Migration and Deportation in West Africa

Developing Effective Remedies

Edited by
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Open Society Initiative for West Africa
About the Open Society Initiative for West Africa

The Open Society Initiative for West Africa (OSIWA), established in 2000, is part of the global network of autonomous Soros Foundations. OSIWA works to build vibrant, open democracies in 18 countries, including the 15 members of the Economic Community of West African States – Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo – as well as Cameroon, Chad, and Mauritania.

OSIWA supports civil society organizations and advocates at governmental and regional levels on issues of governance, law, justice and human rights, public health and development, information, communication technology, and, media.

OSTWA is based in Dakar, Senegal, with country offices in Nigeria, Liberia and Sierra Leone.
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Foreword

The trend in migration, especially between Africa and Europe, has experienced unprecedented increase over the last decade, with grave implications for the sub region. West Africa has become the take-off point for most of these migrants, through the Atlantic Ocean and the Sahara Desert. The high number of deaths, the human rights violations and the emerging stringent policy environment are a source of concern among the various stakeholders in West Africa. The factors responsible for this trend point not only to the failure of the systems and processes of governance to meet the basic needs of the population, but also of the deplorable conditions of living in West Africa and the shrinking economic opportunities.

To foster the understanding of the phenomena, especially of irregular migration in West Africa, OSIWA in 2008 sponsored a research in four West African countries, namely, Ghana, Mali, Mauritania and Senegal. The research concluded that “the absence of democracy, respect for individual and collective liberties, the lack of transparency in the management of public affairs, the injustice which is established as a system of governance, and the lack of equal opportunities for all citizens, constitute some of the conditions that incite the youth to venture out” (OSIWA, Irregular Migration in West Africa, 2008:23). This is further strengthened by a set of pull factors, such as the opportunity for economic development that became available with globalization. While most of the opportunities are for skilled migrants and therefore addressed, as much as possible, through formal migration processes, West Africa has been the focal point of mass migration of unskilled labor, often using illegal means across the Atlantic Ocean and the Sahara Desert. Africa has therefore continued to be the source for both skilled and unskilled labor that is supporting the economic growth of other continents at the detriment of its growth.

The benefits of global economic trends are diverse and are accompanied with varied disadvantages. Some of these contradictions are evident in the management of migration. The quantification of the impact of migration in most of the literature has concentrated on the added value of remittances rather than on the effect on the countries of origin. One of these consequences has involved a surge in illegal migration, which has been met with de-humanizing and abusive treatments and stringent policies and measures that violate the human rights of these migrants. Thousands of migrants have not only died in transit, but are also being detained in
dehumanizing conditions with no recourse to the law. International conventions and instruments that have hitherto provided the framework for addressing human rights issues have been made redundant amidst the emergence of new policy frameworks for the management of migration, at both country and regional levels, against an overriding emphasis on sovereignty over human rights principles, rather than address the challenge of managing migration globally. These developments have also triggered the emergence of policy framework for managing migration in a manner that favors the depletion of Africa of the vital skills needed for service provision and development, through selective migration not only at the national and bilateral levels, across countries, but also at the multilateral levels.

In September 2006, the United Nations General Assembly in New York organized its first-ever plenary session on migration issues, with a focus on ways to maximize the development benefits of migration and to reduce difficulties. Since then the UN has set up the Global Forum on Migration and Development, which received quite fierce reactions from countries of the North. Both at the country and regional level, Europe has come up with not only physical measures in the form of barriers and coastal patrols, but also bilateral agreements and regional frameworks for the management of migration. On the other hand, the non-responsiveness of African governments to the issue is a challenge. On the continent, it is only recently that we have seen a few countries formulate migration policies but with little implementation back-up or monitoring of the migratory trends. Human rights activists are also not adequately engaged on issues of migration, the process is further complicated by the lack of policy or legal frameworks, where some work is being done, there is said to be a lack of synergy between human right activists and the policy makers.

A stakeholders’ workshop organized by OSIWA in Dakar, Senegal, in 2008, discussed the outcome of the research and proposed a high-level International Colloquium to address the challenges of managing migration and deportation in Africa. This was convened in Abuja, Nigeria, in March 2009, and brought together policymakers, jurists, lawyers, and human rights activists from West Africa and beyond to devise strategies for transforming the politics of migration and mainstreaming human rights protections into migration policy and management. The colloquium reviewed existing legal and institutional frameworks at the multilateral, regional and bilateral levels and concluded that there are provisions to remedy violations of rights in migration. But it also concluded that there is lack of capacity and experiences that will allow them be leveraged to address these violations. One
of the outcomes of the colloquium is this collection of policy papers that should guide further research and advocacy by civil society groups and media organizations in West Africa.

OSIWA therefore commends this collection of papers to activists, civil society organizations, legal practitioners, governmental and intergovernmental institutions and all relevant stakeholders to serve as a reference in guiding efforts to stem the continuing trend towards the violations of the rights of migrants. The content of the articles are strictly the responsibility of the various authors and do not represent the opinions of OSI and OSIWA.

Nana Tanko
Executive Director
OSIWA
Introduction

Migration has become a strategic economic and security issue for African countries in the era of increased globalization. Migration poses challenges to human capital development in Africa through brain-drain. It also impacts on economic development with regard to remittances from the Diaspora. Also, migration affects economic and political development through what is generally known as ‘the absence effect’. This is the most economically devastating effect of migration in the long run. The idea here is that migratory policies in Europe and the US attract the most talented and skilled labor from Africa and leave the weak to suffer at home. By so doing, they weaken the capacity of African countries to build strong institutions to support economic and political development.

As Davesh Kapur and John McHale put it, “Countries have limited supplies of people willing and able to take on entrenched interests to reform schools, establish clinics, and fight for the rule of law. The dilemma is that potential institution-builders are most likely to leave where institutional quality is worst. And the very individuals most likely to be institution-builders by talent and temperament, be it professionals or managers, are the most likely to be internationally marketable. If people of talent and drive are essential for building institutions, then their loss can have severe consequences”.1 Migration affects the capacity of African countries to achieve their different national development plans. Unfortunately, these countries are yet to rise to the politics of migration in the globalized economy.

Migration is further complicated in Africa because of the challenges of globalization. With decreasing cost of transportation and communication, it is easy and attractive to migrate. Worsening economic conditions, wars and violence in Africa constitute powerful push factors. African countries are not addressing the economic stagnation and political instability that push nationals away from the continent and into the cold hands of European migratory policies. Receiving countries in the west, in order to maximize their own economic advantages, and as a response to growing xenophobia, have constructed migratory policies that allow only the very educated and skilled to migrate to their countries. The implication of restrictive migratory policies in Europe and America is that only very skilled persons will

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have the opportunity for regular migration further increasing the rate of irregular migration and the violations associated with it. Migratory policies in Europe and America enhance the growing phenomenon of irregular migration and aggravate the negative human rights consequences of migration.

Migration and migratory policies are mismanaged in West Africa. First, there is little concern about migration issues and how they affect economic and political development in the region. Although West African countries and the rest of the African continent have signed a policy platform on migration, they have not taken concrete and strategic actions to raise awareness, control the rate of irregular migration, and pressurize deporting countries to comply with human rights obligations whenever deportation becomes necessary.

African scholars and rights activists have also failed to develop human rights norms and policy framework for managing migration in a manner that respects the human rights of the people and fulfills the obligations of states under international human rights frameworks. It is human rights groups and scholars in the west who are actively engaged in shaping norms that could protect human rights in migratory policies. In fact, the challenge before human rights activists in Africa is to mainstream migration within the jurisprudence of human rights.

There is the additional problem of lack of synergy between policymakers and rights activists on how to deal with the challenges posed by migration and globalization to African economic and political development. There is little conversation on this important issue between the two very important stakeholders in the migration debate. This contrasts with Europe and America where such synergy exists. To this we can add the problem of insufficient information and lack of expertise on how to litigate violations of human rights in management of migratory issues and deportation proceedings and advocate changes in migratory policies.

These are the issues that necessitated the Open Society Institute for West Africa (OSIWA) to organize a high-level international colloquium to address the challenges of managing migration and deportation in Africa. The idea of the colloquium is to bring together policy-makers, jurists, lawyers, and rights activists from West Africa and beyond to devise strategies for transforming the politics of migration and mainstreaming human rights protections into migration policy and management. The colloquium produced human rights norms, implementation strategies and policy action-plans that will guide the management of migration
within West Africa and strengthen bilateral engagement between African leaders and European and US policy-makers on migration.

This collection selects some of the papers presented at the colloquium. The first chapter in this collection, “Legal and Institutional Frameworks for Managing Migration and Deportation in West Africa”, looks at the various frameworks that can sustain engagement for policy and legal remedies for violations of rights in migration and deportation processes. In the paper, Dr. Sam Amadi, connects globalization to migration and outlines the various legal and institutional frameworks which provide support for efforts to protect the human rights of migrants. His argument is that many such frameworks exist but the capacity and experiences to leverage them to protect strategic national interests on migration and the human rights of migrants is underdeveloped. He shows the economic impacts of migration on sending and receiving countries in a globalizing economy and the need for a strategic response that recognizes the politics of migratory policies in terms of who migrates and in what condition.

The second chapter continues the discussion of migration and human trafficking using a right-based approach. In her paper, “Promoting Migration for Development and Combating Human Trafficking Using Rights Based Approach”, Joy Ngozi Ezeilo, the United Nations Special Rapporteur on Trafficking in Persons, explores the connection between migration, trafficking of persons and smuggling. She examines the similarities and differences between migration, trafficking in persons and smuggling and analyzes how each of these phenomena reinforces the others and also provides lever to manage the others. Although migration is different from trafficking, irregular migrants may become victims of trafficking in some circumstances. She analyzes some of the human rights resources, especially the United Nations Convention Against Transnational Organized Crimes and the accompanying Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. She examines the rulings and decisions of UN special rapporteurs and commission and how they can be effectively used to minimize violations of the rights of migrant workers and victims of trafficking. Her paper focuses on international human rights-based approach to fighting the ills of migration and trafficking of persons.

Chapter three begins discussion of regional experiences of migration and how regional courts, tribunals and law-related institutions have intervened in mitigating or remedying violations of human rights of migrants. Pablo Ceriani Cernadas, in his
paper, “Migrant Rights and Migration Control Policies in the Jurisprudence of the European Court of Human Rights: Opportunities and Challenges of Litigation”, interprets the jurisprudence of the European Court of Human Rights in adjudicating claims brought under the European Convention on Human Rights. He shows how the judges of the court have wrestled with difficult human rights cases on migration and how they have tried to balance public interests and individual rights in those cases. He relates the ambivalence of the European Court of Human Rights to “complexities and challenges surrounding the issue of immigration”. This paper provides useful guidance for West African activists who may wish to protect the rights of migrants in Europe using the legal and institutional resources of the European Union.

The fourth chapter by Ayodele Gansallo, “The Role of Strategic Litigation in Protecting the Rights of Migrants – A Philadelphia Perspective”, examines the specific experience of efforts to protect migrants in the United States, particularly in Philadelphia, using the resources of the Hebrew Immigrants Aid Society and Council Migrant Service of Philadelphia (HIAS and Council). She begins with a short history of the changing nature of immigration regimes in the United States and the metamorphosis of HIAS and Council’s approach to protecting the rights of immigrants. She shows the changing nature of US immigration policy, starting with a largely open policy to a more restrictive policy, especially after the September 11 terrorist attack on the United States. The present status of immigration policy and statutes is that they now tighten procedures, authorize longer delays in adjudicating claims and seemingly mandate pervasive detention of immigrants for flimsy violations. From the point of view of an institution dedicated to defending the rights of migrants, Gansallo shows the transition from administrative case management to strategic interest litigation. She analyzes the various constraints of litigating on behalf of migrants – finances (finding the money to engage in expensive litigation on behalf of a person who may be very poor); specialized expertise (getting persons with requisite specialized legal skills to act on pro-bono) and locus standi (convincing the court that your applicant have sufficient standing to review administrative decision), and provides insights and experiences that will assist lawyers protecting the rights of West African migrants. Her practical insights on how to use the media for post-litigation campaign will be very helpful in West Africa in situations where oftentimes litigation fails and other strategies are necessary to remedy policy failures.
In chapter five, “Applying International Human Rights Instruments on Migration Issues in Africa: An Analysis of the Decisions and Jurisprudence of African Domestic and Regional Tribunals”, Femi Falana examines some of the cases from domestic courts in Africa and the resolutions of regional judicial and quasi-judicial institutions in handling cases of deportation and discriminatory treatments of migrants and foreign nationals by African countries. He finds that because the decisions of the African Commission on Human and Peoples Rights (ACHPR) are merely advisory and not binding, the practices of member countries regarding migration and deportation has not improved. He points out the possibilities open to the ECOWAS frameworks.

Chapter six focuses specifically on ECOWAS and its protocol on free movement, right of residence and establishment. Oumar Ndongo argues that in spite of the forward-looking protocol not much has been done to make West Africa one community without restrictions on free movement and residence. He highlights some of the institutional and infrastructural constraints that continue to pose nightmares to members of the community who travel through the borders. The failure of community countries to align their individual legal regimes and institution frameworks to the protocol provisions further undermine the creation of a real free zone. This is a short paper that strategically addresses what should be done to make the dreams of the ECOWAS Protocol a reality.

This publication is put together partly to make available papers presented at the colloquium and partly to further engender discussions, research and analysis of the violations of human rights in migration and deportation of West Africans in and outside the region and to help find ways to protect the rights of these migrants and deportees.
Chapter 1

Legal and Institutional Frameworks for Managing Migration and Deportation in West Africa

Sam Amadi

Introduction

The crisis of the twenty-first century is in some sense the crisis of migration. Migration has become a major foreign policy and domestic policy concern. At the level of foreign policy, migration has gained in visibility as one of the core issues in bilateral and multilateral negotiations. The truncated Economic Partnership Agreement (EPA) between Europe and Africa, Caribbean and Pacific (ACP) countries has been dogged by the issue of migration. Bilaterally, many countries in West Africa, especially Nigeria, Senegal and Mauritius, have signed agreements with European countries either to strengthen their borders against irregular migrations or to receive citizens who have migrated irregularly to European countries.2

The importance of migration in foreign relations of African countries is evident in the high-profile framework on migratory policy adopted by the African Union, although not much is being done to implement the provisions of the policy framework. Domestically, many countries with significant migration issues such as Nigeria are deploying policies and strategies to respond to irregular migration of their nationals. We may touch on these strategies lightly later. But before we get to the legal framework for managing migration and deportation it is important to contextualize the upsurge of migration from West Africa in the context of today’s globalization.

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1 Sam Amadi is the Director of Center for Public Policy & Research, Abuja, Nigeria.
2 The Nigerian government has signed a couple of MOUs with the UK government to accept Nigerian prisoners in the UK who are irregularly living there.
Understanding the Relationship Between Migration and Globalization

The importance of migration rises as globalization advances. How do we understand the relationship between globalization and migration? Which component of globalization affects migration most? Will migration endanger globalization or change its features? Answers to these questions require a basic understanding of globalization.

In a way, globalization can be said to be coterminous with migration. Globalization is all about movement; movement of people, goods and services; movement of risks and hazard; and of culture and art. Movement of people has been as ancient as the human society. As a gatherer, *Homo sapiens* migrated in order to meet basic needs; and when human beings became village or town dwellers, they continued to migrate in search of better living environments. So, migration has always been part of globalization.

When we define globalization, its relationship with migration becomes more comprehensible. There are as many definitions of globalization as there are scholars interested in the issue. Each definition emphasizes a particular dimension of the phenomenon. Because ‘globalization’ is a much-abused and ambiguous word it easily lends itself to multiple and conflicting definitions. Some perspectives see globalization as a new phenomenon, as the twentieth century’s contribution to world affairs. Others see it as a pre-existing phenomenon that has gained increased intensity and relevance in the contexts of contemporary challenges. Some people think globalization is another form of Americanization or westernization because of some of its cultural baggage, while others argue that it is a universal and cross-cultural development.

The United Nations Committee on Economic, Social and Cultural Rights defines globalization as “a variety of specific trends and policies including an increasing reliance on the free market, a significant growth in the influence of international financial markets and institutions in determining the viability of national policy priority, a diminution in the role of the state and the size of its budget [and] the privatization of various functions previously considered to be the exclusive domain of the states…” 3 This definition focuses on the mainly negative features of globalization. It also emphasizes the features of present-day globalization and not the

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essential nature of globalization considered from the perspective of globalizations in previous eras. Other definitions in this light include those of Asbjorn Eide who defines globalization as a “process by which powerful economic interests seek to expand their reach beyond borders towards reach”.

This category of definition, especially from political and human rights activists, are circumstantial rather than conceptual; it looks at how neoliberal economic reform has triumphed under present-day globalization. When we get to more scholarly definitions we begin to have a more rounded interpretation that captures the essence of globalization and emphasize how it relates to migration. David Held et al. defines globalization as a “process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions… assessed in terms of their extensity, intensity, velocity and impact, generating transcontinental or interregional flows and networks of activity, interaction and the exercise of power”.4 Joseph Nye and Robert Keohane define globalization as “the process by which globalism becomes increasingly thick”. They define globalism as “a state of the world involving networks of interdependence at multi-continental distances”. These networks are “linked through flows and influences of capitals and goods, information and ideas, people and force, as well as environmentally and biologically relevant substances (such as acid rain or pathogens). Globalization refers to the increase or decline of globalism”.

What emerges from these definitions is that globalization involves flows and networks, interfaces and interconnections in both more intensive and more extensive dimensions. Hence Held and others focus their analysis of globalization on features of globalization such as its intensity, extensity, velocity and the impacts of global flows and interconnectedness. So, how does migration relate to globalization seen as the phenomenon of how globalism increasingly extends and intensifies? First, how do we define migration?

Migration is defined as the movement of people across borders, whether the borders of a country or of a region. In the context of this paper the focus is on migration of West African nationals outside the African region, especially migration into

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Europe. The focus will also be on irregular migration and the attendant violations of rights of irregular migrants including forceful deportation from countries of irregular migration.

Globalization is directly related to migration because invariably the spate and nature of migration in the future will depend on the nature of globalization. The relationship between migration and globalization is interdependent. As globalization becomes more intense and extensive, migration increases. Neither globalization and migration are new phenomena but there are new features of globalization that shapes the policies and frameworks for managing migration. Because the forces and trends that shape today’s globalization determine the spate and structure of migration as well as the character of the policies and institutional frameworks of managing migration, understanding some of the basic characters of globalization may help in the analysis of migration.

Even though globalization is not a new phenomenon it has some new characteristics which affect migration and migration policies. It is generally assumed that there have been different kinds of globalization in human history. The prevailing view is that the phenomenon described as present-day globalization began earnestly after the second world war. Before then there have been roughly two other kinds of globalization. The first globalization is dated around 1500 and 1760, which is the early modern period. Globalization in the modern period started around 1760 and lasted till the outbreak of the Second World War in 1939.

Contemporary globalization involves more extensive migration than previous ones. The reasons are very obvious. In previous globalization some parts of the world were unknown and unexplored. The cost of communication was also very high and prohibitive. There are several logistic challenges for transportation which advances in science and technology have greatly lowered. Today we live in a virtual global village where behind a computer one can easily plots his travel across the world and procure all travel documents and flight tickets. Great advances in marine technology began the process of compressing distance. Today, innovation in aviation science has made traveling a pleasure (although international terrorism is rolling back the gains of science and technology).

Statistics also tell the same of story of enhanced extensity of migration in contemporary globalization. In the pre-modern and modern era globalizations the migratory flows were restricted and one-dimensional. In pre-modern globalization
hunters and gatherers moved mostly within local and regional territories. With globalization in the early modern period we began to see large scale transatlantic migrations to the Americas of settlers and colonists from Europe and slaves from Africa. The modern era sees the intensification of this interregional migration. Between 1880 and 1893, 1.8 million Germans migrated to the United States. This is far more than the number of people who migrate today in the same span of time. Contemporary migration is not necessarily more in numbers than in previous globalization. What has changed is the extensity of migration. In previous migrations, Africans did not move beyond their region except as slaves. Today, the migratory flow from Africa to Europe and America is even greater than the flow from these continents to Africa.

So what has changed about migratory behavior in the present globalization is simply that the contemporary migration has continued to increase in diffusion and in extensity with greater migration both within and from Europe, Asia and the Middle East as a result of political upheavals after the Second World War; migration within and from Africa, Asia and Latin America as a result of civil strife and political oppression in postcolonial states; and greater economic migration to the OECD countries from the developing world. So we can classify the trend in three broad categories which reinforce each other. The first is migration caused by political upheavals in Europe, Asia and Middle East; migration caused by state failure in some part of Africa, Asia and Latin America; and migration related to economic opportunities in OECD countries. So the trend of globalization which has produced ‘oasis of prosperity’ in the ‘desert of poverty’ has also changed the direction of migration northward.

The other issue is to consider the push–pull factors driving migration. This shows how trends in globalization affect migration. It is noteworthy how the forces that influence migration change with each different era globalization. In the pre-modern globalization migratory flows were influenced by the economic imperatives of hunter-gatherer society. Migration was also partly shaped by the political imperative of military conquests and constrained by the limitations of transportation. In the early modern period, transatlantic ocean-going vessels and the science of navigation encouraged trans-regional migration. In the modern period, migration is aided by industrialization and the need for labor and raw materials. Colonialism also encouraged transcontinental migration from Europe to Africa. This was one-dimensional and involved Europeans moving to Africa.
Political and economic crisis is the major factor driving migration from Africa to Europe and America. The international Labor Organization (ILO) estimates that African migrants constitute about one-fifth of the global migratory flow and predicts that by 2025 one in ten African would live and work outside his or her country of origin. In 2007, migrants in Africa were estimated to be about 16.3 million and Africans also made up 13.5 million displaced persons out of a global number of 26 million.

We can draw a few lessons from available statistics of migration in Africa and of Africans. The first is that in terms of overall global numbers migration in contemporary period still falls short of the intensity of previous globalization but in terms of extensity it has exceeded previous globalizations. Secondly, the previous receiving countries of migrants like African countries are now prime senders of migrants, especially irregular migrants. So migratory flows have changed in direction. Specifically, in terms of migrants from Africa, especially West Africa, the flow involves more skilled persons rather than unskilled. This is a result of migratory policies in the receiving countries of Europe and America which skews regular migration in favor of very skilled Africans. Even migrants from Asia to OECD countries are also mainly skilled labor. The only exception are farm workers from Mexico and other Latin American Countries to the United States.

Framework for Managing Migration in Africa

The real problem of migration in West Africa is three-fold. The first is the increasing rate of migration of skilled and unskilled labor outside of the region in search of better opportunities. This illustrates the increasing push and pull factors at work in West Africa. The second component of the problem is the dehumanizing experiences of West African migrants to Europe and other regions of the world from departure to arrival and settlement in the host countries. The third component of the problem is the harrowing experience and human rights violation of deportation of irregular migrants. The policy of automatic expulsion of irregular migrants from European countries raises serious concerns about violation of human rights and discriminatory foreign policy.

West African countries must pay good attention to the push and pull factors of migration and the effects of migration on their political economies. They must also pay quality attention to the economic consequences of migration. It is also important that they develop a coherent policy framework regionally and nationally to mitigate the hardship and violation which their nationals involved in irregular migration experience daily. Understanding the push and pull factors is important for stemming the tide of irregular migration. As the Migratory Policy Framework for Africa argues migratory behavior is tied to strategic economic considerations. The grave poverty and joblessness in almost all West African countries have encouraged the mass exodus of young men and women through the second ‘Middle Passage’ of the Mediterranean Sea into the living infernos of Europe. Numerous deaths result in the struggle to get to the eldorado of Europe through flimsy boats.

