

# **The UWI Open Hand Initiative The Protection of Refugees & Migrants in Trinidad and Tobago:**

## **A Comparative legal analysis of international and domestic frameworks relevant to migration in Trinidad and Tobago**



September, 2020

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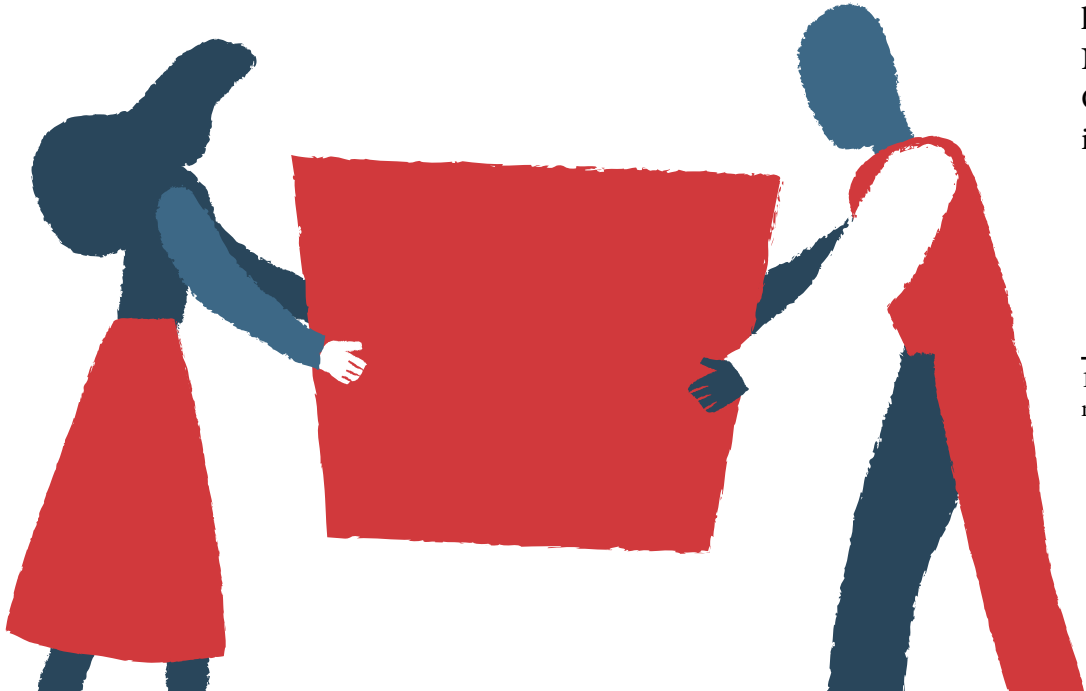
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## Introduction -The Venezuelan Migrant Phenomenon

This Comparative Legal Analysis study arises out of the ‘Open Hand Initiative,’ a multi-disciplinary project of the University of the West Indies/ PADE. The project which was developed to build the resilience of local and migrant populations as a result of the increased numbers of Venezuelan migrants in Trinidad and Tobago. The project is based on action research which takes a multi-stakeholder community-partnership approach.

The conceptual core of the Open Hand Initiative is on uniting efforts to build local capacity, provide protection, assistance and sustainable solutions to vulnerable Venezuelan migrants in Trinidad and Tobago. <sup>1</sup>



The study is one of the activities of the project, a component on law spearheaded by The Faculty of Law, University of the West-Indies (UWI) St. Augustine. It seeks to provide a comparative legal analysis of the domestic and international frameworks relevant to migrants in Trinidad and Tobago. The study examines the legal context in which Venezuelan migrants exist in Trinidad and Tobago, highlighting the several existing legal challenges that they face. The domestic legal framework, policies and practices are measured against international standards with a view to making proposals to lobby for reform and to build capacity in the legal sphere.

While a legal analysis, the study is not designed to be an academic exercise, or legal treatise, but a practical, useful tool to sensitise policymakers, legal practitioners, community service organisations and other stakeholders to the significant legal issues that underpin the Venezuelan migrant phenomenon, with a view to effecting meaningful change and a more humane environment.

The well-documented on-going socio-economic and political crisis in the Republic of Venezuela has led to vast migration to other countries. Several of these Venezuelan migrants are also seeking asylum in these countries. At its closest point, Venezuela is situated approximately 7 miles off the coast of Trinidad. Given this proximity and the ongoing exodus of migrants and asylum-seekers out of Venezuela, Trinidad and Tobago has become a haven for many of these persons. This phenomenon has been met with a number of approaches by the Trinidad and Tobago state, from utilizing domestic law immigration procedures, including detentions, deportations and increased national security attempts to prevent illegal entry into its borders, to limited asylum processes under international law and since May 2019, a temporary ‘stay,’ through a national registration/ amnesty program (the National Venezuelan Migrant Registration Program). This program is an initiative undertaken by the Government of the Republic of Trinidad and Tobago to register Venezuelan migrants in the country, in what is best described as a temporary migration program not regulated under any law.

<sup>1</sup> Activity 1.1.1: “Conduct a comparative legal analysis of the domestic and international frameworks relevant to migrants, measuring these against international standards and proposing recommendations to lobby for reform.”



The number of Venezuelan migrants in Trinidad and Tobago is uncertain. International agencies like the United Nations High Commission for Refugees (UNHCR) and Amnesty International are notable sources of such information. Figures quoted by such agencies are not in conformity with official figures from the state. The State relies on numbers from the National Venezuelan Migrant Registration Program. After this initiative, it was reported that the final figure of registered Venezuelan migrants within Trinidad and Tobago stood at 16,523<sup>1</sup>. The figure is much lower than numbers suggested by international agencies prior to this registration program, which put the figure as high as approximately 40,000 persons in January 2019. Further, in December 2019<sup>2</sup>, the UNHCR stated that there were 21,000 persons of concern registered with the UNHCR in Trinidad and Tobago<sup>3</sup> and 18,882 persons registered as of June 2020, using a Biometrics Identity Management System to collect data.

It is likely that these official figures of State registered persons do not take into account Venezuelan migrants who, whether out of fear or other concern, chose not to register under the National Venezuelan Migrant Registration Program. It also ignores the fact that even after this registration initiative, Venezuelan migrants continue to arrive. A survey done in July 2020 by the Faculty of Law, UWI under this project (the FoL-UWI Migrant Survey<sup>4</sup>), reveals from the sample that there are higher numbers of Venezuelan migrants in the country than those officially noted, since persons who arrived after the registration program were identified.

Whatever the accurate number, given that Trinidad and Tobago's native population stands at approximately 1.39 million persons<sup>5</sup>, the unprecedented number of persons migrating from Venezuela and seeking asylum in Trinidad and Tobago poses a significant challenge. Further, despite the lack of precise numbers of Venezuelan migrants in the country, this highly visible influx of migrants and refugees has become impossible to ignore. It has raised concerns in the population about the country's capability to aid so many asylum seekers, or refugees. For policy-makers, NGOs and international observers, there is concern about the capacity of the State to protect and provide for such migrants within the existing legal framework.

<sup>1</sup> Gail Alexander, '16,523 migrants registered in two weeks' Trinidad and Tobago Guardian (Port of Spain, 26 June 2019) < <http://www.guardian.co.tt/news/16523-migrants-registered-in-two-weeks-6.2.872276.48a91166b4> > accessed 6 July 2020.

<sup>2</sup> Melanie Teff, 'Forced into Illegality- Venezuelan Refugees and Migrants in Trinidad and Tobago- Field Study, Refugees International, January 2019. See also Estela Aragón, Alia El-Assar International Office of Migration (IOM), 'Migration Governance in The Caribbean Report on The Island States of the Commonwealth Caribbean', 2018.

<sup>3</sup> Human Rights Watch, 'The Venezuelan Exodus: The Need for a Regional Response to an Unprecedented Migration Crisis' as cited in Christina Valencia 'Venezuela's Refugee Crisis: Trinidad and Tobago' (William R. Rhodes Global Advisors, 2020).

<sup>4</sup> See Appendix III.

<sup>5</sup> Trinidad and Tobago Central Statistical Office, 'Mid-Year Population Estimate by Age and Sex 2005-2019'.



Photo by by Reuters



## General Legal Context of Venezuelan Migrants in Trinidad and Tobago

The State has been confronted with conflicting imperatives – on the one hand, the need to provide a humanitarian response even in the context of uncertain international obligations, as against a population increasingly hostile to migrants due to worsening economic and health circumstances. The State has also been forced to juxtapose humanitarian assistance to Venezuelans fleeing their country, with a context in which Trinidad and Tobago continues to maintain normal diplomatic and trade relations with Venezuela, even as some other countries have condemned that country for human rights violations. For Trinidad and Tobago to accept Venezuelans as refugees is to make a de facto admission that Venezuela is guilty of gross human rights violations sufficient to warrant international intervention. It is an admission that Trinidad and Tobago has not, thus far, been willing to make. These are difficult policy issues hinged on genuine political, economic and even health dimensions which must and do inform the legal context and approach.



As will be detailed further in this study, the legal infrastructure for Venezuelan migrants, who are typically seeking asylum, is inadequate and uncertain. The main problem is the lack of specific law and application of existing international legal standards for both asylum-seekers/ refugees and migrants in Trinidad and Tobago. This, in turn, is due largely to the refusal of the State to treat such international standards as binding in the domestic legal context, coupled with, at best, an increasing apathy to the issue and at worst, an ever-growing tendency toward xenophobia. There is a resort to a National Policy, which itself is imperfectly and inconsistently implemented, if at all. This ineffective legal framework forces Venezuelan migrants into a State of illegality and perpetual limbo. There is a reluctance to accept such asylum-seekers and migrants as legitimate entrants into the country at all, resulting in large-scale detentions, deportations and violations of the rights of such migrants.

The State has thus far emphasised narrow nationalistic objectives. Indeed, Michael Kagan is of the view that the UNHCR goals which promote the protection of refugees are often at odds with that of host states, who are more interested in migration control and restricting access to asylum.<sup>1</sup> We may add the Covid-19 pandemic to the mix. This discord is of particular importance given the fact that Trinidad and Tobago does not yet have a formal government refugee status determination procedure, or law in place and primarily relies on collaboration between the UNHCR and the Refugee Unit of the Immigration Division. The voluntary UNHCR process for refugee status determination remains the cornerstone of the asylum process in the absence of a formal national refugee status determination procedure. There is little movement toward a regime more in accord with international standards, even where humanitarian gestures, such as the National Venezuelan Migrant Registration program, another voluntaristic mechanism, is made.

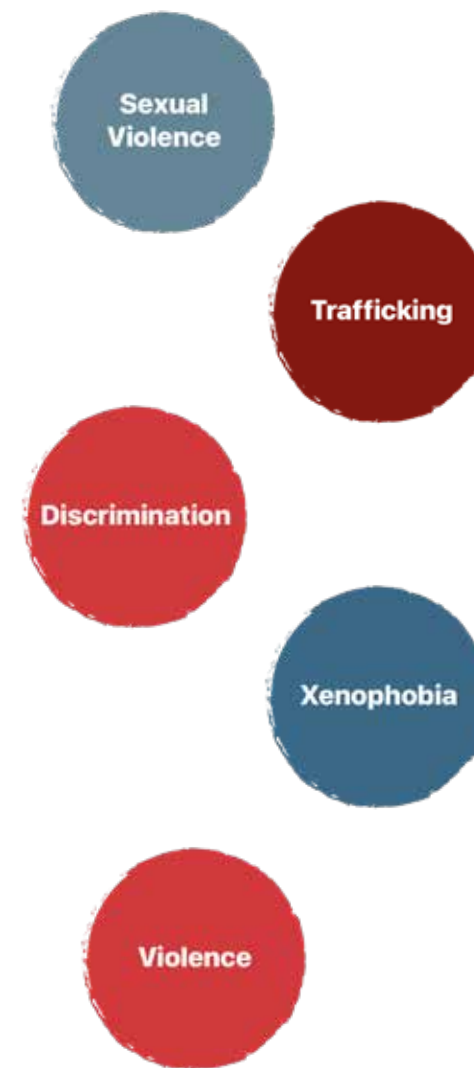
In essence, to address asylum seekers and migrants, Trinidad and Tobago employs a voluntaristic model, which is unsupported by law and inconsistent. In its current construction, as the analysis explores further below, it offends the rule of law and due process and ultimately, the duty of the State itself to act.

Moreover, the searching jurisprudential questions that should be challenging the status quo with respect to Venezuelan asylum seekers and migrants who seek entry are only now beginning to emerge in the courts. Currently, therefore, the courts offer little relief to asylum seekers, refugees, or migrants.

For migrants who remain in the country, there are claims that such persons are being exploited and even face a greater risk of death due to several factors such as a greater vulnerability to discrimination, xenophobia, sexual violence, trafficking and violence. Venezuelan women and children are particularly vulnerable, as evidenced in the FOL-UWI Migrant Survey and a public hearing presented by the Faculty of Law, UWI, St. Augustine to the Inter-American Commission on Human Rights (IACHR), (the FOL UWI IACHR Migrant Hearing).<sup>1</sup>

In addition, the Covid-19 pandemic has increased fears by the population and State actors that undocumented Venezuelan migrants are contributing to the incidence of the corona virus in the country, discussed further in the section below on the right to health. Indeed, a recent UNHCR Country report states that: “Authorities have published images of COVID-19 positive asylum-seekers, in one instance referring to a registered Venezuelan refugee who tested positive for COVID-19 as “a risk to the safety of citizens”.<sup>2</sup> At the same time, as a vulnerable, often marginalised community, the Covid-19 pandemic has increased the vulnerability of Venezuelan migrants and the risks they face, including health risks and employment income.

Since the country has very limited laws and coherent practices to deal with Venezuelan migrants, refugees or asylum seekers, this increases their vulnerability and substantial risk of being deported. Several human rights violations are occurring because of the failure of Trinidad and Tobago to put in place adequate, coherent, legal, policy and administrative frameworks to treat effectively and humanely with the huge numbers of Venezuelan migrants entering its borders.



<sup>1</sup> The Faculty of Law, UWI, St. Augustine presented a public hearing to the Inter-American Commission on Human Rights, (IACHR), OAS, Washington, on the subject: Reports of Violations of Human Rights of Venezuelan Migrants In Trinidad And Tobago, September 8, 2019; [https://www.youtube.com/watch?v=EUnQQSjTlp0&list=PL5QlapyOGhXvvyKD3Y0-GblPrDQ1xE\\_Ht&index=25&t=0s](https://www.youtube.com/watch?v=EUnQQSjTlp0&list=PL5QlapyOGhXvvyKD3Y0-GblPrDQ1xE_Ht&index=25&t=0s); <https://sta.uwi.edu/law/newsfeatures/ContentPageHearingonViolationsofVenezuelanMigrants.php>; [https://sta.uwi.edu/uwitoday/archive/july\\_2019/article23.asp](https://sta.uwi.edu/uwitoday/archive/july_2019/article23.asp)

<sup>2</sup> Trinidad and Tobago: UNHCR Situational Report, August 2020, UNHCR, 2020, <https://reliefweb.int/report/trinidad-and-tobago/trinidad-and-tobago-unhcr-situational-report-august-2020>.

## 2.1. Legal Status Challenges – the Distinction Between

Refugees

&

Migrants

From the outset, a distinction must be made between migrants, refugees and asylum-seekers. The rules for refugees and asylum-seekers flow from international law, while migrants who are not classified as the former are regulated under the Immigration Act.<sup>1</sup> Venezuelan migrants can be further divided into documented and undocumented migrants. The vast majority of Venezuelan migrants are undocumented, despite the temporary National Venezuelan Migrant Registration Program.

An important issue in the legal context of Venezuelan migrants in Trinidad and Tobago relates to the difficulty in categorising them in terms of their legal status. Venezuelans coming to the country as a result of the economic and political situation are deemed ‘migrants’, but typically seek asylum status upon arrival, so as to be deemed refugees. Refugees/asylum seekers and migrants are distinct categories of individuals that have different rights afforded to them under international law and domestic law.

There is no universal definition of a ‘migrant’. However, the UN describes an international migrant as “someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status.”<sup>2</sup> The Office of the United Nations High Commissioner for Human Rights defines the migrant as “any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence.”<sup>3</sup> These individuals generally leave their home countries voluntarily, for varying reasons and in many cases intend on returning to their country once they have fulfilled their purpose for leaving. They are subject to the host country’s immigration laws and the rights and protections afforded to them are limited. In contrast, refugees do not willingly leave their homes, but are instead forced to do so and it is agreed that a refugee is a different concept to a migrant.

A special international law regime prioritising persecution and revolving around the 1951 Convention Relating to the Status of Refugees,<sup>4</sup> (the 1951 Refugee Convention), a treaty Trinidad and Tobago has ratified, treats with persons who can legitimately claim refugee, or asylum status. Once refugee status is acquired, such persons are entitled to expansive rights under international law. The definition of a refugee must, however, conform to the arguably limited prescribed criteria itemised under this treaty and related instruments under Article 1 of the 1951 Refugee Convention, as explored below in more detail. International standards for migrants flow mainly from the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (the Migrant Workers Convention)<sup>5</sup>, which, notably, Trinidad and Tobago has not ratified.

Nonetheless, the issue of Venezuelan migrants blurs this distinction because of these persistent refugee claims. In addition, as discussed further below, because of the particular context in which such migrants are entering Trinidad and Tobago and other countries, they have been deemed to fit the definition of a refugee. Accordingly, much of the discussion and analysis in this study focusses on conceptualising and defining a legal framework that speaks to the context of migrants seeking asylum, or refugee status.

In sum, the right to seek asylum is now firmly established as a binding international legal norm. What remains however, are the variables in the criteria used to determine refugee status, particularly in the context of the Venezuelan migrant phenomenon, where economic distress appears to be the most compelling factor for movement. The weakest link in the jurisprudential debate is not whether Trinidad and Tobago has obligations toward asylum, but the scope and content of those obligations, given the relatively narrow definition of asylum.

## 2.2. The Application of International Standards to Migrants in Trinidad & Tobago

In addition to the classification of Venezuelan persons entering into the country as asylum seekers/refugees, or migrants [who are not asylum-seekers], whether documented or undocumented, the domestic legal standards applied to such persons will also depend on the application of international legal standards for the particular category. This will turn on whether the State has ratified and / or incorporated the relevant treaties. Where it has not, Trinidad and Tobago applies pure domestic legal standards.

The two main treaties that are relevant to the Venezuelan migrant phenomenon are the 1951 Refugee Convention and the Migrant Workers Convention. The former treats with the issue of persons entering a State to seek asylum or refugee status, while the latter deals more generally with migrants who are not refugees. Trinidad and Tobago has ratified the first but not the second.

Trinidad and Tobago is a dualist State and as such, treaties do not take direct effect unless incorporated into domestic law by way of domestic legislation. While the official position of the state is that the relevant treaties are not binding because they have not been incorporated, this is not the full position in law.<sup>1</sup> Indeed, the State had wrongfully asserted that the 1951 Refugee Convention had not been ratified.<sup>2</sup> On this question of the application of such international standards, this study puts forward alternative approaches to the state’s official position, which are more in accord with modern, in-depth understandings of international law obligations. These alternative approaches, which are supported in law, will, if implemented, also result in more humane treatment of Venezuelan migrants and asylum seekers and be more consistent with international human rights.

First, and most important, the absence of incorporation does not and should not mean that such ratified treaty law and norms are without any application, or effect, as Trinidad and Tobago currently asserts. It is now a well-established norm that States which ratify treaties and conventions acquire obligations to bring them into effect by either altering their domestic law, or creating entirely new ones in order to incorporate and ensure compliance with the treaties. Second, it is a principle of legislative interpretation that legislation is to be read in conformity with unincorporated principles of international law to the extent of any inconsistency, or where legislation is void of a guiding principle.<sup>3</sup> Notably, the Immigration Act, which is the vehicle for migrant and asylum claims is not in conflict with international law in or itself. Rather, it is silent on the issue and is used as a ‘stop-gap’ measure. Unsurprisingly, international law norms have been most often referenced in Caribbean constitutional law review, addressing human rights issues. Human rights principles are generally viewed as universal in scope, unlimited by sovereignty concerns and treaty provisions have been used as aids to interpretation or even applied directly.

A more direct route to justiciable international law norms emanating from ratified treaties also exists through purposive interpretations of the Constitution. Precedents from the European Court on Human Rights interpreting the European Convention on Human Rights are helpful, both because such jurisprudence has always been persuasive in Caribbean courts due to similarities in their respective authoritative documents and also because, like the Constitution, the Convention does not contain any explicit reference to the right to asylum. Instructively, the ECtHR has interpreted Article 3 of the Convention - the prohibition against cruel, inhuman, or degrading treatment or punishment, to locate protection for asylum seekers, in recognition of the risk of torture, inhuman or degrading treatment or punishment, that a migrant faces on return to his country.<sup>4</sup>

<sup>1</sup> As enunciated by the Attorney-General Hon. Faris Al Rawi. See ‘AG Says No Law for Refugees, asylum seekers, Trinidad and Tobago not ready yet Guardian, Mon 19, 2018 - <https://www.guardian.co.tt/news/ag-no-law-for-refugees-asylum-seekers-6.2.719051.d3618d40c5>. The statement and the approach were also criticized by international organisations and commentators, such as Amnesty International: ‘Amnesty International Slams AG Al Rawi on Asylum Issue’, Loop News, November 21, 2018, <https://www.looptt.com/content/amnesty-international-slams-ag-al-rawi-asylum-issue>.

<sup>2</sup> Alina Doodnath, ‘AG insists: No refugee laws, but there are protocols’, Loop News, 23 November 2018. In a media briefing, Al-Rawi made the erroneous statement that “although Trinidad and Tobago is a signatory to the 1951 Refugee Convention, the agreement was never ratified in law.” Trinidad and Tobago also acceded to the 1967 Protocol relating to the Status of Refugees in November 2000. <https://www.looptt.com/content/ag-insists-no-refugee-laws-we-have-protocols>.

<sup>3</sup> Vishaka and others v. State of Rajasthan and others (1997) 6 SCC 241 [14].  
<sup>4</sup> Soering v. UK, (1989)11 EHRR 439.

<sup>1</sup> Chapter 18:01, No 41 of 1968 as amended.  
<sup>2</sup> Statement UN#4 - <https://refugeesmigrants.un.org/definitions>.  
<sup>3</sup> UN OHCHR, ‘Summary of Recommendations from the OHCHR Expert Meeting on the Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants’ (5 Oct 2017). For more expansive definitions, see: <https://wayback.archive-it.org/10611/20171126022441/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/>  
<sup>4</sup> (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.  
<sup>5</sup> Adopted by General Assembly resolution 45/158 of 18 December 1990.



Other Convention protections, such as the right to life, prohibition of slavery, servitude and compulsory labour, right to liberty and security, right to a fair trial, right to respect for private and family life, right to freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, prohibition of discrimination in the enjoyment of ECHR rights, have also been used to invoke protection against refoulement for asylum seekers.<sup>1</sup>

Consequently, despite not having incorporated the 1951 Refugee Convention into the domestic laws, as a ratified Convention, the State cannot simply ignore it and its core principles. In sum, while in dualist states like Trinidad and Tobago, incorporation is usually expected for international treaties to have full effect, even when this has not occurred the country can still be legitimately held to the standard of the unincorporated treaty and its provisions treated as justiciable. In particular, the principles from such ratified Conventions can be used to interpret domestic refugee laws and immigration procedures wherever there may be gaps in the existing legislation or procedure, as is the case in Trinidad and Tobago in relation to the 1951 Refugee Convention.

Moreover, the courts in Trinidad and Tobago have recognised ratified Conventions without incorporation before, both before the Judicial Committee of the Privy Council, (the Privy Council), the final court of appeal and the Caribbean Court of Justice, (CCJ) the final court for trade matters under the Treaty of Chaguramas.<sup>2</sup> The jurisprudence has advanced further in recent years with the highest courts in the land, the Privy Council and the CCJ, upholding the doctrine of legitimate expectation as a pathway to making such international treaty obligations justiciable.<sup>3</sup> In AG v. Joseph and Boyce, which relied on the doctrine of legitimate expectation in a death penalty case, the President of the CCJ expressly noted the influence and legitimacy of international law norms in decision-making in domestic courts, saying: In determining the content of a municipal right, domestic courts may consider the judgments of international bodies.”<sup>4</sup>

Further, while treaties not ratified by Trinidad and Tobago have persuasive effect only, they can be important guides for shaping policy and domestic law according to best practice.

### Customary International Law

International obligations toward migrants and refugees also accrue as a result of the principles of customary international law even where no specific treaties exist. These are directly binding on states. As explained further below, there are rules of customary law that have emerged in relation to asylum-seekers and perhaps more contentiously, with respect to migrants. This is especially important for rights to relevant migrants which flow from the Universal Declaration of Human Rights (UDHR),<sup>5</sup> given that Trinidad and Tobago has not ratified the Migrant Workers Convention. It is also a rule of customary international law that a State may not invoke the provisions of its internal law, or lack thereof, to justify its failure to uphold the terms of a treaty. Where Trinidad and Tobago fails to obey principles of customary law, as is often the case in the Venezuelan migrant phenomenon, the State is in breach of its international law obligations.

The applicability of international law and international human rights law is therefore key to understanding the legal obligations that legitimately arise in Trinidad and Tobago with respect to Venezuelan migrants, asylum seekers and refugees. It also explains the rationales for the lacunae in legal standards that exist.

<sup>1</sup> See, e.g. on the right to life - D. v. UK (1997) 24 EHRR 423; H.L.R. v. France (1997) ECHR 24573/94, Bader and Kanbor v. Sweden, (2008) 46 EHRR 197,42; V.F. v. France, No. 7196/10 (2011); Othman v. UK, (2012) 55 EHRR 1; right to respect for private and family life.

<sup>2</sup> See e.g. Naidike v the Attorney General of Trinidad and Tobago [2004] UKPC 49, considered below; Shanique Myrie v State of Barbados, [2013] CCJ 1 (OJ) (R). Myrie was a case from Jamaica, but since it was in the original jurisdiction of the CCJ, is binding on Trinidad and Tobago. The CCJ's Belize case of Maya Leaders Alliance v. The Attorney General of Belize [2015] CCJ 15, is also highly persuasive.

<sup>3</sup> See, e.g. Naidike, *ibid*, and Attorney General v. Boyce and Joseph, [2006] CCJ 1 (AJ), at para 106; AG v. Boyce and Joseph, (2006) 69 WIR 104 (CCJ) at para [106], respectively. See also the Australian case of Minister for Immigration and Ethnic Affairs v Teoh (1994) 128 ALR 353, upon which both the Privy Council and the CCJ relied.

<sup>4</sup> Boyce and Joseph, *ibid*

<sup>5</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). Adopted by the UN General Assembly in Paris during its 183rd plenary meeting.

### Recognition of Asylum in Practice and an Ad Hoc System

Notwithstanding the state's reluctance to formally recognise its treaty and customary international law obligations, arguably, the State can be said to have waived its objection to the right of asylum, given that, in practice, it has recognised it on previous occasions and will no doubt continue to do so. This is evidence of its acceptance of the existence of the right to seek and enjoy asylum in international law. It is also de facto recognition by the state that it has obligations in international law toward asylum seekers. In Trinidad and Tobago this practice is as a result of a longstanding collaboration with the UNHCR in designating migrants as refugees.

As noted previously, there is no specific law that regulates the asylum seeking process in Trinidad and Tobago. The Immigration Act regulates migrants and not asylum-seekers or refugees. What is in effect in Trinidad and Tobago, is an informal and sometimes ad hoc arrangement with external actors, the UNHCR and its Honorary Liaison/ implementation partner, the Living Water Community (LWC) to harness, process and register Venezuelan migrants seeking asylum in line with international standards. Notably, a UNHCR procedure arises where a state is unable or unwilling to assume responsibility for this process. “For states in which there are no national procedures in place, where procedures prove to be deficient in detecting protection needs, or where the government has limited the implementation of the 1951 Convention, UNHCR is obliged to carry out RSD under its mandate (UNHCR, 2005).<sup>1</sup>

This extra-State process is itself cause for concern. Significantly, the UNHCR registration documents granted to each asylum seeker disseminates no legal rights and has a tenuous status, sometimes respected by Ministry of National Security officials and other law enforcement personnel and sometimes not. Further, where persons do not succeed in being registered as a refugee, they must be handed over to the Immigration authorities and may be detained, charged and tried for illegal entry before the Magistrates courts or, on other occasions, deported.

The failure of Trinidad and Tobago to incorporate, or apply the treaty obligations of the Conventions it has signed, or even principles of customary international law on these issues, is an important one. The consequence is that the State is therefore lacking a proper system that can allow for the legal integration of asylum seekers into the society. Thus, for Venezuelan migrants, many of whom also need and seek refugees or, asylum status for protection, the main challenge is that while Trinidad and Tobago has ratified the primary treaty instrument on the issue, it has not incorporated it. Trinidad and Tobago is therefore in breach of its treaty obligations given that no domestic laws relating to refugees currently exist and the administrative procedures formulated to bring the State in conformity with the 1951 Refugee Convention are either applied arbitrarily and inadequately, or not at all. Moreover, since the Venezuelan migrant phenomenon began, the State has pursued a route that seeks to actively deny that any international legal obligations accrue as a result of their ratification of the relevant treaties. This means that not only are treaty principles being ignored, but actively resisted, in direct contradiction to the state's signal to accept the treaty when it ratified it.

The relevant treaty instruments that apply to migrants and refugees/asylum seekers, together with the core principles that flow from them, are considered in turn below. Given the special designation of Venezuelan migrants as ‘refugees’ by the UN, more emphasis is placed on the legal framework applicable to asylum seekers and refugees, as opposed to traditional migrants.

The obligations under these various treaty instruments are examined in order to decipher whether the Trinidad and Tobago legislation meets the international standards and what areas in domestic law need improvement. This study also compares the international response to the various categories (refugee and migrants, both legal entrants and entrants with an irregular status) as opposed to the response of the Trinidad and Tobago Government to these groups of persons.

<sup>1</sup> Explained in Migration Governance in the Caribbean, Report on the Island States of the Commonwealth Caribbean, International Organization for Migration, 2018, p. 47. [https://caribbeanmigration.org/sites/default/files/repository/regional\\_report\\_on\\_migration\\_governance\\_in\\_the\\_island\\_states\\_of\\_the\\_commonwealth\\_caribbean.pdf](https://caribbeanmigration.org/sites/default/files/repository/regional_report_on_migration_governance_in_the_island_states_of_the_commonwealth_caribbean.pdf).

**Relevant International Law Standards on Migrants and Asylum Seekers**

The rights and protections which should accrue to refugees/asylum seekers in any State emanate mainly from international instruments and norms and are expected to be translated into domestic law. In Trinidad and Tobago, however, many of these rights and protections are absent due to the paucity of appropriate legislative provisions and administrative procedures reflective of such international law in the domestic legal framework.

There are a number of international treaty instruments and norms that regulate the treatment of migrants and asylum seekers and refugees. Such sources of international law provide both substantive and procedural rules for addressing the status and treatment of migrants and refugees in the domestic sphere. In particular, such treaties provide a platform for protection for persons fleeing harm from their home states. Both international humanitarian law and international human rights law establish minimum standards of treatment that states must afford to individuals within their territory or jurisdiction. The most important of these international treaty instruments are the following:

**The Convention Relating to the Status of Refugees and the 1967 Protocol**

While there are several international legal instruments which address the issue of asylum seekers and refugees, the 1951 Refugee Convention is the premier, specialised international instrument, or *lex specialis* for addressing refugees and the foremost legal authority on the status and treatment of refugees.<sup>1</sup> Trinidad and Tobago ratified the Convention on the 10th of November 2000. In accordance with international law, it is expected that the State parties who have acceded and ratified this convention, will use its articles as a foundation for their own domestic laws through the process of incorporation. As noted above, this country has not yet incorporated the 1951 Convention, although it formulated a Draft Policy in 2014 to promote its main provisions.

**"The Convention itself originated as an effort by the United Nations to ensure safe harbour of persons fleeing the events of the Second World War in Europe prior to 1951"**

Refugee protections and rights are also provided for under the Protocol Relating to the Status of Refugee, an addendum to the 1951 Refugee Convention.<sup>2</sup> Trinidad and Tobago acceded to this Protocol on November 10, 2000.<sup>3</sup> The Protocol amended the Convention, removing the limitations to the scope of refugee protection and allowing for universal coverage. Consequently, the Convention in conjunction with the Protocol, today provide protection to any person considered a refugee under their provisions, an important requirement which will be further discussed in relation to the present study.

**The Migrant Workers Convention**

Given that many Venezuelan migrants who seek asylum will be unsuccessful and will therefore remain as undocumented migrants, international standards that treat with migrants in general, are relevant in a consideration of the legal framework and identifiable gaps. The Migrant Workers Convention is the main instrument providing for the protection of migrants.<sup>4</sup> Trinidad and Tobago has not ratified this Convention and therefore under international law, Venezuelan migrants and their families have no legal claim to protection under this specific treaty. However, several of the rights enshrined in this Convention are also found in other international law instruments to which Trinidad and Tobago is a State Party. Moreover, certain principles in the treaty are principles of customary international law. Consequently, Venezuelan migrants and their families are entitled to these universal fundamental rights and freedoms. Further, the Migrant Workers Convention is an important source of international law that can be influential in guiding national policy and courts examining gaps in domestic law.

1 It was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva in July 1951 and entered into force and registered on 22 April 1954, in accordance with article 43 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. There are currently 19 signatories and 146 parties to this Convention. The Convention itself originated as an effort by the United Nations to ensure safe harbor of persons fleeing the events of the Second World War in Europe prior to 1951.

2 New York, 31 January 1967 was approved and transmitted to the States mentioned in article V by the General Assembly Resolution 2198 (XXI)2 of 16 December 1966. It was registered and entered into force on 4 October 1967, in accordance with Article VIII. There are 147 parties to the protocol

3 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol). This Instrument is an addendum to the 1951 Convention, which was originally designed to provide relief to refugees of the Second World War, limiting the scope of its provisions to these persons. The 1967 Protocol removed these limitations giving the Convention universal coverage.

4 UN International Convention on the Protection of the Rights of Migrant Workers and their Families (adopted 18 December 1990, entered into force 1 July 2003) UNTS vol. 2220. The Migrant Workers Convention was adopted by the UN in 1990 and entered into force only in 2003.

As revealed in its Preamble, the Convention was drafted to address the vulnerability of migrant workers and their families. It acknowledges that the problems involved in migration and migrant employment are even more serious for irregular or undocumented migrants. It therefore aims to encourage States to establish measures and policies to prevent and eliminate underground movements and trafficking in migrant workers to ensure the protection of their fundamental human rights.

**The Convention on the Elimination of All Forms of Discrimination Against Women<sup>1</sup>**

The Convention on the Elimination of All Forms of Discrimination Against Women, (the Women's Convention), addresses a broad and diverse range of concerns relevant to women and their well-being. As such, it encompasses many of the issues that Venezuelan migrant women face. These include, but are not limited to, gender violence, discrimination, the right to health, including sexual and reproductive health, equal remuneration and trafficking. Trinidad and Tobago is a party to this important Convention.



**Convention on the Rights of the Child**

The Convention on the Rights of the Child (CRC)<sup>2</sup> is an important supplementary treaty instrument to consider in assessing the protections that should be afforded to refugee seekers and migrants who are children.

The CRC provides an additional and important route of protection in international law for Venezuelan children who are migrants or refugees, providing for both civil and political rights and economic and social rights. Trinidad and Tobago ratified the CRC in 1991 and has since incorporated its main provisions into the domestic law of Trinidad and Tobago, primarily enshrined in the Children Act 2012.<sup>3</sup> However, no explicit mention is made of provisions for refugee children, including any process to grant refugee status, or migrant children. This is a deficit in the legal obligations of the State to bring the law into conformity with the CRC.

Notwithstanding, the Act does not specify that only children who are nationals of Trinidad and Tobago enjoys its protections. Indeed, it speaks to offences against children that are committed within the jurisdiction. Further, it references the CRC in its Interpretation section. It can therefore be inferred that the Children's Act is to be interpreted in the light of the CRC and the courts have already begun to employ this route of interpretation.<sup>4</sup>

**General Human Rights Treaties – UNDHR, ICCPR and ICESCR**

More general international human rights instruments such as the International Covenant on Civil and Political Rights<sup>5</sup> (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>6</sup>, and the UDHR, also supplement the rights provisions and protections of the more specific treaties on refugees and migrants as named above. These general human rights treaties proclaim certain rights which, it is suggested, are of universal application and consequently apply to all persons, including migrants, whether documented or undocumented.

