnerability.⁷⁰ The Special Rapporteur on Adequate Housing as a Component on the Right to an Adequate Standard of Living indicates that states have a dual obligation to prevent housing discrimination for non-nationals and to address the additional vulnerabilities non-nationals often face when seeking housing.⁷¹

Egypt has a reservation to the ICESCR stating that Egypt will implement all provisions of the ICESCR provided they do not contradict Islamic Sharia. Egypt has not applied this Reservation to the right to adequate housing.⁷² In 1990, Egypt participated in issuing the *Cairo Declaration on Human Rights in Islam*. The Cairo Declaration stipulates that every individual is entitled to decent standard of living to meet their basic needs, including housing.⁷³ The Declaration applies to everyone regardless of nationality.

ICCPR

ICCPR prohibits unlawful or arbitrary interference in a number of protected spheres, namely an individual's privacy, family, home, correspondence, honor, and reputation.⁷⁴ Human Rights Committee (HRC) states that "[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."⁷⁵ HRC includes the entitlement to privacy, family, home, and correspondence as one of the core ICCPR rights owed to non-nationals.⁷⁶ Thus, refugees, asylum-seekers, and failed asylum-seekers are entitled to freedom from unlawful or arbitrary interference in their home except in rare circumstances outlined below.

⁷⁰ CESCR requires states take into account the challenges vulnerable groups face in securing housing: "The elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disaster, people living in disaster-prone areas, and other groups" should receive priority. *CESCR Comment No. 4*, *supra* note *supra* note 37, at para. 8(e).

⁷¹ *CESCR Comment No. 7*, *supra* note 54 at para. 39.

⁷² *Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.*

⁷³ Organization of Islamic Conference, *Cairo Declaration on Human Rights in Islam*, art. 9 adopted on 5 August 1990, at Article 17. [Hereinafter, *Cairo Declaration*]

⁷⁴ *ICCPR*, *supra* note 4, at Article 17.

⁷⁵ Human Rights Committee, *General comment No. 15: The Position of Aliens under the Covenant* HRI/GEN/Rev.9 (Vol. 1) (1986) at para. 1. [Hereinafter, *HRC Comment No. 15*].

⁷⁶ *HRC Comment No. 15*, *supra* note 75 at para. 7.

The right to privacy precludes unlawful or arbitrary interference by public authorities or private actors within a place where a person resides.⁷⁷ Interference is “arbitrary” when it occurs unlawfully, is a result of domestic legislation not in accordance with the aims and objectives of the Covenant, or is unreasonable in the particular circumstance.⁷⁸ The European Court of Human Rights (ECtHR) has interpreted this as obliging states to prevent the willful damage of an individual’s home,⁷⁹ and damage caused by nuisance.⁸⁰ ICCPR creates an immediate obligation to “adopt legislative and other measures to give effect to the prohibition against such interferences and attacks.”⁸¹

Individuals do not enjoy an absolute right to privacy and non-interference in the home and private life.⁸² States may call for private information if it is essential to the interests of society and in line with the purpose of the Convention.⁸³ However, state interference in personal affairs must be limited in scope, prescribed through detailed domestic legislation, and occur on a case-by-case basis.⁸⁴ As a minimum standard, ECtHR and High Commissioner for Human Rights require a warrant to enter a home.⁸⁵ Laws governing the issuing of warrants must be narrowly tailored, sufficiently precise in temporal and spatial scope, and contain adequate safeguards against abuse.⁸⁶

The right to privacy in the home may be curtailed during a state of emergency. ICCPR allows states to derogate from certain provisions during officially proclaimed public emergencies if

⁷⁷ UN Committee on Civil and Political Rights, *General comment No. 16: Article 17 (Right to Privacy), The Right to Privacy, Family, Home and Correspondence, and the Protection of Honour and Reputation*, (1988) at para. 5. [Hereinafter, *CCPR General Comment 16*].

⁷⁸ *Id.* at para. 3 & 4.

⁷⁹ *Akdivar and Others v. Turkey*, 99/1995/605/693, Council of Europe: European Court of Human Rights 30 August 2006.

⁸⁰ URSULA KELLEY, *THE RIGHT TO RESPECT OF PRIVATE AND FAMILY LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Council of Europe 2001) at 59-60. [Egypt is not bound by the provisions of Article 8 of the European Convention on Human Rights. However, Article 8(1)’s text is consistent with ICCPR Article 17, and the implementation guide provides useful guidelines.]

⁸¹ UN High Commissioner for Human Rights, *Progressive Realization* E/2007/82 (2007) at para. 1.

⁸² *CCPR Comment No. 16, supra* note 77, at para.7.

⁸³ *Id.* at para. 7.

⁸⁴ *Id.* at para. 8.

⁸⁵ *See*, EUROPEAN COURT OF HUMAN RIGHTS, *GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME, AND CORRESPONDENCE* (Council of Europe 2018) at 69; UN High Commissioner for Human Rights, *The right to privacy in a digital age* A/HRC/27/37 (2014) at para. 38. [The High Commissioner further notes that broad range surveillance programs, even when employed in the name of national security, violate the right to privacy in their homes.]

⁸⁶ *CCPR Comment No. 16, supra* note 77, at para. 28. & *Supra* note 75 at 63. The text cites an extensive list of procedural safeguards included in Swiss domestic law as an example of compliance with this obligation. This decision is not binding on Egypt but provides an example of the procedural safeguards required [*Camenzind v. Switzerland*, 136/1996/755/945, Council of Europe: European Court of Human Rights (1997)].

measures undertaken are necessary, proportionate, and non-discriminatory.⁸⁷ During a state of emergency, states are obliged to refrain from undertaking actions discriminatory to minorities and have a positive obligation to ensure minority populations' human rights are protected.⁸⁸ HRC considers non-nationals generally to constitute a minority group that would thus be entitled to protection.

Other International Human Rights Law Instruments

Children have additional housing entitlements under the *Convention on the Rights of the Child* (CRC). Committee on the Rights of the Child (CRC Committee) emphasized that children seeking asylum or who have refugee status should receive appropriate protection and assistance in enjoying their rights.⁸⁹ Though migrant children are not explicitly mentioned, CRC Committee has stated that they are entitled to all CRC rights.⁹⁰ CRC stipulates that children have a right to a "standard of living adequate to for the child's physical, mental, moral and social development."⁹¹ The UN Children's Fund (UNICEF) interprets this Provision as entitling children to a right to housing, since it is a necessary component of obtaining an adequate level of physical and mental development.⁹² Children's entitlements to housing extend beyond a simple "right to shelter." Their right to housing encompasses access to housing that is structurally and environmentally safe, has adequate access to potable water, and is

⁸⁷ ICCPR, *supra* note 4, at Article 4. Article 4 includes a list of Articles which may not be abridged under any circumstances but Article 17 is not included. As such, certain limitations to the right to privacy during a state of public emergency are legally permissible. Any state limiting ICCPR entitlements during a public emergency must notify the UN Secretary General and provide communication to all ICCPR signatories. The Communication must include from what Provisions it has limited and the reasons this occurred.

⁸⁸ Egypt to Extend State of Emergency for Three Months," *eNews Channel Africa* (24 June 2018), available at: <https://www.enca.com/africa/egypt-to-extend-state-of-emergency-for-three-months>. [Hereinafter, *Egypt to Extend State of Emergency*]. The impact of Egypt's national emergency laws on domestic legislation is discussed in Subsection 4.1.1.

⁸⁹ CRC, *supra* note 5, Article 22.

⁹⁰ The Committee explains that with regard to migrant children

States should ensure that children in the context of international migration are treated first and foremost as children. States parties to the Conventions have a duty to comply with their obligations set out therein to respect, protect and fulfil the rights of children in the context of international migration, regardless of their or their parents' or legal guardians' migration status.

Committee on the Rights of the Child & Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of the child in the context of international migration* CMW/C/GC/3-CRC/C/GC/22 (2017) at para. 11. [Hereinafter, *CMW Committee Comment No. 3*]

⁹¹ CRC, *supra* note 5, at Article 27.

⁹² UN Children's Fund, *The Convention on the Rights of the Child- Survival and Development Rights: The basic rights to life, survival, and the development on of one's full potential* in IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (3rd ed. 200) at 399.

proximate to health care and education facilities.⁹³ States are obliged to undertake appropriate measures to assist parents with providing children shelter, including material assistance and support programs.⁹⁴ In the case of unaccompanied or separated children without a guardian capable of providing for basic needs, states must assume the cost of providing basic shelter.⁹⁵ CRC also protects children from “arbitrary or unlawful interference with his or her privacy, family, or correspondence.”⁹⁶ This is interpreted consistently with the ICCPR, and thus extends to children the right to privacy in the home.⁹⁷

The *Convention to End All Forms of Discrimination against Women* (CEDAW) outlines women’s housing entitlements. The CEDAW Committee indicates that all housing-related provisions apply to migrant women.⁹⁸ First, it stipulates that women have equal capacity to men in all civil matters like the conclusion of contracts, administration of property, freedom of movement, and choice of home.⁹⁹ Women are entitled to own and lease property under the same conditions as men.¹⁰⁰ Second, CEDAW indicates that women possess equal legal capacity to men for the acquisition, ownership, and sale of immovable property, including residences and land.¹⁰¹ Domestic legislation that allows an uneven division of assets in divorce or inheritance violates CEDAW.¹⁰² However, Egypt has a Reservation on CEDAW Article 16 and Article 2(1) that is based on *Sharia* law,¹⁰³ and the division of assets during divorce or inheritance is governed by *Sharia* law in Egypt rather than CEDAW. Third, rural women are entitled to additional housing entitlements in recognition of rural communities’

⁹³ United Nations Conference on Human Settlements [HABITAT II], *Final Report*, A/CONF.165/14 (1996) at 15.

⁹⁴ CRC, *supra* note 5, at Article 27.

⁹⁵ Committee on the Rights of the Child, *General Comment No. 6: Unaccompanied and Separated Children outside Their Country of Origin* CRC/GC/2005/6 (2006) at para. 6. The Committee defines an unaccompanied minor as a child migrant separated from and not cared for by parents, guardians, and relatives, while a separated minor is a child migrant separated from parents and guardians but cared for by relatives.

⁹⁶ CRC, *supra* note 5, at Article 16.

⁹⁷ UN Children’s Fund, *supra* note 92 at 112.

⁹⁸ 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 to End All Forms of Discrimination against Women* CEDAW/C/GC/28 (2010) at para. 12. [Hereinafter, *CEDAW Committee Recommendation No. 28*]. The non-discriminatory nature of CEDAW is pursuant to Article 2(1) of the Convention.

⁹⁹ CEDAW, *supra* note 6, at Article 15.

¹⁰⁰ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations* A/49/38 (1994) at para.7. [Hereinafter, *CEDAW Committee Recommendation No. 21*].

¹⁰¹ CEDAW, *supra* note 6, at Article 16.

¹⁰² CEDAW Committee Recommendation No. 21, *supra* note 98, at para. 25.

¹⁰³ CEDAW, *supra* note 6, at Egypt’s Reservation.

marginalization. The Provision indicates special attention needed to secure the fundamental rights of women and female children in rural areas.¹⁰⁴

The *Convention on the Rights of Persons with Disabilities* (CRPD) ensures that persons with disabilities have equal housing rights with abled persons. The Special Rapporteur on the Rights of Persons with Disabilities has stated that securing non-nationals' rights is a current priority for the United Nations.¹⁰⁵ CRPD reinforces persons with disabilities' entitlement to an adequate standard of living for themselves and their families, including the right to adequate housing.¹⁰⁶ In particular, it requires states to provide persons with disabilities access to public housing. Persons with disabilities have the right to independent living,¹⁰⁷ and the state is obliged to provide assistance to secure this. They also have the right to choose their place of residence subject only to the restrictions applicable to the general population.¹⁰⁸

The Trafficking Protocol recommends states provide housing entitlements to trafficked persons, defined as individuals' transported without their consent for the purpose of exploitation.¹⁰⁹ States are encouraged to provide housing for trafficked persons, and required to provide special accommodation for trafficked children.¹¹⁰ This is a temporary protection until trafficked persons obtain refugee status or some other visa to remain in Egypt or return to the country of nationality.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (CMW) reinforces regular and irregular migrant workers' and their families' housing entitlements. Refugees and asylum-seekers are excluded from the scope of the CMW,¹¹¹ and the Convention provides more expansive rights to regular migrants than irregular migrants.¹¹² Regular and irregular migrants have the right to privacy in their home.¹¹³

¹⁰⁴ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 34 on the Rights of Rural Women* CEDAW/C/GC/34 (2016) at para. 15.

¹⁰⁵ Catalina Devandas Aguilar, "Migrants and Refugees with Disabilities Must be New Priority in New Global Compact on Migration," *Office of the High Commissioner for Human Rights* 12 April 2017.

¹⁰⁶ CRPD, *supra* note 7, at Article 28.

¹⁰⁷ *Id.* at Article 9.

¹⁰⁸ *Id.* at Article 9 & 19.

¹⁰⁹ Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, 12 FMR 25, 28 (2002) at 25.

¹¹⁰ *Trafficking Protocol*, *supra* note 8, at Article 6.

¹¹¹ CMW, *supra* note 9, at Article 3.

¹¹² *Id.* at Article 36.

¹¹³ *Id.* at Article 14.

The scope of this entitlement is undefined but it is likely consistent with interpretations of the ICCPR.¹¹⁴

Failed asylum-seekers who are working and regularly staying in Egypt and their family members have additional housing rights. Regular migrant workers are entitled to move freely within the state's territory and choose their residence, subject to restrictions states enact for their own nationals.¹¹⁵ They are also granted equal housing entitlements as nationals, including social housing schemes. CMW does not define the right to housing, but the European Union interprets this provision similarly to the ICESCR:¹¹⁶ states are not obliged to prevent homelessness but should progressively ensure the security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy of housing options.¹¹⁷ The commentary to the International Migrants Bill of Rights ties migrant housing rights to the general human rights framework for an adequate standard of living.¹¹⁸ CMW provides migrant workers engaged in project work and their families housing on an equal basis as nationals but does not require access to social housing schemes.¹¹⁹

8.1.2. Regional Law

8.1.2.1. Regional Instruments¹²⁰

- *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*¹²¹
- *African Charter on Human and Peoples' Rights*¹²²

¹¹⁴ *CCPR Comment No. 16*, *Supra* note 77, at para. 5.

¹¹⁵ UN HIGH COMMISSIONER FOR HUMAN RIGHTS, THE INTERNATIONAL CONVENTION ON THE RIGHTS OF MIGRANT WORKERS AND ITS COMMITTEE: FACT SHEET NO. 24 (REV. 1) (2005) at 7.

¹¹⁶ Artus Kucs, Zane Sedlova, & Liene Pierhurovica, *The Right to Housing: International, European, and Domestic Perspectives* 64 Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol 101, 123 (2010) at 104.

¹¹⁷ *CESCR Comment No. 4*, *supra* note 37, at para. 8. The European Union's approach is not binding on Egypt but is useful for interpretive purposes.

¹¹⁸ *International Migrants Bill of Rights*, 28 Geo. Imigr. L. J. 23, 103 (1993) at 97. Though the IMBR is not legally binding, its authors are experts in international human rights law and it is useful for interpretive purposes.

¹¹⁹ *CMW*, *supra* note, at Article 61 & Article 62.

¹²⁰ Full text of the following legal instruments can be found in Annex F.

¹²¹ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974). [Hereinafter, *OAU Refugee Convention*]. Egypt ratified the Convention on 17 November 1980.

¹²² African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

- *African Charter on the Rights and Welfare of the Child*¹²³
- *African Youth Charter*¹²⁴
- *Charter on the Rights of the Arab Child*¹²⁵ (Arab children only)

8.1.2.2. Analysis of Regional Instruments

8.1.2.2.1. Differences on the Basis of Nationality

African Charter on Human and Peoples' Rights (African Charter), *African Charter on the Rights and Welfare of the Child* (ACRWC), and *African Youth Charter* (AYC) recognize the human rights of all individuals within the territory of a state party, whether they are nationals or non-nationals.¹²⁶ African Charter Article 2 prohibits any discrimination based on several grounds, including "other status."¹²⁷ There is no available preparatory work for the African Charter, so scholars have interpreted Article 2 with reference to a similar provision in the ICESCR.¹²⁸ The CESCR interprets prohibited discrimination on the grounds of "other status" in the ICESCR as including discrimination based on nationality.¹²⁹ The African Commission confirmed that rights of the Charter apply to refugees, asylum-seekers, regular migrants and irregular migrants regardless of their nationality.¹³⁰ ACRWC and AYC also contain identical prohibitions on discrimination based on "other status."¹³¹ ACRWC also directly stipulates that

¹²³ African Charter on the Rights and Welfare of the Child, July 1, 1990, CAB/LEG24.9/49 (entered into force Nov. 29, 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

¹²⁴ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

¹²⁵ Charter on the Rights of the Arab Child, art. 11, *adopted* on 6 June 1983 [Hereinafter, *CRAC*]. Egypt ratified the Charter on 1 January 1993.

¹²⁶ Monette Zard et al., *Refugees and the African Commission on Human and Peoples' Rights*, 16 *Forced Migr. Rev.* 33, 34 (2003).

¹²⁷ *African Charter*, *supra* note 122, Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

¹²⁸ ICESCR, *supra* note 3, Article 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹²⁹ UN Committee on Economic, Social and Cultural Rights, "General Comment No. 20: Non-discrimination in economic, social and cultural rights" (2009), UN Doc. E/C.12/GC/20, July 2, 2009, para 30.

¹³⁰ Marina Scharpe, *The Regional Law of Refugee Protection in Africa* 130 (2018).

¹³¹ *ACRWC*, *supra* note 123, Article 3: "Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" & *AYC*, *supra* note 124, Article 2(1): "Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

states provide refugee children with protection and humanitarian assistance.¹³² Following the aforementioned reasoning, this prohibits any discrimination among non-nationals based on nationality, and makes these legal instruments applicable to refugees, asylum-seekers and failed asylum-seekers alike.

The Charter on the Rights of the Arab Child (CRAC) identifies the rights owed Arab children.¹³³ CRAC does not define “Arab,” so it is unclear whether it applies to all citizens of Arab states, only citizens of State Parties to the Charter, only to those of Arab ethnicity regardless of nationality, or some other category. The Charter’s focus on Arab children potentially limits its protections for some refugee children but the parameters are unclear. The CRAC was criticized for violating the non-discrimination provisions of international human rights law,¹³⁴ especially towards non-Arab communities.¹³⁵ However, Egypt subsequently participated in non-binding declarations that include a commitment to guaranteeing children’s rights without reference to ethnicity.¹³⁶

8.1.2.2.2. Regional Entitlements

African regional human rights conventions provides four housing-related entitlements: the right to choose one’s place of residence in accordance with domestic law,¹³⁷ contingent on obedience to domestic law,¹³⁸ the right to own and inherit property,¹³⁹ the right privacy and protection of the home,¹⁴⁰ and the right to adequate housing.¹⁴¹ African Charter on the Rights and Welfare of the Child (ACRWC) and African Youth Charter (AYC) provide specific

¹³² *ACRWC*, *supra* note 123, Article 22: “Refugee Children should receive appropriate protection and humanitarian assistance.”

¹³³ MERVAT RISHMAWI, *THE LEAGUE OF ARAB STATES HUMAN RIGHTS STANDARDS AND MECHANISMS* (Cairo Institute for Human Rights Studies 2015) at 84.

¹³⁴ RISHMAWI, *supra* note 133, at 82-84.

¹³⁵ Juliane Osterhaus, *The Arab Human Rights System ABC of Human Rights for Development Cooperation* 1, 10 (2017) at 3.

¹³⁶ *See, The Cairo Declaration on Development Challenges and Population Dynamics*, Regional Conference on Population and Development in the Arab States (ICPD Beyond 2014), 2013 & *Rabat Declaration on Children in the Islamic World*, Organization of Islamic Conferences, 2003.

¹³⁷ *African Charter*, *supra* note 122, at Article 12 & *OAU Refugee Convention*, *supra* note 121, at Article II.

¹³⁸ *OAU Refugee Convention*, *supra* note 121, at Article II.

¹³⁹ *African Charter*, *supra* note 122, at Article 18.

¹⁴⁰ *Id.* at Article 14 & Article 18; *ACRWC*, *supra* note 123, at Article 10; *AYC*, *supra* note 124, at Article 7 & Article 8.

¹⁴¹ The Charter does not contain an explicit entitlement to housing but the African Commission on Human and People’s Rights found that Articles 14, 16, and 18 together create this entitlement. (*See, Communication No. 155/96, Social, Economic, and Cultural Rights Centre and Centre for Economic and Social Rights vs. Nigeria* 15TH ANNUAL REPORT 1996-1997 at para. 60. [Hereinafter, *SERAC*]).

housing entitlements to child and youth refugees.¹⁴² Under regional law, refugees, asylum-seekers, and failed asylum-seekers have the same housing entitlements as nationals based on physical presence in the state, regardless of nationality. Unlike international law, regional law does not differentiate between regular and irregular migrants. The only exception is the OAU Refugee Convention, which only applies to refugees and asylum-seekers.

African Commission for Human and People's Rights (ACHPR) states the right to choose one's residence is expansive but not unlimited. There is a difference between the permissible restrictions on the right to choose one's residence in regional law and other international instruments. Amnesty International's guidelines explain that "authorities are allowed to restrict this right only in exceptional circumstances, such as war, when they may temporarily forbid people from leaving their home towns, for example."¹⁴³ OAU Refugee Convention further conditions this right: "[F]or reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin." Subject to these constraints, aliens have the right to choose their place of residence.

The African Charter provides a more explicit right to own and inherit property than other international human rights law instruments.¹⁴⁴ ACHPR broadly interprets this right.¹⁴⁵ The right to property consists of two principles: the right to own and peacefully enjoy property and the right to protection against interference with private property.¹⁴⁶ States are under a dual obligation to respect property ownership and ensure private actors respect property ownership.¹⁴⁷ ACHPR notes that the right to property ownership is not contingent on citizenship.¹⁴⁸ However, the state may encroach on the right to property in the interest of public

¹⁴² *ACRWC*, *supra* note 123, at Article 10 & Article 14; *AYC*, *supra* note 124, at Article 7, Article 8, Article 9, Article 14, & Article 16.

¹⁴³ AMNESTY INTERNATIONAL, A GUIDE TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (Benson House 2006) at 17. [Hereinafter, *Guide to the African Charter*].

¹⁴⁴ *African Charter*, *supra* note 122, at Article 14.

¹⁴⁵ Communication Nos. 54/91, 61/91, 98/93, 164-166/94, & 210/98, *Malawian African Association and Others v. Malawi* 13TH ACTIVITY REPORT (2000) at para. 128: "[The] right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed, invaded or encroached upon."

¹⁴⁶ *Dino Noco v. Democratic Republic of Congo*, African Commission on Human and People's Rights, Communication No. 286/2004, 22 October 2012, at para. 128. [Hereinafter, *Dino Noco*]

¹⁴⁷ Manisuli Ssenyonjo, *Analysing the Economic, Social, and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* 29 Nethl. QHR 358, 397 (2011) at 374.

¹⁴⁸ In *Dino Noco*, *supra* note 146, ACHPR addressed non-nationals' rights to property ownership under African Charter Article 14, finding that when interpreted considering Article 2(1)'s non-discrimination clause, Article 14 "clearly show[s], beyond reasonable doubt, that that every individual has the right to property ownership (para. 143).

need or for the community's general good. Such limitations must be enacted into domestic legislation.¹⁴⁹ "Public need" and "general good" are left undefined. Domestic legislation permitting property deprivations cannot not be discriminatory and must be proportionate to achieve the aforementioned legitimate aims.¹⁵⁰ Even when proportionate and provided for by domestic law, states must evidence that deprivation of property is the least restrictive policy measure possible.¹⁵¹

Unlike ICESCR, the African Charter does not explicitly state that individuals have a right to housing. In the *SERAC* decision,¹⁵² ACHPR articulated that the right to housing is derived from the combination of African Charter provisions protecting the rights to property, health, and to family life. *SERAC* requires states to refrain from destroying the homes, protect individuals from housing destruction, and provide remedies in the event of destruction.¹⁵³ States are also responsible for preventing both state and non-state actors from violating the right to housing.¹⁵⁴ Drawing on *SERAC* and the subsequent *Darfur* case,¹⁵⁵ the ACHPR issued the *Resolution on the Right to Adequate Housing and Protection from Forced Evictions*.¹⁵⁶ The Resolution emphasizes that a forced eviction should be an option of last resort and urges states to adopt legislation prohibiting this practice.¹⁵⁷ The African regional framework does not discuss the quality or accessibility of housing.

ACRWC and AYC reinforce the housing entitlements owed to children and youth. The ACRWC confers entitlements to privacy in the home,¹⁵⁸ protection for the family unit,¹⁵⁹ and

¹⁴⁹ ACHPR, *supra* note 122, at Article 14.

¹⁵⁰ *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and People's Rights, Communication No. 276/2003, 4 February 2010, at para. 211. [Hereinafter *Endorois Welfare Council*].

¹⁵¹ *Endorois Welfare Council*, *supra* note 150, at para. 214.

¹⁵² *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESCR) vs. Nigeria*, African Commission on Human and Peoples Rights, Communication No. 155/96, 27 October 2001 at para. 60. [Hereinafter, *SERAC*]. Paragraphs 59-63 addresses the right to housing.

¹⁵³ *SERAC*, *supra* note 152, at para.61.

¹⁵⁴ See, *SERAC*, *supra* note 152, at para.61 & African Commission on Human and People's Rights, *Resolution on the right to adequate housing and protection from forced evictions* 52nd Ordinary Session Doc. No. 231 (2012). [Hereinafter, *ACHPR Resolution on Adequate Housing*].

¹⁵⁵ *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, African Commission on Human and People's Rights, Communication No. 279/03-296/05, 27 May 2009. at para. 159

¹⁵⁶ ACHPR *Resolution on Adequate Housing*, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ ACRWC, *supra* note 123, at Article 10.

¹⁵⁹ *Id.* at Article 18.

entitlements to housing.¹⁶⁰ States are under an obligation to “fully ensure the right to an adequate standard of living for children, including the right to housing, nutrition, and the highest attainable standard of health.”¹⁶¹ An “adequate standard of living” consists of the right to survival and the right to development, defined as fostering and nurturing the many dimensions of the child.¹⁶²

The AYC provides youths, defined by the Charter as person between the ages of 15 and 35,¹⁶³ with entitlements to privacy,¹⁶⁴ property,¹⁶⁵ and housing,¹⁶⁶ in a manner consistent with other international and regional treaties. Furthermore, it gives female youths equal rights to property ownership and inheritance as male youths. This entitlement to equal property rights has importance for refugee women because Egypt has made reservations to similar provisions in the ICESR and CEDAW but not to AYC.

CRAC provides the right to sustainable shelter as part of the broader right to social insurance and healthy environment from conception until the end of childhood.¹⁶⁷ The *Cairo Declaration* further addresses the right to shelter.¹⁶⁸ The Declaration does not limit the entitlement to housing to children, and is applicable to the larger community. It is non-binding but indicates a political acknowledgment of housing’s importance and bolsters similar provisions in binding Conventions.

8.1.3. Bilateral Law

8.1.3.1. Bilateral Instruments¹⁶⁹

- *Four Freedoms Agreement between Egypt and Sudan*¹⁷⁰ (Sudanese nationals only)

¹⁶⁰ *ACRWC*, *supra* note 123, at Article 10 & 14. Similar to the African Charter, children’s right to housing is derived from an interdependent interpretation of the right to family unity and the right to the best attainable physical, mental, and spiritual health.

¹⁶¹ THOKO KAIME, *THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: A SOCIO-LEGAL PERSPECTIVE* (Pretoria University Law Press 2009) at 120.

¹⁶² KAIME, *supra* note 161, at 121.

¹⁶³ *AYC*, *supra* note 124, at Preamble.

¹⁶⁴ *Id.* at Article 7.

¹⁶⁵ *Id.* at Article 9.

¹⁶⁶ *Id.* The right to housing is determined by an interdependent reading of Article 7 & 9.

¹⁶⁷ *CRAC*, *supra* note 125, at Article 11.

¹⁶⁸ *Cairo Declaration*, *supra* note 73, at Article 9: “[T]he States shall ensure the right of the individual to a decent living that may enable him to meet requirements and those of his dependents, including food, clothing, housing...”

¹⁶⁹ Full text of the following legal instruments can be found in Annex F.

¹⁷⁰ *Four Freedoms Agreement between Egyptian and Sudan*, Egy.-Sud (adopted 4 September 2004, entered into force 9 September 2011. [Hereinafter, *Four Freedoms Agreement*].

8.1.3.2. Analysis of Bilateral Instruments

In 2004, Egypt and Sudan concluded a bilateral agreement governing relations between the two states.¹⁷¹ The Four Freedoms agreement applies to all Sudanese in Egypt (and vice versa to Egyptians in the Sudan), including refugees, asylum-seekers, and migrants. It gives Sudanese the right to enter, reside, and move within Egypt's territory provided the person possesses a valid passport or other document agreed upon by both parties.¹⁷² Sudanese who enter without valid travel documents would fall outside the scope of the Agreement. Sudanese have "the right to own and dispose of land, real estate, and moveable property."¹⁷³ Therefore, they can purchase and sell homes and enter into leases and contracts equal to Egyptians.¹⁷⁴ The Agreement remains in force but both states are unwilling to implement all provisions at present.¹⁷⁵

8.1.4. Domestic Law

8.1.4.1. Legal Instruments¹⁷⁶

- Constitution of the Arab Republic of Egypt¹⁷⁷
- Law No. 12 of 1996 Promulgating the Child Law¹⁷⁸
- Law No. 131 of 1948 Issuing the Civil Code¹⁷⁹
- Law No.136 for the Year 1981 Regulating Leasing and Selling Properties and the Relationship between Lessee and Lessor¹⁸⁰
- Law No. 230 of 1996 Organizing the Possession of Built-Realities and Vacant Lands by Non-Egyptians¹⁸¹

¹⁷¹ For further information on the bilateral relationship between Egypt and Sudan refer to Chapter 6.4.

¹⁷² *Four Freedoms Agreement*, *supra* note 170, at Article 2. In practice, this is not enforced and Sudanese men between the ages of 18 and 50 are required to obtain a visa. (Interview with an official at the Egyptian Ministry of Foreign Affairs, April 2019).

¹⁷³ *Four Freedoms Agreement*, *supra* note 170, Article 3(2).

¹⁷⁴ Leila Hilal & Shahira Samy, *Asylum and Migration Country Fact Sheet: Egypt*, Euro-Mediterranean Human Rights Network 1, 17 (2017) at 6.

¹⁷⁵ "Egypt, Sudan continue to disagree on visa-free travel deal" *Middle East Monitor* (11 January 2018).

¹⁷⁶ Full text of the following legal instruments can be found in Annex F.

¹⁷⁷ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

¹⁷⁸ Law No. 12 of 1996 (Child Law), *Al-Jarida Al-Rasmiyya*, 28 March 1996 (Egypt). As amended by Law No. 126 of 2008 and Law No. 6 of 2015. [Hereinafter, *Child Law*]

¹⁷⁹ Law No. 131 of 1948 (Promulgating the Civil Code), *Al-Waqa'i' al Misriyah*, 29 July 1948 (Egypt). [Hereinafter, *Civil Code*]. The Civil Code was reinstated as the regime applicable to tenancies pursuant to Law No. 4 for the Year 1996 (as amended by Law No. 137/2006).

¹⁸⁰ Law No. 136 of the Year 1981 Regulating Leasing and Selling Properties and the Relationship between Lessee and Lessor, *Al-Jarida Al-Rasmiyya*, 30 July 1981 (Egypt). [Hereinafter, *Lease Law*].

¹⁸¹ Law No. 230 of 1996 Organizing the Possession of Built-Realities and Vacant Lands by Non-Egyptians (as amended by Law No.137/2006) *Al-Jarida Al-Rasmiyya*, 14 July 1996 (Egypt). [Hereinafter, *Law No. 230/1996*].

- Ministry of Justice Decree No. 3338 of the Year 1996 Regulating Work in the Office of the Possession Affairs of Built Realities by Non-Egyptians¹⁸²
- Cabinet Decree No. 1237 of the Year 2018 Mandating Jurisdiction of the Advisor of the Minister of Justice to the Prime Minister as Stipulated in Article (2) and (5) of Law No. 2301 of the Year 1996¹⁸³
- Prime Minister's Decree No. 548 of the Year 2005 Concerning the Non-Egyptian's Ownership and Usufruct of Residential Units in Certain Areas¹⁸⁴
- Decree-Law No. 15 of the Year 1963 Prohibiting the Ownership by Foreigners of Farmland and the Like¹⁸⁵
- Military Order No. 62 of the Year 1940 Regarding Ownership of Real Estate in Border Areas¹⁸⁶
- Law No. 77 for the Year 1943 Regarding Inheritance¹⁸⁷
- Law No. 71 of the Year 1946 Regarding Wills¹⁸⁸
- Law No. 150 for the Year 1950 Promulgating the Code of Criminal Procedure¹⁸⁹
- Law No. 162 of the Year 1958 Concerning the State of Emergency¹⁹⁰
- Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15¹⁹¹

8.1.4.2. Analysis of Domestic Instruments

¹⁸² Decree of the Minister of Justice No. 3338 of 1996 (On Organizing Work in the Offices Regulating the Possession Affairs of Build Realities and Vacant Lands by Non-Egyptians) *Al-Jarida Al-Rasmiyya*, 3 August 1996 (Egypt). [Hereinafter, *Ministerial Decree No. 3338/1996*].

¹⁸³ Cabinet Decree No. 1237 of the Year 2018 Mandating Jurisdiction of the Advisor of the Minister of Justice to the Prime Minister as Stipulated in Article 2 and 5 of Law No. 2301 of the Year 1996 *Al-Jarida Al-Rasmiyya*, 11 July 2018 (Egypt). [Hereinafter, *Decree No. 1237/2018*]

¹⁸⁴ Prime Minister's Decree No. 548 of the Year 2005 Concerning the Non-Egyptians' Ownership and Usufruct of Residential Units in Certain Areas, *Al-Jarida Al-Rasmiyya*, 5 April 2005 (Egypt). [Hereinafter, *Ministerial Decree No. 548/2005*].

¹⁸⁵ Decree No. 15 of the Year 1963 of the President of the United Arab Republic Prohibiting the Ownership by Foreigners of Farmland and the Like, *Al-Jarida Al-Rasmiyya*, 19 January 1963 (Egypt). [Hereinafter, *Decree-Law No. 15/1963*].

¹⁸⁶ Military Order No. 62 of the Year 1940 Regarding the Ownership of Real Estate in Border Areas, *Al-Wakaye Al-Mesreya*, 23 June 1940 (Egypt). [Hereinafter, *Military Order No. 62/1940*].

¹⁸⁷ Law No. 77 for the Year 1943 Regarding Inheritance, *Al-Waqa'i' al-Misriyah*, 12 August 1943 (Egypt). [Hereinafter, *Law No. 77/1943*].

¹⁸⁸ Law No. 71 for the Year 1946 Regarding Wills, *Al-Waqa'i' al-Misriyah*, 1 July 1946 (Egypt). [Hereinafter, *Law No. 71/1946*].

¹⁸⁹ Law No. 150 for the Year 1950 Promulgating the Code of Criminal Procedure, *Al-Jarida Al-Rasmiyya*, 15 October 1950 (Egypt). [Hereinafter, *Criminal Code*].

¹⁹⁰ Law No. 162 for the Year 1958 concerning the State of Emergency, *Al-Jarida Al-Rasmiyya*, 28 September 1958 (Egypt). [Hereinafter, *State of Emergency Law*].

¹⁹¹ Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15, *Al-Jarida Al-Rasmiyya*, 3 June 2013 (Egypt).