Why would several young Africans continue to pass through these death passages every month in spite of the death of hundreds who tried to get to Europe through the seas if not that the economic and social conditions at home are totally hopeless. The first challenge therefore in managing migration is to bring to the front-burner the question of economic growth and prosperity in these countries. West African economies should grow fast to cater for the growing economic needs of a growing population. But fast-tracked economic growth is not all that is required. It is doubtful if the sort of chronic poverty that pervades the West African subcontinent will still exist even with the present economic growth if the available wealth is fairly distributed. So, more than economic growth, the crisis of poverty in Africa may be more a result of corrupt leadership and social inequality than of low rate of economic growth. Growing the economies of the region should go together with fairer distribution of wealth and honest and transparent governance to create social and economic conditions that encourage would be migrant to stay at home.

The other economic consequence which a clear policy should respond to is the impact of what is generally called absence factor to prospects of sustainable development for sending countries. In the wake of mass migration of Africans to Europe, European countries have skewed their migration policies to sort out the highly skilled from the low skilled. Whereas highly skilled Africans are wooed to come over under different kinds of working visas, the low-skilled and non-skilled Africans are left at home to attempt irregular migration. When the best and the brightest are forced by the push factors of political instability, conflicts and economic downturns to flee their countries they enrich the economies and social institutions of the receiving countries.
It is for the value of migrants to the economy of receiving countries that a former UK Immigration Minister, Lord Rooker, justified the UK Highly Skilled Immigrant Program as a plan to “maximize the benefit to the UK of highly skilled workers who have the qualifications and skills required by UK businesses to compete in the global marketplace”. J. K. Galbraith recognized that migrants boost the economies of their host countries. It is estimated that about 25 and 50 percent of West African nationals living abroad are university graduates. In 2000, about 25 percent of skilled West Africans resided in OECD countries.  

What has been the impact of these skilled workers on the political economy of West Africa? What is the mitigation of these impacts? We can assess the negative impact of the exodus of very skilled Africans from two perspectives: the loss of productivity and the loss of effective demand for institutional transformation. These doctors and engineers who have fled to Europe and elsewhere could be saving lives and constructing bridges in West Africa. In some of the countries recovering from war like the Sierra Leone and Liberia, they need all the doctors, nurses, teachers and engineers they can find. The negative impacts of slavery and colonialism that laid the foundation of Africa’s late technological take-off are being compounded by brain drain. The possibility of transformative economic development is founded on high-class human capital. Africa is denied this possibility if its best and brightest end up in Europe and the US because of inauspicious conditions at home.

The other aspect of the brain-drain is the lost opportunity for institution building. Key institutions required for economic development and good governance in Africa cannot be created unless there is a strong community of persons demanding for such institutions. Such institutions like the free press, independent judiciary and representative and accountable parliaments will not just emerge unless there is an active constituency working and demanding for them. Other societies were built by active engagement and agitations of the middle class, that is the class of professionals and creative people who have sufficient incentives in the prosperous and democratic state to demand for one. Unfortunately for Africa, the bulk of that constituency is in the Diaspora. This is the most fundamental problem of mass migration in the continent, especially in the West African region.

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9 Kapur and McHale, Ibid.
Kapur and McHale puts the absence effect very succinctly thus

“Countries have limited supply of people willing and able to take on entrenched interests to reform schools, establish clinics, and fight for the rule of law. The dilemma is that potential institution-builders are most likely to leave where institutional quality is worst. And the very individuals most likely to be institutional builders by talent and temperament, be it professionals or managers, are most likely to be internationally marketable. If people of talent and drive are essential for building institutions, then their loss can have severe consequences”.10

It is important to note that these severe consequences are not mitigated merely by remittances from the Diaspora. Because of the growing volume of remittance from Diaspora to home countries there is a certain glee about turning brain-drain into brain-gain. In terms of net value, Diaspora remittances are insufficient to compensate for the failure to build critical infrastructure and institutions. The lack of such institution hinders effective utilization of remittances from abroad. Except the skilled persons in the Diaspora return home, the absence effect will continue to haunt Africa.

Contemporary immigration policies drain the sending countries the skills of those who would have revived its fortunes, leaving those who should have been taken to safety and succor in fulfillment of Galbraith’s dictum that migration is the cure for poverty. The economic impact of migratory policies on poor countries is to deny such countries the human capital required to build and strengthen the institutions required to create prosperity and stability.

The violation of the rights of migrants constitute another problem of migration. The sufferings and indignities endured by irregular migrants to Europe from West Africa has become common legends and documented by human rights organizations in Europe. The indignity and dehumanization starts with the deathly journey from West Africa to Europe. Many of the migrants die in the scorching deserts as they endeavor to make the long trek across North Africa. Others die in the ocean when their flimsy boats capsize. The UN Special Rapporteur on Migration reports that more than 4,000 irregular migrants have drowned in the Straits of Gibraltar while attempting to cross over from Morocco to Spain.11 Italian officials have also

10 Kapur and McHale op cit.
reported the case of a boat running out of supplies and drifting on the seas with 85 passengers on board, 70 of them died.\textsuperscript{12} Fourteen Nigerians died one day in July 2008 while attempting to reach Spain by the sea. Between 1999 and 2002, more than 10,000 Nigerians have died in transit to Europe from North Africa.\textsuperscript{13}

Those who make it to Europe are arrested and detained without access to the most basic rights. Most European countries have contracted out border control to private firms which increase the likelihood of violations and undermine accountability. Spain borders are patrolled by FRONTEX, which applies excessive force to retrain migrants from entering Europe. Those who finally enter Europe end up as migrant workers without the most basic human rights. It is such violations of human rights that made the Commissioner for Human Rights of the Council of Europe to state bluntly that national governments must protect the human rights of migrants and identify and protect asylum seekers in the course of the operation to seek, rescue and return them to their countries.\textsuperscript{14}

The worst violations usually occur during detention prior to deportation and in the process of deportation. The Parliamentary Assembly of the Council of Europe has found that “all too often, persons awaiting expulsion are subjected, in breach of the European Convention on Human Rights, to discrimination, racist verbal abuses, dangerous methods of restraints and even violence and inhuman and degrading treatment. All too often, the officials…resort to an unjustified, improper or even dangerous use of force”.\textsuperscript{15} Amnesty International also reports various violations of human rights of persons detained in a preventive detention camp in Mauritania, one of the favored EU partner for detention of those attempting to cross over to


\textsuperscript{13} Ojo Maduekwe, Punch, August 12, 2008 online edition visited at http://www.punchontheweb.com/Article=Art20080808142331676


During deportation deportees are subjected to all kinds of violations of their human rights. They are gagged to the point of suffocation throughout the duration of the flight. In 1999, a Nigerian irregular migrant, Marcus Omofume, died while being violently deported to Nigeria from Austria on board a Balkan Air flight. In 2007, another Nigerian died on board an Iberian flight while being violently deported from Spain.

These violations and issues make it necessary to develop legal and institutional frameworks to effectively manage migration and deportation in West Africa. What are the frameworks that will help the West African community minimize the negative effects of migration while maximizing the positive impacts? First, it is important that West African policymakers and civil society activists engage in political battles over migration policy in Europe and the US. Although migration, especially of skilled workers, could constitute dangerous brain-drain for sending countries, they should engage in the debate about the right to migrate. The tendency of receiving countries is to unduly restrain migration on the basis that every sovereign country has the right to stop people from entering its territory. Although the right to migrate is not guaranteed under either the Universal Declaration on Human Rights (UDHR) or the International Covenant on Civil and Political Rights (ICCPR), the right to life in these international human rights instruments can be construed as granting persons faced with life-threatening situations the right to migrate to regions of safety. If the first rule of life is self-preservation, then the most fundamental human rights is the right to migrate to safety and prosperity. 17

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17 Pope John Paul II argued that “In many regions of the world today people are living in tragic situations of instability and uncertainty. It does not come as a surprise that in such contexts the poor and the destitute make plans to escape…. This is the migration of the desperate: men and women, often young, who have no alternative than to leave their own country to venture into the unknown. Everyday thousands of people take even critical risks in their attempt to escape from a life with no future. When migration is the only vehicle by which a migrant can escape conditions that directly threaten the basic goods of human life, that right is near inviolable. This inviolability holds even when the host country is not responsible for the dire conditions that drive migrants from their home countries” (http://www.nccbuscc.org/pope/wmde.htm quoted in Andrew Yuengert, *Inhabiting the Land: the Case for the Right to Migrate*, Grand Rapid: Action Institute for Religion and Liberty, 2004).
the first battle to fight: the battle to liberalize migration as a form of human rights for those facing humanitarian situations, defined beyond those in actual war of violent conflict to including persons facing extreme economic hardship.

**International Human Rights Instruments**

Regime of international human rights law provide a framework for dealing with the gamut of issues affecting migration and deportation. As I have pointed out above, even the right to migrate in difficult period can be sourced from some provisions of both the Universal Declaration and the conventions. The two conventions can be of immense help to the development of humane policies on migration. The International Covenant on Civil and Political Rights notably guarantees the right of every person to life, freedom of movement, freedom of association and freedom of speech and conscience. It also prohibits torture and inhuman treatment or punishment as well as discrimination on the basis of race, color, gender, ethnicity or nationality. It also guarantees equal access and full protection of the law to every person irrespective of immigration status.

The effect of the UDHR and the ICCPR is to transform international law by establishing "systems of accountability which provide for regular assessment of how they (countries) implement their commitments on human rights". Countries that fail to accord migrants these rights would be failing in their human rights obligation. Such failure could trigger sanctions at international or domestic human rights tribunals and strictures by the Human Rights Council of the United Nations. The Human Rights Council (formerly the Human Rights Committee) has ruled that the rights in ICCPR and the ICESCR "must be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrants workers and other persons".

Apart from the International Covenant on Civil and Political Rights guidance on management of migration and deportation can be found in other specialized conventions like the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention Against Torture and other Cruel,

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18 See Stefania Grant op cit.

inhuman and degrading treatment and punishment (cat). the right to health in the icescr has been interpreted to require that states grant minimum health care to everyone including regular and irregular migrants. irregular migrants are also entitled to equal treatment under the law, access to ordinary legal process and to the protection of the justice sector institutions. these rights are now comprised in regional human rights systems, especially the european convention on human rights (echr) which is now applicable both in domestic and regional courts in europe.\textsuperscript{20} the committee on the elimination of racial discrimination has stated that states are required to "ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each person concerned been taken into account". it held that spain’s mass deportation of migrants in its enclaves of melilla and ceuta is conducted in a manner that suggests racial discrimination and in contravention of protocol iv of the echr which prohibits mass expulsion.\textsuperscript{21}

Clearly, the international human rights instruments provide effective framework for legal and diplomatic actions to protect the process of discouraging migration, patrolling borders, arresting, detaining and deporting irregular migrants. the fundamental rights to life, dignity, non-discrimination and access to equal protection of the law cannot be denied migrants because of their immigration status. by virtue of the incorporation of these human rights in the european convention on human rights and the applicability of the provisions of the convention in domestic courts in european community countries and also in community courts in strasbourg, effective remedies to the violations of the rights of migrants and prohibition against further violation can be secured by sending countries and persons and organizations in those countries.\textsuperscript{22} These instruments are reinforced by special instruments like the convention on migrant workers and the vienna convention on treaties which provides for full complement of rights for migrant workers and requires consular services for foreign nationals accused of crimes respectively. all that is required is legal and institutional skills to negotiate the legal terrains of these courts.

\textsuperscript{20} jeremy mcbride, “irregular migrants and the european convention on human rights”, as/mig/inf vol. 21, 2005.

African Human Rights Framework for Managing Migration

African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (ACHPR) is the prime human rights document in Africa. It has the distinction of being the first human rights treaty to seamlessly combine civil and political rights as well as economic, social and cultural rights in one document. It guarantees to every person basic rights and freedoms without distinction as to race, color, sex, ethnic group, religion or political or national origin. The charter provisions are supervised by the African Commission on Human and Peoples’ Rights which receives reports from states and individuals after exhausting national remedies. The commission has ruled against state violation of charter obligations and appointed special rapporteurs to investigate violations. The African Charter has been ratified by all African countries. Some like Nigeria have also domesticated it into local law such that its provisions are applied in courts in the same manner as other local law. The Nigerian Supreme Court has ruled that the provisions of the African Charter stand higher than ordinary laws in the hierarchy of law, second only to the constitution.

Migratory Policy Framework for Africa

What legal and legislative framework exists in Africa to deal with the incidents of migration? The African Union has developed a set of soft law instruments comprised in the Migratory Policy Framework for Africa. The framework aims to provide the necessary guidelines and principles to assist African countries and the various regional economic communities (RECs) to formulate domestic policies on migration and coordinated regional policies and strategies on migration. The framework recognizes the economic incentives for migration in Africa and argues that “…crossborder migration in Africa… represents an important livelihood and coping strategy to ecological and economic downturns and is key to understanding as well as forecasting the onset and evolution of humanitarian conditions”.\(^2\)

The framework obviously looks more inward at intra-regional migration. It focuses more on regulating intra-African migration.

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Its location of the cause of increasing migration in the quest for economic and social survival mirrors the views of the famous US economist, J.K. Galbraith, who argued that “Migration is the oldest action against poverty. It selects those who need help. It is good for the country to which they go, it helps break the equilibrium of poverty in the country from which they come. What is the perversity in the human soul that causes people to resist so obvious a good?” 23 The framework rightly observes that migration might be early warning signs of creeping humanitarian situation which may require proactive peace initiative.

The policy framework is a high-level framework that is a non-binding reference document. It does not create legal obligations or rights but provides wide-ranging recommendations on nine strategic themes of migration, namely, labor migration, border management, irregular migration, forced displacement, human rights of migrants, internal migration, migration data, migration and development and inter-states cooperation and partnership. The framework aims to help African countries develop domestic management strategies that effectively deal with the negative effects of migration like loss of skilled labor. In the section on human rights of migrants the framework urges African countries to mainstream international human rights frameworks into their policy and strategy architecture for dealing with migration. Particularly, the framework advocates that migrants should be accorded all human rights, especially those relating to fair trial and humane treatment. The principles of non-discrimination and access to basic rights should be guaranteed during arrests and deportation of migrants.

The problem with the policy framework is that it is just a framework and does not amount to a convention. Even as a framework it does not articulate common position with regards to European migration policies which are matters of urgent concern to many African countries, especially West African countries whose nationals often seek migration to Europe. Especially, in the context of several agreements between North Africa countries and European countries on the policing of borders and interdiction of irregular migrants to Europe through the Mediterranean routes. This is a big omission because today the collaboration between European countries and some of the North African countries on pernicious strategies to control migration is a major issue on migration in Africa.

There are other minor instruments like the African Charter on the Rights and Welfare of the Child, the OAU Convention on Refugees in Africa. The former charter was adopted by the Assembly of Heads of States and Governments of the then Organization of African Unity in 1979. This charter guarantees all rights to the child irrespective of race, sex, gender, nationality, religion or citizenship. The OAU Convention on Refugees in Africa is extremely important in the context of many civil wars in Africa and the hordes of refugees they have created. The convention was adopted in 1969 to provide support and settlement for refugees. It grants refugees rights as well as duties. It parallels the Geneva Convention Relating to the Status of Refugees which protects the rights of refugees from violation. It obligates states to provide most favored treatment accorded to a national of a foreign country to any refugee legally in its territory.

**Regional Human Rights Framework**

In the contexts of effective remedial actions in West Africa, some legal and institutional regimes and frameworks provide support to efforts to manage the problems of migration and deportation. The reality of a west African economic community through the ECOWAS Protocol and other instruments of that regional body assures to a great extent that instances of detention and mass expulsion of irregular migrants will be rare. But nevertheless there has been instances of such violations. This necessitates an analysis of regional, legal and institutional frameworks for dealing with migration and deportation.

**ECOWAS Common Approach on Migration, 2008**

The ECOWAS has built upon its Protocol on Free Movement of Persons, Rights of Residence and Establishment to develop its own approach to migration. The ECOWAS Protocol guarantees to citizens of West African countries the right to move freely and reside anywhere in the region. They also have the right to open businesses in West African countries without facing discrimination. The protocol allows West African citizen to enter into any West African country as long as he or she does so through an official port of entry and the person has a valid travel document. There are no visa requirements between countries in the region only basic identity document to stay for 90 days.
The Common Approach to Migration builds on the momentum of integration and common market to set out an institutional and legal framework for managing migration in West Africa. The document requires states to manage migration within the terms of ECOWAS Treaty, especially Article 59 of the treaty which guarantees to every citizen the right to entry, residence and establishment throughout West Africa. It provides for free movement within the community and recognizes that migration of community citizens to other regions of the world has immense positive effects on development in the community. The document urges community countries to ratify the UN Convention on the Protection of Migrant Workers and align their domestic policies to protect rights guaranteed in the convention.

Conclusion

The crisis of migration will continue to pose challenges to West African countries as they fail to solve some of the most critical development challenges they face. As long as economic conditions worsen and political crises fester, nationals of West Africa will continue to face strong attraction to escape to Europe in spite of the harrowing experiences of the journey through the second ‘middle passage’ and the dehumanization and outright brutality of life as irregular migrants in Europe. Mass migration of skilled Africans will continue to drag back the race to transformative development. That a large percentage of West African brainpower is outside the region is also a heavy burden on development. Remittances alone will not compensate for this loss. Diplomatic solution should be found to make this army return back to home countries to help their development.

On a human rights point, the more urgent work is to protect the human rights of these migrants wherever they are – in transit, in Europe or on their way back to their home countries. Legal and institutional frameworks exist to secure their rights. What matters is to work these frameworks in an effective manner so that these rights are secured. This requires much training of lawyers and civil society workers on the strategies of strategic impact litigation and institutional advocacy. In this way, a lot can be learnt from the successes of human rights NGOs in Europe and the US in protecting rights of migrants and refugees in European and American tribunals and commissions using the resources of international human rights and diplomacy.
Chapter 2

Promoting Migration for Development and Combating Human Trafficking Using Rights-Based Approach

Joy, Ngozi Ezeilo

Introduction: Migration and Linkages to Trafficking

Contemporary international migration is both a manifestation and a consequence of globalization, and while many migrate safely, others find themselves subjected to trafficking abuses and other forms of exploitation. Respect for migrant rights underpins and reinforces the positive linkages that can be made between migration and development. Protection of migrant rights, both in countries of origin (prior to departure) and of destination is of fundamental importance to realizing its full potentials.

There is a necessary migration–trafficking nexus that must be explored for completeness of any discourse on migration or indeed trafficking. Human trafficking and migration are separate but inter-related phenomena. Migration could be regular or irregular and may be done out of choice or due to circumstances which force the need to migrate upon a person such as conflicts, economic crises or natural disasters. Human trafficking, on the other hand, involves some form of movement of a person by another for the sole purpose of exploiting them or their labour or services. Trafficking can encompass a number of illegal actions, including abuses of the individual victim’s human rights, transnational criminal activities, illegal immigration and violations of labour standards.

Undoubtedly, human rights should be at the core of any effort to combat or eliminate trafficking in persons. Trafficking is a grave violation of human rights, in particular the right to liberty, human dignity, and the right not to be held in slavery.

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1 Joy Ngozi Ezeilo is the United Nations Special Rapporteur on Trafficking of Persons.
or involuntary servitude. Moreover, as experiences from around the world show, trafficking is often related to the violation of a wide range of other fundamental human rights. The rights violated include, but are not limited to: the right to freedom from discrimination, right to life and security of person, right to human dignity, freedom from torture, inhuman or degrading treatment, right to recognition as a person before the law, right to freedom from arbitrary detention, right to access to justice, legal aid and representation, right to equal protection before the law, right to compensation and effective remedy, and right to non-conditional assistance, right to privacy, right to freedom of movement, right to information and freedom of expression, right to freedom of association, right to be heard, right not to be held in slavery and freedom from forced or compulsory labour, right to just and favourable conditions of employment, right to remuneration, right to equal pay for equal work, right to marry, right to health, right to bodily integrity, right to reproductive self-determination, right to gender equality. 

The protection of the rights of migrant workers will serve to greatly reduce trafficking, because then migrants are more empowered and have the ability to get themselves out of abusive/exploitative situations as they have the protection of the law. For example, illegal migrant workers that are not protected under labour laws cannot go to the authorities for help, because they fear being criminalized as illegal workers. If migrant workers are protected, then they can go to authorities to claim non-payment of wages, report abusive employers, beatings etc. without fear of immediate deportation so this stops trafficking and reduces exploitative conditions of work. Also as employers realize that migrant workers are protected they are less likely to abuse them.

While irregular labour migrants are most vulnerable to human trafficking and forced labour because of their status, regular migrants are not completely immune to all forms of human rights abuses, exploitation, forced labour and denial of wages as traffickers can and do take away the travel documents of their victims so that they cannot prove that they have a right to be in the destination country thereby rendering them vulnerable.

The linkages between these concepts add to the complexities especially of the issue of human trafficking and illegal migration or human smuggling. This has often led to the mix up in addressing issues on human trafficking with that of illegal

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2 The UN Special Rapporteur Report 2009 A/HRC/10/16, Page 16.
migration and with cases of forced labour. The resultant effect is such that often leads to situations whereby the legislative framework and policies which aim at combating human traffic in reality end up restricting migration rather than the crime of human trafficking.

Article 13, The Universal Declaration of Human Rights stipulates that:

“Everyone has the right to leave any country, including his or her own.”

This guarantee must be understood in the light of social and economic realities that cause people to leave their place of origin to look for better opportunities elsewhere. With regard to the particular situation of women, a report of the Special Rapporteur on violence against women states that

“The lack of rights afforded to women serves as a primary causative factor at the root of both women’s migration and trafficking. The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminization of poverty, which has led to the feminization of migration, as women leave their homes in search of viable economic options. Further, political instability, militarism, civil unrest, internal armed conflict and natural disasters also exacerbate women’s vulnerabilities and may result in an increase in trafficking.”

The recent report of the Special Rapporteur on Trafficking in Persons, especially women and children (2009) underscores the need to raise awareness to prevent trafficking since many victims are lured into being trafficked by prospects of jobs and better living opportunities in destination countries. Growing poverty and high youth unemployment in many countries of origin have increased vulnerability to trafficking. Restrictive immigration laws and policies are obstacles to a large supply

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of human power from source countries to meet the high demand for cheap labour in host countries. This helps generate a lucrative market for traffickers.  

The Migration Phenomenon

Migration is a phenomenon that not only affects women, but also men and children. *World Migration Report 2005* notes that in 2000, there were 175 million international migrants in the world, that is, one out of every 35 persons in the world was an international migrant. This total represented more than a twofold increase from 76 million in 1960. By comparison, the world population only doubled from 3 billion in 1960 to 6 billion in 2000. As a result, international migrants represented 2.5 percent of the world population in 1960 and 2.9 percent in 2000. While rising, the total number of international migrants still accounts for a small percentage of the world’s population. The most significant changes in recent years have been an increased concentration of migrants in the developed world and in a small number of countries. There have also been significant shifts in the poles of attraction for labour migration, for example to East and Southeast Asia, and a remarkable contribution of international migration to the population growth of receiving countries experiencing low fertility levels. It is important to note that labour migration is not simply from developing to developed countries. Some 60 percent of migrants live in developing countries.

One distinguishes between push and pull factors that cause migration to happen.

**Push factors** include:

- Inadequate employment opportunities, combined with poor living conditions, including a lack of basic education and health provision.

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• Political breakdown or economic dislocation which may be caused by conflict, environmental disaster, structural adjustment policies, mismanagement of the economy, etc. These may threaten an individual’s ability to sustain themselves and their family directly or indirectly as such crises usually lead to higher unemployment, rising cost of living and fewer public services.

• Discrimination (gender, ethnic or caste), nepotism and/or corruption which excludes people from employment or professional advancement.

• Family breakdown (particularly the sickness or death of one or both parents) which often compels remaining family members to send the children away from their homes to work and/or have better opportunities.

