



## LAUNCHING THE GLOBAL STRATEGIC LITIGATION COUNCIL FOR REFUGEE RIGHTS

### *A Concept Note*

International law, and the laws of many countries, establish rights for refugees and other migrants compelled to cross a border to find safety. The 1951 Convention on the Status of Refugees guarantees refugees rights to work, to education, due process and non-discrimination, and access to the social safety net, as well as the crucial right not to be returned to a country where they would face persecution. Other important human rights conventions—guaranteeing economic, social and cultural and civil and political rights, protecting women, children and persons with disabilities, and forbidding torture and inhumane treatment—include refugees and other persons on the move within their ambit.

Despite these widely recognized protections, refugees around the world experience violations of rights on a daily basis. They are denied the right to work, children are kept out of schools, women are subject to violence and discrimination. In seeking to escape persecution at home, refugees are denied entry elsewhere; they are pushed back to the open sea or to States that don't recognize their rights, or they are detained in camps under deplorable conditions and with no prospect of resuming a normal life.

Civil society organizations, individual lawyers and advocates, and international organizations (primary among them, the Office of the High Commissioner for Refugees (UNHCR)) speak up for refugee rights, sometimes bringing lawsuits in domestic and international courts. While important and often successful, these efforts tend to proceed on an ad hoc basis with no overall strategy for affirming and advancing rights regionally or globally.

The Global Strategic Litigation Council for Refugee Rights is being established to help close this large and troubling gap between the promises of rights protection and the practices of rights denial. The Council, constituted by a diverse set of legal experts, litigators and refugee advocates, will craft a strategy for establishing a global jurisprudence on refugee rights through litigation in international, national and regional courts, and through related advocacy.

To date, 28 organizations and individuals have joined the Council, the majority of which are located in the Global South (where the vast majority of refugees are hosted). The Council is led by a Steering Committee comprised of leaders of refugee-led social movements, litigators (with a track record of engagement with the national and transnational recognition and protection of international refugee law in a diverse set of jurisdictions) and academics.

The Council will develop a public, affirmative global strategic litigation agenda for expanding the recognition and protection of the rights of refugees and other people on the move which will be pursued through litigation in national courts around the world and in regional and global fora, including bodies within the regional and global human rights systems. The Steering Committee will establish Working Groups to advance and support the Council's litigation and advocacy strategy.



Working Groups will be organized around particular themes that intersect with a set of rights. Working Groups will be established based on consideration of a range of factors, including (1) the extent to which an issue or contemplated litigation fits within the priorities and needs of refugee communities and refugee-led organizations; (2) the likelihood whether litigation will result in the recognition and protection of core rights in a proposed thematic area; (3) already on-going litigation regarding the thematic area or reasonableness that litigation can be initiated; (4) the likelihood of a successful outcome for litigation; and (5) the extent to which the potential jurisdiction in which litigation is pending or could be brought fits within the bigger, transnational picture and the likely impact of a good decision for the particular region or the world.

With participation from a number of Council members, Working Groups have been established around two thematic areas: (1) Legal Status and Lawful Stay; and (2) Detention and Due Process. (A description of these thematic areas can be found in the Appendix.) Additional Working Groups will be established to develop litigation strategies for other sets of rights; these may include labor rights, family reunification, barriers to entry, and rights denials resulting from pandemic measures.

In addition to supporting litigation and promoting the development of legal standards, the Council will serve as a resource center, as a locus for network-building and as a conduit for amplifying the global impact of national and regional victories for refugee and migrant rights. The Council plans to develop information-sharing events, translations of pleadings and court decisions, and crowd-sourced technical assistance for time-sensitive litigation research queries. It may seek the engagement of academics and pro bono lawyers for research and other litigation assistance. It will also establish partnerships with other key stakeholders, such as refugee-led social movements, regional or national governmental entities committed to the progressive development of refugee law, and global and national groups of judges and attorneys practicing refugee and immigration law.

The activities of the Council are envisioned as a complement to the work pursued by UNHCR, through its Department of International Protection (DIP) and its protection staff in its regional and national offices. UNHCR will be invited to act as a permanent observer on the Council and may participate in thematic working groups. The Council will endeavor to benefit from DIP's efforts to further crystallize and advance normative developments in refugee protection as well as to help DIP identify Council members who could assist UNHCR in the preparation of *amicus curiae* briefs. The Council would also support the continued development and institutionalization of the UNHCR-HIAS-Asylum Access Annual Strategic Litigation Roundtable. Other international organizations with core mandates relevant to the Council's work, such as OHCHR and ILO, will also be invited to engage and collaborate with the Council.

The Council will also seek to create a Network of Cooperating Strategic Litigators who are engaged in work consistent with the Council's agenda, including litigation and related advocacy to advance recognition and protection of refugee rights in national courts. The Network could further reach out to those who contribute supplementary expertise in related areas of law.