1 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.  
2 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.  
3 Chapter 46:01  
4 See the Naidike case, n. 21, discussed below.  
5 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).  
6 General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, UNTS 993, p3.





### 2.3. The Main Domestic Law Standards & Practice under the Immigration Act

The above-mentioned international treaty framework should serve as a solid foundation upon which domestic laws, policy and norms are to be built. It is therefore pertinent to examine the domestic legal framework to measure the extent to which these are being provided. Despite being parties to the 1951 Refugee Convention and its 1967 Protocol, it is difficult to discern any reflection of these Convention principles from the treatment of Venezuelan migrants by the authorities of the State. Based on the response of the Trinidad and Tobago Government, there is also little regard to the United Nations stance on viewing Venezuelan Nationals as refugees. This is seen particularly in the absence of coherent and adequate legislation for refugees and the disregard for due process guarantees, often leading to deportation and the prohibition against detention, considered below.

In Trinidad and Tobago, the domestic legal infrastructure for migrants and refugees is framed by a single piece of legislation, the Immigration Act. This is because there is no specific legislation that addresses refugees, or asylum seekers, forcing such persons to rely on processes in the existing general immigration framework in order to protect refugees. This works in conjunction with non-legal administrative practices and policies to aid the refugee status determination process.

These come from Agreements with the UNHCR, their Honorary Liaison, the LWC and other partners such as the FPATT.<sup>1</sup> Without those Agreements, the Immigration Act would be applied strictly, resulting in refugees having no rights, or protections when entering the state.

The Immigration Act treats with all migrants in Trinidad and Tobago. However, it is ill-equipped to deal with the particular problems of the appropriate status and protections to be afforded Venezuelan migrants, given their vulnerable socio-political situation and high number. The Act is also outdated and does not reflect the contemporary international law norms that should apply to refugees and migrants. At best, it provides a hearing before migrants are deported. At worse, even its basic provisions are ignored and Venezuelan migrants are unceremoniously deported, or imprisoned without any due process.

<sup>1</sup> The Family Planning Association of Trinidad and Tobago (FPATT), an NGO over 63 years in existence which provides sexual and reproductive health services.



Section 9 of the Immigration Act outlines entry requirements for non-nationals. Venezuelans attempting to enter ‘legally’, may be permitted to do so as “tourists or visitors.”<sup>1</sup>

An immigration officer may issue a certificate of entry for a specified period and subject to the terms and conditions deemed as necessary. Up to late 2018, several Venezuelans were being granted entry through this route. Indeed, it caused complaints of discrimination against other migrants, such as those from Africa, and even a diplomatic incident relating to Jamaican nationals who are entitled to entry under the Caribbean Single Market and Economy.<sup>2</sup> However, this route to legal entry diminished as the numbers of Venezuelan migrants increased.

Migrants, including Venezuelan migrants, are subject to the rules under the Immigration Act relating to deportation. According to section 11 of the Immigrant Act migrants who enter the country unlawfully have no right to remain and can be deported on the order of the Minister with no right of appeal. Persons may also be detained under section 14 of the Act.<sup>3</sup> Provision is made for special inquiries, or hearings to determine whether a deportation order should be made and a migrant may be detained pending the outcome of the hearing.<sup>4</sup> In the determination of the deportation hearing, migrants with irregular status may be granted voluntary repatriation or a deportation order. Migrants are also subject to fines. If a migrant is granted voluntary repatriation, he can enter Trinidad at any time, but if he is given a deportation order then he is banned from re-entering Trinidad legally.

Section 13 of the Immigration Act specifies that immigration officers in charge of a port of entry are Special Inquiry Officers who have the authority to inquire into and determine whether any person shall be admitted into Trinidad and Tobago or allowed to remain in Trinidad and Tobago or shall be deported. Both sections 14 and 15 of the Immigration Act confer, on the Minister, Chief Immigration Officer and Special Inquiry Officers, the authority to detain. Section 14 provides the mechanism to do so with a warrant and section 15 without a warrant or direction. Nonetheless, whether the power that is being exercised is under section 14 or 15, importantly, the purpose of exercising the power to detain is to hold an inquiry or for deportation [emphasis mine]. An inquiry is the commencement of deportation proceedings and the relevant process is set out in sections 21 to 27 of the Immigration Act and Regulation 25 of the Immigration Regulations. Section 16 of the Immigration Act makes provision for detention of a person pending inquiry, examination, appeal or a deportation or rejection order at an immigration station or other place satisfactory to the Minister.

Under section 21(1) of the Immigration Act, after examination of a person seeking to enter into Trinidad and Tobago, where an immigration officer is of the opinion that it would or may be contrary to a provision in the Act or the Regulations to grant admission to such a person, he may either (i) make an order for the rejection of such person; or (ii) cause such person to be detained pending the submission of a report to a Special Inquiry. Pursuant to section 29 of the Immigration Act, where a deportation order is made, it must be enforced as soon as possible and it remains valid over the individual unless the order is cancelled on the instructions of the Minister.

Where a migrant claims he is seeking asylum, a different process is however expected. As noted earlier, since there are no procedures for asylum seekers under the Immigration Act, alternative processes that seek to conform to international standards have had to be derived on an informal basis. Currently, refugee processes are handled by external actors, the UNHCR and the LWC. The Refugee Status Determination (RSD) process is spearheaded by the UNHCR under its mandate, as there is no formal refugee status determination process that has been enacted by the state.

**Refugee Policy and Collaborations with the UNHCR for Asylum Procedures**

Given the paucity of the domestic legal framework with respect to refugees, in 2014, the government of Trinidad and Tobago established a cabinet approved National Policy to Address Refugee and Asylum Matters (the Refugee Policy) As the name suggests, this was to provide a coherent framework to address the asylum process pending the enactment of hard law. The policy envisages collaboration between the UNHCR and the State for the purposes of a clear process for refugee status determinations. It provided for a three phased approach to the process.<sup>1</sup> However, the Policy was not implemented except for partial arrangements under Phase 1, which initiated the partnership between the state, through the Immigration Department and the UNHCR, with its Honorary Liaison, or agent, the LWC. The more detailed provisions of Phases 2 and 3, which emulated established UNHCR procedures, were never implemented.<sup>2</sup>

The UNHCHR and the LWC continue to work with the government to implement fully the provisions of the Refugee Policy and established international standards.<sup>3</sup>

In 2017, Interim Standard Operating Procedures for The Protection of Asylum-Seekers And Refugees In Trinidad And Tobago<sup>4</sup> (Standard Operating Procedures) were formulated by the State and implemented to attempt to fill some of the gaps in the non-implementation of the Refugee Policy. The Standard Operating Procedures are categorized into three parts, with each part dealing with an individual aspect of the refugee status determination process. These Standard Operating Procedures were intended to guide the actions of the representatives of the UNHCR, LWC and the officers of the Immigration Division, pending the enactment of legislation which would give effect to the 1951 Refugee Convention and abide with the objectives set out in the Refugee Policy.

The Tenth Study of the Joint Select Committee on Human Rights, Equality has emphasised that these procedures have no force of law, but are best practice guidelines.<sup>5</sup> The fact that changes to these Standard Operating Procedures can occur under the sole directive of the Permanent Secretary, Ministry of National Security, makes them not standard at all and in danger of being arbitrary. Consequently, while some important cooperation has materialised as envisaged under the Refugee Policy, it has not been adequate, or certain, as demonstrated further below. The Eligibility Committee prescribed in the 2014 Refugee Policy was never created.<sup>6</sup> However, a Refugee Unit of the Immigration Division was established. The Refugee Unit works in coordination with the UNHCR and the LWC to implement agreed asylum procedures.

**Agreed Asylum Processes Through the UNHCR and LWC**

UNHCR and LWC, as implementing agents for asylum on behalf of the state, work in compliance with the 2014 Refugee Policy and the 2017 Interim Standard Operating Procedures, collaborating with the Immigration department, especially the Refugee Unit and other enforcement agencies. These processes, although without the force of law, are the primary guides for the asylum process.<sup>7</sup>

There are different routes for asylum seekers to obtain regularization of their status within Trinidad and Tobago. Based on the 2014 Refugee Policy and the 2017 Standard Operating Procedures, an asylum seeker can make representations either directly to the UNHCR, through its agent, the LWC, or to an Immigration Officer. The Immigration Unit may also refer persons seeking asylum to the UNHCR/ LWC. Where received by the LWC, these documents are referred to the UNHCR for a status determination based on the guidelines highlighted above. Depending on the party to whom the representation is made, there are variances in the procedures.

When presented to the UNHCR or LWC, the asylum seeker must first be pre-screened by the LWC in an interview to assess the situation and begin the refugee status determination process. Asylum seekers are required to produce certain information, including their passports, which contain bio-data, any identification or travel documents and any other relevant certificates. Once this information is received and the asylum seeker is registered, the refugee status determination process can commence. After the pre-screening, a LWC Reception Officer sets up an appointment for the migrant to go to UNHCR to register and complete the registration process.<sup>8</sup>

1 Under s. 9 (c). Persons entering Trinidad and Tobago for the purpose of engaging in a legitimate profession, trade or occupation may also be admitted under s. 9 (i), but this would typically not apply to Venezuelan migrants.  
2 New City Chambers Press - <https://newcitychambers.com/tt-newsday-gayle-speaks-on-african-migrants-in-trinidad-tobago/>; Derek Achong, Urvashi Tiwari-Roopnarine, ‘Rowley welcomed to Jamaica Key bi-lateral talks on today’, <https://www.guardian.co.tt/article-6.2.356124.c5678916e1>.  
3 14. (1) The Minister may issue a warrant for the arrest of any person in respect of whom an examination or inquiry is to be held or a deportation order has been made under this Act, and may order the release of any such person.  
(2) The Minister, the Chief Immigration Officer or a Special Inquiry Officer, may make an order for the detention of or direct the detention of any such person.  
4 See sections 21 – 25 of the Immigration Act.

1 See Appendix B for further details of the Policy.  
2 See Appendix A.  
3 The Faculty of Law, Interview with a Senior Legal Officer, Living Water Community (LWC), 3 August 2020.  
4 Parliament of the Republic of Trinidad and Tobago, Fourth Session of the Eleventh Parliament, Tenth Study of the Joint Select Committee on Human Rights, Equality and Diversity on the Treatment of Detainees at the Immigration Detention Centre (2018/2019) 182-186.  
5 Ibid.  
6 Interview with LWC, supra, n. 43.  
7 Ibid.  
8 Ibid.

The migrant is then given a UNHCR card which indicates that he or she is seeking asylum. The asylum seeker will subsequently be called in for a refugee status determination interview for the UNHCR to decide if refugee status will be granted, or not. The UNHCR utilises international standards and criteria for determining refugee status as prescribed by relevant treaty instruments such as the 1951 Refugee Convention.<sup>1</sup> Upon reaching a determination, the UNHCR will notify the asylum seeker by letter if successful, or in person if unsuccessful. If successful, the person of concern will be regarded as a refugee under international law and within Trinidad and Tobago. However, if unsuccessful, the asylum seeker has an appeal for a decision within thirty days of the receipt of decision. If the denial is upheld, the decision is conveyed to the asylum seeker in person via letter. Under the agreed terms, an individual who is granted refugee status is allowed to stay in Trinidad and Tobago indefinitely.<sup>2</sup>

The UNHCR card given to asylum seekers does not confer any legal rights to the migrant, including any right to remain in Trinidad and Tobago or to work.<sup>3</sup> However, because of the procedures that have been agreed upon between the State and the UNHCR, the right to apply for asylum, have access to territory and to not be deported is expected to be respected. For example, although the asylum-seeking card has no legal weight, when migrants are called for deportation/ immigration hearings, asylum seekers who are registered through reception with the LWC and the UNHCR can have their hearing adjourned pending the outcome of their refugee status, once they present their registration documents to these immigration officers during the hearing.<sup>4</sup> Consequently, no decision regarding deportation or voluntary repatriation would be made concerning the migrant. In this sense, the UNHCR asylum-seeking card is respected even though it is not mentioned in any domestic laws.

Persons who receive a first instance denial of asylum have the right to appeal. An appeal application must be submitted to UNHCR within the indicated time frame.

Throughout this process, once registered as an asylum seeker, the Refugee Unit of the Immigration Division will perform a background check and conduct an interview with the person of concern. The Immigration Division will also place the asylum seeker under an Order of Supervision pursuant to section 17 of the Immigration Act, pending the outcome of the refugee status determination procedure. He may be asked by an Immigration Officer to pay a security bond if he interacts with an Immigration Unit that is not the Refugee Unit. It is part of immigration procedure to ask foreign nationals to pay a bond before being placed on an Order of Supervision, if they are in breach of the Immigration Act.

Under the terms of the agreed procedures, it is expected that the Refugee Unit will work with the UNHCR and the LWC to ensure that asylum-seekers and refugees are also registered with the Government, will facilitate local integration in accordance with the current legislative framework, liaise with other authorities to confirm the asylum-seeker, or refugee status, and raise awareness about the situation of refugees and asylum-seekers in Trinidad and Tobago.<sup>5</sup>

The files of migrants who have been recognised as refugees are transferred to the Refugee Unit and these refugees are monitored or placed on 'study' by the Refugee Unit every three months<sup>6</sup>, in contrast to a regular migrant with an order of supervision would have to Study every month to the Immigration Division. The Refugee Unit may also allow migrants to keep their passports depending on the circumstances.

However, in the event that the Immigration Division comes into contact with a person who is not an asylum seeker, normal immigration procedures and penalties outlined under the Immigration Act will be enforced, as described above. These may involve hearings before the Magistrates Courts.

The LWC and the UNHCR continue to conduct the above procedures. Currently, the LWC is facilitating reception activities with migrants over WhatsApp as persons are not allowed to come into the office due to the COVID-19 pandemic.<sup>7</sup> The above agreed procedures could be adequate if consistently implemented as envisaged. However, there is concern that these agreed procedures are not always carried out and that the close collaboration expected between the UNHCR and the Refugee Unit/ Immigration Department is often not forthcoming.

1 Described below in the analysis of international criteria. For example, in all cases, the person making the representation must have a fear, or the person to whom the representation is being made must perceive such a fear, of returning to the country of their origin or last habitual residence.  
2 Interview with LWC, supra, no. 43.  
3 Ibid.  
4 Ibid.  
5 Where to Seek Help?" (Trinidad and Tobago April 17, 2020) <https://help.unhcr.org/trinidadandtobago/where-to-seek-help/> accessed July 10, 2020.  
6 Interview with LWC, supra, n. 43.  
7 Ibid.

**Regional Inter-Agency Coordination Platform**

In 2018, the UN Secretary-General requested of the UNHCR and IOM, that a Regional Inter-Agency Coordination Platform (R4V) be established to spearhead and organise the response of refugees and migrants from Venezuela.<sup>1</sup> The aims of this platform were to address the protection, assistance and integration needs of both refugees and migrants from Venezuela<sup>2</sup>. In order to achieve these goals, country-specific support, information management, communication (messaging and reporting) and resource mobilization were provided.<sup>3</sup> As a result of this platform, a Refugee Migrant Response Plan (RMRP) was established. The RMRP highlights the priority needs for refugees and migrants in host communities, namely, direct emergency response, protection response, gender-based violence, shelter, access to food, adequate nutrition and healthcare and provision of livelihoods and self-reliance opportunities.<sup>4</sup>

While this initiative aims to deal with matters on a regional level, the UNHCR/ LWC have transplanted its core principles to the Trinidad and Tobago framework, whether in its dealings with the State under the National Policy or with NGOs working on migrant issues, such as the provision of shelter, food, medical care and the like.<sup>5</sup>

**The National Venezuelan Migrant Registration Program**

After continued and intense advocacy by international organisations, the UWI and NGOs about the plight of Venezuelan migrants, the Trinidad and Tobago government offered an amnesty and conducted a registration process with the Venezuelan migrants in May 2019, the National Venezuelan Migrant Registration Program. This applied regardless of whether their entry into the country was legal or illegal.

During a two week migrant registration period, Venezuelan nationals, regardless of their immigration status, were allowed to register with the relevant Ministries for the purposes of receiving a "work permit exemption" card permitting employment, also called the "Minister's card." <sup>6</sup> Migrants who completed the registration process successfully were deemed eligible and were granted a stay in the country and permitted to work for one year, ( initially six months)<sup>7</sup> and more recently, an extra six months ending in December 2020.<sup>8</sup>

They were required to fill out an online copy of the registration form, print it and attend one of the three set registration venues, during the period 31 May 2019 to 14 June 2019, between the hours of 7:00 am to 5 pm, where they were asked to present certain specified documents, namely their Birth Certificate, Cedula/Identification Card, Passport, 2 Passport-sized Photographs, Proof of address, Marriage Certificate (if applicable) and/or Legal Guardian documents (if applicable)<sup>9</sup>. During this process registrants were fingerprinted, photographed, and required to provide proof of their nationality as well as their place of residence in Trinidad and Tobago and undergo a medical examination.<sup>10</sup>

Checks were made to verify the accuracy of the information and to prevent migrants with criminal backgrounds from being registered. Successful applicants were given registration cards and photo identification.<sup>11</sup>

1 Christina Valencia 'Venezuela's Refugee Crisis: Trinidad and Tobago' (William R. Rhodes Global Advisors, 2020).  
2 Refugee and Migrant Response Plan 2020 (R4V, Response for Venezuelans, January – December 2020) <https://r4v.info/en/situations/platform>.  
3 Ibid  
4 Ibid  
5 Christina Valencia 'Venezuela's Refugee Crisis: Trinidad and Tobago' (William R. Rhodes Global Advisors, 2020).  
6 Interview with LWC, supra, n. 43.  
7 Trinidad and Tobago Government Online 'FAQ: Venezuelan Migrant Registration Process' (News.gov.tt) <http://www.news.gov.tt/content/faq-venezuelan-migrant-registration-process#.XysW1PIKjIX>  
8 Richard Khan, "Venezuelan migrant registration to be extended" Guardian (Trinidad and Tobago, 12 June 2020) <<https://www.guardian.co.tt/news/venezuelan-migrant-registration-to-be-extended-6.2.1135391.f7326f1583>>  
9 Trinidad and Tobago Government Online 'FAQ, supra, n. 64.  
10 See statement made by the Minister of National Security, and Minister of the Office of the Prime Minister, of Trinidad and Tobago, Mr. Stuart Young "Venezuelan Migrant Registration Policy Gets Green Light" (Office of the Prime Minister Republic of Trinidad and Tobago, 11 April 2019) <<https://www.opm.gov.tt/venezuelan-registration-policy-gets-green-light/>>  
11 Shiva Mohan, 'A 'Migrant Registration Framework': Counting Venezuelan Immigrants in Trinidad & Tobago (2019) Researchgate 1.





This permit grants temporary quasi-legal status to Venezuelan migrants, so that they are allowed to move around freely and work in the country. However, this was the last attempt of the government to deal with the influx of Venezuelan migrants entering the country. Further, the tenure of the amnesty/ registration period remains uncertain. Moreover, Venezuelan migrants and asylum seekers continue to arrive. The relevant Minister advised that when this period of ‘amnesty’ ends, the law would revert, and the migrants will be required to return to Venezuela, or otherwise deported. Ultimately, therefore, the registration exercise is not a means to acquiring refugee status, nor protection, but a temporary reprieve on humanitarian grounds.

***Amnesty an Obstruction to Genuine International Obligations***

A notable feature of this ‘amnesty’ is that it exists outside of the boundaries of the law, whether domestic law, or international law. While a good humanitarian gesture, it is, being an indeterminate creature, paradoxically, an obstruction to the implementation of appropriate or genuine international legal standards on asylum and migrant rights. Indeed, in many ways it has allowed the State not only to evade international obligations, but to turn a blind eye to the ever-increasing flow of migrants that continue to enter and the plight of those who reside in the country, whether registered, or unregistered. There has been no official notice, for example, of the lack of education, xenophobia, or abuse of migrant workers’ rights since the ‘amnesty.’

It was only in July 2020, after reports of increased Covid-19 cases in the country, when Venezuelan migrants were blamed for the spread, that the State returned its attention to the migrant phenomenon, but its only actions were to seize, detain and deport Venezuelan migrants without any regard for due process, or appropriate legal standards. In fact, the state’s response became worse than before the amnesty.

The draconian approach was seemingly justified by the panic caused by the Covid-19 pandemic and public health rationales, although there has been little evidence produced that the increase in Covid-19 spread was due to Venezuelan migrants. In fact, Health and National Security Minister Stuart Young initially denied this, but migrants remain convenient scapegoats. Given its limitations, it cannot be said that the National Venezuelan Migrant Program is an adequate substitute for refugee status, or even international legislative standards on migrants. There are severe shortcomings with regard to employment, health and education, increasing xenophobia and sexual violence. These have received little attention by the state.

The 2019 National Venezuelan Migrant Registration Program, upon its initial six month extension, was described by the government of Trinidad and Tobago as a program allowing migrant Venezuelans access to protections from the local authorities, aiding in the bid to stop human trafficking.<sup>1</sup> And it has indeed provided a sort of domestic humanitarian approach to dealing with the looming refugee crisis and its impact on Trinidad and Tobago. Given the absence of domestic laws on refugees and the non-implementation of the 2014

Refugee Policy, the National Venezuelan Migrant Registration program is one of, if not the only initiative of the State to aid and protect Venezuelan migrants. Whether the registration program is demonstrative of a genuine shift in the state’s attitude toward Venezuelan migrants and refugees and a first step in moving toward adopting international legal standards, remains to be seen.

Mohan asserts that the program was a shift in Trinidad and Tobago’s governmental policy from a “lethargic” attitude toward the Venezuela situation, stemming from its adoption of CARICOM’s stance of “non-intervention” and “non-interference.”<sup>1</sup> He nonetheless criticizes the registration policy, describing it as “short-term”, “piecemeal” and “incognizant of migrants’ daily precariousness and the indeterminate situation in Venezuela.” He contends that it is “far from a humanitarian response,” failing in its application to address the “critical challenges faced by Venezuelans [seeking refuge] in Trinidad and Tobago.”<sup>2</sup>

In support of his criticism, Mohan highlights the absurdity of the actions of the Trinidad and Tobago government in surrendering the identities of migrants’ to “high-level security scrutiny, as well as the political gaze of the Venezuelan government” in the registration process, pointing out that there are those who fled Venezuela for political reasons, and disclosing their identities and as such, their current location, puts them at greater risk of persecution. So too is the harshness of the Minister’s discretion to deport those found to have a criminal background, as the socio-economic downturn of Venezuela and the lack of access to basic necessities, as well as the political tensions and violent clashes as a result, may skew the data in that, the current climate of Venezuela is “loaded with nondescript avenues for persecution by the state.”<sup>3</sup> He labels the program “short-sighted, lacking real initiative, “devoid of contextual, holistic, and pragmatic considerations to properly address the daily realities of Venezuelan immigrants in Trinidad and Tobago” and concludes that it is an “opportunistic ploy for future political gain.”<sup>4</sup>

As noted earlier, the National Venezuelan Migrants Registration Program has been offered by the Government of Trinidad and Tobago as the state’s response to an ever-growing and significant Venezuelan migrants problem, with all of its attendant humanitarian and human rights considerations. While an improvement on the pre-registration period, the Program is an exceedingly poor substitute for refugee status, or worse, protection from refoulement. Worse, it has induced complacency by the State with regard to its international obligations toward asylum seekers and refugees. The advent of the Covid-19 pandemic has further undermined any impetus toward honouring international obligations toward refugees. New migrants entering the country have less possibility than before to have access to an asylum procedure. In contrast, international organisations and advocacy groups have emphasised that during this time, the vulnerability of migrants make it imperative for their rights to be secured.<sup>5</sup>

Venezuelan Migrants are left in a perpetual State of limbo, wondering at the end of every six-month renewal, if they will be allowed to remain in Trinidad and Tobago, or returned to a country with significant civil unrest. Additionally, the limited time period given for the work permit suggests that there is no intention to host these persons for a lengthy period and that there is a likelihood that the principles of non-refoulement and non-detention would be breached. While the basis of this policy lies in the right to work granted to the migrants, its real and perhaps only strength is that it has opened a pathway for legislative change, providing a foundation upon which Trinidad and Tobago can build a domestic migration framework. Yet, the situation remains tentative.

1 Shiva Mohan, supra, n. 68.  
2 Ibid.  
3 Ibid.  
4 Ibid.

5 See, e.g. the Zolberg Institute on Migration and Mobility, which prioritises a list of 14 rights principles, These norms – including those of non-discrimination, rights to health and to information, due process, and non-return to risks of serious harm – apply to all persons, irrespective of their immigration status.’ Human Mobility And Human Rights In The Covid-19 Pandemic: Principles Of Protection For Migrants, Refugees, And Other Displaced Persons’, 2020, <https://zolberginstitute.org/covid-19/>; 1. Equal treatment and non-discrimination 2. Right to health 3. State obligations to combat stigma, racism and xenophobia; 4. Restrictions on movement between States; 5. Restrictions on movements within States; 6. Non-return and access to territory; 7. Enforcement of immigration law, including detention; 8. Right to protection

1 Loop News, ‘Six-month extension for Venezuelans with registration cards’ Loop (Trinidad and Tobago, 17 January 2020) <https://www.looptt.com/content/six-month-extension-venezuelans-registration-cards>.





## Core Rights Principles Applicable to Venezuelan Migrants and Refugees

Cross-border movement which is now characteristic of the modern international space, has necessitated the advancement of several critically important principles which underpin its existence. Arising out of international legal standards, in particular international human rights standards, based on treaties, customary international rules, and jurisprudence, these principles have become vital to the exposition of migrant and refugee.

Such core legal principles are no less significant to Venezuelan migrants in Trinidad and Tobago and provide a rational basis to explore and resolve attendant problems. In the following sections, the study will interrogate the relevant international legal principles and norms to ascertain their source, substantive character and the extent to which they are applied in the domestic legal context. For convenience the foundational principles are first summarised and are thereafter analysed in greater detail. The following principles merit this further review:

1

**The Right to Seek and Enjoy Asylum and the Principle of Non-Refoulement** – which prohibits a State from returning, or deporting a person who has fled his or her country because of a well-founded fear of persecution or harm. In the context of children migrants, it encompasses the right to family unity;

2

**The Guarantee of Due Process** – a right well established in international human rights law, which guarantees fairness and procedural safeguards where substantive rights are in issue. The discussion of this right includes a consideration of access to justice and in the context of migrants, references particularly deportation and confidentiality;

3

**The Prohibition Against Detention** – which prohibits a State from placing asylum-seekers and migrants in detention except as a last resort and after due-process;

4

**The Rights to Personal Integrity and Dignity** – which mandate a State to safeguard migrants from harmful conduct that violate these fundamental rights. Under these umbrella rights we can locate a number of ancillary rights and protections which, in the particular context of migrants may be itemised as:

- (i) the protections against gender violence and trafficking; and
- (ii) the prohibition against discrimination; and

### The Right to Seek and Enjoy Asylum

International law recognises the right of persons to seek and where eligible, to enjoy asylum from persecution in other countries. This right is enshrined under the 1951 Refugee Convention and its 1967 Protocol. However, the right has a longer legal tradition given that the 1951 Refugee Convention and its Protocol arose out of, and became grounded in already existing and firmly established international human rights laws, particularly Article 14 of the UNDR, which grants the right to every human “to seek and to enjoy in other countries, asylum from persecution.” Unlike their antecedents, which applied to only certain specified groups of refugees, the 1951 Refugee Convention and its related Protocol offer protection to asylum seekers on a global scale. They comprise the authoritative body of rules governing the treatment of refugees internationally, providing a foundation upon which ratifying states can implement domestic refugee law.

### Designation as a Refugee and Protections under the 1951 Refugee Convention

Under the 1951 Refugee Convention and its 1967 Protocol, persons who satisfy the qualifying criteria set out in Article 1 of the 1951 Refugee Convention, are deemed refugees and are entitled to the legal status of a refugee and the accompanying rights and protections. Article 1 addresses persons who:

as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. <sup>1</sup>

### Limitations of the Refugee Definition

The definition of a refugee under the 1951 Refugee Convention is fairly limited in scope and been defined restrictively. These limitations are of particular importance for Venezuelan migrants. The definition has three main components, all of which are restrictively interpreted:

1. A well-founded fear of being persecuted;
2. The persecution is ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’; and
3. The person ‘is outside the country of his nationality.’

The requirement of a ‘well-founded fear of being persecuted’ is the central criteria for claiming refugee status. The term “well-founded fear” contains a subjective element (fear) as well as an objective one (well-founded), both of which must be evaluated together. Here, “fear” means that the person believes or anticipates that he/she will be subject to that persecution. The State of mind of the applicant at the time of departure is used to establish this. As long as there are no facts which causes the adjudicator to doubt the credibility of the applicant’s statements, said statements will be accepted as notable demonstrations of the existence of the fear. In Trinidad and Tobago it is the UNHCR that partners with the State to assess whether an applicant meets this criteria.<sup>2</sup>

Persecution may be defined as “a sustained and systemic violation of basic human rights demonstrative of a failure of state protection.”<sup>3</sup> Persecution may be equivalent to discrimination, but it is not a simple difference in treatment as held in the case of *Gashi and Nikshiqi* <sup>4</sup>. Rather, it is discrimination that leads to substantially prejudicial treatment with dire consequences. It is also important to note that persecution is not the same as punishment for an offence against the common law.

According to the UK case of *R v Secretary of State for the Home Department, Ex Parte Sivakumaran*<sup>5</sup>, a refugee can be said to have a well-founded fear of persecution if upon return to his country there was a reasonable likelihood that he would be persecuted. This would be determined by the relevant authority upon deliberation of the facts, to determine if the fear was objectively justified. Leaving this to be decided based on the interpretation of one individual allows for subjectivity and having it decided by a member of the State provides a risk that an actual fear may be overlooked if the State is the one creating this well-founded fear.

The greatest challenge to Venezuelan migrants is that under Article 1, the persecution must be attached to one of the protected grounds listed above. While individuals seeking asylum must be outside of their country to be classified as a refugee, how they left their State would be of little concern. The difficulty with this definition and its interpretation is that it does not include persons who are fleeing a country due to economic hardship, or even the denial of economic, social and cultural rights, such as health, work or education. Rather, only civil and political rights related to race, nationality, political opinion and the like are specifically protected. Given that many Venezuelans seeking asylum are doing so due to the country’s economic instability, this is a difficult hurdle to cross. The study next considers how other international law standards may alleviate this obstacle.

<sup>1</sup> Refugee Convention Art 1.

<sup>2</sup> An evaluation of risk of persecution should be made based on the consideration of facts which consider the personal circumstances of the applicant as well as the elements surrounding the situation in the country of origin. Office of the United Nations High Commissioner for Refugees, ‘Note on Burden and Standard of Proof in Refugee Claims’ (UNHCR, 16 December 1998).

<sup>3</sup> James Hathaway, ‘Refugees and Asylum’ [2012] Cambridge Univ. Press 177-204.

<sup>4</sup> *Gashi and Nikshiqi* [1977] INLR 96.

<sup>5</sup> *R v Secretary of State for the Home Department, ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] AC 958 (HOL).

Notwithstanding, where procedures agreed to between the UNHCR and the State are adhered to, there has been a high rate of successful refugee designations.<sup>1</sup> It is very rare that someone would not be granted the asylum-seeking card and then granted refugee status. These individuals would usually fall under the exclusionary clauses which State that individuals who are a threat to national security would not be granted refugee status.<sup>2</sup>

**Expansion of the Definition of a Refugee under the Cartagena Declaration**

Given the limitations of the 1951 Refugee Convention in determining who is a refugee, other international agreements were created that provides a broader definition of a refugee, thereby encompassing more individuals in the category of refugee. The 1984 Cartagena Declaration on Refugees is the most important of these and offers the most encompassing definition of refugee. It defines ‘refugee’ as:

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>3</sup>

The scope of the Cartagena Declaration is adequate to address the Venezuelan migrant context. However, the Declaration is not legally binding on Trinidad and Tobago. Yet, the definition and the principles from the Declaration are widely received by Latin America and respected internationally. It could therefore be used as a guide to incorporate refuge law in Trinidad and Tobago.

**Expanding Scope of Refugee and Designation of Venezuelan Migrants as Refugees**

The UNHCR also deems as refugees those persons “who are outside their country of origin and who are unable or unwilling to return there owing to serious threats to life`, physical integrity or freedom resulting from generalized violence, or events seriously disturbing public order.”<sup>4</sup> This definition provides a pathway to asylum for Venezuelans to be deemed as refugees as they can be deemed to be individuals with a fear of a threat to life due to events “seriously disturbing public order,” since Venezuela is experiencing serious bouts of unrest and increasing levels of crime.

Recognising the challenges that the Venezuelans would face in seeking asylum and status as a refugee, based on the limiting definition under the 1951 Refugee Convention, the UNHCR, in a May 2019 Guidance Note specifically included Venezuelan migrants in the current paradigm within the concept of a refugee.<sup>5</sup> It stated that “the majority of Venezuelans fleeing ongoing turmoil in Venezuela should be considered refugees and provided with the requisite relief and assistance,” revising an earlier Guidance Note to acknowledge that:

*“... given the worsening political, economic, human rights and humanitarian situation in Venezuela that to date has seen 3.7 million people leave, UNHCR, the UN refugee agency, now considers that the majority of those fleeing the country are in need of international refugee protection.”*

The updated Guidance Note sought to assist those adjudicating international protection claims by asylum-seekers from Venezuela and those responsible for setting government policy on this issue. Noting that there had been some deportations from Caribbean islands, including by Trinidad and Tobago in 2018, the UNHCR reiterated its call to states to “allow Venezuelans access to their territory and provide them with proper protection and standards of treatment, highlighting the critical need for safety for people forced to flee for their lives and freedoms.”<sup>6</sup>

1 The rate of recognition of refugee status under the UNHCR is about 98% according to a Faculty of Law Interview with the LWC, supra, n. 43.

2 Ibid.

3 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984. [www.refworld.org/docid/3ae6b36c.html](http://www.refworld.org/docid/3ae6b36c.html). The Cartagena refugee definition has been incorporated into the national laws of Argentina, Belize, (the OAU refugee definition), Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

4 Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner's Programme, para. 6, UN Doc. A/AC.96/660 (1985).

5 UN High Commissioner for Refugees (UNHCR), Guidance Note on International Protection Considerations for Venezuelans – Update I, May 2019, Palais des Nations in Geneva; per UNHCR spokesperson Liz Throssell, speaking at a media briefing : available at: <https://www.refworld.org/docid/5cd1950f4.htm>. See also Jim Wyss 'Amid Rising Hardship, Death Toll, U.N. says Venezuelans Should Be Considered' (Miami Herald 21 May 2019) <https://www.miamiherald.com/news/nation-world/world/americas/venezuela/article230655084.html>.

6 Ibid. It noted that by the end of 2018, some 460,000 Venezuelans had formally sought asylum, the majority in neighbouring countries in Latin America.

Notably, the updated UNHCR Guidance Note was aimed particularly at States that have incorporated the refugee definition contained in the Cartagena Declaration or apply it in practice, using the criteria contained in the Cartagena Declaration on the basis of threats to their lives, security or freedom resulting from the events that are currently seriously disturbing public order in Venezuela.

The hesitancy of UN bodies to deviate from standard interpretations of the 1951 Refugee Convention as to who is a refugee is understandable, given that treaty interpretation must be consistent. An obvious obstacle to the special designation is that there have been many other migrant situations the world over which were driven by economic hardship, but for which economic refugee designations were not forthcoming. A pertinent example in the region is the situation of destitute migrants coming from Haiti, recognised as one of the poorest countries in the world, where the US and other countries continued a controversial policy that did not designate Haitian migrants as refugees. Many were fleeing the “brutal, three-decade-long Duvalier father-son dictatorship, the collapse of which in 1986 led to political and economic chaos in Haiti.”<sup>1</sup> The persistent refusal to recognise Haitians as refugees who were victims if refouled led to complaints that US policy was discriminatory<sup>2</sup>. Even after the devastating earthquake in Haiti in 2010, there was a reluctance to treat survivors as refugees. A concession was eventually made when they were given Temporary Protected Status, which allowed them to work in the U.S. for 18 months<sup>3</sup>, but importantly, this was extended only to Haitians already in the US.

It is nonetheless significant that the UNHCR has deemed Venezuelan migrants to be refugees using the Cartagena definition.

**The 1951 Refugee Convention and its Protocol Do Not Apply to Migrants**

The protections offered to refugees under the 1951 Refugee Convention do not extend to migrants who are unsuccessful in claiming refugee status. The UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, which is discussed later in this study, does however, extend and secure some of these protections to such persons. It provides an important legal standard for Trinidad and Tobago to adopt. Nonetheless, refugee status provides a wider basket of rights and protections than migrant status.