**Pull factors** include:

• Fewer constraints on travel (eg. Less restrictions on freedom of movement; cheaper and faster travel opportunities; easier access to passports, etc).

• Higher salaries and standard of living abroad; greater job mobility and opportunities for professional advancement; and more options for acquiring new skills and education.

• Established migration routes and communities in other countries and a demand for migrant workers, along with the active presence of recruitment agents or contacts willing to facilitate jobs and travel.

• High expectations of opportunities in other countries boosted by global media and internet access.

**Trafficking vs. Smuggling**

But not all migration is a form of legal migration where the individual leaves his/her home country voluntarily to move to another country and settles there with the consent of the authorities of that country. Two particular, but inter-related forms of illegal movement of persons across national borders are the trafficking and smuggling of persons.
In other words, trafficking, smuggling and migration are separate, but inter-related issues. Migration may take place through regular or irregular channels and may be freely chosen or forced upon the migrant as a means of survival (e.g., during a conflict, an economic crisis or an environmental disaster). If the method of migration is irregular then the migrant may be assisted by a smuggler who will facilitate illegal entry into a country for a fee. The smuggler may demand an exorbitant fee and may expose the migrant to serious dangers in the course of their journey, but on arrival at their destination, the migrant is free to make his or her own way and normally does not see the smuggler again.

Trafficking is fundamentally different as it involves the movement of people for the purposes of exploiting their labour or services. The vast majority of people who are trafficked are migrant workers. They are seeking to escape poverty and discrimination, improve their lives and send money back to their families. They hear about well-paying jobs abroad through family or friends or through “recruitment agencies” and other individuals who offer to find them employment and make the travel arrangements. For most trafficked people it is only once they arrive in the country of destination that their real problems begin as the work they were promised does not exist and they are forced instead to work in jobs or conditions to which they did not agree.

It is no coincidence that the growth in trafficking has taken place during a period where there has been an increasing international demand for migrant workers, which has not been adequately acknowledged or facilitated. The lack of regular migration opportunities to take up work in other countries and the fact that many migrants are looking for work abroad as a means of survival, rather than an opportunity to improve their standard of living, has left migrants with little choice but to rely on smugglers or traffickers in order to access these jobs.

Despite this, many governments have responded to the problem by proposing tighter immigration controls, which usually increase the profitability of smuggling and trafficking and make matters worse.

Distinction between smuggling and trafficking

In principle, trafficking is generally considered a crime against human beings, and routinely involves coercion, deception, abduction, debt bondage, abuse of power and financial gain for those who facilitate and profit from the trade, and general exploitation of the victims of trafficking. It can imply threats to personal safety, sexual and reproductive health, and can entail abuse and degrading treatment during the process.

By contrast, smuggling of migrants has been seen essentially as a crime against States, whereby the procurement of the illegal entry into a country of a non-citizen is seen as a violation of States’ sovereign power to refuse entry to aliens. The definition of smuggling can be found in the smuggling protocol, the “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Crime.” According to the protocol, “smuggling of migrants” shall mean “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Art. 3(a)).

In principle, smuggling is not, at least initially, a coercive practice because the potential migrant enters into a contract with the smuggler. However, smuggling practices have become much more comprehensive, as anti-migration policies have become more restrictive, opening up migrants to infinite abuses, inter alia, sexual exploitation, physical assault, debt servitude, and abandonment. As such, smuggled migrants are often susceptible to violations which they may not have foreseen before agreeing to be smuggled. Moreover, in certain cases, smuggled migrants can also become victims of trafficking, further blurring the distinction and causing a false hierarchy of victimization.

In other words and in contrast with the definition of trafficking, although smuggling can be abusive and dangerous, its definition does not necessarily denote the occurrence of exploitation or a violation of human rights. In practice, however, the distinction between the two can be hard to draw and, as explained above, migrants who initially consent to being smuggled may end up in exploitative situations.
Moreover, as discussed in the 2008 report of the Special Rapporteur on the human rights of migrants, the notion of consent to being smuggled becomes ever more complex:

“Once an irregular migrant is intercepted, it is up to the State in question to determine the migrant’s level of complicity in the mode of irregular entry, leaving much latitude for assignment of culpability or, by contrast, victimization, which impacts the level of protection that migrants may receive. That is, an irregular migrant that is thought to have consented to being smuggled may be perceived as deserving less protection than a victim of trafficking who may be perceived to have been unknowingly exploited. These distinctions are further complicated by discriminatory sentiments pertaining to country of origin or assumptions based on race and gender.”

Due to the possible ambiguities, and not least owing to the proliferation of networks of traffickers and smugglers of persons as a response to ever more restrictive anti-immigration policies, it is particularly important that States receive irregular migrants perceived to be involved in trafficking and smuggling practices on an individual basis, investigating to the fullest extent their potential complicity, and providing for them guarantees of due process.

A related problem is the fact that victims of trafficking, often misinformed, commit administrative infractions, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention and contribute to their criminalization. The laws of some States punish as criminal offences irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution. Victims of trafficking are thus often detained and deported without regard for their specific needs for protection and without consideration for the risks they may be exposed to if returned to their country of origin.

10 See report of the Special Rapporteur on the human rights of migrants, Jorge Bustamente, A/HRC/7/12.
International Standards for Protection of Trafficked Persons and Migrant’s Rights

Because trafficking cases worldwide often involve multiple border crossings, consistent international standards are important to effectively prosecute traffickers and protect trafficking victims whether they are regular or irregular migrants.

Existing international standards on human trafficking can be found under the international legal framework provided by the United Nations and are classified into two categories viz: legally binding documents, such as treaties which articulate the legal obligations of state members to refrain from committing human rights violations and also to take positive steps to ensure that individuals are able to enjoy their human rights; and non-binding documents, such as resolutions and declarations which do not have force of law but nevertheless represent important guidelines on States’ obligations.

The approach of the United Nations to human trafficking can be understood from various directions but three critical perspectives will be highlighted here. Firstly, the UN human rights instruments are relevant to the kinds of abuses suffered in cases of trafficking and violation of the rights of migrants.


Trafficking is defined for the first time in international law in the Protocol (Article 3) but it is primarily a law enforcement document because the impetus for developing a new international instrument arose out of the desire of governments to create a tool to combat the enormous growth of transnational organized crime. Hence the Protocol is a strong law enforcement tool. But in terms of human rights protections and victim assistance the language is comparatively weak; urging state parties to undertake these measures merely “in appropriate cases” and “to the

12 For a full text of the Convention, the Trafficking Protocol and their status please visit www.unodc.org/unodc/en/crime_cicp_signatures.html
13 One hundred and nineteen States have ratified it as at 26 September 2008.
extent possible.” Despite the weaknesses in human rights protections offered by the Protocol, it represents a strategically important re-conceptualization of trafficking in persons especially women.14

Article 2 of the Trafficking Protocol, the Statement of Purpose, sets forth the goals of the document:

- To prevent and combat trafficking in persons, paying particular attention to women and children;
- To protect and assist the victims of such trafficking, with full respect for their human rights;
- To promote cooperation among state parties in order to meet those objectives.

Significantly, the Trafficking Protocol articulates a need for state parties to cooperate. States should cooperate across borders on the following actions, outlined in the Trafficking Protocol: assistance and protection of victims (Article 6), repatriation of victims (Article 8), prevention of trafficking through reducing vulnerability (Article 9) information exchange and training (Article 10) and border measures (Article 11). Effective measures to combat trafficking require harmonized efforts by national governments.

The Trafficking Protocol is not a human rights instrument as such, yet it does contain an obligation to protect the rights of and provide assistance to trafficking victims, consistent with international human rights standards. The Protocol thus emphasizes the importance of protecting trafficking victims and not labelling them as criminals (whether their status as migrants is regular or otherwise).

Finally, relevant UN and ILO conventions,15 which contain provisions to protect the rights of both regular and irregular migrants include:


15 Note that the nature of the obligation on each state to the listed Conventions may depend on whether they have ratified the Convention in question or not, the category of the migrant worker or those in particular circumstances.
i) ILO Convention No. 29 on Forced Labour, 1930\textsuperscript{16}, which defines forced labour (Article 2), commits member states not to impose forced labour and to prevent its occurrence (Article 1), and obliges governments to punish the use of forced labour as a penal offence while ensuring that the penalties imposed by law are adequate and strictly enforced (Article 25). This Convention covers any migrant worker who is undertaking any work or service against their will due to coercion or threat of some punishment.

ii) ILO Convention No. 97 on Migration for Employment (Revised), 1949\textsuperscript{17}. The scope of this Convention is limited to persons regularly admitted as migrants for employment (Article 11). It requires states to provide adequate and free service including accurate information to assist migrants for employment (Article 2); to take all appropriate steps against misleading propaganda relating to migration (Article 3); ensure that immigrants are treated equally to nationals in certain areas including remuneration, conditions of work, accommodation and union memberships (Article 6); and where migration between countries is sufficiently large, competent authorities shall enter into agreements to regulate matter of common concern to the application of the Convention (Article 10).

iii) ILO Convention No. 143 on Migrant Workers (Supplementary Provisions), 1975\textsuperscript{18}. This Convention requires states to respect the basic human rights of all migrant workers (Article 1); to take measure to suppress clandestine movements of labour migrants and against third parties organizing them (Article 3); not regard a migrant as illegal by virtue of loss of employment (Article 8); treat all migrants and their families equally in respect of rights arising out of past employment irrespective of (current) irregular status (Article 9); guarantee equality in employment, social security, trade union, cultural rights and individual and collective freedoms for regular migrants and their families (Article 10); and educate and give assistance to migrants in the enforcement of their rights (Article 12).

\textsuperscript{16} Has 163 ratifications and is one of ILO’s fundamental Human Rights Conventions with which member states are supposed to comply even if they have not ratified them.

\textsuperscript{17} Has 42 ratifications to date.

\textsuperscript{18} Has only 18 ratifications to date.
iv) UN Convention on the Protection of the Rights of Migrant Workers and Members of their Families (1990).19 The most comprehensive international standard dealing with migrant workers this Convention builds on the principles of the previous two Conventions and the Universal Declaration on Human Rights to extend human rights law to all migrant workers and members of their family throughout the migration process. It also seeks to prevent and eliminate, “the clandestine movements and trafficking in migrant workers” and the employment of migrant workers in irregular situations.

Parts I and II of the Convention contain very important provisions – Article 1(1) states the coverage of the convention to include all migrant workers and their families without distinction of any kind while Art1(2) makes it clear that the convention shall apply during the entire process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire stay and remunerated activities in the state of employment as well as return to the state of origin or the state of habitual residence. Migrant worker is defined 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” (Article 2), defines family members (Article 4), and provides for non-discrimination concerning human rights of migrant workers (Article 7).

Part III extends basic human rights protections to all migrant workers and their family regardless of status. These include protection from torture (Article 10); slavery and forced labour (Article 11); freedom of thought, conscience and religion (Article 12); right to privacy (Article 14); right to liberty and security (Articles 16 and 17); due process before the law (Articles 18–20); protection from confiscation and destruction of identity documents (Article 21); equality of treatment with nationals in remuneration and conditions of work (Article 25); right to participate in trade union activities (Article 26); information on their rights arising from the Convention and their rights and obligations in the host country (Article 33).

Part IV sets forth some additional rights for documented migrants which include: information on conditions of admission stay and employment prior to their entry (Article 37); right to be temporarily absent from work (Article 38); reunification with partners and dependent children (Article 44); equality of access with nationals

19 Has 23 ratifications (all sending countries) and entered into force on 1 July 2003 and will have a treaty monitoring body to compliance to it by ratifying states.
to education, vocational training and social services (Article 43 and 45); equality of protection with nationals against dismissal, unemployment benefits and access to alternative employment if work if terminated (Article 54).

Part VI proposes policies to promote equitable and lawful international migration including: regulating organizations recruiting workers for employment abroad (Article 66); collaboration between states to prevent the dissemination of misleading information regarding migration and measure to prohibit and punish those responsible for the illegal movement of migrant workers or for the employment of undocumented migrants (Article 68); and ensuring that migrant workers and their families in a regular situation enjoy the same living conditions as nationals in relation to “standards of fitness, safety, health and principles of human dignity” (Article 70).

v) UN Convention Relating to the Status of Refugees, 1951.\textsuperscript{20} Article 1 defines a refugee as “someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear is unwilling to avail himself of the protection of that country”. It obligates state parties not to penalise refugees who are in their country illegally provided they show good reason for the illegal entry, have come direct from the situation of the threat and have presented themselves to the authorities (Article 31). Again Article 33 prohibits the expulsion or return of a refugee to the territory where they face a threat to their life or freedom because of their race, religion, and nationality, membership of a social group or political opinion.

This convention has been used in various countries to grant protection to trafficked migrants. For example, in the UK between February and May 2002, two Nigerian girls both aged 16 years who had been trafficked into the UK for prostitution were granted protection under the Convention. The basis being that they belong to social groups of “young girls trafficked from Nigeria whose economic circumstances are poor” and “the well documented social group of girls trafficked from West Africa” and they faced serious risk of being re-trafficked if returned home to Nigeria.

\textsuperscript{20} Has 131 ratifications. It limits the grant of refugee status to people who show fear of a personal threat due to the conditions listed as opposed to fear from general situation of violence or upheaval faced by a group of people.
vi) The ILO Declaration on Fundamental Principles and Rights at Work. Adopted in June 1998, the Declaration brings together and reinforces the rights and principles embodied in the eight key ILO conventions21 by providing thus:

“All members, even if they have not ratified the (above) Conventions in question, have an obligation arising from the very fact of membership in the organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of these conventions, namely:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.”

Way Forward

All immigration legislation should be examined with regard to its impact on the human rights of (irregular) migrant workers and trafficked persons. Tightening legal immigration cannot be the answer. There is a need to increase the opportunities for legal, gainful and non-exploitative labour migration for workers of all skill levels, and strengthen regulatory and supervisory mechanisms to protect the rights of migrant workers. Opening ways of legal immigration and transparency about these opportunities in the countries of origin may help prevent both trafficking and smuggling.

Furthermore, the adoption of international legal instruments that recognize the rights both of regular migrants and irregular migrants like ILO Convention No. 143 on Migrant Workers, 1975 and the UN Convention on the Protection of

21 The Forced Labour Convention, 1930 (No. 29), The Abolition of Forced Labour Convention, 1957 (No. 105), The Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182), The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Equal Remuneration Convention, 1951 (No. 100), the Freedom of Association and Protection of the Rights to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).
the Rights of All Migrant Workers and their Families, 1990 can be instrumental in creating an international legal framework that allows for the protection of human rights of all migrants, including the victims of trafficking that end up in a situation of illegal migration. Adopting transparent policies that allow for legal migration will diminish the incentives for people to approach people smugglers and to fall victims of human trafficking. It will curb the profits of traffickers and people smugglers. At the same time, both traffickers and people smugglers, as well as the networks of organized crime that stand behind these operations must be prosecuted and punished.

More in general, governments should focus more closely on the root causes of trafficking, such as poverty, gender discrimination, inequality and armed conflict, both in the international counter-trafficking debate and in research, action plans and policy measures.

Trafficking in person results in cumulative breaches of human rights, and this correlation needs to be recognized in any intervention effort. As far as the mandate of the Special Rapporteur is concerned, the real challenge is not just in adopting strategies that will effectively lead to catching the perpetrators and punishing them. Rather, it is preferable to put in place strategies that will focus equally on the victim by recognizing and redressing the violations suffered, empowering the victim to speak out without being doubly victimized, jeopardized or stigmatized, while at the same time targeting the root causes of human trafficking. The strategies must be people-centred, bearing in mind that human trafficking is about persons whose basic right to live free particularly from fear and want is under constant threat. We must recognize the dignity of the victims and their right to survival and development. Thus, restorative justice is central to combating human trafficking.

Conclusion

Let us think “Migration for Development” for both countries of origin and destination and this is a more positive approach instead of seeing the migrants as liabilities/burden on the host country. As has been rightly observed “interlinking migration and development policies can facilitate the management of migration and make difficult trade-offs easier to handle”. 22

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We should re-examine Readmission Agreements to ensure compliance to international human rights standards that promote respect to migrant rights. Some of the existing agreements between some European countries and some of the countries of the West African sub region are skewed against the ECOWAS nationals and offers little by way of recognition of victim’s dignity and human rights.

States are urged to ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

States should take immediate steps to incorporate the provisions of the Palermo Protocol into their domestic legal system, including by establishing dedicated national anti-trafficking machineries (e.g. an agency) and adopting a plan of action that integrates a human rights framework.

States should continuously conduct capacity building, awareness raising and sensitization campaigns on trafficking in persons for law enforcement officials, particularly police, judiciary and immigration, and the general public. 23

23 See the Recommendations of the UN Special Rapporteur on Trafficking in Persons, especially women and children A/HRC/10/16 Pages 25–27.
Chapter 3

Migrant Rights and Migration Control Policies in the Jurisprudence of the European Court of Human Rights: Challenges, Obstacles, and Opportunities for Litigation

Pablo Ceriani Cernadas¹

I. Introduction

At the turn of the 21st century, the recognition and effective realization of the human rights of migrants is one of the major challenges worldwide to fully achieving universality, a key principle of international human rights law. Both by their status as non-nationals and their status as migrants, migrants have to cope with a wide range of constraints to their basic rights in the countries where they live or transit. This problem is particularly severe in the European context. Indeed, growing restrictive migration policies that have been adopted by European countries in the last decades have increasingly undermined such universal protection.

In order to face this challenge, there is a set of initiatives that main stakeholders (governments, civil society organizations – including migrants associations – UN agencies, trade unions, etc.) could and should develop or strengthen. In regard to civil society institutions, it is well known that an important tool that have been increasingly utilized to promote and protect human rights is litigating before local, national, and regional courts. There is an extensive variety of examples that evidence how litigation may improve levels or rights protection and fulfilment. On the other hand, there is an important range of information that demonstrates the extent of obstacles, problems, challenges, and even perils that human rights litigation may involve, beyond the possibility of losing the case.

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Developing litigation initiatives meant to defend migrants’ rights within migration control policies of European countries may involve the necessity of evaluating a wide range of policies and practices which impact several human rights. In this sense, one matter to consider is the existing policies used to deport migrants, both at national and regional level. That is, the variety of mechanisms created by each state (e.g., expulsion, devolution, and return in Spain) and by EU bodies (EU Directive, FRONTEX joint operations, joint returning flights, etc.), as well as the diversity of rights that could be affected by such policies. In addition, the jurisprudence of a particular court or jurisdiction may be a relevant element to be taken into consideration before carrying out a litigating initiative.

In addition, these initiatives could be developed in order to prioritize litigation either before national and local courts of justice or before international human rights mechanisms. In this paper, although we are fairly aware of the extreme relevance of human rights litigation before internal courts, I will exclusively focus on the main regional human rights body, that is, the European Court of Human Rights (ECtHR), which jurisdiction has been recognized by all the member states of the Council of Europe. The Court rules its cases based on the European Convention of Human Rights (ECHR) and its Protocols.

The purpose of this document is to identify constraints, challenges, opportunities for litigation based on the judgements that have been adopted by the European Court regarding migrants’ rights within migration control policies, particularly through detention and deportation measures. These precedents, and particularly those which have set progressive standards, may not also be relevant for future litigation initiatives before this Court, but also at national and local Courts, as well as for advocacy strategies aimed at improving migrants’ rights at different levels. On the contrary, the paper will review several judgements that have set up regressive standards, including some which are far lower than precedents that have been established by other courts (national and regional) and also by the European Court itself on same issues but not regarding migrants.

Of course, the cases that will be analyzed here are not all the judgements that the Court has made on these issues. Doing that would be a huge task that would largely

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2 It must be reminded that, on the one hand, courts of justice must implement international treaties in their daily judgements, as any other power of the state; on the other hand, international human rights mechanisms are usually invoked when internal remedies have not been efficient to protect these rights.
exceed the goal of this document. As a key aim is to observe how the European Court have been interpreting migration control policies, the paper is focused on cases linked strictly with human rights involved within procedures meant to sanction breaches to migration law. That is, irregular entry and remaining in the territory without residence permit or after its expiration. Therefore, these comments will not cover cases related to, for instance, deportation based on criminal offences.

As for the human rights issues to be addressed through the ECtHR jurisprudence, will examine the following: Due Process Safeguard; Right to an Effective Remedy; Prohibition of Collective Expulsions; Principle of Non Refoulement; Right to Physical Integrity; Child Rights; Right to Liberty; and Right to Family Life.

Finally, after these standards and precedents have been described (although also briefly within the analysis of those issues) I will make a few comments on litigation strategies before the European Court, as well as some of their challenges and opportunities. In particular, these comments will mainly discuss litigation possibilities regarding deportation of African migrants from European countries, and on how these aspects could be strategically considered in order to increasingly improve such precedents.

II. Migration Policies and ECHR Jurisprudence

It is important to bear in mind that all the judgements that the European Court of Human Rights has made on migration policies have relied upon a key reasoning: “as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry, residence and expulsion of non-nationals”. Therefore, prior to getting into each of the sections on the ECtHR jurisprudence on migrants’ rights, it is worthy to make a brief comment on this approach.

A state is formally sovereign for designing and enforcing all public policies, in every matter (health care, security, taxes, justice administration, etc.). As well, states are obliged by human rights treaties that they had ratified – regardless of the matter involved – in relation to all individuals within their jurisdiction. Yet, when other topics are under the analysis of the Court, it does not clarify that states are

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3 Most of the content of the following section is an updated translation from Pablo Ceriani Cernadas (2009a), written and published in Spanish.
sovereign to define their own policy. Evidently, this different treatment evidence, on the one hand, shows that despite the fact that international migration has increasingly become a structural element of current global world,\(^4\) it is still treated within some logics closer to the nineteenth century than to the present.

On the other hand, it highlights the extent of challenges that have to be faced when it comes to litigating for migrants’ rights before the European Court. In this regard, the principle of state sovereignty has been spread through the Court’s judgements related to migration and human rights, as a sort of exception – in some topics – to international human rights obligations and standards. It is true also, as it will be observed, that the European Convention and its protocols contain few articles that may have an impact on such dissimilar treatment. These circumstances, as it will be described below, have influenced the Court decisions on these matters, which in many occasions have led to worrisome restrictive standards regarding migrants’ rights.

\section*{II.1. Migration Policies and Due Process of Law: Discrimination Based on Nationality and Migration Status}

Due process safeguards are critical tools for the effective realization and protection of all human rights, as well as to prevent, to end or to repair its deprivation. For this reason, they have a special protection standard, which states that even under emergency situations those guarantees cannot be disrespected. A fair and impartial process developed by an independent court that respects both parts equal, which allows every person to present his/her evidences and to contradict the evidences presented by the other part, the right to be heard, to obtain a decision in a reasonable period of time, among other guarantees, represents – symbolically and materially – one of the core elements of a constitutional state in a democratic society.

As well, these guarantees have a particular relevance when it comes to the different procedures currently adopted on the field of migration policies. Especially, procedures regarding admission to the territory, obtaining a residence permit, and

\(^4\) Indeed, migration root causes are increasingly linked to structural elements of current globalization processes, including international economic and trade system. Both growing disparities among and within countries, as well as labour demand in destination countries, are intrinsically tied with such processes, which, at the same time, have been undermining state sovereignty – but strengthened when it regards to migration control and migrants’ rights (see Bauman, 1999).
forced deportation to the country of origin or departure. The wide range of discretionary tactics that states have usually had on migration policies makes these guarantees even more transcendent, in order to ensure a rights-based approach in both the design and enforcement of such policies.