8.1.4.2.1. Refugees, Asylum-Seekers, and Regular Migrants

The Constitution provides only citizens with the right to housing. It prohibits all forms of racism and discrimination, which would protect non-nationals from discrimination based on race, ethnicity, or religion.¹⁹² The Child's Law gives housing rights to all children, not only citizens. Children have a right to life, survival, and development, protection from discrimination, and to form their own opinion.¹⁹³ Any decision or policy enacted by the state must primarily consider the best interest of the child.¹⁹⁴ The National Council for Childhood and Motherhood administers the Childhood and Motherhood Care Fund. This fund administers the budget of the state's key child-related sectors and "establish[es] shelter homes, schools, and hospitals for children."¹⁹⁵

Alien property ownership and tenancy rights, including the rights of refugees, asylum-seekers, and regular migrants, are regulated by Egypt's *Civil Code* and Law No. 136 of 1981 Regulating Leasing and Selling Properties and the Relationship between Lessee and Lessor (Law No. 136). The Civil Code states that acquisition, ownership, and lease of immoveable property is governed by the law where the property is located.¹⁹⁶ The Civil Code does not differentiate between nationals and non-nationals with regard to lease length,¹⁹⁷ rental conditions,¹⁹⁸ subletting,¹⁹⁹ or the cancelation of rental agreements.²⁰⁰ The Civil Code provides non-nationals with the same right as nationals to rescind the contract or reduce the rent in the event government-approved activity reduces the property's worth.²⁰¹ Law No. 136 guarantees most aliens the same property leasing rights as nationals. The only difference is that the laws allows for the termination of the leases held by irregular migrants.²⁰² This does not apply to refugees, asylum-seekers, and regular migrants because they possess valid residence permits. Legal experts indicated that leases should not be voided while refugees and asylum-seekers await the renewal of their status.²⁰³

¹⁹² *Constitution*, *supra* note 177, at Article 54.

¹⁹³ *Child's Law*, *supra* note 178, at Article 3.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at Article 144.

¹⁹⁶ *Civil Code*, *supra* note 179, at Article 17.

¹⁹⁷ *Id.* at Articles 559 & 560.

¹⁹⁸ *Id.* at Articles 563, 565, 567, 568, 586, 587 & 1004.

¹⁹⁹ *Id.* at Article 593.

²⁰⁰ *Id.* at Articles 563, 572, 598, 599, 605, 607 & 608.

²⁰¹ *Id.* at Article 574.

²⁰² *Law No. 136*, *supra* note 180, at Article 17.

²⁰³ Interview conducted with the Egyptian Refugee Rights Project's legal experts in March 2019.

There are certain limitations to non-nationals' rights to own property in Egypt. All non-nationals are prohibited from owning "farmland and the like cultivable, barren, and desert land."²⁰⁴ Non-nationals are further prohibited from owning land in the border region without the approval of the Minister of Defense.²⁰⁵ Law No. 230 of 1996 Organizing the Possession of Built-Realities and Vacant Lands by Non-Egyptians (Law No. 230) set additional parameters for non-national's property ownership. Foreigners can only possess two realties for private dwelling, each less than four thousand meters squared.²⁰⁶ Foreigners who acquire vacant land must begin building within five years of purchase.²⁰⁷ Law No. 230 prohibits foreigners from disposing of realty during the first five years of ownership.²⁰⁸ The Real Estate Registration and Naturalization Department oversees foreigners' property and land ownership.²⁰⁹ Ministerial Decree No. 3338 of 1996 requires sub-offices in each governorate,²¹⁰ daily follow-up with applications submitted by non-Egyptians,²¹¹ and preparation of a free and readily accessible guide for non-Egyptians.²¹² Special regulations apply in tourist areas, where non-nationals share Egyptians' housing entitlements.²¹³

The right to inherit property differs based on nationality and religion. Law No. 77 for 1943 Regarding Inheritance prohibits inheritance between Muslims and non-Muslims.²¹⁴ Difference in nationality does not impact inheritance between Muslim non-nationals, whose have the same

²⁰⁴ *Decree No. 15/1963, supra* note 185, at Article 1.

²⁰⁵ *Military Order No. 62/1940, supra* note 186, at Articles 1 & 4. Any contract that allows non-nationals to possess the aforementioned land is considered null and void.

²⁰⁶ *Law No. 230/1996, supra* note 181, at Article 2.

²⁰⁷ *Id.* at Article 4.

²⁰⁸ *Id.* at Article 5. According to Article 6, during these first five years a foreigner's property disposal can be nullified following a court judgment issued at the request of the Public Prosecution

²⁰⁹ *Law No. 230/1996, supra* note 181 at Article 7.

²¹⁰ *Ministerial Decree No. 3338/1996, supra* note 182, at Article 1.

²¹¹ *Id.* at Article 3.

²¹² *Id.* at Article 9. Pursuant to Cabinet Decree No. 1237, the Advisor of the Minister of Justice, under the jurisdiction of the Prime Minister's office, handles appeals against the Office of the Possession Affairs of Built Realities by Non-Egyptians

²¹³ *Ministerial Decree No. 548/2005, supra* note 184, at Article 1. The office of the Prime Minister provides non-Egyptians the same treatment as Egyptians regarding ownership of residential property in the following tourist areas: Sidi Abdel-Rahaman, Hurghada, the Red Sea tourist area, Ras Al-Hekma, and any other area reallocated for tourism by the Tourism Development Authority. In Sharm El Sheikh, foreigners can be granted usufruct rights to property for up to 99 years.

²¹⁴ In Egyptian law, the difference between inheritance and willed legacies is determined by *Shariah* law. Inheritance refers to the allocation of a set percentage of a deceased's estate as stated in the Koran and Islamic jurisprudence. It occurs only between Muslims. Non-Muslim's inheritance is dependent on the rules and traditions of their faith and/or the laws of their state. Willed legacies refer to the one-third of the deceased's estate which the deceased can choose how to allocate. The deceased may allocate this part of the estate to a non-Muslim. They may not allocate it to an individual who stands to inherit. For a detailed explanation of inheritance law in Islamic Law, *see*: David Powers, *The Islamic Inheritance System: A Socio-Historical Approach*, 8 Arab L.Q. 13, 29 (1993).

inheritance rights as Muslim nationals.²¹⁵ Non-nationals' inheritance rights differ if they are not Muslim. The inheritance rights of non-Muslim foreigners depend on Egypt's reciprocal relationship with their country of nationality.²¹⁶ If the country of nationality prohibits Egyptians from inheriting from its nationals, their non-Muslim nationals do not have inheritance rights in Egypt. Law No. 71 of 1946 regarding wills governs the portion of the deceased's estate that they choose how to allocate. It stipulates that wills are valid between individuals from different religions, sects, and nationalities. The law makes an exception for Muslim non-nationals. Their right to direct a will to non-Muslims depends on whether their country of nationality's domestic legislation permits this practice.²¹⁷ Finally, non-nationals may inherit land in Egypt's border region.²¹⁸

Foreigners are entitled to privacy in their home. The Constitution guarantees to everyone the inviolability of the home and obliges state agents to obtain a judicial warrant before entering or searching a home.²¹⁹ Law No. 150 for 1950 Promulgating the Code of Criminal Procedure further codifies privacy rights for all. State authorities cannot enter a private dwelling without a warrant or in case of emergency such as a fire.²²⁰ Searches are permitted only to find items related to a crime or that are illegal.²²¹ A search warrant requires written justification,²²² and the resident may appeal the Public Prosecutor's warrant before a judge.²²³ The accused or an authorized representative should be present during the search; if this is not possible, two witnesses must be present. Preference is given to witnesses related to the accused.²²⁴

Egypt's State of Emergency Law includes three provisions which curtail housing associated rights granted in other domestic legislation. Egypt has been in a state of emergency for most of the past 50 years, and the government amended and reinstated Law No. 162 of the Year 1958 Concerning the State of Emergency in 2013, which was later approved by the Egyptian

²¹⁵ *Law No. 77, supra* note 187, at Article 6.

²¹⁶ *Id.*

²¹⁷ *Id.* at Article 9.

²¹⁸ Military Order No. 62/1940, *supra* note 186, allows for non-national ownership of inherited land in the border region without permission of the Minister of Defense

²¹⁹ *Constitution, supra* note 177, at Article 58.

²²⁰ *Code of Criminal Procedure, supra* note 189, at Article 45.

²²¹ *Id.* at Article 50.

²²² *Id.* at Article 91.

²²³ *Id.* at Article 54.

²²⁴ *Id.* at Article 51 & Article 92.

Parliament.²²⁵ The Emergency Law applies to all people in Egypt. Early iterations allowed for the searches without a warrant. However, in 2013, the Supreme Constitutional Court struck down the section of Article 3(1) that permits searches without warrant as a violation of the Constitution.²²⁶ Thus, the government is still obliged to procure a judicial warrant to search residences during states of emergency. The Emergency Law also grants the government the right to confiscate moveable and immoveable property.²²⁷ Finally, it allows the government to evacuate or cordon off territory in the interest of national security.²²⁸ This Provision could impact access to homes if the government evacuates a given area.

8.1.4.2.2. Irregular Migrants

Failed asylum-seekers irregularly in Egypt have fewer housing entitlements because they do not have valid residence permits. In particular, they do not have the right to lease or own property. Law No. 136 terminates leases when a residence permit expires.²²⁹ The Public Prosecutor's office is the competent authority to notify and carry-out all evictions.²³⁰ Irregular migrants are also prohibited from owning property in Egypt. While the laws regulating non-nationals' property ownership do not explicitly address immigration status, the paperwork required by the Real Estate Registration and Naturalization Department includes proof of valid residency.²³¹ Irregular migrant children have a right to housing pursuant to the Child's Law, as the law does not differentiate based on immigration status.²³² Should they attempt to claim this right, they risk deportation. Irregular migrants have the same entitlements as refugees, asylum-seekers, and regular migrants with regard to inheritance and the right to privacy in the home. However, it is important to note that remaining in Egypt after the expiration of one's residency violates Egyptian law. It is therefore possible their immigration status may provide cause for a search warrant.²³³

²²⁵ *State of Emergency Law*, *supra* note 190. The state of emergency was briefly lifted in 2012 following the 2011 January Revolution but reinstated in 2013. Minor alterations were made in 2014.

²²⁶ Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15, *Al-Jarida Al-Rasmiyya*, 3 June 2013 (Egypt).

²²⁷ *State of Emergency Law*, *supra* note 190, at Article 3. Confiscations are subject to the compensation and appeals process set forth in General Mobilization Law of 1960.

²²⁸ *State of Emergency Law*, *supra* note 190, at Article 3.

²²⁹ Leasing Law, *supra* note 180, at Article 17. This law only applies to contracts concluded after 1981.

²³⁰ *Id.* at Article 17. If an irregular migrant's Egyptian spouse and/or child reside in the house, they may not be evicted under this Article.

²³¹ *Ministerial Decree No. 3338/1996*, *supra* note 182, at Article 7.

²³² *Child's Law*, *supra* note 178, at Articles 3 & 144.

²³³ *Code of Criminal Procedure*, *supra* note 189, at Articles 51 & 91.

8.1.5. Analysis of Overall Legal Framework

Refugees, asylum-seekers, and failed asylum-seekers have housing and property rights. All non-nationals have the right to adequate shelter. While this is not an entitlement to provide housing, it obliges the state to play an active role in meeting their housing needs. Refugees, asylum-seekers, and regular migrants may sign leases subject to the same tenancy laws as Egyptians. Non-nationals are entitled to protection against forced eviction, although irregular migrants may have their leases terminated by the Public Prosecution Office. They have the right to privacy in their homes, and Egyptian officials must obtain a search warrant prior to entry. Women, children, persons with disabilities, and trafficked persons have special entitlements to housing. Refugees, asylum-seekers, and regular migrants have the right to purchase property in Egypt. They may not purchase farmland, border land, or more than two residential properties. They are required to submit different paperwork than nationals and go through the Real Estate Registration and Naturalization Department. Sudanese nationals are allowed to own property subject to the same conditions as Egyptian citizens. During a state of emergency, the government may expropriate private property for national security reasons. Irregular migrants cannot own property. All non-nationals have the right to inherit property, but religious law plays a role in determining the applicable regulations. Refugees, asylum-seekers, and regular migrants have the right to choose their place of residence, although this can be limited during Egypt's state of emergencies. Irregular migrants do not have the right to choose their place of residence as their remaining in Egypt violates domestic law.

8.2. IMPLEMENTATION

While all refugees, asylum-seekers, and failed asylum-seekers have the right to adequate shelter, only refugees, asylum-seekers, and regular migrants have the right to sign leases and purchase property in Egypt, with a special condition for Sudanese individuals who are allowed to purchase property like Egyptian nationals. Special entitlements are owed to women, children, the differently-abled, and trafficked individuals when it comes to housing. Many of the interviewees expressed concern with rising rent costs, issues with landlords which needed mediation or a legal interference, and safety issues with regards to location of the apartments as many affordable housing options for refugees and asylum-seekers are in informal or increasingly unsafe areas.

Caritas Egypt assists unaccompanied youth up to 15 years old with emergency housing needs. They see a huge gap in awareness for unaccompanied minors, especially when it comes to sexual and reproductive health, as well as psychosocial needs and support of all kinds.²³⁴ Another organization which works with emergency housing needs is the Psychosocial Training Institute (PSTIC). PSTIC has a housing project in which they help refugees find homes to live in, especially for those facing evictions, or find themselves in other emergency situations related to housing. The housing project is made up of a team of 11 specialists who cover all the geographic areas in Cairo, in addition to the North Coast (Alexandria and Damietta). In essence, the housing team is an ‘emergency response team’ which works on housing solutions from the vantage point of ‘protection’ and not charity based work. There is a helpline which the refugee community has access to in case of an emergency. Anyone who calls the helpline can expect to have their issue solved within 1-3 days. The team receives cases day and night, and responds to them at any time. Per month, they receive approximately 300 requests, and usually take around two thirds of them. The kinds of services provided in the housing project are: financial planning, housing grants (the tenant is paid the money in the presence of the refugee after signing the rental contract), providing employment opportunities, mediating to solve problems between clients, landlords, employers, etc. The team usually has a time limitation when looking for apartments (three weeks). If they do not find the housing within this time, the case is closed.²³⁵

8.3. RECOMMENDATIONS

The issue of access to formal work is intrinsically tied to the issue of housing and must be taken seriously by the Government of Egypt and relevant authorities. With restrictions to this access and difficulty obtaining work in the formal sector, rent is going to become extremely difficult for refugees and asylum-seekers to pay, causing direct issues with brokers and landlords which could lead to forced eviction or worse. Naturally, Egyptians also have difficulty accessing formal work. Job growth in the formal sector should be a key priority.

Authorities also need to take issues between non-nationals and landlords seriously without dismissing claims against a landlord. In order to make this happen, landlords must provide

²³⁴ Information obtained in an interview with Caritas Egypt, July 2019.

²³⁵ Information obtained in an interview with PSTIC, June 2019.

leases in all cases of renting and submit these leases to the relevant government office in order to register. In addition, UNHCR cards must be viewed as valid legal documents which are not to be easily dismissed. Authorities also need to properly investigate complaints of harassment, assault, and theft. Landlords should also abide by the rule of only a yearly increase, and not do so mid-year, or against a rental contract which may state otherwise.

CHAPTER 9: DETENTION AND EXPULSION

9.1. LEGAL FRAMEWORK

9.1.1. International Law

9.1.1.1. International Instruments¹

- *1951 Convention Relating to the Status of Refugees*²
- *International Covenant on Civil and Political Rights*³
- *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*⁴
- *Convention to End All Forms of Discrimination against Women*⁵
- *Convention on the Rights of the Child*⁶
- *Convention on the Rights of Persons with Disabilities*⁷
- *Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Organized Crime*⁸
- *Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*⁹

¹ Full text of the following legal instruments can be found in Annex G.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*]. Egypt acceded to the Convention and its Protocol on 22 May 1981.

³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*]. Egypt ratified the Covenant on 14 January 1982.

⁴ Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987). [Hereinafter, *CAT*]. Egypt ratified the Convention on 25 June 1986.

⁵ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1248 UNTS 13 (entered into force 3 September 1981). [Hereinafter, *CEDAW*]. Egypt ratified the Convention on 18 September 1981.

⁶ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [Hereinafter, *CRC*]. Egypt ratified the Convention on 6 July 1990.

⁷ Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 UNTS 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*]. Egypt ratified the Convention on 14 April 2008.

⁸ Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004). [Hereinafter, *Smuggling Protocol*]. Egypt ratified the Convention on 1 March 2005.

⁹ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 UNTS 319 (entered into force 25 December 2003). [Hereinafter, *Trafficking Protocol*]. Egypt ratified the Protocol on 5 March 2004.

- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*¹⁰
- *Vienna Convention on Consular Relations*¹¹

9.1.1.2. Analysis of International Instruments

9.1.1.2.1. International Entitlements for Refugees

International law entitles registered refugees to five legal protections pertaining to detention and expulsion.¹² First, refugees are entitled to freedom of movement.¹³ Second, they are entitled to remain within the country of refuge's territory unless they pose a threat to national security or public order.¹⁴ Third, refugees cannot be returned (refouled) to a country where their life or freedom would be threatened,¹⁵ or where there is substantial chance they would be tortured.¹⁶ Fourth, refugees have a right to freedom from arbitrary detention, whether it is related to their status as non-nationals or other factors.¹⁷ Fifth, detained refugees must be treated in accordance with international human rights conventions, including an absolute prohibition against torture, the right to access courts,¹⁸ and the right to humane detention conditions.

Refugees' first entitlement is the right to move freely and choose their place of residence subject to the same regulations governing all aliens.¹⁹ States may restrict refugees' movement the same as it restricts other aliens' movements. For example, states might regulate aliens'

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*]. Egypt's accession to the Convention occurred on 19 February 1993.

¹¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967). [Hereinafter, *VCCR*]. Egypt ratified the Convention on 21 June 1965.

¹² UN High Commissioner for Refugees, *Egypt*, UNHCR GLOBAL APPEAL (2011) at 142. UNHCR handles all activities pertaining to refugee registration, documentation, and status determinations. [Hereinafter, *UNHCR Global Appeal*]. Refugees, asylum-seekers, and failed asylum-seekers' entitlements to Refugee Status Determinations and documentation are further discussed in Chapter 3 & Chapter 11.

¹³ *Refugee Convention*, *supra* note 2, at Article 26.

¹⁴ *Id.* at Article 32.

¹⁵ *Id.* at Article 33.

¹⁶ *CAT*, *supra* note 4, at Article 3.

¹⁷ *ICCPR*, *supra* note 3, at Article 9

¹⁸ Entitlements to access courts is further discussed in Chapter 10.

¹⁹ *Refugee Convention*, *supra* note, at Article 26: *Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstance.* The Article uses "shall accord" to imply that freedom of movement is mandatory. [See, ATLE GRAHL-MADSEN, COMMENTARY ON THE REFUGEE CONVENTION 1951 (ARTICLES 2-11, 13-37) (UN High Commissioner for Refugees 1997) at 64.]

movement to secure military installations.²⁰ Such restrictions are permissible when applied to all aliens but not allowed if just focused on refugees. The Refugee Convention further requires any movement restrictions be narrow in scope and necessary.²¹ This would prohibit states from restricting refugee movement for administrative or economic convenience.²²

The right to freedom of movement is also found in other international human rights treaties, and the Refugee Convention states that refugees are entitled to rights granted by other international human rights treaties.²³ *International Covenant on Civil and Political Rights* (ICCPR) stipulates that all individuals lawfully within a state's territory have the right to freedom of movement and free choice of residence.²⁴ A refugee who enters a state irregularly is regularized through the Refugee Status Determination (RSD) process,²⁵ and therefore considered lawfully present and entitled to move freely.²⁶ States may, under specific circumstances, restrict the movement of non-nationals provided such restriction does not contradict the principle of free movement. Women receive entitlements to freedom of movement under *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).²⁷

The second entitlement owed to refugees is the right to remain in the territory of the state in all but exceptional circumstances. The Refugee Convention provides refugees higher protection from expulsion than asylum-seekers or those planning to seek asylum.²⁸ The United Nations High Commissioner for Refugees (UNHCR) assists refugees in Egypt with paperwork granting lawful residency.²⁹ As a result, they can only be expelled in the limited circumstances outlined

²⁰ PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS (UN High Commissioner for Refugees 1990), at 146-148.

²¹ *Refugee Convention*, *supra* note 2, at Article 31: "[T]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary." Though this Article addresses asylum-seekers not yet registered, it applies in at least equal measure to recognized refugees. [See, ATLE GRAHL-MADSEN, GORAN MELANDER, & ROLF RING, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT, (Gudmundur Alfredsson and Asbjorn Eide, eds. 1999) at 272.]

²² *Id.* at 272.

²³ *Refugee Convention*, *supra* note 2, at Article 5.

²⁴ ICCPR, *supra* note 3, at Article 12.

²⁵ Refugees, asylum-seekers, and failed asylum-seekers' entitlements to RSD procedures and documentation is discussed in Chapter 3 & Chapter 11.

²⁶ Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12) CCPR/C/21/Rev. 1/Add. 9* (1999) at 2 & 6. [Hereinafter, *HRC Comment No. 27*]. The Human Rights Committee (HRC) further states that the right to freedom of movement does not depend on the reason someone wants to move.

²⁷ CEDAW, *supra* note 5, at Article 15.

²⁸ JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 663 (Cambridge University Press 2005).

²⁹ UNHCR *Global Appeal*, *supra* note 12.

in the Refugee Convention: in the interest of national security or public order.³⁰ This Provision was only intended for exceptional circumstances, and cannot be used to address “social issues” like indigence, illness, or minor criminal infractions.³¹ However, “national security” and “public order” are both terms that provide states considerable leeway in interpreting the scope of these interests.³² The Refugee Convention also provides procedural safeguards for refugees that the state wishes to expel.³³ Expulsion decisions must be made according to domestic law.³⁴ Such legislation could potentially limit the interpretive scope of “national security” and “public order”. Refugees also have the right to submit evidence on their own behalf, be assisted by a lawyer, and appeal expulsion decisions.³⁵ Finally, a refugee that is ordered to be expelled must be given time to secure lawful admission to another country.³⁶ If a refugee is found to be a threat to national security or public order and procedural safeguards are followed, then legal expulsion can occur. In this context, the prohibition of refoulement may, in some situations, offer protection from expulsion.

Refugees’ third entitlement is protection from refoulement.³⁷ Under Article 33, states are forbidden from returning refugees to countries where their life or liberty would be threatened, even if a case for the expulsion can be made. The prohibition of non-refoulement is a central aspect of the Refugee Convention, and states may not make a reservation to this Article.³⁸ Despite its importance, the prohibition against refoulement is not absolute. States could refoule

³⁰ *Refugee Convention*, *supra* note 2, at Article 32.

³¹ WEIS, *supra* note 20, at 233.

³² GRAHL-MADSEN, *supra* note 19, at 679.

³³ *Refugee Convention*, *supra* note 2, at Article 32(2): *The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*

³⁴ *Refugee Convention*, *supra* note 2, at Article 32.

³⁵ WEIS, *supra* note 20, at 234. An exception is made when giving evidence could constitute a threat to national security, for example if a refugee is charged with terrorism.

³⁶ *Refugee Convention*, *supra* note 2, at Article 32. While refugee arrange entry into another state, the country of refuge is entitled to take “internal measures” deemed necessary. This could include detention. Article 32(3) protects refugees from “orbiting” between countries, defined as a situation in which refugees are deported and detained in successive countries that all deny responsibility for admittance. [See, Violeta Moreno-Lax, *The Legality in “Safe Third Countries” Notion Contested: Insights from the Law of Treaties in MIGRATION & REFUGEE PROTECTION IN THE 21ST CENTURY-LEGAL ASPECTS* 665-721 (G. Goodwin-Gill & P. Weckel 2015), at 671.]

³⁷ *Refugee Convention*, *supra* note 2, at Article 33: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

³⁸ *Refugee Convention*, *supra* note 2, Article 42 reads: At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

individuals considered security threats or who are convicted of a particularly serious crime,³⁹ provided the state meet a high evidentiary threshold.⁴⁰

Refugees are also entitled to protection from refoulement to torture under *Convention against Torture* (CAT).⁴¹ “[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴² This obligation is applicable to all persons, regardless of nationality or immigration status, and no exceptions can be made.⁴³

The fourth entitlement owed to refugees is protection from arbitrary detention.⁴⁴ ICCPR does not define “arbitrary detention,” but HRC explains

The drafting history of [a]rticle 9, [p]aragraph 1, confirms that ‘arbitrariness’ is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances.⁴⁵

Thus, detention that is contrary to domestic law or that is inappropriate, unjust, or unpredictable also would violate refugees’ human rights. The United Nations Working Group on Arbitrary

³⁹ *Refugee Convention*, *supra* note 2, Article 33. Article 33(2) generally applies to crimes committed in the country of asylum rather than a refugee’s actions prior to seeking asylum. Article 1(f) of the Refugee Convention provides the grounds for exclusion from refugee status due to an asylum-seekers’ actions prior to claiming asylum. [See, Geoff Gilbert, *Current Issues in the Application of the Exclusion Clause in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 1, 29 (E. Feller et al. eds. 2003) at 2]

⁴⁰ Gilbert, *supra* note 39, at 27.

⁴¹ CAT, *supra* note 4, at Article 3. Article 1 defines torture as

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when suffering or pain is inflicted by or at the instigation of or with the consent or acquiescence of public officials or any person acting in an official capacity. It does not include pain and suffering arising from, inherent to or incidental to lawful sanctions.

⁴² *Id.* at Article 3.

⁴³ Aioffe Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 IJRL 373, 390 (2008) at 375.

⁴⁴ ICCPR, *supra* note 3, at Article 9: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

⁴⁵ *Alphen v. Netherlands*, Human Rights Commission, Communication No. 305/1988 (4 October 1990), at para. 54.

Detention has also compiled a definition.⁴⁶ Detention is arbitrary in the following circumstances:

- Detention occurs without legal justification;
- Detention results from the exercise of a universal human right;
- Detention occurs in violation of the right to a fair trial;
- Detention violates anti-discrimination standards; or
- Detention is prolonged administrative custody for refugees, asylum-seekers, or migrants.⁴⁷

The prohibition of detention for exercise of a universal human right and the prohibition of prolonged administrative custody are particularly important to refugees. The Universal Declaration of Human Rights contains the right to seek and enjoy asylum,⁴⁸ and prolonged administrative detention after receiving refugee status constitutes arbitrary detention.⁴⁹ Refugees are also entitled to protection from detention as a result of exercising their other human rights, such as the right to freedom of assembly,⁵⁰ freedom of expression,⁵¹ and freedom of religion.⁵² The Working Group's recent report reiterates that these basic human rights are not contingent on citizenship.⁵³

Certain subsections of the registered refugee population are also entitled to specific protection from all forms of detention under other international conventions. *Convention on the Rights of the Child* (CRC) prohibits the arbitrary detention of minors and obliges states to only detain children as a measure of last resort.⁵⁴ CRC explicitly guarantees that refugee children enjoy the full host of rights set forth in all international conventions.⁵⁵ Furthermore, CRC is premised on the commitment that the best interest of the child is the primary consideration for all actions

⁴⁶ David Weissbrodt & Brittany Mitchell, *The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence* 38 Hum. Rts. Q. 655, 705 (2016) at 670. The definition draws on UN General Assembly Resolution 43/173 (1988) on *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

⁴⁷ Working Group on Arbitrary Detention, *Fact Sheet No. 26* (2015) at 4.

⁴⁸ UN General Assembly, *Universal Declaration on Human Rights*, 10 December 1942, 217 A(III) [Hereinafter, *UDHR*].

⁴⁹ Working Group on Arbitrary Detention, *supra* note 47, at 2.

⁵⁰ *ICCPR*, *supra* note 3, at Article 21 & *UDHR*, *supra* note 48, at Article 20.

⁵¹ *ICCPR*, *supra* note 3, at Article 19 & *UDHR*, *supra* note 48, at Article 19.

⁵² *ICCPR*, *supra* note 3, at Article 18 & *UDHR*, *supra* note 48, at Article 18.

⁵³ Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, E/CN.4/2000/4, annex II (2018) at 4. [Hereinafter, *Revised Deliberation No. 5*].

⁵⁴ *CRC*, *supra* note 6, at Article 37.

⁵⁵ *Id.* at Article 22.

concerning children.⁵⁶ Detention of children due to their parents' migration status is never in the best interest of the child.⁵⁷ CRC also entitles refugee children to family unity,⁵⁸ and prohibits separating children from parents unless it is judicially determined to be in the child's best interest.⁵⁹ Thus, states must consider the best interests of refugee children not only regarding the detention of the child, but also in regards to the detention of their parents or guardians.⁶⁰ The *Convention on the Rights of Persons with Disabilities* (CRPD) prohibits the arbitrary detention of persons with physical or mental disabilities.⁶¹ This protection extends to refugees meeting the definition for persons with disabilities as outlined in CRPD Article 1.⁶² Finally, Egypt has ratified conventions which extend additional protection from detention to smuggled and trafficked persons.⁶³ The Protocol against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol),⁶⁴ and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (Trafficking Protocol)⁶⁵ prohibit the detention of smuggled and trafficked persons.

The final entitlement owed to refugees is minimum standards of treatment if detained. Refugees must obey the laws of their host country,⁶⁶ and the consequence of breaking the law may result in detention as it would for citizens. If the refugee is detained for any reason, the state is obliged to ensure detention conditions conform to international human rights standards. CAT obliges the state to ensure that torture is not used against any individual in its territory.⁶⁷ Information gained through torture is impermissible as evidence in judicial proceedings.⁶⁸ CAT also obliges states to criminalize torture under domestic law,⁶⁹ and to implement an accessible reporting

⁵⁶ *Id.* at Article 3.

⁵⁷ Working Group on Arbitrary Detention, *supra* note 47, at 2.

⁵⁸ Refugees, asylum-seekers, and failed asylum-seekers' entitlements to family unity is discussed in Chapter 4.

⁵⁹ CRC, *supra* note 6, at Article 9.

⁶⁰ Working Group on Arbitrary Detention, *supra* note 47, at 2.

⁶¹ CRPD, *supra* note 7, at Article 14.

⁶² *Id.* at Article 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

⁶³ Smuggled and trafficked persons differ based on their consent. Smuggled persons consensually enter into a transaction to enable transnational movement, while trafficked persons are transported without their consent for the purpose of exploitation. [See, Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, 12 FMR 25, 28 (2002) at 25.]

⁶⁴ *Smuggling Protocol*, *supra* note 8, at Article 5.

⁶⁵ *Trafficking Protocol*, *supra* note 9, at Article 7.

⁶⁶ *Refugee Convention*, *supra* note 2, Article 2.

⁶⁷ CAT, *supra* note 6, Article 1.

⁶⁸ *Id.* at Article 15.

⁶⁹ *Id.* at Article 4.

mechanism for torture committed in detention sites.⁷⁰ The state must prosecute alleged torturers for acts committed on their territory no matter the victim's nationality.⁷¹ The prohibition against torture is also found in other international human rights treaties signed and ratified by Egypt.⁷²

In addition to freedom from torture, refugees are entitled to a number of procedural safeguards during detention. First, refugees have the right of access to courts.⁷³ Refugees who have habitual residence in Egypt are to be accorded the same treatment as nationals with regard to access to legal representation.⁷⁴ Second, refugees are entitled to procedural protections codified in international human rights treaties. ICCPR stipulates that detainees must be informed of the reason for their arrest, be promptly brought before a judicial officer, are entitled to take proceedings before a court, and receive compensation for unlawful arrest.⁷⁵ The state must separate detainees awaiting trials from those convicted of crimes, and separate juveniles from adult offenders.⁷⁶ The state is prohibited from imprisoning for inability to fulfill contractual obligations.⁷⁷ Additional procedural obligations are owed to women,⁷⁸ children⁷⁹ persons with disabilities,⁸⁰ and smuggled and trafficked persons.⁸¹

Finally, international law regulates prison conditions. ICCPR obliges states to treat all persons deprived of liberty with humanity and dignity.⁸² The 2016 United Nations *Standards Minimum Rules for the Treatment of Prisoners* (*Mandela Rules*) were created to interpret this obligation.⁸³ The *Mandela Rules* apply to all detainees regardless of national origin or other

⁷⁰ *Id.* at Article 13.

⁷¹ *Id.* at Article 2.

⁷² See ICCPR, *supra* note 3, at Article 7; CRC, *supra* note 6, at Article 37; CRPD, *supra* note 7, at Article 15; & *Smuggling Protocol*, *supra* note 8, at Article 16. The text of these Provisions indicates they protect all persons, regardless of nationality or legal status.

⁷³ *Refugee Convention*, *supra* note 2, at Article 16 & ICCPR, *supra* note 3, at Article 14. Refugee, asylum-seeker, and failed asylum-seekers entitlements to access courts is discussed in Chapter 10.

⁷⁴ *Refugee Convention*, *supra* note 2, at Article 16. The inclusion of Article 16 reflected the Drafting Committee's understanding that foreigners' right to bring court cases is often illusory because of procedural and financial impediments. [See, HATHAWAY, *supra* note 28 at 906.].

⁷⁵ ICCPR, *supra* note 3, at Article 9.

⁷⁶ *Id.* at Article 10.

⁷⁷ *Id.* at Articles 9, 10, & 11.

⁷⁸ CEDAW, *supra* note 5, at Article 15.

⁷⁹ CRC, *supra* note 6, Article 37 & Article 40.

⁸⁰ CRPD, *supra* note 7, at Article 14.

⁸¹ *Smuggling Protocol*, *supra* note 8, at Article 5 & *Trafficking Protocol*, *supra* note 9, at Article 7.

⁸² ICCPR, *supra* note 3, at Article 10.

⁸³ UN General Assembly, *United Nations Standards Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* A/Res/70/175 (2016). [Hereinafter, *Mandela Rules*]. The UN General Assembly's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* outlines many of the

status.⁸⁴ They provide all detainees with rights to accommodation that is sufficiently hygienic and spacious,⁸⁵ access to medical and dental services,⁸⁶ and food, water, and clothing provided by the detention facilities administration at no cost to the detainee.⁸⁷ They further recommend separate facilities for male and female detainees and separation of convicted persons from those awaiting trial.⁸⁸ The latter category are afforded more privileges (e.g. additional visitation rights), reflecting their presumed innocence pending trial.

ICCPR Article 4 allows states to take measures derogating from their normal obligations in times of public emergency that threaten the life of the nation when states may limit entitlements under Article 9 (prohibition of arbitrary detention), Article 10 (separation of accused persons from convicted persons), and Article 14 (access to courts).⁸⁹ As a result of ICCPR Article 4 and Egypt's current state of emergency, refugees' lack protection against arbitrary detention and access to procedural safeguards during detention. However, ICCPR still protects important rights during a state of emergency;⁹⁰ for instance, torture is never permitted.⁹¹

9.1.1.2.2. International Entitlements for Asylum-Seekers

same rights as the *Mandela Rules* but is premised as a list of principles, not rules. UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* Res. 43/173, 9 December 1988. [Hereinafter, *UNGA Resolution 42/173*].

⁸⁴ Shyla Vohra, *Detention of Irregular Migrants and Asylum-Seekers in*, INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 49, 70 (R. Cholewinski, R. Perruchoud, & E. MacDonald eds. 2007) at 61. [Vohra discusses the UN's *Standard Rules for the Treatment of Prisoners*, which were adopted in 1955 and were supplanted by the *Mandela Rules* after her publication. The Preamble to the *Mandela Rules* expresses the General Assembly's desire to codify the "progressive development of international law pertaining to the treatment of prisoners." However, the *Mandela Rules* do not differentiate between nationals and non-nationals, and Vohra's interpretation is applicable.]

⁸⁵ *Mandela Rules*, *supra* note 83, at Rules 12 & 13.

⁸⁶ *Mandela Rules*, *supra* note 83, at Rule 24; *UNGA Resolution 42/173*, *supra* note 83, at Principle 24.

⁸⁷ *Mandela Rules*, *supra* note 83, at Rules 22 & 19.

⁸⁸ *Mandela Rules*, *supra* note 83, at Rule 11; *UNGA Resolution 42/173*, *supra* note 83, at Principle 8.

⁸⁹ *ICCPR*, *supra* note 3, at Article 2. In the event of a national emergency, State Parties to the ICCPR must officially declare a state of emergency and inform other State Parties to the treaty through communication to the United Nations Secretary General.

⁹⁰ The Committee on Civil and Political Rights outlines important constraints on states ability to limit ICCPR rights during states of emergency. First, states are still prohibited from enacting policies that discriminate on the grounds of race, color, sex, language, religion, or social origin. Second, state of emergency policies must be necessary and proportionate to combat the existential threat facing the country. If the "survival of the state" is not in question, the state cannot invoke Article 4 to curtail rights. Finally, states are under an obligation to ensure minority communities, including non-nationals, have their human rights protected. [See, Committee on Civil and Political Rights, *General Comment No. 4: State of Emergency (Article 4)* CCPR/C/21/Rev.1/Add. 11 (2001), at para. 3-13]. The Egyptian government imposed its current state of emergency in 2013, and it has been extended by presidential decree at three-month intervals ever since. See, "Egypt to Extend State of Emergency for Three Months," *eNews Channel Africa* (24 June 2018), available at: <https://www.enca.com/africa/egypt-to-extend-state-of-emergency-for-three-months>. [Hereinafter, *Egypt to Extend State of Emergency*].