The protection of asylum and refugee status under the UDHR is significant given the universality of this instrument. The right of everyone “to seek asylum from persecution” is established under Article 14(1) of the UDHR<sup>4</sup> Several rights in the UDHR have been elevated to jus cogens, such as the prohibition of slavery and torture found in Articles 4 and 5 respectively. Additionally, several legal scholars have argued that the UDHR has become accepted as customary international law, with consistent State practice and opinio juris both being present and as a consequence, are binding on all states. The dictum of the ICJ in the Barcelona Traction Case<sup>5</sup>. states that obligations erga omnes include those derived from the principles of basic human rights, which suggests that the UDHR has become customary international law. Subsequent ICJ decisions have led to a school of thought that the Court considers rights and freedoms enshrined in the UDHR to be legally binding, thereby allowing the Court to invoke these Articles to determine several human rights violations.<sup>6</sup>

The principles under the UDHR should therefore be considered general principles of international law in accordance with Article 38(1)(c) of the Statute of the ICJ, and thus acquire binding effect. This is an important point in advocating for the existence, recognition and justiciability of the right to asylum in Trinidad and Tobago, despite the official, somewhat misleading stance of the state’s current administration that the provisions of the 1951 Refugee Convention are not binding.

1 Kira Olsen-Medina and Jeanne Batalova, 'Haitian Immigrants in the United States, Migration Policy Institute, August, 12, 2020, <https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2018>.

2 Diane Russel, 'HAITIAN REFUGEES', Cultural Survival Quarterly Magazine, June 1981, Cambridge, MA, USA.

3 Carmen Gentile, 'Earthquake Leads U.S. to Relax Policy on Haitian Refugees, Time Magazine, Jan. 15, 2010.

[http://content.time.com/time/specials/packages/article/0,28804,1953379\\_1953494\\_1954262,00.html](http://content.time.com/time/specials/packages/article/0,28804,1953379_1953494_1954262,00.html)

4 Adopted as a UN General Assembly Resolution in 1948, the UDHR was the first document setting out international human rights standards. As it is not a treaty, the UDHR has no binding force on UN Member States. It merely offers protection to refugees as a supplemental document that provides guidance to states on approaching Human Rights issues including the rights of Refugees. However, almost all international human rights Conventions contain rights outlined in the UDHR, as do national constitutions.

5 Case Concerning Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain) [1970] ICJ 1.

6 See, e.g. Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 Ga J Int'l & Comp L 287.





The approach allows persecuted individuals the opportunity to flee from their country to another to seek asylum and they would be entitled to go through the process to become a refugee. The preamble to the UDHR proclaims that these rights are inalienable to all members of the human family. Rights enshrined are therefore not based on any special status, but simply based on humanity. All Venezuelan migrants are entitled to these rights on this basis, regardless of whether their immigration status has been regularised or not.

Like numerous other states, Trinidad and Tobago has adopted and incorporated several rights and freedoms of the UNDR into its national legislation and Constitution. The UNDR is thus a significant influence over administrative and judicial decision making and legislative drafting for all UN Member states. Further, no State has rejected the rights enshrined in the UDHR and the political influence it holds over diplomatic relations cannot be ignored.<sup>1</sup> These rights principles and universal standards should be utilised in addressing the Venezuelan migrant situation, given that Trinidad and Tobago is a party to the UNDR and recognises its authoritative character.

The Inter-American Court on Human Rights has also considered asylum to be a human right in an Advisory Opinion embodied in the American Convention on Human Rights and the American Declaration on Human Rights<sup>2</sup>. Trinidad and Tobago revoked the Convention, but is still bound by principles found in the Declaration. It is no longer part of the jurisdiction of the Inter-American Court but the Inter-American Commission on Human Rights still has jurisdiction over Trinidad and Tobago. Accordingly, such jurisprudence is of importance

**Substantive rights and protections under the 1951 Refugee Convention**

Once an individual is deemed a refugee, unlike migrants, they are automatically afforded all protections under refugee law, which include protection from expulsion from the State they are seeking refuge in and a wide range of entitlements. Indeed, persons who qualify as refugees under the 1951 Refugee Convention and its 1967 Protocol are granted significant substantive rights and protections, similar to a national of the country. Of particular note are the following:

- Protection from discrimination by the host country as to race, religion or country of origin -Article 3.
- The right to lawful residence in the territory to which the refugee has fled after being forcibly displaced- Article 10;
- The right to “the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment” -Article 17
- The right to the same treatment as is accorded to nationals with respect to elementary education” -Article 22.
- The right to “the same treatment with respect to public relief and assistance as is accorded to their nationals”-Article 23.
- The right to “the same treatment as is accorded to nationals in respect of workers” rights, protections and social security; -Article 24.
- The right to the issue of “identity papers to any refugee in their territory who does not possess a valid travel document” - Article 27.
- Protection against the imposition of “penalties, on account of their illegal entry or presence,” restrictions [to movement] other than those which are necessary and the right to “a reasonable period and all the necessary facilities to obtain admission into another country”-Article 31.

1 Hurst Hannum, *ibid*.  
 2 Inter-American Court of Human Rights, *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection* (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights), Advisory Opinion OC-25/18, 30 May 2018, [www.refworld.org/docid/5c87ec454.html](http://www.refworld.org/docid/5c87ec454.html), para. 123. Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, 19 August 2014, [www.refworld.org/docid/54129c854.html](http://www.refworld.org/docid/54129c854.html), para. 79;



- Protection from expulsion, save for on the grounds of national security or public order, or in pursuance of a decision made by due process of law - Article 32.
- Protection from refoulement - Article 33.
- The right to the facilitation by the Contracting State to the assimilation and naturalization of refugees - Article 34.
- The right to “free access to the courts of law on the territory of all Contracting States, and to equal treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi” - Article 16.
- The right to the issue of travel documents for the purpose of travel outside of the territory – Article 28.<sup>1</sup>

<sup>1</sup> Other entitlements include: The freedom to practice one's religion - Article 4; Protection from 'exceptional measures which may be taken against the person, property or interests of nationals of a foreign State - Article 8; Treatment not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property - Article 13; The right to 'treatment equally as favourable to nationals of a foreign state,' with regard to 'non-political and non-profit-making associations and trade unions' - Article 15; The right to not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies' - Article 18; The right of 'refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession' to "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances" - Article 19; The right to 'treatment not less favourable than that accorded to aliens generally in the same circumstances' with regard to housing- Article 21.



### 3.2. The Principle of Non-Refoulement & the Right to Remain

The principle of non-refoulement is a core aspect of the right to seek asylum and a fundamental principle of international refugee law. It is also a peremptory norm under customary international law.<sup>1</sup> It dictates that any person who leaves their country of origin for fear of persecution, to reside in another territory, is protected from being forcibly returned to their home nation. It has been expressly contained in a number of international human rights, humanitarian and refugee law instruments of varying scope and conditions of application. The principle was initially codified in Article 33 of the 1951 Refugee Convention and its 1967 Protocol, where it is considered a foundational aspect of the protection of refugees and/or asylum seekers. Article 33 states that “no one shall expel or return a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.”

The principle of non-refoulement is today considered by the United Nations Human Rights Committee and the European Court of Human Rights (ECtHR) as an “integral component” of international human rights, particularly in the protection against cruel, inhuman or degrading treatment, torture and/or the arbitrary deprivation of life.<sup>2</sup> While there is no doubt that the principle of non-refoulement is essential to the protection of refugees, its recognition as a principle of customary international law allows for its ideals to extend to other vulnerable groups of persons, including migrants, who are not refugees, or seeking refugee status.<sup>3</sup> Customary international law is part of the common law and may be allied without contradiction<sup>4</sup> Several scholars and international law bodies have proclaimed its character as acquiring the status of jus cogens, that is, a peremptory norm of international law from which no derogation is permitted.<sup>5</sup> Common law courts have relied on this view in decision-making in asylum cases. For example, in *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport* (United Nations High Commissioner for Refugees intervening),<sup>6</sup> Lord Bingham of the UK Supreme Court held that it was a generally accepted principle that a person seeking asylum in another state should not be rejected or returned without the appropriate investigation of the alleged persecution. This reasoning was followed in Hong Kong, in the case of *C and Others v. Director of Immigration and Another*.<sup>7</sup>

The principle of non-refoulement is therefore firmly established in the common-law tradition of which Trinidad and Tobago is a part, albeit derived from international law. The recent CCJ case of *Maurice Tomlinson*, which addressed a claim that the Immigration Act of Trinidad and Tobago was discriminatory because of its provisions that permitted denial of entry on grounds of sexual orientation, the CCJ, sitting in its original jurisdiction, affirmed the justiciability of human rights standards derived from customary law and the status of customary international law as an aspect of the common law. The CCJ stated:

[44] . . . The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are among the important international instruments that recognize the human dignity of every person. Sexual orientation is protected from discrimination (Article 2) and protected by the guarantee of equality before the law (Article 26) in the International Covenant on Civil and Political Rights (1966): *Toonen v. Australia*. International human rights which have crystallized into customary international law form part of the common law of Trinidad and Tobago.

<sup>1</sup> See, e.g. David Weissbrodt and Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999).

<sup>2</sup> <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>; 'Note on Migration and the Principle of Non-Refoulement' (2017) 99 Int'l Rev Red Cross 345.

<sup>3</sup> See also European Union Agency for Fundamental Rights, 'The Scope of the principle of non-refoulement in contemporary border management: evolving areas of law', 2016, Luxembourg. See also, UNHCR, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, January 16 2002, HCR/MMSP/2001/09; San Remo Declaration on the Principle of Non-Refoulement; UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001 available at: <https://www.unhcr.org/protection/globalconsult/4a1baa6/refugee-protectioninternational-law.html>

<sup>4</sup> See John Dugard, *The Application of Customary International Law Affecting Human Rights by National Tribunals*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 76 (APRIL 22-24, 1982), pp. 245-251, Cambridge University Press; <https://www.jstor.org/stable/25658134>. See the application of the principle of non-refoulement as a rule of customary law where domestic law does not contradict in *Trendtex v. The Central Bank of Nigeria*, (1977) Q.B. 529; *Triquet v. Bath*, (1764) 3 Burr 1478; *Heathfield v. Chilton*, (1767) 4 Burr 2016.

<sup>5</sup> See, e.g. Jenny Poon, *Non-Refoulement in the International Refugee Law Regime: A Lex Specialis?* Cornell International Law Journal Online, <http://cornellilj.org/non-refoulement-in-the-international-refugee-law-regime-a-lex-specialis/>; Jean Allain, 'The Jus Cogens Nature of Non-refoulement', International Journal of Refugee Law, Volume 13, Issue 4, October 2001, Pages 533–558, <https://doi.org/10.1093/ijrl/13.4.533> See also General Conclusion on International Protection General Conclusion on International Protection No. 25 (XXXIII) – 1982 Executive Committee 33rd session. Contained in United Nations General Assembly Document No. 12A (A/37/12/Add.1) Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. B; C. Costello and M. Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, Netherlands Yearbook of International Law 2015 pp 273-327, The Netherlands.

<sup>6</sup> *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport* (United Nations High Commissioner for Refugees intervening), [2005] 2 AC 1. 53.

<sup>7</sup> *Hong Kong*, Civil Appeals No. 132-137, (2008).



While the CCJ declined to declare the Immigration Act null and void for other reasons, its affirmation of customary law, in particular, for international human rights, is very important and paves the way for other such rights to be reviewed.

As noted earlier, there are strong precedents at the European Court of Human Rights holding that the principle of non-refoulement may be identified as an aspect of rights protected in constitutions and conventions, such as prohibitions against torture, inhuman punishment and the right to live. This is an important element in the argument toward Trinidad and Tobago’s international obligations. The interpretation of the principle of non-refoulement within the boundaries of customary international law is therefore significant in the context of the Venezuelan migrant phenomenon, where some deserving migrants may not secure refugee status because of the ad hoc and arbitrary system in place for asylum in Trinidad and Tobago.<sup>1</sup>

Human rights violations in the country of flight which may trigger the application of the principle of non-refoulement include, but are not limited to the following:

- Torture and cruel, inhuman or degrading treatment or punishment;
- Indiscriminate violence in the country of return;
- Death sentence imposed as a consequence of an unfair trial;
- Multiple rapes;
- Harmful practices such as female genital mutilation;
- Inhuman and degrading conditions of detention;
- Living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basis needs;
- In exceptional circumstances, expulsion to face death as a result of a serious illness, such as HIV;
- Extrajudicial killings;
- Indiscriminate violence and threats to life, including by non-State actors, which violate the right to life;
- Forced disappearances;
- Action not in the best interests of the child;
- Violations against the prohibition of slavery and forced labour;
- Flagrant denials of the right to a fair trial;<sup>2</sup> and
- In exceptional cases, violations of the freedom of thought, conscience and religion.

This principle plays such a fundamental role in the protection of refugees that the 1951 Refugee Convention itself does not allow for reservations and derogations to it. In 2001, State parties to the 1951 Convention and the 1967 Protocol, (which include Trinidad and Tobago), issued a Declaration re-affirming their commitment to these instruments, once again recognizing the principle as being embedded in customary international law and accordingly, binding on all states.

In relation to migrants, as opposed to refugees, non-refoulement, according to the International Organization of Migration (IOM),<sup>3</sup> is described as an ideal which “prohibits States from returning an individual in any manner whatsoever to a country or territory in which their lives, physical integrity or freedom may be threatened or in which they risk being submitted to torture of inhumane and degrading treatment or punishment.”<sup>4</sup>

Beyond its foundation in the 1951 Refugee Convention, the IOM has indicated that the concept of non-refoulement also explicitly appears in the text of “Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22 of the American Convention on Human Rights (AHCR), Article 16 of the International Convention for Protection of All Persons from Enforced Disappearances, and Article 19 of the Charter of Fundamental Rights of the European Union” while its obligations are enshrined in a host of other international instruments, including the “Convention on the Rights of the Child (CRC), the International Covenant for the Protection of Civil and Political Rights (ICCPR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).”<sup>5</sup>

The International Committee of the Red Cross (ICRC), among other notable international human rights bodies, has issued statements advising that ‘non-refoulement’ is particularly recognized “where there is a risk of torture and other forms of ill-treatment, arbitrary deprivation of life, or persecution

1 Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago, [2016] CCJ 1 (OJ).  
2 EU Agency, *ibid*.  
3 In their ‘IML Informational Note on The Principle of Non-Refoulement’ (2014) Int’l Org for Migr (IOM) 1.  
4 *Ibid*.  
5 *Ibid*.

on account of race, religion, nationality, membership of a particular social group or political opinion, although it might cover a number of other grounds depending upon the treaties ratified by the States concerned,” and “prohibits the transfer of individuals irrespective of whether the danger of fundamental rights violations emanates from State or non-State actors.”<sup>1</sup> It adds that this principle can only be derogated from in exceptional cases such as when a refugee constitutes a danger to the security of the host country, or if they have been convicted of a particularly serious crime.<sup>2</sup> There is no doubt then, that the principle of ‘non-refoulement’ is essential to any law relating to the nature, status or protection of refugees, be it international or domestic, and in any and all territories duly recognized as an autonomous State.

Such an expansive reference underlines the critical importance of this principle to the protection of all human beings, particularly for those who fear for their safety, or lives and its character as customary law. In that regard, and as clarified by the IOM, there is no doubt that all categories of migrants, legal, illegal, asylum-seeking or internally displaced persons, are protected from forced return, by any nation of the international community, not just those who have ratified these instruments, to a territory where they are in danger of persecution.

Consequently, Trinidad and Tobago has no basis to ignore the binding nature of this principle. To the extent that it fails to recognise it explicitly, or implicitly in relation to Venezuelan migrants, or avoids securing its adherence in legal and administrative mechanisms, the State violates this grund norm in in international human rights and international humanitarian law.

In an Informational Note, the IOM helpfully articulates the standard used to evaluate non-refoulement in a claim by a migrant being forcibly removed to their country of origin.<sup>3</sup> It indicates that in accordance with the Convention on Torture, the UN Human Rights Committee and the European Court of Human Rights, there is a requirement that there be a “real risk” of the violation of certain human rights, such that the migrant in question would potentially suffer torture, cruel, inhumane and degrading treatment or punishment, or arbitrary depravation of life. The Human Rights Committee and the Convention on torture have “further clarified that this means that the violation must be “the necessary and foreseeable consequence of deportation”, the latter postulating that the grounds must “go beyond mere theory or suspicion,” but that “the risk does not have to meet the test of being highly probable.”<sup>4</sup>

In determining whether there are substantial grounds to invoke the right to non-refoulement i.e. whether there is a real risk of human rights violations, the IOM goes on to further identify certain criteria that the courts should take into consideration during the deportation hearing, inclusive of “general statements on the human rights situation in a country, reports from non-governmental and international organizations, forensic medical reports, and personal histories.”<sup>5</sup> Beyond this, the Informational Note emphasizes that the principle of non-refoulement applies to all migrants regardless of their status; that it applies both on land and in maritime zones and to situations wherein a migrant is being expelled to a country not of his/her origin but a third party State where they may be at risk of human rights violations.

According to the UNHCR’s Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention and its 1967 Protocol, a person is not to be deported while seeking asylum. The UNHCR stated as follows:

“Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of non refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared. The principle of nonrefoulement is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.”<sup>6</sup>

1 The strongest protections exist in cases of danger of being subjected to torture (found expressly in the Convention against Torture), cruel, inhuman or degrading treatment or punishment, and arbitrary deprivation of life articulated in regional international human rights instruments.” Note on Migration and the Principle of Non-Refoulement’ (2017) 99 Int’l Rev Red Cross 345.  
2 Note on Migration and the Principle of Non-Refoulement’ (2017) 99 Int’l Rev Red Cross 345.  
3 IOM Informational Note, *supra*, n.104.  
4 *Ibid*.  
5 *Ibid*.  
6 UN High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, at para 6. available at: <https://www.refworld.org/docid/45f17a1a4.htm>

This principle was noted in the Machado case, discussed further below.<sup>1</sup> While the principle of ‘non-refoulement’ is a first principle in refugee law and international migrant law, Trinidad and Tobago has failed to put in place the appropriate legal infrastructure to uphold it, or even to specifically proclaim it, thereby failing to protect migrants arriving on its shores seeking refuge. The 2014 Draft Refugee Policy of Trinidad and Tobago,<sup>2</sup> which is the only specific document on migrant and/or refugee protection, has attempted to integrate this principle into the domestic sphere, albeit non-binding. However, like other aspects of migrant and refugee law addressed in this study, nothing more than a bare explanation of the principle is offered and the policy itself is not fully in operation.

With the increasing number of Venezuelan migrants arriving in the country in recent times, several public bodies have made claims of a lack of adherence to the principle of non-refoulement. For example, Eric Schwartz, the President of Refugees International, has requested that the government of Trinidad and Tobago actively recognize it, by not turning away the boats of persons entering the country illegally which is a potential violation of the non-refoulement law<sup>3</sup>

**Grounds for Non-Refoulement in the Venezuelan Context**

Of the accepted criteria that can ground the principle of non-refoulement, in the Venezuelan migrant’s context, claims of living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basis needs, indiscriminate violence, violations of the right to a fair trial and the need to act in the best interests of the child, have been made. These have been well-documented and have also found their way into reports of organisations such as the Inter-American Commission on Human Rights<sup>4</sup>, (IACHR) which published a special report on the human rights situation in Venezuela and has also included Venezuela in Chapter IV (B), (a chapter naming states accused of serious human rights violations), of its Annual Report since 2002. Venezuela has also been a subject of several press releases condemning conditions in that country and the actions of the state. The criterion for asylum relating to risk of life due to serious illness on return is on less certain ground in the context of Venezuelan migrants, but may also be explored, (IACHR) which published a special report on the human rights situation in Venezuela and has also included Venezuela in Chapter IV (B), (a chapter naming states accused of serious human rights violations), of its Annual Report since 2002. Venezuela has also been a subject of several press releases condemning conditions in that country and the actions of the state<sup>5</sup>

The criterion for asylum relating to risk of life due to serious illness on return is on less certain ground in the context of Venezuelan migrants, but may also be explored, especially in the current Covid-19 pandemic. Such a criterion applies in exceptional circumstances and has been utilised successfully in a line of cases where persons living with HIV fled countries with inadequate or discriminatory health systems.<sup>6</sup> These included asylum seekers from the Caribbean who were gay. These cases are not so recent and the threshold for their success has been made more difficult given the huge advances in medical care for HIV and the arguably more enlightened approach in relation to the LGBTI community, who are a vulnerable group.

Could a case be made for Venezuelan migrants on the basis that they will be exposed to life threatening risks due to Covid-19, or that their ability to recover if they acquire the virus will be severely compromised by the Venezuelan health system? From the dicta from cases before the European Court of Justice and the IACHR, such as *D v United Kingdom*<sup>7</sup> and *Andrea Mortlock v United States*,<sup>8</sup> which followed it, the situation in the home country must meet an exceptionally high standard

1 Machado v Chief Immigration Officer and Attorney General of Trinidad and Tobago [2020] TT HCJ; Claim No. CV2020-01118, decided May, 11, 2020, at para 51.  
2 A Phased Approach Towards the Establishment of a National Policy to Address Refugee and Asylum Matters in the Republic of Trinidad and Tobago’ 2014.  
3 ‘Refugees International Urges Trinidad and Tobago to extend the Venezuelan Migrant Registration Process’ (2019) Refugees International <https://www.refugeesinternational.org/reports/2019/6/13/refugees-international-urges-trinidad-and-tobago-to-extend-the-venezuelan-registration-processnbsp>.  
4 See e.g. Situation of Human Rights in Venezuela, Country Report, IACHR, OAS, OEA/Ser.L/V/II), 2018, Washington. <http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf> and Chapter IV (B) of the IACHR’s Annual Report 2019 <http://www.oas.org/en/iachr/docs/annual/2019/docs/IA2019cap4BVE-en.pdf>. Venezuela was first included in Chapter IV (B) in 2002.  
5 IACHR Arrives at the Venezuelan –Colombian Border to Meet with Victims of Human Rights Violations in Venezuela Press Release of February 5, 2020, IACHR, OAS, Washington. [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/021.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/021.asp)  
6 IACHR Calls on States to Protect the Rights of Venezuelans Who Return to their Country During the COVID-19 pandemic. See also Resolutions calling on States to protect Venezuelan migrants, such as: RESOLUTION 2/18, ‘FORCED MIGRATION OF VENEZUELANs’, March 2, 2018, Bogota, Colombia.  
7 *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997). D faced homelessness, given the lack of friends, family or support D had in St. Kitts. D also provided evidence of discrimination against HIV/AIDS sufferers in St. Kitts, resulting in reduced employment opportunities. Ultimately, the European Court recognized that D’s quality of life depended on “the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by charitable organizations.” *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), at para. 51. Furthermore, the European Court held that these extreme circumstances, when combined, would amount to inhumane treatment and would, therefore, violate Article 3 of the European Convention. The right to life was referenced at the admissibility stage of the proceedings.  
Report N° 63/08 Case 12.534, Admissibility and Merits (Publication), July 25, 2008.  
8 Report N° 63/08 Case 12.534, Admissibility and Merits (Publication), July 25, 2008.

standard such as to constitute cruel and inhumane treatment. While there have been reports of large-scale failures of the health system in Venezuela, it is unclear, indeed unlikely, that this would meet the required standard in international law at the current time on this particular ground..

The UNHCR has also condemned the Trinidad and Tobago State for breaching its international obligations and failing to recognise non-refoulement, since official reports have stated that Venezuelans seeking asylum have been deported.<sup>1</sup> One such report, by Melanie Teff [2019],<sup>2</sup> attests to this, providing disturbing first-hand accounts of the experiences of deported Venezuelan refugees, who were made to sign a “voluntary” return order, or to pay a security bond, inter alia, to be released. This was also reported in the FoL IACHR Hearing and provoked strong responses from IACHR Commissioners.<sup>3</sup> It is a particularly egregious violation of due process that persons seeking asylum, some with asylum UNHCR cards, have been deported.

Further, while some Venezuelan migrant asylum seekers succeed through the established voluntary arrangements with the UNHCR, there has been no official recognition by the State that Venezuela is a country that has placed discernible numbers of its citizens at risk such as to justify invoking non-refoulement, or even asylum in general. Indeed, Trinidad and Tobago has continued to enjoy excellent diplomatic and trade relationships with the Venezuelan state. This, together with the failure of Trinidad and Tobago to formally adopt the principle into the legal lexicon, makes the hurdle for Venezuelan asylum seekers higher. While it is not suggested that such rationales do, or do not exist in Venezuela, the point being made is that it is the case that the principle of non-refoulement stands on more certain ground when the conditions for its declaration, for example, torture, have been officially noticed.

Despite the above clear international standards on asylum to which Trinidad and Tobago is bound, the right to asylum is actively resisted and even criminalised. Indeed, the approach to criminalising Venezuelan migrants has been accentuated in the current environment. They are typically stereotyped as “illegal” and therefore criminal, even those who may have entered the country by legal means. The lack of formal asylum processes supported by law also encourages many people to enter countries illegally and live in hiding without going through the legal process of applying for asylum. In turn, this leaves these groups vulnerable to exploitation and fundamental human rights abuses as they are not offered protection by the law and can be easily taken advantage of. In the FOL UWI IACHR Migrant Hearing, Commissioner Macaulay criticised this tendency to criminalise migrants emphasising that migration is not a crime.<sup>4</sup>

Official attention is focussed on often draconian measures to root out Venezuelan migrants “offenders,” with little thought of providing opportunities for humanitarian assistance, or for these persons to be given the opportunity to claim such assistance through established international standards. There is little recognition of the principle of non-refoulement as applied to the Venezuelan migrant context by the State. The attitudes of the most senior immigration personnel and the Minister of National Security epitomise this approach, as gleaned from public statements. For example, as recently as July 2020, the Minister of National Security, Stuart Young, warned locals, employers and registered Venezuelan migrants that harbouring illegal immigrants is a criminal offence and anyone caught in this activity would be prosecuted. He justified this on the grounds that illegal migrants were spreading Covid-19.<sup>5</sup>

**3.3. Special Protections for Refugee Children**

Article 22(1) of the CRC specifically proclaims the rights of children to seek and enjoy asylum. It provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.<sup>6</sup>

1 Carls Bridglal ‘UNHCR: TT in breach of International Refugee Law’ (2018) Trinidad and Tobago Newsday. < <https://newsday.co.tt/2018/04/23/unhcr-tt-in-breach-of-international-refugee-law/>> accessed 05 August 2020.  
2 Melanie Teff, ‘Forced into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago’ (2019) Refugees Int’ 10.  
3 FoL Hearing, supra, n.8.  
4 Ibid.  
5 ‘Young: Anyone caught harbouring immigrants will be arrested’, <https://www.looptt.com/content/young-anyone-harbouring-illegal-immigrants-will-be-arrested>, Loop News, July 25, 2020.  
6 CRC, Art 22(1).



General Comment 6 of the CRC further provides that the principle of non-refoulement is an imperative and a State party shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.<sup>1</sup> These additional considerations where Venezuelan children are involved are not, however, apparent in the Trinidad and Tobago context.

The UN Committee on the Rights of the Child has noted that the definition of a refugee “must be interpreted in an age and gender-sensitive manner. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds . . .<sup>2</sup> A child’s application for refugee status must therefore be closely examined in order to protect the rights and freedoms of the child. Given the persistent accounts of Venezuelan migrant children being trafficked and susceptible to sexual abuse, this is of special significance to Trinidad and Tobago, but has not at all been considered.

Further, in relation to the definition of a refugee according to the 1951 Refugee Convention in relation to a child, the UNHCR noted that ‘persecution’ may involve any type of flagrant human rights violations and that ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child, such as forced labour, child pornography and violations of socio-economic rights<sup>3</sup> For example, a violation of a socio-economic right may amount to persecution where minimum core elements of that right are not realized such as the denial of a street child’s right to an adequate standard of living, including access to food, water and housing, which threatens the development and survival of that child.<sup>4</sup> At all times, the harm must be assessed from the views of the child. The contentious issue in any refugee application, including that for children, is whether persecution is based on a Convention ground. The UNHCR has stated that it is sufficient that the Convention ground be a relevant factor, but it need not be the dominant reason, a view which suggests that socio-economic factors may be considered.<sup>5</sup> This is a departure from the more traditional, rigid elements of the grounds for persecution, which typically do not prioritise economic criteria. In terms of Venezuelan migrant children, this is a significant pathway for refugee status given the economic factors weighing heavily in the equation in the Venezuelan context.

The Committee also outlined that obligations vis-à-vis unaccompanied and separated children include establishing national legislation, administrative structures and the necessary research, information, data compilation and comprehensive training activities to support such measures.<sup>6</sup> The obligations require a State party to refrain from infringing on such children’s rights and also to take measures to ensure the enjoyment of these rights without discrimination. These obligations also apply to children who are accompanied by their parents. In July and August 2020, there were persistent reports of unaccompanied children being sent to Trinidad and Tobago. This did not invoke any particular concern, or policy response on the part of the state, except that the Children’s Authority informed that only 4 children were under their care.<sup>7</sup> It was also unclear whether these children had been sent by parents for a better life, or trafficked. The ‘best interests of a child’ principle articulated in Article 3<sup>8</sup> is an umbrella principle in the CRC and has particular importance for children seeking refugee status and migrant children in danger of being deported and/ or being separated from their parents. Accordingly, States Parties undertake to “ensure the child such protection and care as is necessary for his or her well-being.”<sup>9</sup>

The ‘best interests’ principle is a standalone right as well as an interpretive principle to consider when implementing other Convention rights.<sup>10</sup>

1 CRC General Comment 6 [84].  
2 UN Committee on the Rights of the Child ‘General Comment 6’ (2005) UN Doc CRC/GC/2005/6 (CRC General Comment 6) [74].  
3 UNHCR, ‘Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’ (2009) UN Doc HCR/GIP/09/08 (UNHCR Guidelines) [18].  
4 UNHCR Guidelines, *ibid*, [35].  
5 UNHCR Guidelines, *ibid*, [40].  
6 *Ibid* [13].  
7 Radica Sookraj, CNC3 news, August 18, 2020: “While the Children’s Authority of Trinidad and Tobago is contacted when migrant children are located, the Trinidad and Tobago Immigration Division works with the Venezuelan Embassy, to identify the children and where possible unite them with their relatives,” the authority said in a statement. <https://www.cnc3.co.tt/childrens-authorityonly-4-venezuelan-children-under-our-care/>. The Children’s Authority responded to an earlier report by CNC3, reported by Radica Sookraj, August 17, 2020 – ‘Help needed for Venezuelan children’, in which the President of FPATT and Dean, Law, UWI, R-M. B. Antoine was interviewed on August 17, 2020 about FPAT’s fieldwork observations on migrant children: <https://www.cnc3.co.tt/help-needed-for-migrant-children/>  
8 (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.  
9 “ . . . taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.” Convention on the Rights of a Child Art 3.  
10 UN Committee on the Rights of a Child ‘General Comment 14’ (2013) UN Doc CRC/GC/2013/14 (CRC General Comment 14).

The child’s interest must be prioritised when formulating immigration policies, including decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians.<sup>1</sup> A determination of what is in the best interest of the child requires a comprehensive assessment of the child’s identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities, and protection needs.<sup>2</sup> In an Advisory Opinion, the Inter-American Court on Human Rights has espoused similar views.<sup>3</sup>

The preamble of the CRC recognizes the importance of the family in assessing the best interests of the child where refugee children or children seeking refuge status are concerned, such that protection of the parents and guardians of such children are also included in the assessment. The importance of maintaining the family unit where these children are involved is seen not only in the cases considering whether rights to asylum should accrue, but also in deportation cases, considered below. As the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, the family should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.<sup>4</sup> Further, General Comment 23 mandates that it is in the best interests of any child who enters into a State seeking refugee status, that he or she ought to be fully informed of the process in a language they understand, and to this end, the State should establish a service offering free legal advice.<sup>5</sup>

Importantly, the ‘best interests’ provision in the CRC was judicially embraced by the Privy Council in the Trinidad and Tobago case of Naidike v the Attorney General of Trinidad and Tobago,<sup>6</sup> Trinidad and Tobago case of Naidike v the Attorney General of Trinidad and Tobago, concerning the attempted deportation of a child’s father. Baroness Hale emphasised the important place that the CRC had in judicial interpretation when the treaty had been ratified, even if not incorporated. She stated: “[I]t is important that the rights and interests of children are taken seriously by all countries which are party to the UN Convention on the Rights of the Child.”<sup>7</sup> She recognized that the rights enshrined in the CRC, although authoritative, are not absolute and a child’s best interests, as per Article 3, may need to give way to weightier interests, including the right of a State to expel any non-national who no longer has a right to stay in the country.

The court said: “The Convention itself has not been incorporated into the domestic law of Trinidad and Tobago, although its spirit is reflected in numerous specific laws relating to children.”<sup>8</sup> Relying on the Australian case of Minister for Immigration and Ethnic Affairs v Teoh<sup>9</sup> she found that ratification gave rise to “a legitimate expectation that administrative decision-makers would act in accordance with the Convention and treat the best interests of the children of a potential deportee as a primary consideration.

This is important dicta for the review of Venezuelan migrant children in Trinidad and Tobago. However, it has gone unnoticed in the context of Venezuelan migration and asylum in that state.

**Maintaining Family Unity in Respect of Children**

Every migrant or refugee ought to be afforded the right to enjoy and maintain the unity of their family. However, many refugees are separated from their family members as a result of persecution, or in the chaos of conflict and flight. Separation increases the risks all family members face, especially women and children, who may as a result be exposed to violence and exploitation. Further, they are often unable to secure the protection and assistance they need, and yet must take responsibility for their households and younger siblings<sup>10</sup> Acknowledging the risks and threats posed to the sanctity of the family, several international treaties provide for protection of family unity.

For example, other international instruments such as the Conclusion on Family Reunification<sup>11</sup> the UNDR, the International Covenant on Civil and Political Rights and the Migrant Workers Convention, all recognise family unity as foundational to life. These international instruments act as

1 CRC General Comment 22 [29].  
2 CRC General Comment 6 [93].  
3 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series a No.21 (19 August 2014).  
4 Convention on the Rights of a Child.  
5 UN Committee on the Rights of a Child ‘General Comment 23’ (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23 (CRC General Comment 23) [17].  
6 Naidike v the Attorney General of Trinidad and Tobago [2004] UKPC 49.  
7 *Ibid*, at para 68.  
8 *Ibid*.  
9 (1994) 128 ALR 353.  
10 Frances Nicholson and Judith Kumin, A Guide to International Refugee Protection and Building State Asylum Systems (Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, UNHCR, 2017.  
11 Executive Committee of the High Commissioner’s Programme, Family Reunification No. 24 (XXXII) -1981, 21 October 1981, No. 24 (XXXII), available at: <https://www.refworld.org/docid/3ae68c43a4.html> [accessed 6 August 2020]

guidelines for how this issue should be addressed. They also demonstrate, as indicated earlier in the study, that family unity is not only a principle afforded to refugees, but extends to migrants since this is deemed essential to all categories of persons regardless of migrant status.<sup>1</sup>

The principle has particular significance for children, who have special protections in relation to the maintenance of family unity since it falls within the general principle that the ‘best interests’ of the child should be secured, as discussed earlier. To reiterate, the CRC recognises the importance of the family unit and a child’s right to enjoy same. It notes that special consideration ought to be made to keep families together when they are seeking asylum and that this should only be breached in extreme circumstances where the separation is for the best interest of the child. As mentioned earlier in this report, Convention rights are given not only to refugee children, but also to migrants based on the principle of non-discrimination within Article 2 of this Convention.

Further, Article 9 of the CRC provides that the familial unit should be maintained unless it is in the best interests of a child to be separated from his/her parents. Refugee and migrant children are also entitled to have this right respected, especially under the principle of non-refoulement. Article 9 places a duty on a State party to ensure that despite any illegalities regarding their entries, the maintenance of the family unit is imperative to the well-being of the child. To this end, the Committee disapproves of deporting or detaining family members.<sup>2</sup> Further, Article 16 prevents arbitrary or unlawful interference with the child’s privacy and family.

Little to no mention is made of family unity in the Children Act of Trinidad and Tobago to enable such protection for migrant children. Further, there is no enforceable law, policy or practice that guides the treatment of Venezuelan migrants and refugees, in terms of protecting the family unit. This lacuna in the legislative and policy framework places Venezuelan female and children migrants and refugees, in particular, at a substantially higher risk of harm and exploitation. There have been no reports of Venezuelan migrants being separated from their parents, or children within the country. However, some have been forced to enter the country alone without their entire family to help them navigate the difficulties of adjusting to a new culture and society. No guideline or laws exist which would alleviate this situation.