Due process of law within the ECHR has been recognized by article 6.1. In this regard, it has been stressed that this article is aimed at ensuring that each state will provide to everyone an effective access to the courts of justice without unjustifiable restrictions, and to obtain from them a motivated resolution through a process that assure basic guarantees in order to avoid any arbitrary decision which may impact individual rights (Esparza and Etxeberria, 2004:152). Nonetheless, as it will be described below, ECtHR standards on due process of law within migration procedures is considerably poor. Indeed, there is a profuse and polemical Court's interpretation on non application of article 6 of the ECHR within such proceedings. Mainly, this problem is based on two aspects. 1) The content of this article itself; 2) how it has been applied by the Court on migration-related cases.

Regarding the content of article 6.1 ECHR, it must be highlighted that its drafting has been more restrictive than how due process guarantees have been approved in other human rights instruments, such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, and the American

5 "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

6 Article 10 UDHR: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

7 Article 7.1 Banjul Charter: “Every individual shall have the right to have his cause heard. This comprises: a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) The right to be presumed innocent until proved guilty by a competent court or tribunal; c) The right to defence, including the right to be defended by counsel of his choice; d) The right to be tried within a reasonable time by an impartial court or tribunal”.

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It can be evidenced that while the ECHR mentions civil and criminal rights, the rest of those instruments refer to any kind of process, where human rights might be involved. Consequently, the interpretation of what the court has been doing for decades is influenced by such characteristics, as it will be analyzed further.

On the other hand, the Court has applied this restrictive interpretation to migration procedures, so all migrants might be affected by this criterion. Besides, as it will be explained below, Protocol 7 of the Convention establishes a differentiated treatment based on immigration status of each person. Then, there is also a distinct standard for migrants without legal residence.

Since the *Maaouia v. France* case, the European Court of Human Rights has held that article 6 ECHR is not applicable to cases related to the entry, residence and deportation of foreigners. The Court has stressed that the provisions of the ECHR must be interpreted in the light of the entire Convention system, including the protocols. Consequently, it is understood that article 1 of the Protocol 7 contained enough procedural guarantees to be applied in cases on deportation of migrants. It added that such article of the Protocol has been precisely included because states were aware that article 6.1 ECHR did not apply to that kind of procedures. Afterwards, it has stated that the procedures referring to expulsion from the territory does not concern the determination of a “civil law” for the purpose of article 6.1, regardless that deportation may “incidentally” have important repercussions on private and family life of migrants, as well as on their employment prospects. Finally, it has asserted that those decisions did not concern either the determina-

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8 Article 8.1 ACHR: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature”.


10 Article 1, Protocol 7: “An alien lawfully resident in the territory of a State shall not be expelled except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion; b) to have his case reviewed; and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority”.

11 Ibid, para. 36.

12 Ibid, para. 38.
tion of a criminal charge, since in general exclusion orders not classified as "criminals" within the member states of the Council of Europe, but constituted a special preventive measure used for achieving immigration control goals.

Several issues can be raised from this judgement. First of all, as it has been highlighted by the dissenting opinions, it has not been considered that reference to "civil rights" in article 6.1 was not there in opposition to civil law but to criminal law. Furthermore, as the Convention was aimed at protecting peoples rights, its application should cover all types of procedures in which human rights are involved, and particularly in those processes vis-à-vis with public administration, where guarantees of due process are crucial to protect people from discretionary powers of state authorities. Moreover, in spite of that, in most of the processes tied up with migratory questions, particularly those that decide granting residence or expulsion from the territory, we are undoubtedly dealing with the exercise or the restriction of "civil" rights (freedom of movement, family life, private life, among others), the Court drew on abstract aspects (such as the sovereignty of states) to deny the existence of civil rights in such cases, even when it is evident that those procedures can be determinants for either recognition or deprivation of those rights.

Likewise, the Court has denied the evolution experienced by its own jurisprudence on article 6.1, as well as the criterion adopted by other international tribunals (as the Interamerican Court of Human Rights). In fact, in Martinie v. France, the ECtHR stated that “the correct approach in accordance with the object and purpose of the Convention is to adopt a restrictive interpretation of the exceptions to the safeguards afforded by Article 6.1”. In this sense, it could be assumed that in Maaouia's case the Court has not taken into account the principle pro homine, as it has chosen through such a restrictive interpretation.

This criterion can also be questioned from another of the key principles of international human rights law: the principle of non discrimination, as the only people who can be affected by that doctrine are those of foreign nationality. Although it is logical that certain measures of migration policies impact migrants exclusively, what is relevant here is that the position of the Court entails a standard of due

13 Dissenting Opinion of Judges Loucaides and Traja.
15 Application no. 58675/00, Judgement 12 April 2006, para. 30.
process that harm specifically those people, despite the fact that article 6 does not distinguish among nationals and foreigners. It is true also that the restrictive ECtHR jurisprudence on article 6.1 exceeds the issue of migration, so other matters have been excluded from such protection. Nonetheless, when this interpretation has to deal with other issues, there is no impact on a particular social group. That is, they are on topics which may affect any person which may be involved in a particular circumstance. On the contrary, regarding migration procedures only non nationals could be affected by ECtHR jurisprudence on article 6.1.

The European Court has indicated in numerous opportunities that the ECHR must be interpreted as a “living instrument”, hence it should be applied in the light of present-day conditions.16 However, this assertion has not been appropriately considered on cases regarding due process safeguards within migration procedures. In current times of migration flows towards Europe, their quantity and diversity, as well as the influence of migrant population in European societies in every aspect (social, economic, cultural, and even political), the maintenance of such a restrictive criterion is particularly worrisome. Moreover, it should be reminded that irregular migration is closely linked to increasing restrictive measures adopted by EU countries, and in many cases, it is a decision that is taken in very vulnerable conditions. Therefore, human rights mechanisms should adapt to such challenges and needs, rather than consider them for supporting restrictive approaches.

In spite of the serious and well founded reasons that have been held in the dissenting opinion of Maaouia case, as well as other motives signed out above, the European Court has maintained that criterion unaltered until nowadays. In effect, that position has been reaffirmed in further cases as Lupsa v. Romania,17 and Makuc v. Slovenia.18 In these occasions, the ECtHR has added that the procedures that regulate “the citizenship of a person”19 (understanding the concept of “citizenship” in a restricted form, that is, as synonym of nationality20) are among the areas

16 Among others, Tyrer v. United Kingdom, application no.5856/72, Judgement 25 April 1978, para. 31.
17 Application no. 10337/04, Judgement 8 June 2006.
19 Ibid, para. 186.
20 On the discussion about “citizenship” terminology, and particularly on why this concept should be disconnected from the notion of “nationality” (hence, migrants – at least, permanent or long-term residents - should be considered also “citizens” of the
excluded from article 6.1’s scope. In the case Chair and Brunken v. Germany, where it was sustained that an expulsion ordered alongside a criminal conviction constituted a double jeopardy (and expulsion procedure had been done without due process), the Court has upheld the same criterion. In Mabroki v. Sweden and in Taheri Kandomabadi v. The Netherlands, the Court applied the same reasoning to asylum procedures.

In addition, as we have mentioned above, the Court have pointed out in Maaouia that basic safeguards in due process within migration procedures were assured through article 1 of Protocol 7, rather than article 6.1 ECHR. Nonetheless, this opinion could be questioned for several reasons:

• Article 1 of Protocol 7 refers only to deportation cases, so due process regarding admission to territory and obtaining/renewing a residence permit, would remain out of the scope of both articles;
• Protocols do not have the goal to cover aspects ignored in the ECHR, as the Court had stated, but to strengthen and complement the Convention in specific circumstances;
• This protection could only be invoked in cases that occurred in countries that had already ratified the Protocol;
• Article 1 P7 could be inapplicable if the state alleges reasons of national security or public order; and
• The Court has confirmed that migrants without legal residence are not protected by article 1 P7, as it will be analyzed below.

countries where they live, work, and study, regardless their nationality), see Balibar (2003), Baübock (2004), Carens (1992), De Lucas (2004), Ferrajoli (1999), Habermas (1999), Mezzadra (2005), and Sassen (2003).

21 Decision of Admissibility, Application no. 69735/01, 14 February 2006.
22 Application no. 22556/05, decision of admissibility, 21 November 2006.
23 Applications no. 6276/03 and 6122/04, decision of admissibility, 29 June 2004.
24 So far (October 2009), four member states of the European Council have not ratified yet the Protocol 7: Belgium, Germany, The Netherlands, and Turkey. Spain has just ratified it in September 2009.
25 Article 1.2 of Protocol 7 asserts: “An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security”.
In the cases *Bolat v. Russia* and *Lupsa v. Romania*, the Court has stated that the scope of article 1 P7 applies only to foreigners that reside “legally” in the territory of the State. That is, neither article 6.1 ECHR nor article 1 P7 would be available for migration procedures regarding irregular migrants. Hence, the standard settled by the Court for these cases is so low, or better said, so legitimately questionable, that it has been contradicted by the Committee of Ministers of the Council of Europe. Indeed, the Committee has asserted – through the opinion of a committee of experts in the matter – that the safeguards provided in article 1 P7 should be extended and be assured to all the migrants, regardless their migration status. According to the Committee, the *ratione personae* scope of this article is particularly restrictive, so it should be extensively interpreted.

For these reasons, the criterion that has been set by the Court could imply that millions of people who currently live within European countries may be excluded from their territory, or a residence application may be denied, without ensuring basic due process of law safeguards in such procedures. At least, violation of such safeguards might not be invoked before the human rights regional court. Then, in this type of cases it will be the legislation and jurisprudence of every State that will decide to which extent those safeguards will be ensured. Considering the short scope provided by the court, it is reasonable to expect that national legal framework may be broader. The Court standard may also impact on regressive legislation and jurisprudence.

On the other hand, this jurisprudence of the ECtHR is a significantly inferior standard as what exists in other regions, such as within the Interamerican system of human rights. There, both the Interamerican Commission and Court have expressed precisely and repeatedly that due process safeguards are fully applicable to migration procedures, regardless whether migrants were legally resident or not.

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26 *Bolat v. Russia*, para. 76.
27 *Lupsa v. Romania*, para. 52.
28 Council of Europe, Committee of Ministers, Ad Hoc Committee of Experts on Legal Aspects on Territorial Asylum and Refugees, 4 May 2005, Final 20 May 2005, *Comments on the Twenty guidelines on forced return, Guideline 2, commentary*.
29 For instance, in Spain, the Constitutional Court has stated that due process safeguards must be ensured in all migration procedures, independently of the migration status of the person (see, among others, judgements STC 94/1993 and 95/2003).
30 IHR Court, Advisory Opinion OC-18/03, para. 121, 124–126.
Actually, while in many human rights matters the Interamerican bodies have been following standards envisaged by the European Court, regarding migration issues (both on due process and other topics), the standards established so far within the Interamerican system is appreciably higher.31

However, unlike the posture assumed by the European Court on this subject, the standard set up on the right to an effective remedy (art. 13 ECHR) in order to cope with an exclusion order against migrants is notably wider, as it will be shown next.

II.2. Deportation and the Right to an Effective Remedy

According to article 13 ECHR, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. Through its jurisprudence, the European Court has recognized that all migrants, regardless of their migration status, are entitled to such right, in case that rights protected by the Convention might have been affected by a deportation order. In Conka v. Belgium,32 the Court has developed the scope of this right as it covers migrants without legal residency (that is, without considering this circumstance). According to the main facts of the case, four Slovaks, who did not have legal residency status in Belgium and whose application for asylum had been refused, were arrested and subsequently expelled collectively. In its judgement, the Court stated that the goal of article 13 consists in requiring the provision of a domestic remedy that attends to the substance of a debatable demand according to the Agreement, and guaranteeing an appropriate repair. That remedy must be “effective” in practice as well as in law. Furthermore, it affirmed that the notion of an effective remedy of article 13 requires that the remedy could be able to prevent the execution of any decision that might be contrary to the Convention and whose effects were potentially irreversible.

An interesting aspect that has been raised by the Court in this case has to do with the “suspensive effect” of a remedy against a deportation order. On this, the Court has expressed that the two available remedies were not able to withhold executing the order solely on the ground that an appeal to the court had been lodged. So, the order could still be executed before the remedies had been solved (that it is

31 An extensive analysis of the jurisprudence of the Interamerican Human Rights System on migrants rights, see Ceriani Cernadas, Fava and Morales (2009).
precisely what happened in the case). In this regard, the Court pointed out that in order to exclude the risk in a system to stay an execution, it must be applied for since it is discretionary and may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits nonetheless has to quash a deportation order for failure to comply with the Convention. In those cases, the Court stressed that the remedy exercised by the plaintiff would not be effective enough for the purposes of article 13.33

Finally, the Court stated that the requirements of article 13 and others from the Convention take the form of a guarantee and not a mere declaration of intent or a practical arrangement. This aspect, according to the Court, is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the articles of the European Convention.34 Therefore, the Court has established that the states must organize their judicial system in such a way that the courts can fulfil its requirements. This statement of the Court would mean, regarding migrants deportation, that states must have a judicial organization, a procedural legislation, and practices meant to effectively ensure all migrants the right to have an effective remedy to question that order in case that any human right recognized in the ECHR might be involved.

The European Court has confirmed this criterion in the case Hilal v. United Kingdom.35 The case was about an asylum seeker from Tanzania, whose application had been refused and as – according to the state he did not have basis to remain “legally” in the country – his expulsion was ordered. The Court has decided that there was no violation of the Convention, but has reaffirmed that any migrant, independently of his/her migration status, is entitled to an effective remedy against a deportation order.

II.3. Prohibition of Collective Expulsions

Prohibition of collective deportation is closely tied up with due process in law and the right to access to justice since this prohibition seeks that a person can only be deported from a country only as a consequence of a due process based on facts about his/her particular situation. This entails, evidently, the possibility to know

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33 Ibid, para. 80–82.
34 Ibid, para. 83.
the reasons of such a decision and, then, the right to question that order. This prohibition operates as a safeguard against arbitrariness and gives the opportunity to challenge the decision if it is considered illegitimate (e.g., disproportionate, without legal basis, etc.). The prohibition has been incorporated to the European human rights system through article 4 of Protocol 4.

The Court has defined collective expulsion (in the sense of art. 4 of Protocol 4) as every measure that obliges some foreigners, as a group, to leave a country, except where such measure is taken on the basis of a reasonable and objective examination of the particular situation of each individual of that group. Likewise, the fact that a number of foreigners receive a similar decision does not lead to the conclusion that there is a collective expulsion, if each of those people has had the opportunity of presenting his/her arguments against the order before the competent authorities, on an individual basis (Andric v. Sweden, Conka v. Belgium, and others).

In other regional human rights system, this prohibition has also been protected in several cases.38

On the other hand, in some cases the European Court has paid attention, in application of the article 39 of its Rules, to requests for interim measures in favour of immigrants in irregular situation on whom there was the risk of being victims either of article 4 P4 or of violation or article 3 ECHR (see below). In

37 Majic v. Sweden (application no. 45918/99, decision of admissibility, 23 February de 1999); Alibaks and others v. The Netherlands (application no. 14209/88, decision of admissibility, European Commission, 16 December 1988); Becker v. Denmark (application no. 7011/75, decision of admissibility, European Commission, 3 October 1975).
38 Within the African system, on the basis of article 12.5 of the African Charter on Human and Peoples’ Rights, see the decisions of the Commission in cases Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia (Communication no. 71/92, judgement October 1997) and Union Inter Africaine des Droits de l’Homme et autres v. Angola (Communication no. 159/96, judgement 11 November 1997.). Within the Interamerican system, basis on article 22.9 ACHR, see the decision of the Court in the case of Haitians and Dominicans of Haitian Origin v. Dominican Republic, Interim Measures, 18 August 2000).
39 “1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”
May 2006 the court declared partially admissible the measures required in the facts included in the case Hussun and others v. Italy, where it was claimed that the eventual expulsion of tens of migrants from the Italian island of Lampedusa towards Libya would constitute the violation of those articles.

This precedent is particularly relevant in current context, when externalization of European migration control policies (both countries and EU agencies, such as FRONTEX) through the Mediterranean Sea, the Atlantic Ocean, and even African countries territorial waters, imply in practice the devolution of thousands of migrants that try to reach European territory. It has been highlighted that within operations there is not a legal procedure to ensure basic rights and safeguards, including the prohibition of collective expulsions, the right to asylum, and child rights, among others (Ceriani Cernadas, 2009b; Human Rights Watch, 2009; VV.AA., 2008; Weinzierl, 2008).

Anyway, there is not yet any judgement of the European Court on these kinds of circumstances, and it could take some years to have a decision on this issue. Considering the precedents of the Court regarding due process and migration policies in cases of irregular migration, it would be extremely critical how these cases are submitted to the Court, in order to avoid negative decisions and, on the contrary, improve existing standards.

II.4. The Right to Physical Integrity and the Principle of Non-Refoulement within Migration Control Policies

Article 3 of the European Convention has been analyzed by the Court in numerous opportunities linked to different aspects of migration policies and, consequently, to migrants’ rights. In the wide majority of these cases, the facts refer to the analysis about whether the execution of a deportation order might mean the violation of the right to the physical integrity of the person in the state in which the person would eventually be deported. In this context, we will see three types of

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40 Decision 11 May 2006, in applications no. 10171/05 (Hussun and others v. Italy), 10601/05 (Mohamed and other v. Italy), 11593/05 (Salem and others v. Italy), and 17165/05 (Midawi v. Italy).

cases on this debate, differentiated only by a few characteristics but points to the same standard or criterion assumed by the Court in the sense of guaranteeing the protection of this right regardless of their migration status. Thus, we will see some judgements bound exclusively to whether expulsion could imply an inhuman, cruel or degrading treatment. Afterwards, we will observe how the Court applies this opinion to cases in which the expulsion can result in an inhuman treatment due to the condition of health of the person. And then, a brief mention will be done on the possibility to adopt interim measures in these circumstances, in order to prevent the irreparable affectation of such right.

Finally, we will see a case in which the Court has examined article 3 in relation to the rights of child migrants affected by migration control policies, particularly to migration-related detention and the deportation of an unaccompanied girl-child based on her migration status.

II.4.1. The principle of non refoulement and the expulsion of migrants

Deportation of migrants and its relation with article 3 ECHR has been framed within one of the basic principles of both international humanitarian and human rights law: the principle of non refoulement. This principle, recognized in multiple treaties, forbids the deportation to another country\(^2\) when the person could be deprived of his/her right to life and private and physical integrity in the country to which he or she is sent.

Throughout its jurisprudence, the European Court has been setting a very high standard to the protection of the rights of article 3. In this context, in migration control policy cases, it has stated that the enforcement of these policies should ensure an examination in order to verify if the measure to be adopted (e.g., expulsion, denial of entry) could evidence a problem with regard to article 3, and therefore jeopardize the responsibility of the state. These criteria have been exposed by the Court in numerous cases, such as Chahal v. United Kingdom,\(^3\) Cruz

\(^2\) The principle applies to any kind of forced mechanism used to sending one person from one country to another. Thus, and according to the country and the facts of each case, it could be a deportation, devolution, expulsion, extradition, returning, etc.

\(^3\) Judgement 15 November 1996.
In addition, the ECtHR has highlighted that the principle of non refoulement could also be affected in an indirect form. That is, through the expulsion of a person to a state which afterwards sends that person to a third state, in which he/she may be deprived of the rights of article 3 ECHR. In the case T.I. v. United Kingdom, the Court has held that an indirect return to an intermediate state does not affect the responsibility of the first of the states of being assured that the person, as result of its decision of deporting him/her, will not be exposed to a treatment contrary to article 3.

This last standard is also dreadfully relevant nowadays. Some African countries (as Morocco, Libya, Senegal or Mauritania) currently are not only countries of origin of migrants, but also countries of transit and destination, particularly from sub-Saharan African countries, but also from Asia. In this regard, European countries, especially Italy and Spain, have been pushing for signing bilateral agreement with such countries (among others) in order to strengthen European migration control policy, including its goals and mechanisms.

Consequently, joint operations (African-European), organized and financed by the European side, are meant to prevent irregular migration through the Mediterranean Sea or the Atlantic Ocean. In many of these initiatives the patrol send migrants back to the country of departure. This decision is taken without

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46 Judgement 17 December 1996.
47 Judgement 29 April 1997.
48 The Court has strengthened the same position in more recent cases, such as Jabari v. Turkey (judgement 11 July 2000), Saad v. The Netherlands (judgement 5 July 2005), Bader v. Sweden (application 13284/2004, judgement 8 November 2005), N. v. Finland (application no. 38885/2002, judgement 26 July 2005).
49 Chahal v. UK, cit., para. 80.
50 Application no. 43844/98, Decision of Admissibility, 7 March 2000.
any individual examination whether if a person could be subjected to any kind of inhuman treatment, both in the country where he/she is sent back and in a third country where he/she is finally returned by the second country (see, Cuttita, 2006; Human Rights Watch, 2009). It should be reminded that according to human rights treaties, including the ECHR, states have to respect human right to every individual under its jurisdiction. This exceeds the territorial component of a state, so states are engaged by human rights obligations wherever their exercise their authority, which includes extraterritorial responsibility (Ceriani Cernadas, 2009b; Weinzierl, 2008).

II.4.2. The principle of non refoulement and the condition of health of migrants

The European Court has also applied the principle of non refoulement to cases which have linked the right to not being submitted to cruel, inhuman or degrading treatment with the condition of health of migrants that could be deported to the country of origin (in some cases, based on his/her migration status). In these cases, the Court has fixed some standards intended to evaluate the legitimacy of deportation decisions in cases in which the person involved claimed that considering his/her health condition the enforcement of the measures would infringe article 3 ECHR.

The first case on this question was D. v. United Kingdom, about a St. Kitts national, facing an expulsion order from United Kingdom based on his irregular migration status and criminal background. He was living with the HIV virus in an advanced state, and then he has asserted that he would not be able to continue his medical treatment in his country of origin. The Court has decided that the expulsion would be a violation of article 3, even if he did not have a legal residence. Nonetheless, the Court has remarked that the case was dealing with exceptional

52 Judgement 2 May 1997.
53 “…Regardless of whether or not he ever entered the United Kingdom in the technical sense…it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art. 1)... It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art. 3) irrespective of the gravity of the offence which he committed” (D. v. UK, cit., para. 48).
humanitarian circumstances, so the decision would not mean that foreigners that
had served a prison sentence and are subject to a deportation process, could not
invoke any right to remain in order to continue benefiting medical or social assist-
ance, or of another type, provided by the state during the stay in prison.54

In Bensaid v. United Kingdom55, the Court maintained the same criterion, although
it emphasised how exceptional should be the circumstances in order to decide that
an expulsion would configure a breach of article 3 ECHR. Hence, the Court has
declared that there were no violation of such article, as well as it has done later in
further cases.56 The case Ndangoya v. Sweden57 demonstrates how the Court
standard had become restrictive. In effect, the Court has asserted that there were
not reasons to contest the legitimacy of the deportation order, still when there was
medical documentation that signed out the structural difficulties that the person
could face in order to continue the HIV antiretroviral treatment in his country of
origin (Tanzania).