⁹¹ *ICCPR*, *supra* note 3, at Article 4.

Asylum-seekers enjoy many of the same entitlements to protection against expulsion and detention as refugees. The Refugee Convention provides asylum-seekers with the right to move freely.⁹² Because their presence is legal, they are protected from expulsion, except in the interest of national security or public order.⁹³ Asylum-seekers are also entitled to protection against refoulement to a country in which their life or liberty would be threatened or they would face torture.⁹⁴

Asylum-seekers are entitled protection from arbitrary detention.⁹⁵ The UN Working Group on Arbitration stipulates that asylum-seekers retain their right to personal liberty throughout the migration process.⁹⁶ Asylum-seekers have specific protection against administrative detention under the Refugee Convention. It prohibits penalization for illegal entry or presence provided that: asylum-seekers came directly from a territory where their life or freedom was threatened, they presented themselves to authorities without undue delay, and they demonstrated good cause for their illegal entry.⁹⁷ UNHCR's *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* states that as a general principle, asylum-seekers should not be detained.⁹⁸ The *Guidelines* indicate that states breach international law if they use detention to criminalize irregular entry or to deter individuals from seeking asylum.⁹⁹

⁹² *Refugee Convention*, *supra* note 2, at Article 26. Article 26 states that refugees legally present with the right to move freely subject to restrictions applicable to aliens in the same circumstances. Asylum-seekers are considered lawfully present in a state's territory from the moment they enter to seek asylum, until they are recognized or denied refugee status, including time spent on exhausting appeals. According to statements made by the Convention's drafters, an individual's presence is lawful even if the person is not yet in possession of a residency permit provided they have applied for one. The drafters stated that "only those who had not applied or whose application had been refused were in an irregular position." [See, HATHAWAY, *supra* note 28, at 175-177 & UN Doc. E/AC.32/SR. 15 Jan. 27 1950 at 15].

⁹³ *Refugee Convention*, *supra* note 2, at Article 31. Article 31(2) further provides asylum-seekers with the right to freedom of movement. Article 32's prohibition against expulsion is also premised on an individual's lawful presence. Since an asylum-seeker's legal status has not yet been determined, the state is obliged to view them as lawfully present once they begin the asylum-seeking process. This is consistent with Human Rights Commission (HRC)'s interpretation of ICCPR Articles 9 and 12 [See, *HRC Comment No. 27*, *supra* note 26, at 2 & HATHAWAY, *supra* note 28, at 177.]

⁹⁴ *Refugee Convention*, *supra* note 2, at Article 33. This Article is applicable regardless of whether refugee status has been formally decided [HATHAWAY, *supra* note 28, at 304].

⁹⁵ *ICCPR*, *supra* note 3, at Article 9. Asylum-seekers may not be detained without legal justification, in violation of the right to fair trial, as the result of discriminatory policies, or for exercising a universal human right. See, *supra* note 46.

⁹⁶ Working Group on Arbitrary Detention, *supra* note 47, at 2.

⁹⁷ *Refugee Convention*, *supra* note 2, at Article 31. Drafters of Article 31 used the term "refugee," which extends to asylum-seekers because the state has not yet determined their legal status [See, HATHAWAY, *supra* note 28, at 157].

⁹⁸ UN High Commissioner for Refugees, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* 1, 64 (2012), at para. 28. [Hereinafter, *Guidelines relating to the Detention of Asylum-Seeker*].

⁹⁹ *Guidelines relating to the Detention of Asylum-Seekers*, *supra* note 98, at para. 31.

Despite the general prohibition on detaining asylum-seekers, states may detain them in certain situations. Entry without valid visa is only permitted if the asylum-seeker comes directly from a country where their life or freedom is threatened, present themselves without delay, and show good cause for illegal entry.¹⁰⁰ Rather than outlining specific criteria for determining if an asylum-seeker is “coming directly,”¹⁰¹ presenting themselves “without delay” or expressing “good cause” for illegal entrance, the UNHCR Guidelines call for an individualized assessment of each case’s merits.¹⁰² This expansive understanding of Article 31 protects many asylum-seekers from detention. However, if an asylum-seeker’s irregular entry does not fulfill the aforementioned criteria, detention or other penalties short of refoulement is permissible.¹⁰³ Furthermore, states have the right to temporarily detain asylum-seekers or restrict their freedom of movement during the RSD processes.¹⁰⁴ Such restrictions should be applied only when necessary and end when the asylum-seeker’s status is regularized.¹⁰⁵ UNHCR interprets detention as “necessary” if it is in the interest of public order,¹⁰⁶ public health,¹⁰⁷ or national security.¹⁰⁸ HRC further supports this approach and reiterates the limited permissibility of detaining asylum-seekers.¹⁰⁹

¹⁰⁰ *Refugee Convention*, *supra* note 2, at Article 31.

¹⁰¹ For example, UNHCR considers an asylum-seeker as “coming directly” if they came directly from their country of origin, came from a third country where their protection and security could not be assured, or if they briefly transited through a third country [See, *Guidelines relating to the Detention of Asylum-Seekers*, *supra* note 98, at para. 4.]

¹⁰² *Guidelines relating to the Detention of Asylum-Seekers*, *supra* note 98.

¹⁰³ HATHAWAY, *supra* note 28, at 387.

¹⁰⁴ *Refugee Convention*, *supra* note 2, at Article 31.

¹⁰⁵ *Id.* at Article 31.

¹⁰⁶ Public order is a more open-ended category than public health or national security. UNHCR considers initial detention for the purpose of identity verification and a preliminary interview as permissible in the interest of public order. However, detention for the duration of the RSD process is prohibited. Similarly, UNHCR opposes detention for asylum-seekers who enter without valid travel documents or with forged documents but permits detaining asylum-seekers who intentionally destroy their travel documents to hinder identification or deportation. [See, *Guidelines relating to the Detention of Asylum-seekers*, *supra* note 98, at paras. 22-28.]

¹⁰⁷ UNHCR considers temporary detention for the purpose of determining an asylum-seekers health and quarantine of an asylum-seeker to prevent the spread of infectious disease as “necessary” public health concerns. [See, *Guidelines relating to the Detention of Asylum-seekers*, *supra* note 98, at para. 29]

¹⁰⁸ UNHCR acknowledges that states have the primary responsibility for determining their own national security interests. However, it requires that domestic legislation permitting the detention of asylum-seekers in the interest of national security adhere to the principles of non-discrimination, proportionality, necessity, and judicial oversight. [See, *Guidelines relating to the Detention of Asylum-Seekers*, *supra* note 98, at para. 30].

¹⁰⁹ Human Rights Commission, *Promotion and Protection of All Human Rights, Civil, Political, Social, Economic, and Cultural Rights Including the Right to Development* A/HRC/7/4 (2008), at para. 46.

If detained, asylum-seekers are entitled to legal assistance and humane treatment at the same level available to nationals.¹¹⁰ Additional legal assistance must be provided for children,¹¹¹ persons with a disability,¹¹² and smuggled and trafficked persons.¹¹³ This legal assistance is also applicable to asylum-seekers who fall under these categories. Furthermore, detained asylum-seekers have entitlements to humane and dignified treatment during the duration of penal or administrative detention.¹¹⁴ The United Nations has expressed concern that administrative detention facilities are often not subjected to judicial oversight, thereby facilitating violations of migrants' human rights.¹¹⁵ The aforementioned rights are also presented in UNHCR's *Guidelines relating to the Detention of Asylum-seekers*.¹¹⁶ While UNHCR guidelines do not create binding legal obligations for states, these Guidelines reiterate detained asylum-seekers' rights under other international human rights instruments.

9.1.1.2.3. Failed Asylum-Seekers

Once an asylum-seeker's claim has been denied, they are no longer under the protection of the Refugee Convention. However, they are still entitled to rights conferred by other international human rights conventions. Regular and irregular migrants have different entitlements regarding protection against expulsion. ICCPR provides the right to freedom of movement for all those lawfully within a state's territory.¹¹⁷ Thus a failed asylum-seeker who is in Egypt regularly would be entitled to move freely, with due regard for public order, national security, public health, and the rights of others. In addition, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW) provides the right to freedom of movement for regular migrants and their families.¹¹⁸ An irregular migrant does not share these entitlements because they are not lawfully within the country.

¹¹⁰ *Refugee Convention*, *supra* note 2, at Article 16.

¹¹¹ *CRC*, *supra* note 6, at Article 37 & Article 40.

¹¹² *CRPD*, *supra* note 7, at Article 14.

¹¹³ *Smuggling Protocol*, *supra* note 8, at Article 5 & *Trafficking Protocol*, *supra* note 9, at Article 7.

¹¹⁴ *ICCPR*, *supra* note 3, at Article 10. This includes: rights to accommodation that is sufficiently hygienic and spacious; access to medical and dental services; and food, water, and clothing provided by the detention facilities administration at no cost to the detained person. Asylum-seekers who have not been convicted of a crime have the right to the presumption of innocence, separation from convicted persons, and may receive additional privileges. [See, *Mandela Rules*, *supra* note 83 & *UNGA Resolution 42/173*, *supra* note 83].

¹¹⁵ UN Economic, Social, and Cultural Council, *Report of the Special Rapporteur, Ms. Gabriela Rodriguez-Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/06* UN Doc. E/CN.4/1997/4 (2002), at para. 55-57. [Hereinafter, *Report on Resolution 2002/06*]

¹¹⁶ *Guidelines relating to the Detention of Asylum-Seekers*, *supra* note 98, at para. 48.

¹¹⁷ *ICCPR*, *supra* note 3, at Article 12.

¹¹⁸ *CMW*, *supra* note 10, at Article 39.

The Convention provides differentiated rights to migrant workers based on the regularity of their status and does not apply to refugees or asylum-seekers.¹¹⁹ CMW forbids collective expulsion of migrant workers and their families regardless of their legal status.¹²⁰ This decision must be made on an individual basis by the competent authority under domestic law.¹²¹ Migrants also have the right to appeal an expulsion decision.¹²² Finally, CMW indicates that any migrant facing expulsion is entitled to assistance from the consular or diplomatic staff of their country of nationality. This obligation arises out of the Vienna Convention on Consular Relations (VCCR).¹²³ VCCR authorizes consular officials to work on behalf of their nationals abroad. States are obliged to inform detained non-nationals that they have the right to notify their country of nationality's consulate that they have been detained.¹²⁴ In practice, many failed asylum-seekers would not choose to notify their consulate because of distrust of their country of nationality's government.

For individuals who do not fall within the scope of the CMW, for example a failed asylum-seeker who has never been employed in Egypt and who remains on a student visa or other type of residency permit, other international instruments provide protection against collective expulsion. ICCPR Article 13 precludes deportation of aliens lawfully within the country unless there are grave national security risks.¹²⁵ The collective expulsion of aliens violates international human rights law because it deprives the individual alien of the procedural guarantees required.¹²⁶ For regular migrants, the HRC determines entitlements to a judicial decision prior to expulsion, an appeal process, and legal assistance.¹²⁷ This does not prevent

¹¹⁹ *Id.* at Article 3.

¹²⁰ *CMW*, *supra* note 10, at Article 2. It defines a migrant worker as “a person who is to be engaged or has been engaged in remunerated activity in a state of which he or she is not a national.”

Article 4 defines family members as: “Persons married to the migrant worker or having with them a relationship that, according to the applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between States concerned.”

¹²¹ *CMW*, *supra* note 10, at Article 22.

¹²² *Id.* at Article 22.

¹²³ *VCCR*, *supra* note 11, at Article 5.

¹²⁴ *Id.* at Article 5. Some failed asylum-seekers may choose not to notify officials from their country of origin due to distrust or fear of retribution from their home state for seeking asylum. This is permissible as long as they are given the option of notification.

¹²⁵ *ICCPR*, *supra* note 3, at Article 12.

¹²⁶ UN Human Rights Committee, *Expulsion of Aliens in International Human Rights Law*, OHCHR Discussion Paper (2006) at 15, 17. [Hereinafter, *HRC Expulsion of Aliens*].

¹²⁷ *HRC Expulsion of Aliens*, *supra* note 126. This position is also supported by the work of Special Rapporteur for Expulsion of Aliens, who notes in their Report that while states have the right to expel aliens residing within

states from expelling several migrants of the same nationality at the same time. Rather, the expulsion measure must “be taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”¹²⁸ Furthermore, mass expulsion of migrants violates customary international law.¹²⁹

It is permissible to expel failed asylum-seekers provided the procedural safeguards discussed above are met. However, the state is obliged to refrain from expulsion if it would result in refoulement.¹³⁰ Though Refugee Convention Article 33(1) uses the term “refugees,” the prohibition on refoulement is a customary international law right applicable to all individuals.¹³¹ In this regard, a failed asylum-seeker cannot be expelled if they can prove they face a high risk of death, unlawful imprisonment, or torture. However, many states require failed asylum-seekers meet a high threshold of proof that they would face these threats before they can claim non-refoulement protection.¹³² Failed asylum-seekers are also subject to the exception that allows refoulement of a person convicted of a serious crime or dangerous to the state.¹³³ Failed asylum-seekers are also protected from refoulement to a state where they face torture.¹³⁴ CAT is not contingent on refugee status and may provide protection to individuals that the Refugee Convention would allow expelled.¹³⁵

Migrants have the same protections against arbitrary detention and torture and entitlements to procedural safeguards as refugees and asylum-seekers. The additional protection against detention and procedural safeguards owed to children,¹³⁶ persons with a disability,¹³⁷ and

their territory, this right is not unlimited. [See, Maurice Kamto, *Third report on the expulsion of aliens*, Documents of the fifty-ninth session of the International Law Commission A/CN.4/581 (2007) at 116.]

¹²⁸ Kamto, *supra* note 127, at 132.

¹²⁹ Drafting Committees of the European Convention on Human Rights and the African Charter on Human and Peoples’ Rights prohibited collective expulsion based on the growing understanding that differential treatment based on nationality was intellectually and morally difficult to accept [See, Kamoto, *supra* note 127, at 128.]

¹³⁰ *Refugee Convention*, *supra* note 2, at Article 33.

¹³¹ See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (2003) at 78; Phil Chan, *The Protection of Refugees and Internally Displaced Persons under Customary International Law?* 10 Int’l. J. Hum. Rts. L. 231, 234 (2006); & UN High Commissioner for Refugees, *Note on Non-refoulement*, EC/SCP/02 (1977) at para. 11.

¹³² E.g., the United States requires a “clear probability” threshold (over 51% chance) to extend protection from refoulement to a denied asylum-seeker in comparison to the “possibility” standard used to establish a “well-founded fear.” *Immigration and Naturalization Service v. Predag Stevic* 467 U.S. 407 (1984).

¹³³ *Refugee Convention*, *supra* note 2, at Article 33.

¹³⁴ *CAT*, *supra* note 4, at Article 3.

¹³⁵ Duffy, *supra* note 43, at 380.

¹³⁶ *CRC*, *supra* note 6, at Article 37 & Article 40.

¹³⁷ *CRPD*, *supra* note 7, at Article 14.

smuggled and trafficked persons¹³⁸ are also applicable to failed asylum-seekers. Finally, detained migrants have the same right to humane and dignified treatment if placed in penal or administrative detention as refugees and asylum-seekers.¹³⁹

9.1.2. Regional Law

9.1.2.1. Regional Instruments¹⁴⁰

- *Convention Governing the Specific Aspects of Refugee Problems in Africa*¹⁴¹
- *African Charter on Human and Peoples' Rights*¹⁴²
- *African Charter on the Rights and Welfare of the Child*¹⁴³
- *African Youth Charter*¹⁴⁴

9.1.2.2. Analysis of Regional Instruments

9.1.2.2.1. Differences on the Basis of Nationality

The African Charter on Human and Peoples' Rights (African Charter), African Charter on the Rights and Welfare of the Child (ACRWC), and African Youth Charter (AYC) recognize the human rights of all individuals within the territory of a state party, whether they are nationals or non-nationals.¹⁴⁵ African Charter prohibits any discrimination based on several grounds, including "other status."¹⁴⁶ There are no available *travaux préparatoires* for the African Charter, but scholars have interpreted "other status" with reference to a similar provision in the ICESCR.¹⁴⁷ The CESCR interprets prohibited discrimination on the grounds of "other status"

¹³⁸ *Smuggling Protocol*, *supra* note 8, at Article 5 & *Trafficking Protocol*, *supra* note 9, at Article 7.

¹³⁹ *ICCPR*, *supra* note 3, at Article 10.

¹⁴⁰ Full text of the following legal instruments can be found in Annex G.

¹⁴¹ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974). [Hereinafter, *OUA Refugee Convention*]. Egypt ratified the Convention on 17 November 1980.

¹⁴² *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

¹⁴³ *African Charter on the Rights and Welfare of the Child*, July 1, 1990, CAB/LEG24.9/49 (entered into force Nov. 29, 1999). [Hereinafter, *ACRWC*]. Egypt ratified the Charter on 9 May 2001.

¹⁴⁴ *African Youth Charter*, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

¹⁴⁵ Monette Zard et al., *Refugees and the African Commission on Human and Peoples' Rights*, 16 *Forced Migr. Rev.* 33, 34 (2003).

¹⁴⁶ *African Charter*, *supra* note 142, Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

¹⁴⁷ *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976). [Hereinafter, *ICESCR*]. Egypt ratified the Covenant on 14 January 1982. Article 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the

as including discrimination based on nationality.¹⁴⁸ The African Commission on Human and People's Rights (ACHPR) has also confirmed that African Charter rights apply to refugees, asylum-seekers, regular migrants and irregular migrants.¹⁴⁹ ACRWC and AYC also contain identical prohibitions on discrimination based on "other status."¹⁵⁰ ACRWC also directly obliges states to provide refugee children with protection and humanitarian assistance.¹⁵¹ Following the aforementioned reasoning, this prohibits any discrimination among non-nationals based on nationality, and makes these legal instruments applicable to refugees, asylum-seekers and failed asylum-seekers alike. Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) only applies to refugees and asylum-seekers.¹⁵²

9.1.2.2.2. Regional Entitlements for Refugees and Asylum-Seekers

The regional conventions reinforce several rights found in international conventions. The African Charter provides the entitlement to free movement for all individuals legally in a state party.¹⁵³ This right mirrors the ICCPR and is broader than the Refugee Convention.¹⁵⁴ OAU Refugee Convention obliges states to settle refugees a "reasonable distance" from the frontiers of their country of nationality, thereby authorizing states to implement certain restrictions on movement.

Refugees and asylum-seekers are entitled to protection from mass expulsion.¹⁵⁵ ACHPR's jurisprudence outlines specific circumstances in which deportation of aliens violates

present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹⁴⁸ UN Committee on Economic, Social and Cultural Rights, "General Comment No. 20: Non-discrimination in economic, social and cultural rights" (2009), UN Doc. E/C.12/GC/20, July 2, 2009, para 30.

¹⁴⁹ Marina Scharpe, *The Regional Law of Refugee Protection in Africa* 130 (2018).

¹⁵⁰ ACRWC, *supra* note 143, Article 3: "Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" & AYC, *supra* note 144, Article 2(1): "Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

¹⁵¹ *Id.* at Article 22: "Refugee Children should receive appropriate protection and humanitarian assistance."

¹⁵² The OAU Refugee Convention's definition of a refugee is discussed in Chapter 1.3.

¹⁵³ *African Charter*, *supra* note 142, at Article 12.

¹⁵⁴ *Refugee Convention*, *supra* note 2, at Article 26.

¹⁵⁵ *African Charter*, *supra* note 142, at Article 12. The illegality of mass expulsion of non-nationals was already a general principle of international law before the 1981 conclusion of the African Charter. The African Charter's drafters included this provision to specifically address the mass expulsions of aliens, including refugees and asylum-seekers that occurred across Africa during the 1970s. [See, Alfred de Zayas, *International Law and Mass Population Transfers* 16 Harv. Int'l. L. J. 207,258 (1975) at 24.6 & Daniel Turak, *The African Charter on Human and Peoples' Rights: Some Preliminary Thought* 17 Akron L. Rev. 365, 381 (1984) at 380].

international law. It prohibits expulsions based on nationality, race, religion, or ethnicity because such discrimination violates the spirit of the African Charter.¹⁵⁶ ACHPR further held that expulsions which separate families or occur without judicial oversight also violate the African Charter.¹⁵⁷ ACHPR stipulates that states conduct deportations consistently with due process of law and entitles aliens to “remedies under domestic law to at least challenge, if not reverse, their expulsion.”¹⁵⁸

The protection against refoulement is reiterated in the OAU Refugee Convention. It prohibits rejection at the frontier and return or expulsion to the territory of a state where an individual’s “life, physical integrity or liberty” would be threatened for the reasons outlined in the Convention.¹⁵⁹ It also provides refugees three additional protections. First, the OAU Refugee Convention adopts a broader definition of who constitutes a refugee than the Refugee Convention,¹⁶⁰ which has the potential to extend refugee status and non-refoulement protection to individuals fleeing for reasons other than persecution.¹⁶¹ Second, it prohibits rejection at frontiers in order to prevent refoulement. This lends credibility to the argument that there is a right to seek and obtain asylum in Africa that is more expansive than the right to simply seek asylum that exists in other international conventions.¹⁶² Third, OAU Refugee Convention includes a categorical prohibition against refoulement where life, physical integrity, or liberty

¹⁵⁶ *Union Interafricaine des droits de l’Homme, Federation internationale des ligues des droits de l’Homme, RADDHO, Organisation nationales des droits de l’Homme au Senegal, Association malienne des droits de l’Homme v. Angola*, African Commission on Human and People’s Rights, Communication No. 159/96 (1997) at para.16. [Hereinafter, *RADDHO*].

¹⁵⁷ *RADDHO*, *supra* note 156, at para 17-19.

¹⁵⁸ *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 Others v. Angola*, African Commission on Human and People’s Rights, Communication No. 292/04 (2008).

¹⁵⁹ *OAU Refugee Convention*, *supra* note 141, at Article 2.

¹⁶⁰ *Id.* at Article 1: “The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

The OAU Refugee Convention’s definition of a refugee and how it expands the Refugee Convention’s definition is discussed in Chapter 3. Scholars have debated the precise reason the Organization of African States adopted this more expansive definition and posit different theories. *See*, Isabelle Gunning, *Expanding the International Definition Of Refugee: A Multicultural View*, 13 *Fordham Int’l. L. J.* 35, 85 (1989) [arguing the African Refugee Convention adopted a more expansive definition because the individualized nature of the Refugee Convention would be insufficient for handling Africa’s civil wars and internal strife] & George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20 *RSQ* 79, 138 (2001) [arguing the OAU Refugee Convention did not mean to significantly expand the Refugee Convention but wanted to leeway to differentiate persons fighting against colonial/apartheid governments from persons fighting post-colonial states].

¹⁶¹ Beginning in the early 2000s, the branch of UNHCR operating in Egypt began to consider claims for refugee status using Article 1(b) of the OAU Refugee Convention alongside the Refugee Convention, which increased the number of positive status determinations. [See, Alice Edwards, *Refugee Status Determination in Africa* 14 *African J. Int’l. & Comp. L.* 204, 233 (2006) at 205]. The right to seek asylum is further discussed in Chapter 3.

¹⁶² Okoth-Obbo, *supra* note 160, at 88.

could be threatened. This differs from Refugee Convention which allows refoulement if the person is deemed a danger to national security or convicted of a serious crime.¹⁶³ The OAU Refugee Convention does prohibit refugees from engaging in “subversive behavior,”¹⁶⁴ but does not make continuation of refugee status or protection against refoulement contingent on conduct. That is to say, regional laws extend international laws and provide refugees and asylum-seekers with more comprehensive protection against refoulement.

Furthermore, Egypt’s obligations under regional human rights law prohibits arbitrary detention.¹⁶⁵ African Charter Article 6’s prohibition on arbitrary detention is formulated more forcefully than the ICCPR.¹⁶⁶ Unlike the ICCPR, African Charter does not allow for derogation during national emergencies. This is an important difference, because while Egypt’s current state of emergency permits the suspension of certain ICCPR rights, the practice violates African Charter obligations. ACHPR’s jurisprudence and guidelines help further interpret this entitlement. ACHPR considers the following as violating the right to protection from arbitrary detention:

- Arrest for acts not criminalized by domestic law;¹⁶⁷
- Arrest under domestic legislation that criminalizes an international human right;¹⁶⁸
- Extensive pretrial detention or incommunicado detention pretrial;¹⁶⁹
- Detention without charge or judicial review;¹⁷⁰ and
- Detention after the completion of a judicially mandated sentence.¹⁷¹

¹⁶³ *Refugee Convention*, *supra* note 2, at Article 33.

¹⁶⁴ *OAU Refugee Convention*, *supra* note 141, at Article 3.

¹⁶⁵ *African Charter*, *supra* note 142, at Article 6: “No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

¹⁶⁶ *ICCPR*, *supra* note 3, at Article 9. The African Charter only mentions that a person cannot be deprived of their freedom for acts permissible by law when committed. The ICCPR provides for judicial review and

¹⁶⁷ *Monim Elgak, Osman Hummeida, and Amir Suliman v. Sudan*, African Commission on Human and Peoples’ Rights, Communication 379/09 (20014), at para. 103-104.

¹⁶⁸ *Kevin Mgwanga Gunme et al v. Cameroon*, African Commission on Human and Peoples’ Rights, Communication No. 266/03 (2009) at 118. [ACHPR found that Cameroonian legislation banning the assembly of certain political parties violated Article 10 of the African Charter, which provides the right to freedom of association. The Commission stated that detentions stemming from violations of this provision of Cameroonian law constituted arbitrary detention.]

¹⁶⁹ *Leisbeth Zegveld and Mussie Ephram v. Eritrea*, African Commission on Human and People’s Rights, Communication 250/02 (2003), at para. 55. [ACHPR held that holding prisoners incommunicado and/or intentionally prolonging the pretrial detention period amounted to arbitrary detention.]

¹⁷⁰ *Huri Law v. Nigeria*, African Commission on Human and People’s Rights, Communication 225/98 (2000), at para. 46. [ACHPR stated that the refusal or negligence of Nigeria to bring the applicant promptly before a judge for trial violated African Charter Article 7].

¹⁷¹ *Concerning Andualem Aragie Walle* (Ethiopia), Human Rights Council, Opinion No. 60/2017 (2017), at para. 59.

ACRWC provides that refugee and asylum-seeking children receive specific protection from arbitrary detention. It sets out obligations for the arrest, trial, and detention of children which would be incompatible with the definition of arbitrary detention.¹⁷²

Refugees and asylum-seekers who are lawfully detained have procedural rights regarding the pretrial and detention processes.¹⁷³ These entitlements should be interpreted in light of the HRC and ACHPR's work.¹⁷⁴ Every detainee has the right to trial before a competent and impartial judicial body, the right to defense and legal counsel, the right to the presumption of innocence, and the right to appeal a conviction.¹⁷⁵ Furthermore, collective punishment is prohibited, thus ensuring each defendant is entitled to individual trials and sentencing.¹⁷⁶ This is particularly important for refugee defendants because it prohibits the state from deporting or detaining without an individualized trial. The state has to allow a defendant legal representation and is required to provide legal counsel or interpreters to indigent defendants.¹⁷⁷

Children and youth receive additional procedural entitlements under the ACRWC and AYC. States must provide child defendants legal assistance and interpreters and place them in separate detention facilities.¹⁷⁸ ACRWC states that incarceration should be a measure of last resort for children and mothers. It entitles mothers of infants and young children to special sentencing considerations if convicted of a crime to preserve the integrity of the family unit.¹⁷⁹ Finally, AYC outlines the procedural rights of youth detainees.¹⁸⁰ It states that accused and convicted youth defendants are entitled to a lawyer, which is an important procedural guarantee not explicitly addressed by the African Charter.¹⁸¹

¹⁷² ACRWC, *supra* note 143, at Article 17.

¹⁷³ ACHPR, *supra* note 142, at Article 7

¹⁷⁴ FATSIAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA (Martinus Nijhoff Publishers 2003), at 139.

¹⁷⁵ ACHPR, *supra* note 142, at Article 7.

¹⁷⁶ OUGUERGOUZ, *supra* note 174, at 139.

¹⁷⁷ *Id.* at 141. As a result of this deficiency, the ACHPR passed *Resolution on the Right to Recourse and Fair Trial*, which encourages states to provide legal representation if the defendant cannot afford the cost. The Resolution's text indicates that African Charter Article 7 also creates an obligation for states to provide free interpretation assistance to all criminal defendants. [African Commission on Human and Peoples' Rights, *Resolution on the Right to Recourse and Fair Trial* ACHPR/Res./4(XI)92 (2003). [Hereinafter, *Resolution on the Right to Recourse*]. Pursuant to African Charter Article 43, ACHPR's resolutions detail the specific content of the Charter's substantive rights.]

¹⁷⁸ ACRWC, *supra* note 143, at Article 17.

¹⁷⁹ *Id.* at Article 30.

¹⁸⁰ AYC, *supra* note 144, at Preamble. AYC applies to youths between the ages of 15 and 35.

¹⁸¹ *Id.* at Article 18.

Lastly, regional conventions address the minimum standards of treatment for persons in detention. This includes the absolute prohibition against torture, because such acts violate human beings' inherent dignity.¹⁸² As with CAT, the African Charter's prohibition against torture is absolute. ACHPR jurisprudence draws heavily on its *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, or Degrading Treatment or Punishment in Africa*.¹⁸³ Also known as the *Robben Island Guidelines*, they are not binding but illustrate the Commission's expectations for pretrial and detention conditions and were drafted with reference to the *Mandella Guidelines*.¹⁸⁴ In addition, the ACHPR's *Guidelines on the Conditions of Arrest, Police Custody, and Pre-Trial Detention in Africa* indicate that detainees have rights to adequate and nutritious food, emergency medical assistance, and adequate shelter in both pretrial detention and incarceration.¹⁸⁵ In the case of children and youth, ACRWC and AYC reiterates this protection.¹⁸⁶

9.1.2.2.3. Regional Entitlements for Failed Asylum-Seekers

As a result of their legal presence, regular migrants share many of the same rights as refugees and asylum-seekers with regard to expulsion and detention because applicable regional conventions are not based on migration status. Protection against expulsion is contingent on an individual's lawful presence in a state's territory, while protection against arbitrary detention and torture are universal.¹⁸⁷ The African Charter entitles failed asylum-seekers who are regular migrants to freedom of movement.¹⁸⁸ The same provision prohibits mass expulsion and requires any expulsion based on an official decision by the competent authority based on domestic law.¹⁸⁹ Failed asylum-seekers who are irregular do not have the same legal entitlements to freedom of movement and protection from expulsion as refugees, asylum-

¹⁸² *African Charter*, *supra* note 142, at Article 5. *Egyptian Initiative for Personal and Interights v. Egypt*, African Commission on Human and Peoples' Rights Communication No. 334/06 (2011), at paras. 168-190. In past decisions, the ACHPR has defined torture with reference to CAT Article 1, and held that states violate African Charter when engaging in direct acts of torture or when failing to provide procedural safeguards (eg. legal representation, judicial oversight of detention centers, and so on) that limit the likelihood of torture.

¹⁸³ African Commission on Human and Peoples Rights, *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa: The Robben Island Guidelines* (2 ed. 2002). [Hereinafter, *Robben Island Guidelines*].

¹⁸⁴ *Robben Island Guidelines*, *supra* note 183, at 6.

¹⁸⁵ African Commission on Human and People's Rights, *Guidelines on the Conditions of Arrest, Police Custody, and Pre-Trial Detention in Africa* (20014), at 10. [Hereinafter, *Guidelines on the Conditions of Arrest*]

¹⁸⁶ ACRWC, *supra* note 143, at Article 16 & AYC, *supra* note 144, at Article 18. Both require legislation and administrative measures to prevent torture and create monitoring units to oversee child detention facilities

¹⁸⁷ Oji Umozirike, *The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness*, 13 Ann. Surv. Int'l. & Comp. L. 179-19(2007) at 183.

¹⁸⁸ *African Charter*, *supra* note 142, at Article 12.

¹⁸⁹ *Id.*

seekers, and failed asylum-seekers.¹⁹⁰ However, they do have the same entitlements related to the prohibition on refoulement,¹⁹¹ prohibition of torture and arbitrary detention,¹⁹² treatment in detention,¹⁹³ and procedural safeguards.¹⁹⁴ The legal entitlements of irregular migrants who are children or youth are repeated in the ACRWC and the AYC.¹⁹⁵

Failed asylum-seekers in Egypt irregularly violate domestic law, and therefore are not entitled to freedom of movement.¹⁹⁶ The African Charter provides non-nationals who were legally admitted to the country with the right to a legal decision prior to expulsion.¹⁹⁷ It is ambiguous whether an irregular migrant who initially entered regularly but remained after their visa expired would have this entitlement. However, all migrants are protected from mass expulsion.¹⁹⁸ ACHPR has stated that mass expulsion of non-nationals violates their fundamental human rights as codified in the African Charter and other international human rights law.¹⁹⁹ Thus, irregular migrants are entitled to protection from mass expulsion. Domestic law governing their expulsion must be non-discriminatory, not arbitrary, and provide for judicial and appellate decisions.

9.1.3. Bilateral Law

9.1.3.1. Bilateral Instruments²⁰⁰

- Four Freedoms Agreement between Egypt and Sudan²⁰¹ (Sudanese nationals)

9.1.3.2. Bilateral Entitlements for Sudanese Refugees, Asylum-Seekers, and Regular Migrants

¹⁹⁰ *Id.*

¹⁹¹ *OAU Refugee Convention, supra* note 141, at Article 2.

¹⁹² *African Charter, supra* note 142, at Articles 5 & 7.

¹⁹³ *See, African Charter, supra* note 142, at Article 5; *Robben Island Guidelines, supra* note 183; *Guidelines on the Conditions of Arrest, supra* note 185.

¹⁹⁴ *African Charter, supra* note 142, at Article 7.

¹⁹⁵ *ACRWC, supra* note 143, at Articles 2, 16 & 18; *AYC, supra* note 144, at Article 18.

¹⁹⁶ *African Charter, supra* note 142, at Article 12.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v. Guinea* African Commission on Human and People's Rights, Communication No. 249/02 (2004), at para. 71.

²⁰⁰ Full text of the following legal instruments can be found in Annex G.

²⁰¹ Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan ("Four Freedoms Agreement"), Apr. 4, 2004, ratified by Egypt and entered into force 9 September 2004. [Hereinafter, Four Freedoms Agreement] The Agreement was published in the Official Gazette through Decree No. 76 of 2004 by the Foreign Minister, Al-Jarida Al-Rasmiyya, 9 September 2004 (Egypt).

In 2004, the Egyptian and Sudanese governments concluded the Four Freedoms Agreement, which gives Sudanese migrants to Egypt specific entitlements related to residency, movement within Egypt, property ownership, and employment.²⁰² The agreement is reciprocal and requires Egyptian migrants to receive the same entitlements in Sudan. Under the Four Freedoms Agreement,²⁰³ Sudanese failed asylum-seekers with a valid passport or other agreed upon documentation are entitled to the right to remain in Egypt. As a result, all Sudanese migrants with a valid passport or other such documents should be considered regular migrants. This provision should also entitle failed asylum-seekers with valid travel documents to reside in Egypt without fulfilling visa requirements. Two different groups could be considered irregular migrants, in which case the Agreement would not apply. First, it is possible there are Sudanese in Egypt who entered the country without possessing a valid passport or travel documents, whether as a result of smuggling or illegal entry through the porous southern border. In the latter situation, the individual would have violated Egypt's domestic laws and would not be entitled to the right to residency. Second, Sudanese nationals whose passports or other travel documents have expired would no longer fulfill the requirements outlined in Four Freedoms Agreement and be at risk for deportation. At present, the Agreement remains in force, but both states acknowledge their unwillingness to implement it.²⁰⁴

9.1.4. Domestic Law

9.1.4.1. Domestic Instruments²⁰⁵

- Constitution of the Arab Republic of Egypt²⁰⁶
- Memorandum of Understanding between Egypt and UNHCR²⁰⁷
- Law No. 89 of 1960 concerning Entry and Residence of Aliens in the Territories of the United Arab Republic and Their Departure Therefrom²⁰⁸

²⁰² Egypt and Sudan share historical linkages over many millennia. More recently, British colonial rule considered the two states one territory. There is a long history of migration across the two territories, further complicated by a disputed border region. From 1976 to 1995, the Wadi El Nil Agreement governed the migration of Sudanese nationals and granted them the right of residency in Egypt without needing to register with UNHCR. The Egyptian government repealed this agreement in 1995, and from 1995-2004 Sudanese nationals did not receive special entitlements.

