FIFTH COLLOQUIUM ON CHALLENGES IN INTERNATIONAL REFUGEE LAW THE MICHIGAN GUIDELINES ON THE RIGHT TO WORK

CONVENED BY THE PROGRAM IN REFUGEE AND ASYLUM LAW THE UNIVERSITY OF MICHIGAN LAW SCHOOL NOVEMBER 13–15, 2009

EXPLANATORY NOTE

*Penelope Mathew**

The Fifth Michigan Colloquium on Challenges in International Refugee Law considered the topic of the right to work for refugees and others in need of international protection. The right to work is a fundamental human right recognized in many international and regional human rights instruments, including the 1951 Convention Relating to the Status of Refugees (Refugee Convention),[1] as well as international labor conventions. However, in many countries, refugees are denied access to the labor market and opportunities for self-employment. Refugees also face other barriers to their right to work, such as problems gaining recognition of their qualifications. This leaves states in violation of the international legal obligations to which they have freely consented and results in numerous socio-economic problems for states that host refugees. The Michigan Guidelines on the Right to Work were adopted by participants at the Colloquium with the aim of assisting states in the proper implementation of the right to work for refugees and other similarly situated persons.

The guidelines are intended for use by national policy- and decisionmakers—for example, those responsible for designing and implementing national asylum laws and national labor laws. The experts who participated in the Colloquium also hope that bodies charged with monitoring states' obligations under the relevant treaties, including the United Nations High Commissioner for Refugees, the United Nations treaty bodies, and the International Labour Organization's Committee of

* Convenor and Chair, Fifth Michigan Colloquium on Challenges in International Refugee Law. Penelope Mathew is the Freilich Foundation Professor at The Australian National University. Email: pene.mathew@anu.edu.au.

1. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

Experts on the Application of Conventions and Recommendations, will use the guidelines in the course of their monitoring activities. It is also envisaged that non-governmental organizations may find the guidelines useful in their advocacy work.

The guidelines are divided into eight substantive sections. After an introductory section devoted to the right to work, the first section of the guidelines underlines the importance of the right to work to the dignity of refugees, and to durable solutions. The second section sets out the appropriate interpretative approach to the Refugee Convention and other human rights instruments relevant to the right to work. The third section interprets the obligations imposed by the Refugee Convention. Fourth, the guidelines address relevant human rights standards other than the Refugee Convention. The guidelines focus on Article 6 of the International Covenant on Economic, Social and Cultural Rights,[2] which establishes the right to work as a universal entitlement that is protected on a non-discriminatory basis.[3] However, the guidelines draw attention to many other international and regional human rights instruments that protect the right to work. These include instruments that protect against discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination[4] and the Convention on the Elimination of All Forms of Discrimination Against Women.[5] The right to work is also interdependent with other fundamental rights, and the fifth section of the guidelines underlines the importance of the right to social security and social assistance in order to support refugees and other similarly situated persons who are unemployed, unable to work, or underemployed. In the sixth section of the guidelines, the situation of asylum-seekers is addressed. The institution of asylum may be threatened by state policies—such as policies of enforced destitution for asylum-seekers—that are based on fear of abuse of the asylum system by so-called "economic migrants." Drawing on available case law, particularly the seminal House of Lords decision in *R. (Limbuela) v. Secretary of State for the Home Department*[6] and the decision of the South African Supreme Court of Appeal in *Minister of Home Affairs v. Watchenuka*,[7] the experts agreed that such treatment could amount to inhuman and de-

2. International Covenant on Economic, Social and Cultural Rights art. 6, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

3. *Id.*

4. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

5. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

6. R. (Limbuela) v. Sec'y of State for the Home Dep't, (2006) 1 A.C. 396 (H.L.) (U.K.).

7. Minister of Home Affairs v. Watchenuka, 2004 (4) SA 326 (SCA).

grading treatment. The experts also agreed that such policies could result in spontaneous return of asylum-seekers to a place of persecution—a constructive violation of the norm of *non-refoulement*. For example, destitute asylum-seekers may be more likely to acquiesce in state-funded repatriations, or to return on their own. Although it was decided not to address the question of detention in the guidelines, the experts recalled with approval the well-established jurisprudence of the United Nations Human Rights Committee holding that mandatory detention policies violate the prohibition on arbitrary detention, noting that this in turn interferes with the right to work. The seventh section of the guidelines expounds upon states' obligations to respect, protect, and fulfill the right to work for refugees and others requiring international protection, including obligations of international co-operation and assistance. The eighth and final section of the guidelines addresses the situation of mass influx.

When using the guidelines, it may be useful to bear in mind two points about the interpretative approach applied and the question of customary international law. The interpretative approach expounded in the guidelines is required by international law and the guidelines are designed to operate on the international legal plane, reflecting and informing international law. However, where the domestic legal system constrains the extent to which national decisionmakers may use international law, it is appropriate to refer to the Bangalore Principles on the Domestic Application of International Human Rights Norms.[8] According to the Bangalore Principles, domestic decisionmakers such as the judiciary should always refer, so far as is possible, to relevant international human rights standards.

The question of customary international law has been deliberately avoided in the guidelines. It was agreed that it was more useful to focus on clearly identified treaty standards than to pronounce upon the existence and scope of customary international law. There was, however, broad consensus among the experts attending the Colloquium that many of the relevant standards referred to in the guidelines reflect customary international law. In particular, the prohibition on inhuman and degrading treatment, which may be violated when refugees and others similarly situated are prohibited from working, is a norm of customary international law and *jus cogens*. This provides a floor of protection binding on all states, whether they are party to relevant treaties or not.

8. *See* Annex, *Bangalore Principles, in* Colloquium, *Judicial Colloquium in Banjul, The Gambia (Nov. 7–9, 1990)*, 3 DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE DOMESTIC APPLICATION OF HUMAN RIGHTS NORMS 151 (1990).