Children have special protection against deportation in the context of migration. In the Privy Council decision of Naidike,<sup>3</sup> referenced earlier, the court appreciated that a proper balancing exercise must be undertaken, weighing the right of the State to deport a non-national who no longer has the right to stay, against the impact of deportation on his/her child, before a decision of deportation can be made and executed. Family unity was a persuasive factor in staying deportation. The court also relied on jurisprudence from the European Court on Human Rights that the rights of one family member may be infringed by action taken against another where the action taken was the long term decision to deport or expel, in which all the relevant factors could be placed before the authorities and taken into account.<sup>4</sup> While in the particular case, the child had not been harmed, the principle that the best interests of the child prioritises family unity, is to be noted as influential in the jurisprudence.

Likewise, the right to family reunification under Article 10 of the CRC applies to all children. The Article provides:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.<sup>5</sup>

These provisions have particular significance for unaccompanied migrant children and underscore the importance of familial unity and the role of the family. Further, the Committee has reiterated that the State’s obligations include establishing national legislation, administrative structures and the

Further, the Committee has reiterated that the State’s obligations include establishing national legislation, administrative structures and the necessary research, information, data<sup>1</sup>

Indiscriminate deportation and detention may impact migrant children negatively, causing significant collateral damage. Fear of detention and deportation haunts migrants and restricts their mobility. Young mothers worry that their detention will effectively strand, or orphan their children. In the IACHR hearing it was reported that a “local woman recently rescued two Venezuelan children, aged 8 and 10, that she found wandering the streets after their aunt, who the children were brought with, was deported<sup>2</sup>. Given the number of Venezuelan children in the country, these may not be isolated cases.<sup>3</sup>

Despite the very clear and strong international standards for the special protection of children in the migrant context and although many of these protections reside in the CRC, which Trinidad and Tobago has ratified and purported to incorporate, the State has enforced none of these special protections for migrant children in the domestic space. This is so even though the most authoritative court in the land has already pronounced upon the justiciability of the CRC in migrant contexts in the landmark Naidike case and by extension, the binding character of ratified treaty obligations.<sup>4</sup> Such a powerful dictum has remained invisibilised and invoked no policy change. Venezuelan migrant children remain as uncertain as adults in securing refugee status and are just as likely to be deported without due process safeguards. Further, they remain just as vulnerable as adult migrants, indeed, more so, to the harsh social environment in Trinidad and Tobago for migrants. Such migrant children are susceptible to various forms of violence, discrimination, neglect and violation of their rights, as discussed below, whether residing precariously in Trinidad and Tobago as a migrant, or upon deportation to Venezuela.

**Children Born in Trinidad and Tobago to Migrant Parents**

With the recent mass influx of Venezuelan migrants and refugees into Trinidad and Tobago, more and more non-citizens are giving birth within that territory. In Trinidad and Tobago, there are no laws that specifically target the situation of children born to Venezuelan parents who are refugees or migrants, documented or undocumented. In comparison, in similar situations which arose in the region, that, is the matter of Haitian descendants born in the Dominican Republic and Haitian descendants born in the Bahamas, specific laws sought to preclude such children from obtaining citizenship and effectively rendered them stateless. The IACHR addressed this matter and ruled that despite attempts even under the Constitution of the Dominican Republic to deny such children citizenship, they were so entitled.

<sup>5</sup> International legal standards, including those delineated under the 1951 Refugee Convention, also mitigate against the statelessness of such persons, pointing toward full citizenship rights and the right to remain.

The risk of statelessness is not an uncommon phenomenon in a modern world, full of wars and crimes against humanity. Described by the 1954 Convention Relating to the Status of Stateless Persons<sup>6</sup> as any person who is “**not considered a national by any State under the operation of its law**”, statelessness in the present day context, according to the UNHCR, is estimated to affect almost 10 million persons globally.<sup>7</sup> This means that almost ten million persons cannot claim to be protected by an originating country and as a result, are in danger of becoming victims to abuse. Many of these high risk individuals happen to be children, particularly children of refugees and/or asylum seekers who are born in territories which have refused to grant nationality to their parents and many times themselves, putting them at the very top of the vulnerability index.

In response to the problems associated with statelessness, the United Nations, as well as numerous other international organizations, have sought to prevent the occurrence of this phenomenon by introducing a guaranteed right to nationality into international refugee and human rights instruments,

1 Committee on The Rights of the Child Thirty-Ninth Session 17 May – 3 June 2005 General Comment No. 6 (2005), “Treatment of unaccompanied and separated children outside their country of origin,” [13].  
2 Radhica Sookraj, ‘Venezuelan influx strangling T&T’, Trinidad Guardian, February 2, 2019. <http://www.guardian.co.tt/news/venezuelan-influx-strangling-tt-6.2.771633.02b3d12a39>.  
3 Ibid  
4 Supra, n. 21.  
5 Report on the Situation of Human Rights in the Dominican Republic, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc. 45/15, 31 December 2015.  
6 UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html> [accessed 12 September 2020].  
7 United Nations Human Rights Office of the High Commissioner, ‘Right to a Nationality and Statelessness’ (OHCHR) <<https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>.

1 The Trinidad and Tobago Refugee Policy notes the need for family unity, but gives little detail. Further, the expressed intention to comply with 1951 Refugee Convention and to follow the guidelines of the various instruments underscoring family is frustrated by the fact that the Policy has not been implemented, not even in relation to children ‘A Phased Approach Towards the Establishment of a National Policy to Address Refugee and Asylum Matters in the Republic of Trinidad and Tobago’ 2014.  
2 CRC General Comment 23 [29].  
3 Naidike v the Attorney General of Trinidad and Tobago [2004] UKPC 49.  
4 Ibid.  
5 CRC, Art 10.



including Article 15 of the Universal Declaration of Human Rights<sup>1</sup> , Article 1(1)<sup>2</sup> and 8(1)<sup>3</sup> of the 1961 Convention on the Reduction of Statelessness, Article 20(2) of the American Convention on Human Rights<sup>4</sup> and Articles 7 and 8 of the Convention on the Rights of the Child.<sup>5</sup> Of particular importance is the latter instrument, which grants to any child, inter alia, the right to be registered after birth and the right to acquire a nationality to be respected by the State, “recognized by law without unlawful interference.” Further, the Inter-American Court of Human Rights case of Yean and Bosico Girls v. Dominican Republic placed an obligation on States not to adopt laws or practices which could increase the number of stateless persons. In addition, the case of Expelled Dominicans and Haitians v. Dominican Republic held that where the place of birth is uncertain, a State must grant nationality to the child so as to avoid statelessness at birth.

In Trinidad and Tobago, citizenship status is addressed generally under the Constitution, one basis of which is birth in the state.<sup>6</sup>

By virtue of section 17(1) of the Constitution of the Republic of Trinidad and Tobago 1976, “every person born in Trinidad and Tobago . . . shall become a citizen of Trinidad and Tobago at the date of his birth”<sup>7</sup> Thankfully, the exceptions for citizenship by birth under subsection (2) do not speak to the situation of Venezuelan migrants, so that there is no legislative impediment to such children of migrant parents acquiring citizenship. These are where, “at the date of his birth (a) neither of his parents is a citizen of Trinidad and Tobago and either of them possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Trinidad and Tobago,”<sup>8</sup> or where “either of his parents is an enemy alien and the birth occurred in a place then under occupation by the enemy.”<sup>9</sup>

Currently, there is therefore no formal risk of statelessness for children born in Trinidad and Tobago to Venezuelan migrant parents. Further, there is no indication that there is an intention, or regressive initiative to change the Constitution to negatively impact such children, as has occurred elsewhere in the region. In May 2019, the Prime Minister of Trinidad and Tobago, Dr Keith Rowley, seemed to affirm not just the law of the land, but the policy intentions of his administration when he remarked informally: “It doesn’t matter where you come from. As long as you are born in Trinidad and Tobago you lay claim to citizenship. It doesn’t matter who your father or mother is or where you come from. Once the birth takes place in our border you lay claim to citizenship”.<sup>10</sup>

It is suggested that such children should be entitled to remain in the country and enjoy full rights of citizenship, but there has been no official word or policy on what is an emerging phenomenon. One important element would be what consideration should be given to the migrant parents of such children to remain the country with their children who are Trinidad and Tobago citizens. Significantly, the important Naidike case referenced just such a context, with the migrant father of a child citizen protected from deportation on the grounds of family unity and the best interests of the child. Future policy should be guided by the dicta in this judgment<sup>11</sup>

While the legal position is clear, there are signs that it may not be reflected in practice. The issue should therefore be examined and situations like these monitored, with an appropriate emphasis on the human rights and humanitarian context. This is particularly because, while, to date, there are no officially recorded cases of new-borns being denied nationality, there are unconfirmed reports of conduct which deviate from the legal requirements and expectations. These refer, for example, to twenty-seven (27) Venezuelan migrant women who have claimed that upon the birth of their child in Trinidad and Tobago, the authorities failed to register said birth. The FoL-UWI Migrant Survey also revealed that at least 1 woman had been refused Trinidadian citizenship for her Trinidadian-born baby. If these cases are factual, then such children would be considered stateless, per the definition of the United Nations, and are now more vulnerable to abuse and human rights violations.

1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 15.  
2 Convention on the Reduction of Statelessness (adopted 30 August 1961 UNTS vol. 989) Art 1(1).  
3 Ibid Art 8(1).  
4 Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 12 September 2020]  
5 CRC, Articles 7 and 8.  
6 Constitution of the Republic of Trinidad and Tobago Act (Ch. 1:01), 1976.  
7 Ibid, Article 17(1).  
8 Ibid 17(2) (a).  
9 Ibid 17(2)(b).  
10 Shaliza Hassanali, ‘Govt had no role in release of migrants — Young’ Trinidad & Tobago Guardian (Trinidad and Tobago, 23 May, 2019) <https://www.guardian.co.tt/news/govt-had-no-role-in-release-of-migrants-young-6.2.852697.5e44bcd73>> accessed 10 September 2020.  
11 Naidike, supra, n. 21.

Notably, states have obligations not merely to have appropriate laws in place, but to avoid structural defects and obstacles in the implementation of such law and the enjoyment of the rights contained therein.

### 3.4. The Guarantee of Due Process & Protection against Deportation

All migrants and asylum seekers have the right to due process of law. This requires a number of procedural safeguards in the interest of fairness. Most important is the requirement for migrants and asylum seekers to be notified of proceedings against them so that they can make proper representations. Migrants are also entitled to other minimum due process guarantees, including proceedings and hearings to determine their status and their rights, detention reviews; translation, legal counsel, and appeals.<sup>1</sup> Such processes must be clear, consistent, equitable and not arbitrary. The sources for verifying due process requirements for migrants and asylum seekers are several. Certainly, the 1951 Refugee Convention as described above, mandates such due process safeguards for asylum seekers. Due process is not only limited to asylum seekers, however. Articles 16, 17 and 18 of the Migrant Workers Convention enumerate various procedural requirements concerning the arrest and detention of migrant workers and their families, in accordance with due process of law rights.<sup>2</sup> These exist alongside substantive rights such as the right to be treated with humanity and respect for inherent dignity.<sup>3</sup>

The Constitution of the Republic of Trinidad and Tobago also offers additional protection in relation to core rights such as due process. These rights apply without discrimination to all persons within the state, since there are no exclusionary references between nationals and non-nationals. As such, migrants are also entitled to these rights. Due process, in fact, is viewed as an inalienable right across international human rights treaties and Constitutions, as confirmed by both the Privy Council and the Caribbean Court of Justice (CCJ). Landmark case law establishes that such due process rights also exist in relation to treaty obligations. <sup>4</sup> In Lewis<sup>5</sup> the Privy Council ruled that due process required that the State allow a person on death row who had applied to the Inter-American Court for a hearing, invoked because of a treaty obligation under the American Convention, to complete this process before being executed. In Boyce, <sup>6</sup> the CCJ came to a similar result, but using different reasoning, that is, that there was a legitimate expectation to such due process rights flowing from the ratification of the treaty. Such dicta allow Venezuelans, whether migrant, or asylum seeker, to be protected both by the Constitution, which is the supreme law of the land and due process rights emanating from treaties. Section 5 of the Constitution also allows for redress to be sought if these rights are breached.<sup>7</sup>

With respect to Venezuelan migrants in Trinidad and Tobago, due process safeguards come into play mainly with respect to the refugee application process, as well as in the determination of immigration status under the Immigration Act, both described in a previous section. To recall, the latter may be at the point of entry into the state. Under the Immigration Act, the State is required to ensure that the person seeking entry is afforded a fair hearing, either before a judicial tribunal by a magistrate before a decision on deportation is made for the offence of unlawful entry, or a special inquiry for other entries. Proceedings before the High Court to challenge detentions are also part of the due process protection framework afforded to ever person. The latter is relatively recent and is explored in a following section.<sup>8</sup>

Due process also requires that where a person enters the State and seeks asylum, that internationally established legal standards for asylum are complied with in evaluating the claim. In Trinidad and Tobago, as noted previously, this is a non-statute based process constructed with the assistance of the UNHCR and its agent, the LWC, in a partnership with the State through the Immigration Department. The voluntaristic and ad hoc character of this process is itself problematic.

1 FoL Hearing, supra, n.8.  
2 UN International Convention on the Protection of the Rights of Migrant Workers and their Families (adopted 18 December 1990, entered into force 1 July 2003) UNTS vol. 2220 Art 18.  
3 Ibid Art 17(1), explored below.  
4 See Lewis et al v Attorney General of Jamaica (2000) 57 WIR 275 (PC, Jamaica); [2000] 3 WLR 1785 (PC, Jamaica) upheld by the Caribbean Court of Justice (CCJ) in Boyce, supra, n.22.  
5 Ibid, Lewis.  
6 Ibid, Boyce.  
7 Section 4 of the Constitution further lists the rights of an individual within the State, including the right to “security of the person”.  
8 CRC, [117-143].

Children should be subject to special procedural processes if due process is to be safeguarded. Article 12 of the CRC mandates due process, including the right of the child to express his/her views in any matter concerning them.<sup>1</sup> Further, the Inter-American Court has advised that immigration and border authorities should not require them to show documentation that they may not have, should immediately direct them to personnel who are able to assess their needs for protection based on their best interests and should not prevent the entry of migrant children into national territory.<sup>2</sup> interests and should not prevent the entry of migrant children into national territory. None of these procedures are routinely carried out in Trinidad and Tobago, despite reports of unaccompanied children attempting to enter the state.<sup>3</sup>

#### State Abdicating its Jurisdiction Through External Processes

It is submitted that the very conceptualisation and existence of an asylum process that is determined by external actors and located entirely outside of State processes, undermines due process. International standards that flow from the 1951 Refugee Convention and related treaty instruments all place obligations, whether substantive or procedural, on the State itself. Where the entire process resides outside of the state's authoritative jurisdiction and the state does not adequately collaborate in the process, the State may be viewed as abdicating its responsibility to determine refugee status for migrants appealing to it, within its own sovereign territory. It is not contested that the UNHCR has the authority to implement the asylum process in lieu of the state, but this is to fill gaps due to inability or inefficiency, as noted earlier. In the case of Trinidad and Tobago, the problem is the reluctance of the state and the tendency it has shown to ignore processes it has agreed to.

In this vein, the comment made by Justice Mohammed in the Machado<sup>4</sup> case should be examined. He declared that the authority to make asylum, or refugee determinations is left to the UNHCR, not the court, referencing correctly, the voluntary mechanism established by the State through an agreement with the UNHCR. The Court took no responsibility for reviewing any substantive decisions on refugee status in Trinidad and Tobago and, by extension, appeared to accept that the State itself, had no part in the decision-making process and no duty to act. However, in the judicial review process, a court has an inherent supervisory jurisdiction to review decisions of the Executive. It is submitted that a process that effectively removes such jurisdiction from the court and the state, offends the rule of law and due process, as well as the international obligations of the State to act to fulfil its duty.

#### Inconsistent Voluntaristic Processes Unsupported by Law

In addition to the asylum process being outside of the state's authority, the decision-making process for refugee status is entirely unsupported by any law, rendering it susceptible to uncertainty and arbitrariness. As noted earlier, although Trinidad and Tobago has signed the 1951 Refugee Convention, it has yet to incorporate it into domestic law and depends on the Refugee Policy. This voluntaristic schema, it is suggested, also offends the core principles of due process. While accepting that the asylum seeking process has been recognised and enshrined in the Refugee Policy and seeks to conform to international standards, it remains only a policy and not a legally enforceable document. It is not law and depends, ultimately, on the good will of the state, which has been inconsistent and indeed, deteriorating in recent times. Further, despite creating the Refugee Policy to rectify the defects of the Immigration Act with regard to asylum seekers, it is not always followed. The National Refugee Policy to address asylum and refugee matters which Trinidad and Tobago created, is, therefore, an imperfect substitute for fulfilling international obligations. Moreover, it has not been fully implemented.<sup>5</sup> Indeed, it is doubtful whether a voluntary process could achieve the desired result.

Given Trinidad and Tobago's failure to incorporate the 1951 Refugee Convention and to implement the Refugee Policy fully, the state's treatment of Venezuelan migrants is characterised by a serious disregard of key substantive and procedural rules of international law relating to asylum seekers and refugees. Further, policy and practice have been unclear and inconsistent, despite sustained efforts by international agencies such as the UNHCR and NGOs like the LWC and the FPATT. The ramifications of that uncertain status and unenforceable policy have been seen in the ad hoc, inconsistent procedures used in asylum processes. It is submitted that the absence of specific provisions in domestic law that provide for separate processes for asylum-seekers under the Immigration Act, or elsewhere, is itself a violation of due process rights.

1 CRC, [117-143].

2 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No.21 (19 August 2014) [83].

3 See CNC 3 news reports by Radica Sookraj, CNC3 news, August 18, 2020, and August 17, 2020, supra

4 Machado, supra, n. 113.

5 'A Phased Approach Towards the Establishment of a National Policy to Address Refugee and Asylum Matters in the Republic of Trinidad and Tobago' 2014.

There are thus legal and policy gaps and inconsistencies in administrative (immigration) and judicial processes which lead to an arbitrary, uncertain and unfair environment for migrants that mitigates against due process rights. Further, these impact to undermine their substantive rights. Both the facts that the asylum process is voluntaristic and that it is carried out by external actors contribute to its inconsistent and uncertain character, which in turn, further violates due process.

Of particular note are the following concerns, although not exhaustive:

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- i Failure to provide coherent and consistent or adequate procedural mechanisms for asylum seekers, leading to arbitrariness in the asylum process;
  - ii Inconsistent and arbitrary mechanisms for the deportation of migrants;
  - iii Inconsistent and discriminatory sentencing in magistrates' decisions on migrants;
  - iv Failure to abide by policy agreements as to procedures for migrants and asylum seekers;
  - v Failure to provide legal representation;
  - vi Lack of translation facilities in hearings, thereby undermining the right to a fair hearing;
  - vii Repeated violations of the right to a fair hearing and to be brought promptly before a judge ;
  - viii Failure to provide special procedural mechanisms for securing the best interests of children.

Notably, despite Trinidad and Tobago not being a Party to the Migrants Workers Convention, the Privy Council in the landmark case Naidike v The Attorney General of Trinidad and Tobago, recognised and protected the due process rights of migrant workers. In this case, a migrant who had been permitted to work in Trinidad and Tobago under successive work permits, was held by the court to have had a right to a fair hearing as to why his permit should not be revoked. This had given rise to a legitimate expectation. While the migrant has no right to be granted the permit, he or she has the right to due process in considering whether the permit should be granted.<sup>2</sup> This underscores the inalienable nature of due process safeguards.

However, this enlightened judicial stance on migrant rights and in particular, reliance on international standards in the face of legislative deficiencies, has not been replicated in lower courts, as seen below in the review of the emerging jurisprudence.

Venezuelan migrants registered under the 2019 Registration procedure were only granted permission to work for one year and a subsequent six-month extension. It is therefore unlikely that a legitimate expectation arises in their favour that this permission will not be revoked without good reason, or a fair hearing. Those migrants who did secure work permits would however, fall under the Naidike rule.

Procedural requirements under the applicable law, the Immigration Act, remain inadequate. It is clear that existing law was not designed for, nor can effectively regulate, or cope with, the influx of migrants seeking refuge entering the State of Trinidad and Tobago. The provisions in the Immigration Act make no distinction in the categories of persons who enter a country as ordinary migrants, or refugees, or any mention of special provisions for those entering Trinidad and Tobago seeking asylum. Further, immigration authorities often ignore their own processes for individualised reviews, such as special inquiries.<sup>3</sup> Accompanying procedures, such as deportations through the Magistrates' courts are also problematic. For example, penalties are arbitrary. Some Magistrates discharge migrants, others detain for up to 4 years, others issue hefty fines (up to \$50,000) to migrants.

1 Secured under the Migrants Convention, Art 16(6).

2 Naidike v the Attorney General of Trinidad and Tobago [2004] UKPC 49.

3 Detailed in the FoL-UWI IACHR Hearing, supra, n.8 and corroborated in the interview with the LRC, supra, n.43



The failure of Trinidad and Tobago to incorporate the principles and protections of international standards, such as under the 1951 Refugee Convention, which it has ratified, continues to have deeply unjust repercussions for migrants. Even where migrants have entered the country legally, the period of stay permitted legally often expires which leaves them with an irregular status. Once these individuals are detained by the police, they are at risk for deportation or detention for illegal entrance or illegal stay, as are those who enter illegally.

Regression of Due Process

There is evidence that the National Venezuelan Migrant Registration Program has impacted negatively on due process expectations, accentuating the opaqueness of the process for new asylum seekers. For example, up until 2019, the LWC, the UNHCR and the Refugee Unit would meet on a monthly basis to liaise. Additionally, the LWC would meet with the Refugee Unit as well as the International Affairs Unit of the Ministry of National Security to talk about the issues facing migrants and refugees and policies concerning them<sup>1</sup>. However, since the National Migrants Registration Program, these established routines have waned.

Even before the advent of the National Venezuelan Migrant Registration Program, concerns had been expressed about the steady regression, even breakdown, in agreed asylum processes between the State and the UNHCR as the numbers of Venezuelan migrants increased. As reported in the FOL-UWI IACHR Migrant Hearing, <sup>2</sup> instead of formulating a humanitarian response to support this vulnerable group, the State had decreased protection measures that were previously available. These include waivers of security bonds and Orders of Supervision meant to be alternatives to detention. Indeed, detentions and deportations were increasing.

The process whereby the UNCHR was allowed to make Refugee Status Determinations was being and continues to be undermined, due to ad hoc detentions and deportations and clandestine operations. Decisions on deportation do not typically take into account required elements such as family ties and the humanitarian situation in the country of destination. Further, appeals or judicial review are often inaccessible. Existing protections are being diminished without any, or appropriate substitution. It will be seen in the following section that the alternatives to detention post the registration program, are even more scarce, as the State ramps up its efforts toward detention and deportation.

***Deteriorating Due Process Safeguards in the Deportation Process***

Deportation was considered in the previous section in its substantive sense, as ancillary to the right to remain in the country for asylum. In this section we examine deportation in its procedural sense. Deportation is, of course, a logical result of failed asylum or migrant status claims, as discussed above. However, deportation is also important in the context of due process, in assessing whether fair and transparent procedures were carried out in the process of evaluating whether a Venezuelan migrant is to stay, or remain. As such, it is also a subject that assumes a special significance in examining due process requirements in the context of migrants.

Deportation, which is the antithesis of a right to stay, remains the greatest danger to Venezuelan migrants in Trinidad and Tobago. It occurs where the State does not respect the right to asylum, or where the applicant fails to meet the criteria for asylum. Migrants not seeking asylum also have rights in relation to deportation. In line with international standards, expulsions may take place only in pursuance to a decision taken by the competent authority in accordance with law<sup>3</sup>, and where such decision is taken, the migrant has the right to submit reasons why he/she should not be expelled and have their case reviewed, except where a final decision is made by a judicial authority or compelling reasons of national security require otherwise.<sup>4</sup>

It is particularly egregious where, as discussed below, deportation of asylum seekers occurs. The deportation itself violates the established agreed procedure and therefore violates due process. As noted above, under international law and in particular, the 1951 Refugee Convention, where a migrant applies for asylum, he should not be deported while his asylum application is being processed, as reflected in the Refugee Policy and related agreed Standard Operating Procedures. One major complaint is that the protection against deportation that the UNHCR card affords to persons is not being respected. The UNHCR card is supposed to provide a margin of appreciation in the detention and deportation hearing processes.

1 Ibid.  
2 Supra, n.8.  
3 The Migrants Convention, Arts 22(1), 22(2).  
4 Ibid, Art 22(4).

Deportation while the asylum application process is pending has, however, occurred before in Trinidad and Tobago and continues to occur, according to continuing reports. In April of 2018, the State deported eighty-two (82) immigrants, who had their legal documents proving that they were asylum-seekers, some already with UNHCR cards. This breached a core component of international refugee law with impunity and attracted much criticism from international organisations. <sup>1</sup>

In an interview with the LWC, it was disclosed that some persons seeking asylum, who may have started the process, either reception with the LWC, or by registering with the UNHCR, were deported from Trinidad and Tobago during the last set of deportations conducted by the Ministry of National Security.<sup>2</sup> Further, it appears that migrants who have registered with the UNHCR are continuously being detained and they may even be deported, even though they are in possession of the UNHCR asylum-seeking card.<sup>3</sup> Evidently, the aspect of the process that affords protection against deportation to migrants possessing the card is currently uncertain, or severely undermined.

The interview with the representative from the LWC also revealed that recently, one hundred and sixty-two (162) individuals were deported in recent months. This is also a breach of the due process requirements, considered infra and potentially, the principle of non-refoulement owed to refugees. <sup>4</sup>

More recently, the scant regard for agreed procedures has apparently worsened. On September 18, 2020, for example, attorneys representing ninety-three (93) Venezuelan migrants seeking asylum who had been granted a stay of deportation by the courts reported that they had been deported.<sup>5</sup> This is an ongoing contentious matter although the State has conceded that some, at least of these persons, had applications before the UNHCR.<sup>6</sup> This is an alarming development, since it is not only contempt of court, but an infringement of the separation of powers doctrine and a violation of the rule of law.

There is therefore, insufficient respect for the Venezuelan migrant asylum application and process for refugee status and in particular, the safeguards against deportation when an asylum application is pending. Detentions and deportations also continue for migrants who are not within the UNHCR process and even, reportedly, those under the National Venezuelan Migrant Registration Program. Further, migrants are often not informed of their right to seek asylum through the UNHCR. Many are not given the opportunity to apply for asylum. Even where detainees seek asylum, the follow up process is delayed and slow.

The due process emphasis in the Naidike case<sup>7</sup> concerning deportation, is also to be recalled. The Privy Council found that procedural fairness required immigration officials to give migrants’ notice and an adequate opportunity of presenting their case.”<sup>8</sup>

In sum, there are persistent and credible reports that the refugee status determination process which should be conducted by the UNHCR is being undermined, due to ad hoc detentions and deportations and clandestine operations, even for migrants with UNHCR registrations.<sup>9</sup> These phenomena violate due process principles.

*Access to Legal representation and Translation*

Serious concerns of due process arise from credible reports that migrants are often denied their right to legal representation. This was revealed by attorneys with personal experiences in relation to their own clients at the FOL UWI’s National Symposium on Refugees in 2018 and in the FOL UWI IACHR hearing.<sup>10</sup> LWC officers also confirmed this and added that there were instances where IDC officials dissuaded the detainees at the IDC from seeking legal representation. Ministry officials responded to complaints by stating that detainees must ask for legal representation and that they are not automatically informed of a right to legal representation.

1 Loop News, April 24, 2018, ‘Amnesty International writes Trinidad and Tobago on deportation of Venezuelans’, <https://www.loopjamaica.com/content/amnesty-international-writes-rowley-deportation-venezuelans-2>  
2 nterview with LWC, supra, n8. These occurred during the period June to August.  
3 Ibid.  
4 Ibid.  
5 93 Venezuelans Deported: Lawyers Fail to Save Asylum Seekers,’ Guardian newspaper, Sep 18, 2020, Trinidad.  
6 Legal notes obtained from one attorney Cristin J. Williams, on October 3, 2020.  
7 Supra, n. 195.  
8 Ibid, at para 72.  
9 Interview with LWC, supra, n 43.  
10 Alina Doodnath, ‘Attorney – TT Aligning with US to Clamp Down on Refugees,’ Loop News, June 18, 2018, <https://www.looptt.com/content/attorney-tt-aligning-us-clamp-down-refugees>.



The information was corroborated by the state's own Joint Select Committee<sup>1</sup>, a Parliamentary Committee which confirmed complaints that migrants are denied access to their attorneys and to the UNHCR in detention centres, preventing monitoring and their rights to legal representation and a fair trial.<sup>2</sup>

Such conduct is in violation of the Privy Council's decision in *Thornhill v the Attorney General of Trinidad and Tobago*, where it was confirmed that it is the fundamental Constitutional right of a person detained to access a lawyer without delay,<sup>3</sup> a principle that was expanded by the same court in *Attorney General v Whiteman* where it was held that the right to legal representation includes the right to be informed of the right to communicate with legal representation.<sup>4</sup> Additionally, migrants and asylum seekers are also entitled to access legal aid.<sup>5</sup>

Free legal representation and assistance of a translator being provided by the State are also important components of due process for migrant children. There is jurisprudence in Trinidad and Tobago which apply to all children in that State that mirrors international standards as under the CRC.<sup>6</sup> However, there is no evidence that this important right is being adhered to with respect to Venezuelan migrant children.

### 3.5. The Principle of Confidentiality

Every asylum seeker should enjoy the right to confidentiality during the asylum, or immigration process, particularly during the registration procedure. The principle should be viewed as an important element of due process in the refugee context. Since these individuals would have left their homes to preserve their lives in the face of persecution, there is a need for their location and personal information to remain confidential within the host state. the 1951 Refugee Convention 1951 and its 1967 Protocol both protect the right to confidentiality, so that Venezuelan migrants who fall within the definition of an asylum seeker, or refugee, would be entitled to benefit from this right.

The issue of confidentiality was also given attention under the UN's 2001 Executive Committee Session entitled 'Conclusion on Registration of Refugees and Asylum Seekers.'<sup>7</sup> Under this Conclusion it was stated explicitly that the registration of asylum seekers should be confidential and conducted in a safe and secure location. As Trinidad and Tobago is a party to the 1951 Refugee Convention it would also be guided by the documents and or Conclusions that flow from that Convention as these are recommendations that can aid in interpretation and application.

<sup>1</sup> Joint Select Committee, *supra*, n 44.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Thornhill v the Attorney General of Trinidad and Tobago* [1981] AC 61.

<sup>4</sup> *Attorney General v Whiteman* (1990) 39 WIR 397.

<sup>5</sup> Interview with LWC, n.43.

<sup>6</sup> See *Leith v The State*, 108 (2001) 61 WIR 435. The right for children to have access to legal representation, including legal aid is discussed in Antoine, R-M. B. *Commonwealth Caribbean Law and Legal Systems*, Routledge-Cavendish, 2008 at p 365.

<sup>7</sup> Executive Committee of the High Commissioner's Programme, Conclusion on Registration of Refugees and Asylum Seekers No. 91 (LII) – 2001, 05 October 2001, No. 24 (LII), available at: <https://www.unhcr.org/excom/exconc/3bd3e1d44/conclusion-registration-refugees-asylum-seekers.html> [accessed 20 July 2020]

In Trinidad and Tobago, the main document that attempted to follow this guideline was the Refugee Policy. It acknowledges that refugees are entitled to privacy and protection from unlawful interference. However, in comparison to the international instrument, it is deficient. No mention is made as to how it ought to be enforced, and it does not detail the circumstances that permit a breach of this right. Moreover, given that the Refugee Policy has not been fully implemented, the right to confidentiality is not secured, despite attempts by the UNHCR to preserve it.

Information gathered in an interview with the Senior Legal Officer at the LWC endorses this view.<sup>1</sup>

In the refugee/ asylum registration process in Trinidad and Tobago, the UNHCR upholds the rights of the refugee, or asylum seeker to the principle of confidentiality. Thus, when Venezuelan migrants apply to attain refugee status their information is kept confidential. However, during the government's National Venezuelan Migrant Registration Program, this right was compromised because it involved sharing information with Venezuelan authorities to determine any falsified information, or criminal backgrounds of migrants.<sup>2</sup> The duty of confidentiality is therefore balanced against national security concerns and the State's right to protect itself and its citizens.

### 3.6. The Prohibition Against Detention

It is the inalienable right of all human beings to have their liberty and security of the person respected. Consequently, every human being is protected under international human and humanitarian law against arbitrary detention or deprivation of their liberty. Detention can only be applied in pursuit of a legitimate aim and must be necessary and proportionate in each individual instance. This protection is enshrined under Articles 2 and 3 of the UDHR, which declares that all humans have the right to life, liberty and security of person, regardless of any "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." It is underpinned by Articles 9, 10 and 11, which further demonstrate this ideal, by proclaiming a policy of non-detention, or arrest by arbitrary measure and the right to due process. This privilege extends to all humans, inclusive of migrants, asylum seeking, documented, or undocumented. It is a right which has been especially entrenched in international human rights instruments dealing with migrants, particularly the 1951 Refugee Convention and the Migrant Workers Convention 1990. No derogations are permitted from the prohibition against the detention and imprisonment of any person, national or non-national, without due process, or by lawful means. Due process, as discussed above, is thus an essential element of this right.

In practice, however, migrants and refugees are often confronted with imprisonment and harsh detention conditions when they arrive in their desired host nations, especially when undocumented (illegal). This is a problem which requires an immediate solution in a modern world plagued with economic, social and political crises. Indeed, it is a typical scenario in Trinidad and Tobago with respect to Venezuelan migrants.

In its definition of detention, the International Organization for Migration (IOM) includes, in its concept of detention, both a simple restriction on the freedom of movement, or a complete deprivation of liberty within the scope of ICCPR.<sup>3</sup> Article 9 of the ICCPR prohibits such actions "except on such grounds and in accordance with such procedures as are established by law". These are concepts distinguishable from one another by degree or level of intensity, as affirmed by the European Court of Human Rights. For instance, a simple restriction of movement may occur where a migrant is held at an international airport for questioning, but if this restriction becomes prolonged, then it may extend into a deprivation of his/her liberty. This then, begs the question as to how a lawful restriction of movement of a migrant can be prevented from evolving into an arbitrary deprivation of liberty.

The UN Human Rights Committee in its General Comment No. 8,<sup>4</sup> confirmed that the prohibition against detention extends to detention for immigration control purposes. Other international human rights bodies, such as the Working Group on Arbitrary Detention, have verified that limitations to this general right to liberty must be exceptional, occurring sparingly in situations of administrative detention and where the reasons for the detention are not punitive in nature. Such exceptions "must be clearly defined and exhaustively enumerated in legislation", the law referred to must not be arbitrary in itself nor in its enforcement and it "must be verified . . . against international law and particularly

<sup>1</sup> Interview with LWC, n.43.

<sup>2</sup> *Ibid.*

<sup>3</sup> See its Informational Note on International Migration Law, *supra*, which offers a definition of the detention of migrants, describing it as the "restriction on freedom of movement through confinement that is ordered by an administrative or judicial authority."

<sup>4</sup> As reported in the Int'l Organization for Migration IML Information Note on International Standards on Immigration Detention and Non-Custodial Measures (2016). 1.



Further, such “deprivations of liberty must “have a legitimate aim, be proportionate to the aim pursued and have a fair balance struck between the conflicting interests”<sup>1</sup> . It is to be used as a measure of last resort. Accordingly, the Inter-American Court of Human Rights, in the case of *Velez Loor v Panama*<sup>2</sup> , noted that mandatory or automatic detention of migrants falls into the category of arbitrary detention, establishing that immigration policies which focused on mandatory detention were incompatible with the American Convention on Human Rights and the American Declaration on Human Rights, to which Trinidad and Tobago are parties.

As clarified in the Advisory Opinion on Child Migrants,<sup>3</sup> although States have a margin of discretion when determining their immigration policies, they are obliged to respect the human rights of all persons within their jurisdiction, including migrants, “because they are based, . . ., on the attributes of the human personality, irrespective of nationality . . . “ whether the person is there temporarily, or . . . in an irregular migratory situation.”