Similarly, in Amegnigan v. The Netherlands58 the Court decided that the expulsion
was not contrary to article 3. Yet, the doctors of the claimant had indicated that
the his health condition would be severely deteriorated if the antiretroviral treat-
ment was interrupted, and that the access to this treatment was not universally
fulfilled in Togo, since it requires him to have an health insurance (which was far
from inexpensive). Likewise, in N. v. United Kingdom59, the ECtHR has reaffi rmed
this restrictive standard and has rejected the application, even when among the
evidence there were reports of the World Health Organization which highlighted
the diffi culties to eff ective access to antiretroviral treatment in Uganda. The same

54 Ibid, para. 51-53.
56 See Arcila Henao v. The Netherlands (application no. 13669/2003, judgement 24 June
2003), Meho and others v. The Netherlands (application no. 76749/2001, judgement 20
January 2004), Salkic and others v. Sweden (application no. 7702/2004, judgement 29
59 Application no. 26565/05, Judgement 27 May 2008 (see para. 29-51, in which the
Court has done a synthesis of its jurisprudence on this subject).
decision has been adopted in a case against the United Kingdom by a national from Congo with HIV.60

This remarkable regressive trend could be linked with current European migration policies regarding irregular migration. Therefore, it is pertinent to add to this scenario another contextual element for deeper debates on this question: in the background of these cases the root causes of migration can be identified, such as the deprivation of the right to health care to millions of people in many countries. Hence, the position of the ECHR should be examined in the light of factors that create such conditions, including decisions at local, regional, and international level (for instance, international regulations on production and distribution of medicines, including drug patents). While current disparities and asymmetries in living conditions in different countries are not fully tackled, then this kind of jurisprudence will be not only extremely restrictive, but also disconnected from critical and structural processes and, on the contrary, linked to selective policies to stop migration without coping with its causes.

For these reasons, litigation strategies regarding deportation policies in cases linked to the right to health care and article 3 ECHR could be part of broader discussions and initiatives on issues such as the universal fulfilment of the right to health care, as well as international trade and regulations on drug patent. Furthermore, strategies meant to improve this jurisprudence should emphasise some human rights principles (as pro homine, non-discrimination, proportionality) and could also involve complementary actions (media, experts’ reports, etc.).

II.4.3. Preventive measures, inhuman treatment, and deportation of migrants

In section II.3 we have seen how on certain occasions the Court has adopted interim measures meant to prevent a collective expulsion. Similarly, the Court has also analyzed whether these measures could prevent a breach of article 3. In 2004, for example, Somali asylum seekers presented an application for interim measures against the Dutch State61, claiming that the deportation that had been dictated

60 M. v. United Kingdom, Application no.25087/06, Decision of Admissibility, 24 June 2008.

61 Yuusuf Nuur (no. 1734/04), Salah Sheekh (no. 1984/04), Ali Yousef (no. 2683/04), Abdi Iyow (no. 4028/04), Warmahaye (no. 4142/04), Jimale (no. 7028/04), Noor Mohammed
against them could infringe their right to physical integrity. The decision that was rendered by the Court resulted in the suspension of the expulsion order. In addition, the interim measures adopted by the Court in cases as Müslüm Zade and others v. Sweden\(^{62}\), and Haziri and others v. Sweden\(^{63}\), were fundamental not only to stop the deportation to their countries of origin (Azerbaijan and Serbia) but for obtaining further a residence based on humanitarian grounds.

These cases could be taken into account for future litigation strategies, in order to prevent the enforcement of deportation measures. But also for developing broader strategies meant to advocate for policy reform; for instance, regarding migration control mechanisms in European southern borders, as mentioned above.

**II.4.4. Migration control, child rights, and inhuman treatment**

In the case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium\(^{64}\), the European Court settled on some standards in relation to the rights of unaccompanied children without regular migration status. In this case, a five-year-old girl, national of the DR Congo, was being carried by her uncle to Canada, where she was living as an asylum seeker. In the connecting airport, Brussels, she was detained and taken to the Detention Centre, where she was held for two months.

The Court, on the one hand, stressed that the irregular migration status of the girl would indicate the extent of vulnerability of her situation, rather than an element on which to base her rights restrictions. On the other hand, regarding article 3, it has stated that her detention and deportation to the DRC afterwards, has evidenced such a lack of humanity that configured an inhuman treatment.\(^{65}\)

Nonetheless, the decision of the Court does not seem to forbid children migration-related detention, as it has been recommended by the UN Committee on the

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62 Application no. 41983/04. The Court, once the government had suspended the deportation and has granted him a residence permit, has closed the case on 31 January 2006.
64 Application no. 13178/03, Judgement 12 October 2006.
65 Ibid, para. 58, 59.
Anyway, we may have further cases in the upcoming years, as the EU Directive on Return of Irregular Migrants approved in 2008 may lead to national policies which include children detention within migration control procedures. In this case, litigation strategies will have to be developed in order to obtain a clear standard on non deprivation of liberty of children within migration control policies.

II.5. The Right to Liberty in the Context of Migration Control Policies

The European Court jurisprudence on the right to personal liberty of migrants (article 5 ECHR), particularly of those in irregular migration status, has analyzed different aspects of such right. Among them is the issue of the length of detention, the competent authority to order a deprivation of liberty, the place of detention, the judicial role in such circumstances, and the situation of particular groups as asylum seekers and unaccompanied children.

Before getting into these issues, it should be highlighted that the Convention includes a particular constraint linked to migration policies. Indeed, article 5 establishes that

“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

Therefore, the Convention would be authorizing the possibility to arrest a person in order to enforce migration control measures, particularly in the cases of irregular entry and deportation (I will return to this matter below).

One of the situations analyzed in several cases decided by the Court regards the detention carried out as consequence of the measures to control entry into the

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66 See Committee on the Rights of the Child, General Observation no. 6, Treatment of unaccompanied and separated children outside of their country of origin, CRC/GC/2005/6, 1 September 2005.

territory of a state. In one matter, the Court exposed a series of argumentations on the validity of the right to liberty in the called “indirect areas” that exist in places of entry into the country – especially, in airports, and thus of the faculties and limits that states would have in such spaces. In *Amuur v. France*[^68], on the arrest for twenty days of four brothers asylum-seekers from Somalia in the international area of the Paris-Orly airport (and afterwards, expelled from the country), the Court has held that there had been a violation of article 5.1. The Court stated that to “Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations” (para. 43).

On the length of such detentions, the Court has indicated that they “should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty…into a deprivation of liberty”.[^69] This, in turn, was bound by the Court with the question of the legality and legitimacy of the decision of custody, but also with aspects related to conditions of detention and the right to defence. In this regard, it said that to examine whether ‘a procedure prescribed by law’ has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness…[^70]. More recently, in the case *Saadi v. United Kingdom*[^71], the ECHR upheld the detention of an asylum seeker for 7 days in the airport detention centre in London. The ECHR considered, among other factors, the administrative problems generated by the joint arrival of large numbers of people in such conditions.

The issue of the order of arrest (along with the basis of the decision) was dealt by the Court in the case of *Shamsa v. Poland*[^72], referring to the arrest of two Libyan

[^69]: Ibid, para. 43.
[^70]: Ibid, para. 50.
[^71]: Application no. 13229/03, Judgement 29 January 2008.
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citizens by the border police at Warsaw airport, in the transit area reserved for those who are not authorized to enter the country. The applicants were detained for 3 months but, according to Polish legislation, in that term an expulsion order should be executed, otherwise people should be freed. However, after that term they were moved to the detention location of the transit area of the airport, where they were held for forty days. The Court expressed that, in cases of restriction of liberty, it is particularly important to respect the legal security principle and that in this case there was not a decision that had justified the applicants’ arrest in the transit area and that had settled the length of such detention. Later on, the Court held that the fact that a person is detained in an area for an uncertain and unforeseen period, when such arrest is not based on either a specific legal provision or in a valid judicial decision, is contrary to legal certainty principle, as well as the Convention.73

II.5.1. The reasonableness of migrants detention (article 5.1.f. ECHR)

In some cases the European Court of Human Rights has ruled on the reasonableness which should have an order of detention within a process of expulsion. Chahal v. United Kingdom was about the detention of a citizen of India for expulsion (issued on arguments of “national security”), whose habeas corpus were rejected in all instances. In this case, the Court examined article 5.1.f of the Convention and then stated that in these cases the Convention “does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing” (para. 112). According to the Court, this provision does not provide the same protection as that of article 5.1.c, as it only requires that the action is taken with a view to deportation. However, the Court pointed out that if the procedure is not carried out with due diligence, the detention is no longer justified under that provision. This same principle was reiterated in Conka v. Belgium and Saadi v. United Kingdom, above mentioned.

In Saadi, the Court held that the application of article 5.1.f extends to the time of the person granted formal permission for such entry. In particular, the Court has stated that “until a State has ‘authorised’ entry to the country, any entry is ‘unauthorised’ and the detention of a person who wishes to effect entry and who needs

73 Shamsa v. Poland, cit., para. 48, 55, 58.
but does not yet have authorisation to do so, can be, without any distortion of language, to ‘prevent his effecting an unauthorised entry’…”74.

This decision of the ECHR is truly complex, particularly in relation to the implementation of these detention powers on people that have already come into the country and cannot prove that they have entered the country regularly. If these people do not have a deportation order against them, could the authorities detain them – without substantiating the need for such a decision – arguing the lack of “formal authorization of admission”? The obligation that mandates to interpret restrictively the restrictions on fundamental rights should lead to a negative response. Thus, the jurisprudence of the Court would apply only to detentions in entry points, in a reasonable time and until the adoption of a decision on the admission of the person. In other circumstances, it is supposed that it would only be viable as a result of an expulsion order. Anyway, as we have seen, in these cases the due process safeguards are considerably limited, especially in cases of migrants who are in an irregular situation.

Otherwise, people living in this situation (who cannot prove that they had entered regularly into the country, regardless of how and when they have done it) could be continuously detained because of an admission control policy, even though they did not hold either a detention order or a deportation process against them. This would be clearly unreasonable and far from basic human rights standards. Besides the injury to such people, also the host society and the state would be affected, as a consequence of having particular groups living with a permanent threat of being deprived of their liberty without due justification (such circumstances would be a sort of state of exception).

On the other hand, in *Saadi v. UK*, the Court has stated, with regard to article 5.2 (“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”), that as the person had been informed of the reasons for his detention newly seventy-six hours after being deprived of his freedom, it was incompatible with the requirement of providing such information “promptly”.75

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74 Ibid, para. 65. The dissenting opinion have disagreed with this reasoning as the applicant in this particular case.

75 Ibid, para. 84.
In another decision relating to article 5.1.f, the European Court has also addressed the issue of period of detention of a migrant, within a deportation process. In *Singh v. Czech Republic*76 (two Indian nationals with criminal records and legal residents, who were detained for over two and a half years as part of a process of expulsion), the Court ruled that articles 5.1.f and 5.4 have been infringed since the expulsion had not been carried out with the required diligence, so the detention was no longer justified under article 5.1.f.

Anyway, we must observe which will be the position of the ECHR on the length of migrants’ detention within removal proceedings, due to the entry into force in each country of the Return Directive approved in 2008 by the European Union, which establishes the possibility to detain migrants for a dreadfully long period (6 months, and it could be extended up to 18 months).77 It is true that in many European countries that period is considerably shorter nowadays, and that a due respect of the principle of progressiveness of human rights would not allow making a regressive reform in order to extend it till the length that has been set up in the Directive. Nonetheless, Italy has recently increased the length of migrants’ detention from 2 up to 6 months, precisely in order to be in line with the EU Directive78.

In this regard, litigation strategies will have to deal with these regressive trends, in order to convince the ECtHR not only about the illegitimacy of such human rights constraints, but also about the necessity and fairness of improving its own jurisprudence.

**II.5.2. The place for detention of migrants**

In one case under consideration, the Court ruled – though timidly – on the question of the place of detention of migrants subject to removal proceedings, in relation to the location of persons detained for criminal reasons. The declaration of inadmissibility in the case *Zhu v. United Kingdom*79, the Court stated that while

77 Article 15.
the claimant was arrested while he was awaiting expulsion from the country and not on criminal matters, it was undesirable for those who are awaiting deportation to be kept in the same place as those prisoners convicted of criminal offences. This comment by the Court may result in this court to undertake the internationally established standard (for example, the Convention on the Rights of Migrant Workers and Their Families\(^{80}\)), in the sense that those detained on immigration charges are not located in the same facilities as those accused or convicted of committing a criminal offence.

Anyway, on this matter two comments could be made. On the one hand, that many migrant detention centres in European countries, although they are not formally prisons, function in the same way, regardless that migrants without legal residence had not committed any crime so they do not need any kind of re-socialization measure. In fact, a report required by the European Parliament has evidenced degrading conditions of these prison-like centres (STEPS Consulting Social, 2008). On the other hand, it must be taken into account that within harsher migration policy trends, some countries have criminalized irregular migration; that is, it is being sanctioned as a criminal offence (e.g., Italy\(^{81}\)).

\section*{II.5.3. Detention and deportation of unaccompanied children}

In \textit{Mubilanzila v. Belgium}, cited above, the girl was detained for two months in the detention centre near Brussels Airport. The ECtHR has stated that the detention centres used for foreigners await deportation, are acceptable only when they intend to facilitate states “to combat illegal immigration”\(^{82}\). But then it has added that these facilities should comply at the same time with their international obligations,

\begin{enumerate}
\item Article 17.3: 3: “Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial”.
\item See \textit{Disposizioni in materia di sicurezza pubblica}, cit., art. 1, 21, h).
\item Para. 81. It is extremely worrying that the Court, following the inappropriate terminology utilized by European Union bodies, still refers to “illegal” migration. Even the Parliamentary Assembly of the Council of Europe has proposed avoiding this terminology (2006). Moreover, irregular migration is a multidimensional phenomenon that should not face through “combat”, but through integrated and coherent solutions, including root causes, and ensuring a rights-based approach. Hence, it is on achieving solutions, rather than enforcing combats.
\end{enumerate}
including those arising under the Convention for the Rights of the Child. In this sense, it has stressed that “States’ interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State’s immigration policy must therefore be reconciled”.83

With regard to detention, the Court has held that even when it could have been framed in article 5.1.f of the Convention, it does not necessarily mean that the decision had been legal in the meaning of that provision, while the law requires that there must be a relationship between the cause of such restriction and its place and conditions. While the girl was being held in a closed centre for “illegal immigrants” (sic), under the same conditions as adults, according to the Court those conditions were not adequately adapted to the extremely vulnerable position in which she was as a result of her status as unaccompanied foreign child. In these circumstances, the Court considered that the Belgian legal system at that time, as it operated in that instance, didn’t protect her right to liberty.84

Finally, the Court examined the issue of judicial review of the detention order. In this regard, it held that article 5.4 is intended to provide individuals who are arrested the right to judicial review on the legality of such decisions. Then, remedies should be available during the arrest, so that the person quickly obtains a judicial review that could lead, if appropriate, to his/her release. In this occasion, the Court has noted that the authorities had made arrangements for the deportation of the applicant on the day after she had submitted her claim to the Council Chamber. The authorities at any time reconsidered its decision to deport her, and she was deported on the day appointed, although the period of 24 hours to appeal to the Council had not expired. Therefore, the Court has concluded that Article 5.4 had been violated.85

This decision reaffirms the special protection that the Court recognizes to child rights, and highlights the vulnerable condition of migrants in irregular conditions, especially unaccompanied children. As well, it provides quite precise criteria regarding the remedies available to a person undergoing a pre-deportation deten-

83 Ibid, para. 81.
84 Ibid, para. 102-104.
85 Ibid, para. 113-114.
tion and limits of the States as to how to develop the process of implementing those measures. Moreover, the Court’s reference to the protection afforded by the Convention on the Rights of the Child could mean a significant precedent for expanding the scope of rights and interests of migrants by other treaties ratified by the state. In this regard, it would be relevant the ratification of the Convention on the Rights of Migrant Workers and Their Families by European countries, a step that so far has been ignored by the vast majority of states in the region.  

II.6. Deportation of Migrants and the Right to Family Life

When interpreting and defining the scope of article 8 of the Convention in cases involving migration policies, particularly in matters of admission, residence and deportation, the European Court has established over many decisions a number of criteria to consider in each case. Nonetheless, it is noteworthy that only in rare cases has the ECHR been issued on the implications of a removal order for a person with irregular migration status, as in most of them the facts were linked to criminal offences (a matter that, as we have said, will not be examined in this paper). In these few occasions, while the fact that an irregular migration status did not automatically lead to a justified expulsion under article 8, the Court has considered this circumstance, along others, in order to resolve each case either in favour or against the right to family life invoked by the applicant.

In 2006, the Court decided two cases regarding the right to family life of migrants that had been deported. In both cases, the special protection that child rights have within the international human rights law framework was a key element of the Court’s judgement. These are the cases Rodrigues da Silva and Hoogkamer v. The Netherlands 87 and the – above mentioned – Mubilanzila Mayeka v. Belgium. In the case of the girl detained for more than two months in a detention centre in Belgium, beyond the violation of the rights to liberty and physical integrity, the Court has also taken into consideration the provision of article 8, while the arrest and subsequent expulsion of the child impeded her to meet her mother in Canada. In its ruling, the Court noted that the term “privacy” of article 8 ECHR includes

86 Of the 39 member states of the Council of Europe, so far (October 2009) only four states have ratified this Convention: Albania, Azerbaijan, Bosnia Herzegovina and Turkey. Only two other states have signed it (Montenegro and Serbia). No member state of the European Union has either signed or ratified the Convention.

87 Application no. 50435/99, Judgement 31 January 2006.
physical and mental integrity of the person. Therefore, the guarantee enshrined in this article seeks to ensure the development, without no interference, of the personality of each individual in his/her relations with other human beings. Then, the Court referred specifically to the issue of family reunification, asserting that as she was an unaccompanied child, the Belgian State was under an obligation to facilitate such reunification.

This Court’s conclusion is relevant in a European context in which a considerable number of unaccompanied children are arriving at its borders. Anyway, it should be assessed in more detail whether the decision would be the same in similar but not identical cases. For instance: How the Court would understand the right to family life, and particularly family reunification, in the case of the arrival of unaccompanied children who reach European territory, where both or one parent is living. As discussed below, the current European Union legislation on family reunification of “third-country nationals” legally residing in Member States, and its confirmation by the European Court of Justice, would seem to contradict that obligation to facilitate family reunification. This Directive, as the one of returning of irregular migrants, also contains a set of provisions which do not look in conformity with international human rights standards (John, 2004; Oosterom-Staples, 2007).

Moreover, there is another complex case before a decision to expel or return a child to his/her country of origin. States often argue that the measure seeks to ensure family reunification as their relatives live in that country (not in a European state). If the Court follows the fundamentals of that background, such action would be legitimate if it attests that, firstly, this reunification becomes effective, and secondly, that the reunification ensures the best interests of the child (in the case of Spain, for example, reports of UN and civil society have complained that these

88 Ibid, para. 85.
elements have not been sufficiently valued).91 Hence, what would be the position of the ECtHR in these cases?

In Rodríguez Da Silva v. The Netherlands, the Court assessed the legitimacy of an expulsion of a migrant who had lived in the country without legal residence for three years and was the mother of a girl of Netherlands nationality. To do so, it examined the different circumstances that may lead to or not to such decision. In terms favourable to the applicant, the Court took into consideration the fact that she has not been convicted for any crime and that since an early age she has had a maternal role with her daughter, a Netherlands national.92 On the contrary, the Court basically highlighted issues related to immigration control, such as the history of immigration law breaches or the fact that when the family had been created, they were aware that the immigration status of one of them was such that the persistence of family life within the state was precarious.

Similarly, the Court has noted that in three years of irregular residence the applicant had made no attempt to regularize her immigration status, and whoever does not comply with regulations regarding the residence in a country enjoys no right particular to expect but to be given a right of residence93. However, despite these adverse circumstances, the Court has stated that this case should be distinguished from others because of the consequences that the expulsion could generate in the applicant responsibilities as a mother, as well as her family life with her daughter. For these reasons, the Court asserted that by applying the principle of child’s best interests, the applicant should remain in the Netherlands. Therefore, the Court has considered that in these circumstances, the economic welfare of the country (argument invoked by the State) could not be above the right to family life of the applicant, even when she was residing irregularly at the time of the birth of her daughter94.

However, shortly thereafter, in the case Omoregie and others v. Norway, the ECtHR decided that there was no violation of article 8 due to the expulsion to Nigeria of an immigrant without regular residence that was married to a Norwegian national.

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92 Rodríguez da Silva v. The Netherlands, cit., para. 42.
93 Ibid, para. 40, 43.
94 Ibid, para. 44.
Both were parents of a child that was born in Norway. Among other issues, the Court stated that the ties in Norway of the applicant were not quite strong for having lived there just under five years, and because he also had relatives in his home country. In turn, the Court has contraddictorily asserted that his wife would have no trouble settling in Nigeria for having lived a while in another African country (South Africa). It has not considered either the ties of their child, a Norway national. Therefore, without questioning the generic argument put forward by the sending country (the economic welfare of the host society), the Court has decided to give priority to the “right” of states to control and punish irregular migration, rather than protect the right to family life of applicants, including the right of the child to not be separated from one parent.

Based on the arguments that have led to these decisions, it seems appropriate to make some additional comments. First, it is clear that in both cases the ECtHR has expressed a negative opinion of the fact that a person is in an irregular migration status, particularly when the person can not demonstrate that he/she has made some efforts to regularize his residency in that country. According to the Court, in these circumstances there would be no right to stay, although exceptionally this could change if there were other fundamental rights at stake (family life, physical integrity, life). But while the decision can lean either way depending on the circumstances of each case, the Court has maintained such a broad discretionary coverage that sometimes can affect basic rights, as in the Omoregie v. Norway case. Moreover, it is striking that the Court has criticized the absence of actions intended to obtain a legal residence, without considering the very limited and complex possibilities to achieve the regularization of migration status in the vast majority of the Council of Europe member states.

In any case, it is important the debate that the Court has reflected (albeit briefly and ambiguously) in relation to either balance or conflict between the general interests and individual rights. That is, the equilibrium between the right to family life and children’s rights and the reasons given by the state to regulate, control and punish irregular migration. In the field of migration policies it is very common to find multiple individual decisions (e.g. deportation) made on the basis of arguments such as “public order”, “national security”, the “general interest”, “welfare”, etc. In many of these occasions, it is possible to identify a general lack of evidence aimed at effectively demonstrating the relationship between the chosen medium

95 Application no. 265/07, Judgement 31 July 2008, para. 53–68.
(deportation) and the goal invoked (e.g. general interest), which makes the resolution unreasonable and illegitimate. In Rodriguez Da Silva, the Court has relied, as it should be, on the deprivation of rights in order to justify why the public interest had to be shelved. Similarly, it could have also deepened its reasoning – following the jurisprudence on the principle of reasonableness – based on the need to examine the link between these general issues and the facts alleged in each case. The absence of this evaluation may impact negatively, as in Omorogie, in the recognition and realization of fundamental rights.

In Liu and Liu v. Russia, the Court dismissed the state’s allegation about “national security risk” for justifying the deportation of the applicant for irregular residence. The claimant was married to a Russian national, and both had two children that were born there. According to the Court, the violation of article 8 had been produced through the absence of strict review by an independent authority (the judiciary, in the case) on the arguments provided by the Executive. That is, the lack of essential due process safeguards in order to prevent an arbitrary interference on family life. Shortly thereafter, the Court reiterated this view in CG and others v. Bulgaria, which, in turn, also questioned the broad assertion that had been given by the state to the notion of “national security”.

Nonetheless, in the Y. v. Russia case, the ECtHR prioritized the state’s interest in deporting a person without a residence permit, who was invoking his right to family life (Mr. Y was a Chinese national, and his wife, a Russian national). The Court noted, as on previous occasions, that when it comes to issues related to immigration, article 8 cannot be interpreted as meaning that spouses have the right to choose the country where they want to inhabit. However, this argument forgets two important elements. First, that one spouse possesses the nationality of the state where they live (Russia, in this case) and therefore, it is reasonable to argue that they would have a right (not absolute) to live as a couple in one of these countries. And among both options, it would be reasonable to think that the priority would probably be the one where they had met and got married (Mr. Y had travelled repeatedly to Russia, while his wife had not been to China). Furthermore, if China followed the same way of reasoning of the Court, and then did not grant Mr. Y’s

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96 Application no. 42086/05, Judgement 6 December 2007.
97 Application no. 1365/07, Judgement 24 July 2008.
98 Application no. 20113/07, Judgement 4 December 2008.
99 Ibid, para. 104.
wife the residence, then the couple would not have a place to live together as a family.