²⁰³ *Four Freedoms Agreement*, *supra* note 201, at Article 2.

²⁰⁴ "Egypt, Sudan continue to disagree on visa-free travel deal" *Middle East Monitor* (11 January 2018).

²⁰⁵ Full text of the following legal instruments can be found in Annex G.

²⁰⁶ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

²⁰⁷ Memorandum of Understanding between Egypt and the United Nations High Commissioner for Refugees (adopted on 10 February 1954) Egy.-UNHCR. Available at http://carim-south.eu/databases/legal/Egypt/Bilateral%20Agreements/LE3EGY1054_844.pdf. [Hereinafter, *MoU*].

²⁰⁸ Law No. 89 of 1960 (Entry and Residence of Aliens in the Territories of the United Arab Republic and their Departure Therefrom), *Al-Jarida Al-Rasmiyya*, 24 March 1960 (Egypt). [Hereinafter, *Entry and Residence Law*].

- Law No. 82 of 2016 on Combatting Illegal Migration and Smuggling of Migrants²⁰⁹
- Law No. 64 of 2010 regarding Combatting Human Trafficking²¹⁰
- Law No. 12 of 1996 Promulgating the Child Law²¹¹
- Code of Criminal Procedure²¹²
- Law No. 396 of 1956 concerning the Organization of Prisons²¹³
- Ministry of Interior Decree No. 691 for the Year 1998 concerning the Treatment and Conditions of Prisoners²¹⁴
- Law No. 162 of 1958 concerning the State of Emergency²¹⁵
- Presidential Decree No 298 of 1995 on Securing the Eastern Borders of the Arab Republic of Egypt.²¹⁶
- Ministry of Defense Decree No. 176 of 1995²¹⁷
- Ministerial Decree No. 204 of 2010²¹⁸

9.1.4.2. Analysis of Domestic Instruments

9.1.4.2.1. Domestic Entitlements for Refugees, Asylum-Seekers, and Regular Migrants

Egyptian law provides refugees, asylum-seekers, and regular migrants with legal entitlements to freedom of movement, procedural guarantees during the deportation process, and humane treatment in detention. Article 91 addresses political asylum and is the only Constitutional provision that explicitly addresses non-nationals.²¹⁹ Its broad definition of “political asylum”

²⁰⁹ Law No. 82 for the Year 2016 issuing the Law on Combatting Illegal Migration and Smuggling of Migrants, *Al-Jarida Al-Rasmiyya*, 7 November 2016 (Egypt) [hereinafter, *Smuggling Law*].

²¹⁰ Law No. 64 for the Year 2010 regarding Combatting Human Trafficking, *Al-Jarida Al-Rasmiyya*, 9 May 2010 (Egypt) [hereinafter, *Trafficking Law*].

²¹¹ Law No. 12 of 1996 Promulgating the Child Law as amended by Law No. 126 of 2008 and Law No. 7 of 2015, *Al-Jarida Al-Rasmiyya*, 15 June 2008, (Egypt) [Hereinafter, *Child Law*].

²¹² Law No. 150 of 1950 (promulgating the Criminal Procedure Law), *Al-Jarida Al-Rasmiyya*, 15 October 1951 (Egypt). [Hereinafter, *Criminal Procedure Law*].

²¹³ President of the Republic Decree promulgating Law No. 396 for 1956 concerning the Organization of Prisons, *Al-Jarida Al-Rasmiyya* 29 November 1956 (Egypt). [Hereinafter, *Prison Organization Law*].

²¹⁴ Ministry of Interior Decree No. 691 for the Year 1998 concerning the Treatment and Conditions of Prisoners, *Al-Jarida Al-Rasmiyya*, 2 April 1998 (Egypt). [Hereinafter, *Decree Concerning Treatment of Prisoners*].

²¹⁵ Law No. 162 for the Year 1958 concerning the State of Emergency, *Al-Jarida Al-Rasmiyya* 28 September 1958 (Egypt). [Hereinafter, *State of Emergency Law*].

²¹⁶ Presidential Decree No. 298 of 1995 on Securing the Eastern Borders of the Arab Republic of Egypt, *Al-Jarida Al-Rasmiyya*, 9 September 1995 No. 33 Bis (Egypt). [Hereinafter, *Decree No. 298/1995*].

²¹⁷ Ministry of Defense Decree No. 176 for the Year 1995 on the Implementation of Presidential Decree No. 298 for the Year 1995 to Secure the Eastern Borders of the Arab Republic of Egypt, *Al-Jarida Al-Rasmiyya*, 18 February 1996 (Egypt). [Hereinafter, *Defense Decree No. 176/1995*].

²¹⁸ Ministerial Decree 204 of the year 2010, *Al-Jarida Al-Rasmiyya*, 22 July 2010 (Egypt). [Hereinafter, *Decree 204/2010*]

²¹⁹ *Egyptian Constitution*, *supra* note 206, Article 91: “The state shall grant political asylum to any foreigner who has been persecuted for defending the interests of peoples, human rights, peace or justice.”

could provide status for individuals not qualifying for refugee status under the Refugee Convention or the OAU Refugee Convention.²²⁰ However, Egypt delegates the authority for determining refugee status to UNHCR,²²¹ which makes the determination based on the Refugee Convention and OAU Refugee Convention definitions.²²²

Refugees and asylum-seekers in Egypt are not confined to camps, and there is no domestic legislation restricting their movement.²²³ Some legislation restricts all movement in certain areas. Presidential Decree 298 prohibits presence within 1,500 meters of the Egyptian-Israeli border between the towns of Taba and Raba'a. The Decree punishes those entering this area without military permit by up to six months imprisonment and gives the Egyptian General Intelligence Directorate (in times of peace) or military (during states of emergency) jurisdiction over such cases.²²⁴ Ministry of Defense Decree 176 applies Presidential Decree 298 to those attempting to exit Egypt.²²⁵ This is relevant because transiting through Egypt to reach Israel was once a common migration route.²²⁶ Ministerial Decree 204 prohibits any person, Egyptian or foreign, to enter the Governorate of Matrouh from the Western border with Libya without a permit. This law was enacted to limit the number of migrants crossing through Egypt with the intention of traveling from Libya to Europe by sea. Those found in Matrouh without a permit face imprisonment or a fine.²²⁷

Egyptian law provides basic standards of treatment for all detainees. The Constitution prohibits any form of torture and explicitly extends the prohibition of torture in detention.²²⁸ Despite

²²⁰ Egypt has previously granted political-asylum status to the former kings of Libya, Yugoslavia, and Albania; the former presidents of Tunisia, Sudan, and the Democratic Republic of the Congo; and the former Shah of Iran, some of whom may not have been granted refugee status under international or regional conventions. See, Sherifa Shafie, *FMO Research Guide: Egypt*, Forced Migration Online 1, 33 (200) at 10.

²²¹ *MoU*, *supra* note 207, at Article 2.

²²² UNHCR's Refugee Status Determination process is discussed in Chapter 3.3.

²²³ *Egyptian Constitution*, *supra* note 206, at Articles 62 & 63. The Constitution only provides the right to freedom of movement for citizens. It also prohibits the government from enacting policies that force citizens to migrate.

²²⁴ Decree 298/1995, *supra* note 216, at Article 2; Defense Decree 176/1995, *supra* note 208, at Article 2. As Egypt is currently in a state of emergency it is likely that the Military would determine the sentence for a foreigner who attempted to enter or exit Egypt illegally in this area.

²²⁵ Defense Decree 176/1995, *supra* note 208.

²²⁶ However, the construction of a barrier on the border, Israel's refugee detention policies, and Egypt's violent crackdowns at the border have considerably suppressed this route [See, Global Detention Project, *Egypt Immigration Detention Profile* (2019). Available at:

<https://www.globaldetentionproject.org/countries/africa/egypt>

²²⁷ Decree 204/2010, *supra* note 218,

²²⁸ *Egyptian Constitution*, *supra* note 206, at Article 52: "All those who are apprehended, detained or have their freedom restricted shall be treated in a way that preserves their dignity. They may not be tortured, terrorized, or coerced. They may not be physically or mentally harmed, or arrested and confined in designated locations that

this, reports of torture in Egyptian prisons were made by some media and human rights organizations.²²⁹ Egypt's Prison Law outlines the minimum standards of treatment for detained persons that are further explained by the Ministry of Interior Decree concerning the Treatment and Conditions of Prisoners.²³⁰ The Prison Law requires the treatment of detained aliens be equal to that of nationals. It requires Egypt provide all detained persons with educational services,²³¹ work opportunities,²³² and healthcare.²³³ Likewise, the Decree concerning the Treatment of Prisoners, which specifies housing, clothing, and nutritional entitlements, does not differentiate on the basis of nationality or immigration status.²³⁴ The Prison Law permits the detention of aliens pending deportation.²³⁵

Egyptian law also addresses individuals' procedural entitlements during arrest and imprisonment. The Constitution prohibits detention without a warrant except if caught in the act of committing a crime.²³⁶ The Criminal Procedure Law also mandates that a person suspected of a crime can only be detained if caught in the act of committing a crime or following an investigation by the Office of the Public Prosecutor.²³⁷ The Constitution further obliges the state to inform persons of charges against them, give them opportunity to contact relatives, provide legal representation during questioning, and ensure appearance before the judiciary within a week of arrest.²³⁸ The Criminal Procedure Law expands on the permissible period for temporary detention,²³⁹ and the enforcement of imprisonment sentences.²⁴⁰ The Criminal Procedure Law contains two provisions that limit non-nationals' entitlements. First, courts may temporarily detain non-residents until the establishment of a fixed address in the Court's jurisdiction.²⁴¹ Housing insecure refugees, asylum-seekers, and regular migrants, and those arrested outside their governorate of residence may risk lengthy detention until a fixed address is assigned. Second, the Criminal Procedure Law mandates the post-conviction

are appropriate according to humanitarian and health standards. The state shall provide means of access for those with disabilities."

²²⁹ See, Orla Guerin, "The Shadow over Egypt-Looking for the Disappeared," *BBC* (23 February 2018) & *Egypt Immigration Detention Profile*, *supra* note 226.

²³⁰ *Decree Concerning Treatment of Prisoners*, *supra* note 214.

²³¹ *Prison Law*, *supra* note 213, at Article 28.

²³² *Id.* at Article 38.

²³³ *Id.* at Article 33.

²³⁴ *Decree concerning Treatment of Prisoners*, *supra* note 214, at Articles 1-3.

²³⁵ *Entry and Residence Law*, *supra* note 208, at Article 27.

²³⁶ *Egyptian Constitution*, *supra* note 206, at Article 54.

²³⁷ *Criminal Procedure Law*, *supra* note 212, at Articles 34 & 40.

²³⁸ *Egyptian Constitution*, *supra* note 206, at Article 54.

²³⁹ *Criminal Procedure Law*, *supra* note 212, at Articles 137 & 145.

²⁴⁰ *Id.* at Article 465.

²⁴¹ *Id.* at Article 145.

detention if one does not have a fixed residence in Egypt and plans to appeal the decision.²⁴² While these Articles are equally applicable to Egyptian citizens without a fixed residence, it is likely to disproportionately impact refugees and other non-nationals, particularly those without family in Egypt. Detained children receive additional entitlements regarding the permissible length of detention,²⁴³ separate facilities from adult detainees,²⁴⁴ fair trial,²⁴⁵ and prohibition on pretrial detention.²⁴⁶

Enjoyment of the aforementioned entitlements is limited by Egypt's State of Emergency Law. According to the Constitution,²⁴⁷ the President may declare a state of emergency after consultation with the Cabinet and the approval of parliament when the security or public order of the Republic are at risk due to a state of war, the threat of war, internal disturbances, public disasters, or epidemics.²⁴⁸ Though the President should invoke the State of Emergency Law in only these narrow circumstances, Egypt has remained in a nearly continuous state of emergency for the last sixty years.²⁴⁹ During a state of emergency, the government can curtail some domestic legislation. The State of Emergency Law allows the state to detain suspects and to search persons and places without complying with the procedures outlined in the Criminal Procedural Law,²⁵⁰ until a 2018 Constitutional Court decision found this provision unconstitutional.²⁵¹ Thus, the state must obtain a warrant before searching individuals' homes. The State of Emergency Law also allows the Egyptian President to restrict residents' movement and detain individuals "suspected of or representing a danger in security and public order."²⁵² It permits the government to refer cases to specially established state security or military courts, even for civilians.²⁵³ Under the State of Emergency Law, the government can detain persons deemed dangerous to national security for a one-month renewable period

²⁴² *Id.* at Article 463. However, persons with fixed residencies who are not thieves or habitual offenders are eligible for bail pending the outcome of the appeal.

²⁴³ *Child's Law*, *supra* note 211, at Article 107.

²⁴⁴ *Id.* at Article 112.

²⁴⁵ *Id.* at Article 116.

²⁴⁶ *Id.* at Article 119.

²⁴⁷ *State of Emergency Law*, *supra* note 215, Article 1.

²⁴⁸ *Egyptian Constitution*, *supra* note 206, at Article 154.

²⁴⁹ The latest renewal, at the time of writing this Report, took place on 21 October 2018, when the Egyptian Parliament approved Presidential Decree Number 473 of 2018. Article 3 refers to the provisions of the Egyptian Emergency Law No 162 of the year 1958, which means that the Emergency Law is currently in force.

²⁵⁰ *State of Emergency Law*, *supra* note 215, Article 3.

²⁵¹ Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15, *Al-Jarida Al-Rasmiyya*, 3 June 2013 (Egypt).

²⁵² *State of Emergency Law*, *supra* note 215, at Articles 3 & 6. Refugees' access to courts under the State of Emergency Law is further discussed in Chapter 10 "Access to Courts".

²⁵³ Nathan Brown, "Egypt Is in a State of Emergency. Here's What It Means for Its Government," *Washington Post* (13 April 2017).

without trial,²⁵⁴ subject to the oversight of the state security courts. That is to say, independent judicial oversight and procedural protections for those detained seems curtailed during the state of emergency. The 2014 Amendment to the State of Emergency Law does permit detainees to complain against an order of arrest after six months of detention. In the State of Emergency Law, Egypt's international obligations are likely not fully respected.²⁵⁵ The ICCPR allows for derogations during times of public emergency. However, the Covenant requires that any limitations on rights to be necessary and proportionate. This requirement does not look like observed in the State of Emergency Law.

9.1.4.2.2. Domestic Entitlements for Irregular Migrants

Irregular migrants are not lawfully present and therefore Egyptian law enables their expulsion. The Entry and Residency Law requires migrants entering Egypt have valid documentation.²⁵⁶ Under this law, migrants who stay in Egypt after the expiration of their visas commit an administrative offense and are subject to deportation.²⁵⁷ Migrants who attempt to remain in Egypt after an expulsion order or irregularly reenter the country after deportation face criminal charges.²⁵⁸ The minimum penalty for such reentry is no less than one-year imprisonment.²⁵⁹ In the past, the state pursued criminal cases against irregular migrants who did not comply with expulsion orders.²⁶⁰ Currently, criminal cases are rarely pursued, as the government has adopted an approach of detaining and deporting irregular migrants. Egypt's Law No. 82 for 2016 issuing the Law on Combatting Illegal Migration and Smuggling of Migrants prohibits the criminalization of individuals smuggled into Egypt.²⁶¹ This protects smuggled persons from criminal sanctions but would not protect them from administrative detention and expulsion orders.²⁶²

²⁵⁴ *State of Emergency Law*, *supra* note 215, at Article 3.

²⁵⁵ See ICCPR, *supra* note 3, at Article 9; CAT, *supra* note 4, at Article 14; CRPD, *supra* note 7, at Article 14; ACHPR, *supra* note 142, at Article 5; & ACRWC, *supra* note 143, at Article 16.

²⁵⁶ *Entry and Residence Law*, *supra* note 208, Article 2.

²⁵⁷ *Id.* at Article 27.

²⁵⁸ *Id.* at Article 31.

²⁵⁹ *Id.*

²⁶⁰ Muhammad al-Kashef, *Egypt: The Escape Portal*, University of Oxford Faculty of Law (2017) available at: Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/egypt-escape>.

²⁶¹ *Smuggling Law*, *supra* note 209, Article 12.

²⁶² Interview with Mr. Naser Mesalam, expert on Egypt's counter trafficking policies and child migration conducted on February 25, 2019.

Domestic law outlines procedural guarantees for irregular migrants facing deportation. First, the decision to expel an irregular migrant must come from a committee comprised of representatives from the Ministry of Interior, Ministry of Foreign Affairs, and State Council.²⁶³ This procedure offers some protection against arbitrariness. In addition, Residency and Nationality Law stipulates that when detention or deportation proves difficult, authorities can mandate house arrest or periodic, scheduled reports to the police station.²⁶⁴ This severely and indefinitely restricts the movements of failed asylum-seekers who are irregular migrants,²⁶⁵ but is less constraining than indefinite detention. Finally, detained failed asylum-seekers who are irregular have the same procedural guarantees and the right to minimum standards of treatment as all persons in Egypt.

9.1.5. Analysis of Overall Legal Framework in Egypt

Refugees and asylum-seekers have the right to freedom of movement, with some limited restrictions provided for parts of the border with Israel and Libya. They are entitled to remain in Egypt and not be subjected to mass expulsion. They cannot be sent to a territory where they would face torture or threats to their life, liberty, or physical integrity. Refugees and asylum-seekers are protected by an absolute prohibition of torture and arbitrary detention but may be detained if they violate Egyptian law. Detainees are entitled to legal representation, notification of the charges they face, prompt appearance before a civilian court, and release from detention following the court's determination of their innocence or the completion of their sentence. They are also entitled to minimum standards of treatment while detained, including hygienic accommodation, sufficient food and water, and clothing. Child refugees, youth refugees, refugees with disabilities, and smuggled and trafficked refugees have additional substantive and procedural entitlements under international and regional law. Egypt's State of Emergency Law modifies these entitlements considerably, in contravention of ICCPR Article 4. Sudanese nationals have additional entitlements to freedom of movement and visa-free entrance.

The rights of failed asylum-seekers differ based on whether they are regularly or irregularly in Egypt. Both groups are protected from mass expulsion, refoulement, torture, and arbitrary detention. Failed asylum-seekers that are regular migrants share the same entitlements as refugees and asylum-seekers relating to freedom of movement and expulsion because they are

²⁶³ *Entry and Residence Law*, *supra* note 208, at Article 24.

²⁶⁴ *Id.* at Article 30.

²⁶⁵ Al-Kashef, *supra* note 260.

lawfully in Egypt. Irregular migrants lack a legal right to remain in Egypt and do not have the right to freedom of movement. It is permissible for the state to expel irregular migrants, subject to an individualized expulsion process that includes the right to appeal. It is permissible to detain failed asylum-seekers pending deportation, although this cannot be done arbitrarily.

9.2. IMPLEMENTATION

The law allows for freedom of movement in most situations for refugees and asylum-seekers, as well as freedom from torture, mass expulsion, refoulement, and arbitrary detention. As noted, refugees and asylum-seekers may be detained if they violate Egyptian law. For failed asylum-seekers, their rights differ based on legal status, and, if here irregularly, are not guaranteed freedom of movement and may be expelled subject to an individualized process. However, failed asylum-seekers in Egypt, both regular and irregular, are protected against torture, mass expulsion, refoulement, and arbitrary detention.

For many community members interviewed, the main complaint is that the authorities are unaware that the UNHCR refugee card is a valid source of residence in the country. According to these same participants, detention can last anywhere from a few hours to a few months. There were many issues that participants faced after being detained. The first being that many were not told the reason for their arrest by the authorities. They also claimed that after being detained, it is difficult to receive assistance from UNHCR or other NGOs, even when trying to access the phone hotlines given for such a situation. According to UNHCR, the referral pathways which can be used when one is detained can be as follows: calling the UNHCR phone hotlines, utilizing the UNHCR functional mailbox, approaching the UNHCR gate directly on behalf of someone who was detained, and calling the UNHCR legal partners emergency helplines or any other partner.²⁶⁶

A member of the Prosecution has rarely seen refugees and asylum-seekers being detained because their paperwork is expired. However, this varies based on the location of the Prosecutor's Office. The Director of the Madinat Nasr Prosecutor's Office [which covers areas with large migrant communities like Hay Ashra] sees irregular migrants more frequently, but rarely sees asylum-seekers or refugees. The Madinat Nasr office indicated that status-based

²⁶⁶ Information obtained in an interview with UNHCR Egypt, January 2020. UNHCR has limited access to detention facilities that is based on prior approval from authorities yet, has a direct channel to work with the relevant authority.

arrests usually occur in one of two situations. First, when the Ministry of Interior directs police to go door-to-door and check immigration statuses. This is fairly uncommon. Second, when the police want to exert pressure on community leaders. This usually happens when a crime is committed and the alleged perpetrator is a member of a migrant community. If the community leaders do not assist police in identifying the individual, police will begin checking visas and arresting irregular migrants.²⁶⁷

An expert on child trafficking and migration mentioned that concerning failed asylum-seekers, whoever is above 18 years gets immediately deported. Those below the age of 18 years are not deported. Furthermore, if a family of failed asylum-seekers has a child with them, they usually do not get deported. This is in accordance to the stipulated provisions in the Executive Regulation of Law No. 82 of 2016.²⁶⁸ A governmental official stated that the role the Ministry of Foreign Affairs (MoFA) plays in deportation, is obtaining the consent of the individual's country of origin because this is necessary before someone can be removed. According to them, Egypt does not deport many people and takes the obligation not to refoul very seriously.²⁶⁹

When asked about the process of notification between the government and UNHCR when a registered refugee or asylum-seeker is detained, Tarek Badawy, a local lawyer, believes this is an unofficial policy that is a matter of practice. In migration or misdemeanour cases, it is less expensive and time consuming for Egypt to deport foreigners than prosecute, so they have an incentive to cooperate with international organizations. Also, when a foreign national is detained, National Security in the Ministry of Interior is notified. They usually have a [perhaps unofficial as their directives are not public record] policy of notifying UNHCR, but it is a matter of the length of time before notification.

The Egyptian Foundation for Refugee Rights (EFRR) has strategically litigated against refoulement administrative decisions, hence, creating legal precedent. A total of 14 legal cases appealing administrative decisions to refoul refugees and asylum-seekers exist. 13 out of the 14 legal cases filed were won by EFRR. According to EFRR, the rationale of the court was based solely on international instruments in these court cases. However, a further reading of

²⁶⁷ Information obtained in an interview with a member of the Prosecution, February 2019.

²⁶⁸ Information obtained in an interview with an expert on trafficking and migration, February 2019. *Smuggling Law*, *supra* note 209,

²⁶⁹ Information obtained in an interview with a government official, April 2019.

the court decisions highlights the interpretation of ‘other’ clauses in local Egyptian laws related to refugees.²⁷⁰ EFRR said that the case they lost was based on the fact that the claimant (refugee/asylum-seeker) had a criminal record, and hence was considered by the court as a threat to public peace. The court ordered that the annulment of the deporting administrative decision, yet unlike the other cases, it did not release him from detention. The claimant was soon resettled after EFRR filed a complaint in Geneva.²⁷¹

9.3. RECOMMENDATIONS

9.3.1 Detention

For the migrant communities interviewed, there exists a gap between theory and practice when it comes to arbitrary detention. An awareness campaign among authorities informing them of the UNHCR cards and their meanings would seemingly go a long way in stopping arbitrary detention of refugees and asylum-seekers who are accused of not having valid residency documents in the country. If detained, a migrant, regardless of their legal status, should be informed of the reason for their detention. If a language barrier exists between the police and the individual in question, an interpreter should be brought in to facilitate communication. Likewise, UNHCR and the various INGOs and NGOs who work with migrant detainees need to streamline their communication processes for those who have been detained and their friends and family members so they are aware of what is happening and next steps in the process. If one happens to be detained, overall conditions are improvable, regardless of nationality. Individuals should not be placed in overcrowded rooms and should be allowed access to family visits and meals brought by family members. Mistreatment should be prevented for any individual in detention, regardless of nationality.

9.3.1 Deportation

For deportation, there exists a gap between theory and practice, particularly for refugees and asylum-seekers. To begin, the process and fees to renew residency on a UNHCR card must be made easier and more affordable for refugees and asylum-seekers. As illustrated above under detention, an awareness campaign for local authorities needs to occur so they are aware that having a yellow or blue card gives one legal status in the country and safety from deportation.

²⁷⁰ Information obtained in an interview with EFRR, March 2019.

²⁷¹ *Id.*

Access to a lawyer once the process of deportation has begun should be mandatory, as well as an appeals process if a negative decision is given to the migrant. UNHCR should make their presence well-known to those who reach out to them for assistance if detained and threatened with deportation.

CHAPTER 10: ACCESS TO COURTS

10.1. LEGAL FRAMEWORK

10.1.1. International Law

10.1.1.1. International Instruments¹

- *Convention Relating to the Status of Refugees 1951*²
- *International Covenant on Civil and Political Rights (ICCPR)*³
- *Convention on the Rights of the Child (CRC)*⁴
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁵
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*⁶
- *Convention on the Rights of Persons with Disabilities (CRPD)*⁷
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*⁸
- *Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)*⁹

¹ Full text of the following legal instruments can be found in Annex H.

² Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, (entered into force April 22, 1954). [Hereinafter, *Refugee Convention*] Egypt acceded to the Convention on 22 May 1981.

³ International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976). [Hereinafter, *ICCPR*] Egypt ratified the Covenant on 14 January 1982 with the following reservation: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁴ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, (entered into force September 2, 1990). [Hereinafter, *CRC*] Egypt ratified the Convention on 6 July 1990.

⁵ Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1248 U.N.T.S. 13, (entered into force September, 3 1981). [Hereinafter, *CEDAW*] Egypt ratified the Convention on 18 October 1981.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195, (entered into force January 4, 1969). [Hereinafter, *ICERD*] Egypt ratified the Convention on 1 May 1967.

⁷ Convention on the Rights of Persons with Disabilities, 13 Dec. 2006, 2515 U.N.T.S. 3, (entered into force May 3, 2008). [Hereinafter, *CRPD*] Egypt acceded to the Convention on 18 September 1981.

⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3, (entered into force July 1, 2003). [Hereinafter, *CMW*] Egypt acceded to this Convention on 19 February 1993.

⁹ Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 U.N.T.S. 319, (entered into force Dec 25, 2003). [Hereinafter, *Trafficking Protocol*]. Egypt ratified the Convention on 5 March 2004.

- *Vienna Convention on Consular Relations 1963*¹⁰

10.1.1.2. Analysis of International Instruments

10.1.1.2.1. Entitlements under the Refugee Convention

The *Convention Relating to the Status of Refugees 1951* (Refugee Convention) entitles refugees to free access to courts on the territory of all Contracting States.¹¹ “Free access” in this context does not necessarily mean cost-free access, but rather refers to an access free of any restrictions, which would hinder specifically refugees from exercising their rights.¹² States may impose court fees on refugees but these fees must not be higher than those imposed on nationals in the same situation.¹³ This entitlement is broadly phrased and does not specify legal status or a residency requirement. Thus, legal experts interpreted this provision as not even requiring the physical presence of the refugee in the territory of the State Party whose court they wish to access.¹⁴ The only condition to be fulfilled is that the court needs to be on the territory of a State Party. This helps in situations where, for instance, a refugee has to file a lawsuit against a debtor residing in a different state, if the courts of the defendant’s country of residence have jurisdiction over the case.¹⁵

The Refugee Convention also provides for more detailed rights concerning access to courts. Refugees enjoy the same treatment as nationals in the state of their habitual residence.¹⁶ This includes the right to legal assistance and the exemption from *cautio judicatum solvi*.¹⁷ In contrast with the mere right to access courts, this provision for the same treatment requires habitual residence. Habitual residence does not necessarily mean a permanent domicile but implies a degree of connection between refugees and state that exceeds mere presence.¹⁸ Although the law explicitly mentions legal assistance and exemption from *cautio judicatum solvi*, it is not limited to these two aspects. Rather it entitles refugees to equal treatment in all other matters pertaining to access to courts. The content of this entitlement depends on the

¹⁰ Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, (entered into force March 19, 1967).

¹¹ *Refugee Convention*, *supra* note 2, Article 16(1).

¹² BJÖRN ELBERLING, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 939. (Andreas Zimmermann ed., 2010).

¹³ *Refugee Convention*, *supra* note 2, Article 29(1).

¹⁴ ELBERLING, *supra* note 12, 938.

¹⁵ *Id.* at 938.

¹⁶ *Refugee Convention*, *supra* note 2, Article 16(2).

¹⁷ *Cautio judicatum solvi* means a bond which is deposited at court to secure the payment of the litigation costs. It is sometimes used in the case of foreign nationals initiating court proceedings.

¹⁸ ELBERLING, *supra* note 12, 940.

rights citizens in the same situation hold. If a state does not provide legal assistance to its citizens, then this provision does not create a right to legal assistance for refugees.¹⁹

Furthermore, the Refugee Convention addresses the situation of a refugee involved in court proceedings in a country other than their country of habitual residence. In this case, refugees receive the same treatment as nationals of their country of habitual residence would in the same situation with regard to access to courts, legal assistance and exemption from *cautio judicatum solvi*.²⁰ This scenario, where two states are involved, raises the question of whether the forum state is bound by the positive Refugee Status Determination awarded by the state of habitual residence. The Refugee Convention Conference of the Plenipotentiaries did not provide an answer on this matter. However, if a refugee has to undergo a new status determination in every state outside their country of habitual residence, then the lengthy RSD process this would entail poses an obstacle to them enjoying the right to access to courts. Therefore, it is assumed that in this situation the forum state is obliged to accept the status determination of another Contracting State to enable refugees to access courts away from their habitual residence.²¹

In order to situate the provision on access to courts within the legal framework of the Refugee Convention, it should be noted that it only covers proceedings at courts, while other provisions in the Convention deal with refugees' rights to administrative assistance,²² and their procedural guarantees and legal remedies when at risk of expulsion.²³ Which entitlement refugees can refer to in a specific case depends on whether it is a proceeding conducted by courts or by administrative authorities. For example, in the United States, a refugee claimant may not ask for the judicial review of an administrative decision rendered in their case, as it is a purely administrative process.²⁴ In this situation it is impossible to invoke the right to access to courts because courts do not have jurisdiction over the matter according to the domestic system.

¹⁹ *Id.* at 941.

²⁰ *Refugee Convention*, *supra* note 2, Article 16(3).

²¹ ELBERLING, *supra* note 12, 942-3.

²² *Refugee Convention*, *supra* note 2, Article 25.

²³ *Id.* at Article 32 reads: "EXPULSION 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

²⁴ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 647 (2005).

Free access to courts is a fundamental human right and no reservations are permitted to it.²⁵ While reservations are permitted to the right to receive the same treatment as nationals of the country of habitual residence, only three countries have introduced such reservations.²⁶ As argued by legal scholars, receiving refugee status is merely a declaratory act by states. It would not be fair if those seeking asylum, who will qualify as refugees once the domestic RSD process is completed, would not be able to exercise their rights under the Refugee Convention while awaiting their RSD decision. To solve this dilemma, it is necessary to preliminarily grant asylum-seekers the same rights as refugees.²⁷ Thus, also asylum-seekers are entitled to free access to courts to the extent described in the preceding paragraphs.

10.1.1.2.2. Further Entitlements for Refugees, Asylum-Seekers and Failed Asylum-Seekers

Apart from the Refugee Convention, refugees, asylum-seekers and failed asylum-seekers possess rights under other international human rights treaties. The *International Covenant on Civil and Political Rights* (ICCPR) entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal to determine their rights and obligations.²⁸ It declares all persons equal before the law and establishes minimum safeguards during court proceedings.²⁹ It obliges states to offer an effective legal remedy to any person whose rights or freedoms are violated, which entitles everyone to have a competent judicial, administrative, or legislative authority decide on their case.³⁰ Should they be arrested or detained on a criminal charge, a judge must assess the legitimacy of the detention promptly and the trial take place within reasonable time.³¹ Individuals are entitled to compensation if detention is unlawful.³² Special consideration shall be given to underage defendants to whom the rules of juvenile delinquents apply.³³ Any hearing must be public.

²⁵ *Refugee Convention*, *supra* note 2, Article 42(1) reads: “At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”

²⁶ ELBERLING, *supra* note 12, 936: Only Uganda, Timor-Leste and China made reservations to Article 16 paras. 2 and 3.

²⁷ HATHAWAY, *supra* note 24, 159.

²⁸ *ICCPR*, *supra* note 3, Article 14.

²⁹ *Id.* at Article 14.

³⁰ *Id.* at Article 2(3).

³¹ *Id.* at Article 9(3).

³² *Id.* at Article 9(4)(5).

³³ *Id.* at Article 14(4).

In the case of criminal charges, there is a presumption of innocence, the defendant must be informed of the charges, given time to prepare a defense, and receive legal assistance if they cannot pay for it.³⁴ Once a judgment is rendered, a defendant has the right to review by a higher court and is entitled to compensation in the case of miscarriage of justice.³⁵ The ICCPR also confirms the generally accepted principle of *ne bis in idem* (everyone has the right not to be tried again for an offense for which they have previously been convicted or acquitted)³⁶ and the prohibition of retroactive application of laws (nobody can be held guilty for an act that did not constitute a criminal offense at the time it was committed).³⁷

Refugees, asylum-seekers and failed asylum-seekers benefit from all the above discussed procedural safeguards when they appear before a court. In addition, ICCPR and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) stipulate that all persons are equal before the law, are entitled to the protection of the law without discrimination on any ground including race, color, language, national or social origin, birth or other status,³⁸ and to have an effective legal remedy against acts of racial discrimination with the possibility of receiving compensation.³⁹ The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) requires that women are treated as equal to men before the law, that women have the same legal capacity as men, and must be treated equally in all stages of procedure in courts and tribunals.⁴⁰ Interestingly, no specific reservation was made to this provision dealing with the equality of men and women before the law, although Egypt did enter a reservation on the right for men and women to be treated equally regarding marriage and family, stating that there are legal differences between the two genders under Islamic Sharia.⁴¹

³⁴ *Id.* at Article 14(2)(3).

³⁵ *Id.* at Article 14(5)(6).

³⁶ *Id.* at Article 14(7).

³⁷ *Id.* at Article 15.

³⁸ *Id.* at Article 26. ICERD, *supra* note 6, Article 5(a).

³⁹ ICERD, *supra* note 6, Article 6.

⁴⁰ CEDAW, *supra* note 5, Article 15.

⁴¹ Egypt made special reservations for Article 16 on eliminating discrimination of women in all matters pertaining to marriage and family relations: “Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is

Egypt also has a reservation to CEDAW Article 2, which is the general provision obliging states to eliminate all discrimination against women. The reservation proclaims that “(t)he Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia”.⁴² In addition to marriage and family law, Islamic Sharia also differentiates on the basis of gender in some other legal matters. For example, in the rules of evidence, Islamic law prescribes that one should provide two male witnesses, or alternatively one male and two female witnesses, when it comes to testimony in business transactions.⁴³ CEDAW Committee General Recommendation No. 28 states that Article 2 is crucial to the full implementation of the Convention because it lays out the general obligations of states to respect the rights stipulated in the Convention on a domestic level.⁴⁴ The Committee considers any reservations against Article 2 as being against the object and purpose of CEDAW and impermissible under CEDAW Article 28.⁴⁵

Furthermore, Egypt has ratified the *Convention on the Rights of Persons with Disabilities* (CRPD), which entitles everyone with disabilities to be recognized as persons before the law and to enjoy legal capacity on equal terms with others in all aspects of life.⁴⁶ However, the legal capacity of those with disabilities is limited through a reservation Egypt made on equal recognition before the law. It states that persons with disabilities have the capacity to acquire rights, but not the capacity to enter binding obligations.⁴⁷ This reservation clarifies that in Egypt

not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.”

⁴² Reservation retrieved from the UN Treaty Collection website:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec (accessed on 5 September 2018).