States are mandated to protect asylum seekers and irregular migrants from criminal prosecution. To quote the UN High Commissioner for Human Rights and IACHR Commissioner Macaulay: “Irregular migration is not a crime.”<sup>4</sup> Nor is seeking asylum. The criminalization of illegal entry into countries and their lack of emphasis on due process during detention proceedings, in the form of impartial decision making and the right to challenge a decision by the migrant in question, is therefore cause for concern.<sup>5</sup>

At minimum, all migrants are entitled to basic human rights. The IACHR and Inter-American Court have emphasised these principles in the jurisprudence of the Inter-American System of Human Rights.<sup>6</sup>

Beyond these general guidelines, the IOM specifies standards applicable to immigration detention, derived from the various international human rights instruments and jurisprudence. These include:

- (i) The right to be informed upon entry in the territory and while in detention of the reasons for arrest in language he understands, codified in Article 9(2) of the ICCPR 1976;<sup>7</sup>

(ii) The right to communicate with the outside world, originally entrenched in the Standard Minimum Rules for the Treatment of Prisoners 1955<sup>8</sup> ; and later expressly reiterated in Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988;<sup>9</sup>

1

Ibid.

2

Velez Loor v Panama Inter- American Court of Human Rights Series C (23 November 2010).

3

Advisory Opinion Oc-21/14 Of August 19, 2014, requested by The Argentine Republic, The Federative Republic of Brazil, The Republic of Paraguay and The Oriental Republic of Uruguay Rights and Guarantees of Children in The Context of Migration and/or in Need of International Protection.

4

Also recalling the remarks of the UN High Commissioner for Human Rights.

5

It has also been condemned by the IOM's Working Group on Arbitrary Detention. Information Note, supra, n.104.

6

See, e.g. Inter-American Commission on Human Rights (IACHR), Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, 31 December 2015, OEA/Ser.L/V/II.;Doc. 46/15, available at: <https://www.refworld.org/docid/5821c778b.html>.

7

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him “, ICCPR. It is also protected under Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988 which states that ‘anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him’. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted 9 December 1988) 43 UNTS 173 Principle 10. and; Principle 1 of the guarantees concerning persons held in custody set forth in The Working Group on Arbitrary Detention 1999 Deliberation No. 5.

8

Rule 37 states: Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. Rule 38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons. Rule 39 Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration’. Standard Minimum Rules for the Treatment of Prisoners (adopted and approved 13 May 1977) Rule 37-39.

9

This stipulates that ‘communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.’See (n 129) Principle 15.

- (iii)The obligation to register any migrant placed either in custody or in detention, originating from Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners 1955;<sup>1</sup>

(iv)The obligation to establish a maximum period of detention in national legislation, established in Article 9(3) of the ICCPR<sup>2</sup>;

(v) The right to be heard by a judicial authority within a reasonable time;<sup>3</sup>

(vi)The right to humane detention conditions and obligation to respect the inherent dignity of every human person, enshrined in Article 10 of the IC-CPR<sup>4</sup> and the UN Standard Minimum Rules for the Treatment of Prisoners 1955<sup>5</sup> which accounts for the “specific needs of detainees, such as clothing, bedding, food, personal hygiene, medical services, exercise and sport, book and religious worship.”<sup>6</sup> Such facilities should not resemble prisons and should prioritise the health and wellbeing of the refugee.

(vii) The obligation to allow monitoring of reception centres to promote transparency and accountability;

(viii) A prohibition against detaining vulnerable individuals, including children. <sup>7</sup>

Of the above, only (iii) and (viii) are regularly enforced in Trinidad and Tobago.

A number of non-custodial measures<sup>8</sup> may also be used as alternatives to immigration detention of Venezuelan migrants , but are rarely, if ever, employed in Trinidad and Tobago. These include:

- (a) Open or semi-open facilities;

(b) Release with registration requirements;

(c) Reporting requirements;

(d) Release on bail, bond or surety;

(e) Controlled release;

(f) Electronic monitoring; and

(g) Voluntary Return Programmes.

1

This states: In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:  
(a) Information concerning his identity;  
(b) The reasons for his commitment and the authority therefor;  
(c) The day and hour of his admission and release.  
(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register. Later reiterated in Principle 4 of guarantees concerning persons held in custody set forth in The Working Group on Arbitrary Detention 1999 Deliberation No. 5

2

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement’, and alluded to in Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988. Article 9(3). See also Principle 11.

3

Ibid. 1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.’

4

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status’. Article 10.

5

Rule 8- 45.

6

Ibid. In Rules 8 to 45, and the Parliamentary Assembly of the Council, customary international law of Europe in its Resolution on Europe’s boat people is examined. There is list of requirements for migrant detention/ housing facility, namely “appropriate food and sufficient quantities of drinking water; adequate clothing and change of clothing, bedding, blankets, toiletries, etc.; adequate furniture, such as beds, chairs and tables, as well as lockers to allow private items to be stored and kept safely; separate accommodation and separate sanitation for men, women and unaccompanied minors; adequate sanitation facilities which are kept clean and in serviceable operation; regular access to the open air during substantial parts of the day; sufficient recreational activities (television, reading, exercise, games, etc.).

7

If vulnerable persons are to be detained, then the conditions of detention must be appropriate and they must be provided with health care and skilled professional support as needed. The International Committee of the Red Cross (ICRC) has released a number of key considerations for States when detaining migrants, reflecting these very guidelines, condemning the detention of migrants and expressing concern about the vulnerable position that this leaves these persons who are deprived of their liberty, having “ been taken out of their normal environment” and being “no longer allowed to manage their own lives”, citing systemic shortcomings as the most common factor detainees are negatively affected. These guidelines to migrant detention, although embodying international human rights, humanitarian and refugee laws to migrant detention, may depend on the legislation of the host country and their status in relation to these international instruments and bodies, as well as the facts of each circumstance.

8

These have been recommended by the IOM. See Information Note, supra, n. 104, 7.

**Detention of Asylum Seekers**

The prohibition against detention is even stronger in relation to asylum seekers. Indeed, the principle of non-detention is a foundational principle of the 1951 Refugee Convention, which stipulates that “subject to specific exceptions, refugees should not be penalized for their illegal entry or stay.” It explains that in seeking asylum, refugees may be required to breach immigration laws, that is, illegal entry. Heavy penalties, such as “being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum” should not be employed.<sup>1</sup> Once an individual has been recognized as a refugee under the requirements of Article 1 of the 1951 Convention, these penalties are to be waived and prohibited from being used against the said refugee. Article 31 of the 1951 Convention emphasises this principle by forbidding states from imposing penalties on refugees for illegal entry. This is only bridged in exceptional circumstances, listed in Articles 1, and in full consideration of all possible alternatives. What this means in relation to migrants is that persons who enter another territory, legally or illegally, seeking asylum, and who satisfy the qualifying criteria in Article 1, are entitled to protections from detention and penalization on this basis.

Migrants who do not seek refugee status or do not satisfy the needed requirements, however, can be detained or deprived of their freedom of movement, but even this detention is subject to lawful expectations, as explained above.

Articles 37 and 40 of the CRC give further protection to children against detention, for example, by reason of irregular migration status. Detention must be the last resort, for the shortest period of time and access to legal advice must be provided. The Committee has emphasized that detention of a child based on his/her immigration status is a violation of Article 3 and should not carry the same consequences as that of the commission of a crime.<sup>2</sup>

In Trinidad and Tobago, the established norms against detention for migrants and asylum seekers are typically not met. Contrary to international standards which mandate that migrants be detained only in exceptional circumstances, detention is a routine course of action for Venezuelan migrants. The state’s duty to avoid penalisation of migrants and refugees, including prohibiting penalties such as detention, except as a last resort, is persistently breached. Large numbers of Venezuelans are being incarcerated in detention centres and even jails on remand for long periods. In some cases, these include those seeking refugee status and possessing asylum certificates. This is a violation, not only of migrant and asylum rights, but the rights of persons not to be deprived of liberty. Such detentions are not, as required in international human rights law, necessary or proportionate in order to secure the appearance of the person at proceedings, or to facilitate due process requirements within the shortest time possible.

Bail also depends on family or social ties which migrants do not have and most cannot afford security bonds for release, re-introduced in June 2018. This increases the propensity to detain and incarcerate migrants.

Like the principle of non-refoulement, in Trinidad and Tobago, non-detention is mentioned and explained only in the Refugee Policy. Further, this document merely gives a brief insight into the principle, citing Article 21 of the 1951 Convention regarding non-penalization of illegal migrants seeking asylum, while recognizing that detention should only be done as a last resort, or in four exceptional circumstances:

- (i) to verify identity;
- (ii) to determine elements on which the claim for refugee status or asylum is based;
- (iii) in cases where asylum seekers or refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; and
- (iv) to protect national security and public order.

According to the LWC’s draft working document, authorities may detain an asylum seeker for a maximum of ten days, or release the person unconditionally, or on condition that the person resides or remains in a particular district or place in Trinidad and Tobago, except in the instances listed above.

Apart from the mentions in the Refugee Policy, which is not fully implemented, the government of Trinidad and Tobago has failed to enact any domestic laws, or policies regarding the protection and treatment of asylum seekers with regard to detention and the Immigration Act<sup>1</sup> is silent on this issue. The Act itself favours detention in a variety of circumstances, including pending deportation hearings. Moreover, the policy guidelines agreed by the State are routinely breached and migrants, including asylum seekers, are regularly detained, often for long periods.

The Refugee Policy also states that the detainee should be housed in a detention centre and not imprisoned with convicted persons. However, in further violation of international standards, migrants are often detained in prisons, as documented by the Joint Select Committee of Parliament and noted by international organisations and NGOs.<sup>2</sup>

Migrants are typically detained for breaches of the Immigration Act, including illegal entry and overstaying their visa, particularly, under s9(4), s22 and s40 of the Act. Section 14 allows the Minister to issue a warrant for the arrest of any person for purposes of examination or inquiry or if a deportation order has been and allows for the detention of such person.<sup>3</sup> Section 15 allows a police or immigration officer to arrest any person who is, based on reasonable grounds, suspected of committing a s9(4) or 22(1)(i) offence, without a warrant. Sections 16 and 17 of the Immigration Act collectively allows either for the detention of an immigrant pending inquiry, examination, appeal or deportation or may be granted conditional release of an order of supervision under certain conditions requiring him him/her to Study to Immigration for inquiry, appeal, examination or deportation. Further, if there is non-compliance with these conditions, he/she can be retaken into custody.<sup>4</sup>

As reported in the FOL UWI IACHR hearing, special inquiries, or hearings pursuant to the Immigration Act to determine detention, or deportation have been inadequate to address asylum concerns. They have also been inconsistent.

In a Report done by Melanie Teff,<sup>5</sup> interviews with Venezuelan deportees were conducted, offering a first-hand insight into the detention experience in Trinidad and Tobago. The deportees told the interviewers that while they were being held at the Immigration Detention Centre (IDC), they were “compelled to choose between signing a “voluntary” return order, or being put in prison. Ultimately, they “chose” to return. Those who refused repatriation had to fulfil several requirements before they could be released from the IDC. They had to pay a security bond of TT\$2,100 (roughly \$300), turn over their passports, and agree to an Order of Supervision.

In the FOL UWI IACHR Hearing, automatic detention, which violates the acceptable limits of detention according to international standards was found to be prevalent. IACHR Commissioner Margaret Macaulay expressed surprise and dismay at the plight of Venezuelan migrants in Trinidad and Tobago.<sup>6</sup> She urged the State to accept its responsibilities in this regard. The Parliamentary Joint Select Committee also noted not just the frequent occurrence of the detention of migrants, but also the deplorable conditions in which they were held.<sup>7</sup>

The deviation from coherent and certain refugee status determinations often leads to detention and can have many detrimental impacts on refugees. Persons who have fled their countries, but who have not accessed the asylum process are forcibly held in detention centres in usually deplorable conditions, most times without access to medical care or legal assistance. These occurrences are supported by the inquiry done by Parliament itself and reflected in its JSC Parliamentary Report.<sup>8</sup> Such information was also made public in the IACHR hearing presented by the Faculty of Law, UWI in May 2019<sup>9</sup> and validated in the 2020 FOL-UWI IACHR Migrant Survey.

In a recent interview conducted by the Faculty of Law, UWI, the LWC noted that, especially in recent times, even migrants who had UNHCR cards issued to them upon registration with the LWC, were being detained. Migrants who enter illegally, but seek asylum, may still go through the regular immigration process. This violates the agreed procedures. Where a migrant UNCHR card-holder is detained, the card may facilitate a faster release, as it is a document recognized by the Ministry of

1 Immigration Act 1969.  
2 See e.g. Amnesty International, April 2, 2020, <https://www.amnestyusa.org/press-releases/governments-must-halt-dangerous-and-discriminatory-detention-of-migrants-and-asylum-seekers/>  
3 Ibid s14(2).  
4 Ibid ss16, 17.  
5 Melanie Teff, 'Forced into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago' (2019) Refugees Int'l 13.  
6 FOL-UWI IACHR Migrant Hearing, supra, n 8.  
7 JSC, 2018, Supra, n43.  
8 Ibid.  
9 FOL UWI IACHR hearing, supra, n 8.

1 1951 Refugee Convention, Informational Note, ibid.  
2 CRC General Comment 23, [5].



National Security, but given its status as identifying the person as a registered asylum seeker, there should be no detention in the first instance.<sup>1</sup>

However, a Joint Select Committee of the Parliament of Trinidad and Tobago has indicated that children are not detained at the Immigration Detention Centre and where possible, they may be placed with relatives under an Order of Supervision. The child must be accompanied by relatives and returned to the Enforcement Unit, Immigration Division on a scheduled date with a ticket for their departure.<sup>2</sup> After detention, migrants are often deported to their country of origin and forced to face the same challenges which they once tried to escape.

**Conditions in Detention**

Apart from the illegality of many instances of detention, whether procedurally, or going against substantive norms of international law, conditions in detention are also concerning. A substantial amount of inquiry and review has occurred to assess these conditions by international organisations, NGOs, the UWI and even the State itself. The picture that emerges is one of appalling conditions of detention, with Venezuelan migrants treated in similar and sometimes worse conditions than convicted criminals, given that they have no support systems or family in Trinidad and Tobago to alleviate their suffering.

Indeed, one of the first alarming observations is that Venezuelan migrants are housed, not just in “approved” immigration detention centres, but also in prisons. This is due to overcrowding at the detention centres. Indeed, even more concerning is that recently, migrants have been housed in coastguard barracks. Because of a secrecy culture, it is difficult to ascertain to what extent this phenomenon continues post the National Venezuelan Migrant Registration program. However, credible reports from attorneys representing these detained migrants suggest that the numbers are at least 150 persons. Further, given that there are no laws, or policies, or administrative practices that specifically preclude it, in view of the increasing arrivals of Venezuelan migrants, it is likely that this will continue and therefore still deserves comment.

The detention objectives of the State as self-described are to:

- provide basic accommodation that ensures the well-being, safety and respect for privacy and inherent dignity of all detainees;
- provide prompt and effective physical and mental health services to detainees; cater to the basic human rights of the detainees including the freedom to express religious beliefs within the limitations of the necessary security arrangements;
- provide recreational or activity services in order to maintain physical and mental health of the detainees and make appropriate provisions for the detainees with special needs to ensure their safety and comfort.<sup>3</sup>

The above objectives appear laudable, but may be exposed as mere ‘lip service.’ The reality of detention conditions, whether at detention centres, or prison, seems far removed from the goals as outlined in the Immigration documentation.

Notably, given that detention centres, or prisons where Venezuelan migrants are housed are not set up to cater for inmates that are not convicts, life quality support mechanisms that exist in such spaces, such as educational classes, recreational programs and the like do not include Venezuelan migrants. This, indeed, is a similar problem faced by remand prisoners. The Joint Select Committee of Parliament that inquired into the detention conditions of migrants gave important and authoritative information about the inadequate detention conditions.<sup>4</sup> The Teff Report<sup>5</sup> also described the deplorable conditions at the Centre, describing a situation of overcrowding, a lack of natural light, and limited access to the outside, or medical attention. It was compared to living in a prison. This was reported in the FOL-UWI IACHR Hearing, including by a migrant who had himself been formerly imprisoned, who gave testimony before the IACHR.<sup>6</sup>

1 Interview with LWC, supra, n 43.  
2 JSC, supra, n 44, [3.14].  
3 Ibid [2.15].  
4 Ibid.  
5 Teff, supra, n 240.  
6 Supra, n 8.

Detainees are housed in two dormitories, separated into male and female. They are provided with beds and mattresses and the largest unit holds forty detainees. The LWC indicated that the mattresses and sheets are often dirty, and it is easy for disease and illness to spread amongst detainees. Overcrowding challenges are sometimes addressed by utilising the Santa Rosa Facility of the Trinidad and Tobago Prisons Service to detain migrants, repatriating detainees and by granting Orders of Supervision. Golden Grove and other prisons have also been utilised.

Recent reports of migrants being temporarily detained in coastguard barracks and other unauthorised spaces are also of concern, given the strict international obligations on the detention of migrants and the due process safeguards that must attend it. Since the Covid-19 pandemic, the detention of large numbers, sometimes over 200 migrants coming into such detention spaces, have caused the officers to be worried about Covid-19 pandemic risks.<sup>1</sup> Very recently, this situation was challenges successfully in court, as discussed in the following section on Judicial Responses.

Detainees spend approximately eight hours per day in the sleeping area. They are woken up at 6am daily, locked in at 10pm nightly and are given two hours of recreation time daily. Recreation time however may be altered depending on weather conditions of any particular day.

Detainees are allowed visits from family, legal representatives and embassy representatives. However, the JSC noted that children are not allowed to visit and the LWC indicated that there is limited UNHCR-LWC access to visitation. The serious concern that legal representatives/ attorneys are often denied visitation rights, an issue that violates the right to a fair trial, was addressed earlier. Notably, Venezuelan migrants would typically not have friends or family in the country.

In violation of international law standards, convicted and non-convicted detainees are not separated because of an absence of a classification policy. This is similar to what obtains for persons on remand and is indicative of generally poor standards of prisons and incarceration policy in Trinidad and Tobago.

**Length of Stay and Detentions at Prisons**

The Ministry of National Security reports that the average length of stay in detention is approximately two to three weeks, and the longest period was four (4) years and seven (7) months as at 2018<sup>2</sup>. Other credible reports suggest that long periods of detention are not uncommon.<sup>3</sup> These lengthy periods of detention are also confirmed by the FOL-UWI Migrant Survey.

In addition, at the FOL IACHR public hearing, oral evidence was presented by a Venezuelan migrant who had been detained for nearly 3 years. He also gave evidence of several other migrants in similar situations. This evidence was actually corroborated by the then Commissioner of Prisons, Mr. Gerard Wilson, who participated in the hearing at the request of the Faculty of Law, UWI, St. Augustine. Commissioner Wilson also gave evidence that the numerous detentions of Venezuelan migrants for lengthy periods were putting a strain on prison resources in an already overpopulated prison space. Factors affecting length of stay include language barriers and the availability of interpreters, the absence of valid travel documents, pending and outstanding police investigations and matters before the court and lack of resources to purchase return tickets. These factors also impact due process requirements. In the inquiry done by the Joint Select Committee of the Parliament, the Committee concluded that the process for detainees seeking asylum and to verify the asylum documentation is slow<sup>4</sup> and leads to excessive periods of detention.

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Detainees are provided with three mails daily, and special diets are provided based on recommendations of the resident doctor. However, the LWC submitted that the meals were insufficient and do not reflect a proper balanced diet.

Female detainees are provided with toiletries and hygiene products once required. Males are provided with toiletries on a weekly basis. However, the largest female unit houses eighteen detainees, with only four showers and four toilets and wash sinks, while the largest male unit houses forty detainees who share five showers and three toilets. Arguably, this is insufficient and inadequate to accommodate the needs of the detainees, especially when the units are at capacity.

1 ‘CNC3 News, July 28, 2020: <https://www.cnc3.co.tt/tt-coast-guard-concerned-over-venezuelan-influx/>  
2 SC, supra, n 44, [3.34-3.35].  
3 See e.g. the FOL UWI IACHR Hearing, n 8.  
4 SC, supra, n 44, [1.4].

Detainees are medically examined upon admission to the IDC and can request further medical care if necessary. A detainee who requires ongoing treatment or medication, is sent to a health-care facility, such as the Arima Hospital for special care. Detainees exhibiting symptoms of illness, physical or mental, are examined by the resident doctor and referred to medical institutions if necessary. Medication for detainees is obtained from the medical institution or purchased through the approved pharmacies. According to the LWC, detainees complain of slow or delayed medical care.

The FOL-UWI IACHR Hearing also revealed significant concerns from Venezuelan migrants about their mental health, especially because of detention. The Covid-19 pandemic has also increased the psychological stress on detained migrants, as well as posing additional threats to their physical health. The lack of communication with family, including children, exacerbated these concerns.

The LWC also noted that there is restricted access to potable drinking water, which is justified by the authorities on the basis that the last water dispenser was destroyed by detainees and an insistence that this followed international standards. This complaint is serious given the context of the Covid-19 pandemic. It mirrors complaints made by the general prison inmates and remandees in Trinidad and Tobago and is reportedly one of the reasons for protests by detainees in the prison.

Indeed, since the Covid-19 pandemic, concerns about the health of detained Venezuela n migrants have increased exponentially. While there was some effort to release remandees and persons with lesser offences in May and April to reduce the congestion in the prisons and prioritise public health concerns, this did not extend to migrants in detention. The hygiene and lack of adequate water supplies, needed for washing hands to reduce the spread of the corona virus has led to panic and anxiety in the prison system. There are reports that approximately 150 Venezuelan migrants in prison as at September 2020, are once again on a hunger strike to protest the threats to their health and well-being posed by the corona virus and delays in judicial and administrative processes, including from the Ministry of National Security, demanding to be repatriated to Venezuela. While this has been denied by the Commissioner of Prisons, information obtained from their attorneys, other prisoners who reached out to publicise their concern and Venezuelan activists living in the country<sup>1</sup> make this claim credible.

This is not the first time that Venezuelan migrants have gone on hunger strikes to protest prison conditions and the fact that they are in prison, or attention at all, given international standards. In June 2019, detainees embarked on a hunger strike, protesting unfair treatment and detention, claiming their matters were not being dealt with in a timely manner. One elderly asylum seeker, holding a card confirming his status as an asylum seeker, indicated that turned himself into the IDC on the promise that his matter would be dealt with quickly. However, months passed, and his matter is still unresolved.<sup>2</sup> Another indicated that he paid the requisite fine, but was still not released from IDC custody.

Apart from the hunger strike in June 2019, in April 2020, some 80 Venezuelan migrants at the Aripo Detention Centre protested because they were afraid that they would contract the corona virus. They gathered in the basketball court and refused to go back to confinement, calling on the Government to return them to Venezuela<sup>3</sup> Conditions in the prison have attracted widespread attention, even from Amnesty International which, in April 2020, stated:

**The government of Trinidad and Tobago should release any migrants and asylum seekers held in immigration detention solely for irregular entry or while awaiting their asylum claims and grant them access to necessary healthcare and other essential services, free from discrimination<sup>4</sup>**



Given the seriousness of the corona virus as a life-threatening virus, the human rights concerns about prison conditions must be elevated to concerns about the very right to life, a right secured to all human beings, regardless of nationality, or immigration status.

The IACHR has published a press release on the need to safeguard human rights in relation to Venezuelan migrants in the face of the Covid pandemic<sup>1</sup>. In May, 2020, the Inter-American Court on Human Rights also gave an important decision in relation to migrant prisoners in the context of the Covid-1 pandemic in the case of *Vélez Loor vs. Panama*<sup>2</sup>. The Court said that it must “protect the right to health, among other human rights such as the right to life and to personal integrity, of individuals found in migrant detention centres.” In order to do this, it stated that’ Panama must give access to essential health services to all persons found in the ‘La Peñita’ and ‘Laja Blanca’ centres, and that the early detection and treatment of COVID-19 were to be included among those services. This jurisprudence is important in the Trinidad and Tobago context.

The Court adopted its decision taking into account risk factors raised by the representatives of the individual declared as victim by the Court in its decision on the merits. Among those factors, the following were mentioned and found: the length of detentions -the closures of borders and movement restrictions had an impact on their extension-; crowded conditions in the centres (para. 7); or the lack of primary health services and measures in relation to contagion cases (idem).

A following section examines the emerging case-law before the courts of Trinidad and Tobago, particularly in relation to the core issues of detention, deportation and the right to remain (asylum), as measured against international standards.t

<sup>1</sup> Including well known Venezuelan advocate Yesenia Gonsales, who reached out to the project leader on the subject. Remand prisoners associated with the Faculty of Law/ EU Remand Injustice project also confirmed the situation.

<sup>2</sup> “Watch: IDC Detainees Plead for Help, Begin Hunger Strike”, Loop TT (4 June 2019) <<https://www.looptt.com/content/watch-idc-detainees-plead-help-begin-hunger-strike>> [https://trinidadexpress.com/news/local/103-venezuelans-go-on-hunger-strike-at-detention-centre/article\\_ba91add0-887b-11e9-b372-2f742cc1ef2.html](https://trinidadexpress.com/news/local/103-venezuelans-go-on-hunger-strike-at-detention-centre/article_ba91add0-887b-11e9-b372-2f742cc1ef2.html)

<sup>3</sup> Guardian newspaper, April 9, 2020: <https://www.guardian.co.tt/news/idc-detainees-protest-over-coronavirus-concerns-6.2.1095737.fc9f8a6bf8>.

<sup>4</sup> Amnesty International, April 2, 2020: <https://www.amnestyusa.org/press-releases/governments-must-halt-dangerous-and-discriminatory-detention-of-migrants-and-asylum-seekers/>. See also,

<sup>1</sup> See e.g. The IACHR urges States to protect the human rights of migrants, refugees and displaced persons in the face of the COVID-19 pandemic, April 17, 2020, Washington, DC.; IACHR Concerned About Restrictions of the Rights of Migrants and Refugees in the United States During COVID-19 Pandemic, July 25, 2020, Washington, DC.

<sup>2</sup> Caso Vélez Loor v. Panamá, Resolution of the Inter-American Court of Human Rights, on May 26, 2020.



### 3.7. The Rights to Personal Integrity and Dignity

It is the inalienable right of every person, including migrants, whether documented or undocumented, to personal integrity and to the right to dignity. Personal integrity and dignity may be violated in myriad ways with respect to Venezuelan migrants. Indeed, the very refusal of the State to recognise fully, the right to asylum and its too easy resort to detention and deportation, are all violations of the right to personal integrity, dignity, as well as specific and separate violations of international human rights, many of which are protected in the Constitution and humanitarian law.

Instances where Venezuelan migrants are physically assaulted, subjected to harsh living and working conditions and even killed, are further examples. The rights to personal integrity and dignity are therefore to be seen as umbrella rights which may stand alone, or embrace other rights. In this section, we examine two examples of these other, intimately related rights which are considered to be prevalent in the migrant context. These are (a) the right to gender equality, including to be free from sexual violence and trafficking; and (b) the prohibition against discrimination in general. Both of these categories of rights are, at the same time, stand-alone rights and obtain their authority and substance from important sources of international law and domestic law, which we suggest, should also apply to Venezuelan migrants.

#### (a) The Prohibition Against Discrimination

The principles of equality and non-discrimination are first principles of general application in all universal human rights instruments. They underscore the concept that fundamental rights, where they exist, are to be applied equally. This notion is given expression both in specific international treaties that apply to migrants and refugees, as well as in broad international human rights instruments that proclaim fundamental rights to all persons, regardless of their residency status. These include, but are not limited to, the ICCPR, the ICESCR, the UDHR, the American Declaration on Human Rights, which have been discussed infra.

As noted previously, where refugee status has been granted, refugees are to be given a broad spectrum of rights without discrimination in the host state, pursuant to the 1951 Refugee Convention and related instruments. With regard to migrants generally, importantly, Articles 1 and 7 of the Migrant Workers Convention seek to ensure that all migrant workers and their families are entitled to protection under the Convention, without discrimination of any kind. Bearing in mind the statements made by various UN Treaty Bodies, all migrant workers, regardless of immigration status, are entitled to benefit from all fundamental human rights, and therefore include the rights enshrined under the present Convention. Article 2 of the UNDHR further proclaims the inalienable right of every person to be protected against discrimination.

The Migrant Workers Convention seeks to protect both civil and political rights and economic, social and cultural rights of Migrant Workers. For example, Article 16(2) places an incumbent duty on a State Party to ensure that migrants are effectively protected by the State against violence, injury, threats and intimidation. This is especially important where migrants are arrested and detained by public authorities and where, as in the case of Venezuelan migrants, they are faced with the reality of xenophobia and racism.

#### *Xenophobia in Relation to Venezuelan Migrants*

Given that all persons are to enjoy the rights to human dignity and equality protected under the ICCPR, the UDHR and enshrined in the Constitution of Trinidad and Tobago, it is expected that Venezuelan migrants should be protected against all forms of xenophobia, hate speech and other expressions of inequality. However, there is increasing xenophobia against Venezuelans and evidence of ethnic profiling. This offends the principle of non-discrimination enshrined in all human rights treaties, a *jus cogens* norm.<sup>1</sup>

The persistent portrayal of migrants as criminals in the media and the characterisation of migrant women and girls in sexualised stereotypes, have increased xenophobic attitudes toward them.

They are persistently referred to as “illegal immigrants,”<sup>2</sup> as if being Venezuelan is synonymous with “illegal” with little awareness in the media and in the public that they are persons seeking asylum

There is also a perception in the country that the numbers of ‘Venes’, as they are disparagingly called, are much higher than they may be in reality. This may be due to the consistent reports of hundreds of Venezuelans arriving every week, their conspicuousness in communities and more recently, the fact that they were blamed for an exponential increase in the corona virus in the country and other negative, stereotyped reporting in the media. There is a steady stream of news and social media discussing the “criminality”, “sexuality”, or “illegality” of the ‘Venes’. Any scan of news headlines therefore reveals the trope of illegality that stigmatizes Venezuelans in Trinidad.

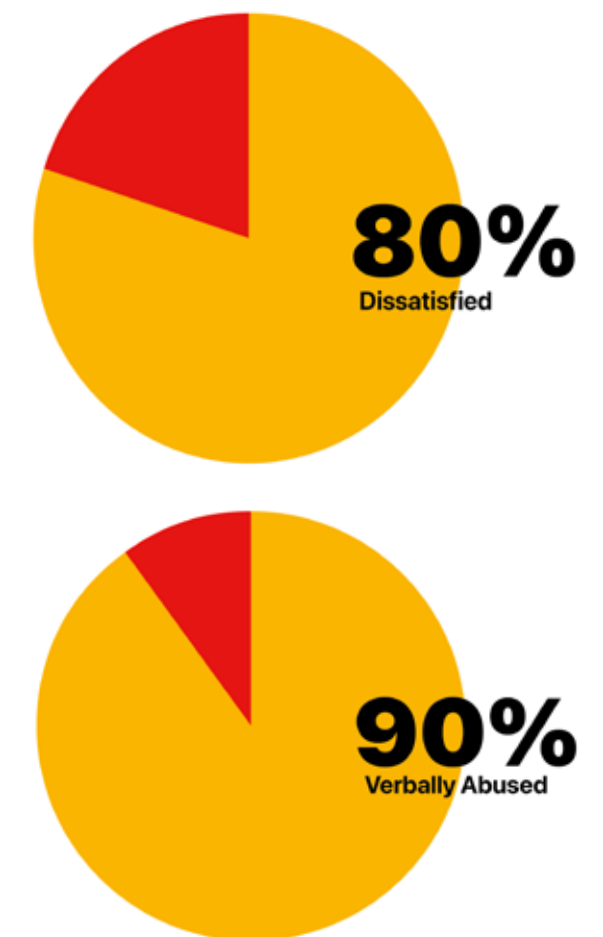
It is interesting to note that in 2018, when the Faculty of Law, UWI St. Augustine, held a National Symposium on the Venezuelan Refugee Situation, there was considerable empathy for their plight. Only one participant in the large audience of a packed Hall of Justice reacted negatively. Media reports were also empathetic. However, in a surprisingly short space of time, perhaps due to the often repeated negative statement by the state’s administrative officials, by May 2019 when the IACHR hearing was held, the attitudes toward Venezuelan migrants had changed drastically, for the worse.<sup>1</sup>

The recent FOL-UWI Migrant Survey reveals the hurt, fear and mental stress that the xenophobic attitudes toward Venezuelan migrants cause to the migrant population. 80% of the respondents are dissatisfied with the treatment received from Trinidadian and Tobago citizens. Moreover, 90% of the respondents have been verbally abused in various situations and by various people- such as their employer, a landlord, a person in a personal relationship, employees on their job, people in Trinidad and Tobago and other migrants from other countries. The survey noted that generally, Venezuelan migrants felt discriminated against because of their nationality.<sup>2</sup>

This corroborates evidence presented at the FoL-UWI-IACHR Migrant Hearing. Over half of Venezuelan migrants complained about being discriminated against due to their nationality, and in 8 per cent of these cases, people suffered physical violence. More recently, the UNHCR has made reference to this xenophobia in its August, 2020 Country Report, stating: “An environment of increased fear has arisen, due to recent instances of detentions, deportations, evictions and a generally heightened xenophobic atmosphere. . .”<sup>3</sup>

In general, Trinidad and Tobago has weak legislative protections against xenophobia and hate speech. Even where legislative provisions exist, they are rarely enforced and there is low visibility of the existing protections by the public. It is therefore unsurprising that xenophobia has gone relatively unchecked against Venezuelan migrants. The Equal Opportunity Act does prohibit discrimination on grounds of race and ethnicity. It also prohibits discrimination on the grounds of “place of origin” and “status”. Like other grounds of discrimination, these will extend to employment, accommodation, education, the provision of goods and services and offensive conduct.<sup>4</sup> Offensive behaviour is described under section 7, which reads:

7. (1) A person shall not otherwise than in private, do any act which— (a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of persons; (b) is done because of the gender, race, ethnicity, origin or religion of the other person or of some or all of the persons in the group; and (c) which is done with the intention of inciting gender, racial or religious hatred.



<sup>1</sup> <https://sta.uwi.edu/law/newsfeatures/RefugeeLawPanel.php>; Alina Doodnath, 'Attorney – TT Aligning with US to Clamp Down on Refugees', Loop News, June 18, 2018, <https://www.looptt.com/content/attorney-tt-aligning-us-clamp-down-refugees>.

<sup>2</sup> Supra, n 5.

<sup>3</sup> 'Trinidad and Tobago: UNHCR Situational Report, August 2020', UNHCR, 2020, <https://reliefweb.int/report/trinidad-and-tobago/trinidad-and-tobago-unhcr-situational-report-august-2020>.

<sup>4</sup> Equal Opportunity Act 2001, Chap 22:03 (Trinidad and Tobago). Under section 4. This Act applies to— (a) discrimination in relation to employment, education, the provision of goods and services and the provision of accommodation, if the discrimination is— (i) discrimination on the ground of status as defined in section 5; or (ii) discrimination by victimisation as defined in section 6; (b) offensive behaviour referred to in section 7.

<sup>1</sup> This protects all persons within a State's territory or control from being denied fundamental rights on the basis of their race, ethnicity, or gender, among other factors.

<sup>2</sup> ([https://www.trinidadexpress.com/news/local/venezuelan-women-children-suspected-drowned-trying-to-reach-trinidad/article\\_6581e366-6768-11e9-80d3-77819652856a.html](https://www.trinidadexpress.com/news/local/venezuelan-women-children-suspected-drowned-trying-to-reach-trinidad/article_6581e366-6768-11e9-80d3-77819652856a.html))



At face value, these provisions which speak to place of origin and status may offer protection to Venezuelan migrants. These particular grounds have, however, not yet been tested before the courts. As with other legislative protections ‘on paper’, xenophobia and fear of deportation also militate against seeking refuge from the law.

*Special CRC Protections for Migrant Children (Documented and Undocumented)*

In relation to children, Article 2 of the CRC prohibits discrimination of any kind against any child within the jurisdiction of a Member State and is arguably one of the most far reaching rights and general principles of international law. It provides:

(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.<sup>1</sup>

This is important for refugee children as Member States are obliged to ensure that refugee children are afforded all Convention rights, regardless of their nationality, or any other status. General Comment 22 provides that addressing only de jure discrimination will not necessarily ensure de facto equality and as such, States Parties shall adopt positive measures to prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate de facto discrimination against them.<sup>2</sup>

Given that, as explained above, the principles of non-discrimination and best interests of a child, as enshrined under Articles 2 and 3 respectively, are paramount in ensuring rights under the CRC, it follows that refugee children are also entitled to rights guaranteed under Articles 24 and 28, i.e. the rights to adequate health care and education and to other rights similar to other children in the state. However, Venezuelan migrant children in Trinidad and Tobago are not granted such entitlements as discussed more fully below. These principles are, therefore, routinely violated.