Secondly, and as a consequence of previous point, the Court would be endorsing an immigration breach, or rather, lack of residence permit would be sufficient argument to warrant the deportation decision taken by the state (in the case, there was no irregular entry or other type of infringement, because Mr. Y had applied for asylum, which was not granted in Russia, and had got married during those procedures). In my opinion, the international standards that require proportionality and reasonableness (among the reasons given and the decision to adopt) have not been properly taken into account by the ECtHR, although those standards derive from its own jurisprudence. Thus is set, or rather ratified, a precedent that not only is substantially limiting, but also weakly substantiated, legitimating a wide states’ discretion to either deny residency or expel migrants in a way that the right to family life may be severely affected.

Considering these precedents, it is critical to develop litigation strategies to improve the existing standard before the European Court of Human Right regarding the right to family life of migrants, regardless of their migration status.

III. Closing Remarks. The ECtHR Jurisprudence and Litigation Challenges

Throughout these pages we have tried to provide a rough idea of the key criteria set by the European Court of Human Rights in its bulky case on the implementation of human rights guaranteed by the ECHR in respect of migrants, with particular emphasis on those in an irregular migratory situation. A considerable number of judgements have not been incorporated into this analysis, and those that made it have been treated only briefly, intending just to be able to unite at least the most important elements that come from these court decisions. As has been noted, the issue of irregular migration is not taken into account by the Court as a factor which can influence the degree of protection of certain fundamental rights (right to physical integrity, the prohibition of collective expulsion, the right to an effective remedy, right to health). In return, migration conditions may be decisive either for the lack of recognition of a right (due process safeguards), for restricting its extent (family life, right to liberty) or for ensuring their protection (unaccompanied child).
In these cases, such as those referring to all migrants, the European Court has continuously passed between issues associated with what the Court has called the public interest and individual rights of migrant men and women. However, we believe that at times these two elements can be in collision and as in many other human rights issues where this happens, it seems evident that it leads to an absence of deeper analysis of the implications (causes and consequences) of migration movements. The nineteenth-century reference to certain principles on the sovereign right of a nation-state should give rise, increasingly, to a more consistent argument not only with the issue of sovereignty and migration at present, but also to the progressiveness of international human rights. In contrast, in several cases and for different rights, the Court’s action has firmly set limits on state power against the rights of persons, both national and migrants, regular and irregular residents.

This ambivalent perspective from the principal human rights body at the European level regarding the rights of irregular migrants cannot be dissociated from the complexities and challenges surrounding the issue of immigration. Migratory flows to Europe mean a challenge to their states. Also, they question their society, they challenge the basis for their rule of law and the strength and breadth of its values, principles and guarantees, particularly in relation to the fundamental and universal rights of individuals. As in other regions, this scenario calls for rethinking the causes of these migration processes, specifically the living conditions in different countries, inequalities between and within them, the responsibility of the more economically developed countries regarding poverty, conflicts and other problems that constantly affect others. It also requires reviewing the policies imposed at the international level on those who have taken advantage of global economic systems and its consequences. Migration remains one of the consequences of this set of factors.

Regarding the impact of this phenomenon in the destination countries, it is clear that the deepening of the mechanisms of protecting human rights is a key to successfully meeting the changes occurring in these societies. The full recognition of the human rights of migrants, particularly those without legal residency, is a prerequisite for this. In order to achieve this goal, litigation before national and regional courts might be a key tool for improving the level of migrant rights protection in European countries. Within this challenge, improving the ECtHR jurisprudence on these matters would be critical in order to advocate for policy and legislative reform at both national and regional level. For these reasons, and regardless of the obstacles and constraints that have been evidenced through the
European Court judgements, it is definitively worth developing initiatives aimed at moving forward the approaches of the Court. In this regard, this paper will end with a set of brief notes on issues to bear in mind for discussion, designing, and implementing litigation strategies.

III.1. Brief Notes on Litigation Strategies

A main issue to discuss as regards human rights litigation, and particularly on strategic litigation, is on the goals of each case. Therefore, a set of possibilities could be debated in a case-by-case basis, such as the following:

- Is it just about gaining the case, that is, to achieve a positive decision?
- Is the case meant to obtain some kind of reparation or compensation for the victim of human rights deprivation? (e.g., health treatment and monetary compensation to a migrant mistreated in a detention centre).
- Does the case seek to impact public policies? (For instance, a case intended to influence legislative reform on deportation processes, in order to ensure free legal aid to everyone, or provision of guardian for unaccompanied children).
- Opening policy debates and discussion with government.
- Litigation as part of a broader strategy (advocacy before the parliament; social mobilization; promoting rights campaigns).
- Individual or collective litigation (e.g., class actions aimed at questioning detention conditions in migration detention centres).

In addition, some other issues should be fully discussed, both for planning a long term litigation agenda and for preparing each case to be submitted to the Court.

- Which are the current and potential allies?
  - NGOs (both in Africa and Europe)
  - Actors authorized access to detention centres
  - International UN and Regional Agencies
  - Trade Unions
  - Free attorneys on migration issues
• Faith-based associations authorities
• Media
• Allies for gathering evidence
  i) NGO’s in countries of origin and destination
  ii) Experts as allies (e.g., medical evidence)

Discussions on strategic human rights litigation should consider the relevance of utilizing litigation as part of broader strategies meant to protect and advocate for human rights fulfilment (CELS, 2008).

• If litigation is within broader strategies, which complementary actions could be developed in each case?
  • Media
  • Advocacy meetings
  • Social support, demonstrations, etc.
  • Usage of both comparative law and Jurisprudence
  • *Amicus Curiae*

• Discussion on strengths and weaknesses in the possible judicial jurisdiction where the case should be submitted
  • Study of existing jurisprudence
  • Probabilities at national and international levels
  • Risks and opportunities

As we have analyzed through this paper, litigation on migrant rights within migration control policies before the European Court of Human Rights may involve a wide set of challenges. All in all, despite some restrictive positions of the Court which have been highlighted, there are important precedents (both in this matter and in others), as well as relevant decisions that have been taken by other Courts, that might be extremely useful in order to progressively improve these standards. Ultimately, human rights must be protected and defended by all the legal existing mechanisms and before any democratic institution – including judicial – capable and obliged to fulfil them. Universality of human rights is at stake.
Chapter 4

The Role of Strategic Litigation in Protecting the Rights of Migrants – A Philadelphia Perspective

Ayodele Gansallo

Introduction

Over the last decade, the number of migrants to the United States has increased to a record 37.9 million people, approximately 12 percent of the US population. The greatest growth in numbers has taken place since 1990. Of this number, about 1.4 million are native Africans, about 3.7 percent of all immigrants. The

1 Having initially qualified and worked as a solicitor in England, Ms. Gansallo is also admitted as an attorney with the New York Bar. She has been working on immigration and nationality issues with non-profit organizations both here and in the UK for over fifteen years. She is currently the senior staff attorney at the Hebrew Immigrant Aid Society and Council Migration Service of Philadelphia (HIAS and Council), a non-profit organization established more than 125 years ago primarily to resettle eastern European Jews to the United States. Today, HIAS and Council provides representation in all non-business related immigration issues. Ms. Gansallo joined the organization in 1998 following completion of her LLM at Temple University’s Beasley School of Law. Ms. Gansallo’s practice focuses primarily on complex litigation before U.S. Immigration Courts, the Board of Immigration Appeals and the U.S. Court of Appeal for the Third Circuit. In addition, she provides mentorship and training on immigration issues to pro bono attorneys and community groups. Ms. Gansallo is also a member of the Mayor’s Commission on African and Caribbean Immigrant Affairs.


3 Center for Immigration Studies, 2007 report.


5 Ibid.
countries of origin for these migrants are principally Nigeria, Egypt and Ethiopia.6 Forty (40) percent of Africans who obtained lawful permanent residence did so as immediate relatives of US citizens,7 either as spouses, children, parents or siblings. One third of the total number entering the US as a result of grants of humanitarian relief – refugees and asylees – originated from Africa,8 principally from Somalia, Burundi, Liberia, Ethiopia and Eritrea.9 After many years of favoring refugees from the former Soviet States, the U.S. changed its policy during the 1990s to allow a greater number of nationals from other parts of the world to enter. Africans have benefited from this change, which has resulted in an increase in infl ow from 1,990 people in 1987 to 18,979 by 2001.10

Undoubtedly, migrants from any region face many challenges as they adapt to their new home, acculturation, language and education barriers to name a few. However, refugees without an anchor relative in the country of destination can experience additional hurdles that may hinder their ability to adapt to their new environment. This may include difficulties dealing with traumas arising from the atrocities that led them to seek refuge in the first place.

In relative terms, the migration of Africans to the United States has been a small percentage of the total number of people who have and continue to migrate to these shores. However, it is important to note that they typically comprise a larger percentage of the educated immigrant population11 and therefore theoretically, are more prepared to enter the labor force. Protecting the rights of these and all migrants provides an important challenge.

Often discussions on the rights of migrants in many societies – whether they are documented or otherwise – evoke strong feelings on all sides of the debate. Many of the negative feelings engendered may be as a result of misinformation – migrants usurp the local labor force through artificially deflated wages; they don’t

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6 Ibid.
7 Id.
8 Id.
9 Id.
10 Congressional Research Service report for Congress, Refugee Admissions and Resettlement Policy, Jan.22, 2002 (CRS report)
11 MPI report, supra
pay taxes\textsuperscript{12} or contribute to the fabric of the societies in which they live; migrants are responsible for the majority of crimes within communities.\textsuperscript{13} While empirical studies provide information that dispels these ideas, for some, the negative stereotyping of migrants is so entrenched that accurate information is viewed with suspicion. Within this climate, the role of those who seek to protect the rights of migrants can often be an uphill battle.

Against this backdrop, there is also the need to operate within the framework of a legal system which, for a number of years, has consistently eroded the rights of migrants, even to the point of denying them the right to competent counsel to represent them in defensive immigration proceedings.\textsuperscript{14} Identifying opportunities to challenge regulations incompatible with statute or the erroneous interpretation of statutes becomes an important task for all lawyers interested in the protection and furtherance of justice.

This paper seeks to highlight one particular model for strategic litigation adopted by the Hebrew Immigrant Aid Society and Council Migration Service of Philadelphia, a non-profit organization operating in Philadelphia, USA, and successfully implemented over the last four years as a means of protecting the rights of migrants nationally. While no claim is made to a perfect model that can easily be replicated, it is hoped that, through highlighting both the positives and negatives of this particular approach, there may be aspects that other organizations will consider worthy of duplication within their own legal systems.

\textsuperscript{12} A report by the National Research Council argued that migrants collectively pay more in taxes than they consume in public services and benefits. \textit{The New Americans: Economic, Demographic, and Fiscal Effects of Immigration}, 1997.


\textsuperscript{14} See \textit{Matter of Compaen}, 24 I&N Dec. 710 (A.G. 2009). The Attorney General, Michael Mukasey, overruled a longstanding decision in \textit{Matter of Lozada}, 19 I&N Dec. 637 (BIA 1988), recognizing the right of immigrants to be represented by competent counsel. In reaching his decision, Mukasey held that the Sixth Amendment right to counsel guaranteed under the U.S. Constitution did not exist for migrants in deportation proceedings because they were civil rather than criminal in nature. He did recognize a statutory privilege for migrants to retain counsel of their choosing, but also noted that proceedings could not be reopened in the event that that attorney proved to be incompetent, fraudulent or ineffective in the representation provided.
The History of HIAS and Council

The HIAS and Council was established in the late 1800s in order to facilitate the resettlement of Jews seeking to escape the persecution they were suffering in Eastern Europe. For over a century, the work of the organization focused exclusively on providing a way for this vulnerable population to flee the horrors they experienced purely because of their ethnic origin. Over time, whole families were resettled throughout the U.S. and more particularly in the Philadelphia region. Later in the 1980s through 1990s, there was a strong focus on assisting Jews who were finally able to leave the former Soviet Union after many years of being denied exit visas, resulting in communities of Russian-speaking migrants inhabiting pockets of central and suburban Philadelphia.

Resettlement of Jews remained the focus of the organization, with a period from approximately 1979–1985 including resettlement of South East Asians to the region until the mid-1990s which ushered in an era of significant reductions in the number of those seeking to resettle in America. Paradoxically, this decline provided an opportunity for reflection on the future of the organization and recognition that other communities around the world were sharing the Jewish experience of persecution, ethnic cleansing and intolerance and therefore required assistance in seeking humanitarian relief that would allow them to come to the U.S. Remaining blinkered to such atrocities as the genocide in Rwanda, brutal and horrific wars in Sierra Leone, Liberia and the Democratic Republic of Congo, political instability in Latin America, was not an option for an organization dedicated to providing protection to all in need, regardless of country of origin, ethnic identity or religious culture.

15 HIAS and Council as an organization exists in other states and countries. While there is no formal link between the various organizations, HIAS and Council has worked collaboratively with HIAS New York for many years on specific issues.
18 U.S. policy on refugees encouraged this migration, permitting close to 37,000 people from Eastern Europe to settle in the U.S. in 1999 as compared to just over 13,000 Africans for the same period. See CRS report, supra.
19 Today, HIAS and Council focuses its resettlement program on Burmese refugees from refugees camps in Thailand and Malaysia.
20 Id.
affiliation. HIAS and Council embraced the Jewish adage of “Welcoming the Stranger” and opened its doors to as many people who required its services as its resources would allow, with the objective of assisting them to navigate the complex maze that has become the immigration system in the U.S., whether it is to reunite family members or to assist in applications for humanitarian relief.21

A Brief History of Immigration Law in the U.S.

The history of immigration in the United States is a long and complex one. Only the briefest of retelling will be provided here. The open door policy that existed for more than one hundred years since independence in 1776 was eroded by the first legislation seeking to restrict those who could enter and remain.22 Subsequent restrictive legislation ensued until 1952 when the Immigration and Nationality Act (INA) entered into law, providing the basic structure for present day immigration law, including provisions for family resettlement23. In 1980, the U.S., as a signatory to the 1967 Protocol Relating to the Status of Refugees24 implemented the Refugee Act25 in an effort to comply with its obligations to this vulnerable group. The statute was designed to “establish a coherent and comprehensive refugee policy and to create a systematic and flexible procedure for the admission and resettlement of refugees.”26

21 U.S. immigration law offers an opportunity for highly skilled workers to enter in order to take up a temporary position with a company based in the U.S. or to apply for permanent residency based on special skills not readily available in the American labor force. See Immigration and Nationality Act 1952 (INA) Public Law 82-414, 66 Stat. 163, §101(a)(15), 8 U.S.C. §1101(a), INA§203(b), 8 U.S.C. §1153(b). However, as a non-profit organization, HIAS is unable to provide representation in these types of cases, save in rare instances. This paper will not discuss employment based immigration.

22 The Immigration Act of 1882 was the first general federal immigration law; the Chinese Exclusion Act of 1882 excluded those from China; The Immigration Act of 1907 established grounds of exclusion.


Laws, ostensibly introduced to control potential terrorists and illegal immigrants, were introduced in 1996.\textsuperscript{27} In fact, they have operated to harshly affect long-term permanent residents and their American citizen relatives. At the same time, they have resulted in considerable expansion of unreviewable and extraordinary powers of border agents to deny admission and summarily remove certain persons suspected of breaching immigration laws.\textsuperscript{28} Examples of this include the deportation of those convicted of relatively minor crimes;\textsuperscript{29} the reduction in availability of legal challenges or opportunity to seek judicial review of decisions;\textsuperscript{30} and expanded the list of grounds that would render a person inadmissible.\textsuperscript{31} At the same time, the rights of immigrants to access certain welfare benefits were seriously curtailed,\textsuperscript{32} while low income families unable to meet certain financial limits for sponsorship of family members they wanted to join them, experienced additional hurdles to reunification.\textsuperscript{33} Victims of domestic violence and trafficking were provided with avenues to legalize their immigration status.\textsuperscript{34}

Post September 11, 2001 legislation continued the erosion of immigrant rights with legislation that expanded the definition of a terrorist, increased periods of detention without charge and created a system for background security checks and identity verification of all those applying for any immigration benefits.\textsuperscript{35} The

\textsuperscript{28} INA §235, 8 U.S.C. §1225.
\textsuperscript{29} INA §237, 8 U.S.C. §1227. See also INA §101(a)(43), 8 U.S.C. §1101(a)(3) which provides a list of crimes defined as aggravated felonies for the purpose of immigration law and which would render a person convicted of such crimes deportable.
\textsuperscript{30} INA §242, 8U.S.C. §1152.
\textsuperscript{31} INA §212, 8 U.S.C. §1182.
\textsuperscript{33} INA §213A, 8 U.S.C. §1183a.
\textsuperscript{34} Victims of Trafficking and Violence Protection Act, 2000, PL 106-386, 114 Stat. 1464 (Oct. 28 2000).
REAL ID Act of 2005\textsuperscript{36} imposed further restrictions and requirements on those seeking humanitarian relief while also eliminating *habeas, mandamus* and other district court actions to challenge detention or deportation.\textsuperscript{37}

**The Need for Strategic Litigation**

Against this backdrop of continual erosion of rights, it became clear that to provide effective representation to those who sought legal assistance from HIAS and Council it would be necessary to utilize the judicial system. For many years, HIAS and Council concentrated its work on administrative applications with the immigration agencies responsible for their adjudication, and representing clients in defensive applications in the administrative courts. However, over time, the Immigration Service was taking an inordinate amount of time to decide applications, leaving clients in limbo as to the status of their cases. A growing number of clients were losing federal welfare benefits to which they were entitled but that required them to naturalize and become U.S. citizens for them to continue to receive the money; unable to travel to visit sick relatives abroad because, without a resolution of their case, there was no guarantee they would be permitted to re-enter the country; some were prevented from making long-term plans because of an uncertain future that was dependent on the decision yet to be made regarding their immigration status.

At the same time, clients who sought asylum at the border were being held at detention centers or prisons until the conclusion of their applications for humanitarian relief\textsuperscript{38} which in some cases could take several years, all the while leaving


\textsuperscript{38} Human Rights First, in a recent report, noted a doubling of the number of immigrants detained from 202,000 in 2002 to an estimated population of 442,941 in 2009. See *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, available at http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sumdoc.pdf. A memorandum dated November 6, 2007, from Immigration and Customs Enforcement, the section of the Department of Homeland Security with responsibility for enforcing the immigration laws, set out the criteria under which parole applications would be adjudicated for those arriving at the border who are subject to expedited removal but have expressed a fear of persecution or intent to apply for asylum within the terms of INA §235(b)(1)(A); 8 U.S.C. 1225(b)(1)(A). The effect of the memo was to make release from detention during the asylum consideration process even less likely,
them puzzled as to why they were being treated like criminals when in fact they had simply had the audacity to seek protection. Add to this an administrative law system where immigration judges often allow their personal biases to influence their decisions and, in some cases, their very treatment of the respondents before them,39 coupled with an inadequate body of jurisprudence from an administrative appeals court which in too many instances endorses poorly researched and written decisions of immigration judges who are overburdened within a system which is rapidly breaking down,40 it became clear that effective representation would in some cases require the intervention of federal and district court judges through petitions for review, *mandamus* and class action lawsuits.

**Practical Considerations**

Having made this determination, there were many hurdles to be overcome in order to pursue this line of work, not least of which related to financial resources. As a relatively small non-governmental public interest organization representing low income clients yet recognizing the need to enter the fray, the first concern became how to effectively achieve our goals using resources we do not have. Within the HIAS and Council model, the answer has been to collaborate with attorneys in large firms who provide their services on a pro bono basis. HIAS and Council is fortunate to work within a legal community that values and respects the opportunity to provide pro bono services to low income clients who are just as deserving of quality representation. Attorneys are encouraged to ‘give back’ in this important way.

An important component in this partnership is the provision of training to those interested in representing HIAS and Council clients and who typically have no

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39 See *Cham v. Attorney Gen. of the U.S.*, 445 F.3d 683 (3d Cir. 2006), finding IJ’s conduct violated due process and deprived applicant of a fair hearing; *Shah v. Attorney General of the U.S.*, 446 F.3d 429, 437-438 (3d Cir. 2006), reversing credibility findings of judge because it appeared he was looking for reasons to deny case; *Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005), judges remarks were caustic and without substance.

prior experience of conducting an immigration case. Immigration cases attract healthy numbers of attorneys interested in taking representing our clients. In addition, considerable resources are spent in providing on-going mentorship throughout the application process. Yet, there is benefit to HIAS and Council as many more clients in need are provided with representation. Immigration Judges also appreciate the fact that pro bono attorneys are willing to assist clients because this affords the court with an opportunity to obtain all relevant facts before rendering a decision that may or may not result in a person being returned to a country where their life may be in danger.

As a result of this collaborative model, HIAS and Council has been able to engage in strategic impact litigation in order to protect the rights of migrants who may or may not be our clients, through the avenue of class action law suits in district courts, petitions for review before the United States Court of Appeals for the Third Circuit and seeking legal challenges of decisions of immigration judges before the BIA.

Often, knowledge of many different legal disciplines is required in order to engage in these types of actions which are not within the experience of our organization. For instance, class actions require the knowledge of very specific rules, including knowledge of social security law if the agency being sued administers this benefit, etc; knowledge of the Federal Rules of Procedure which would not readily be at our grasp because the bulk of our work is not focused on this area; District Court rules applicable to actions in mandamus; or a detailed understanding of Civil Rights laws. Working in partnership with attorneys with the relevant experience and knowledge you lack, a formidable team can be forged.

41 Having said that, the HIAS experience has been that there is little attrition of attorneys on our pro bono list, other than when there is a change in employment and philosophy from one firm to another. This way, attorneys working with us build a bank of knowledge which enables them to handle more complex cases with limited supervision.

42 The Executive Office for Immigration Review, the agency responsible for immigration courts, judges and the Board of Immigration Appeals or BIA, issued a memorandum on March 10, 2008, providing guidelines to immigration judges on what actions they can take to facilitate pro bono legal services within their courts. The document, Operating Policies and Procedures Memorandum 08-01: Guidelines for facilitating Pro Bono Legal Services, can be found at http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf
As an example, HIAS and Council was recently involved in a high profile class action case which required seven different lawyers acting together to sue the immigration service, Federal Bureau of Investigation (FBI) and the Social Security Administration Agency on behalf of migrants nationally who had been denied social security benefits to which they were entitled because of government delays in processing applications for green cards and citizenship. See Kaplan v. Chertoff, 481 F.Supp. 2d 370 (E.D. Pa. 2007).

The delays in adjudication were as a result of huge backlogs in completing background security checks\(^{43}\) that are now required to be conducted on all applicants for immigration benefits,\(^{44}\) resulting in some people waiting over five years for adjudication of their applications. This delay severely impacted a vulnerable group of refugees and asylees who Congress had mandated were entitled to access certain benefits for a maximum period of seven years\(^{45}\) on the understanding that they would have become U.S. citizens within this time and therefore entitled to receive the benefits indefinitely.\(^{46}\) The delays with completing the background security checks meant that many exhausted their seven years without naturalizing.

\(^{43}\) By July 2006, the Citizenship and Immigration Service or CIS which is the government agency responsible for processing and adjudicating applications for naturalization, publicly acknowledged a “gross backlog” of 1.1 million unprocessed naturalization applications with 140,000 under CIS “control,” and the other 960,000 not within its “control,” the majority of the latter constituting applications which are pending before the FBI, described as “pending law enforcement security checks.” CIS News Release, Sept. 15, 2006, available at: http://www.uscis.gov/graphics/publicaffairs/newsrels/N400Bklg091506NR.pdf.

\(^{44}\) Immigration Act of 1990 (P.L. 101-649), Sec. 503 (b).