⁴³ MASHOOD BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 101 (2003). Baderin cites the relevant sections from the Qur'an which mention the necessity of two female witnesses in place of one male witness. Qur'an 2:282: “*O you who believe! When you contract a debt for a fixed period, write it down. [...] And get two witnesses out of your own men, and if there are not two men [available] then a man and two women, such as you agree for witnesses, so that if one of them [two women] errs, the other can remind her.*” In other areas of law, however, the Qur'an uses the generic term “two persons” to describe the witnesses, and does not differentiate between genders. Qur'an 65:1-2: “*when you divorce women [...] either take them back on equitable terms or part with them on equitable terms; and take for witnesses two persons from among you ended with justice*”

⁴⁴ 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 Dec. 2010, para 6.

⁴⁵ *Id.* at para 41. CEDAW, *supra* note 5, Article 28(2): “*A reservation incompatible with the object and purpose of the present Convention shall not be permitted.*”

⁴⁶ CRPD, *supra* note 7, Article 12(1)(2).

⁴⁷ Reservation entered by Egypt to Article 12: “*The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before*

persons with disabilities are entitled to hold rights that are in their own interest, but are unable to enter any legal transactions creating obligations. This interpretation can be useful to protect persons with mental disabilities from, for instance, entering a contract without understanding its consequences. Similar to the limitation usually imposed on the legal capacity of children to prevent them from entering any obligations beyond their understanding. This reservation only seems relevant to the situation of persons with certain types of mental disability, and becomes problematic when applied generally to all persons with disabilities where there is no reason to limit their legal capacity for their own protection. The provisions of the CRPD explicitly apply to mental as well as physical disabilities by declaring that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁴⁸ It is not clear whether the Egyptian reservation was intended to apply only to the relevant types of mental disability or to all persons with disabilities. In case of the latter, the reservation risks going against the object and purpose of the Convention because, instead of eliminating discrimination between disabled and not-disabled persons, it creates an unnecessary and severe discrimination stripping individuals with disabilities of their legal capacity. A reservation with such a wide scope would thus be invalid and Egypt, unless explicitly stated otherwise, would remain state party to the CRPD but without the benefit of the invalid part of this reservation.⁴⁹

Furthermore, the CRPD explicitly requires states to provide persons with disabilities the necessary support to exercise their legal capacity.⁵⁰ Thus, they are obliged to provide those they consider limited in their ability to fully exercise their legal capacity with suitable means to take part in legal transactions, for instance, through providing a guardian or legal representative. Article 13 of the CRPD entitles persons with disabilities to effective access to justice and obliges states to facilitate their participation in all legal proceedings.⁵¹ In order to

the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub') but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law.” “Ahliyyat al-'ada” can be understood as active legal capacity, and “ahliyyat al-wujub” as receptive legal capacity.

⁴⁸ CRPD, *supra* note 7, Article 1.

⁴⁹ Guide to Practice on Reservations to Treaties, 2011 Y.B. Int'l L. Comm'n Vol. II Part 2, U.N. Doc. A/66/10/para. 75, at 4.5.3.

⁵⁰ CRPD, *supra* note 7, Article 12(3).

⁵¹ *Id.* at, Article 13(1).

implement this right, states are obliged to promote appropriate training to those working in the justice sector.⁵²

Children of refugees, asylum-seekers and failed asylum-seekers can additionally rely on their rights enumerated in the *Convention on the Rights of the Child*, which mirror the above described rights established by the ICCPR. In addition to the ICCPR, the CRC emphasizes that the best interest of the child shall be a primary consideration before courts of law.⁵³ States have to ensure that every child accused of infringing the penal law has the following minimum guarantees: to be presumed innocent until proven guilty; to be promptly informed of the charges against him/her; to receive a fair hearing before an independent and impartial institution; not to be compelled to admit guilt; to have any decision rendered reviewed by a higher authority; to use the assistance of an interpreter if necessary; and to have the right to privacy being respected.⁵⁴ Article 40 requires penal laws to consider the child's sense of dignity and worth, as well as reintegration of juvenile delinquents into society.⁵⁵ Therefore, states shall promote the establishment of laws protecting children facing criminal charges through creating a minimum age for being criminally liable, through establishing procedures alternative to judicial proceedings and through considering measures such as counselling, foster care or educational programs as alternatives to institutional care.⁵⁶

Refugees, asylum-seekers and failed asylum-seekers who were victims of trafficking enjoy additional protection under the Trafficking Protocol.⁵⁷ Victims shall be informed of any court or administrative proceedings taking place. Legal proceedings relating to cases of trafficking are to be held confidential to protect the privacy of the victims and shall give them the opportunity to express their views against the offender.⁵⁸ Furthermore, State Parties' domestic

⁵² *Id.* at Article 13(2).

⁵³ *CRC*, *supra* note 4, Article 3(1).

⁵⁴ *Id.* at Article 40(2)(b).

⁵⁵ *Id.* at Article 40(1).

⁵⁶ *Id.* at Article 40(3)(4).

⁵⁷ *Trafficking Protocol*, *supra* note 9, Article 3(a): “‘*Trafficking in persons*’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”

⁵⁸ *Trafficking Protocol*, *supra* note 9, Article 6(1) and (2).

legal system has to offer victims the possibility of receiving compensation for the damage they suffered.⁵⁹

Failed asylum-seekers who fulfill the criteria of being a migrant worker enjoy additional rights stipulated in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW).⁶⁰ A migrant worker is 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.”⁶¹ The CMW repeats many basic rights already provided through the ICCPR, with regard to the right to liberty and security of the person, the right to be recognized as a person before the law, the protection against arbitrary arrest, and the procedural safeguards in connection to criminal charges.⁶² However, there are some differences or additions to the provisions of ICCPR. With regard to criminal charges, the CMW highlights that it should not be a general rule for migrant workers and their families to be detained while awaiting trial and that any verification of identity carried out by the law enforcement has to be carried out in accordance with procedures established by law.⁶³ Detained migrant workers and their families have the right to communicate with the consular or diplomatic authorities of their state of nationality, to be informed of any treaties between the states concerned providing additional rights, to meet with representatives of said authorities and to make arrangements for legal representation.⁶⁴ The right of detainees to contact the consular authorities of their home state, can also be found in Article 36 of the Vienna Convention on Consular Relations.⁶⁵ This Convention applies not only to failed asylum-seekers but to everyone. In practice however, these provisions are unlikely to be helpful for asylum-seekers and refugees as they cannot avail themselves of the help of their country of nationality.

In addition to those rights, the CMW entitles migrant workers and their families to the protection of the law against any unlawful interference or attacks on their privacy, family, home or correspondence and guarantees them the protection of the law against such interference or attacks.⁶⁶ Migrant workers and their families shall not be subject to measures of collective

⁵⁹ *Id.* at Article 6(6).

⁶⁰ *CMW*, *supra* note 8. The CMW explicitly excludes refugees from its application, *see* Article 3 CMW.

⁶¹ *Id.* at, Article 1

⁶² *Id.* at Articles 16, 18, 19 and 24.

⁶³ *Id.* at Article 16 (3) and (6).

⁶⁴ *Id.* at, Article 16 (7).

⁶⁵ Vienna Convention on Consular Relations, *supra* note 10.

⁶⁶ *CMW*, *supra* note 8, Article 14.

expulsion. Instead they are entitled to have each case examined individually by a competent authority and in accordance with the law.⁶⁷ Any decision must be communicated to them in writing in a language they understand and include the reasons for the decisions. If the decision for expulsion was not rendered by a judicial authority, then regular migrants have the right to have their case reviewed and to receive compensation in case of annulment. Only compelling reasons of national security may constitute an exemption to these entitlements.⁶⁸ Even if migrant workers are to be expelled, the CMW continues to protect their rights by obliging states to grant them the opportunity to settle any claims for wages and other entitlements prior to their deportation and the costs for expulsion shall not be borne by them.⁶⁹

In general, migrant workers and their families have the right to be informed of their rights arising from the CMW by their state of nationality, state of employment, or state of transit.⁷⁰ Whenever these rights are infringed, they have the right to resort to the protection and assistance of the consular or diplomatic authorities of their state of nationality.⁷¹ All the above described rights found in the CMW are granted to regular and irregular migrant workers, and their families, alike. However, Egypt made a reservation to Article 18(6) of the CMW, which grants migrant workers and their families compensation for any miscarriage of justice in criminal cases.

10.1.2. Regional Law

10.1.2.1. Regional Instruments⁷²

- *African Charter on Human and Peoples' Rights*⁷³
- *African Charter on the Rights and Welfare of the Child*⁷⁴
- *African Youth Charter*⁷⁵

⁶⁷ *Id.* at Article 22(1)-(2).

⁶⁸ *Id.* at Article 22.

⁶⁹ *Id.* at Article 22(6)-(9).

⁷⁰ *Id.* at Article 33(1).

⁷¹ *Id.* at Article 23.

⁷² Full text of the following legal instruments can be found in Annex H.

⁷³ African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

⁷⁴ African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG 24.9/49, (entered into force Nov. 29, 1999). Egypt ratified the Charter on 9 May 2001. [Hereinafter, *ACRWC*]

⁷⁵ African Youth Charter, 2 July 2006, (entered into force Aug. 8, 2009). Egypt ratified the Charter on 1 April 2015. [Hereinafter, *AYC*]

- *Riyadh Arab Agreement for Judicial Cooperation*⁷⁶ (*Applicable to member states of the League of Arab States*)⁷⁷

10.1.2.2. Analysis of Regional Instruments

Applicable regional instruments that include provisions related to access to courts are the *African Charter on Human and Peoples' Rights* (African Charter),⁷⁸ the *African Charter on the Rights and Welfare of the Child* (ACRWC),⁷⁹ and the *African Youth Charter* (AYC).⁸⁰ These Charters do not differentiate on the basis of nationality, nor on the basis of legal status, but confer entitlements to everyone on the territory of a State Party.⁸¹ Thus, these legal instruments apply to refugees, asylum-seekers and failed asylum-seekers alike, and regardless of their nationality. The *Riyadh Agreement for Judicial Cooperation* is only relevant for nationals of the contracting states, which are Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria Tunisia, United Arab Emirates, Yemen, and Egypt.

On the regional level, refugees, asylum-seekers and failed asylum-seekers have less detailed entitlements than on the international level. However, the African Charter covers the most essential rights necessary to provide refugees fair access to courts, mirroring the ICCPR.⁸² It guarantees everyone the right to be considered equal with others before the law and to receive the equal protection of the law.⁸³ In addition, the Charter emphasizes that every human being has the right to recognition of their legal status.⁸⁴ This provision mainly aims at prohibiting any forms of exploitation or degradation, such as slavery or inhuman treatment, but also ensures that nobody may be denied legal status and recognition. Everyone has the right to appeal to a competent authority against the infringement of any of their fundamental rights guaranteed in

⁷⁶ Riyadh Arab Agreement for Judicial Cooperation, League of Arab States, April 6, 1983. Signed by Egypt on August 19, 2014, ratified through Presidential Decree No. 278 of 2014, *Al-Jarida Al-Rasmiyya*, 4 Dec. 2014 (Egypt).

⁷⁷ Signatory parties: Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria Tunisia, United Arab Emirates, Yemen. Egypt signed in 2014.

⁷⁸ *African Charter*, *supra* note 73.

⁷⁹ *ACRWC*, *supra* note 74.

⁸⁰ *AYC*, *supra* note 75.

⁸¹ This can clearly be concluded from the terms used in the legal instruments with regards to the beneficiaries of the entitlements: "everyone", "every young person", "every child".

⁸² *ICCPR*, *supra* note 3.

⁸³ *African Charter*, *supra* note 73, Article 3.

⁸⁴ *Id.* at Article 5.

conventions, laws, regulations and customs in force, in order to have their cause heard.⁸⁵ Should they be accused of a crime, they have the right to be presumed innocent until proven guilty, the right to defend themselves (with the assistance of a lawyer if needed), and the right to be tried within a reasonable time.⁸⁶ As provided for in the ICCPR, nobody may be condemned for an act which did not constitute a crime at the time the act was committed. Also, nobody other than the offender may receive punishment for a crime committed.⁸⁷ Unlike the ICCPR, the African Charter includes a provision obliging states to guarantee the independence of their courts and to establish the necessary institutions to promote and protect the rights enumerated in the Charter.⁸⁸

Regional law provides special protection for children or young persons. The ACRWC entitles children who broke the law to special treatment according to their needs, and emphasizes their right to be free from torture or mistreatment while being imprisoned.⁸⁹ States are obliged to provide special treatment to expectant mothers and the infants or young children of mothers who have been accused or condemned for a crime,⁹⁰ which is particularly helpful in cases of children born while their mother is in custody or serving prison time. The AYC provides specific provisions for those between the age of 15 and 35 years.⁹¹ Refugees, asylum-seekers and failed asylum-seekers within this age span who have been accused or found guilty of a crime, have the right to be treated with humanity and respect. Particularly this entails that the state has to ensure they are not subjected to torture, or inhumane or degrading treatment in detention, and that accused minors are separated from convicted persons. Other state obligations include the establishment of special rehabilitation facilities for imprisoned minors, providing programs for reformation, social rehabilitation and reintegration, and to include continued education and skills development part of a restorative justice process.⁹² In addition, this Charter emphasizes states' obligation to ensure young persons' representation through a lawyer.⁹³ The AYC's provisions on eliminating the discrimination against girls and young

⁸⁵ *Id.* at Article 7(1)(a).

⁸⁶ *Id.* at Article 7(1)(b)-(d).

⁸⁷ *Id.* at Article 7(2).

⁸⁸ *Id.* at Article 26.

⁸⁹ *ACRWC the, supra* note 74, Article 17. The term children in this context, according to Article 2 of the before mentioned Charter, refers to every human being below the age of 18 years.

⁹⁰ *Id.* at Article 30.

⁹¹ *AYC, supra* note 75, Preamble: For the purposes of this Charter, *youth* or *young people* shall refer to every person between the ages of 15 and 35 years.

⁹² For more details see Chapter 9 on Detention and Expulsion.

⁹³ *AYC, supra* note 75, Article 18.

women indirectly include a court-related entitlement: States shall develop programs of actions that, among other areas, provide legal support to female youth who have been subjected to violence and abuse.⁹⁴

The *Riyadh Arab Agreement for Judicial Cooperation* confirms that all citizens of Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria Tunisia, United Arab Emirates, Yemen, and Egypt have the right to access courts in the territory of any contracting state. Furthermore, they are protected from having to pay any kind of security for the litigation costs, as is sometimes required from foreigners involved in a lawsuit abroad.⁹⁵ This mirrors the same exemption given to refugees and asylum-seekers under the Refugee Convention,⁹⁶ though in this case the entitlement is applicable to refugees, asylum-seekers and failed asylum-seekers alike, provided they are nationals of a state party to the Agreement. Furthermore, the Agreement stipulates that citizens of State Parties are always entitled to receive the same legal assistance within the territory of a state party as their own citizens.⁹⁷ Generally, the Riyadh Agreement facilitates extradition between State Parties, however, refugees, asylum-seekers and failed asylum-seekers may benefit from a specific provision protecting from extradition all those who are accused of a political crime or of a breach of military duties.⁹⁸ Regardless of any extradition agreements, refugees and asylum-seekers remain always protected from refoulement and may never be sent back to a country where their life or freedom would be threatened.⁹⁹

10.1.3. Bilateral Law

10.1.3.1. Bilateral Instruments¹⁰⁰

⁹⁴ *Id.* at Article 23.

⁹⁵ Riyadh Arab Agreement for Judicial Cooperation, *supra* note 76, Article 3.

⁹⁶ *Refugee Convention*, *supra* note 2, Article 16(2).

⁹⁷ Riyadh Arab Agreement for Judicial Cooperation, *supra* note 76, Article 4.

⁹⁸ *Id.* at Article 41. Crimes that do not fall under the category of “political crimes”: Assault on kings and presidents of the Contracting Parties of their wives or their ascendants or descendants; Assault on heirs apparent or vice-presidents of the Contracting Parties; Murder and robbery committed against individuals, authorities, or means of transport and communications.

⁹⁹ *Refugee Convention*, *supra* note 2, Article 33: “1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” For more detailed information on non-refoulement see Chapter 3 “Asylum and Refugee Status”.

¹⁰⁰ Full text of the following legal instruments can be found in Annex H.

- *Agreement Between the Arab Republic of Egypt and the Republic of Yemen Regarding the Transfer of Sentenced Persons Imprisoned in Execution of Criminal Judgments*¹⁰¹

10.1.3.2. Analysis of Bilateral Instruments

The only bilateral agreement located in the context of access to courts, is the *Agreement Between the Arab Republic of Egypt and the Republic of Yemen Regarding the Transfer of Sentenced Persons Imprisoned in Execution of Criminal Judgments*.¹⁰² This instrument does not directly address access to courts, but applies to situations where regular migrants already went through the different stages of the Egyptian court system and received a prison sentence for committing a criminal offense. In this case, a prisoner of Yemeni nationality is entitled to request a transfer to Yemen in order to complete the sentence there.¹⁰³ This is only possible under certain conditions: the crime for which the prisoner is serving the sentence has to be punishable with imprisonment in Egypt and Yemen; the sentencing judgment rendered in Egypt must be final and enforceable; both states need to approve the transfer; and the remaining prison sentence must not amount to less than nine months.¹⁰⁴

It is also possible for either Egypt or Yemen to request the transfer of a Yemeni prisoner.¹⁰⁵ However, the prisoner has the right to prevent the transfer, as their approval is necessary.¹⁰⁶ The agreement also includes further entitlements for the imprisoned individual, by obliging the states to notify the sentenced person in writing of every decision issued with regard to the transfer request.¹⁰⁷ Also it is inadmissible to request a transfer if it concerns a crime for which a decision was already rendered in Yemen and the sentence was carried out, or the statute of limitation expired for the crime in question, or the defendant was declared not-guilty.¹⁰⁸ Most importantly, the Agreement guarantees that the sentenced person has to be fully aware of the legal effects a transfer would have on them, in order to be able to agree to it. Should they be

¹⁰¹ *Agreement Between the Arab Republic of Egypt and the Republic of Yemen Regarding the Transfer of Sentenced Persons Imprisoned in Execution of Criminal Judgments*, signed between both sides on 17 May 2006. [Hereinafter, *Transfer of Prisoners Agreement*]

¹⁰² *Transfer of Prisoners Agreement*, *supra* note 101.

¹⁰³ *Id.* at Article 3.

¹⁰⁴ *Id.* at Article 4.

¹⁰⁵ *Id.* at Article 3(a).

¹⁰⁶ *Id.* at Article 4(d).

¹⁰⁷ *Id.* at Article 5.

¹⁰⁸ *Id.* at Article 6(b)-(d).

unable to form an informed consent, then a legal representative shall be included in the process.¹⁰⁹

In practice, this bilateral agreement will not be applied in the cases of refugees or asylum-seekers. Yemeni refugees or asylum-seekers have no reason at all to request their transfer to Yemen. The Egyptian government, on the other hand, might be interested in removing refugees or asylum-seekers from its territory if they committed a criminal offense, but as the agreement requires the consent of the prisoner it cannot be applied against their will.¹¹⁰ There are specific provisions in the Refugee Convention which would allow Egypt in these situations to expel refugees or asylum-seekers if they threaten national security or public order, but at the same time Egypt is obliged to give them adequate time to seek admission in a different country before being expelled.¹¹¹ In addition, the prohibition of non-refoulement may not be violated.¹¹² Therefore, Egypt does not have the option to return a Yemeni refugees or asylum-seekers to Yemen, if their life or freedom would be threatened there.

The situation for failed asylum-seekers looks different. Regular migrants who are imprisoned might have an interest in returning to their home country to serve their prison sentence and can thus request a transfer to Yemen.¹¹³ This is only possible under the following conditions: the crime for which the prisoner is serving the sentence has to be punishable with imprisonment in Egypt and Yemen; the sentencing judgment rendered in Egypt must be final and enforceable; both states need to approve the transfer; and the remaining prison sentence must not amount to less than nine months.¹¹⁴ It is also possible for either Egypt or Yemen to request the transfer of

¹⁰⁹ *Id.* at Article 9.

¹¹⁰ *Id.* at, Article 4(d).

¹¹¹ *Refugee Convention, supra* note 2, Article 32: “1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary”

¹¹² *Id.* at Article 33: “1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

¹¹³ *Transfer of Prisoners Agreement, supra* note 101, Article 3.

¹¹⁴ *Id.* at Article 4.

a Yemeni prisoner.¹¹⁵ However, the regular migrant has the right to prevent the transfer, as the prisoner's approval is necessary.¹¹⁶ Irregular migrants of Yemeni nationality can also benefit from the Agreement between Egypt and Yemen by requesting a transfer to Yemen should they be imprisoned in Egypt.¹¹⁷ In case the Egyptian or the Yemeni government chooses to apply the Agreement and request the transfer of the sentenced person, the irregular migrant may object to the transfer and thus impede it.¹¹⁸ Nevertheless, the rights granted in this Agreement only protect the sentenced person from being transferred to Yemen if the transfer request is based on this Agreement. Based on their irregular status and lack of legal foundation to stay in Egypt, it lies in government's discretion to deport them from Egyptian territory on the basis of the Residence of Aliens Law.¹¹⁹ Thus, the entitlements resulting from the Agreement are not absolute and cannot protect irregular migrants who were found guilty of a crime from deportation.

10.1.4. Domestic Law

10.1.4.1. Domestic Instruments and relevant court decisions¹²⁰

- Constitution of the Arab Republic of Egypt 2014¹²¹
- Law No. 13 of the year 1968, promulgating the Civil & Commercial Code of Procedures¹²²
- Law No. 1 of the year 2000 on Reorganization of Certain Matters and Procedures of Litigation in Personal Status Issues¹²³
- Law No. 12 of the year 1996 promulgating the Child Law¹²⁴
- Law No. 10 of the year 2004 promulgating the Law on Establishing Family Courts¹²⁵

¹¹⁵ *Id.* at Article 3(a).

¹¹⁶ *Id.* at Article 4(d).

¹¹⁷ *Id.* at Article 3(2).

¹¹⁸ *Id.* at Article 4(d).

¹¹⁹ Law No. 89 of 1960 (Entry and Residence of Aliens in the Territories of the United Arab Republic and their Departure Therefrom), as amended by Laws Nos 49/1968, 124/1980, 100/1983, 99/1996, 88/2005, 77/2016, *Al-Jarida Al-Rasmiyya*, 24 March 1960 (Egypt). Article 25: "*The Minister of Interior, by decree issued by him, may deport aliens.*" See Chapter 11 on Documentation and Chapter 9 on Detention and Expulsion.

¹²⁰ Full text of the following legal instruments can be found in Annex H.

¹²¹ Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

¹²² Law No. 13 of 1968 (Promulgating the Civil & Commercial Code of Procedures), *Al-Jarida Al-Rasmiyya*, 9 May 1968 (Egypt).

¹²³ Issued in Law No. 1 of 2000 (Promulgating the Law on Reorganization of Certain Matters and Procedures of Litigation in Personal Status Issues), as amended by Law No. 91/2000, *Al-Jarida Al-Rasmiyya*, 29 January 2000 (Egypt).

¹²⁴ Law No. 12 of 1996 (Child Law), *Al-Jarida Al-Rasmiyya*, 28 March 1996 (Egypt). As amended by Law No. 126 of 2008 and Law No. 6 of 2015.

¹²⁵ Law No. 10 of 2004 (Establishing Family Courts), *Al-Jarida Al-Rasmiyya*, 18 March 2004 (Egypt).

- Ministry of Social Affairs Decree No. 130 of the year 1996¹²⁶
- Law No. 119 of the year 1952 on the Custodianship of Money¹²⁷
- Law No. 150 of the year 1950 promulgating the Criminal Procedure Law¹²⁸
- Law No. 64 of 2010 regarding Combating Human Trafficking¹²⁹
- Emergency Law No. 162 of the year 1958¹³⁰
- Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15¹³¹
- Law No. 47 of the year 1972 on the State Council¹³²

10.1.4.2. Analysis of Domestic Instruments

Domestic legal instruments do not confer entitlements to specific nationalities with regard to access to justice and courts. There is no law dealing explicitly with access to courts for refugees, asylum-seekers, failed asylum-seekers, or foreigners, thus the domestic laws discussed below apply equally to all those categories.

10.1.4.2.1. Rights Granted in the Constitution

The Egyptian Constitution provides rights on access to courts that are not limited to citizens. Everyone whose personal freedom has been restricted has the right to be immediately informed of the reasons thereof, contact their families and lawyer, and brought before a judge or prosecutor within 24 hours. Questioning may only take place in the presence of their lawyer. If the individual has no lawyer, one shall be appointed. There is also a right to appeal against the restriction of freedom before the judiciary and to receive compensation for unlawful detention.¹³³ During the detention, the Constitution guarantees everyone the right to be free

¹²⁶ Ministry of Social Affairs Decree No. 130 of 1996 (on determining the conditions to be met by those appointed as social observers or experts in the juvenile court), *Al-Jarida Al-Rasmiyya*, 25 August 1997 (Egypt).

¹²⁷ Law No. 119 of 1952 (Provisions on the Custodianship of Money), *Al-Jarida Al-Rasmiyya*, 30 July 1952 (Egypt). This law addresses the custodianship over money or property of minors by their parents or legal guardians, as well as for persons with mental disabilities if necessary.

¹²⁸ Law No. 150 of 1950 (promulgating the Criminal Procedure Law), *Al-Jarida Al-Rasmiyya*, 15 October 1951 (Egypt).

¹²⁹ Law No. 64 of 2010 (regarding Combating Human Trafficking), *Al-Jarida Al-Rasmiyya*, 9 May 2010 (Egypt).

¹³⁰ Law No. 162 of 1958 (Concerning the State of Emergency), *Al-Jarida Al-Rasmiyya*, 28 September 1958 (Egypt).

¹³¹ Constitutional Court Decision on 2 June 2013, Case Number 17 of the Judicial Year 15, *Al-Jarida Al-Rasmiyya*, 3 June 2013 (Egypt).

¹³² Law No. 47 of 1972 (State Council Law), *Al-Jarida Al-Rasmiyya*, 1 October 1972 (Egypt).

¹³³ *Egyptian Constitution*, *supra* note 121, Article 54.

from torture or any mental or physical harm. Those accused of a crime have the right to remain silent and any statement given under pressure shall be considered null and void.¹³⁴

The Constitution includes further rights essential for due process. Nobody may be sentenced for an act which did not constitute a crime at the time it was committed. Punishments can only be rendered by a judicial ruling and only on the perpetrator personally.¹³⁵ Those accused of a crime are considered innocent until proven guilty and have the right to defend themselves in a fair hearing.¹³⁶ The right to a defense includes to defend oneself in person or through a lawyer. Those who are unable to hire a lawyer, due to financial reasons, shall receive legal aid through the provisions of the applicable procedural law.¹³⁷ Everyone has the right to litigate and also to receive compensation if any of their rights or freedoms guaranteed in the Constitution are infringed.¹³⁸ In order for the judicial system to function, the Constitution guarantees that court decisions shall be implemented by the state through necessary means.¹³⁹ To protect children, the state is obliged to establish a judicial system for them and provide legal aid if needed.¹⁴⁰ However, it is worth noting that the constitutional right for persons to be treated equally before the law and not to be discriminated is provided only to citizens.¹⁴¹

10.1.4.2.2. Procedures in Matters of Civil Law

The Civil and Commercial Code of Procedures regulates access to civil courts. A civil lawsuit may only be filed if the claimant has a personal or direct interest therein.¹⁴² Egyptian courts must have jurisdiction over the case. A case filed by a non-national is to be accepted by the Egyptian courts if the case is brought against an Egyptian national, even if they do not have a place of residence in Egypt.¹⁴³ A case brought against a non-national is to be accepted by Egyptian courts if they have a domicile or place of residence in Egypt,¹⁴⁴ or an elected domicile, or if the case is related to certain specific situations with connection to Egypt, as enumerated

¹³⁴ *Id.* at Article 55.

¹³⁵ *Id.* at Article 95.

¹³⁶ *Id.* at Article 96.

¹³⁷ *Id.* at Article 98.

¹³⁸ *Id.* at Articles 97, 99.

¹³⁹ *Id.* at Article 100.

¹⁴⁰ *Id.* at Article 80.

¹⁴¹ *Id.* at Article 53.

¹⁴² Law No. 13 of 1968, *supra* note 122, Article 3.

¹⁴³ *Id.* at Article 28.

¹⁴⁴ *Id.* at Article 29.

by the law.¹⁴⁵ Egyptian courts also have jurisdiction over cases concerning inheritance issues, and in cases where the adversaries expressly accept the jurisdiction.¹⁴⁶ Court hearings must be public unless a closed session is necessary for public order or family privacy.¹⁴⁷ Litigants have the right to be heard,¹⁴⁸ through the presence of litigants themselves or through their lawyers.¹⁴⁹ With power of attorney, lawyers can carry out all the necessary work for court proceedings on behalf of litigants.¹⁵⁰ To preserve the rights of litigants, lawyers are forbidden to withdraw from cases at unsuitable times.¹⁵¹ The right to be heard corresponds with an obligation to attend the hearing or to send a legal representative. If neither appears before court, the court may render a judgment or put it aside and consider it null and void after 60 days.¹⁵² If the defendant does not appear before court after being served a notice of summons, the court may issue its judgment in absentia. If the defendant was not served with a notice of summons, then the case may be postponed to preserve the defendant's right to be heard.¹⁵³ The Civil Procedure law also gives litigants the right to appeal. A deposit of 50 EGP need to be made for an appeal against the judgment of a court of first instance, 100 EGP for the judicial review of final judgments, and 125 EGP for challenging the Court of Appeal's decision before the Court of

¹⁴⁵ *Id.* at Article 30: "The courts of the Republic shall have jurisdiction to examine the cases filed against a foreigner who has no domicile or place of residence in the Republic, in the following cases:

- 1) If he/she has an elected domicile in the Republic.
- 2) If the case is related to money existing in the Republic or related to an established or expired obligation or related to a bankruptcy in which he/she was defamed.
- 3) If the case is contesting a marriage contract and the contract requires to be concluded at an Egyptian notary.
- 4) If the case is related to a request for the abrogation of a marriage or a divorce or separation and it is filed by a wife who has, by marriage, lost the nationality of the Republic, whenever she has a domicile in the Republic. Or if the case is filed by a wife who has a domicile in the Republic, against her husband who had had a domicile thereto, when the husband had abandoned his wife and made a domicile abroad after establishing the reason for abrogation, divorce, separation or has left the Republic.
- 5) If the case is related to a request for alimony for the mother or the wife whenever they have a domicile in the Republic or for the infant who resides thereat.
- 6) If the case concerns the kinship of an infant residing in the Republic or negation of guardianship on himself/herself or restricting it or stopping it or redeeming same.
- 7) If the case was related to a matter of personal status and the plaintiff was a national or was a foreigner and has a domicile in the Republic, and that is if the defendant's domicile abroad is unknown or if the law of the state is applicable to the case.
- 8) If the case is related to one of the matters dealing with guardianship on money whereby the immature or the person required to be placed under guardianship or to be judicially helped, has a domicile or place of residence in the Republic or if it comprises the last domicile or place of residence of the absentee.
- 9) If one of the defendants has a domicile or place of residence in the Republic."

¹⁴⁶ Law No. 13 of 1968, *supra* note 122, Articles 31, 32.

¹⁴⁷ *Id.* at Article 101.

¹⁴⁸ *Id.* at Article 102.

¹⁴⁹ *Id.* at Article 72.

¹⁵⁰ *Id.* at Articles 73, 75, 79.

¹⁵¹ *Id.* at Article 80.

¹⁵² *Id.* at Article 82.

¹⁵³ *Id.* at Article 84.

Cassation.¹⁵⁴ Domestic law also acknowledges the needs of persons with disabilities when accessing courts. Those who suffer from two sensory impairments, for example muteness and deafness, or blindness and deafness, or blindness and muteness, may receive a judicial assistant appointed by the court to assist them in expressing their will.¹⁵⁵

Egyptian domestic law contains provisions which facilitate the access to courts in family disputes, from which women and children may particularly benefit. The access to courts in personal status issues¹⁵⁶ is possible without a lawyer's signature. The court will inform litigants of the procedures and give them adequate time to prepare a defense. Should it deem the participation of a lawyer necessary, the court may delegate a lawyer to defend the claimant, with lawyer's fees provided by the Public Treasury. Those not of full legal capacity shall be acted for by a legal representative or guardian appointed by court. The age of legal capacity is reduced to 15 years in personal status matters for guardianship, which enables some teenagers to voice their opinion in legal procedures. In addition, lawsuits in alimony affairs are exempted from fees.¹⁵⁷ Hearings on personal status matters may be held in closed session for reasons of public order or moral considerations. In these cases, a member of the Public Prosecution Office will be present in the hearing, and the judgment will later be issued in open court.¹⁵⁸ Since 2004, jurisdiction over personal status matters lies with the Family Courts.¹⁵⁹ In Family Courts there are three judges on the bench who are assisted by two experts, one of them a social worker, the other a psychologist. At least one of the experts must be a woman.¹⁶⁰ To avoid the distress of a court hearing in cases which are not urgent, the claimant must first present a request for settlement at the Family Dispute Settlement Office before being allowed to initiate a lawsuit. The Office shall give advice and guidance in resolving the conflict at hand to preserve the family.¹⁶¹

10.1.4.2.3. Proceedings in Matters of Criminal Law

¹⁵⁴ *Id.* at Articles 211, 219, 221, 241, 243, 248, 254.

¹⁵⁵ Law No. 119 of 1952, *supra* note 127, Article 70.

¹⁵⁶ "Personal status" refers to matters related to family law, such as marriage, divorce, child custody and can also include inheritance matters.

¹⁵⁷ Law No. 1 of 2000, *supra* note 123, Articles 2-4.

¹⁵⁸ *Id.* at Article 5.

¹⁵⁹ Law No. 10 of 2004, *supra* note 125, Article 3.

¹⁶⁰ *Id.* at Article 2.

¹⁶¹ *Id.* at Article 6.

The Criminal Procedure Law¹⁶² allows victims of crimes to file a criminal complaint with the Public Prosecution Office, either orally or in writing, within three months after gaining knowledge of the offense or perpetrator. The Public Prosecution then files a criminal lawsuit and initiates the necessary proceedings.¹⁶³ If there is more than one victim, it is sufficient if one of them files a complaint. When there is more than one perpetrator, a complaint against one of them is considered to be against all of them.¹⁶⁴ In case the victim is under 15 years old, or lacking full legal capacity due to mental illness, the complaint shall be filed by their guardian.¹⁶⁵ Anyone harmed by a crime may join a criminal case as a civil rights plaintiff through a complaint to the Public Prosecution.¹⁶⁶ The statute of limitations for crimes expires ten years from the day the crime was committed, three years for misdemeanors, and one year for fines.¹⁶⁷ The statute of limitations is interrupted by any investigation procedures, indictment, or trial; but will recommence from the date the last procedure ended.¹⁶⁸

Those accused of committing a crime have the right to not be interrogated without the presence of a lawyer, except in cases of *flagrante delicto* or urgency to prevent the loss of evidence.¹⁶⁹ If the accused has no lawyer, or the lawyer does not appear after being invited, the investigator is obliged to appoint a lawyer for the accused, who may add any defenses, requests or observations to the investigation record.¹⁷⁰ When a crime is punishable with imprisonment, the accused is required to attend the courts hearing in person, while in other cases they might send a lawyer as representative instead. The court is obliged to appoint a lawyer for the accused, should they appear without having a legal representative.¹⁷¹ If the accused is financially incapable of paying the appointed lawyer, then the Public Treasury may be asked to cover the lawyer's fees.¹⁷² The lawyer is obliged to defend the accused, if this duty is neglected a fine may be imposed by the court.¹⁷³

¹⁶² Law No. 150 of 1950, *supra* note 128.

¹⁶³ *Id.* at Articles 1 and 3.

¹⁶⁴ *Id.* at Article 4.

¹⁶⁵ *Id.* at Article 5.

¹⁶⁶ *Id.* at Article 27.

¹⁶⁷ *Id.* at Article 15.

¹⁶⁸ *Id.* at Article 17.

¹⁶⁹ *Id.* at Article 124.

¹⁷⁰ *Id.* at Article 124.

¹⁷¹ *Id.* at Article 237.

¹⁷² *Id.* at Article 376.

¹⁷³ *Id.* at Article 375.