The CRC Committee, in General Comment 6, clarified that all children are entitled to CRC rights without discrimination based on any status, including migration status.<sup>3</sup> This means that the rights, freedoms and protections outlined above that are secured to refugee children, are also conferred on migrant children, whether documented or undocumented. To do otherwise arguably also violates the non-discrimination principle under Article 2 of the Convention.

Notwithstanding the above authoritative sources for the protection of children and their entitlement to a full slate of rights without discrimination, such children have no special protection in Trinidad and Tobago. As will be seen in the following sections on gender violence, education and other economic, social and cultural rights, Venezuelan migrant children suffer violations of some of the most fundamental rights that should be secured to children. These include their rights to personal integrity, to be educated, to be free from sexual violence, housed and to have basic health care.

1 CRC, Art 2.  
2 UN Committee on the Rights of a Child ‘General Comment 22’ (2017) UN Doc CMW/C/GC/3-CRC/C/GC/22 (CRC General Comment 22) [26].  
3 CRC General Comment 6, supra, n 153, [12].



**(b) Gender Issues Sexual Violence and Trafficking in Person**

Legal obligations that address gender issues are very relevant to the discussion on Venezuelan migrants. While part of general anti-discrimination norms, they assume special importance in the migrant context. These issues, which speak to subjects such as sexual violence and trafficking in persons, also flow from the general right to gender equality. Such obligations emanate from international sources of law, in particular, the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention). Article 6 of the Women’s Convention<sup>1</sup>, signed by Trinidad and Tobago in 1985 and ratified in 1990, requires a State Party to adopt effective measures to suppress all forms of exploitation of women, including prostitution<sup>2</sup>. Article 11 of the Women’s Convention outlines numerous labour rights conferred to women, ranging from equal remuneration for work of equal value to maternity leave and healthy and safe working conditions.<sup>3</sup>

Such rights also flow from general international human rights instruments such as the ICCPR and the ICESCR, that protect against discrimination, including on the ground of gender. Many of these norms have been incorporated into domestic law.<sup>4</sup>

*Domestic Laws on Gender Issues, Sexual Violence and Trafficking*

In addition to the main international legal instruments addressing migrants and refugees discussed above, a number of domestic laws are of relevance to Venezuelan migrants who are victims of gender inequality, sexual violence and trafficking in Trinidad and Tobago, although migrants are not specifically referenced in such legislation. These are the Sexual Offences Act<sup>5</sup>, the Domestic Violence Act<sup>6</sup>, the Equal Opportunity Act<sup>7</sup>, the Children Act and the Constitution. The main hurdle to the enforcement of these laws in relation to migrants however, is the underground nature of Venezuelan migrants who may be fearful of detention and deportation because of their unregulated and uncertain immigration status. Alternatively, such persons, including those with refugee status, may be fearful of xenophobia and discrimination.

1 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS vol. 1249 (UN CEDAW).  
2 Ibid Art 6.  
3 Ibid Art 11.  
4 These include the Equal Opportunity Act Chapter 22:03, the Sexual Offences Act Chapter 11:28, the Domestic Violence Act Chapter 45:46, the Children Act and the Constitution, as described infra.  
5 Sexual Offences Act, Chap 11:28 (Trinidad and Tobago).  
6 Domestic Violence Act, Chap 45:56 (Trinidad and Tobago).  
7 Equal Opportunity Act 2001, Chap 22:03 (Trinidad and Tobago).



Sexual offences, which include rape, serious indecency and indecent assault, are governed by the Sexual Offences Act and extend to all persons. The jurisdiction of the Sexual Offences Act is not limited to citizens or nationals, so that migrants and refugees may make a formal complaint to the Trinidad and Tobago Police Service. Domestic Violence offences are governed by the Domestic Violence Act. Since the Act's jurisdiction encompasses any person in Trinidad and Tobago<sup>1</sup>, victims of domestic violence who are migrants or refugees can apply for protection, such as under a Protection Order. In addition, the Equal Opportunity Act of Trinidad and Tobago prohibits specified forms of discrimination, including on grounds of sex<sup>2</sup>. The Act goes beyond the workplace and extends to discrimination in accommodation, education and offensive behaviour, which is particularly useful in the migrant context.

Refugee children are also entitled to special protection from sexual exploitation and sexual abuse under Article 34 of the CRC. To this end, Trinidad and Tobago has enacted several pieces of legislation criminalizing trafficking in persons, child prostitution and child pornography, including the Trafficking In Persons Act and Parts V and VIII of the Children Act respectively.

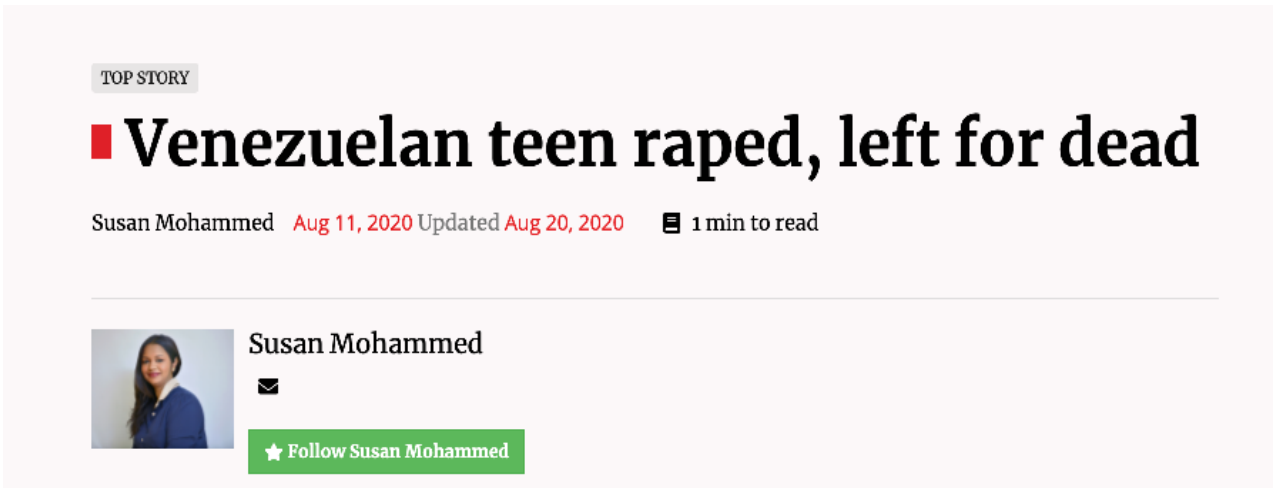
#### *Vulnerability of Migrant Women to Gender Violence and Exploitation*

The question remains whether the existing domestic law protections against gender discrimination and violence are capable of, or are applied in a manner, to protect Venezuelan migrants and refugees. Unfortunately, despite the several legal protections that exist for Venezuelan migrant women and girls, both on the international plane and under domestic law, there is a disturbing pattern of gender discrimination, sexual violence, including trafficking, that is evident in Trinidad and Tobago. The current paradigm exposes significant gender dimensions accentuating the vulnerabilities of Venezuelan migrant women in Trinidad and Tobago.<sup>3</sup>

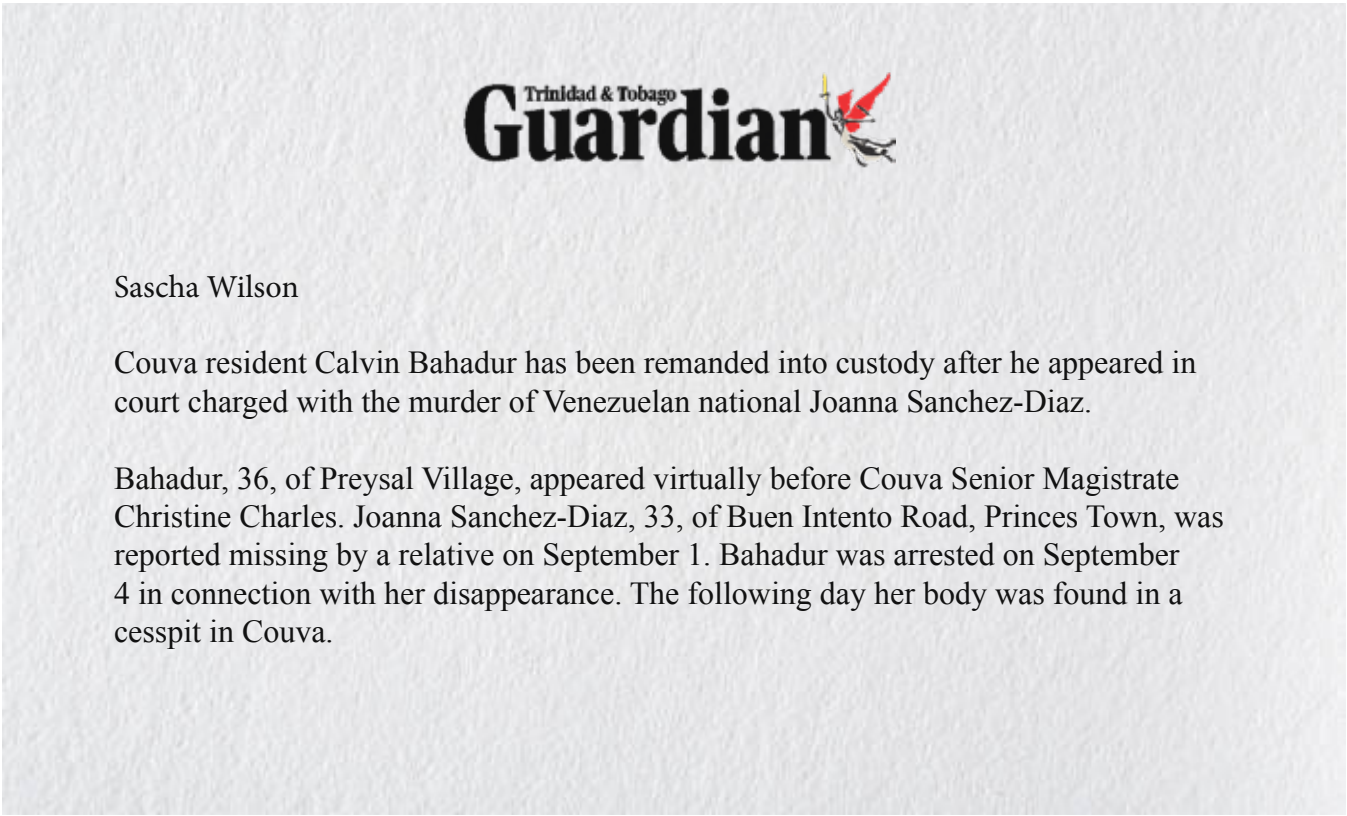
Given the socioeconomic reality of many Venezuelan refugee and migrant persons, they are vulnerable to sexual exploitation and human trafficking<sup>4</sup>. This is particularly true for women and girls.

The high prevalence of sexual violence suffered by Venezuelan migrants and refugees is directly correlated to their vulnerable immigration status.

At the time of writing newspaper reports revealed the rape and violent assault of a Venezuelan child migrant, a situation that has been reported to be not uncommon<sup>5</sup>. Another incident concerned domestic violence and murder of a Venezuelan woman<sup>6</sup>. Migrant women, if detained, are also vulnerable to physical and sexual abuse from the authorities and access to justice may be hindered. It is for the above reasons that the CEDAW recommends that State Parties draft and implement legislation and policies to ensure that women migrant workers are afforded the same rights and protection afforded to nationals, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations<sup>7</sup>. Additionally, if women migrants are detained, the State must ensure that they receive humane treatment and have access to due process of the law, including free legal aid and unhindered access to the courts.<sup>8</sup>



1 See section 4.  
2 Section 3.  
3 Section 4  
4 Ch 12:10  
5 'Venezuelan Teen raped, left for Dead', [https://trinidadexpress.com/newsextra/venezuelan-teen-raped-left-for-dead/article\\_ce79859c-dc18-11ea-ad53-fbb-1cfffbeeb9.html](https://trinidadexpress.com/newsextra/venezuelan-teen-raped-left-for-dead/article_ce79859c-dc18-11ea-ad53-fbb-1cfffbeeb9.html), August 11, 2020. See also Faculty of Law IACHR hearing, above.  
6  
7 UN Committee on The Elimination of Discrimination Against Women 'General Comment 26' (2008) Un Doc CEDAW/C/2009/WP.1/R (CEDAW General Comment 26), [26].  
8 Ibid.



It is submitted that the gender issue is structurally related to race/nationality discrimination, whereby Venezuelan women are stereotyped. These gender intersections are particularly evident with regard to sexual violence and discrimination in an environment that offers little or no protection to Venezuelan women and girls to live free of violence and abuse.

#### **The intersections of gender and nationality make Venezuelan women prime targets, and precarious immigration-status as a marginalised and dependent group, is both the impetus and catalyst for such vulnerability.**

The Committee on the Elimination of Discrimination Against Women (CEDAW) cautioned that all migrant women, even undocumented migrants, are entitled to the Convention rights<sup>1</sup>. As noted by CEDAW, women migrants, regardless of refugee or immigration status, may be forced into low paying domestic labour and prostitution jobs, jobs which are not covered in any domestic laws<sup>2</sup>. As such they are not afforded legal protection in these jobs, receive low wages and suffer long working hours and unsafe working conditions, including sexual vulnerability.

1 Supra, n 283.  
2 Ibid.  
3 At the 2019 FoL-UWI IACHR Migrant Hearing, important evidence of the realities of gender inequity, sexual violence and trafficking experienced by Venezuelan migrants, including children, was given. The presenters had interacted with Venezuelan migrants on the ground and were able to reproduce the powerful testimonies on the abuse that Venezuelan migrants confront daily in Trinidad and Tobago. During that hearing, the FPATT, which partnered with the UWI, also gave first-hand accounts of sexual violence to Venezuelan migrants. The FPATT is the NGO that provides sexual and reproductive health services to Venezuelan migrants on behalf of the UNHCR and is well placed to provide authoritative evidence of such violence and violations of human rights.

As stated in the hearing, “while men are increasingly stigmatized as criminals, women are labelled as hyper-sexual and “face prejudice, discrimination, harassment and assault<sup>1</sup>.” The IACHR heard that due to such stereotyping which emboldened men to harass and abuse Venezuelan migrant women and girls with impunity, women, including mothers, were being aggressively propositioned in front of their young children at supermarkets and other public places. One pregnant migrant was called a “Venezuelan whore” when she ignored her assailants. In another case, a security guard hit a young woman who had rebuffed his advances. Fear and shame keep many women, particularly those with children, indoors. Verbal assaults and harassment are prolific and seemingly condoned in the absence of any recourse or support that protects the rights of migrant women and girls. While the culture of Trinidad and Tobago is one that exhibits a high amount of sexual harassment in public, it appears that such gender violence meted out to Venezuelan women is disproportionate.

Police and Immigration officials are commonly accused of preying on Venezuelan women and girls, taking advantage of their vulnerability and uncertain immigration status<sup>2</sup>. Yesenia Gonzales, a well-known Venezuelan activist, complained that Venezuelan migrants could not simply make reports to law enforcement officials, because information reaching her from the migrant community suggested that police and immigration officials are also implicated in their abuse.<sup>3</sup> She said: “There is police in Trinidad and Tobago that walking in the street free and they are criminals and they rape women. They pay the men to buy the girls and keep them trafficking all over the place. We have information<sup>4</sup>,” Gonzales said. “How you expect to tell everybody, all the Venezuelans to go and make a report to the police and you know when you go to the police they put you in jail and beat you down and they throw (inaudible) in the cell and cursing you,”<sup>5</sup> she continued.

Law enforcement in Trinidad and Tobago is beginning to confront and prosecute these atrocities. Some isolated cases have been prosecuted, including some recent arrests of police officers<sup>6</sup>. Recently, in August 2020, a special reserve policeman who owns the vehicle used in the kidnapping, rape and attempted murder of a young Venezuelan woman was arrested<sup>7</sup>. The woman, an empanada vendor, was on her way home when she was kidnapped by three persons in a car. She was blindfolded, tied up and taken to a gravel road off the M2 Ring Road in Debe, where she was robbed of money, raped and stabbed multiple times on her neck. Her attackers then pushed her out the vehicle and left on the road for dead.<sup>8</sup>

In 2019, a Special Reserve Police officer, an engineer, a casino worker and a truck driver were arrested for kidnapping a 24-year-old female Venezuelan national in Diego Martin.<sup>9</sup> Additionally, immigration officers were accused of demanding money from families seeking to visit detainees.<sup>10</sup> Alejandra Larez, a Venezuelan migrant, noted that the situation Venezuelans and Cubans were placed in by immigration officers were more likely to contribute to exploitation and further illegal activity.<sup>11</sup>

The Inter-American Court also highlighted that migrant children may be victims of abuse and trafficking.<sup>12</sup> It is therefore incumbent on every State to thoroughly investigate all cases involving children and, to afford these children the necessary protection and to establish and implement procedures to combat trafficking.

Children are not immunised from the harsh realities of sexual violence. Venezuelan migrant children are also victims of sex work, as revealed in the FoL-UWI Migrant Survey. Ten percent (10%) of teenagers were reported to be engaged in part time sex work.

Moreover, given that no specific provisions have been made for migrant children, or refugee children, their vulnerability is high.

1 Evidence given by Priya Kissoon, part of the UWI delegation, a forensic geographer who carried out extensive field work with Venezuelan migrants in Trinidad.

2 FoL Hearing, supra, n 8.

3 Richard Khan, ‘Yesenia Wants Young with Her on Visit to Cops’ (Trinidad Guardian March 29, 2019) <<https://www.guardian.co.tt/news/yesenia-wants-young-with-her-on-visit-to-cops-6.2.812325.06d28ebe0a>.

4 Ibid.

5 Ibid.

6 ‘Two Cops Arrested for Trafficking Venezuelan Women’, [https://trinidadexpress.com/newsextra/cops-arrested-for-trafficking-venezuelan-women/article\\_19a1cf2a-4cdb-11ea-b888-eb30b01576cc.html](https://trinidadexpress.com/newsextra/cops-arrested-for-trafficking-venezuelan-women/article_19a1cf2a-4cdb-11ea-b888-eb30b01576cc.html); February 11, 2020; ‘Cop, Venezuelan in Court for Trafficking, Gang Activity’, <https://www.loopitt.com/content/cop-venezuelan-court-trafficking-gang-activity>, February 20, 2020; ‘Cop on suspension Arrested for Brutal Rape Attack on Venezuelan Teen’, [https://trinidadexpress.com/newsextra/cop-on-suspension-arrested-in-brutal-rape-attack-on-venezuelan-teen/article\\_c72e2524-dcc0-11ea-8ee2-47f1b5ec566e.html](https://trinidadexpress.com/newsextra/cop-on-suspension-arrested-in-brutal-rape-attack-on-venezuelan-teen/article_c72e2524-dcc0-11ea-8ee2-47f1b5ec566e.html) August 12, 2020.

7 Sacha Wilson, ‘Suspect Arrested in Connection with Venezuelan Teen’s Attack’ (Trinidad Guardian August 12, 2020) <<https://www.guardian.co.tt/news/suspect-arrested-in-connection-with-venezuelan-teens-attack-6.2.1179256.2fb073736f>.

8 Ibid.

9 Carolyn Kissoon, ‘Cop, Engineer Arrested in Abduction of Venezuelan Woman’ (Trinidad Express Newspapers February 12, 2019) <[https://trinidadexpress.com/news/local/cop-engineer-arrested-in-abduction-of-venezuelan-woman/article\\_9aebba14-2ed2-11e9-ae52-df9ea1e27d46.html](https://trinidadexpress.com/news/local/cop-engineer-arrested-in-abduction-of-venezuelan-woman/article_9aebba14-2ed2-11e9-ae52-df9ea1e27d46.html)>

10 Peter Christopher, ‘Refugees: Don’t Exploit Us Any More’ (Trinidad Guardian February 5, 2019) <<https://www.guardian.co.tt/news/refugees-dont-exploit-us-any-more-6.2.773652.b351ab71f5>.

11 Ibid.

12 Rights and Guarantees of Children in the Context of Migration, supra, n. 93.

Further, many children fall completely outside of the veil of protection if they are not registered under the National Venezuelan Migrant Registration program. There may not even be a gesture toward support from the Children’s Authority.

Indeed, the National Venezuelan Migrant Registration Program, while a welcome humanitarian initiative, in reality does little to address the acute vulnerabilities of Venezuelan migrants in Trinidad and Tobago, particularly women and children, whether to sexual violence, xenophobia or labour exploitation. They face a host of challenges every day including abuse by the police, discrimination, violence at the hands of locals, and sexual assault, inclusive of the general sexualisation of Venezuelan women, as reported by the IACHR hearing, newspaper reports and other studies.

*Trafficking of Venezuelan Migrants*

International norms on trafficking in persons are also pertinent to the Venezuelan migrant issue. These also include protections under the Women’s Convention. For example, Article 6 places a positive and incumbent obligation on a State to ensure that trafficking and prostitution of women are curtailed.

In response to international standards, Trinidad and Tobago has enacted the Trafficking in Persons Act,<sup>1</sup> protecting all persons within Trinidad and Tobago, regardless of migration status, gender, sex or age, by creating an indictable offence of trafficking in persons.<sup>2</sup> Article 14 contains a clause which states that the Protocol operates without prejudice to the rights and obligations under international human rights law, in particular the 1951 Convention on the Status of Refugees and its 1967 Protocol and the principle of non-refoulement.<sup>3</sup> . Notwithstanding the existence of domestic law which specifies international norms on trafficking and applies to all persons, Trinidad and Tobago’s Ministry of National Security advised that any legal migrant, refugee/asylum seeker who wished to claim legislative protection in the State was bound by the Immigration Act. Notably, the Immigration Act does not make specific provision for persons who have been trafficked.

As seen in a preceding section, migrants without documentation are still likely to be detained in administrative detention centres pending deportation to their country of origin, despite efforts by the LWC and UNHCR to determine if they have been trafficked. Attempts are sometimes made by the State to extend humanitarian assistance to possible victims of sexual exploitation in a way that respects the dignity and security of the person, in accordance with legal obligations.<sup>4</sup> However, these are ad hoc and insufficient.

Because migrants are undocumented or ‘illegal’, they are unaccounted for, and so, they can also be sold into human trafficking with impunity. Moreover, trafficking crimes committed against migrants often go unreported because of fear of the authorities and of being deported. Trafficking in Venezuelan migrants also appears to be difficult to prosecute, as noted by the Chief Immigration Officer.<sup>5</sup> This further perpetuates their cycle of vulnerability. The failure to effectively enforce the trafficking laws is noted in a 2019 OCHA Report.<sup>6</sup>

The result is that victims of trafficking, mainly women and girls, who, under domestic and international law are entitled to assistance, are criminalised, detained and imprisoned. This includes children, as identified in the FOL UWI IACHR hearing, from first-hand accounts. Sometimes, women and girls, who are in truth, trafficked persons, are identified as prostitutes and ‘illegal’ migrants, as opposed to victims needing State assistance and support.<sup>7</sup>

The Chief Immigration Officer, Ms. Charmaine Gandhi-Andrews, has complained that smuggling in migrants is not covered under the Immigration Act *per se*. The Act sanctions any person who receives any fee or reward to secure or assist in securing illegal admission into Trinidad and Tobago

1 Trafficking in Persons Act 2011, Chapter. 12:10.

2 Section 16 reads: ‘A person who, for the purpose of exploitation— (a) recruits, transports, transfers, harbours or receives persons into or within Trinidad and Tobago; (b) recruits, transports or transfers persons from Trinidad and Tobago to another jurisdiction; (c) receives persons from Trinidad and Tobago into another jurisdiction; or (d) harbours persons from Trinidad and Tobago in another jurisdiction, by means of— (i) threats or the use of force or other forms of coercion; (ii) abduction; (iii) fraud or deception; (iv) the abuse of power or the abuse of a position of vulnerability; or (v) the giving or receiving of payment or benefits to achieve the consent of a person having control over another person. This follows international standards established by the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000. Trinidad and Tobago ratified it in 2007.

3 TIPS Protocol art 14.

4 Joint Select Committee on Human Rights, Equality and Diversity, Inquiry into the Treatment of Migrants with Specific Focus on Rights to Education, Employment and Protection from Sexual Exploitation (2020) [3.52].

5 As reported by Marlene Augustine, ‘Smuggling Migrants Not a Criminal Offence’ Trinidad and Tobago Newsday (4 October 2018).

6 ‘Caribbean Sub-Region Situation Report June - July 2019’, published September 17, 2019, United Nations Office For the Coordination of Humanitarian Affairs, (OCHA), Geneva, <https://reliefweb.int/report/dominican-republic/caribbean-sub-region-situation-report-june-july-2019>.

7 A hidden phenomenon which our courts, laws and practices have failed to address is the extent to which women and girls involved in sex work are actually victims of trafficking.



and aiding and abetting illegal entries.<sup>1</sup> Further, without evidence, it is often difficult to get convictions. She added that smuggling migrants involve organised networks and is often very difficult to prosecute.<sup>2</sup> Most recently, a boat operator was charged under s40(i) with aiding and abetting Venezuelan migrants to enter into Trinidad and Tobago at a place other than a port of entry and failing to report to an immigration officer for examination.<sup>3</sup>

Reports suggest that as many as 80,000 to 120, 000 Venezuelan women are trafficked annually and many end up in Trinidad and Tobago.<sup>4</sup> Many of the victims were teenagers who were kidnapped. Some are sold as sex slaves to criminal elements in Trinidad and Tobago and other countries. Recent reports have indicated that at least two dozen police officers have been implicated in a trafficking ring between Venezuela and Trinidad and Tobago.<sup>5</sup> Officers allegedly use police equipment to transport the women, drugs and guns.<sup>6</sup>

One incident relayed in the FoL-UWI IACHR Migrant Hearing<sup>7</sup> illustrates not just the vulnerability of migrant women to violence, but also of children and girls. A Venezuelan mother left her two children in the care of her parents so she could work in Trinidad, send back remittances, and offer them a better life. The young daughter ran away from her grandparents’ home, making the dangerous journey to Trinidad by boat alone. When she arrived, unaccompanied, officials denied her entry, and she was returned to Venezuela where she was intercepted by sex traffickers who promised to help her reunite with her mother. She was about seven months pregnant from being raped when she called her mother from an unknown beach, where she had been brought with others.

3.8. Economic, Social and Cultural Rights

Venezuelan migrants and refugees should enjoy not only civil and political rights, but certain economic, social and cultural rights. Three rights are of particular significance. These are rights to health, education and work. Theoretical justification for these rights come from international sources of law, in particular, the ICESCR, the Refugee Convention and ILO Conventions and Recommendations.

As noted previously, a refugee as defined under the 1951 Refugee Convention is entitled not only to protection of civil and political rights, but also to economic, social and cultural rights, like work, health and education. Other general treaty instruments, such as the ICESCR, as well as the Migrant Workers Convention also protect the economic, social and cultural rights of migrants, in particular, the right to work and work-related rights, health and education, regardless of migrant status.<sup>8</sup>

Refugees are entitled to several such rights, including but not limited to the basic rights of social welfare, wage-earning employment, public education, housing and health services.<sup>9</sup> Additionally States are required to treat refugees equally with nationals and to allow them to enjoy the socioeconomic and cultural rights recognized in international law.<sup>10</sup>

For children, economic, social and cultural rights specific to migrant and refugee children are also secured under the CRC.v

THE UNIVERSAL DECLARATION OF

HUMAN RIGHTS

Adopted by the General Assembly of the United Nations in 1948, the Universal Declaration states fundamental rights and freedoms to which all human beings are entitled.

You have the responsibility to respect the rights of others.

**We are all born free and equal.**

No one can take away any of your rights.

Everyone is entitled to these rights no matter your race, religion, sex, language, or nationality.

Everyone has the right to life, freedom, and safety.

No one has the right to hold you in slavery.	You have the right to seek asylum in another country if you are persecuted in your own.	Every adult has the right to a job, a fair wage, and membership in a trade union.
No one has the right to torture you.	Everyone has the right to a nationality.	You have the right to leisure and rest from work.
You have a right to be recognized everywhere as a person before the law.	All consenting adults have the right to marry and to raise a family.	Everyone has the right to an adequate standard of living for themselves and their family.
We are all equal before the law and are entitled to equal protection of the law.	You have the right to own property.	Everyone has the right to an education.
You have the right to seek legal help if your rights are violated.	Everyone has the right to belong to a religion.	Everyone has the right to freely participate in the culture and scientific advancement of their community and their intellectual property as artist or scientist should be protected.
No one has the right to wrongly imprison you or force you to leave your country.	You have the right to think and voice your opinions freely.	Everyone has the right to gather as a peaceful assembly.
You have a right to a fair public trial.	You have the right to participate in the governance of your country either directly or by helping to choose representatives in free and genuine elections.	We are all entitled to a social order in which we may enjoy these rights.
Everyone is innocent until proven guilty.	You have the right to social security and are entitled to economic, social, and cultural help from your government.	Everyone's rights and freedoms should be protected unless they obstruct the rights and freedoms of others.
You have the right to privacy. No one can interfere with your reputation, family, home, or correspondence.		No State, group, or person can use this Declaration to deny the rights and freedoms of others.
You have the right to travel.		

This is a simplified version of the UDHR. For the complete text, visit [www.un.org](http://www.un.org)

1 Ibid.  
2 Supra, n. 304.  
3 Shane Superville, '18 Months' Jail for Boat Captain Held for Transporting Illegal Immigrants' Trinidad and Tobago Newsday (14 August 2020).  
4 Radhica de Silva, 'Report: 17,136 Women Trafficked from Venezuela in a Year' Trinidad and Tobago Guardian (23 July 2020).  
5 Ibid.  
6 Ibid.  
7 Supra.  
8 Articles 25 and 26 confer labour rights to migrant workers, including equal remuneration with nationals regardless of any irregular migration status and the freedom to join trade unions. See also Article 28 which provides for the right of migrant workers and members of their families to receive medical care that is urgently required to preserve their life or prevent irreparable harm, without discrimination on any grounds, including any irregular migration status.  
9 1951 Refugee Convention, Art 2-34.  
10 Office of the United Nations High Commissioner for Human Rights, CERD. General Recommendation 30, Discrimination Against Non-Citizens, Sixty-Fourth Session, 2004, UN Doc. CERD/C/64/Misc.11/rev.3.

*The International Covenant on Economic, Social and Cultural Rights*

The most influential international legal source on economic, social and cultural rights is the ICESCR.

<sup>1</sup> influential international legal source on economic, social and cultural rights is the ICESCR. This Convention is one of the three treaty instruments that make up the International Bill of Rights, the others being the UNDHR and the ICCPR. The ICESCR places an obligation on all State Parties to progressively realize all of the rights enshrined therein in light of State resources. Trinidad and Tobago acceded to the ICESCR in 1978. Economic, social and cultural rights have been viewed as increasingly justiciable, either as extensions of civil and political rights, such as the right to health being viewed as an extension of the right to life, or as stand-alone rights.<sup>2</sup>

Distinct from the issue as to the concrete obligations placed on states to provide economic, social and cultural rights, is the question of how these rights and entitlements, where provided, are distributed. Article 2 of the ICESCR proclaims the enjoyment of treaty rights without discrimination, but leaves a margin of appreciation for developing countries to guarantee such rights to non-nationals.<sup>3</sup>

However, the Committee on Economic, Social and Cultural Rights (The Committee) has noted that discrimination must be eliminated both formally in laws and policies and substantively, i.e. eliminating de facto discrimination by giving sufficient attention to groups which suffer persistent prejudice<sup>4</sup>. This can apply to Venezuelan migrants based on the xenophobia attached to their presence here in Trinidad and Tobago, especially as it relates to the right to work. The Committee opines that States parties may be under an obligation to adopt special measures to mitigate against conditions that perpetuate discrimination<sup>5</sup>, such as adopting national legislation or policy affording equal opportunity, or even policies of positive discrimination where necessary, reasonable and proportionate.

The Committee has expressly stated that the ICESCR rights apply to everyone including non-nationals, such as refugees, asylum-seekers, migrant workers and victims of international trafficking, regardless of legal status and documentation<sup>6</sup>. Therefore as it relates to Venezuelan refugees and migrants, all should be entitled to Convention rights regardless of their immigration status.

The Migrant Workers Convention also recognizes the importance of family unity in relation to all migrant workers<sup>7</sup> and aims to protect the families of migrant workers in terms of their social, economic and cultural needs.<sup>8</sup>

**(i) The Right to Education**

The right to education is an important element in the basket of economic, social and cultural rights that should be secured to all persons, particularly children, regardless of nationality, or immigration status. It is protected under several sources of international human rights law. The strongest expositions of this

right is perhaps the CRC, which Trinidad and Tobago has ratified and attempted to incorporate into domestic law, for example, under the Children Act. Article 28 of the CRC confers the right to education on all children and the complementary right to compulsory and free primary education.<sup>9</sup> Consequently, all migrant children, regardless of immigration, or refugee status, are entitled to enjoy the right education.

The right to education is also protected under Article 13 of the ICESCR and is broad enough to include migrant children. It provides:

1. The States Parties to the present Covenant recognize the right of everyone to education.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

The progressive realisation of secondary and tertiary education is promoted.<sup>1</sup>

When read in conjunction with the provisions of the CRC, Article 13 of the ICESCR mandates that at minimum, all migrant children have the right to free primary school education and access to secondary school education without discrimination<sup>2</sup>. This right reduces the risk of a child having their education stagnated either because of a Government order or policy denying them an education, which will be in breach of the State's international obligations, or because they cannot access education and may be forced to work under exploitative conditions to afford to go to school. The Committee has reiterated that having regard to Article 2 of the Convention on the Rights of the Child and Article 3(e) of the UNESCO Convention Against Discrimination in Education, all persons living in the territory of a State Party, including migrants, regardless of their immigration status, and who are of schooling age, are entitled to benefit from Article 13, by virtue of the principle of non-discrimination<sup>3</sup>. Further, States are under an obligation to respect all Convention rights and are thus obligated to avoid measures that hinder or prevent the enjoyment of the right to education<sup>4</sup>. Therefore a State Party is in violation of Article 13 with any introduction of, or failure to repeal legislation, or policies that discriminate against individuals or groups, with regards to education.

Article 30 of the Migrant Workers Convention also guarantees the right of each child of a migrant worker to education on the basis of equality of treatment with nationals of the State Party, regardless of the migrant parent or the child's immigration status<sup>5</sup>. Likewise, the 1951 Refugee Convention provides for the right to education to all refugees, in similar manner to nationals.

*Migrant and Refugee Children Denied Education*

Trinidad and Tobago is fortunate enough to have free universal primary and secondary public education, as well as funded tertiary education. However, as noted under the discussion on the CRC above, currently, Venezuelan child refugees and migrants are not afforded the right, or access to formal public education in Trinidad and Tobago. This is a serious human rights violation in the face of the very strong international human rights norms and indeed humanitarian principles that exist in this sphere. Further, it is a direct contravention of important Conventions that the State has ratified. Moreover, none of the interim, temporary, or policy instruments that Trinidad and Tobago has put forward as mechanisms to address Venezuelan migrant and refugee needs have considered this fundamental right to education, at least for migrant children. For example, the Refugee Policy does not address the needs of children particularly, or the right to their education.

Similarly, the lack of access to education for migrants and their children is still unaddressed by the 2019 National Venezuelan Migrant Registration Program, or current practice and acts as a barrier to the economic and social naturalization of Venezuelans in Trinidad and Tobago. Venezuelan refugees and migrants thus do not prima facie have a right to public education in the absence of legislation, or policies to the contrary. Indeed, this entitlement was specifically excluded when the program was announced<sup>6</sup>. Further, refugee status does not entitle refugee children to public education. Denial of education to migrant and refugee children violate Article 28 of the Convention on the Rights of a Child and other international law standards, but this obligation is ignored.

1 International Covenant on Social, Economic and Cultural Rights (adopted 16 December 1966, entered into force 1 January 1976) 993 UNTS 3.  
2 See Antoine, R-M. B. 'Engendering Justice - Identifying Gender Dimensions of Economic, Social and Cultural Rights in the Commonwealth Caribbean', in Teelucksingh and Shane Pantin, Ed, Regional Discourses on Society and History: Shaping the Caribbean, Peter Lang Publishers, USA, February, 2020; Antoine, R-M. B.; Labour in the economic social cultural rights regime of the Inter-American system on human rights', in Brodie, Busby & Zahn (ed) The Future Regulation of Work, Palgrave Macmillan, 2016, UK, 193 -218; Antoine R-M. B. 'Economic, Social and Cultural Rights in a Working Environment' [1997] 7 (2) Carib. LR 534.  
3 It provides:  
(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.  
(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.  
4 UN Committee on Social, Economic and Cultural Rights 'General Comment 20' (2009) Un Doc E/C.12/GC/20 (CSECR General Comment 20) [8].  
5 CSECR General Comment 20 [9].  
6 Ibid [30].  
7 Ibid Art 44.  
8 Ibid Art 64. See also Art. 30 on the right of children of migrant families to education.  
9 Convention on the Rights of a Child, Art 28.