\(^{46}\) “The 5-year exception in the welfare law was designed to allow refugees and asylees, who often arrive in the U.S. with few possessions, time to adjust to life here. However, because of delays in adjusting to permanent resident status, mandatory residency requirements before applying for citizenship, and recent increases in waiting times in the naturalization process, under the 5-year eligibility period, many would become ineligible for welfare benefits despite their attempting to naturalize at their earliest opportunity. By extending the exception to allow these groups 7 instead of 5 years of eligibility, these noncitizens would be given more time to naturalize while continuing to receive welfare benefits without interruption.” H.R. Report No.149, 105th Cong., 1st Sess. 1182 (1997) (emphasis added).
and, in some cases, without even becoming permanent residents, a prerequisite to naturalization.

Several contacts with the Immigration Service to alert them to the plight of our clients were to no avail. Even the fact that a double amputee who clearly could not work and would be required to live on subsistence income once his benefits were terminated did not move the Service to act, leaving no option but to pursue legal avenues to protect the rights of our client.

One of the first issues to be resolved when undergoing strategic litigation is the question “is there a suitable plaintiff with locus standi, willing and able to represent the interest of the many that comprise the defined class?” When legal action is being brought to defend the rights of the undocumented, it is important to protect them from the potential of being placed in deportation proceedings. It is easy to comprehend why some would not be willing to participate as named plaintiffs. However, it is also important to recognize that even those migrants who do have legal status may be reluctant to use the courts to defend their rights. Many are afraid of government retaliation if they participate in legal action which is essentially critical of how the government has handled their case. Whether clients are

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47 An additional question arises – are there substitute clients who are also willing to be named in the complaint in the event that the government approves an application that previously was static but miraculously gains momentum in the attempt to moot out the client’s claim before a class is certified and thereby thwart attempts to establish jurisdiction?

48 For example, HIAS, along with the ACLU of PA represented a couple denied a marriage license because a local city ordinance required all applicants to provide documentation that they had legal status in the U.S. However, the husband to be, a citizen of Mexico, could not comply with this requirement because he had already been issued with an order of deportation and was therefore required to leave the U.S. Despite this the couple, who had a young child, wanted to marry in their local church before he left. In many instances, the presence of the undocumented migrant would not be known to the Immigration Service and therefore careful thought would be given to bringing legal action where potential exposure of the non-U.S. citizen could result in arrest and placement into removal proceedings. However, since there were no additional immigration consequences of coming out of the shadows this case presented excellent facts with which to mount a constitutional challenge. See *Buck v. Stankovic*, 485 F. Supp. 2d 576. (M.D. PA.2007).

49 In *Kaplan*, HIAS had a number of clients with *locus*. However, few were willing to become named plaintiffs, preferring to lose their benefits and wait for other suitable
undocumented or have regularized their immigration status, in many ways, they remain a vulnerable population.

An important part of the process is to first listen and understand the concerns of potential clients and acknowledge that some of their concerns may be valid but to also admit that, while the government’s response is unknown, there is a possibility of retaliation, most likely in creating obstacles by requiring additional documents to substantiate a claim to an immigration benefit that might otherwise have been ignored.\footnote{Anecdotal stories abound of the Service conducting more thorough reviews of files that had previously been ready for adjudication. However, following a remand of the case to the Service after a successful action in *mandamus* to compel a long-awaited decision, with specific instructions to adjudicate an application, new requests for further evidence have been known to be issued, some seeking information regarding issues that may have occurred many years prior.} Being honest with clients, explaining that there are inherent risks involved in pursuing litigation that cannot be quantified, is an important part of the process to ensure that clients are fully aware of what they are agreeing to undertake and ensures that informed consent has been given to pursue an action in the name of a client brave enough to agree to be a named plaintiff. Undoubtedly, many will decline to participate. But the ones who do can feel proud that by their decisions, they are speaking not only for themselves, but also for the tens of thousands like them who for one reason or another, are unable to speak openly.

Of course as part of discussions with clients, alternative options – if available – should be explored with the client so they can decide the way forward. In many instances there will be no alternative to litigation. Where possible, attempts to negotiate are made first but sometimes, the pathway leads inevitably towards the courts. When this is the case, one must not be afraid to take on the challenge, particularly when your arguments are supported by the law.

While the vehicle of class action lawsuits by their very nature may protect the rights of many migrants, individual cases carefully identified because of their potential to achieve precedential decision status, and developed in so as to protect legal arguments that will be raised on appeal, may achieve a similar effect either nationally in the case of decisions by the Board of Immigration Appeals or within a particular circuit in the case of decisions handed down by a United States Court of Appeal. Here, HIAS and Council has found that a concerted effort to develop
allies is beneficial to increase the likelihood of a favorable decision but also to highlight the fact that organizations other than our own are interested in the legal arguments being raised before the appellate body.

Our efforts at collaboration in this sphere have included inviting others to write amicus briefs on particular issues within a case. HIAS and Council is currently working with the UNHCR on an asylum case that will hopefully push the boundaries of the definition of membership in a social group. In 2007, the United States Court of Appeal for the Third Circuit issued a precedential decision in this case and remanded it back to the administrative appellate court with clear instructions on issues to be reviewed. Rather than comply, the Board of Immigration Appeals decided that it did not need to consider these issues because it was now able to deny Respondent’s case on other grounds that it had introduced into the process for considering social group asylum cases since the appeal court for the third circuit had handed down its earlier decision.

For a number of reasons, this case presents important legal issues that will impact many applicants within the jurisdiction of the third circuit and therefore the legal challenge has continued with a second petition for review being filed with the Court of Appeals. The amicus filed by the UNHCR clarifies that, under its guidelines the “protected characteristics” and “social perception” approaches to particular social group considerations are alternate approaches and not dual requirements as asserted by the BIA. Another precedential decision is expected some time in 2010.

51 Valdiviezo-Galdamez v. Atty General, 502 F.3d 285(3d Cir. 2007).
52 See Matter of S-E-G, 24 I&N Dec. 579, 584 (BIA 2008) which imposes a requirement that it be possible to accurately describe a proposed social group such that it can be recognized within the society in question as a discrete class of persons, and its companion case, Matter of E-A-G, 24 I&N Dec. 591 (BIA 2008), requiring that a particular social group possess the social visibility that would allow others to identify its members as part of such a group.
53 Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.
Advantages of Using the Media

An important strategy to be employed, both in the class action context and also in selected immigration cases is the media. Identifying sympathetic cases to bring to public attention with the specific intent of garnering support can be an effective way to move a case along. Two examples of how HIAS and Council used the media are offered. In both instances, the focus was on the most egregious actions of the government. The first is the case of a woman from the DR Congo who was held in immigration detention for almost four years while her case was being litigated in immigration and Federal courts, despite several attempts to have her released on parole. She was married to a U.S. citizen and so was clearly not a flight risk and therefore should have been released, particularly since she was trying to manage health issues without adequate treatment within the prison where she was held. What was most sympathetic about her case was that she personally had suffered many atrocities during the war in the DR Congo, having been repeatedly raped and forced to watch members of her family murdered by rebel soldiers. Her prolonged detention in a prison facility when she had committed no crime served only to become a re-traumatizing experience for her.

Several requests for parole to the Deportation District Director of the Immigration Service were not successful in obtaining her release and she remained in detention until the completion of her case. Therefore, a decision was made to highlight her case, not because we believed it would change the director’s decision on detention, but understanding that bringing her case to the public arena would shed light on the practices of the government in its treatment of immigration detainees.

54 Of course, use of the media may also pose disadvantages to a case. A balancing test of pros and cons should be identified at the outset.

55 See Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003), where the court issued a precedential decision recognizing that rape can constitute torture and that applications for asylum and protection under the Convention Against Torture require different analysis by an immigration judge.

56 Interestingly, following media interest in this case, articles began to appear documenting the atrocities occurring in the DRC, essentially corroborating Ms. Zubeda’s description of what was happening in her country. While it is impossible to know whether the work of HIAS and Council in highlighting this one particular case generated interest in the wider conflict in the region, the resulting publicity and increased awareness furthered our cause of educating the public on the plight of migrants seeking protection.
This raises another aspect of strategic litigation – determine at the outset - where possible – what the goals are of the particular action taken, in other words, how will you define success? Must it encompass winning the relief sought, or is there room to redefine success so that exposing government misconduct would suffice? Would a negotiated settlement where the government promises to cease a specific violation be enough, particularly if there is a mechanism for monitoring that change and to reinstate legal action where there is a breach of that promise? What if success resulted in the deportation of the respondent but a policy change or precedent decision that positively affected many others resulted at the same time?

The second case where the media was used effectively was in the class action in Kaplan v. Chertoff, supra. Prominent newspapers around the country were interested in the case from the outset to outcome because of its impact on thousands of people around the country. There was also a clear understanding that this was a sympathetic and vulnerable group, caught up in government bureaucracy through no fault of their own. Bringing his case to the forefront resulted in ordinary members of the public becoming aware of what the government was doing in their name. With this knowledge, the public was now able to express its displeasure by pressuring local congressional representatives through letters, phone calls and meetings, urging them to intervene to rectify the injustice. This has ultimately led to legislative change extending benefits for this vulnerable population and procedural changes resulting in speedier processing of applications.

HIAS and Council continues to experiment with the use of media formats, including visuals which appear to be very attractive to the media. Given our limited resources, development of this area must be in collaboration with progressive law schools that recognize the importance of this medium as a way to protect the rights

57 This was the result obtained in the Kaplan case which ultimately did not require us to complete litigation. See Kaplan v. Chertoff, No. 06-5304 (E.D. Pa. Mar. 5, 2005), providing a copy of the stipulated order resolving the case and bringing litigation to an end.

58 Debeato v. Att’y General of the U.S., 505 F.3d 231 (3d Cir. 2007), where the court held jurisdiction existed to review a legal challenge to a reinstated removal order notwithstanding INA §241(a)(5) appeared to preclude jurisdiction. Ultimately the court determined there was no miscarriage of justice warranting a collateral attack on the original removal order.

of migrants. Most recently HIAS and Council has worked in conjunction with the Pennsylvania Visual Advocacy Program\textsuperscript{60} which developed a DVD subsequent to the conclusion of the \textit{Kaplan} case, highlighting the life and struggles of the lead plaintiff, both in the former Soviet Union and in the U.S. during the period he was required to survive after his government benefits had been terminated. The DVD assists in highlighting not only the work of HIAS and Council, but the very real effect it has on the life of our clients.

Visual media has been prepared for use in individual immigration cases to highlight how the implementation of immigration laws affects families and individuals.\textsuperscript{61} However, we have yet to determine the propriety of including a DVD as material to be entered into the record for consideration by either an immigration judge for a person in proceedings or to the Service for a person with an affirmative application.

\section*{Beyond Litigation – Next Steps}

In some instances, it will be clear from the outset that litigation alone is insufficient to achieve the goal of protecting the rights of migrants. Consideration should also be given to adopting a strategy that includes advocacy as an effective tool to be used simultaneously or subsequent to exhaustion of all legal avenues. This will often allow for grass roots community groups to become involved in taking responsibility for themselves.

A prime example of this is the Liberian community in the United States. Many have been here for nearly 20 years, seeking protection from the atrocities waged during the civil war that has ravaged that country. During that time, they have established stable lives for themselves and their families, even though they may have

\textsuperscript{60} The Program recently sought contributions from HIAS and Council to a video it was producing to explain the asylum application process in the U.S., highlighting specific pitfalls. The video will primarily be made available to people in Sudan.

\textsuperscript{61} A DVD was prepared to highlight the case of an ethnically Chinese family from Indonesia whose applications for asylum had been denied and were facing deportation. The DVD was made available to the Immigration Service in the hope that it would defer the removal of the family indefinitely. While there has been no specific statement from the Service, the removal of the family has yet to be effected.
only been granted temporary protected status (TPS) by the immigration service. Following the end of the civil war in 2003, the Liberian community has been wary of its fate. In many ways, it is impractical to expect them to return to a country that is struggling with rebuilding its infrastructure, maintaining law and order and also providing jobs for people to sustain themselves. It is also impractical to underestimate the value of remittances being sent to family members from those living and working here and what the loss of that income will do to a fledgling economy.

The most recent grant of TPS was set to sunset on March 31, 2009. Groups from around the country worked together to create a plan to lobby congressional representatives to make them aware of the presence of Liberians in their communities and what they would face were they to be forced to return home at this time. Advocacy included members of the community writing to their congressional representatives explaining the particular problems they would face if forced to return to Liberia; articles in local and national newspapers and DVDs of individuals providing visual explanations of how they would be impacted if the law granting TPS was allowed to sunset without renewal. This concerted effort, coordinated throughout the country, resulted in 15 congressional representatives agreeing to advocate on behalf of the Liberian community and resulted in a further one year extension of TPS. However, the work is not over; efforts continue to obtain a commitment to a legalization program that will ultimately grant permanent residency and bring with it peace of mind to many who see themselves living out the rest of their lives in a country they have already contributed to in so many ways during the many years they have lived here.

Conclusion

Protecting the rights of migrants can occur in varied ways, whether through using the legal system in collaboration with others, grass roots advocacy, championing legislative change or through the use of the media to highlight particular issues that should be brought to the attention of the wider public. The methods available do not remain static and deserve continual exploration. Ultimately, we must remain

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62 See INA § 244, 8 U.S.C. §1254a. TPS provides a temporary safe haven for nationals of particular countries that the Attorney General determines is either under armed conflict, has suffered a natural disaster or has some extraordinary temporary condition that prevents safe return of its citizens. There is an understanding that those granted TPS will eventually return to their country of origin or of last habitual residence.
focused on the needs of our constituency – migrants seeking to improve their lives and those of their family. To this end, we must be willing to adopt methods appropriate to the particular issue at hand.
Chapter 5

Applying International Human Rights Instruments on Migration Issues in Africa: An Analysis of the Decisions and Jurisprudence of African Domestic and Regional Tribunals

Femi Falana

Africa and the Migration Crisis

In order to meet the visa requirements of any of the countries in Europe and America, an applicant must show evidence of ownership of landed property and fat bank accounts. Through such monetization of entry requirements, those who have acquired their wealth through questionable means are allowed to enjoy their fundamental freedom of movement to western countries. Highly skilled professionals who are unable to meet the visa prerequisites are granted special dispensation through visa lottery and other special employment schemes.

However, thousands of young men and women from several African countries who have been denied visa on the ground of limited means find their way to Europe and America with all the risks involved. In the process, many are drowned in the Mediterranean Sea while those who survive the ordeal are arrested and detained in camps to await their deportation.

Instead of rising to the defense of the human rights of migrants who have been dislocated by an unjust international economic order, African states are usually apologetic in their engagement with the West. Hence, questionable agreements are signed between governments of European and African countries for the repatriation of migrants without due process.

1 Legal Practitioner and President West African Bar Association (WABA).
Migration in Africa

From time immemorial Africa has experienced migrations which were caused largely by wars, ecology and trade. In recent times, the anti-people economic policies prescribed for African states by the Bretton Wood Institutions have contributed to migratory movements in and outside the continent. It is estimated that 175 million people currently live outside their countries of origin. With respect to Africa it has been stated that "the number of labour migrants in Africa today constitutes one fifth of the global total and that by 2025, one in ten Africans will live and work outside their countries of origin."

The African Union has belatedly joined the human rights community in addressing the growing crisis of migration by drawing up a Migration Policy Framework for Africa. The aim of the policy framework is to provide the necessary guidelines and principles to assist governments and their Regional Economic Communities (RECs) in the formulation of their own national and regional migration policies as well as their implementation in accordance with their own priorities and resources. Even though it is not binding on African Union Member States the document is comprehensive and all embracing.

In view of the concerns of the African Union on the massive violations of the human rights of Africans who migrate to Europe the Euro–Africa ministerial conferences which took place in Morocco and Libya in 2006 produced the Joint Africa–European Union Declaration on Migration and Development. Among the basic objectives of the Declaration is the protection of human rights of all migrants, particularly of women and children, including through implementation and non-discriminatory application of core human rights instruments. Furthermore, the European Union and African States have also adopted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children to reinforce the United Nations Convention Against Transnational Organized Crime.

For close to four centuries western countries engaged in slave trade with attendant atrocities. An estimated over 50 million Africans were sold into slavery and taken

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to the Americas. Thereafter, imperialist nations partitioned the African continent to suit the agenda of continued economic exploitation which lasted for another century. In the violent annexation of territories some communities were forced to spread across two or three nation states. Even political independence close to 50 years ago, their economies have been tied to the apron string of imperialism. No doubt, with the crisis of global capitalism which has led to unprecedented job losses in Europe and America African migrants face the threat of xenophobic and racial attacks.

Since migration has become a component part of globalization, the United Nations and other regional bodies have drawn up conventions on migrants, refugees and displaced persons. In the interpretation of such conventions by municipal and international tribunals there has emerged a growing jurisprudence on migration.

**Migration and Slave Trade**

Although slavery has been abolished the descendants of slaves are still subjected to discriminatory practices in their lands of birth. It is particularly sad to note that slavery is still practice in Mauritania and Niger despite the ratification of anti-slavery conventions by both African states. In *Hadjhatou Mani Karaou v. The Republic of Niger* the ECOWAS Court exercised its human rights mandate to annul slavery in Niger Republic. In determining the case, the Court invoked the relevant provisions of the 1984 Universal Declaration of Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, 1926 Convention Relating to Slavery, 1956 Supplementary Convention Relating to Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery and 1981 African Charter on Human and Peoples’ Rights.

In *Malawi African Association & Ors. v. Mauritania*, The communication alleged that a majority of the Mauritanian population is composed of slaves. During its mission to Mauritania in June 1996 the African Commission’s delegation noted that it was still possible to find people considered as slaves in certain parts of the country. Though slavery had been abolished by Edict No 81-234 of 9 November1981 it was not followed by effective measures aimed at eradicating the practice.

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5 (Unreported) Suit No: ECW/CCJ/APP/ /08 of October 27, 2008.
6 (2000) AHRLR 149.
The Commission found that Mauritania had violated Articles 2, 4, 5, 69(2), 10(1), 11, 12(1), 14, 16(1) 18(1), 23(1) and 26 of the African Charter and recommended to the government to take diligent measures to replace the national identity documents of those Mauritanians who were taken away from their homes at the time of their expulsion and to take appropriate administrative measures for the effective enforcement of Ordinance No 81-234 of 9 November 1981 on the abolition of slavery.

Migration and Brain Drain

Following the adoption of the World Bank-imposed Structural Adjustment Programme in the 1980s the economies of most African states were completely destroyed. With the withdrawal of subsidies from social services coupled with retrenchment of workers and mass unemployment, an army of highly skilled professionals were forced to migrate to seek means of livelihood abroad.

No doubt, the huge revenue derived from remittance transfers to African countries has been said to exceed Official Development Assistance (ODA) and has important macro-economic effects by increasing total purchasing power of receiving economies the detrimental effects of brain drain on the socio-economic development of Africa cannot be quantified. Realizing the contribution of migration to the development of states, the African Union has drawn up plans to collaborate with African Diasporas. However, the treatment of skilled professionals seconded to African countries by some multilateral agencies has been subjected to discriminatory practices. In Professor Etim Moses Essien v. The Republic of Gambia & Ors, the Applicant sued the Defendants for economic exploitation as his salary and allowances were lower than his emoluments at the Commonwealth Secretariat where he was seconded to the University of The Gambia. The ECOWAS Court dismissed the action on the ground that the Applicant failed to adduce evidence of economic exploitation.

Migration and Extradition

In order to endow municipal courts with an effective instrument for the arrest and enforcement of penalties against offenders fleeing the territory of their state to seek shelter in the territory of another, the ECOWAS came up with the Convention

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7 (Unreported) Suit No: ECW/CCJ/APP/05/05 of 14 March 2007.
on Extradition⁸ and the Convention on Mutual Assistance in Criminal Matters⁹. But in spite of the clear provisions of both regional instruments a contingent of Nigeria Police Force stormed Cotonou, Benin Republic on September 25, 2004 to effect the arrest of a businessman, Alhaji Hammani Tidjani for alleged trans border armed robbery and allied offences.

The action filed in the ECOWAS Court challenging his arrest in Cotonou and subsequent detention and trial in Nigeria was dismissed on the ground that Article 6 of the African Charter on Human and Peoples’ Rights duly recognizes the right of states to prosecute criminal suspects for criminal offences and does not seek to interfere with that except where “the suspect has been arrested, detained and/or tried under a non-existing law, or a law made specifically after his arrest, or detention or for an offence which did not exist at the time of his arrest or detention”. ¹⁰

**Harassment of Refugees by African States**

The official harassment of refugees by some African states under the pretext of defending national security has been condemned by the African Commission. Thus, in *African Institute for Human Rights and Development (On behalf of Sierra Leonean Refugees in Guinea)* v. *Guinea* ¹¹ it was alleged by the Complainant that on 9 September 2000, the then Guinean President, Lansana Conte proclaimed over the national radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps. The broadcast incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of Article 2 of the African Charter.

As the peculiar situation on ground did not favour the exhaustion of domestic remedies, the communication was declared admission by the Commission. Although Guinea was not represented at the 35th Ordinary Session of the Commission, oral submissions from the Complainant and testimonies from witnesses were taken.

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⁸ (A/P1/8/94).
⁹ (A/P1/7/92).
Upon a consideration of the petition, the Commission appreciated the legitimate concern of the Guinean government in view of the threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the borders. However, the massive violations of the human rights of refugees outlined in the communication were said to constitute a flagrant violation of the provisions of the African Charter.

Accordingly, the Commission found the Republic of Guinea in violation of Articles 2, 4, 5, 12(5) and 14 of the African Charter on Human and Peoples Rights and Article 4 of the OAU Convention Governing the Specific Aspects of Refugees in Africa of 1969. It was therefore recommended that a Joint Commission of the Sierra Leonian and the Guinean governments be established to assess the losses by various victims with a view to compensating them.

**Mass Expulsion of Aliens**

From time to time African states adopt the practice of expelling aliens in order to prevent foreigners from taking over their economies. In the process, migrants are exposed to xenophobic attacks and other human rights violations. In spite of Article 12 of the African Charter, which prohibits the mass expulsion of aliens and the decisions of the African Commission on the matter, several African States have continued to remove migrants on account of national security or economic reasons.

*Union Interafricaine des Droits de l’Homme and others v. Angola*\(^{12}\). The communication was jointly filed by the *Union Interafricaine des Droits De l’homme (UIDH)*, *Fédération Internationale des Ligues des Droits de l’Homme (FIDH)*, *Rencontre Africaine des Droits de l’Homme (RADDHO)*, *Organisation Nationale de Droits de l’Homme au Sénégal (ONDH)*, and *Association Malienne des Droits de l’Homme v. Angola (AMDH)* on behalf of certain West African nations who were expelled from Angola in 1996. Before the mass deportation, there were complaints of acts of brutality committed against Senegalese, Malian, Gambian, Mauritanian and other nationals who lost their belongings in the process.

The communication, which was found admissible, alleged violations of Articles 2, 7(1) (9) 12(4) and 5 of the African Charter on Human and Peoples Rights. Upon

hearing the complaint, the Commission conceded that African states were faced with many challenges, mainly economic which required radical measures aimed at protecting their nationals and economy from non-nationals. However, such measures should not be taken to the detriment of human rights of targeted individuals or groups.

The Commission held that it was unacceptable to deport individuals without allowing them the possibility to plead their case before the competent national courts as it is contrary to the spirit and letter of the African Charter and international law. On such grounds, the deportation of the victims was said to have constituted a violation of Articles 2, 7(1)(a), 12(4) 5, 14 and 18 of the African Charter on Human and Peoples’ Rights.