To benefit from the right to be heard, the accused needs to comply with the court's order to attend when summoned. Should they fail to appear at the hearing, and do not send a representative, the court may render a judgment in absentia. If there is no excuse or reason for the accused not to appear, then the judgment is to be considered rendered in attendance, provided that the court diligently reviewed all information provided in the case file.¹⁷⁴ The same applies if the accused leaves during the hearing or fails to appear at a later hearing the case was adjourned to.¹⁷⁵ It is not permitted to appeal against such judgments considered in attendance, except if the accused can provide an excuse that prevented them from attending which could not be presented to the court earlier.¹⁷⁶ The court hearings are to be held in public. However, for reasons of public order or morals the court may decide to hold a session in private or to exclude certain groups or persons.¹⁷⁷ Apart from enjoying the above described rights, the accused also has duties such as having to bear the costs of the procedures in the case of a conviction or a failed appeal.¹⁷⁸

Egyptian domestic law includes detailed provisions on how to deal with minors during criminal cases and is applicable to anyone below the age of 18 years.¹⁷⁹ According to the Child Law, those under 12 years of age are not criminally responsible. If children between 7 and 12 years commit a felony or a misdemeanor, the case may only be heard before a Child Court and only certain types of punishments are allowed: reproach, delivery to parents or guardian, placement in a specialized hospital or placement in a social care institution.¹⁸⁰ If a child under 15 years of age is found guilty, the law also prescribes specific punishments: reproach; delivery to parents, guardians or custodians; training and rehabilitation; committing to certain obligations; judicial probation; community service activities not harmful to the child's health or mental state; placement in one of the specialized hospitals; placement in one of the social care institutions.¹⁸¹ Children may never be detained or imprisoned at the same place with adults. If a public official violates this rule, they may be sentenced to a fine of not less than one thousand Egyptian Pounds, or to a jail sentence between three months and two years.¹⁸²

¹⁷⁴ *Id.* at Article 238.

¹⁷⁵ *Id.* at Article 239.

¹⁷⁶ *Id.* at Article 241.

¹⁷⁷ *Id.* at Article 268.

¹⁷⁸ *Id.* at Articles 313, 314.

¹⁷⁹ Law No. 12 of 1996, *supra* note 124, Article 95.

¹⁸⁰ *Id.* at Article 94.

¹⁸¹ *Id.* at Article 101.

¹⁸² *Id.* at Articles 112, 141.

The Child Court dealing with the criminal offenses of minors is composed of three judges, assisted by two specialized experts in social services to be appointed by the Minister of Justice in agreement with the Minister of Social Affairs (at least one of them needs to be a woman) who submit a report to the court before the judgment is rendered.¹⁸³ To be appointed as an expert three requirements need to be fulfilled: a university degree in social services; a minimum of five years' experience in the field of social care, preferably working with children; and to be of good character and reputation.¹⁸⁴ In place of the Public Prosecution, a specialized Child Prosecution handles criminal cases against minors.¹⁸⁵ Nevertheless, a criminal case involving a minor may lie within the jurisdiction of a general Criminal Court if the accused is above 15 years old, has an adult accomplice, and the case is brought jointly against both.¹⁸⁶

Every child has the right to legal assistance and must be represented by a lawyer during investigation and trial. If the child has no lawyer, then the Public Prosecutor or Court shall appoint one.¹⁸⁷ Child victims and witnesses also have the right to be heard and to legal assistance.¹⁸⁸ To protect the interests of the child, hearings before the Child Court are generally not public, but only attended by the accused child, the child's relatives, witnesses, lawyers, special observers, and other persons holding special permission from the court. If the court deems it necessary, it may order the child to leave the courtroom for part of the hearing or its entirety, provided the lawyer remains present, and before rendering a judgment the court must inform the child of all procedures during the absence.¹⁸⁹ Considering notification, one of the child's parents or guardian shall be notified of any decisions or judgments.¹⁹⁰ Children are exempted from any court fees.¹⁹¹

Victims of trafficking have the right to be heard during all stages of criminal proceedings, the right to legal assistance and to be assigned a lawyer, the right to be informed of all relevant administrative, legal and judicial proceedings, and the right to conceal their identity before

¹⁸³ *Id.* at Article 121.

¹⁸⁴ Decree No. 130 of 1996, *supra* note 126, Article 2.

¹⁸⁵ Law No. 12 of 1996, *supra* note 124, Article 120.

¹⁸⁶ *Id.* at Article 122.

¹⁸⁷ *Id.* at Article 125.

¹⁸⁸ *Id.* at Article 116 bis (d).

¹⁸⁹ *Id.* at Article 126.

¹⁹⁰ *Id.* at Article 131.

¹⁹¹ *Id.* at Article 140.

court if possible.¹⁹² Egypt is obliged to host the victims of trafficking away from the perpetrators and enable them to receive their families and lawyers.¹⁹³

10.1.4.2.4. Proceedings in Matters of Administrative Law

Aside from civil and criminal procedures, there is an independent judicial body for administrative procedures: The State Council.¹⁹⁴ State Council courts have exclusive jurisdiction over the administrative cases enunciated in the law, which include all appeals against final decisions issued by administrative bodies on the grounds of lack of jurisdiction, or defect in legal form, or violation of laws or regulations, or error in their application and interpretation. The court also deals with cases related to public officials, elections, nationality, or requests for compensation in administrative cases.¹⁹⁵ Thus, refugees, asylum-seekers and failed asylum-seekers may resort to the State Council Courts with their claims concerning administrative matters. It is important to highlight that when an administrative authority refuses or abstains from rendering a decision it was supposed to make in accordance with the law, this failure to act is considered an administrative decision in itself and can be appealed.¹⁹⁶ This opens the room for everyone waiting in vain for any administrative decision to resort to the State Council Courts as a legal remedy.

The above described rights and entitlements apply to nationals and non-nationals alike, and thus refugees, asylum-seekers and failed asylum-seekers can benefit from them. Within the category of failed asylum-seekers, however, there might be a problem for irregular migrants. As they lack a valid legal status to stay in Egypt, it is unlikely that they will actively seek out Egyptian authorities as a claimant in a civil lawsuit or filing a complaint in a criminal law case, as then their status in Egypt will be questioned and they might face repercussions including deportation proceedings. Once they come into contact with courts, whether by choice or not, they enjoy the same entitlements as everybody else.

10.1.4.2.5. Restrictions through Emergency Law

The above analyzed rights are partly hindered by the Emergency Law. According to the Egyptian Constitution, the President of the Republic may declare a state of emergency after

¹⁹² Law No. 64 of 2010, *supra* note 129, Article 23.

¹⁹³ *Id.* at 24.

¹⁹⁴ Law No. 47 of 1972, *supra* note 132, Article 1.

¹⁹⁵ *Id.* at Article 10.

¹⁹⁶ *Id.*

consultation with the Cabinet and approval of parliament.¹⁹⁷ Currently, the state of emergency is in force in Egypt and has been constantly renewed.¹⁹⁸ The Emergency Law enumerates the possible reasons for declaring the state of emergency: when the security or public order in the territory of the Republic are at risk whether due to a state of war, the threat of war, internal disturbances, public disasters or the spread of epidemics.¹⁹⁹ Once the state of emergency is declared, the President may set restrictions on the freedom of persons to meet or to move freely,²⁰⁰ and those violating any orders issued in accordance with the Emergency Law may be arrested immediately.²⁰¹ Originally, the law had also allowed to detain suspects and to search persons and places without complying with the procedures outlined in the Criminal Procedural Law.²⁰² The Constitutional Court declared this provision unconstitutional, thus item 1 of Article 3 of the Emergency Law is no longer applicable and the procedural safeguards of the Criminal Procedural Court need to be followed concerning detention and the search of persons and places.²⁰³

Under the Emergency law, every detainee has the right to inform someone of the arrest, including a lawyer, but filing a complaint against the arrest is only possible after thirty days have elapsed. If the arrested decides to file such a grievance, it has to be submitted to the Supreme State Security Court, a special judicial entity created for the purpose of the Emergency law. The Court needs to render a decision within fifteen days. However, even if the Court decides in favor of releasing the detainee, the Minister of Interior may challenge this decision. A different circuit of the Court will decide over this challenge within fifteen days from the date of referral.²⁰⁴ If the Court follows the opinion of the Minister and denies the release of the detainee, he/she has to wait another 30 days before being able to file a new grievance.²⁰⁵ This system makes it possible to detain individuals for a prolonged period of time, especially due to the requirement of waiting 30 days before being able to appeal the arrest. A very problematic provision of the Emergency Law is Article 12, which states that decisions

¹⁹⁷ *Egyptian Constitution*, *supra* note 121, Article 154.

¹⁹⁸ The latest renewal at the time this Chapter was being written took place on 21 October 2018, when the Egyptian Parliament approved Presidential Decree Number 473 of 2018 which declared the state of emergency all over the country for 3 months, effective as of 15 October 2018, and confirmed that the Egyptian Emergency Law No. 162 of the year 1958 is applicable.

¹⁹⁹ Law No. 162 of 1958, *supra* note 130, Article 1.

²⁰⁰ *Id.* at Article 3.

²⁰¹ *Id.* at Article 6.

²⁰² *Id.* at Article 3.

²⁰³ Constitutional Courts, Case No. 17 of 15J, *supra* note 131.

²⁰⁴ Law No. 162 of 1958, *supra* note 130, Article 3-bis.

²⁰⁵ *Id.*

rendered by the State Security Courts may not be challenged in any way.²⁰⁶ This is against the right to judicial review, which is an essential requirement of a fair trial. According to international law, everyone has the right to have their conviction or sentence reviewed by a higher court.²⁰⁷ Instead, under Egyptian Emergency Law it lies solely in the discretion of the President to change a verdict by alleviating the penalty, or suspending its enforcement, or to send the case back to re-trial before a different chamber of the State Security Court.²⁰⁸

10.1.5. Overall Legal Framework in Egypt

Access to courts is essential in order to enforce one's entitlements. Without the possibility of judicial review, redress, and compensation when rights are infringed, legal entitlements are meaningless. This is reflected in numerous international, regional, and domestic laws. The rights related to the access to courts are adopted into domestic law through the Egyptian Constitution, the Egyptian Civil and Commercial Code of Procedure, the Egyptian Criminal Procedure Law and the State Council Law.²⁰⁹

Refugees and asylum-seekers are entitled to freely access courts on the territory of State Parties to the Refugee Convention and may not be charged higher fees than nationals.²¹⁰ In addition, they have the same right as nationals to legal assistance, and may not be requested to pay a deposit at court to cover litigation costs.²¹¹ This entitlement is fulfilled by Egypt, as there are no laws in place excluding refugees or asylum-seekers from the "ordinary" legal procedures before civil and criminal courts, or imposing any special fees on them. The ICCPR guarantees all persons equality before courts and tribunal and the right to be equal before the law and entitled to its protection equally.²¹² International law also prescribes the equality of men and women before the law,²¹³ prohibits racial discrimination before tribunals,²¹⁴ and guarantees effective access to justice for persons with disabilities on an equal basis with others.²¹⁵ In case

²⁰⁶ *Id.* at Article 12.

²⁰⁷ ICCPR, *supra* note 3, Article 14(5): "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

²⁰⁸ Law No. 162 of 1958, *supra* note 130, Article 14.

²⁰⁹ Egyptian Constitution, *supra* note 121; Law No. 13/1968, *supra* note 122; Law No. 150/1950, *supra* note 128; Law No. 47 of 1972, *supra* note 132.

²¹⁰ Refugee Convention, *supra* note 2, Article 16(1), 29(1).

²¹¹ *Cautio judicatum solvi* means a bond which is deposited at court to secure the payment of the litigation costs. It is mainly used in the case of a foreign national initiating proceedings at court.

²¹² ICCPR, *supra* note 3, Articles 14 and 26.

²¹³ CEDAW, *supra* note 5, Article 15.

²¹⁴ ICERD, *supra* note 6, Article 5.

²¹⁵ CRPD, *supra* note 7, Article 13.

discrimination took place, everyone has the right to rely on a legal remedy and receive compensation. The Egyptian Constitution grants the right to equality before the law, without discrimination based on religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, only to Egyptian citizens.²¹⁶ Thus, under domestic law, there is no equivalent right to equality before the law for refugees, asylum-seekers or failed asylum-seekers.

Everyone is entitled to a legal remedy if their rights or freedoms are infringed. Thus, they have the right that a judicial, administrative or legislative authority shall decide on their case with the ability of at least one appeal. They have the right to fair and public hearing at an independent impartial authority and the right to be heard in the proceedings. In case of detention or criminal charges, the following entitlements are applicable to refugees, asylum-seekers and failed asylum-seekers:

- the right to be informed of the reasons for one's arrest and to have them reviewed by a judge;
- the right to contact one's consular authorities if desired;
- the right to be free from torture and any physical or mental harm;
- the right to be brought before trial within reasonable time;
- the right to receive compensation in case of unlawful arrest or infringement of constitutional rights;
- the right to a fair and public hearing;
- the right to be presumed innocent;
- the right to enjoy the minimum procedural safeguards for a fair trial as enumerated in the ICCPR;
- the right to a lawyer, sufficient time to prepare a defense and to receive legal assistance if one cannot afford a lawyer;
- the right to remain silent;
- the right to judicial review of any judgment and compensation for a miscarriage of justice;
- the right of juvenile perpetrators to be treated according to their special needs;
- the right not to be convicted for the same offense twice;

²¹⁶ *Egyptian Constitution*, *supra* note 121, Article 53.

- the right not to be found guilty of an act which did not constitute a crime at the time it was committed.

In addition to the above reiterated rights, certain groups enjoy specific protection. For example, children require special consideration due to their vulnerability. Thus, the best interest of the child has to be the primary consideration in all judicial or administrative decisions. In criminal procedures, the minimum age for criminal liability needs to be observed, which in Egypt starts with the age of 12. Under certain circumstances children between the age of 7 and 12 may be brought before the Child Court. In case a child is convicted of a crime, alternative punishments such as foster care, counseling, or rehabilitation programs should be applied. Furthermore, expectant mothers serving prison times are entitled to special care.

Victims of trafficking enjoy the same rights as any other defendants regarding the right to be heard during all stages of criminal proceedings, the right to legal assistance and to be assigned a lawyer, and the right to be informed of all relevant administrative, legal and judicial proceedings. Additionally, they are entitled to conceal their identity before court if possible.

Further to the above discussed general entitlements connected to the right to access to courts, migrant workers and their families are entitled to protection from interference in or attacks on their privacy, family, home or correspondence. They have the right to have their cases examined individually, no collective expulsion of migrant workers is permitted, and any decision rendered in their case has to be issued in a language they understand.

Yemeni nationals who have already been convicted to a prison sentence in Egypt can rely on a bilateral agreement between Egypt and Yemen. According to this agreement, Yemeni prisoners in Egyptian prisons have the right to request their transfer to Yemen, but are also entitled to refuse the transfer if one of the two State Parties should request it. Refugees and asylum-seekers would obviously not wish to exercise such a right, but regular and irregular migrants might rely on this treaty to request their transfer.

Under the *Riyadh Agreement for Judicial Cooperation*, Citizens of Algeria, Bahrein, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria Tunisia, United Arab Emirates, and Yemen are entitled to access

courts in Egypt without having to pay any security fees for litigation costs, and have the right to receive legal assistance to the same extent as Egyptian citizens.

10.2. IMPLEMENTATION

In theory, asylum-seekers, refugees and failed asylum-seekers have the same entitlement to access courts as Egyptian nationals and enjoy the same procedural safeguards. In practice, there are some obstacles to overcome. Failed asylum-seekers who are in Egypt without a valid visa or residence permit are unable to approach courts without risking deportation due to their irregular status, and thus avoid seeking help from the police or courts.²¹⁷ Those with valid residence permits, including asylum-seekers and refugees, have the necessary identification documents to access courts. UNHCR positively noted that the Egyptian authorities usually recognize UNHCR cards in connection with a valid residence permit as sufficient documentation to file a police report, give powers of attorney or generally appear before the prosecution.²¹⁸ The experiences of the participants in the focus group discussions differ from this observation. Throughout the nationalities, they reported being victims of harassment, verbal and physical assault, theft and robbery. Nevertheless, they mostly refrain from filing police reports to initiate a lawsuit against the perpetrators. This is caused by various reasons: As stated above, those who do not have a valid residence permit cannot go to the police because their irregular status would be detected. Others are afraid of mistreatment by the police if they go to the police station, or are convinced that the police will not help refugees anyway. Several participants stated that they actually did contact the police seeking help after being victims to a crime, but the police refused to assist them. For example, some Ethiopian participants reported how the police accused them of stealing Egypt's water²¹⁹ and insulted them. Some Syrians recounted how they were denied help once they disclosed their nationality to the police officer.

In cases where asylum-seekers, refugees and failed asylum-seekers are already involved in court proceedings, be it in areas of civil or criminal law, as plaintiffs or defendants, they have the same rights as Egyptians but also share the same struggles imbedded in the domestic court

²¹⁷ This was confirmed within the focus group discussions.

²¹⁸ Submission by UNHCR to the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review Egypt, 2014, at 2.

²¹⁹ The accusation of Ethiopians "stealing Egyptians' water" is to be understood in reference to the political conflict between Egypt and Ethiopia over the building of a dam in the Nile.

system. In the UN Human Rights Council's periodic review of Egypt in 2014, states noted problems in the administration of justice and the requirements of fair trial. Thus, recommendations were issued towards Egypt to improve the quality of their legal proceedings, to respect the right to due process, and to ensure that civilians are only tried in front of civilian courts.²²⁰ Additionally, the World Justice Project Rule of Law Index provides a ranking of different legal systems based on their adherence to the rule of law and the access to the civil justice. In 2019 Egypt ranked 121 out of 126.²²¹ Problems can be found in the Emergency Law setting aside essential elements of due process as discussed above, or in the inability to access a lawyer. Some participants in the focus group discussions complained that they were not allowed to contact a lawyer while in detention, or could not afford it. Legal aid is guaranteed under Egyptian Law; however, in practice there are difficulties in implementing this right. The idea of pro bono lawyers is barely known in Egypt, thus lawyers are not willing to provide their assistance free of charge. When a court appoints a lawyer for the defendant in a criminal case *ad hoc*, it randomly chooses one of the lawyers present in the courthouse on that day. Without time for preparation, the quality of defense is far from ideal.²²² With regard to legal assistance at Family Courts, the Ministry of Justice cooperated with the United Nations Development Program (UNDP) since 2008 to establish Legal Aid Offices. These offices provide free legal assistants to the litigants. This includes assistance with filing complaints, obtaining required documents, providing information about their rights and giving legal advice.²²³

10.3. RECOMMENDATIONS

Asylum-seekers, refugees and failed asylum-seekers are reluctant to seek the help of the police due to their negative experience and consequently do not access courts if they have become victims of a crime. This issue can be approached from two sides. Firstly, by providing specific training to police officers to raise awareness on the vulnerability of asylum-seekers and refugees specifically and to eliminate discriminatory or racist behavior against migrants in general. Secondly, the government could establish an alternative institution for complaints outside of police stations which provides plaintiffs with guidance and transmits the complaint

²²⁰ United Nations Human Rights Council, Universal Periodic Review - Egypt, Date of consideration Nov. 5, 2014, Recommendations 166.177, 166.178, 166.179, 166.180, 166.181, 166.183, 166.186, 166.188, 166.189, 166.185, 166.184, 166.182, 166.192.

²²¹ World Justice Project Rule of Law Index, 2018/19, available at: <http://data.worldjusticeproject.org>.

²²² The Law Library of Congress, *Egypt: Access to the Justice System and to Legal Aid*, 2017, 13-14.

²²³ *Id.* at 9.

to the competent police officer later. Such a complaint office would give individuals the possibility to seek help without having to face their fears and worries about Egyptian police. Less mistrust and insecurity makes it more likely that they would actually report crimes and other incidents.

In general, the biggest challenge in accessing courts is the financial burden of affording a good lawyer. To remedy this, the system of legal assistance should be improved by establishing legal aid offices in all types of courts²²⁴ and to encourage the idea of pro bono work among law firms. Also, a list of court-appointed defense lawyers should be established at Criminal Courts, under the prerequisite that those lawyers are given enough time to prepare an assigned case. Furthermore, the access to lawyers when in detention should be better monitored, to ensure that detainees always have the possibility to contact their lawyer.

²²⁴ Currently a Legal Aid Office seems to be only established for Family Courts, see above at 10.2. Implementation.

CHAPTER 11: DOCUMENTATION

11.1. LEGAL FRAMEWORK

11.1.1. International Law

11.1.1.1. International Instruments¹

- *Convention Relating to the Status of Refugees 1951*²
- *International Covenant on Civil and Political Rights (ICCPR)*³
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴
- *Convention on the Rights of the Child (CRC)*⁵
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁶
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*⁷
- *Convention on the Rights of Persons with Disabilities (CRPD)*⁸
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)*⁹

¹ Full text of the following legal instruments can be found in Annex I.

² Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, (entered into force Apr. 22, 1954). [Hereinafter, *Refugee Convention*] Egypt acceded to the Convention on 22 May 1981.

³ International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). [Hereinafter, *ICCPR*] Egypt ratified the Covenant on 14 January 1982 with the following reservation: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁴ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, (entered into force January 3, 1976). [Hereinafter, *ICESCR*] Egypt ratified the Covenant on 14 January 1982 with the following declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

⁵ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [Hereinafter, *CRC*] Egypt ratified the Convention on 6 July 1990.

⁶ Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1248 U.N.T.S. 13 (entered into force Sept. 3, 1981). [Hereinafter, *CEDAW*] Egypt ratified the Convention on 18 October 1981.

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). [Hereinafter, *ICERD*] Egypt ratified the Convention on 1 May 1967.

⁸ Convention on the Rights of Persons with Disabilities, 13 Dec. 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008). [Hereinafter, *CRPD*] Egypt acceded to the Convention on 18 September 1981.

⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003). [Hereinafter, *CMW*] Egypt acceded to this Convention on 19 February 1993.

- *Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*¹⁰
- *Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Organized Crime*¹¹

11.1.1.2. Analysis of International Instruments

Valid documentation is of particular importance to those seeking asylum. As their relationship to their country of nationality has been severed, they can no longer rely on the assistance of the authorities of their home state when it comes to identification papers, travel documents, registration of changes in personal status, or issuing other documents such as birth certificates, for instance. Thus, they require help from their host state. Furthermore, the goal of all those seeking asylum is to obtain permission to remain in the host state. To prove and enjoy this status, they need access to documentation, including residence permits, travel documents, and so on.

11.1.1.2.1. International Entitlements for Refugees and Asylum-Seekers

11.1.1.2.1.1. Identity Papers and Travel Documents under the Refugee Convention

The *1951 Convention Relating to the Status of Refugees* (Refugee Convention) requires states to issue identity papers to any refugee not possessing a valid travel document.¹² Identity papers are a necessary prerequisite to obtain work or housing, to access medical care or education, as well as for registering births, marriages and deaths. Crucially, identity papers, and the registration of refugees which goes hand in hand with it, protect refugees from mistaken *refoulement*¹³ or detention, assist with family reunification, and help to identify any special needs.¹⁴ The Convention refers to “any refugee in their territory”,¹⁵ rather than “lawfully in the

¹⁰ Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 U.N.T.S. 319 (entered into force Dec 25, 2003). [Hereinafter, *Trafficking Protocol*]. Egypt ratified the Convention on 5 March 2004.

¹¹ Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Organized Crime, 15 Nov 2000, 2241 U.N.T.S. 507 (entered into force Jan 28, 2004). [Hereinafter, *Smuggling Protocol*] Egypt acceded to the Protocol on 1 March 2005.

¹² *Refugee Convention*, *supra* note 2, Article 27.

¹³ See Chapter 3 on non-*refoulement*.

¹⁴ JENS VEDSTED-HANSEN, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1166 (Andreas Zimmermann ed., 2010).

¹⁵ *Refugee Convention*, *supra* note 2, Article 27.

territory”, and thus encompasses asylum-seekers as well as refugees.¹⁶ UNHCR follows the opinion that the right to identity papers applies only to those who were officially recognized as refugees and considers them entitled to receive official identity papers. However, asylum-seekers shall receive provisional documents showing their identity and that they are permitted to remain in the country until the RSD process is completed.¹⁷

The Refugee Convention leaves the exact content and format of identity papers to the discretion of states.¹⁸ The UNHCR Executive Committee confirmed that refugees should be provided with official documentation certifying their refugee status.¹⁹ Stating the name, date and place of birth, and the address of refugees in the identity papers would be sufficient to fulfill the obligations of states, however, also including the holder’s refugee status proved to be very useful in practice.²⁰ Asylum-seekers shall receive documentation adequate to preserve their right against non-refoulement.²¹ This provisional document shall show the asylum-seeker’s identity and that she/he is permitted to remain in the country until the RSD process is completed.²² Most states comply with this through issuing some kind of certificate confirming that an application for refugee status has been made.²³ This document is then used by asylum-seekers as a temporary identity document until their status is decided.

In Egypt, the registration, documentation and refugee status determination of refugees are carried out by UNHCR in cooperation with the government authorities based on a Memorandum of Understanding between Egypt and UNHCR.²⁴ By registering with UNHCR, refugees can obtain renewable residency permits from the government that should protect them from being detained or deported.²⁵ When an individual applies for asylum in Egypt, UNHCR

¹⁶ VEDSTED-HANSEN, *supra* note 14, at 1172.

¹⁷ UNHCR, UN Doc. EC/SCP/33 (1984), Conclusion para 3, *available at*: <https://www.unhcr.org/excom/scip/3ae68cce4/identity-documents-refugees.html> (last accessed 17 February 2020).

¹⁸ VEDSTED-HANSEN, *supra* note 14, at 1174.

¹⁹ UNHCR Executive Committee, UN Doc. A/32/12/Add.1 (1977), para 6 (e) (v): “If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.”

²⁰ UNHCR, UN Doc. EC/SCP/33 (1984), *supra* note 17, para. 9.

²¹ The right to not be returned to a country where one’s life or freedom is threatened. *See* Chapter 3 for more details.

²² UNHCR, UN Doc. EC/SP/33 (1984), *supra* note 17, Conclusion para. 3.

²³ *Id.* at paras. 18 and 19.

²⁴ Memorandum of Understanding Between Egypt and UNHCR, Article 2, *adopted* February 1954; UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT, INFORMATION FOR ASYLUM-SEEKERS AND REFUGEES IN EGYPT 7 (2013).

²⁵ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT, *supra* note 24, at 22.

registers them and provides them with a yellow card. After successful completion of the refugee determination status, recognized refugees receive the UNHCR Refugee Registration Card, which is also called the blue card. Some refugees who obtain refugee status not through individual status determination but other protection mechanisms, only receive a yellow card.²⁶ This is the case for asylum-seekers who are recognized as *prima facie* refugees based to the circumstances in their country of nationality, such as Syrian or Yemeni refugees.²⁷ In either case, both cards are proof that the asylum-seeker and refugee is protected by the Egyptian government and UNHCR, with rights to remain, assistance and in the case of refugees the possibility of resettlement.²⁸

Apart from identity papers, those lawfully staying in the country are also entitled to receive travel documents from host states.²⁹ The only exceptions are compelling reasons of national security or public order, both to be interpreted narrowly and applied in exceptional circumstances.³⁰ The Refugee Convention outlines in detail how the travel document may look and annexes a specimen.³¹ The issuing country has to conform to this specimen and its requirements, for example by ensuring that the issuance does not cost more than the lowest fee for national passports,³² and has to recognize the validity of travel documents issued by other State Parties in accordance with the Refugee Convention.³³ National authorities have room for discretion with regard to some elements of the travel document. They may choose whether the document is valid for one year or for two years,³⁴ or in which travel document children shall be included, in the document of a parent or another adult refugee.³⁵ The travel document is intended to enable refugees to travel for family, work, and other purposes, so countries are encouraged to give it the largest geographical scope, but may limit the validity of the document

²⁶ *Id.* at 30.

²⁷ In cases of mass-influx, if circumstances in a country of origin are readily apparent, *prima facie* refugee status may be given. Unlike an individual RSD, *prima facie* status is deployed only in certain group situations where it is impractical, impossible, or unnecessary to resort to individual interviews due to a large scale displacement. See Chapter 3.

²⁸ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT *supra* note 24, 30.

²⁹ *Refugee Convention*, *supra* note 2, Article 28. Lawfully staying refers to recognized refugees who completed their RSD or where accepted as *prima facie* refugees, asylum-seekers in states that fail to comply with a RSD system or where the procedures are unduly prolonged, and those awaiting resettlement in another state. See Chapter 3.

³⁰ VEDSTED-HANSEN, *supra* note 14, at 1206.

³¹ *Refugee Convention*, *supra* note 2, Schedule.

³² *Id.* at Schedule paras 3-5.

³³ *Id.* at Schedule para 7.

³⁴ *Id.* at Schedule para 5.

³⁵ *Id.* at Schedule para 2.

by excluding certain states.³⁶ All in all, the Convention travel document is still subject to the same visa regulations and conditions applicable for holders of ordinary passports. This entitlement is only granted to refugees, asylum-seekers cannot benefit from it.³⁷

11.1.1.2.1.2. Changes in Personal Status under the Refugee Convention

Documentation is not only relevant in connection with receiving identity papers or traveling, but also for any changes in personal status. For example, marriages or divorces can no longer be registered in the state of nationality. Instead, the host state is responsible for registering these changes of personal status. The same applies to the issuance of birth certificates and death certificates. The Refugee Convention requires the personal status of a refugee and asylum-seeker³⁸ to be governed by the law of the country of their domicile or residence, and that previously acquired rights shall be respected by the Contracting States.³⁹ This means that all rights the refugee or asylum-seeker acquired under the law of her/his country of nationality remain valid. Therefore, to determine the validity of, for instance, a marriage or an adoption the legal standards of the country of nationality apply.⁴⁰ All future changes in personal status need to be performed in accordance with the laws and regulations of the refugee's state of domicile.⁴¹ The term "domicile" is understood differently in various jurisdictions. The drafters of the Refugee Convention discussed the different concepts but no clear definition could be agreed on.⁴² Usually "domicile" is the place an individual chooses "to live and carry out his business".⁴³ If a refugee does not have a country of domicile, then the country of residence is

³⁶ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 858 (2005).

³⁷ VEDSTED-HANSEN, *supra* note 14, at 1203.

³⁸ The Refugee Convention refers to a "refugee" without further qualifying the refugee's level of attachment to the host state. In these situations, the Convention's provisions apply to asylum-seekers the same way as to refugees. The reason behind applying these rights that do not refer to a level of attachment also to asylum-seekers lies in the duration of the RSD process. As there is no instant determination of refugee status, individuals who would later qualify as refugees would be deprived of their entitlements pending status determination. See HATHAWAY, *supra* note 36, at 159.

³⁹ *Refugee Convention*, *supra* note 2, Article 12.

⁴⁰ HATHAWAY, *supra* note 36, at 209.

⁴¹ Egypt formulated a reservation to Article 12 (1) because it sees the provision in contradiction with the internal laws of Egypt. This article provides that the personal status of a refugee shall be governed by the law of the country of his domicile or, failing this, of his residence. Egypt states that this formula contradicts Article 25 of the Egyptian Civil Code, which reads as follows: "The judge declares the applicable law in the case of persons without nationality or with more than one nationality at the same time. In the case of persons where there is proof, in accordance with Egypt, of Egyptian nationality, and at the same time in accordance with one or more foreign countries, of nationality of that country, the Egyptian law must be applied." In practice, this reservation is only applicable in very specific situations: when a person is stateless, or if she/he holds more than one nationality. In these cases, the judge declares which law to apply, though if in the latter case one of the nationalities is Egyptian, then Egyptian law applies. In all other constellations, the Refugee Convention remains applicable and the law of the refugee's country of domicile governs all personal status matters

⁴² HATHAWAY, *supra* note 36, at 216.

⁴³ *Id.* at 215.

used as a lower threshold, and personal status will be determined according to where they reside.⁴⁴ This criteria can include even short-term presence in a state for a time of transit or during the stay in a refugee camp.⁴⁵

Refugees and asylum-seekers need to access the necessary administrative apparatus to rebuild their lives.⁴⁶ To enable them to engage in their legal rights for marriage, divorce, adoption, settlement of succession, naturalization or acquisition of property, the Convention obliges States to provide refugees with the assistance of their authorities or of an international authority.⁴⁷

11.1.1.2.1.3. Personal Status Rights outside of the Refugee Convention

Refugees and asylum-seekers possess the same right as everyone else to marry⁴⁸ and to birth registration⁴⁹ under the *International Covenant on Civil and Political Rights* (ICCPR). The latter is also established in the *Convention on the Rights of the Child* (CRC), which grants every child the right to be registered immediately after birth, to acquire a nationality, and to preserve her/his identity.⁵⁰ *International Covenant on Economic, Social and Cultural Rights* (ICESCR) confirms that the family should receive the widest possible protection, it being the fundamental unit for society, and that marriage should be entered only with the free consent of both spouses.⁵¹

Women have the same right as men to acquire, change or retain their nationality and to pass their nationality on to their children.⁵² States are also obliged to take the necessary steps to eliminate discrimination against women in all matters related to family or marriage,⁵³ and

⁴⁴ *Id.* at 217.

⁴⁵ AXEL METZGER, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 877 (Andreas Zimmermann ed., 2010).

⁴⁶ EVE LESTER, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1131 (Andreas Zimmermann ed., 2010).

⁴⁷ *Refugee Convention*, *supra* note 2, Article 25.

⁴⁸ ICCPR, *supra* note 3, Article 23 (2).

⁴⁹ *Id.* at Article 24 (2). See also LESTER, *supra* note 46, at 1136.

⁵⁰ CRC, *supra* note 5, Articles 7 and 8.

⁵¹ ICESCR, *supra* note 4, Article 10.

⁵² CEDAW, *supra* note 6, Article 9.

⁵³ CEDAW, *supra* note 6, Article 16(1). Egypt made the following reservation to this Article: “Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true

outlaws the marriage of children.⁵⁴ The registration of marriages in official registries is compulsory,⁵⁵ which is a provision refugees and asylum-seekers can also benefit from. In addition to the prohibition of gender-based discrimination, states must take steps to eliminate racial discrimination in the enjoyment of the right to a nationality and the right to marry.⁵⁶ *Convention on the Rights of Persons with Disabilities* (CRPD) reiterates that persons with disabilities have the right to a nationality and to not be deprived on the basis of disability from obtaining, possessing or utilizing documentation evidencing their nationality or identity,⁵⁷ and their right to marry and found a family.⁵⁸ Children with disabilities have obviously also the right to be registered immediately after birth, receive a name, and nationality.⁵⁹

11.1.1.2.2. International Entitlements for Failed Asylum-Seekers

Failed asylum-seekers are not protected by the Refugee Convention. If they have permission to remain in a state under a work permit, student visa, or other residency permission, they are regular migrants. If they do not, then they are expected to depart immediately, and any continued presence in the state is considered irregular. International human rights law provides regular and irregular migrants all of the other aforementioned rights under the ICCPR, ICESCR, CRC, CEDAW, ICERD and CRPD to the same extent as refugees and asylum-seekers.⁶⁰

If the person is working regularly or irregularly in a state party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW), they and their families enjoy additional rights under the CMW, unlike refugees and asylum-seekers who are excluded from this Convention.⁶¹ The CMW protects migrant workers' identity papers by declaring it unlawful for anyone, other than a public official duly authorized

equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband." This reservation refers to the aspects of marriage concerning dowry, property rights and divorce, but does not limit women's right to freely choose their spouse and to register the marriage in the official books.

⁵⁴ CEDAW, *supra* note 6, Article 16(2).

⁵⁵ *Id.*

⁵⁶ ICERD, *supra* note 7, Article 5 (iii) and (iv).

⁵⁷ CRPD, *supra* note 8, Article 18.

⁵⁸ *Id.* at Article 23.

⁵⁹ *Id.* at Article 18(2)

⁶⁰ ICESCR, *supra* note 4; CRC, *supra* note 5; CEDAW, *supra* note 6; ICERD, *supra* note 7; CRPD, *supra* note 8.