1 (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.  
2 UN Committee on Social, Economic and Cultural Rights 'General Comment 13' (1999) Un Doc E/C.12/1999/10 (CSECR General Comment 13) [34].  
3 UN Committee on Social, Economic and Cultural Rights 'General Comment 13' (1999) Un Doc E/C.12/1999/10 (CSECR General Comment 13) [34].  
4 Ibid [47].  
5 Art 30.  
6 See statement made by the Minister of National Security, and Minister of the Office of the Prime Minister, of Trinidad and Tobago, Mr. Stuart Young 'Venezuelan Migrant Registration Policy Gets Green Light' (Office of the Prime Minister Republic of Trinidad and Tobago, 11 April 2019) <https://www.opm.gov.tt/venezuela-registration-policy-gets-green-light/>



Venezuelan nationals, migrants and asylum seekers alike, are all without access to public education and social services. To access these services these individuals must use private services for which the cost may be exorbitant and impossible to access.

The State has recognised this serious deficiency, but to date, no action has been taken to rectify it. For example, the 2020 Parliamentary Joint Select Committee Report<sup>1</sup> noted that approximately 3300 migrant children, not specifying if they are all Venezuelan migrant children, or their immigration/refugee status, need formal education, with the demand for primary school education being the highest. The Ministry of Education's Policy Paper 2017-2022 also acknowledges the importance of the education of refugees and migrant children, classifying them as 'vulnerable.' It also recognizes the need to develop and implement policies to govern the placement of these children into the public system. The Ministry identified several hindrances faced by migrant children in obtaining formal education, the main obstacle being irregular immigration status and fear of deportation<sup>2</sup>. Somewhat paradoxically, the Ministry reiterated its compliance to the Immigration Regulations established for the education of migrant children, but also emphasised their support of the LWC and UNICEF's efforts in providing for the educational needs of migrant and refugee children<sup>3</sup>. Given the contradictions and the limitations of the Immigration Act with regard to migrants, it is unclear in what direction the State is prepared to go in ensuring that all migrant children residing in Trinidad and Tobago are provided with education.

The Immigration Regulations 9(6) (a), (c) and (d) made pursuant to the Immigration Act, confer a discretion to the Chief Immigration Officer to issue student permits and stipulate that student permits must be applied for and granted prior to entry into the country and further, they are granted once no national student is displaced in the system<sup>4</sup>. Nationals therefore are given a priority, which is a violation of the principle of non-discrimination under international law. However, it appears that no such permit has been granted for Venezuelan migrant children. These permits are generally reserved for the children of diplomats and those with work-permits etc.

While private schools are available to Venezuelan migrants and refugees they are often unable to access it due to socioeconomic constraints. In the interim, NGOS and international organisations provide informal educational services through initiatives such as the 'Equal Places' program, with key partners including UNHCR, UNICEF and some denominational schools. Through this program, migrant and refugee children ages five to seventeen have access to primary and secondary education based on a curriculum that closely reflected the national curriculum.

At the secondary level, students have the option of pursuing either a Spanish or English curriculum via Bachillerato, or CSEC certifications respectively. Subjects offered are limited due to lack of proper resources.<sup>5</sup> Importantly, a representative of the Ministry of Education monitors and supports the programme by shared Curriculum Guides and Toolkits that are used in primary and secondary schools. The Ministry of Education has also shared online lessons created by Ministry of Education teachers.

Tertiary education is available at the UWI and other private organisations, but fees must be paid since Venezuelan migrants do not qualify for national financial assistance programs such as GATE. This current project seeks to alleviate this constraint.

### (ii) The Right to Health

Apart from the obligations under the 1951 Refugee Convention which apply to refugees, the right to health is expressly recognised under the ICESCR and is today accepted as a fundamental human right to be secured to all persons, even if viewed as an extension of the civil and political right to life<sup>6</sup>.

1 Documented in the Report of the Joint Select Committee on Human Rights, Equality and Diversity, Inquiry into the Treatment of Migrants with Specific Focus on Rights to Education, Employment and Protection from Sexual Exploitation (2020) [3.93].

2 Ibid.

3 Ibid [2.16].

4 Immigration Regulations (1978) ss9(6)(a), (c), (d).

5 Ibid. [3.23-3.24].

6 See R-M. B. Antoine – "Economic, Social and Cultural Rights in a Working Environment" [1997] 7 (2) Carib. LR 534'. Article 12 provides that '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. ICESCR Art 12.

In accordance with the principle of the indivisibility of rights, the right to health is linked to the ability of an individual to exercise other human rights, and is also itself dependent on numerous other human rights including, but not limited to, the rights to food, education, work and equality and non-discrimination.<sup>1</sup>

The ability of a State to fulfil this right is dependent on its resources, which is recognized in Article 2(1). Nonetheless, the Committee elaborates that at minimum, functioning public health-care facilities, potable water, adequate sanitation, food and nutrition, safe and healthy working conditions and environment and related services and programmes, have to be available in sufficient quantity within the State party, dependent on their resources.<sup>2</sup> The above must be accessible, physically and economically, without discrimination, to all within the State's jurisdiction, including migrants.<sup>3</sup>

Article 24 of the CRC details the right of all children, regardless of status, to the enjoyment of the highest attainable standard of health and to have access to facilities for the treatment of illness, including but not limited to the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care. Further, States Parties must ensure that no child is deprived of his or her right of access to such health care services.<sup>4</sup>

All persons in Trinidad and Tobago have a right to access public primary healthcare and to certain medications free of cost. This is an entitlement derived from the inherited UK model whereby national status is not required for primary health care at public hospitals. The State has formulated this into a written Ministry of Health policy, the Policy for *Treating with Non-Nationals with Respect to the Provision of Public Health Care Services*. This cements the rights of non-nationals to healthcare for accident and emergency medical services; population and Public Health Services which include immunization, treatment of non-communicable diseases and high-risk infectious diseases (e.g. malaria, COVID-19). This is one of the most enlightened and proactive State policies with regard to Venezuelan migrants. In addition, PanCap, a special arm of CARICOM, has produced a policy toward the treatment of all persons living with HIV, irrespective of migrant status. The policy is justified on grounds of public health, as a tool to prevention.

In announcing the National Venezuelan Migrant Registration Program, State officials had also stated that migrants would be granted free emergency medical services at public health institutions. However, there was to be no guarantee to educational, training, social, or any other governmental services.<sup>5</sup>

Currently, all migrants and refugees are entitled to access basic primary health care as part of official policy,<sup>6</sup> and thus prima facie, Trinidad and Tobago seems to be compliant with international standards in this regard. In practice, however, as detailed in the FOL-UWI Migrant Survey, the Faculty of Law UWI IACHR hearing<sup>7</sup> and reports from FPATT, migrant children, like adults, are often denied any, or adequate access to health care in Trinidad and Tobago<sup>8</sup>. The Survey informed that 10% of respondents have been refused medical help from a public health facility due to the nature of their illness and not being a citizen of Trinidad and Tobago. Further, they are prohibited from receiving medicine, or accessing surgery. In fact, 60% of the respondents are dissatisfied with access to public health.

In some cases, the weak access to healthcare is due to the fear of being discovered and deported. Indeed, the Survey revealed that 40% of respondents are afraid to access medical care. In other instances, the reason is because of the ignorance of health officials who believe, erroneously, that only citizens are entitled to free health care, especially because of the under-resourced healthcare facilities in the country. To alleviate this problem, the FPATT instituted a program to provide free paediatric care to Venezuelan migrant children (supported by the UNHCR and volunteer doctors).

1 UN Committee on Social, Economic and Cultural Rights 'General Comment 14' (2004) Un Doc E/C.12/2000/4 (CESCR General Comment 14).

2 UN Committee on Social, Economic and Cultural Rights 'General Comment 22' (2016) Un Doc E/C.12/GC/22 (CESCR General Comment 22).

3 Supra, n. 339, [12].

4 Convention on the Rights of a Child Art 24.

5 'Venezuelan Migrant Registration Policy Gets Green Light' (Office of the Prime Minister Republic of Trinidad and Tobago, 11 April 2019) < <https://www.opm.gov.tt/venezuelan-registration-policy-gets-green-light/> >

6 Interview with LWC, supra, n 43.

7 FoL Hearing, supra, n 8.

8 Ibid.

Reports and the results of the FoL UWI Migrant Survey also reveal that Venezuelan nationals are faced with covert and overt discrimination in the healthcare system, even if they are not officially excluded.

Of special significance to Venezuelan migrants is the fact that the Committee has expressed that the right to health is inclusive of the right to sexual and reproductive health. In that regard, in Trinidad and Tobago, the UNHCR's partnership with the FPATT to ensure access to such services free of charge for Venezuelan migrants, is notable. This fills a clear gap in the provision of such services by the state, by a non-state entity. The program extends to rural, hard to reach areas where migrants congregate and does not exclude undocumented migrants. Importantly, the program continues even after the registration program, with FPATT observing and treating new arrivals of Venezuelan migrants as recently as August 2020 in Icacos and other areas of the country<sup>1</sup>. FPATT has highlighted the high prevalence of sexual violence found in this vulnerable migrant population, especially women and girls, an issue which straddles both gender and health issues.<sup>2</sup>

In terms of mental health and sexual health facilities, it is also the case that the Children's Authority, the state body charged with safeguarding the well-being of children in the country, is overburdened. It is reported that it is often unresponsive to Venezuelan migrant children and as mentioned previously, it conceded that it had only 4 Venezuelan migrant children in its care.

The health and safety challenges of Venezuelan migrants who are detained in centres and prisons were addressed in a preceding section. They are reiterated here in the context of the right to health.

#### *The Impact of Covid-19 on the Right to Health of Migrants*

The issue of health with respect to Venezuelan migrants has become more complex since the Covid-19 pandemic. While there is no concrete evidence that Venezuelan migrants are responsible or even a serious factor in the recent community spread of the virus in the country, the contrary view has been expressed repeatedly by various officials, groups and the public. Official statements have not, however, been consistent, with the Minister of National Security initially denying that Venezuelan migrants had penetrated Trinidad and Tobago's borders between June and August and were spreading the virus. This was a sensitive political issue during the August 10, 2020 General Election with the Government being blamed for its inability to police the borders, which perhaps explains the initial denial. Currently, however, Venezuelan migrants are convenient scapegoats for the apparently inexplicable increase in the spread of the corona virus.<sup>3</sup>

The right to health for Venezuelan migrants has now become inter-connected to the right to health of the entire Trinidad and Tobago population. In other words, it is now a public health issue. As policy-makers realised in relation to the HIV virus, excluding 'outsiders' from treatment and testing, from a public health perspective, is counterproductive and results in worse, not better outcomes. Like HIV, if Venezuelan migrants feel discriminated against, or go 'underground' and refuse to access healthcare for fear of deportation, or if they are denied access to health care and treatment, these approaches will lead to increased spread of the corona virus. Whether the contribution to the spread of the corona virus by Venezuelan migrants is perception, or reality, the issue must be addressed as a matter of public health. National security approaches must coalesce with this objective, which is also consistent with human rights and international standards.

Indeed, the supposed threat to Trinidad and Tobago by illegal Venezuelan migrants has been judicially noticed. In *Machado*,<sup>4</sup>, Justice Mohammed, in considering whether to deport Venezuelan migrants who had re-entered the State while under a previous deportation order and was arrested for drug and firearms offences, noted this health threat and the role of the Immigration Act in protecting citizens. He said:

The Immigration Act, as far as this Court is concerned, is part of the immune system of this country. At a time when this country and the world at large are facing a pandemic, inflicted by the novel coronavirus now known as Covid-19, strict adherence to the provisions and intention of The Immigration Act, creates

the proverbial vaccine which inoculates the citizenry of this country from the fatal consequences of the pandemic. Control, therefore, by the Immigration Department of those who can enter and remain in this country, becomes extremely vital.<sup>1</sup>

A pragmatic approach centred more on desirable health outcomes is needed. Threats like those issues by the Minister of National Security, that anyone who harbours Venezuelan migrants will be prosecuted, are likewise counterproductive in the current environment and also contradictory to the state's initiatives on treating migrants for the corona virus. Similarly, the recent reports which inform that law enforcement officers are quickly 'rounding up' Venezuelan migrants and warehousing them in spaces unprepared for the corona virus<sup>2</sup> before deporting them, do not facilitate good health practices, nor due process. Coastguard personnel have themselves expressed fear about the risk to their own health and consequently, the risk of them spreading the virus, but these complaints have not been officially noticed by the state<sup>3</sup>, although in the September 26, 2020 case of Zaray Honores, the court deemed the detention centre unlawful<sup>4</sup>.

Ultimately, the right to health of Venezuelan migrants should be secured, not only on human rights and humanitarian grounds, but for the public good.

Added to the health concerns about Venezuelan migrants in the public domain are issues about corona virus in the prisons. As discussed above, escalating fears about the virus circulating in the prisons with extremely poor preventative health conditions, including inadequate access to water and poor ventilation also impact Venezuelan migrants and bring to the fore additional concerns about possible violations to the right to life. This is exacerbated by reports of prison officers who have already tested positive for the corona virus. Notably, the State has a well-recognised high duty of care to the healthcare of prisoners, as persons deprived of their liberty.<sup>5</sup>

The right to health of migrant children in the context of the Covid-19 pandemic in Trinidad and Tobago has recently been the subject of special concern and inquiry by UNICEF. The study also looked at the overall impact of the pandemic on migrant children, including on their education and general well-being. It noted: "Migrant children are already in a vulnerable situation which is being made worse by the impact of the COVID-19 pandemic."<sup>6</sup>

### (iii) The Right to Work

Article 6 of the ICESCR provides that it is the right of everyone to work and to gain his living by work which he freely chooses or accepts, and that the State Party will take appropriate steps to safeguard this right. The right to work is directly related to the ability of an individual to realize other human rights. The right to

work also implies the right to not be unfairly deprived of work.<sup>7</sup> The Committee has noted that the core obligations of a State Party under Article 6 include:

- ensuring the right of access to employment, especially for disadvantaged and marginalized individuals and groups; and
- avoiding any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups<sup>8</sup>.

<sup>1</sup> *Machado v Chief Immigration Officer and Attorney General of Trinidad and Tobago* [2020] TT HCJ Claim No. CV2020-01118, decided May, 11, 2020.at para 69.

<sup>2</sup> 'Young: Anyone caught harbouring immigrants will be arrested'; <https://www.looptt.com/content/young-anyone-harbouring-illegal-immigrants-will-be-arrested>, Loop News, July 25, 2020.

<sup>3</sup> 'CNC3 News, July 28, 2020: <https://www.cnc3.co.tt/tt-coast-guard-concerned-over-venezuelan-influx/>

<sup>4</sup> Unreported, Case Notes - 26th September 2020, (titled CV 2020-02800) Appeal from a Habeas Corpus application hearing – Re Zaray Honores, before the Honourable Justice Quinlan-Williams. Acknowledgement is given to Cristin J. Williams, the attorney in this case, who provided the case notes, discussed below.

<sup>5</sup> For a discussion of these obligations see, e.g. Rick Lines 'The right to health of prisoners in international human rights law', Int J Prison Health . 2008;4(1):3-53.

<sup>6</sup> The Impact of COVID-19 on Migrant Children in Trinidad and Tobago, USAID, UNICEF, Barbados, 1 July 2020.

<sup>7</sup> UN Committee on Social, Economic and Cultural Rights 'General Comment 18' (2006) Un Doc E/C.12/GC/18 (CSECR General Comment 18) [6].

<sup>8</sup> Ibid [31]. Articles 7 and 8 are complementary to the rights under Article 6. Article 7 reads: The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:  
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;  
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;  
(b) Safe and healthy working conditions; . . .  
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

<sup>1</sup> *Laurel v Williams*, Newsday, Friday 14 August 2020, 'FPATT head: Migrants deserve the same respect as us' Reporting on statements made by FPATT's Executive Director, Dona Da Costa-Martinez: "From October 2018-June 2020, FPATT attended to 1, 893 "unique Spanish-speaking migrants," of whom 431 were males and 1,462, females. The services provided to them include birth control, dietitian consultation, HIV services, paediatric screens, Pap smears and dignity kit assessments and distribution" <https://newsday.co.tt/2020/08/14/fpatt-head-migrants-deserve-the-same-respect-as-us>

<sup>2</sup> Ibid. See also the Faculty of Law, UWI IACHR Migrant hearing, above, n.8.

<sup>3</sup> Camille Hunte 'Illegal migrants may be spreading Covid', Trinidad Express, Jul 29, 2020 Updated Jul 30, 2020.

<sup>4</sup> Supra.



There are also a number of important ILO Conventions which promote rights to work and related protections for migrants. In the main, however, these speak to documented migrants who have been given formal immigration status under the Immigration Act and supposedly, those authorised to work under the Venezuelan Migrant Registration Program. This is not generally the case for Venezuelan migrants.

Trinidad and Tobago has ratified the eight (8) ILO Conventions which collectively constitute the Fundamental Principles and Rights at Work. Of particular importance is that, additionally, Trinidad and Tobago has ratified the ILO Migration for Employment Convention (No. 97). Despite the ambivalence pertaining to undocumented migrants, a Parliamentary Joint Select Committee concluded, significantly, that based on the Ministry of Labour’s advice, all migrants, regardless of migration status, are entitled to the benefit and protection of these nine (9) Conventions and through national legislation, including the Industrial Relations Act, Ch. 88:01.<sup>1</sup>

*Refugees and Migrants (documented)*

The ILO Migration for Employment Convention (No. 97) was entered into force in 1952 and ratified by Trinidad and Tobago in 1963. Article 2 places an incumbent duty on the State to assist migrants on obtaining employment in the host state. Importantly, Article 6 provides that immigrants lawfully within the territory will enjoy treatment not less favourable than that accorded to nationals in respect of remuneration, membership of trade unions, enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes, dues and contributions and legal proceedings relating to the matters referred to in the Convention.<sup>2</sup> ILO’s Migration for Employment Recommendation (Revised), 1949 (No. 86), defines ‘migrant for employment’ as ‘a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.’<sup>3</sup>

Additionally, Article 2 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) requires all Member States to pursue a national policy to promote equality of opportunity and treatment in respect of employment and occupation, to eliminate any discrimination in this regard. Article 1 defines discrimination as ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.’<sup>4</sup>

The Inter-American Court of Human Rights in an Advisory Opinion has also emphasized that once undocumented, or irregular migrants are engaged in employment in a host country, they immediately become entitled to the labour rights conferred by law and cannot be denied these rights or be discriminated against because of their irregular situation.<sup>5</sup> They are also entitled to protection and enforcement of these rights from the State in relation to private employment relationships.<sup>6</sup> The Ministry of Labour’s position appears, prima facie, to be the consistent with this. However, the State may place restrictions on categories of employment.<sup>7</sup> . No such restrictions have been placed formally on Venezuelan migrants.

The Equal Opportunity Act examined in the previous section on gender equality mirrors most of the important grounds of discrimination in the employment context contained in ILO Convention No 111. There is a Minimum Wages Act.<sup>8</sup> which provides for a minimum wage, regulates overtime work and related entitlements in specified industries. Apart from these, employment and labour protections are provided for mainly in the Industrial Relations Act 1971 and the Retrenchment and Severance Payments Act 1988.

Trinidad and Tobago has one of the sparsest labour legislative frameworks in the Commonwealth Caribbean with few codified labour standards. Gaps include fundamental protections such as against unfair dismissals, maternity discrimination, equal remuneration, unemployment insurance, hour of work, vacations and sick leave.

1 Joint Select Committee on Human Rights, Equality and Diversity, Inquiry into the Treatment of Migrants with Specific Focus on Rights to Education, Employment and Protection from Sexual Exploitation [2020], Trinidad and Tobago.  
2 ILO Migration for Employment Convention (Revised) No. 91 (1949) Art 6.  
3 ILO Recommendation R086: Migration for Employment Recommendation (Revised) (1949).  
4 ILO Discrimination (Employment and Occupation) Convention No. 111 (1958) Art 1.  
5 Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series a No.18 (17 September 2003).  
6 Ibid [148-149].  
7 ILO Migrant Convention, Article 52.  
8 Minimum Wages Act 1976, s3.

These legislative gaps are filled by collective agreements if at all, where workplaces are unionised and through the well-developed jurisprudence of the Industrial Court of Trinidad and Tobago and its elemental principle of “good industrial relations practice.” Disputes are relayed to the court through unions. It is indeed apparent that such a labour law framework, even if Venezuelan migrants are not deliberately excluded, is inappropriate and inadequate for Venezuelan migrants, who are unlikely to be unionised.

At least theoretically, this equal treatment in respect of labour rights provides invaluable protection for Venezuelan migrants registered under the National Venezuelan Migrant Registration Program as they are entitled to the same labour rights, as Trinidad and Tobago nationals.<sup>1</sup>

The Joint Select Committee has noted, however, that while all labour rights are conferred, social services are limited. It should be noted, nonetheless, that this is also the case for Trinidad and Tobago nationals, despite being an oil-rich state, Trinidad and Tobago has a poor social service framework, even compared to less financially endowed neighbours, such as Dominica and Barbados, both of which provide unemployment insurance.

Collectively, these rights offer potentially invaluable protection to Venezuelan refugees and migrants who have travelled to Trinidad and Tobago to seek employment opportunities. Under international law and several aspects of domestic law, they are afforded the same protection as Trinidad and Tobago nationals. The Joint Select Committee of Parliament also noted that Venezuelan migrants with Minister’s permits under the National Venezuelan Migrant Registration Program are also afforded protection by national legislation, including the Industrial Relations Act.<sup>2</sup> Venezuelan migrants registered in 2019 are entitled to be paid in accordance with the minimum wage and are subjected to PAYE but exempt from NIS payments.<sup>3</sup> Notwithstanding the above and despite international obligations, refugee status does not automatically confer the right to work legally in the State.<sup>4</sup> . Should they, and any other migrant not in possession of a work permit, wish to work legally, a Minister’s permit is required. The 2019 amnesty and National Venezuelan Migrant Registration Program granted approximately 16,000 Minister’s permits to Venezuelan nationals, conferring the right to work legally, regardless of immigration status. Upon expiration of the permit, migrants are required to Study to an Immigration Office to provide evidence of their employment and residence, in order for their permit to be reviewed to determine its extension. In January 2020, the Minister of National Security announced an automatic six-month extension on the initial expiry of the permits. This should have expired in July 2020, but there has been no official word on further extensions. This permission, or amnesty, under yet another voluntaristic approach, falls far short from the full and equal entitlement to work for refugees, as enshrined in international standards. It is a poor carbon copy.

Moreover, Trinidad and Tobago’s domestic labour laws are silent on such specific rights for migrants and while they do not specifically prohibit such protection, it is nevertheless difficult to see how this could be enforced. In practice, the vulnerability of migrants because of their immigration status means that such workers are unable to benefit from any such rights. Low wages, poor working conditions and lack of job security are the result.

The Ministry of Labour advised the Parliamentary Joint Select Committee that all of Trinidad and Tobago’s labour laws were applicable to migrants, regardless of migration status, once they have these permits and thus they are entitled to minimum wage protection, have the ability to lodge discrimination complaints with the Equal Opportunities Commission and other complaints with the Labour Inspectorate and join a trade union if they wished.<sup>5</sup> However, the Joint Select Committee conceded that migrants are unaware of these rights and their labour rights are being infringed. It recommended that the State undertake a sensitization and awareness programme, educating the migrants of these rights via social media platforms in languages they understand.<sup>6</sup>

1 There are also other Recommendations suggesting more extensive social services, such as ILO Recommendation No.86 that migrants for employment are provided in case of necessity with adequate accommodation, food and clothing on arrival in the country of immigration; ensure, where necessary, vocational training so as to enable the migrants for employment to acquire the qualifications required in the country of immigration; and importantly, to provide access to schools for migrants and members of their families[ILO Recommendation R086: Migration for Employment Recommendation (Revised) (1949). See also ILO Recommendation No. 151, preventing any health risks to which migrant workers may be exposed, including providing training and information on national legislation and safety regulations and that social services including education, vocational training and language training, health services and social security; housing, transport and recreation be provided for migrants and their families; ILO Recommendation R151: Migrant Workers Recommendation (1975) [20-21].  
2 1972, Ch 88:01  
3 JSC, 2020, supra, n. 333.  
4 FoL Interview, supra, n.43.  
5 Supra, n. 333.  
6 Ibid [4.27].

This is a conclusion that is insensitive to the real vulnerabilities Venezuelan migrants face and their powerlessness in a country where they have no rights, but ad hoc ‘privileges’ extended to them, which could be taken away at any time. They are living in limbo. No recommendations were targeted at employers or toward educating the general public about obligations and rights owed to Venezuelan migrants.

In July 2018, an Inter-Ministerial Committee was tasked with the development of a National Labour Migration Policy for Trinidad and Tobago which is still in drafting stage and is yet to be approved by Cabinet.<sup>1</sup>

Despite the claim to legal protection, there is anecdotal evidence of much exploitation in the labour context. The LWC, for example, validated this by advising that they frequently receive complaints of labour exploitation in relation to wages, working conditions and sexual exploitation as a condition for employment. It appears to be widespread and was also confirmed by the Joint Select Committee, which concluded that reports to the relevant authority and to the LWC may also not reflect the true number of labour exploitation as migrants may fear detention and deportation. Many Venezuelan migrants are forced to accept menial jobs with unsafe working conditions and are paid meagre sums of cash in return. This is despite the fact that, as the FOL-UWI Migrant Survey noted, many migrants are highly educated. According to that Survey, the most prevalent jobs are mechanics, construction workers, office assistants, salesclerk, chefs and domestic workers (cleaners, babysitters).

High levels of job discrimination are reported. For example, 20% of the migrants surveyed responded that their “employer treats them worse than people from Trinidad and Tobago” and 30% revealed that they get less than the minimum wage for their employment (part time or fulltime). Further, 90% of the migrants surveyed responded that they have been refused jobs because of their nationality

As noted previously, some are also forced to turn to prostitution to earn a living. The FOL UWI Migrant Survey reveals that sex work is a common occupation of Venezuelan migrants, especially women and girls. Since this is illegal work it is outside of the purview of the Ministry of Labour. Venezuelan migrants also engage in a high percentage of informal work such as the food industry, which is not regulated by law. They are also prevalent as domestic workers. Since domestic work is not covered under the labour laws of Trinidad and Tobago, this means that such workers have no protection or entitlements in law.

Migrant children are also entitled to additional protection under Article 32 of the CRC, which provides that it is the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development<sup>2</sup> What is to be deduced from this right, when read in conjunction with Article 3 and the emphasis placed on family life and the responsibility of the parents throughout the CRC, is that apart from direct prohibitions on child labour, parents of children who have been granted refugee status or are seeking refugee status, must be afforded adequate legal and administrative protection to ensure that the child’s CRC rights are not infringed. The minimum age for employment in Trinidad and Tobago is 16 years<sup>3</sup>

In announcing the Venezuelan Migrant Registration Program, the relevant Minister stated that the registered Venezuelan migrants will be ‘subject to and protected by’ the laws of Trinidad and Tobago, similar to nationals. According to information obtained from the website of the Government of Trinidad and Tobago<sup>4</sup>, migrants who have been registered and have received the work permit exemption card, will be recipients of certain employment rights, including the right to minimum wage and exemptions from NIS taxations. Social security, training or other services are, however, excluded.

However, it is evident from the FOL UWI Migrant Survey and from anecdotal reports that even migrants registered and authorised to work are commonly exploited in the labour sphere, despite assurances that such persons are protected under labour law. This, together with the occupational hazards of the work Venezuelan migrants typically engage in, increase the vulnerability of Venezuelan migrants in the industrial relations context in Trinidad and Tobago.

1 Ibid, Appendix VI.  
2 Convention on the Rights of a Child, Art 32(1).  
3 Children Act 2012, s105.  
4 Venezuelan Migrant Registration Policy Gets Green Light’ (Office of the Prime Minister Republic of Trinidad and Tobago, 11 April 2019) < <https://www.opm.gov.tt/venezuelan-registration-policy-gets-green-light/>>

### (iii) Housing and Food Security

As was revealed in the FOL-UWI IACHR Hearing, many Venezuelan migrants in Trinidad and Tobago lack adequate housing and basic amenities. This is confirmed in the FOL UWI Migrant Survey. They typically live in cramped, overcrowded conditions, which are often catalysts for other abuses.

Food security is precarious, particularly in the current context of the Covid-19 pandemic, where employment opportunities have also dwindled. During the early stages of the pandemic, the government provided grants to nationals as an emergency measure to buffer salary losses and rental challenges. However, Venezuelan migrants, even those accepted as refugees, were not eligible to receive those benefits. This contravenes the provisions of the 1951 Refugee Convention not to discriminate in terms of social security benefits.

In the FOL-UWI IACHR Migrant Hearing, it was reported that 40% of the Venezuelans with dependents rented a room only, and over 70% said their accommodation offered no privacy<sup>1</sup>. For example, families with minor children may live in congested conditions sharing a bedroom or sleeping area with unrelated people. Priya Kissoon, a presenter, noted: “A mother and child I visited took turns sleeping on the floor of the bedroom so their roommate could sometimes have the bed. In another circumstance, there were 11 people, including four children, in an apartment sleeping on mattresses in the corridors and living room.” In such conditions, children are exposed to conditions of severe social and material stress and risk of abuse. While the IOM found that 2.65 per cent of the women inside family groups they surveyed were pregnant, critically, children were pregnant in 20 per cent of those cases<sup>2</sup>. The link between inadequate provision for housing and the rights of the child are obvious.

1 IOM Draft Report, ‘Monitoring Venezuelan Citizens Presence: Trinidad and Tobago Round I: September 2018, [https://reliefweb.int/sites/reliefweb.int/files/resources/DRAFT\\_TT\\_REPORT\\_SEPT2018\\_201810291833.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/DRAFT_TT_REPORT_SEPT2018_201810291833.pdf), p. vii  
2 Ibid, p v.





## Judicial and Law Enforcement Responses to Asylum, Deportation and Detention

The failure of the Immigration Act and the State to incorporate relevant international norms to treat with migrants and more particularly, those who seek refugee status, or asylum, has impacted the courts negatively, particularly with regard to deportation and detention. As established earlier, where there are gaps in existing legislation as is the case in Trinidad and Tobago, treaty norms should be acknowledged. However, Trinidad and Tobago courts, especially Magistrates' courts, have generally failed to do so when addressing issues that relate to migrants and refugees.<sup>1</sup>

Until very recently, there has been little acknowledgement or awareness in the courts and law enforcement authorities that migration and asylum regimes must be enveloped within a human rights framework. Consequently, uncertainty, disconnect and incoherence permeate the administrative and judicial systems that confront Venezuelan migrants which, in turn, exacerbate human rights violations.

### 4.1 Magistrates Decisions on Deportation and Migrant Issues

The lack of awareness of international obligations displayed by the State filters down to all avenues of law enforcement, the Immigration department, the police, the judiciary and more recently, even the Coastguard. However, given that Venezuelan migrants entering illegally commit summary offences which are heard in the Magistrates courts, a fair amount of such cases have been heard in these courts. Such cases typically result in fines, detention or deportation. Since magisterial decisions are unwritten and summary in nature, it is not possible to evaluate adequately the reasoning behind these decisions and sentences. However, sentences are available and magistrates' pronouncements are sometimes reported in the newspaper, by their attorneys, or by the migrants themselves. A pattern of inconsistency has already been discerned in relation to magistrates' sentences.

In deportation hearings, there have been persistent complaints from attorneys and migrants that many magistrates seem unfamiliar with international refugee protections and unaware of the relevant Conventions that could apply. There are reports of magistrates saying that "they do not know what asylum means", thereby sentencing migrants automatically to jail.<sup>2</sup>

In addition, sentences have been inconsistent and often disproportionate. Some migrants are fined, with little possibility of bail. Fines display huge differences with one Magistrates' Court noted as particularly draconian, meting out much higher fines than other courts.<sup>3</sup> Others are imprisoned, or deported. With regard to the reported inconsistencies in Magistrates' sentencing of migrants and asylum seekers in relation to breaches of the Immigration Act, the wide discretion in sentencing is noted. A variety of factors may be considered in their decision making process such as whether the migrant is a first time offender, or whether he or she has previous convictions for similar or other offences, in this case, deported and returned to Trinidad and Tobago. If a magistrate is informed that the migrant is an asylum seeker, or holder of a UNHCR card, it may/ should also play a part in the decision making process as it relates to deportation. However, the complaints by the LWC and UNHCR about the unpredictability of this approach is to be recalled. Despite the agreement with the state, this is not always the route taken. In sum, the strict rules of the Immigration Act continue to be applied without interrogation, even though *prima facie*, they breach international standards on non-refoulment, deportation and non-detention. Other stakeholders compound the opacity and negative impact of the judicial process on Venezuelan migrants. This is seen from the first point of contact by the migrant with law enforcement. Reported accounts of the police tearing up asylum certificates which are supposed to offer protection from deportation, seizing passports and charging recognised refugees with illegal entry are particularly egregious. Operating procedures agreed with the UNCHR are ignored with impunity. Policymakers have even made statements that the State has not ratified the 1951 convention, when it has. This was aired in the FOL-UWI IACHR Migrant Hearing.<sup>4</sup>

Magistrates' courts work in close collaboration with the police and in deportation matters, with the immigration department. Similarly, immigration officers and the coastguard are intimately involved in regulating and supervising the migrant phenomenon. With no refugee laws in place, it is unclear whether police officers, immigration officers, the coastguard, or even ministry officials are aware of the state's international obligations, or agreed procedures. Certainly, such personnel are generally unaware of the complex legal considerations that exist and often are confused about seemingly conflicting objectives. On the one hand, for example, there are public policy statements about humane treatment and on the other, public demands from the Government and the public to deport Venezuelan migrants. There is need for more training and sensitization.

Since the advent of the Covid-19 pandemic, hearings are being done at police stations instead of magistrate courts. If the matter is adjourned, the migrant is placed into custody either at the prison, or detention centre. If the migrant is granted bail, their attorneys may represent them in court without having the migrant present in order to limit the amount of persons at the court at one time. COVID has put a halt on trials for these matters, which only contributes to delays and backlogs.

The enduring inconsistencies and uncertainties underline the arbitrary and inadequate judicial framework that oversees migrants and asylum seeker issues and ultimately impact negatively on their rights and protections. A clear, purpose-directed policy, or hard law is required to inform the judicial system.

### 4.2 High Court Decisions and Judicial Review of Deportation and Related Migrant Issues

Of more value in terms of analyzing judicial opinion on the issue of legal standards for migrants and asylum seekers, is the burgeoning jurisprudence in the High Court, due to proceedings challenging deportation, detention and related orders. Such cases have been slow in coming, perhaps due to the newness of the Venezuelan migrant phenomenon and the unfamiliarity in the legal fraternity, with the relevant international law norms and expectations when measured against domestic laws and practices pursuant to the Immigration Act. This is the first largescale migration/ refugee situation that Trinidad and Tobago has faced.

Persistent advocacy, awareness and training has led to increased capacity of attorneys in international law and migrant/ refugee issues and a willingness to represent Venezuelan migrants. For example, since 2014, the Faculty of Law, UWI, St. Augustine has been attempting to fill the lacunae in knowledge on refugee and migrant law, particularly, the state's obligations and appropriate attitudes for adoption. It has engaged in legal capacity building, sensitising and legal training for attorneys-at-law, NGOs, immigration officers the police and other State agencies on such refugee and migrant matters<sup>1</sup>. Despite this, one attorney working in the area suggests that many lawyers who are retained on behalf of or by asylum seekers are often not trained or skilled to deal with such specific matters adequately.<sup>2</sup>

The cases emerging before the High Courts are mainly habeas corpus proceedings for the release of migrants in detention and therefore deprived of their liberty and preparatory judicial review proceedings. Judicial review of immigration decisions are difficult cases, given the latitude given to immigration authorities generally in administrative law. The absence of clear refugee legal principles in the domestic sphere and the uncertainty about the scope and justiciability of international law obligations even in the judicial sphere, compound this difficulty. The fact that the most protective standards come from policy and not hard law, is problematic for a court of law. Yet, it is judicial review proceedings that are likely to see a more thorough examination of the applicable rights and protections to which asylum seekers, refugees and migrants are entitled and an assessment of the state's obligations toward them.