Organization Mondiale contre la Torture and Others v. Rwanda13. Communication 27/89 alleged the expulsion from Rwanda of Burundi nationals who had been refugees in Rwanda for many years. They were told on June 2, 1989 that they had a month to leave Rwanda on the ground that they constituted a national security risk due to their subversive activities. The refugees were not afforded any opportunity to defend themselves before a competent national court. Communications 46/90 and 49/912 further alleged arbitrary arrests and summary execution and detention of thousands of people mostly aliens in various parts of the country by the Rwanda security forces.

Upon hearing the complaints, the Commission found that groups of Burundian refugees had been expelled on the basis of their nationality contrary to Article 12(5) of the African Charter. While holding that the facts constitute serious or massive violations of Articles 2, 4, 5, 6, 7, 12(3), 12(4) and 12(5) of the African Charter, the Commission urged the government of Rwanda to adopt measures in conformity with the decision. See also the case of Recontre Africaine Pour la Defense des Droits de l’homme v. Zambia14 and Amnesty International v. Zambia. 15

Turning Nationals into Aliens

The exclusion of certain candidates from contesting presidential elections in some African States has led to a situation whereby constitutions are amended to strip such persons of their nationality. Consequently, they are liable to be expelled or internally displaced. The crisis of politics of exclusion led to the civil war in Côte d’Ivoire while it was resolved through constitutional means in Zambia.

Legal Resources Foundation v. Zambia 16

Article 34 of the Constitution of Zambia Amendment Act of 1996 provided that anyone who wished to contest the office of President Zambia had to prove that both parents were Zambian citizens by birth or descent. Although primarily targeted at ex-president Kenneth Kaunda who had been nominated by his party to contest the presidential election, it was alleged that the effect of the amendment was to disenfranchise some 35 percent of the electorate from standing as candidate presidents in any future elections for the highest office of the land. The allegation before the African Commission was that the respondent state had violated Articles 2, 3 and 19 of the African Charter in that the constitutional amendment was discriminatory.

In the course of hearing the matter, the Commission found that the movement of people in what had been the Central African Federation (now the states of Malawi, Zambia and Zimbabwe) was free and that by Zambia’s own admission, all such residents were, upon application granted the citizenship of Zambia at independence.

It was held that to suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the State of Zambia may be arbitrary and its application retrospectively cannot be justifiable according to the Charter. The Republic of Zambia was found in violation of Articles 2, 3(1) and 13 of the African Charter and strongly urged to take the necessary steps to bring its laws and constitution unto conformity with the African Charter.

16 (2001) AHLRA 84.
Attorney-General of Botswana v. Unity Dow

The Respondent, Unity Dow is a citizen of Botswana having been born in Botswana of parents who are members of one of the indigenous ethnic groups of Botswana. She is married to Peter Nathan Dow, an American who has lived in Botswana for 14 years. Prior to their marriage on March 7, 1984 a child was born to them in October 29, 1979. After the marriage two more children were born on March 26, 1995 and November 26, 1987. All the children regard Botswana their country of origin. But in terms of the laws in force prior to the Citizenship Act 1984 the child born before the marriage is a Botswana citizen whereas under the Citizenship Act 1984 the children born during the marriage are not citizens of Botswana and are therefore aliens in the land of their birth.

The Respondent challenged the provisions of the Citizenship Act which denied citizenship to her two younger children. After hearing the parties the learned trial judge found in favour of the Respondent on the ground that the Citizenship Act is discriminatory in its effect on women as it may compel them to live and bear children outside of wedlock. The Court particularly frowned at a situation where the Respondent's two younger children would be obliged to travel on their father's passport and the Respondent would not be entitled to return to Botswana with them in absence of their father.

Dissatisfied with the judgment, the Appellant appealed to the Court of Appeal. In upholding the verdict, the Appeal Court held that if the Respondent's children "are liable to be barred from entry into or thrown out of her own native country, as aliens, her right to live in Botswana would be limited. As a mother of young children she would have to follow them. Her allegation of infringement of her rights under Section 14 of the Constitution by Section 4 of the Citizenship Act seems to have substance".

Bilateral Agreements to Repatriate Migrants

There are instances when governments of African States enter into deals to have their nationals repatriated from western countries without following due process. In such cases the interests of the migrants affected are never taken into consideration. For instance, as part of the measures to decongest its overcrowded prisons,
the British Government recently entered into a deal with the Federal Government of Nigeria to repatriate the over 1,000 Nigerian citizens in British prisons. Without considering the legal implication of the deal and the interests of the prisoners involved the Federal Government has concluded arrangements to admit the first batch of 400 foreign prisoners to Nigerian Prisons.

It is submitted that by the combined effect of Section 2 of the *Prison Act*, Section 253 of the *Criminal Procedure Act*, Section 35(1) of the *Constitution* and Article 6 of the *African Charter on Human and Peoples’ Rights*, the authorities of Nigerian prisons have no powers to admit and keep persons who have not been committed to their custody by Nigerian courts. In other words, Nigerian citizens who have been tried, convicted and sentenced to prison terms by foreign courts cannot be admitted and kept in Nigerian prisons by mere agreements.

**Renewed Defence of Rights of Migrants**

In view of the persistent violations of migrants rights by African States, the African Commission passed a resolution in 2004 on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa. The Special Rapporteur is empowered to undertake fact-finding missions, investigation, visits and other appropriate activities to refugee camps and camps of internally displaced persons and assist member states of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers and internally displaced persons.

Regrettably, the Special Rapporteur has not intervened in the several cases where the rights of refugees and internally displaced persons have been violated. A case in point is the unlawful killing of the 50 West Africans by the security forces of The Gambia on 23 July 2005. The protest by the Commonwealth Human Rights Initiative (CHRI) and the Media Foundation for West Africa (MFWA) has compelled ECOWAS and the United Nations to set up a joint committee to conduct an inquiry into the killings.

With support from the Open Society Initiative for West Africa (OSIWA), the human rights community in West Africa has been mobilized to challenge the infringements of the human rights of migrants. The humiliation of Mr. Ayodeji Omotade by British Airways for protesting the brutal treatment meted to a de-
In the same vein, the West African Public Interest Litigation Centre (WAPILC) has encouraged Fatimah Mbaye, a Mauritanian human rights activist to sue Air France for harassing her when she protested the brutalization of a deportee at the Charles De Gaulle Airport in Paris last year. WAPILC is equally collaborating with the counsel to the parents of John Aikpitani who have sued Iberia for the unlawful killing of their son who died on board while being deported to Nigeria from Spain. Also of interest to WAPILC is the case pending in the ECOWAS Court where West African Bar Association (WABA) leaders are challenging the erection of toll gates where travelers are extorted contrary to the provisions of the ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment.18

Conclusion

Most of the cases analyzed in this paper were decided by the African Commission on Human and Peoples’ Rights. As the decisions have no binding effect on the parties the profound findings and recommendations have been ignored by several African states. The situation is already changing among ECOWAS Member States with the intervention of the ECOWAS Court. For instance, the Niger Republic announced its plan to comply with the historic decision of the ECOWAS Court in the Hadijatou case. In other words, apart from the payment of the sum of CFAF 15 million awarded to the Applicant, the government has undertaken to abolish slavery in the country.

As most migrants whose rights are violated in Europe are unable to seek redress before their deportation there are on-going discussions between some human rights organizations in West Africa and Europe on how best to challenge such violations in European Courts. However, since the root cause of the migration crisis is basically economic, the human rights community should join the campaign for a just international economic order which recognizes the right of Africans to manage their resources in their own interest.

18 Femi Falana & Anor v. Republic of Benin & Ors. ECW/CCJ/APP/10/07.
Chapter 6

ECOWAS Protocols and the Reality of Free Movement of Persons and Goods, Right of Residence and Establishment in West Africa

Oumar Ndongo

The Treaty establishing the Economic Community of West African States (ECOWAS), which came into force on 28 May 1975 provides in Article 59 for the free movement of every citizen of the West African sub-region as well as the right to leave any country, including one’s own, and the right to return, have always been the legitimate aspiration of men and women everywhere in the world since time immemorial.

The Protocol on the free movement of persons and goods, right of residence and establishment adopted some years earlier, i.e., on 29 May 1979 confirmed the willingness to open up the sub-region, thus reaffirming the sub-regional integration mission entrusted to the established institution.

The protocol on free movement indicates clearly the abolition in the ECOWAS sub-region of the entry visa into member states by citizens of the Community. It states also that a citizen needs to possess a traveling document (an international traveling passport to be precise) and an up-to-date international vaccination card. The citizen, holder of these two documents could reside in a member state other than his own for a maximum period of 90 days without facing any harassment from the government of the chosen country. Nevertheless, Article 4 of this protocol indicates that the member state has every right to refuse entry to a citizen of the community whenever it feels that it has valid reasons to do so.

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The 1979 protocol deals with the important provisions on the expulsion of a citizen from a member state. It states that the decision to expel a citizen from a member state must be communicated to the person as well as to the government of his state of origin. The President of the ECOWAS shall thus be informed about this decision to expel. The cost of carrying out the expulsion shall be borne by the country expelling the citizen. In case of expulsion, the security of the person to be expelled as well as that of his family must be guaranteed, his properties must be safeguarded and must be returned to him. The same measures are applicable in case of repatriation of citizens.

The implementation of the protocol on free movement was provided for within the fifteen years which follow its adoption by the Heads of State and its ratification by half of the parliaments of the member states. The three identified stages are as follows:

- Right of entry and abolition of visa
- Right of residence
- Right of establishment

Each of the above stages is accompanied by a series of regulatory texts aimed at fast-tracking the free flow of person, goods and capital across the border posts.

Since the coming into existence of this protocol, an impressive arsenal of regulatory texts has been produced by the authority of the Heads of State and Government of ECOWAS to further indicate their willingness to have an open community in the West African sub-region. The 1993 Revised Treaty, a fundamental text of the present ECOWAS, has reinforced the measures aimed at ensuring the opening up of the borders in the West African region where more than 8 million move from countries other than their own into another every year.

Coming back to the issue of documents relating specifically to free movement, one can mention among other the following:

- Protocol A/P/3/5/82 of 9th May, 1982 on Community Citizenship Law
- The Supplementary Protocol A/SP2/7 /85 of 6th July, 1985 on the Code of Conduct for the implementation of the protocol on free movement of persons and goods, right of residence and establishment
• Decision A/Dec.2/7/85 of 6th July, 1985 on the establishment of an ECOWAS Member State traveling document

• The Supplementary Protocol A/SP1/7/86 of 1st July 1986 on the Implementation of the Second Stage (Right of Residence) of the Protocol on Free Movement of persons and goods, Right of Residence and Establishment.


• Decision A/Dec.2/5/90 of 30th May, 1990 on the establishment of a residential permit of ECOWAS Member State.

• Decision C/Dec.3/12/92 of 5th December, 1992 on the establishment of a Harmonized Form for Immigration and Emigration from ECOWAS Member States.

The list of decisions establishing, in definite terms, free movement as a principle of life in the community is long. Since 1992, there has not been any communiqué of the Summit of the Heads of State and Government which does not comprise at least a paragraph on free movement. More importantly still, after taking note of the non implementation of the measures in the protocols and decisions, the authority of Heads of State and Government adopted a minimum programme of actions based on the following commitments to be implemented according to a precise timeframe:

• Member States must abolish within the shortest timeframe all the administrative measures which tend to impede the free movement of persons, goods and services;

• Before the end of December 1992, reduce all border post controls and bring them together into only one between border posts and the nearest city;

• Member states should implement the formalities for crossing borders by adopting the ECOWAS traveling papers which member states must print out and issue to their citizens before the end of December 1992. These passports should just be stamped without the holders having to fill any form whatsoever. Where the immigration authority demanded for a file to be opened, a harmonized immigration and emigration form comprising
several carbon copies should be adopted and printed by member states before December 1992.

Other practical measures were taken to facilitate transit operations especially in area of inter community transportation, movement of goods and customs documents in order to remain in harmony with the ECOWAS trade liberalization scheme.

Evaluating the weak level of the success of the minimum programme of actions, the Heads of State and Government agree on 27th March, 2000 on the establishment of the borderless ECOWAS with increased responsibilities to the ECOWAS Secretariat which was transformed into a Commission and opening to new stakeholders, notably the civil society and the putting in place of ultra modern means. For this purpose, the following measures were consolidated:

- Elimination of rigid formalities along the borders and modernization of procedures through the utilization of passport screening machines (which can be found in Dakar and Lagos).
- Elaboration of guidelines for the use of the immigration officers requesting them to ensure that measures relating to the right of the citizens of the Community to reside in other member state for a maximum period of 90 days be effectively implemented.
- Reduction of the staff strength of officials at the border posts where only those needed for essential services such as the customs and immigration will be maintained.
- Ratification of the Extradition Agreement of 6th August 1994 without further delay by member states which have not yet done so.
- Abolition of the numerous check points so as to reduce the delays on the road.
- Abolition of residential permits for all the Community citizens.
- Adoption and putting into use of the ECOWAS passport.
- Adoption of a multi-country visa of the Schengen model.

Today, at the period of taking stock, what can we say?

- Abolition of entry visa into member states for community citizens as an undeniable fact.
• Better still, prospect of traveling with ordinary identity cards in member states with the exception of Ghana and Nigeria, is the way to be followed by a poor community with a rate of illiteracy ranking among the highest in the world. This should be a plus to WAEMU (West African Economic and Monetary Union).

The goodwill of ECOWAS alone cannot remove all the roadblocks because it is also facing on its own a sizeable number of obstacles: sovereignty of member states. It is still an organization of States and cannot in the present state of things enact an ambitious and a bold policy which it desires without the contribution of an equally strong and courageous civil society.

As a matter of fact, measures taken by the Heads of State and ECOWAS have not produced expected results. What do we notice on the major roads of the West African sub-region?

• The joint security patrols envisaged along the common borders to fight against criminal acts have been transformed into toll gates.
• Some borders are closed by 10.00 p.m. whereas they are expected to be open all day and night.
• Presentation of complete traveling documents does not exclude one from illegal payments.
• Sophisticated working machines are not used by officials at the land and air borders as formalities at these border posts are still being done manually to encourage direct personal contacts.
• The presence of touts recruited at the border posts by the immigration or customs officials (called ‘Klebe’ at the Seme border for example) constitutes a serious problem which worsens extortion.

In general, obstacles to integration and free movement are in major part linked with:

• Lack of regional awareness of the notion of citizenship on the part of all the stakeholders;
• Pre-eminence of the power of the nation over that of the community. National laws and ECOWAS protocols and conventions are not harmonized and those expected to implement these laws on the ground are inefficient.
By nations it is of course necessary to include national administrations which seek to control every inch of the territory.

- Ambiguity of the integration model that ECOWAS seeks to promote. Does the ECOWAS without borders want to be like the European Union or the American federal system or be more ambitious than these models? The forecast outlined in the Vision 2020 speech does not provide anything reassuring on this context;
- Ignorance of established rights due to poorly publicized laws both by ECOWAS and the civil society;
- Existence of real barriers which are rarely discussed in dept: cultural differences between the French-speaking and English-speaking countries as well as the antagonism between neighbouring countries.
- Aggressiveness and bottlenecks at most border posts is far from the friendly and ease of travels which should normally be found in such places;
- Ineffectiveness of the Commission for fighting against abnormal practices established by ECOWAS and WAEMU which does not have power to sanction observed shortcomings. To be more accurate, the commissions have sent a number of issues to ECOWAS on the non functionality of the measures taken and the responsibilities of each and everyone. A power to sanction accorded to ECOWAS with immediate implementation could be the beginning of the solution.
- The lethargy of the ECOWAS Surveillance Unit due to the weakness of the means at their disposal and lack of commitment on the part of their members. Up till today, only the Lome Unit gives some signs of life. The recourse to the civil society, especially the youth associations, to manage these units could reduce their operational costs.
- The endowment of the border posts with adequate machines and development of the region are obviously a very good thing in the flow of movement but one expects to see the functionality of the autogate systems and the generalization of the use of the digitalized identity cards in member states, issues on which the Department of Free Movement of the ECOWAS Commission is working.
- The three types of ECOWAS passports (ordinary, service and diplomatic) are only in use in Benin, Senegal, Republic of Guinea, Liberia and Niger whereas states such as Nigeria, Côte d’Ivoire and Sierra Leone are still in the
process of preparing their ECOWAS passports. Other countries talk of the existence of a large stock of the unused national passports.

The issue of free movement is a very complex one. Its benefits transcend the simple crossing of borders and comprise a reality which, in the final analysis, will mean for the Community citizen some prerogatives such as finding and enjoying an employment, easily acquiring right of residence, enjoying a social status which is identical to those of the nationals. The situation experienced by the Liberian refugees in Ghana, just to mention this example, is a perfect illustration of the state of our willingness to maintain the nationality and identity of barriers. These are no doubt the greatest obstacles to our ideal of regional integration. If the ECOWAS texts were to be in force, how could a Liberian have been accorded a refugee status in Ghana or Senegal?

While having the feeling that one has not completely dealt with the issue at hand, I would like to say in the final analysis that the need to control the movement of individuals and goods is indisputable. In fact, the control is not in itself synonymous with the idea of obstacle or barriers because it has to do with the security of the state and individuals in order to arrest criminals, dangerous products for reasons bothering on public morality, order, safety, health protection and preservation of plants. But the obstacles which are very current in the ECOWAS sub-region stem from simpler logics. To fight against these simple logics, there is need for combined efforts on the part of all the stakeholders. ECOWAS should stop churning out laws and move rather towards the implementation of those already produced by forging alliances with the civil society and strengthening its institutional architecture and the reality of its mandate with regard to the Parliament and Community Court of Justice. It is only by so doing that it will be able to resolutely move towards the ECOWAS of people at a fixed horizon.

The movement of person within the ECOWAS region should respect a simple logic namely that citizens are not traveling within the region, they only move around. When one is at home, the need for passports, vaccination cards are nothing but means which government officials use to foment hardships along the roads and at the border areas. Any advocacy campaign must target first and foremost the government departments before going to the people who, on this precise issue, are well ahead of the governments.
Recommendations from the International Symposium: “Migrations and Human Rights in West Africa”

National

i) Ratification by West African States of the International Convention on the protection of the rights of migrants and their families (CDTM/CRMW). To date, only Burkina Faso (26 November 2003), Cape Verde (16 September 1997), Ghana (7 September 2000), Guinea (7 September 2000), Mali (5 June 2003) and Senegal (9 June 1999) have done so.

• Actors: States and dismemberments, Parliaments, Civil Society Organizations, Media

ii) Harmonization of national legislations with standards relative to the protection of migrants’ rights in West Africa (Convention, ECOWAS Protocols relative to the free movement of persons and goods, the right of residence and establishment, African Union and ECOWAS common approach documents on Migration)

• Actors: States and dismemberments, Parliaments, Civil Society Organizations

iii) Popularization of community standards on migration

• Actors: ECOWAS, States and dismemberments, Parliaments, Civil Society Organizations, Media.

iv) Sensitization of the populations about the migration issue.

• Actors: ECOWAS, States and dismemberments, Civil Society Organizations, media.

v) Studies/Research on problems raised by migration

• Actors: Research Centre, Universities, Civil Society Organizations

vi) Training those in charge of applying the laws on community standards relative to migrants’ rights

• Actors: States and dismemberments, universities and public servants' training centres (judges, customs officers, etc.), Legal profession, civil society organizations.
vii) Strengthening the capacities of Civil Society Organizations working on this theme.
   - Actors: States and dismemberments, civil society organizations.

viii) Development of litigation on issues relative to migrations
   - Actors: Legal profession, civil society organizations.

Regional

i) Supervision of the application by member states of community standards and principles relative to migration;
   - Actors: ECOWAS organs

ii) Development of litigation on issues related to migration
    - Actors: States, Legal Professions, Civil Society Organizations

iii) Networking of structures working on migration issues:
    - Actors: Civil Society Organizations, Legal Profession and State structures.

Continental

i) Supervision of the application by states of the standards and principles developed by the African Union with respect to migration.

ii) Take African standards into account in the dialogue with the other continents;
    - Actors: Member States, African Union organs, Civil Society Organizations

iii) Development of the litigations on migration issues;
    - Actors: Member States, Civil Society Organizations, national human rights institutions

iv) Development of the partnership with the African Diaspora on all issues relative to migration:
    - Actors: African Union organs, Member States and Civil Society Organizations
International

i) Involving the African civil society in the implementation of the “Migration” component of the African Union–European Union Partnership:


ii) Development of networking between organizations working on migration issues

- Actors: Civil Society Organizations.
Goodwill Message

Hon Justice Awa Nana Daboya Nana, the President of the ECOWAS Community Court of Justice

Ladies and Gentlemen,

May I begin by expressing the appreciation of the community court of justice, ECOWAS to the Open Society Initiative for West Africa (OSIWA), for having the foresight to organise this judicial colloquium on migration. There is no doubt that the subject of this colloquium, is of grave concern to Sub Saharan Africa. By organizing this colloquium, OSIWA has taken the bull by the horns. It is a discourse that is long overdue. In commending OSIWA for taking the initiative to organise this colloquium, we wish to assure OSIWA that the community court of Justice will always collaborate with it, in its effort to build an open and humane society, in the West Africa region.

We are in an age of globalization, with free flow of persons, capital goods and services across national borders. Increased rate of migration has therefore become inevitable. However, the issue of irregular migration has become a major challenge. We are concerned with the fate of the paperless and undocumented migration, from Sub-Saharan African.

It gives us cause for serious concern, that the youth of Sub-Saharan Africa undertake harrowing and dangerous treks across the Sahara desert, ill-prepared and ill-equipped or sail in rickety boats across the Mediterranean Sea. We are disturbed by the number of Sub-Saharan African Youths that meet their untimely deaths far from home, in the Saharan Desert or in the Mediterranean Sea. We are worried by the spate of deportations and the number of our youths that meet their deaths, in the course of deportation, gagged and shackled. We are bothered by the fact, that our youths have fallen victims of criminal networks of human traffickers.

We are appalled by the precarious living conditions of our paperless and undocumented migrants in north Africa and western Europe, who face on a daily basis, arbitrary detentions, sub-standard and dehumanizing conditions of detention, police abuse, procedural violations in criminal and administrative law proceedings, and arbitrary/violent mass deportations.
It is also highly worrisome, that these paperless and undocumented migrants have no civil rights and remain largely anonymous. It also does not bode well for Africa, that the migration policies of the western world, seduce our best brains and skilled workers, leaving us with the challenges of brain drain. It is also true, that poverty, the socio-economic and political conditions here in Sub Saharan Africa are the push factors for irregular migration.

These are major challenges that call for urgent action, not only by the Sub Saharan African states but by the international community. We cannot afford to fold our arms in the face of these problems. The time has therefore come for us to examine, the socio-economic and political push factors, that drive our youth to desperation and irregular migration. It should be noted, that for the economic migrant, the quest for greener pasture is the main consideration, while for the political migrant, wars and civil strife may be the push factors. In the west African sub region, ECOWAS has made tremendous effort to maintain peace and stability. The ECOWAS court of justice also has jurisdiction in respect of human rights violations that occur in any member state. The ECOWAS protocol on free movement has curtailed problems of irregular migration within the sub region.

We note the migration policy framework for African states must however do more to combat the challenges of irregular migration. In this effort, we must collaborate with the western world. Issues of illegal migration must not be addressed in isolation of migrant rights. It should also be noted that it is not merely a security problem as the solution does not lie in strengthening domestic laws to facilitate more deportations.

Our focus therefore, should be on the management of migration and respect for migrant rights, be it political, economic or civil. We are delighted to note that we have in our midst at this colloquium, relevant stakeholders including representatives of RAHHHO, UNHCR, IOM, EU, WABA and WACSOF. I am hopeful, that this colloquium will make concrete recommendations to curb and manage the challenges of migration in Africa. I wish you fruitful deliberations.

Thank you,

Hon Justice Awa Nana Daboya
President
Community Court of Justice, ECOWAS, Abuja, Nigeria.