⁶¹ CMW, *supra* note 9, Article 3 (d).

by law, to destroy documents proving one's identity (including, in the case of regular migrant workers, authorizing the entry or stay in the national territory, or work permits). These documents may only be confiscated in accordance with the law and in exchange for a detailed receipt. Passport and travel documents are under absolute protection and may under no circumstances be destroyed.⁶² The Convention also emphasizes that the children of migrant workers have the right to a name, to be registered at birth and to receive a nationality.⁶³

Special provisions concerning documentation exist for migrants who entered a state as victims of trafficking or smuggling. Trafficking refers to migrants who were forcefully, under threat, or through other forms of coercion, been taken control of for the purpose of exploitation.⁶⁴ A smuggled migrant is a person who paid a financial or material benefit to a smuggler in order to enter a state illegally.⁶⁵ As in both cases the migrant crossed the border illegally, the Protocols only apply to irregular migrants, but not to regular migrants. According to the relevant provisions, the state should facilitate the return of the trafficked or smuggled migrants by requesting the country of nationality to issue the necessary travel documents or authorizations for re-entering its territory.⁶⁶ As the issuance of documentation requires the cooperation of the country of nationality, refugees or asylum-seekers cannot rely on these Protocols to receive travel documents, as they have severed their ties to said country of nationality.

11.1.2. Regional Law

11.1.2.1. Regional Instruments⁶⁷

- *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*⁶⁸
- *African Charter on Human and Peoples' Rights*⁶⁹
- *African Charter on the Rights and Welfare of the Child (ACRWC)*⁷⁰

⁶² *Id.* at Article 21.

⁶³ *Id.* at Article 29.

⁶⁴ *Trafficking Protocol*, *supra* note 10, Article 3.

⁶⁵ *Smuggling Protocol*, *supra* note 11, Article 3

⁶⁶ *Trafficking Protocol*, *supra* note 10, Article 8(4). *Smuggling Protocol*, *supra* note 11, Article 18(4).

⁶⁷ Full text of the following legal instruments can be found in Annex I.

⁶⁸ Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45, entered into force June 20, 1974. Egypt acceded to the Convention on 12 June 1980. [Hereinafter, *OAU Refugee Convention*]

⁶⁹ African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217 (entered into force October 21, 1986). [Hereinafter, *African Charter*] Egypt ratified the Charter on 3 April 1984.

⁷⁰ African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG 24.9/49 (entered into force 29 November 1999). Egypt ratified the Charter on 9 May 2001. [Hereinafter, *ACRWC*]

- *African Youth Charter (AYC)*⁷¹
- *Charter on the Rights of the Arab Child*⁷² (applicable to Arab children)
- *Protocol for the Treatment of Palestinians in Arab States (Casablanca Protocol)*⁷³

11.1.2.2. Analysis of Regional Instruments

There are few provisions within regional law that discuss documentation, identity papers or registration. The regional legal instruments conferring relevant entitlements are the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*,⁷⁴ the *African Charter on Human and Peoples' Rights* (African Charter),⁷⁵ the *African Charter on the Rights and Welfare of the Child* (ACRWC),⁷⁶ the *Charter on the Rights of the Arab Child*,⁷⁷ and the Casablanca Protocol.⁷⁸ Only the last two instruments grant rights to specific nationalities, as the *Charter on the Rights of the Arab Child* exclusively applies to Arab children and the Casablanca Protocol is directed at Palestinians. The other afore mentioned legal instruments grant entitlements regardless of nationality, and are applicable to all individuals within the territory of one of the State Parties.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁷⁹ contains a wider definition of “refugee” than the Refugee Convention. Apart from applying to persons who are outside their country of nationality owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,⁸⁰ the Convention also includes persons fleeing from external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country of nationality.⁸¹ The OAU Refugee Convention entitles refugees to travel documents by referring to the relevant Article and the Annex of the Refugee Convention, which determine the format travel documents should comply with, and states that State Parties shall

⁷¹ African Youth Charter, July 2, 2006 (entered into force 8 August 2009). [Hereinafter, *AYC*]. Egypt ratified the Charter on 1 April 2015.

⁷² Charter on the Rights of the Arab Child, 6 June 1983 (entered into force on 11 January 1994). Egypt ratified the same day. [Hereinafter, *Arab Child Charter*]

⁷³ Protocol for the Treatment of Palestinians in Arab States (Casablanca Protocol), 11 September 1965. Egypt ratified the Protocol on 11 September 1965. [Hereinafter, *Casablanca Protocol*]

⁷⁴ *OAU Refugee Convention*, *supra* note 68.

⁷⁵ *African Charter*, *supra* note 69.

⁷⁶ *ACRWC*, *supra* note 70.

⁷⁷ *Arab Child Charter*, *supra* note 72.

⁷⁸ *Casablanca Protocol*, *supra* note 73.

⁷⁹ *OAU Refugee Convention*, *supra* note 68. See Chapter 3 for more details on the refugee definition.

⁸⁰ *Refugee Convention*, *supra* note 2, Article 1(A)(2). *OAU Refugee Convention*, *supra* note 68, Article 1.

⁸¹ *OAU Refugee Convention*, *supra* note 68, Article 1(2).

issue such documents to refugees lawfully staying the country.⁸² The OAU Refugee Convention is also identical with the Refugee Convention by obliging State Parties to recognize travel documents issued to refugees under previous international agreements,⁸³ by not extending the right to travel documents to asylum-seekers,⁸⁴ and by not being applicable to failed asylum-seekers, as their application for refugee status was rejected.⁸⁵ The main difference between the two Conventions is that the OAU Refugee Convention includes no provision entitling refugees to receive identity papers.

The Member States of the League of Arab States ratified a special Protocol for the Treatment of Palestinians in Arab States which entitles all Palestinians who currently reside in the territory of one of the State Parties, “as well as those who were residing and left to the Diaspora”,⁸⁶ to valid travel documents issued by the national authorities,⁸⁷ and to the same treatment as any citizen of an Arab League Member State with regard to visa or residency application.⁸⁸ How these entitlements are implemented in practice will be analyzed in the section on domestic law.

Documentation is not just related to travel documents and the issuance of an ID, but includes the registration of changes of personal status, as well as the access to birth or death certificates. Regional law rarely covers these aspects of documentation but the few relevant provisions apply to refugees, asylum-seekers and failed asylum-seekers alike. The ACRWC⁸⁹ and the *Charter on the Rights of the Arab Child*⁹⁰ both entitle children to be named and registered at birth (though the latter only covers Arab children). It is clear from the Arab Declaration on Belonging and Legal Identity,⁹¹ that it is a goal of the League of Arab States to encourage implementation within their Member States. At the Ministerial Conference the Member States were urged to “enact legislations, and review and enforce their national laws on nationality; to

⁸² *Id.* at Article 6, referring to *Refugee Convention*, *supra* note 2, Article 28.

⁸³ *Id.* at Article 6(3).

⁸⁴ As previously discussed under the rights granted under the Refugee Convention, the right to travel documents only applies to refugees “lawfully staying” in the territory of a Contracting State. This does not include asylum-seekers but only recognized refugees who have completed their RSD process or count as *prima facie* refugees. For more details on “lawfully staying” see Chapter 3.

⁸⁵ *OAU Refugee Convention*, *supra* note 68, Article 6.

⁸⁶ *Casablanca Protocol*, *supra* note 73, Article 4.

⁸⁷ *Id.*

⁸⁸ *Id.* at Article 5.

⁸⁹ *ACRWC*, *supra* note 70, Article 6.

⁹⁰ *Arab Child Charter*, *supra* note 72, Article 10.

⁹¹ League of Arab States, *Arab Declaration on “Belonging and Legal Identity”*, 28 February 2018. Available at <http://www.refworld.org/docid/5a9ffbd04.html> [accessed 15 August 2018]. [Hereinafter, *Arab Declaration on “Belonging and Legal Identity”*]

ensure, without exception, that all children, including unaccompanied children are registered upon birth and are able to acquire a nationality [...]”.⁹² Furthermore, it was emphasized that children are entitled to a legal identity, including a name and nationality,⁹³ and the necessity of raising awareness among all social segments to register births in order to provide all children upon birth with identification papers.⁹⁴ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) specifies that the registration of birth has to be universal, free and accessible. The principle of universality in this context means that all children have the right to be registered without any discrimination. This includes not only children of citizens but also those born to foreigners, asylum-seekers, refugees and even irregular migrants, because the irregular legal status of the parents should never impede children from being registered. The Committee stresses that the registration of birth gives children a legal identity and thus is an indispensable requirement to acquire any nationality and avoid statelessness. The principle of free and accessible registration entails that the procedures should be facilitated as much as possible and late registration should be possible free of charge or at a very low fee. Also, the competent authorities where births are registered should be accessible even in remote areas of the country.⁹⁵

Unlike international law, there are no provisions on the regional level which oblige states to offer administrative assistance to refugees to receive personal status certificates which they would usually obtain from their country of nationality. Only the African Charter mentions indirectly an entitlement for everyone to have their marriages registered. According to this Charter, the family is the natural unit and basis of society which shall be protected by the state and receive its assistance.⁹⁶ According to the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, the right to protection of the family includes the right to marry.⁹⁷ Therefore, states are obliged to at least “guarantee in law and practice the rights of all persons to enter into marriage with their full and free and personal consent”.⁹⁸ Furthermore, they should include steps in their

⁹² *Arab Declaration on “Belonging and Legal Identity”*, *supra* note 91, Article 3.

⁹³ *Id.* at, Article 4.

⁹⁴ *Id.* at Article 5.

⁹⁵ The African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02 (2014), paras 50-82.

⁹⁶ *African Charter*, *supra* note 69, Article 18 (1)(2).

⁹⁷ African Commission on Human and People’s Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, para 93.

[Hereinafter, *Guideline African Charter*]

⁹⁸ *Guideline African Charter*, *supra* note 97, para 95.

national policies to ensure that every marriage is registered in accordance with the law.⁹⁹ As this right is not exclusively addressed to citizens, refugees, asylum-seekers and failed asylum-seekers can benefit from it. However, ensuring the registration of marriages is not listed under the core obligations, therefore it depends on whether the host state actually implemented these steps. The AYC echoes this right and grants specifically persons under 35 years of age the right to enter into marriages based on their free will, and obliges the State Parties to protect the family as the most basis social unit.¹⁰⁰

11.1.3. Bilateral Law

11.1.3.1. Bilateral Instruments¹⁰¹

- *Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan* (Four Freedoms Agreement)¹⁰²
- *Memorandum of Understanding between the Egyptian Government and the United Nations High Commissioner for Refugees*¹⁰³

11.1.3.2. Analysis of Bilateral Instruments

Egypt did not enter any bilateral agreements which deal with documentation *per se*, however the Four Freedoms Agreement between Egypt and Sudan contains provisions related to travel documents and residency. The Agreement entitles Sudanese to enter Egyptian territory without having to fulfill visa requirements, instead a valid travel document is sufficient. In addition, Egypt may choose to accept any other document besides a valid passport, provided that this decision was made in agreement with Sudan.¹⁰⁴ This entitles Sudanese refugees, asylum-seekers and failed asylum-seekers to enter Egypt and to stay within its territory using a valid travel document or another document agreed upon by the two governments.¹⁰⁵ This exempts

⁹⁹ *Id.* at para 95 (e).

¹⁰⁰ AYC, *supra* note 71, Article 8.

¹⁰¹ Full text of the following legal instruments can be found in Annex I.

¹⁰² Agreement on the Freedom of Movement, Residence, Work, and Property between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan (“Four Freedoms Agreement”), Apr. 4, 2004, ratified by Egypt and entered into force 9 September 2004. [Hereinafter, *Four Freedoms Agreement*] (*unofficial translation*) The Agreement was published in the Official Gazette through Decree No. 76 of 2004 by the Foreign Minister, *Al-Jarida Al-Rasmiyya*, 9 September 2004 (Egypt).

¹⁰³ Translation retrieved from Tarek Badawy, *The Memorandum of Understanding between Egypt and the Office of the United Nations High Commissioner for Refugees: Problems and Recommendations*, CARIM-AS 2010/07, 4 (2010). [Hereinafter, *MoU Egypt UNHCR*]

¹⁰⁴ *Four Freedoms Agreement*, *supra* note 102, Article 2.

¹⁰⁵ *Id.* at Article 2.

them from the requirements of a valid visa or residence permit. As long as they hold valid travel documents, or other agreed upon papers, they are regularly on Egyptian territory. Only if an individual lacks such papers, she/he falls under the category of an irregular migrant.

However, 14 years after the signing of the Agreement, its provisions are not completely implemented.¹⁰⁶ This led to tensions between the two governments and calls from the Sudanese side to abolish the Agreement,¹⁰⁷ but Egypt admits to facing obstacles in its implementation and still wishes to improve relations with Sudan.¹⁰⁸ In practice, the lack of domestic legislation implementing the Four Freedoms Agreement makes it difficult for Sudanese to benefit from its provisions. According to a government official, the Four Freedoms Agreement is fully implemented with the exception of visa-free entrance for Sudanese men aged 18 to 50. Thus, all Sudanese except men of this age group can enter Egypt without needing a visa and reside in its territory. Men between 18 and 50 years of age have to obtain an initial entry visa but afterwards do not need a residence permit to remain in Egypt. Furthermore, all Sudanese nationals should be allowed to work in Egypt and enjoy public services on par with nationals.¹⁰⁹

According to the Memorandum of Understanding between the Government of Egypt and UNHCR, Egypt agreed to grant refugees travel documents with a return visa when they have to travel abroad. The travel documents are to be valid for a limited but sufficient duration. Issuance may only be denied if reasons of public security prevent it.¹¹⁰ Thus, refugees registered with UNHCR are entitled to receive travel documents under the Memorandum.

11.1.4. Domestic Law

11.1.4.1. Domestic Instruments¹¹¹

- Constitution of the Arab Republic of Egypt 2014¹¹²

¹⁰⁶ Eman Maher, “*The Four Freedoms*”- full details on the crisis of the agreement Sudan seeks to abolish, Al Dostor, Jan. 18, 2018, <https://www.dostor.org/2014842>.

¹⁰⁷ *13 Years After Signing It, What Remains of The Four Freedoms Agreement with Egypt*, The Sudanese Media Center, 21 January 2018. Available at <http://smc.sd/en/13years-signing-remains-four-freedoms-agreement-egypt/> (Accessed on 21 August 2018).

¹⁰⁸ Salah Khalil, Al-Ahram Center for Political and Strategic Studies, ‘*The Four Freedom Agreement and the Egyptian-Sudanese Relations*’, page 23. Available at <http://acpss.ahram.org.eg/Media/News/2018/4/1/2018-636581863398725357-872.pdf>.

¹⁰⁹ Information obtained in an interview with a government official, April 2019.

¹¹⁰ *MoU Egypt UNHCR*, *supra* note 198, Article 7.

¹¹¹ Full text of the following legal instruments can be found in Annex I.

¹¹² Constitution of the Arab Republic of Egypt, 18 January 2014. [Hereinafter, *Egyptian Constitution*]

- Law No. 89 of the year 1960 concerning Entry and Residence of Aliens in the Territories of the United Arab Republic and their Departure therefrom¹¹³
- Ministry of Interior Decree No. 31 of the year 1960¹¹⁴
- Ministry of Interior Decree No. 7067 of the year 1996¹¹⁵ (*special registration procedures for nationals from Israel, Somalia, Iraq, Sudan, Yemen, Palestine, Lebanon, Zaire, Chad, Nigeria, Ghana, Liberia, Burundi, Eritrea, Pakistan, Afghanistan, Sri Lanka, Philippines, Bangladesh, India, Honduras, Belize, Barbados, Trinidad & Tobago, Iran, Bosnia, the Islamic countries gained independency from the former Soviet Union and Ethiopia*)
- Ministry of Interior Decree No. 180 of 1964, enforcing certain provisions of Law No. 89 of 1960, in Respect of Admittance and Residence of Foreigners in the Territories of the United Arab Republic and Exit therefrom¹¹⁶ (*includes special fee exemption for Palestinian refugees*)
- Ministry of Interior Decree No. 344 of the year 2017¹¹⁷
- Ministry of Interior Decree No. 8180 of the year 1996, Reorganizing Foreigners' Residence Inside the Arab Republic of Egypt¹¹⁸
- Ministry of Interior Decree No. 179 of the year 1964, in Respect of Travel Documents Which Are Issued to Certain Categories of Foreigners (Transit Cards)¹¹⁹
- Ministry of Interior Decree No. 181 of the year 1964, on Travel Documents for Palestinian Refugees¹²⁰
- Egyptian Civil Code¹²¹
- Law No. 143 of the year 1994, on Civil Status¹²²
- Law No. 12 of the year 1996 promulgating the Child Law, as amended by Law No. 126 of the year 2008¹²³

¹¹³ Law No. 89 of 1960 (Entry and Residence of Aliens in the Territories of the United Arab Republic and their Departure Therefrom), *Al-Jarida Al-Rasmiyya*, 24 March 1960 (Egypt).

¹¹⁴ Ministry of Interior Decree No. 31 of 1960, *Al-Jarida Al-Rasmiyya*, 2 July 1960 (Egypt).

¹¹⁵ Ministry of Interior Decree No. 7067 of 1996, *Al-Jarida Al-Rasmiyya*, 13 October 1996 (Egypt).

¹¹⁶ Ministry of Interior Decree No. 180 of 1964, enforcing certain provisions of Law No. 89 of 1960 (In Respect of Admittance and Residence of Foreigners in the Territories of the United Arab Republic and Exit therefrom), *Al-Jarida Al-Rasmiyya*, 26 November 1964 (Egypt).

¹¹⁷ Ministry of Interior Decree No. 344 of 2007, *Al-Jarida Al-Rasmiyya*, 15 February 2017 (Egypt).

¹¹⁸ Ministry of Interior Decree No. 8180 of 1996, (Reorganizing Foreigners' Residence Inside the Arab Republic of Egypt), *Al-Jarida Al-Rasmiyya*, 10 November 1996 (Egypt).

¹¹⁹ Ministry of Interior Decree No. 179 of 1964 (In Respect of Travel Documents Which Are Issued to Certain Categories of Foreigners, Transit Cards), *Al-Jarida Al-Rasmiyya*, 26 November 1964 (Egypt).

¹²⁰ Ministry of Interior Decree No. 181 of 1964 (Travel Documents for Palestinian Refugees), *Al-Jarida Al-Rasmiyya*, 26 November 1964 (Egypt).

¹²¹ Law No. 131 of 1948 (Promulgating the Civil Code), *Al-Waqa'i' al Misriyah*, 29 July 1948 (Egypt).

¹²² Law No. 143 of 1994 (Civil Status), *Al-Jarida Al-Rasmiyya*, 9 November 1994 (Egypt).

¹²³ Law No. 12 of 1996 (Child Law), *Al-Jarida Al-Rasmiyya*, 28 March 1996 (Egypt). English translation provided by the National Council for Childhood and Motherhood (an entity established by Presidential Decree

- Executive Regulation for the Law of the Child No. 12 of the year 1996, issued by Prime Minister Decree No. 2075 of the year 2010¹²⁴
- Law No. 68 of the Year 1947, regarding documentation¹²⁵
- Executive Regulation promulgated by Royal Order year 1948, on the Documentation Law No. 68 of the year 1947¹²⁶
- Minister of Justice Decree No. 9200 of the year 2015, amending the Executive Regulation of Documentation Law No. 68 year 1947¹²⁷
- Law No. 25 of the year 1929 regarding Personal Status matters¹²⁸
- Law No. 1 of the year 2000, Regulating the Litigation Procedures in Personal Status Matters¹²⁹
- Minister of Justice Decree on the Marriage Officiant Regulation promulgated in 1955¹³⁰

11.1.4.2. Analysis of Domestic Instruments

The main law on the entry, residence and departure of aliens from the territory of the Arab Republic of Egypt applies to all foreign nationalities alike.¹³¹ However, there are some decrees which establish specific rules for certain nationalities. For example, there are special registration procedures for nationals from Israel, Somalia, Iraq, Sudan, Yemen, Palestine, Lebanon, Zaire, Chad, Nigeria, Ghana, Liberia, Burundi, Eritrea, Pakistan, Afghanistan, Sri Lanka, Philippines, Bangladesh, India, Honduras, Belize, Barbados, Trinidad & Tobago, Iran, Bosnia, the Islamic countries gained independency from the former Soviet Union and Ethiopia.¹³² Furthermore, Palestinian refugees are exempted from paying residence card fees.¹³³

under the Ministry of State for Family and Population), amended version of 2008. Retrieved from http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf

¹²⁴ Executive Regulation to Law No. 12 of 1996 (Child Law), Prime Minister Decree No. 2075 of 2010, *Al-Jarida Al-Rasmiyya*, 22 July 1996 (Egypt). [hereinafter, *Executive Regulation to Law 12/1996*]

¹²⁵ Law No. 68 of 1947, *Al-Jarida Al-Rasmiyya*, 29 June 1947 (Egypt).

¹²⁶ Executive Regulation on Documentation Law No. 68 of 1947, *Al-Jarida Al-Rasmiyya*, 3 November 1947 (Egypt).

¹²⁷ Minister of Justice Decree No. 9200 of 2015, *Al-Jarida Al-Rasmiyya*, 12 November 2015 (Egypt).

¹²⁸ Law Number 25 of 1929 (Personal Status Matters), *Al-Jarida Al-Rasmiyya*, 25 March 1929 (Egypt).

¹²⁹ Law No. 1 of 2000 (Litigation Procedures in Personal Status Matters), *Al-Jarida Al-Rasmiyya* 29 January 2000 (Egypt).

¹³⁰ Minister of Justice Decree of the year 1955, on the Marriage Officiant Regulation, *Al-Jarida Al-Rasmiyya* 4 January 1955 (Egypt).

¹³¹ Law No. 89 of 1960, *supra* note 113.

¹³² Decree No. 7067 of 1996, *supra* note 115, Article 1.

¹³³ Decree No. 180 of 1964, *supra* note 116, Article 13.

The entitlements of refugees, asylum-seekers and failed asylum-seekers regarding documentation can be found in different fields of domestic law. First of all, documentation refers to personal identification and issuance of related documents, such as identity papers or travel documents, as well as to residence permits or visas. Apart from this, documentation also includes the registration of new born children, registration of deaths, and the registration of changes of civil status such as marriage or divorce.

11.1.4.2.1. Travel Documents, Identification and Residence Permits

Laws on the residence of aliens are applicable to refugees, asylum-seekers and failed asylum-seekers alike. According to Law No. 89 of 1960, aliens are all those who do not hold Egyptian nationality.¹³⁴ In order to enter and exit Egypt, all aliens need a valid passport or travel document, and receive a visa from the competent official.¹³⁵ The Director of the Passports, Immigration and Nationality Administration may grant special permission to allow entry without a valid passport or visa,¹³⁶ and the Minister of Interior may issue a decree exempting certain nationals from the visa and passport requirements.¹³⁷ Further procedural rules on the issuance of visas were issued in a Decree by the Minister of Interior, which differentiates between diplomatic visas and ordinary visas.¹³⁸ The ordinary visas may be issued for entry into the Egyptian territory or for transit through it. Their validity is six months if not otherwise indicated, but for a maximum of one year.¹³⁹ The prerequisite to receiving such visa, is to be a holder of a valid passport.¹⁴⁰ The passport may include the spouse of the owner and any minor children, stating their names and photographs.¹⁴¹ The Minister of Interior may decree the conditions and procedures for granting certain categories of aliens and refugees travel documents.¹⁴²

According to Decree Number 179 of the year 1964, the Emigration, Passport and Nationality Department, and the Consular Missions of Egypt abroad, may issue special travel documents for persons who have no nationality, for recognized refugees, and for those who have an established nationality but are unable for reasons accepted by the Ministry of Interior to obtain

¹³⁴ Law No. 89 of 1960, *supra* note 113, Article 1.

¹³⁵ *Id.* at Articles 2 and 3.

¹³⁶ *Id.* at Article 4.

¹³⁷ *Id.* at Article 5.

¹³⁸ *Id.* at Articles 32. Decree No. 31 of 1960, *supra* note 114, Article 1.

¹³⁹ Decree No. 31 of 1960, *supra* note 114, Article 11.

¹⁴⁰ *Id.* at Article 12.

¹⁴¹ *Id.* at Article 13.

¹⁴² Law No. 89 of 1960, *supra* note 113, Article 33.

travel documents from their home country.¹⁴³ These travel documents are to be valid for a period of five years, but in order to leave or enter Egypt it is additionally necessary to obtain an entry, transit or re-entry visa.¹⁴⁴ Based on this provision, refugees recognized by UNHCR are entitled to receive special travel documents. For asylum-seekers this could only be possible under the discretion of the Ministry of Interior.

Palestinian refugees residing in Egypt are entitled to request temporary travel documents, which are valid for a period of five years. These travel documents may include the wife of the Palestinian refugee and children below the age of sixteen, provided their names and dates of births are included in the document.¹⁴⁵ To receive such a travel document, Palestinians need to “have acquired refugee status and have a residency proving this.”¹⁴⁶ The law does not provide further detail on how to prove Palestinian refugee status. Historically, the Egyptian Higher Committee for Palestinian Immigrants defined Palestinian refugees as persons who sought refuge in Egypt from 1948 until 1950. To prove this status, an identity card was issued by the Egyptian Department of Passports and Nationality.¹⁴⁷ In order to renew the travel document, such an identity card and a renewed residence permit have to be presented.¹⁴⁸ Those holding such a travel document and travel abroad have to return to Egypt every six months in order to be able to re-enter the country. For specific reasons, such as education or employment, the re-entry visa may be extended to a duration of one year. If the stipulated deadline is not met, re-entry may be denied or the person in question may be deported.¹⁴⁹

In addition to holding a valid passport and an entry or transit visa, aliens of the following nationalities are obliged to follow stricter registration requirements: Israel, Somalia, Iraq, Sudan, Yemen, Palestine, Lebanon, Zaire, Chad, Nigeria, Ghana, Liberia, Burundi, Eritrea, Pakistan, Afghanistan, Sri Lanka, Philippines, Bangladesh, India, Honduras, Belize, Barbados, Trinidad & Tobago, Iran, Bosnia, the Islamic countries that gained independency from the former Soviet Union and Ethiopia.¹⁵⁰ Within seven days from their arrival in Egypt, they have

¹⁴³ Decree No. 179 of 1964, *supra* note 119, Articles 1 and 3.

¹⁴⁴ *Id.* at Articles 4 and 5.

¹⁴⁵ Decree No. 181 of 1964, *supra* note 120, Articles 1, 4 and 7.

¹⁴⁶ *Id.* at Article 1.

¹⁴⁷ Oroub El-Abed, *Palestinian Refugees of Egypt: What Exit Options Are Left for Them?*, 22 *Canada's Journal on Refugees* 15,18 (2005).

¹⁴⁸ El-Abed, *supra* note 147, at 19.

¹⁴⁹ OROUB EL-ABED, *UNPROTECTED – PALESTINIANS IN EGYPT SINCE 1948*, 85 (2009).

¹⁵⁰ Decree No. 7067 of 1996, *supra* note 115, Article 1.

to report at the Aliens Registration Office in the police station of their district to declare the purpose of their stay and provide all necessary personal information.¹⁵¹

In order to reside in Egypt for a longer period of time, all aliens must obtain a residence permit.¹⁵² Under Egyptian law there are three types of residence permits: special residence, ordinary residence and temporary residence.¹⁵³ Special residence is granted for a period of ten years under special circumstances, for example for those who were born in Egypt before 1952, or those who resided in Egypt for 20 years, or if an alien has resided in Egypt for more than five years and carried out works beneficial to national economy or performed other services to the country.¹⁵⁴ Ordinary residence is granted for five years and only awarded to aliens residing in Egypt for 15 years before 1952.¹⁵⁵ Everybody else falls under the category of temporary residence which may be valid for one year, or up to five years based a Decree by the Minister of Interior.¹⁵⁶ The details and procedures concerning obtaining a residence permit are to be established through decrees of the Ministry of Interior, as well as a list of names of those persons banned from entering Egypt.¹⁵⁷

The residence permit duration for Palestinians vary depending on when they came to Egypt. Those who arrived before 1948 (Category A) received renewable residence permits for five years, which would be extended to ten years after a continuous ten-year residency in Egypt. Those arrived in 1948 (Category B) also received renewable permits for five years each. Palestinians who come to Egypt in 1956 (Category C), in 1967 (Category D) and after 1967 (Category H) have to renew their residence permits every three years.¹⁵⁸ The prerequisite to receiving a residence permit is to provide a reason for remaining in Egypt, such as education, work, or family links, which is ultimately linked to providing a guarantor. For example, if the reason for staying in Egypt is education, the school or university functions as a guarantor. Other guarantors could be the employer in case of employment, the spouse in case of marriage to an Egyptian, or an Egyptian business partner.¹⁵⁹

¹⁵¹ Law No. 89 of 1960, *supra* note 113, Article 8.

¹⁵² *Id.* at Article 16.

¹⁵³ *Id.* at Article 17.

¹⁵⁴ *Id.* at Article 18.

¹⁵⁵ *Id.* at Article 19.

¹⁵⁶ *Id.* at Article 20.

¹⁵⁷ *Id.* at Articles 21, 34, 35, 36.

¹⁵⁸ OROUB EL-ABED, UNPROTECTED – PALESTINIANS IN EGYPT SINCE 1948, 80 (2009).

¹⁵⁹ EL-ABED, *supra* note 158, at 80.

Generally, asylum-seekers, refugees and failed asylum-seekers need to apply for a temporary residence permit. If they wish to extend their residence permit, they need to submit an application to the Emigration, Passports and Nationality Department within 15 days before the expiry of the current permit and pay the applicable fees.¹⁶⁰ Only Palestinian refugees are exempted from renewal fees.¹⁶¹ According to the law, the residence permit is issued for a renewable period of three years for refugees registered with the United Nations Refugee Office,¹⁶² and for Palestinians holding passports issued by Egyptian authorities.¹⁶³ A longer residence permit of three to five years may be granted to foreigners owning property on Egyptian territory worth between 200.000 USD and 400.000 USD.¹⁶⁴

UNHCR published the exact procedural steps asylum-seekers and refugees need to follow to fulfill Egypt's legal requirements for staying in Egypt. Those applying for refugee status receive the UNHCR Asylum-Seeker Registration Card, the so-called yellow card.¹⁶⁵ This document shows that an individual has applied for refugee status in Egypt but is still awaiting the final decision on her/his status, and expires after 18 months with the possibility of renewal.¹⁶⁶ Recognized refugees receive the UNHCR Refugee Registration Card, the so-called blue card, which is valid for three years.¹⁶⁷ Within 15 days after receiving the yellow or the blue card, asylum-seekers and refugees need to visit the Department of Refugees at the Egyptian Ministry of Foreign Affairs to obtain a reference number. This number has to be presented at the Residence Unit of the Immigration Department of the Ministry of Interior, together with all other required documents and application forms. The required documents in this context are: the yellow or blue card from UNHCR and a copy thereof, the original passport and a copy thereof, and two passport-sized photos. Once the application has been successfully processed, asylum-seekers used to receive a legal residence sticker by the Egyptian government, which was attached to the UNHCR registration document and valid for six months.¹⁶⁸ In October 2019 this format changed. Instead of a residence permit sticker, all

¹⁶⁰ Decree No. 180 of 1964, *supra* note 116, Article 2.

¹⁶¹ *Id.* at Article 13(j).

¹⁶² "United Nations Refugee Office" is the term used in Egyptian law, refers to UNHCR in Egypt.

¹⁶³ Decree No. 8180 of 1996, *supra* note 118, Article 2 (5) and (8).

¹⁶⁴ Decree No. 8180 of 1996, *supra* note 118, Articles 1(5) and 2-bis.

¹⁶⁵ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT, *supra* note 24, at 30.

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.* at 30.

¹⁶⁸ *Id.* at 31-32.

foreigners now receive a separate residence permit card with photo identification. According to the law, issuance of the residence permit or renewal cost 500 Egyptian Pounds each time.¹⁶⁹ However, for asylum-seekers and refugees this fee is reduced to 100 Egyptian Pounds based on an agreement between UNHCR and the Egyptian government.¹⁷⁰ It remains unchanged that the residence permit for asylum-seekers and refugees is only issued for a period of six months. This contradicts the corresponding provision in Egyptian law which explicitly grants refugees a residence permit for three years, not six months.¹⁷¹

Within the category of failed asylum-seekers, regular migrants are per definition legally in Egypt and thus following the above described laws on residency without involvement of UNHCR. Irregular migrants who unsuccessfully applied for asylum differ from the above described by not having a valid legal ground to reside in Egypt and are in violation of the legal requirement for aliens to hold a residence permit.¹⁷² The laws on residency do not apply to members of foreign diplomatic corps, crews of vessels, aircrafts and vehicles, those exempted based on international agreements and those nationals of neighboring countries who have special permission to enter the border regions based on bilateral agreements.¹⁷³

11.1.4.2.2. Registration of Birth

Once a person is staying in Egypt for a longer period of time, changes in personal status are likely to occur that require registration with the authorities of the host state. If a child is born to parents with refugee status, parents who are asylum-seekers, or failed asylum-seekers, they have the right to a name and to be registered in the births' registers like all children in Egypt.¹⁷⁴ This registration has to take place within 15 days from the date of birth.¹⁷⁵ Certain persons are authorized to report the birth to the local Health Office: the father of the child, the mother of the child, the director of hospitals or other institutions where births occur, the Umda (town mayor) or Sheikh. Relatives and in-laws up to the second degree might also be accepted to report the birth.¹⁷⁶ The Health Office is responsible for receiving birth notifications from Egyptian citizens and resident foreigners, and is thus also the competent authority in the case

¹⁶⁹ Decree No. 344 of 2017, *supra* note 117, Article 5.

¹⁷⁰ Information obtained in an interview with UNHCR Egypt, January 2020.

¹⁷¹ Decree No. 8180 of 1996, *supra* note 118, Article 2(8).

¹⁷² Law No. 89 of 1960, *supra* note 113, Article 16.

¹⁷³ *Id.* at Article 35.

¹⁷⁴ Law No. 12 of 1996, *supra* note 123, Article 5.

¹⁷⁵ *Id.* at Article 5. Law No. 143 of 1994, *supra* note 122, Article 19.

¹⁷⁶ Law No. 12 of 1996, *supra* note 123, Article 15.

of refugees.¹⁷⁷ When reporting the birth, it is not only necessary to state the date of birth, name, surname and gender of the newborn, but also to present the following information concerning the parents: name, surname,¹⁷⁸ nationality, religion, home address, profession, civil registry location and any other information required by a decree of the Ministries of Interior and Health.¹⁷⁹ The Health Office then forwards the birth report to the relevant branch of the Civil Status Department within three days, in order for the birth to be registered in the birth registry,¹⁸⁰ and for the issuance of the birth certificate.¹⁸¹

Once refugees or asylum-seekers receive the birth certificate of their child, this certificate should be submitted to UNHCR in order to add the child to its parents' file at UNHCR.¹⁸² According to UNHCR, asylum-seekers and refugees need to present the following documents at the Health Office to apply for the birth certificate: valid and legally certified marriage or divorce documents, birth notice by the hospital, UNHCR registration card or valid passports of father and mother, death certificate in case the father is deceased.¹⁸³ Thus, asylum-seekers and refugees are able to present the necessary paperwork. Regular migrants need to submit their valid passport instead of the UNHCR registration card. However, irregular migrants might face difficulties when registering their child as their passports do not contain a valid visa. When presenting the necessary paperwork, they risk discovery of their illegal status and hence deportation.

Difficulty may also arise if the registration of birth does not take place within the fifteen-day period stipulated.¹⁸⁴ If the birth is not registered within 15 days, a request for registration may be submitted with the Director of the Civil Status Department within one year from the date of birth.¹⁸⁵ Thus, registration after 15 days is still possible, but failure to register the birth of a

¹⁷⁷ Law No. 143 of 1994, *supra* note 122, Article 4.

¹⁷⁸ There are certain circumstances when the names of the father or mother of a child may not be registered in the birth registry: If the parents are forbidden to marry under Islamic Law; if the mother is married but gives birth to a child whose father is not her husband, then the mother's name may not be recorded; with regard to Non-Muslims, if the father is married and the child is born to a mother who is not his legitimate wife, then the name of the father may not be recorded. These provisions severely impair the rights of illegitimate children. *See* Law No. 12 of 1996, *supra* note 123, Article 22.

¹⁷⁹ Law No. 12 of 1996, *supra* note 123, Article 16.

¹⁸⁰ *Id.* at Article 14; Law No. 143 of 1994, *supra* note 122, Article 6.

¹⁸¹ Law No. 12 of 1996, *supra* note 123, Article 17.

¹⁸² UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT, *supra* note 24, 59.

¹⁸³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Services for Syrians registered with UNHCR in Greater Cairo 10 (2018).

¹⁸⁴ Law No. 143 of 1994, *supra* note 122, Article 19.