*We are optimistic that in 3-5 years of sustained work by the Council and its partners, we can produce real change in the national recognition and protection of international migration and refugee law in a number of target areas and also leverage a growing community of advocates committed to using the courts to advance the rights of people on the move.*

## Appendix: Established Working Groups

### ***1. Legal Status and Lawful Stay***

*Description of issue:* Of the countries that host most of the world’s refugees, many have no clear law or policy that universally and affirmatively grants lawful stay to refugees – a category that opens access to key Convention rights, such as to freedom of association, to engage in wage-earning employment, to practice a profession, and to access public housing and welfare. In some of these countries, refugees have no means of obtaining formal, legal authorization to remain, be present or reside lawfully in the country. In others, subsets of refugees – often determined by nationality or date of arrival – may be granted lawful stay, presence or residence, while others are left without recourse. In still others, refugees are tolerated *de facto* but confined to camps and/or subjected to extortion by state and private actors on account of their unauthorized or indeterminate status in the country. Establishing the duties of States in regard to recognizing lawful presence, lawful stay and lawful residence would provide a pathway for refugees to assert a broad range of Convention rights. Informal work, for example, would be less risky if employers could not threaten refugees with immigration enforcement (e.g., detention, internment, or expulsion) on the basis of their unlawful stay. Similarly, lawful stay would remove the deep fear that, for many refugees, accompanies the transactions of daily life – from walking down the street to walking into a government office – as arrest and detention or deportation would be inherently unlawful.

*Global legal framework:* While the steps taken to protect refugees are broadly seen by international law to be a matter of sovereign discretion, there are limits on the exercise of discretion, such as the principle of effectiveness of obligation under the Convention. Yet, as one treatise notes in relation to presence, for example, “the conditioning of ‘lawful presence’ on formal verification of refugee status would allow a genuine refugee to be held hostage to a decision never to undertake the processing of his or her claim to Convention refugee status.” (Hathaway, *The Rights of Refugees Under International Law*, 181) There is a lacuna in existing jurisprudence about how and when States are obligated to treat refugees as lawfully present, staying or resident in their territories. Currently, the *de facto* choice of many States is to leave those individuals without any legal status or legal residence and often without any documentation at all – indeed, not formally authorized even to remain, and even despite a State’s recognition that it is barred from sending the refugee home. Sound jurisprudence could establish the contours of specific obligations related to lawful stay and lawful residence as an effect both of the Convention and general human rights law. Such jurisprudence would also be consistent with the attention to registration and documentation and individualized status determinations reflected in the non-binding Global Compact on Refugees (GCR) and Global Compact for Migration (GCM). (GCR Para. 58 (committing to support States in expanding capacity for registration and documentation); GCM Objective 7, Para. 23(h) (undertaking to enable individual status assessments of all migrants).)

*Potential legal claims:* Litigation could challenge, for example, the failure to perform status determination in Convention States and raise failure to determine status as a defense in other legal proceedings (such as in connection with the best interests in juvenile/family court and/or in connection with arrest and detention).

## *2. Detention and Due Process*

*Description of issue:* In most countries, immigration authorities have the power to hold non-citizens on grounds relating to a person’s status as a migrant—all too often this includes refugees. This detention is generally the effect of an administrative or civil power that operates separately to the powers given to the police and criminal courts. Immigration detention can occur at different times. It can occur when migration authorities first come into contact with a person and they are unable to establish their identity or regular migration status. Unfortunately, the use of unnecessary—and frequently mandatory and indefinite—immigration detention is growing and endemic to the management of complex mixed migration. Globally, millions of refugees, asylum-seekers and migrants are at risk of immigration detention each year. Refugees, asylum-seekers and migrants are often subjected to arbitrary or unlawful detention and may be detained for months or years in conditions falling below international standards. Additionally, many countries around the world still detain children (including refugee children) and do not respect the principle of using detention as a last resort. The lack of clearly-delineated limitations on the length of detention and/or the lack of judicial review and oversight on commencement and extension of detention is also prevalent in many jurisdictions.

*Global legal framework:* Under general international human rights law, immigration detention is only meant to be used as a last resort and only used where it is individually necessary, reasonable, and proportionate to a legitimate government objective (ICCPR Art. 9, HRC General Comment No. 35). Recently, States committed in the GCM that immigration detention should be used only as a measure of last resort (GCM Objective 13, Para. 29). States also committed to ending child immigration detention (GCM Objective 13 h). Under international human rights principles, a legitimate government objective justifying detention in certain instances may include detaining a person who presents a risk of absconding from future legal proceedings or administrative processes or detaining someone who presents a danger to themselves or to public security. In all cases, immigration detention can be only used after non-custodial, community-based alternatives to detention (ATD) have been explored in each individual case. For refugees, the Refugee Convention specifically forbids the unnecessary or punitive treatment of asylum seekers (Refugee Convention Art. 31). UNHCR has interpreted Art. 31 of the Refugee Convention, read in conjunction with other provisions of the Convention, to require that “detention of asylum-seekers should be a measure of last resort, with liberty being the default position.” (UNHCR Global Strategy: Beyond Detention.) In addition to these broad legal protections, specific rights that protect child migrants, including child refugees, both under prevailing interpretations of the Convention on the Rights of the Child and the Refugee Convention, prohibit (or at least severely restrict) the detention of children in the context of human mobility.

*Potential legal claims:* Coordinating affirmative litigation on detention would allow the Council to leverage these legal norms to push back against the pervasive deprivation of liberty of migrants on the basis of their status alone. Among other things, litigation could challenge mandatory and indefinite detention, the standards for justifying initial detention, the detention of migrant children and the inaccessibility of judicial review.