¹⁸⁵ *Id.* at Articles 45 and 46.

child within 15 days constitutes a violation of the Civil Status Law and is punishable by a fine of between one hundred and two hundred pounds. Thus, UNHCR stresses the importance of completing the registration process within 15 days to avoid complications and prolonged procedures.¹⁸⁶ Even after one year, birth registration is still possible and has to be filed with the Civil Registry,¹⁸⁷ however the earlier one registers, the easier are the procedures.

11.1.4.2.3. Registration of Death

The death of anyone is to be reported within 24 hours to the competent Health Offices in the area where the death occurred. In case an area does not have a Health Office, then the death has to be reported to the health authorities determined by a Decree of the Minister of Health, or the mayor or the sheikh in these areas.¹⁸⁸ The report can be submitted only by the authorized persons and is then forwarded to the Civil Status Department and its branches for the issuance of a death certificate.¹⁸⁹ According to Egyptian law, the authorized persons are: ascendants, descendants and spouse of the deceased; those relatives of the deceased who were present at her/his death; those living in the same household with the deceased; the Doctor in charge for confirming death; or the owner or director of an institution if the death occurred in a hospital, private clinic, home, hotel, school or penal institution.¹⁹⁰ Once this report of death is submitted to the health authorities, accompanied by a medical examination by the doctor in charge of confirming the death, a permission for burial shall be issued.¹⁹¹ If the death is not reported within 24 hours, as stipulated by the law, the death is considered as “not-registered”.¹⁹² However, a request for late registration may be submitted with the Director of the Civil Status Department within one year from the date of death.¹⁹³ Failure to register the death within 24 hours, constitutes a violation of Article 35 of the Egyptian Civil Status Law and is punishable with a fine between one hundred and two hundred Egyptian Pounds.¹⁹⁴

11.1.4.2.4. Registration of Marriage and Divorce

¹⁸⁶ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES REGIONAL REPRESENTATION IN EGYPT, *supra* note 24, 60.

¹⁸⁷ Refugee law expert Mohamed Farahat, speaking at the conference “Preventing Statelessness among Migrants and Refugees: Birth Registration and Consular Assistance in Egypt and Morocco”, held at AUC Tahrir (Cairo, Egypt) on 7 October 2019.

¹⁸⁸ Law No. 143 of 1994, *supra* note 122, Article 4.

¹⁸⁹ *Id.* at Articles 6 and 35.

¹⁹⁰ *Id.* at Article 36.

¹⁹¹ *Id.* at Article 38.

¹⁹² *Id.* at Article 45.

¹⁹³ *Id.* at Article 46.

¹⁹⁴ *Id.* at Article 66.

According to the Egyptian Constitution, family is the basis of society and protected by the state.¹⁹⁵ As this provision is not exclusively directed at citizens, a general right to family can be deducted from it, which also applies to aliens and would grant them the right to get married and found a family. The Egyptian Civil Code includes provisions on conflicts of laws, stating that, on the validity of marriage, the law which each of the two spouses is subject to shall apply.¹⁹⁶ With regard to the results entailed by the conclusion of marriage, for example the effect marriage has on the ownership of property or funds, the law of the state the husband belongs to is applicable.¹⁹⁷ The same applies to divorce.¹⁹⁸ However, if either party is Egyptian, then only Egyptian law shall apply.¹⁹⁹ The Civil Status Department is responsible for maintaining family records and copies of all civil status records.²⁰⁰

Usually, marriages and divorces are recorded by the court clerks in the Family Courts if both spouses are Egyptian citizens and of the same religion. In the case that at least one of the two parties is foreign or non-Muslim, the documentation offices of the Notary Public are the competent authority to record these changes of civil status.²⁰¹ The responsible public servant at the Notary Public (referred to in the law as the registrar) has to examine the legal capacity of the two parties wishing to get married and confirm their consent. In addition, the following conditions apply: The foreign party needs to attend the registration procedures in person,²⁰² the age differences between the spouses does not exceed 25 years, the foreigner presents documents proving he/she is allowed to marry and evidencing their date and place of birth, religion, profession, place of residence and marital status, and both spouses need to submit their birth certificates.²⁰³ If these conditions are not fulfilled, the registrar shall refuse the registration of the marriage.²⁰⁴ In this case, the affected parties may appeal to the *ad hoc* judge

¹⁹⁵ Egyptian Constitution, *supra* note 112, Article 10.

¹⁹⁶ Egyptian Civil Code, *supra* note 121, Article 12.

¹⁹⁷ *Id.* at Article 13(1).

¹⁹⁸ *Id.* at Article 13(2).

¹⁹⁹ *Id.* at Article 14.

²⁰⁰ Law No. 143 of 1994, *supra* note 122, Article 6.

²⁰¹ *Id.* at Article 5.

²⁰² The law only talks of the case of the marriage between a foreigner and an Egyptian woman, but does not specifically mention the case of a foreign woman marrying an Egyptian man. However, Law No. 143 of 1994 made the Public Notary competent for all marriages where at least one of the spouses is foreign and does not use this differentiation. Therefore, it is to be assumed that these rules shall be applied to every foreign-Egyptian couple, regardless of which spouse is foreign, as well as to entirely foreign couples.

²⁰³ Law No. 68 of 1947, *supra* note 125, Article 5.

²⁰⁴ *Id.* at Article 6.

of the competent court circuit within 10 days. This decision in turn can be appealed at the primary court judges' chamber.²⁰⁵

Once all necessary documents and forms are submitted, the registrar must verify the identity of the contracting parties through their identification cards,²⁰⁶ and through the passport number in case of a foreign spouse.²⁰⁷ If these documents are not available, then their identity can be confirmed through two adult witnesses who can present their identification documents.²⁰⁸ This is a provision that might be specifically useful for asylum-seekers who have lost their identification documents and do not yet own a passport issued to recognized refugees. For refugees, missing identification documents can be replaced with the UNHCR registration card. Though it has been reported that some registrars are not aware of this and might reject the UNHCR card as evidence.²⁰⁹ The foreign spouse is required to have a valid visa or residence permit,²¹⁰ which makes it impossible for irregular migrants to fulfill the required paperwork to register a marriage. In addition to the required documents, two witnesses need to be present to register a marriage contract as their signatures are required in addition to the signatures of the spouses and the registrar.²¹¹ Should the registrar refuse to register a marriage contract, the parties may appeal to the competent judge at the family court.²¹²

During an interview with the head of the Egyptian Foundation for Refugee Rights, a different approach to documenting a marriage was discussed. A wife can file a case for documentation of marriage against her husband, claiming they got married informally following customary law²¹³ and asking for the official registration thereof. Consequently, the husband is summoned to court and questioned. Should the court come to the conclusion that he indeed wed the claimant, the court orders their marriage.²¹⁴

²⁰⁵ *Id.* at Article 7.

²⁰⁶ Executive Regulation on Documentation Law No. 68 of 1947, *supra* note 126, Article 7.

²⁰⁷ Law No. 143 of 1994, *supra* note 122, Article 31.

²⁰⁸ Executive Regulation on Documentation Law No. 68 of 1947, *supra* note 126, Article 7.

²⁰⁹ Information obtained in an interview with refugee law expert Mohamed Farahat, February 2019.

²¹⁰ Nahla Gamal, 7 *Conditions for documenting a marriage contract between foreigners*, Akhbar El Yom, (February 22, 2018), available at <https://m.akhbarelyom.com/news/newdetails/2628622/1/٧-شروط-التوثيق-عقد-زواج-الأجانب-تعرف-عليها>

²¹¹ Executive Regulation on Documentation Law No. 68 of 1947, *supra* note 126, Article 8.

²¹² Law No. 1 of 2000, *supra* note 129, Article 1 (issuance), Article 9.

²¹³ This situation refers to the “Orfi” marriage, an informal marriage contract between a man and a woman, signed in the presence of two witnesses, but not further publicized nor officially registered with the authorities.

²¹⁴ Information obtained in an interview with refugee law expert Mohamed Farahat, February 2019.

In 2015, a special provision was introduced for the cases of foreigners marrying Egyptian women with an age difference of more than 25 years. In those cases, the foreigner is obliged to establish an investment certificate with periodic revenue²¹⁵ in the amount of 50.000 Egyptian Pounds, issued in the name of the Egyptian bride.²¹⁶ This law was introduced with the aim to combat the so-called seasonal marriages, where non-Egyptian men visit Egypt and get married to an Egyptian girl only for the duration of their stay.²¹⁷ However, it is doubtful if this provision can actually prevent this practice from happening. Rather it only puts a price on the Egyptian bride which many wealthy men might be easily willing to pay.²¹⁸ Thus, the only positive effect of this legal provision is that it provides the bride with some financial support in case of divorce but will not prevent seasonal marriages from taking place.

Regarding the registration of divorce, the husband is obliged to register it with the competent registrar within 30 days from the day he divorced his wife. Should the wife not be present during this documentation process, she has to be notified of the divorce via court bailiff.²¹⁹ The legal consequences of the divorce, especially concerning financial rights and inheritance, come into effect from the day the divorce took place. However, if the divorce was hidden from the wife, the effects are delayed until the moment she gains knowledge of the divorce.²²⁰ If the husband violates the obligation to register a divorce, he shall be punished by a prison sentence not exceeding 6 months and/or a fine of 200 Egyptian Pounds.²²¹

11.1.5. Overall Legal Framework in Egypt

For refugees and asylum-seekers, because they have severed the contact to their countries of nationality, it can be particularly difficult to obtain travel or identity documents. International law remedies this by obliging State Parties to the Refugee Convention and the OAU Refugee Convention to issue identity papers and travel documents to refugees. In Egypt, identity papers for refugees are issued by UNHCR in the form of the blue card. Asylum-seekers are only

²¹⁵ Comparable to a saving account.

²¹⁶ Minister of Justice Decree No. 9200 of 2015, *supra* note 127, Article 1.

²¹⁷ Sonia Farid, *Does Egypt's new tourist marriage law really protect women?*, Al Arabiya English, (January 18, 2016), available at <http://english.alarabiya.net/en/perspective/analysis/2016/01/18/Does-Egypt-s-new-tourist-marriage-law-really-protect-women-.html>

²¹⁸ George Sadek, *Egypt: Ministerial Resolution Regulating the Marriage of Egyptian Women to Foreigners*, Global Legal Monitor – Library of Congress, (February 11, 2016), available at <http://www.loc.gov/law/foreign-news/article/egypt-ministerial-resolution-regulating-the-marriage-of-egyptian-women-to-foreigners/>

²¹⁹ Law No. 25 of 1929, *supra* note 128, Article 5 bis.

²²⁰ *Id.*

²²¹ *Id.* at Article 23 bis.

entitled to receive provisional identity papers until their RSD is decided, the yellow card issued by UNHCR serves this purpose in Egypt. Refugees recognized by UNHCR and Palestinian refugees have the right to receive travel documents from the Egyptian authorities. Also, the state should facilitate the return of the trafficked or smuggled migrants by requesting the country of nationality to issue the necessary travel documents or authorizations for re-entering its territory.

The law does not only regulate the issuance of travel documents and identity papers, but also protects certain groups from any interference with their already existing papers. For example, persons with disabilities have the right to an ID and may not be deprived thereof based on their disability. Migrant workers are in danger of exploitation in case somebody confiscates their documents as this would hinder them from leaving the country if desired. Therefore, their travel documents are protected from being destroyed and identity papers may only be confiscated in accordance with the law against a receipt. It is unlawful for anyone (except duly authorized officials) to destroy their identity documents.

Part of valid documentation is having a valid visa or residence permit authorizing foreigners' stay abroad. In order to enter Egypt and stay there lawfully, an entry or transit visa and consequently a residence permit are necessary. An ordinary residence permit is usually issued for a period of one year, up to five years. According to the law, refugees and Palestinians are entitled to receive a residence permit for three years. However, there is a discrepancy between the law and practice, as refugees usually only receive a renewable residence permit for the duration of six months. Certain nationalities receive more generous entitlements: Palestinians are entitled to the same treatment as any citizen of a Member State of the League of Arab States with regard to visa or residency application, and are exempted from paying the residency renewal fees. Sudanese nationals are exempted from any visa and residency requirements based on the Four Freedoms Agreement, except men between the age of 18 and 50. Other nationalities²²² are obliged to follow stricter requirements and need to report at the Aliens Registration Office in the police station of their district within seven days from their arrival in Egypt to declare the purpose of their stay and provide all requested personal information.

²²² Nationals of Israel, Somalia, Iraq, Sudan, Yemen, Palestine, Lebanon, Zaire, Chad, Nigeria, Ghana, Liberia, Burundi, Eritrea, Pakistan, Afghanistan, Sri Lanka, Philippines, Bangladesh, India, Honduras, Belize, Barbados, Trinidad & Tobago, Iran, Bosnia, the Islamic countries that gained independency from the former Soviet Union and Ethiopia.

The right to documentation also encompasses the registration of births, deaths, and changes of civil status. Egypt's procedures in this regard apply to nationals and foreigners alike. Every child has the right to a name, a nationality, and to be registered after birth. In Egypt, this registration needs to take place within 15 days of the child's birth. There is no specific entitlement concerning the registration of death in general, except that host states are obliged to register the deaths of refugees and foreigners follow again the same procedural steps as Egyptians. States are obliged to register marriages or divorces in their official registers. Everyone has the right to marry based on their free will, children are entitled to be protected from child marriages, and no discrimination against women is allowed to take place in all matters regarding family matters and marriage. Refugees in particular are entitled to receive the necessary administrative assistance in this regard, and to have their personal status from their country of nationality accepted. (For example, if they were married according to the law of their country of nationality, the host state is obliged to accept this marital status.) All children are entitled to a nationality and women have an equal right as men to pass on their nationality to their children. Persons with disabilities are not to be deprived of their right to a nationality based on their disability.

11.2. IMPLEMENTATION

11.2.1. Travel Documents, Identification and Residence Permits

In documentation and registration issues, the most commonly encountered problem is that the competent authorities often do not recognize the UNHCR cards issued for refugees and asylum-seekers as a valid form of identification.²²³ Usually, refugees and asylum-seekers no longer hold valid travel documents or any other identification beside their UNHCR cards, which prevents them from registering essential civil status events such as marriages, divorces or births if the government official refuses to accept said cards. In other cases, the official might be unsure which procedures to follow for refugees or asylum-seekers and have to refer back to their superior for guidance.²²⁴ This lack of clarity complicates and delays the process of registering civil status matters. Also, foreigners are usually requested to provide documents certified by their embassy, which is difficult to obtain for asylum-seekers and refugees, as most

²²³ Information obtained in an interview with refugee law expert Mohamed Farahat, February 2019; Information obtained in an interview with EFRR's legal team, March 2019.

²²⁴ Information obtained in an interview with United Lawyers, May 2019.

of them are not comfortable to approach their embassy anymore.²²⁵ Failed asylum-seekers who do not have a legally accepted reason to stay in Egypt are unable to obtain a residence permit and are consequently unable to perform any of the below described registrations of civil status matters as they would face deportation if their lack of visa or residence permit is discovered.

According to Egyptian law refugees should be able to receive a three-year residence permit.²²⁶ However, during interviews with practitioners in the field, it was consistently stated that the residence permit is only issued for a period of six months and requires renewal afterwards.²²⁷ Nobody interviewed was aware of the provision in Decree Number 8180 of 1996 explicitly referring to refugees registered with the United Nations and granting them a longer permit.²²⁸ This raised the suspicion that this provision has been revoked or replaced by a newer law, however, no amendments could be located in any legal databases available. Thus, it is assumed that the law is still in force and entitles registered refugees to a residence permit for the duration of three years, but there is a general lack of awareness on all sides. Additionally, the government officials issuing the residence permits are probably working based on an internal directive, instructing them to issue permits for refugees for a maximum of six months. As a consequence, a parallel system has developed in practice, overtaking the actual legislation in place and giving the false impression that the law defines the duration of the residence permit as six months.

Due to the lengthy process and the paperwork needed to renew the residence permit, some refugees choose not to renew their permits and rather take the risk of staying in Egypt irregularly. This of course limits their access to services and puts them at risk for deportation.²²⁹ For example, according to UNHCR's vulnerability assessment of 2016, only 49 percent of Syrian refugees hold a valid residence permit, as they choose to not go through the time and money consuming process of renewing their residency every six months.²³⁰ Without a valid residence permit they cannot access basic social services, are not able to leave Egypt without

²²⁵ *Id.*

²²⁶ Decree No. 8180 of 1996, *supra* note 118, Article 2(8).

²²⁷ Information obtained in an interview with EFRR's legal team, March 2019. Information obtained in an interview with a government official, April 2019.

²²⁸ The term used in the provided translation is "Refugees registered with the United Nations Refugees Office". In the same article the law also refers to "political refugees" as also qualifying for the three-year residency. Thus, it is clear that the law aims at both political refugees as referred to in the Egyptian Constitution, as well as the refugees registered with UNHCR. *See* Decree No. 8180 of 1996, *supra* note 118, Article 2(8).

²²⁹ Information obtained in an interview with Fard Foundation, May 2019.

²³⁰ UNHCR, Vulnerability Assessment of Syrian Refugees in Egypt 2016, at 6.

having to pay late stay penalties, and their children need a valid residence permit to enroll in school.²³¹ The results of the focus group discussions confirmed that asylum-seekers and refugees have difficulties renewing their residence permits. As the procedures take significant time, they actually have to start applying for a new permit several weeks before their current permit has even expired. Furthermore, there are incidents where applicants are simply turned away by government officials and are unable to submit their request for renewal of their residence permit.

Concerning the situation of Palestinians, according to the law they are entitled to a three year residence permit provided they have a reason for their stay in Egypt, such as work, studying or being married to an Egyptian, and are exempted from paying the renewal fees.²³² However, in practice it seems that Palestinians are still expected to pay renewal fees and it is reported that many families struggle with this requirement. If the residence permit is not renewed on time, a fine is imposed which is substantially higher than the actual renewal fee.²³³ Furthermore, the government officials responsible for the renewal of residence permits for Palestinians often refuse to accept requests for renewal. Even if applicants have the necessary paperwork and can prove a reason for their stay in Egypt as required by law, they might fail to renew their residence permit simply because they are unable to submit their documents.²³⁴ The only way to resolve such a situation is to resort to the administrative court. For example, in the case of a Palestinian married to an Egyptian national, the administrative authority refused to accept his papers to apply for a residence permit. A complaint to the Minister of Interior remained unanswered, and the applicant filed a lawsuit with the Administrative Court. The Court confirmed that the plaintiff is married to an Egyptian national and they have three children together, all of the of Egyptian nationality. According to Decree number 8180 of 1996, foreigners married to Egyptians are entitled to a residence permit of three years. Thus, the Court decided in favor of the plaintiff as there are no evident reasons to deny residency and annulled the administrative authority's decision not to grant residency.²³⁵ The situation is even more complicated for individuals of Palestinian origin who came to Egypt as refugees from Syria. They do not fall under the mandate of UNHCR and cannot receive UNHCR cards. Instead the participants of

²³¹ *Id.* at 20.

²³² EL-ABED, *supra* note 158, at 80. Decree No. 180 of 1964, *supra* note 116, Article 13(j).

²³³ OROUB EL-ABED, UNPROTECTED – PALESTINIANS IN EGYPT SINCE 1948, 80-81 (2009).

²³⁴ Information obtained in an interview with a Palestinian living in Egypt, September 2019.

²³⁵ This information is taken from a judgment the Administrative Court of the first circuit rendered on Dec. 5, 2017. For reasons of anonymity the exact number of the case and the name of the plaintiff cannot be revealed in this report, but a copy of the judgment is kept by the research team.

the focus group discussions use their Syrian travel documents as identification which has to be renewed under the same conditions as the Syrian passport for a high fee, as discussed in the below paragraph. Many of them did not renew the travel document and thus were unable to obtain a valid residence permit in Egypt.²³⁶

Unfortunately, refugees do not receive valid travel documents from the authorities in Egypt, in breach of Egypt's obligation under the Refugee Convention and the MoU between Egypt and UNHCR.²³⁷ Should they wish to leave the country, they need to travel on the passport of their country of nationality.²³⁸ This is highly problematic because asylum-seekers and refugees are unable to renew an expired passport at their embassies. Re-availing themselves of the protection or assistance of their embassies can endanger their refugee status. Therefore, they rely on brokers to finish any required paperwork in the embassy in their place.²³⁹ Nevertheless, it is sometimes impossible to renew a passport at the embassy. According to the participants of the held focus group discussions, the Syrian embassy, for instance, charges 350 USD for the renewal of passports. However, men within the age eligible for serving in the army are required to go to Syria to renew their passport there, which puts them at risk to be recruited for army service.²⁴⁰ Thus, they are trapped within Egypt without a valid travel document that would allow them to cross the border into another country. In addition, the lack of a passport can cause problems even within Egypt when certain individuals or authorities do not accept the UNHCR card as valid identification. For example, as the UNHCR observed in their Periodic Review on Egypt in 2014, from mid-2013 immigration authorities have frequently requested a valid passport in addition to the UNHCR card in order to renew refugees' residence permits. This is a requirement that can rarely be fulfilled by refugees or asylum-seekers.²⁴¹

In the focus group discussions, participants confirmed that most of them do not hold a valid passport and are unable to renew them. Furthermore, it was reported that when asylum-seekers or refugees receive their six months residence permit, the authorities "invalidate their passports

²³⁶ Information obtained in focus group discussions held on 2.1.2020 with participants of Palestinian origin who came to Egypt from Syria.

²³⁷ *Refugee Convention*, *supra* note 2, Article 28. *MoU Egypt UNHCR*, *supra* note 198, Article 7.

²³⁸ Information obtained in an interview with a government official, April 2019.

²³⁹ Information obtained in an interview with Ashraf Milad, asylum lawyer and lecturer, September 2019.

²⁴⁰ Information obtained in focus group discussions with Syrian nationals, held on 16.6.2019, 21.6.2019, 5.7.2019.

²⁴¹ Submission by UNHCR to the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review Egypt, 2014, at 6.

with a stamp”.²⁴² This procedure was clarified by an experienced asylum lawyer as follows: The stamp “cancelled” does not invalidate the passport *per se* but only refers to the entry stamp on which it is placed. When asylum-seekers or refugees apply for the first time for a residence permit with their yellow or blue UNHCR card, the government official needs to put an entry stamp on the card to show the date of entry into Egypt. There cannot exist two entry stamps at the same time (one in the passport, one on the card). Thus, the entry stamp from the passport is invalidated by the words “cancelled”.²⁴³ Therefore, it is a wrong assumption that the passports are rendered invalid by the government officials. Theoretically, passports can be used until their official expiry dates. However, in practice, an additional obstacle appears when trying to travel on this kind of passport: when the officials of the passport control at the airport notice the discussed stamp, they are aware the individual is an asylum-seeker or refugee. Previously they would ask for a small fine of around 150 Egyptian Pounds and allow exiting from Egypt. In recent years, this fine was increased to around 2.500 Egyptian Pounds.²⁴⁴ Additionally, the asylum-seeker or refugee is required to officially close their file with UNHCR before being allowed to leave Egypt. This process of closing your file requires significant time. First they have to approach UNHCR with the request to close their file and return their yellow or blue card in exchange for a file number. With this number, they go to the Passport and Immigration Authority who will later issue a letter, which is needed to pass passport control at the airport and leave the country.²⁴⁵

11.2.2. Registration of Births, Marriage and Divorce

11.2.2.1. Registration of Births

Although Egyptian law allows for foreign children to be registered and receive a birth certificate, not all asylum-seekers, refugees and failed asylum-seekers succeed in obtaining such a document for their children. In 2016 for example, 2.470 Syrian refugee children were born and 83% of them have a birth certificate.²⁴⁶ This is a relatively high number, but by far not sufficient as every child has a right to be registered upon birth. Also, the Committee on Migrant Workers has noted that not all children of migrant workers born in Egypt receive birth

²⁴² This procedure was described in the focus group discussions held with South-Sudanese and Sudanese between 10th and 30th of May 2019.

²⁴³ Information obtained in an interview with Ashraf Milad, asylum lawyer and lecturer, September 2019.

²⁴⁴ It is not clear on which grounds this fine is given, and many questions remain unanswered: Is the fine imposed only on asylum-seekers and refugees who have no valid residence permit? Is it a reaction to the cancellation of the entry stamp? Is it merely an established practice not founded in the law? To this point the research team was not yet able to answer these questions.

²⁴⁵ Information obtained in an interview with Ashraf Milad, asylum lawyer and lecturer, September 2019.

²⁴⁶ UNHCR, Vulnerability Assessment of Syrian Refugees in Egypt 2016, at 20.

certificates by the Egyptian authorities, which prevents them from accessing public school and other services.²⁴⁷ Reasons for this can be that the necessary paperwork is lacking, or in the case of refugees and asylum-seekers, that the competent official does not accept the UNHCR cards as valid identification. Furthermore, there might be issues with children born to single mothers or unmarried couples. Although Egyptian law allows for the registration of children born out of wedlock,²⁴⁸ authorities in practice sometimes refuse their registration if the father is absent. This makes it impossible to obtain a birth certificate for such children if the father refuses to acknowledge his paternal filiation.²⁴⁹ An additional obstacle is the required fee for the official stamps affixed to the birth certificate. This financial requirement can also stand in the way of children's fundamental right to birth registration.²⁵⁰

Within the focus group discussions, participants stated that in most cases there are no difficulties in obtaining a birth certificate for a newborn child. However, there are two situations in which it is very difficult or impossible to obtain a birth certificate. Firstly, when the child is born out of wedlock or if the parents cannot present a marriage certificate, the government official often refuses registration. This confirms the above stated discrepancy between law and practice due to the unawareness of the competent officials. Secondly, children born abroad, especially if born to refugees during the journey to Egypt, do not have a birth notification from a hospital, which is a legal requirement to register birth. If a child is born outside of a hospital, it should be possible to have a health inspector examine the newborn to confirm the birth date and issue a birth notification.²⁵¹ In practice, this is not easily done and there are parents who struggle for several years to receive a birth certificate for their child. Obviously, during this time these children are unable to receive official identification documents, cannot obtain a residence permit, register for kindergarten/school or receive important preventive medical care such as vaccinations.

²⁴⁷ Save the Children Sweden – MENA Regional Office, *Child Rights Situation Analysis for MENA Region*, 2008, 36.

²⁴⁸ Law No. 12 of 1996, *supra* note 123, Article 15. Originally, Article 15 of the Child law allowed mothers to register the birth of their child only under the condition that “the marital relationship is confirmed as stipulated in the Executive Regulations.” In 2008, an additional paragraph was added to Article 15, allowing mothers to register the birth of their child without the requirement of proving their marital status. Thus, the law entitles mothers to obtain a birth certificate even if they are unmarried.

²⁴⁹ Submission by UNHCR to the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review Egypt, 2014, at 10.

²⁵⁰ *Id.*

²⁵¹ Law No. 12 of 1996, *supra* note 123, Article 15.

11.2.2.2. Registration of Marriages or Divorce

The registration of marriage is usually possible for asylum-seekers and refugees if they succeed in submitting all the required paperwork. Unfortunately, in some cases the government officials again refuse to accept the UNHCR card as valid identification. Participants from the focus group discussions reported that they are sometimes requested to submit a letter from the embassy, which they are unable to provide. Such a letter should not be requested when two foreigners wish to get married, but only in the case of an Egyptian national marrying a foreigner.²⁵² Some participants of the focus group relied on the support of lawyers to process their marriage registration and succeeded. This confirms that the obstacle of registering does not lie in the law but in the unawareness or wrong information of the government officials. Syrian Palestinians described in the Focus Group Discussions that the registration of marriage is possible if the spouses have a valid residence permit. In those cases, the required documents are: a letter for the embassy stating that there is no hindrance to the marriage; a health certificate; five personal photos; a valid travel document with residence permit.²⁵³

When refugees, asylum-seekers or failed asylum-seekers seek divorce in front of Egyptian Courts, the applicable law is the one of the husband's nationality. Thus, if the husband is not Egyptian, the foreign law needs to be studied and applied by the court. In practice this is a very cumbersome process: The court requests the foreign law; the lawyer of one of the spouses addressed the Ministry of International Cooperation with this request; the Ministry of Cooperation refers to the Ministry of Justice; the Ministry of Justice addresses the Ministry of Foreign Affairs; the Ministry of Foreign Affairs then finally contacts the embassy of the country that issued the law. After an internal process, the embassy provides the Ministry of Foreign Affairs with the requested law, which then is passed back through the above listed ministries until it arrives at the lawyer and eventually the court.²⁵⁴ This process can take more than one year. In some cases, the Court dismisses the case before the foreign law is even obtained.²⁵⁵

11.3. RECOMMENDATIONS

²⁵² Refugee law expert Mohamed Farahat, speaking at the conference “Preventing Statelessness among Migrants and Refugees: Birth Registration and Consular Assistance in Egypt and Morocco”, held at AUC Tahrir (Cairo, Egypt) on 7 October 2019.

²⁵³ Information obtained in focus group discussions held on 2.1.2020 with participants of Palestinian origin who came to Egypt from Syria.

²⁵⁴ Information obtained in an interview with United Lawyers, May 2019.

²⁵⁵ *Id.*

As illustrated above, it is essential for all aspects of the right to documentation that the UNHCR cards are recognized as valid identification. Therefore, it is highly recommended to raise awareness among government officials throughout all offices and authorities that UNHCR cards are to be accepted if presented by asylum-seekers or refugees to confirm their identity. The introduction of the new residence permit cards has the potential to alleviate this problem in the future. Those who succeeded in obtaining valid residence permit cards have a form of identification government officials will be more likely to recognize, as all foreigners will hold the same type of document. Furthermore, it needs to be stipulated that asylum-seekers and refugees should never be requested to present any letters or confirmations from their embassies during administrative procedures, as they are unable to do so based on their severed relationship to their country of nationality. Only regular migrants may be asked to fulfill this kind of requirement.

With regard to residence permit, it is recommended to extend the duration of asylum-seekers' and refugees' residence permit beyond mere six months. Originally, the law provided for a residency of three years, and the currently implemented shorter period of six months is not feasible. By extending this duration, asylum-seekers and refugees are given more time before they have to renew their permits, which relieves them from being caught in a constant cycle of renewal procedures. Also, it will reduce the huge administrative workload imposed on government officials responsible for renewal and thus save money and time for authorities. Furthermore, refugees are less likely to not renew their permits due to the time-consuming procedures, which in turn ensures that less individuals are staying irregularly in Egypt. Another step to facilitate the residence permit renewal is to establish authorities throughout the country where a renewal can be requested. Currently, all applicants have to visit the one authority in Cairo competent for residence permits. Concerning the residence permits of Palestinians living in Egypt, government officials should be trained on the exact procedures and steps to be taken to prevent situations where applicants' papers are simply rejected without examining their case.

Additionally, it is of high importance to provide refugees with valid travel documents. It is against Egypt's obligations under the Refugee Convention that refugees are unable to travel outside of Egypt as soon as their original passports have expired. Thus, Egypt has to provide for the issuance of travel documents for refugees but is free in determining their period of validity.

With reference to obtaining birth certificates, it is to be noted that the law enables foreigners in general to obtain certificates for their newborns. However, in practice they are not always accessible for asylum-seekers, refugees or failed asylum-seekers. Government officials should be informed that legally it is no longer required to show a marriage certificate in order to register one's child, as the mother may complete the registration without the presence of the father, and that UNHCR cards are to be accepted as a valid form of identification instead of passports or Egyptian national IDs. Furthermore, the situation of children born abroad must be improved by waiving the strict requirement of providing a birth notification, as it is impossible to fulfill in cases where the child was born on the journey outside of a hospital. Also, failed asylum-seekers who are irregular migrants should be enabled to request a birth certificate for their children without fearing deportation. Otherwise, their children are doomed to become stateless and trapped in a legal limbo. Actually, it is also in the interest of the state to facilitate the process to obtain a birth certificate as much as possible for all categories of migrants, as it avoids legal uncertainty and in the case of refugees is indispensable for the resettlement of families with recently born children.

Concerning the registration of marriages and divorces, it is to be reiterated that asylum-seekers and refugees shall never be requested to present any documents from their embassies due to the risk of being persecuted. The above described lengthy process of how courts request the applicable foreign law in divorce cases from the different embassies is not always successful. Thus, it should be allowed for courts to obtain the missing laws from institutions other than the embassy for a faster and more effective process.

CHAPTER 12: CONCLUSIONS

This Report aimed at mapping legal entitlements owed to asylum-seekers, refugees, and failed asylum-seekers in Egypt under international, regional, bilateral, and domestic laws, and at identifying any gaps between those entitlements and their accessibility in practice. Eight different entitlements were chosen for the analysis, namely the rights to family unity and reunification, employment, education, health, housing, detention and expulsion, access to courts, and documentation, to cover various areas of daily life in which the communities of concern might face obstacles. The in-depth legal analysis succeeded in providing greater clarity on the legal framework underlying refugee entitlements in Egypt. Furthermore, the Annex to the Report, which compiles all laws referred to in the analysis, will serve as a useful reference for researchers, practitioners and interested community members. Creating a compilation of relevant laws is especially important because Egyptian domestic laws are often quite challenging to locate without access to legal databases such as Tashre'at or Eastlaws, which both require a yearly subscription subject to a fee.

When drawing conclusions from the Report, each chapter revealed gaps between the entitlements stipulated in the law and their implementation to a different extent. However, three commonly reoccurring situations could be observed, causing asylum-seekers, refugees and failed asylum-seekers to not be able to access their entitlements:

Firstly, the entitlements provided by international and regional law were not incorporated in corresponding domestic legislation. In itself, this does not affect the applicability of the international and regional provisions. However, in practice, the lack of domestic legislation leads to a lack of awareness among government officials. Thus, they do not have the necessary guidance on how to deal with each case without infringing rights or entitlements. On the other hand, the concerned communities cannot refer to domestic legislation to enforce their entitlements, nor can they use them in a possible appeal against a detrimental decision.

Secondly, the entitlements provided by international and regional law were incorporated in corresponding domestic legislation, but either the responsible authorities and officials are unaware of their existence and thus do not apply it, or an abundance of conflicting domestic legislation creates confusion on how to apply the law in consistency with Egypt's obligations under international, regional and bilateral law. Furthermore, there is often a lack of awareness among the communities, which prevents them from accessing their entitlements.

Lastly, the correct domestic laws are in place, safeguarding the entitlements of asylum-seekers, refugees and failed asylum-seekers in accordance with international, regional and bilateral law. However, the communities cannot benefit from these entitlements when Egypt is unable to implement the ideal legal standards due to a lack of necessary resources. The latter is especially the case with regard to economic and social rights, such as the right to be provided with adequate shelter or the highest attainable standard of health.

A better understanding of the identified gaps will be used in the following phase of the project to help international organizations, donor organizations, non-governmental and civil society organizations and the Government of Egypt to better direct their limited resources for the maximum benefit of asylum-seekers, refugees and failed asylum-seekers. Thus, the Report includes specific recommendations to the relevant stakeholders on how to fill these gaps in implementation and accessibility for each entitlement. The following are just a few of the most salient recommendations: It is crucial to raise awareness among government officials, including security personnel, and all other entities in contact with asylum-seekers and refugees, about the validity of UNHCR cards as legitimate identification. Furthermore, it is important to facilitate refugees' access to formal employment in Egypt to enable them to live a self-sustainable life, and to grant their children access to free primary education in public schools. Also, it is highly recommended to extend the duration of asylum-seekers' and refugees' residence permit beyond a mere six months for reasons of efficiency and practicality. In general, it is necessary to raise awareness about the existence and content of the discussed entitlements among all involved stakeholders.

To ensure the success of this Report, and in order to have a positive effect on the situation of the concerned communities, trainings and workshops will be held to reach as many stakeholders as possible. This will help in fostering new co-operations and raise awareness on the legal entitlements owed to the communities. Ideally, the participation of government entities and officials is desirable, as they are in the position to encourage new legislation or administrative orders to fill gaps in the law.

Mapping and analyzing legal entitlements is a huge undertaking that will constantly evolve as more information is gathered. Throughout the awareness-raising and capacity building phases, further research will be conducted, primarily in the form of in-depth interviews, to identify the needs of asylum-seekers, refugees and failed asylum-seekers in more detail. The Report hopes

to contribute to improving the concerned communities' enjoyment of their entitlements in Egypt. It also hopes to be of use to the Government of Egypt in formulating policies that allow it to meet its intended objective of honoring its obligations under international law.