<sup>1</sup> FOL-EU Project – Elevating Human Rights in Trinidad and Tobago – Training Workshops on Refugee Law in Trinidad and Tobago - Friday 20th-Saturday 21st May, 2016. Two training workshops were held in conjunction with the European Union, the Living water community and the UNHCR; National Refugee Symposium, June 20th, 2018, Convocation Hall of Justice, POS, as part of the FOL EDF project - Strengthening Trinidad and Tobago's Human Rights Capacity through Innovative Legal Education Delivery'; Alina Doodnath, 'Attorney – TT Aligning with US to Clamp Down on Refugees', Loop News, June 18, 2018, <https://www.looptt.com/content/attorney-tt-aligning-us-clamp-down-refugees>  
<https://sta.uwi.edu/law/newsfeatures/RefugeeLawPanel.php> . <http://www.looptt.com:8080/content/attorney-tt-aligning-us-clamp-down-refugees>. The Faculty of Law UW's International Human Rights Clinic also researched and conducted advocacy activities on Refugees and Migrants. The Faculty also conducted a public hearing before the IACR on May 8, 2019 on Venezuelan migrants.

<sup>2</sup> The Faculty of Law, Interview with the Head of Chambers, Allum Chambers, Mr. Rajiv Persad, (10 September 2020).

<sup>1</sup> International Human Rights Clinic – Faculty of Law, UWI, St. Augustine and Family Planning Association of Trinidad and Tobago, 'A Hearing on Reports of Violations of Human Rights of Venezuelan Migrants in Trinidad and Tobago' (Inter-American Commission on Human Rights, May, 2019).

<sup>2</sup> Revealed in the FoL IACHR Migrant Hearing after research and interviews with migrants and attorneys, supra, n 8.

<sup>3</sup> This is reportedly the Chaguanas Magistrates Court.

<sup>4</sup> Supra, n.8.

Thus far, the emerging jurisprudence before the High Court of Trinidad and Tobago has been ambivalent in terms of offering full relief to migrants seeking protection from the courts. However, there are encouraging signs. In the High Court there is an acknowledgement that Trinidad and Tobago has ratified the 1951 Refugee Convention and a growing recognition of the need to apply international standards, at least consistent with expressed policy, such as the Refugee Policy. The extent to which the court will adhere to contemporary public international law interpretations which permit approaches more favourable to ratified treaties where legislative gaps exist is still unclear, but these are welcome signals.

For example, in a habeas corpus matter heard on September 26, 2020,<sup>1</sup> it was established that Venezuelan migrants could not be legitimately held in unauthorised quarantine centres, in substitution to lawful detention spaces. This was in response to a developing pattern in which arriving migrants were being housed in the coast-guard barracks. The application was filed for Ms. Yaeldeis Zaray Honores who was detained at the Chaguramas Heliport Quarantine Facility for over a month. The State acknowledged that the facility doubled as both a quarantine facility and a detention facility. The Court ruled that the migrant Ms Honores was in fact being held unlawfully and costs were awarded to the Attorneys-at-Law for the Applicant therein. However, the case did not go into issues such as the appropriateness of detention itself, outside of the quarantine context, nor did it examine international standards, refugee or otherwise.

***Declining Jurisdiction to Review State Obligations in Habeas Corpus Matters***

In April, 2020, in *Mendez v Chief Immigration Officer and The Attorney General; Juarez v Chief Immigration Officer and The Attorney General*<sup>2</sup>, issues surrounding the deportation and detention of Venezuelan migrants were considered by the High Court. This was a habeas corpus case, but counsel for the applicants raised the applicability of the 1951 Refugee Convention. Both applicants in this case entered Trinidad and Tobago unlawfully and were being detained pending deportation under section 29(10) of the Immigration Act, which provides for such persons to be detained until arrangements have been made for their removal. The court was asked to examine whether the detentions and pending deportations were lawful since the applicants were seeking asylum. It was held that, despite both parties seeking asylum, since the applicants had breached section 18 of the Act by entering unlawfully, the deportation order would have been a lawful consequence. Accordingly, in the view of the court, the detention, which was premised on authority to deport, was lawful.

In *Mendez*, the High Court ruled, once again, that the issues of whether the 1951 Refugee Convention should be applied, or whether it was breached, were not questions to be answered in habeas corpus matters. It was seen, therefore, as a jurisdiction issue. According to the court, these were to be more properly left to judicial review proceedings. The court thus declined to examine such matters, stating:

It may also be open to challenge the making or carrying out of the deportation order in judicial review proceedings in the circumstances particularly where the applicants are claiming that they are refugees within the meaning of the International Convention and Protocol. But that is a separate claim where the court can examine the evidence being presented by the applicants carefully and consider the response of the State authorities. . . . In this matter it is not appropriate for the court to make any pronouncement on the status of the Refugee Convention and international instruments and what flows from that in relation to the applicants. That is for another day if other proceedings are pursued<sup>3</sup>.

It is questionable whether the state's international law obligations are precluded from the purview of the court in habeas corpus proceedings to determine whether detention is lawful. However, the issue is to come squarely before the court in future judicial review proceeding. This will give an opportunity to examine the view of the *Mendes* court.<sup>4</sup>

In a later case, *Machado v Chief Immigration Officer and Attorney General of Trinidad and Tobago*,<sup>1</sup> heard in May 2020, the issue of Venezuelan migrants in detention, pending deportation, was once again examined. The case gave hope that the case law would move closer toward the state's international law obligations in its extensive coverage of the 1951 Refugee Convention and the Refugee Policy. However, it was false hope as a similar result to *Mendes* was obtained, albeit with somewhat contradictory reasoning.

In *Machado*, the question as to whether the appropriate remedy to challenge the decision of the Chief of Immigration to detain the applicant was via habeas corpus or judicial review proceedings, was once again addressed. The High Court ruled that the appropriate relief was through judicial review proceedings. Notwithstanding, Mohammed J, in an obiter statement, reasoned that the deportation would still have been lawful, merely because of the discretionary power given to the Chief of Immigration under the Immigration Act. He made no attempt to consider whether the provisions of the Act were in itself unlawful, given that they contradict international standards and despite recognising, at least formally, the applicability of the 1951 Refugee Convention in Trinidad and Tobago. He said:

. . . there is an existing valid deportation order against the Applicant under which the Chief Immigration Officer can have the Applicant deported again from the country. There is no provision that the Chief Immigration Officer must commence another special inquiry to determine whether deportation is necessary. The Chief Immigration Officer has the discretionary power to deport the Applicant under the original order: section 29(6)(c). Therefore, even if the Applicant had approached the Court by way of leave for judicial review, it is likely that his application would have failed as a result of the existing deportation order made against the Applicant on 28 August 2018<sup>2</sup>. [my emphasis].

Notwithstanding that these were habeas corpus proceedings and not judicial review, the court accepted the legality of asylum applications pursuant to the 1951 Convention. However, it is submitted that the prediction, at para 103, albeit obiter, that judicial review would fail because of an existing deportation order, is flawed because it fails to appreciate the appropriate international standard for asylum seekers who enter a country illegally.

Curiously, although proceeding by way of habeas corpus, unlike the *Mendez* court, Mohammed, J in *Machado*, did accept the applicability of the 1951 Refugee Convention to the determination of the case. Where he seemed to go wrong was in not fully appreciating the appropriate principles that apply and more generally, accepting that where there is no applicable domestic law, as is the case in Trinidad and Tobago, international obligations must fill the void.

*Machado's case*<sup>3</sup> is coloured because the migrant in question also had criminal charges for cannabis possession and firearms. Nevertheless, it gives a good indication of the emerging recognition of international treaty obligations with respect to asylum seekers. The Court was asked to consider the legality of detention and deportation where a migrant was seeking asylum in a habeas corpus proceeding for the release of the applicant. It was suggested that the applicant had applied for asylum and deportation would deny him the benefit of receiving a decision to have his refugee claim verified by the appropriate body, the UNHCR/ LWC, in keeping with the Refugee Policy. It was also submitted that the actions of the Chief Immigration Officer were ultra vires the United Nations High Commissioner for Refugees "Guidelines on the Applicable Criteria and Standards relating to the detention of Asylum Seekers and Alternatives to Detention," pursuant to its mandate as contained in the Statute of the Office of the United Nations High Commissioner for Refugees in conjunction with Article 35 of the 1951 Convention and Article II of its 1967 Protocol.<sup>4</sup>

<sup>1</sup> Unreported, Case Notes - 26th September 2020, (titled CV 2020-02800) Appeal from a Habeas Corpus application hearing – Re Zaray Honores, before the Honourable Justice Quinlan-Williams. Acknowledgement is given to Cristin J. Williams, the attorney in this case, who provided the case notes.

<sup>2</sup> *Mendez v Chief Immigration Officer and The Attorney General; Juarez v Chief Immigration Officer and The Attorney General* [2020] TT HCJ CV 2020 – 1082/ CV 2020 – 1083, decided April, 2020.

<sup>3</sup> *Ibid*, at para 13.

<sup>4</sup> The attorney in the *Mendez* case, Cristin J. Williams, is to file a judicial review claim, joined with several other applicants, on October 21, 2020. Interview with Cristin J. Williams on September 27, 2020.

<sup>1</sup> *Machado v Chief Immigration Officer and Attorney General of Trinidad and Tobago* [2020] TT HCJ, Claim No. CV2020-01118, decided May, 11, 2020.

<sup>2</sup> *Machado*, supra, n 394, at para 103.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*, at para 46.



The Court acknowledged that while the Immigration Act was the law in question, it did not provide for asylum seekers or refugee status. It further noted that the process of seeking asylum was left to the UNHCR and LWC as provided for under the Cabinet approved Refugee Policy. Importantly, the court accepted the authority of this process to determine refugee status under the 1951 Convention, which it clearly regarded as binding in this context<sup>1</sup>. It further accepted the protection from deportation due to an asylum seeker. Mohammed, J said:

[49] According to the 1951 Convention which was acceded to in Trinidad and Tobago on November 2000, Article 31 of the 1951 Convention specifically provides for the nonpenalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.

[50] Furthermore, the principle of non-refoulement constitutes the cornerstone of international refugee protection which is provided for in Article 33 of the 1951 Convention. This principle prohibits countries from expelling or returning a person, in any manner, whatsoever, to a place where his life or liberty would be endangered on account of his race, religion, nationality, membership of a particular social group or political opinion. However, the protection against refoulement under Article 33(1) of the 1951 Convention applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A (2) of the 1951 Convention and does not come within the scope of one of its exclusion provisions<sup>8</sup>. Asylum-seekers are protected from forced return to their country of origin from the time they express a fear of return until a final decision on refugee status is determined by UNHCR.<sup>2</sup>

Citing the Advisory Opinion, the Court noted the protections offered to asylum seekers:

“Asylum-seekers are protected from forced return to their country of origin from the time they express a fear of return until a final decision on refugee status is determined by UNHCR.”<sup>3</sup>

In this particular case, it was found that the migrant in question did not have the protection of the UNHCR card, which had expired<sup>4</sup>. As such he was deported due to his criminal charges. The dicta of the court on the larger question, however, remains pertinent<sup>5</sup>.

This larger question refers to the duty and jurisdiction of a State to assess and where appropriate, grant asylum, independently of the externally driven, voluntary UNHCR process. As discussed earlier, the obligations under the 1951 Refugee Convention with respect to asylum and non-refoulement, are placed on the State, not external actors and cannot be abdicated by the state, even where the UNHCR is the vehicle used for the asylum process. Moreover, the UNHCR driven process is part of a policy, not law, making the State’s omission even more glaring. It is submitted that the courts, in merely accepting this policy process and declining to interrogate the substantive decisions on refugee status, limited their own supervisory jurisdiction to interrogate the State’s process and action, measuring them against the international standard that it purported to accept and apply. While the current voluntaristic asylum model is premised on registration with the UNHCR, it is reiterated that the State’s obligations go beyond this. To reiterate, these are questions which go to the rule of law.

1 Ibid, “[59] The jurisdiction of determining whether an applicant is a refugee lies with the UNHCR and not within this Court. Accordingly, the Court will not determine whether the Applicant is a refugee for the purposes of the 1951 Convention.”  
2 Ibid, paras 49 and 50.  
3 Ibid, at para 51.  
4 There is no evidence adduced of any ongoing asylum claim made by the Applicant to the UNHCR. Therefore, the Chief Immigration Officer is authorised to act in accordance with the Immigration Act. In that regard, the Deportation Order made on 28 August 2018 cannot be said to be negated by the Applicant’s alleged registration with the UNHCR as it remains valid and in force.” Ibid, at para 59.  
5 The applicant had entered Trinidad and Tobago illegally which was a breach of section 18 of the Immigration Act. He was deported and then re-entered while the order was in effect as it had not been cancelled, in breach of section 29 (2) of the Act, which permits deportation. Counsel for the defendant argued that the deportation order was in breach of Trinidad and Tobago’s international obligations.

***Illegal Entry does not Preclude Asylum Seeking***

Moreover, as discussed *infra*, the right to seek asylum is not prejudiced because of the illegal +entry of a person seeking it. A person expressing a fear of return and claiming asylum must be given an opportunity by the State for this claim to be assessed fairly, even if he or she is an illegal entrant subject to a deportation order. The State cannot abdicate this responsibility merely because a voluntary procedure through the UNHCR is available, more so in circumstances where the applicant had been assessed and registered, but the time had lapsed by a few months.

It is submitted that the State could have avoided breaching its obligations had it assessed the applicant’s claim of asylum and refused asylum on grounds of national security and the like. However, it did not do so.

*Machado*<sup>1</sup> also gives more insight as to current judicial opinion on detention, addressing the legality of detention as well as the reasonableness of detention pending deportation. Justice Mohammed of the High Court found that a migrant charged with criminal offences such as drug possession and awaiting trial is not prevented from being deported. The fact that the applicant’s UNHCR card had expired deprived him of the special protection status from deportation as an asylum seeker that the Court accepted. The Court accepted that the Immigration Act gave the authority for detention pending deportation and this must be reasonable and proportionate so as not to violate the right to liberty. The Chief Immigration Officer had to exercise diligent efforts to expedite the hearing in this regard. In the instant case, given the Covid-19 pandemic and subsequent delays, 3 months was not unreasonable.

[88] Accordingly, when all of the above factors are considered in the round, the Court is of the view that the Applicant’s continued detention as at the date of the filing of the Application for a Writ of habeas corpus is lawful and reasonable at this time. The detention is for the purpose of effecting his removal from Trinidad and Tobago and it has not remotely been for a period which could be said to be excessive or disproportionate even though the Chief Immigration Officer is delayed in effecting removal at this moment in time because of the existing circumstances faced by most, if not all, countries of the world.<sup>2</sup>

While important judicial notice of the existence of the ratified 1951 Refugee Convention in Trinidad and Tobago, the case does not go far enough in assessing the obligations of the state. It merely accepted domestic law as is, and did not proceed to assess domestic law in view of the state’s international treaty obligations. Moreover, it paid no attention to the fact that the domestic framework was in fact, based on a policy and the legislation itself, did not measure up to the standards as established in the ratified treaty.

As was the case in considering the issue of deportation, the court did not apply the appropriate principles of refugee law, although purporting to accept the 1951 Refugee Convention as binding. It further subjugated the authoritative character of the Convention to a mere, non-binding policy. Had it applied the relevant international standards, the conclusion would have been that detention is not appropriate for asylum seekers, except where such persons fall under the exceptions to the 1951 Refugee Convention.

The *Machado* case was appealed with little emphasis on the obligations relating to asylum seekers. In the Court of Appeal<sup>3</sup>, the panel found that the legitimate expectation of the Applicant therein could not arise as he had signed a deportation order and was subsequently deported. Upon his re-entry into Trinidad and Tobago, the legitimate expectation was lost. Consequently, both the High Court and the Court of Appeal used inappropriate standards to assess Mr. Machado’s protection against detention and deportation.

Accordingly, in interpretations of domestic law which ignored how international obligations from ratified treaties are to be applied in circumstances where there is a void in law, the respective courts took a literalistic and it is suggested, limited approach.

1 Machado, *ibid*.  
2 Ibid.  
3 Unreported Court Notes- Jose Royxander Machado -and- The Chief Immigration Officer & The Attorney General of Trinidad and Tobago, Court of Appeal, P108 of 2020, 26th September 2020. Acknowledgement is given to Cristin J. Williams, the attorney in this case, who provided the case notes.

**Emerging Proportionality and Human Rights Principles in Detention Cases**

Notwithstanding the above limitations, the Machado case gives some insight as to how the Court might view applications for judicial review of Venezuelan migrants who have been detained for lengthy periods, reportedly 3 years or more. Where due diligence cannot be shown, these are unlikely to be viewed as proportionate.

In an earlier 2017 detention case concerning a Nigerian migrant, *Henry Obumneme Ekwedike v Chief Immigration Officer*, Gobin J, seemed to favour a broad approach to human rights in assessing detention cases, but this thinking has not been fully expanded by later courts. In this important judgment, which established high standards of due process, she expressed doubt that the power to deal with a person seeking an extension of a permitted stay upon expiry of a work permit under s9(3), includes a power to issue a rejection order resulting in detention, thereby exposing the individual to the loss of his/her liberty. Such an interpretation of the Act would be to arrest and detain any migrant who is trying to comply with the country’s immigration laws<sup>1</sup>. This precedent however, applies to migrants who have permits to reside and work in the country, and it is doubtful that it will be extended to those who do not possess the relevant documentation.

However, the broader concerns about the caution with which the courts must approach detention with its attendant abrogation of the right to liberty, is of universal application. Her judgment also clearly suggests that migrants must also enjoy such rights. In prophetic dicta, she cited the inadequacy of the Immigration Act, as had been noted by previous courts, and said:

36. The time for modern legislative machinery which clearly defines the powers and functions of the Chief Immigration Officer and Immigration officers and which enables them to deal firmly, fairly and humanely with people is long overdue. The challenges posed by increased illegal immigration, human trafficking and a phenomenon which we may well anticipate, of growing numbers of refugee arrivals, make it imperative in my humble view that those who are charged with the power and the responsibility to address the defects in the legislation do so sooner rather than later.<sup>2</sup>

Notwithstanding the adherence to appropriate principles of reasonableness and proportionality, the cases thus far have not been willing to interrogate broader issues of detention for migrants in general, or as a first principle. It appears that detention as a recourse for illegal migrants is acceptable, once not unreasonable due to periods of time. This is not in keeping with contemporary norms relating to migrants, documented or undocumented, which militate against the deprivation of liberty and underline that migration is not a criminal offence. Where migrants are placed in jails, as is currently the case in Trinidad and Tobago, this is even more damaging to fundamental rights to liberty and international standards against detention as a routine course of action for host states.

**Future Considerations for the Courts in Migrant Cases**

The cases demonstrate a reluctance to influence law makers to amend the law to cater to refugee seekers, by condemning it. Instead, the courts use the current law to justify the breaches of the fundamental international principles of non-refoulement and non-detention once the detention period is not unreasonable. As it stands neither refugees, nor asylum seekers have much protection, even from the courts, when they enter Trinidad and Tobago illegally or when they overstay their time, as they would simply be classed and treated as illegal migrants. Despite the world recognizing the Venezuelans as refugees and the international principles that offer protection for refugees and migrants in need of protection, without the enactment of domestic legislation, or the amendment of the Immigration Act to acknowledge refugees, Venezuelans asylum seekers and even refugees would be forced to continue living in fear and in limbo.

Yet, in the face of the overwhelming evidence of international law and human rights principles, it is evident that there is a need to re-evaluate the law surrounding immigration and for the courts to more effectively address the rights, entitlements and humanitarian concerns of refugee seekers and migrants within Trinidad and Tobago.

In applying the strict rules of the Immigration Act and giving it precedence over international obligations despite its shortcomings, the State has breached and continues to breach the international principles of non-refoulement and non-detention.

Judicial review actions are available to challenge decisions, or even the failure to act, in relation to Venezuelan migrants. Decisions regarding deportation and detention are especially important, including decisions made within the special inquiry process under the Immigration Act. Such judicial proceedings offer some hope for a full examination of the 1951 Refugee Convention and related treaties with regard to asylum seekers and the state’s obligations with respect to them. Human rights obligations with regard to migrants in general are also to be explored. It is hoped that a more sensitized legal fraternity will produce better outcomes in future proceedings. These must be tied to international legal standards and the contemporary international law jurisprudence on state obligations owed as a result of ratified treaties. A close examination of the fundamental norms embodied in these treaty instruments is also needed.

It should be noted that judicial review proceedings are not appeals, but proceed on points of law and the exercise of discretionary power and indeed, in several areas under the Immigration Act, the jurisdiction to appeal immigration decisions is ousted. The ouster clause will not easily stand, if at all, in the courts, however, given modern principles of administrative law which give the courts an inherent jurisdiction to supervise, as was reiterated in *Henry Obumneme Ekwedike*<sup>1</sup>. It is the case that the Immigration authorities still have wide discretionary power over all migrants.

In general, the decisions of magistrates are also subject to appeals in the High Court, with leave. Constitutional motions may also be filed in relation to migrant matters, for example, breach of the right to legal representation, or a fair trial.

The discussion earlier in section 2.2. of this Analysis is to be recalled. There are already several existing routes for the Trinidad and Tobago courts to locate binding international law norms protecting the right to asylum and in particular, the principle of non-refoulement. These include obligations toward ratified treaties, customary international law, human rights principles against torture, inhumane punishment and the right to life entrenched in the Constitution and even the doctrine of *jus cogens*

Important considerations in any future judicial review proceedings would be the precedents of *Boyce*<sup>2</sup> in which the CCJ found a legitimate expectation to international obligations, at least in relation to due process; and the *Lewis*<sup>3</sup> case, which similarly identified due process obligations in international law. These principles were also identified as residing in the Constitution. Further, the reasoning in *Naidike*<sup>4</sup>, which allowed the Privy Council to bind Trinidad and Tobago to its international law obligations in relation to the CRC and *Maurice Tomlinson*<sup>5</sup>, where the CCJ identified customary international law as an aspect of the common law, are of importance. Similarly, the CCJ decisions in the *Mayan Alliance Case*<sup>6</sup>, and *Myrie*<sup>7</sup>, in which the CCJ outlined the binding nature of international agreements in a case concerning the original jurisdiction of the court, are highly persuasive.

The matter of the deportation of 103 migrants in September 2020, despite a court order to stay deportation, was referenced earlier. This is an issue also ripe for judicial review, given the seriousness of its rule of law implications. It goes to the heart of the supervisory jurisdiction of the courts and the separation of law doctrine, large issues that must be confronted by the judicial system in the future. Notably, the courts have not yet asserted jurisdiction to determine substantive questions such as who should qualify for refugee status, or whether the State could be mandated to grant refugee status or even implement any migrant or asylum process. Suffice it to say, the judicial authority has thus far been exercised very sparingly with regard to migrant and asylum matters. This has far-reaching implications for the general protection of migrants and asylum-seekers and the extent to which they can rely on the courts to secure their rights.

While there is need for much greater and in-depth jurisprudential development, it is at least evident that the core principles relevant to migrants and asylum seekers - non-refoulement and non-detention/non-penalization in Trinidad and Tobago can no longer be consistently breached in Trinidad and Tobago with impunity.

1           Supra, n 406.  
2           Supra, n 22.  
3           Supra, n.177.  
4           Supra, n. 195.  
5           Tomlinson, supra, n 102.  
6           Supra, n. 21.  
7           Shanique Myrie v State of Barbados, [2013] CCJ 1 (OJ) (R).

1           Henry Obumneme Ekwedike v Chief Immigration Officer and the Attorney General (2017) CV2017-02148. High Court of Justice, decided 11 th August 2017, Madam Justice C. Gobin.  
2           Ibid, at para 36. She noted that calls for amendment had also been made by Kokaram J, in CV 02258 of 2016 Christopher Odikaqbue and in Naidike v. Attorney General of Trinidad and Tobago [2004] UKPC 49.



## The Faculty of Law, UWI Venezuelan Migrant Survey -A Case Study on 100 Refugees

This part of the Study presents methodology, findings, and analysis of recently conducted research on a primary target population of Venezuelan migrants in Trinidad and Tobago (T&T) with refugee status. The migrant specialist designed and administered a 75-question survey instrument to 100 respondents in order to gather data that could offer a snapshot view of Venezuelan migrant experiences in Trinidad and Tobago. As explored further in the analysis, the survey revealed important aspects of that population and an urgent need for support in the areas of education, employment, legal status (protection), cultural integration, and overall mental health.

### METHODOLOGY AND FINDINGS

#### Methodology

Interviews were conducted between July 4 and July 9 2020, 8 am - 4pm and 6pm to 9pm; on the phone and via internet (*with families of prisoners*), and in person at the homes and jobsites of the migrants (*bars, construction sites, supermarkets, brothels and offices*). The interview locations covered the full geographic scope of the island and included: St Augustine, Tunapuna, Siparia, San Juan, Arima, Sangre Grande, St Joseph, St James, Maraval, Arouca, Curepe, Couva and San Fernando.

The survey instrument combined basic demographic questions with questions that assessed the Knowledge, Attitudes and Behaviours (KAB) of Venezuelan migrants regarding their life experiences in Trinidad and Tobago. The survey has seven sections, including quantitative questions about demographic information and more qualitative KAB questions about legal status, cultural integration, and feelings about self-perception.

In the **demographic information section**, basic data about respondents' gender, age, geographic locations in Trinidad and Tobago, country of birth or migration, the number of months or years living in Trinidad and Tobago, marital status and family, employment, and health, was collected. Marital status and family questions focused on single parents, nuclear and other family types; pregnant women or expecting parents, children born in Trinidad and Tobago to migrant families; children who migrated with or without their parents and immigration status for child/children born in Trinidad and Tobago.

In the **legal status section**, respondents were asked to confirm their current legal status. Between 31st May-14th June 2019, The Ministry of National Security registered 16,523 migrants living in Trinidad and Tobago. Respondents were asked to confirm if they were registered or not. Questions about past and current arrests, fines, time spent in prison and deportation were asked to justify the breached laws by the State and to confirm how many migrants with refugee status are currently in prison or were arrested. Respondents were asked to reflect on any traumatic experiences they, their child/children or family members may have encountered while living in Trinidad and Tobago. Some of the categories for these questions included verbal, sexual, mental/emotional, financial/economic, or cultural/identity abuse. Other questions sought data about missing children/people, experiences of being trafficked or kidnapped, death, arrest, abuse and robbery.

The **education section** focused on respondents' level of education, the language barrier (Trinidadian English Creole and Spanish), children or families of the respondents who are registered, not registered or rejected at local schools, and reasons for not having access to education for their child, children and family members.

The **employment section** explored current and past employment status, types of jobs, the treatment of working migrants by their employers, job loss experiences and reasons for job loss. The health section focused on the current general health of the respondents, their child/children and other family members, access to medical care at government health facilities, and vaccination of migrant children.

The **health section** focused on the current general health of the respondents, their child/children and other family members, access to medical care at government health facilities, and vaccination of migrant children.

The **cultural integration** section focused on migrants adapting to their new life in the multi-ethnic cultural and religious life of Trinidad and Tobago. Migrants were asked to express their satisfaction or dissatisfaction with their current living situation, public hospitals, religious institutions, interaction with Trinidad and Tobago citizens, and public transportation. Further questions about integration included cultural and religious events, their views on feeling a sense of belonging in Trinidad and Tobago, as opposed to their home country, their relations with Trinidadian and Tobagonian friends/people, and recommendations about what would improve their lives.

The final part of the survey explored **feelings about themselves/self-perceptions**. Questions focused on respondents' sense of identity and the need for psychological support.

The qualitative findings outlined below offer a rich field of data on Venezuelan migrant experiences in Trinidad and Tobago. While more detail on these findings are presented in the analysis below, the importance of understanding the vulnerability of the migrant community as it is revealed in testimonial evidence concerning education, employment, the fate of children, legal status, and emotional well-being, is to be emphasised. As the Open Hand Initiative continues to develop workshops and various forms of support in Trinidad and Tobago, a clear understanding of obstacles faced by Venezuelan migrants is critical to developing various kinds of interventions and assessing those programs for validity and impact.

The **demographic profile** that emerged is evenly divided between men and women with a strong emphasis on people in the 16-30-year age range (*see Figures 1-4*). The findings revealed that the majority of Venezuelan migrants came from Tucupita. Tucupita is the capital city of the Venezuelan State of Delta Amacuro. Delta Amacuro consists almost entirely of swampy Orinoco River delta. All respondents arrived by boat. Some adults paid between \$300USD, others paid \$350USD. The fee per child is \$150USD or \$200USD depending on the boat.

#### Findings

The legal status (see Figure 9) questions revealed that 48 respondents (nearly half) did not register as migrants in Trinidad and Tobago by the Ministry of National Security in 2019. 45 people registered.

Additional data points relevant to this project include the following:

22 respondents with refugee status were arrested in Trinidad & Tobago (10 men and 12 women)

All 21 of 22 arrestees were required to pay a fine.

7 respondents with refugee status are currently in prison

Only one respondent (male) was dismissed

One respondent who holds refugee status is currently in prison (a 28-year-old male, father of 4) at the Immigration Detention Centre in Sangre Grande. He has been in prison for 1 year and 6 months

The amount of time spent in prison for the arrested respondents varies from two days to weeks and months and even more than one year

The findings for **education** revealed (see Figure 7) that 20 women and 25 men completed high school, 16 women and 3 men hold a BA degree, 2 women have an MA degree, 5 women and 8 men did not complete high school, 7 men completed trade school, 3 women and 1 man did not attend high school, tertiary level or trade school. 10 respondents preferred not to State their level of education.

The **marital status and family** category while intended as part of the basic demographic profile of the Venezuelan migrant community, nevertheless generated an extremely interesting set of data that merits consideration on its own. In this section of the survey, respondents revealed that 36 women and 33 men are single, 8 women and 11 men are married and 12 prefer not to say. Responses to these questions raised important additional findings that include the following:

1. 6 women are pregnant;
2. 8 men are expecting fathers;
3. 7 women do not know if they are pregnant;
4. 19 women have more than two children;
5. 17 men have more than two children;
6. 3 women have children born in Trinidad and Tobago;
7. 1 woman has been refused Trinidadian citizenship for her Trinidadian-born baby;
8. 25 respondents confirmed that their children are living in Trinidad and Tobago;
9. 9 women had difficulties registering their children at public schools;
10. 27 respondents never tried to register their children;
11. 27 respondents whose children/family members are not registered for public schools revealed various reasons for not registering-
  - i. The language barrier
  - ii. They are sometimes afraid of the rejection
  - iii. The public schools do not accept refugee/migrant children with no residence or citizenship
  - iv. They felt discriminated against because of their nationality
12. 80% of the children are at home;
13. 10% of teenagers are engaged in part time sex work, babysitting and cleaning;
14. 60% of the families live in an extended family;
15. 20% of the families live with friends and other migrants (shared rooms/facilities);
16. Some apartments have single rooms and two bedrooms;
17. Various families have between 5 to 11 people living together;
18. In-laws, cousins, aunties, uncles, children, friends and other family members share beds, clothing and bathroom facilities;
19. The rental of a one-bedroom apartments ranges from \$2000 TT to \$2500 TT per month, per family;
20. At least 50% of the respondents have experienced or know someone in their community, verbally/physically abused, robbed, arrested or trafficked.;
21. 90% of the respondents have been verbally abused in various situations and by various people- such as; their employer, a landlord, a relative/relationship, employees on their job-people in Trinidad and Tobago and other migrants q from other countries (see Figure 6 for an example of verbal abuse by a landlord);
22. 90% of the respondents have not reported verbal abuse to the police;
23. 50% of the respondents need support/help.

The **employment category** (see Figure 8) revealed that 8 women and 16 men are employed fulltime, 20 women and 5 men are employed part-time, 12 women from the employed part-time category are sex workers, while 18 women and 19 men are unemployed. The most popular job titles are mechanics, construction workers, office assistants, salesclerk, chefs and domestic workers (cleaners, babysitters). Findings also yielded the following data:

1. 20% revealed that their employer treats them worse than people from Trinidad and Tobago;
2. 30% revealed that they get less than the minimum wage for their employment (part time or fulltime);
3. 90% revealed that they have been refused jobs because of their nationality.

The health category (see Figure 10) revealed that 20% do not know their current health situation. In addition: -

1. 1 child and 1 adult are chronically ill;
2. 10% of respondents have been refused medical help from a public health facility due to the nature of their illness and not being a citizen of Trinidad and Tobago (cannot receive medicine or surgery)
3. 4 children are in need of vaccines;
4. 40% of respondents are afraid to access medical care.

The cultural integration (see Figure 11) category revealed that 80% of the respondents are satisfied with life in Trinidad and Tobago in comparison to present life in Venezuela. Along with this high overall satisfaction level, respondents shed light on additional, more specific aspects of cultural integration where they often faced barriers. Some notable data points include the following: -

1. 93% of the respondents are dissatisfied with the police force;
2. 60% of the respondents are dissatisfied with public health access;
3. 90% of the respondents are satisfied with religious institutions;
4. 93% of the respondents are satisfied with public transportation;
5. 80% of the respondents are dissatisfied with the treatment received from Trinidadian and Tobago citizens;
6. 90% of the respondents attend cultural events in Trinidad and Tobago;
7. 85% of the respondents agreed to the statement, "I feel like a part of Trinidad and Tobago.";
8. 80% of the respondents agreed to the statement, "I feel like a part of my home country.";
9. 93% of the respondents have selected more than three aspects (in three different categories) of Trinidad and Tobago's culture to which they respond most positively, with feelings of greatest integration. The most popular results were: -
  - a. Festivals: Carnival, Christmas, Divali
  - b. Music: Parang, Soca, Steelband
  - c. Religion: Roman Catholic, Rastafarian, Other (Christianity)
10. 80% of the respondents are Roman Catholic;
11. 5% of the respondents are Christians;
12. 93% of the respondents indicated an education, legal status and a job would make their life better in Trinidad and Tobago.

In the final category, Feelings About yourself/Self Perception (see Figure 12), 80% of the respondents revealed that their nationality, family and religion are most important aspects of their identity. Some additional self-perception responses of interest include the following: -

1. 27 women and 10 men feel depressed;
2. 6 women and 1 man are suicidal (5 sex workers are suicidal);
3. 4 women want mental health services or other psychological support;
4. 1 woman and 17 men are happy;
5. 20 women and 22 men are not happy;
6. 6 women and 6 men do not know if they are happy.



## Analysis

In this final section of the report, there was a need to step back a bit from the granular “trees” of the many points covered above and reflect briefly on the experiential “forest” that emerges from the rich data sets generated through fieldwork surveying. Rather than plough through all seven sections of the survey for analytic insights, it was found that many times data from one section, such as education, cross cut with data from other sections such as children, employment, and cultural integration. Consequently, the focus here will be on three cross-cutting areas that it is believed is most critical to understanding and supporting the Venezuelan migrant refugee experience in Trinidad and Tobago.

The Venezuelan migrant refugee community is, perhaps surprisingly, a well-educated cohort. More than half of the survey respondents have completed high school, and a solid 20% have completed a bachelor’s degree, with two women who have progressed to the master’s level. This suggests the value placed on education by the Venezuelan migrant refugees and indicates their capacity for employment beyond the level of trades, domestic work, and sex work.

At the same time, the children of Venezuelan migrants in Trinidad and Tobago are at risk of not achieving the same educational levels as their parents. Findings about the many ways in which children are excluded from schooling need to be reviewed and probed in greater depth to determine the extent to which education is meeting its responsibility to this population. The urgency of this issue cannot be underestimated because for children, school is the place they learn the local language most quickly and effectively, something that has a correlation with cultural integration and future employment success. Inversely, lack of educational access correlates with long-term failure to succeed in cultural integration as well as marginalization through neo-slavery day labour, sex work, and even human trafficking.

## Prisons & Criminal Justice

While 7% of the survey respondents are currently in prison, this number is significantly higher (detention statistics are not easily accessible but many immigrant prisoners including women and children are currently in prison in various detention centres). More than 20% of those surveyed had been arrested, forced to pay a fine, and spent time in jail ranging from days to one respondent who had been incarcerated for more than 18 months. This intersects in negative ways with material issues such as employment prospects and household finances, as well as more emotional-psychological issues like parenting, cultural integration, and self-perception. In this report, the focus is on a population that has refugee status, meaning that there are very strict guidelines for arresting, trying and sentencing persons in that socio-political category.

There is the need to probe deeper into the extent of refugee migrants’ wrongful incarceration in Trinidad and Tobago and urgent reforms, should be proposed that will not only alleviate needless and unlawful suffering by protected refugees, but also yield cross-cutting benefits in all the areas that are currently undermined by harsh experiences with the criminal justice system. Even addressing something as basic as language barriers that prevent clear communication between Venezuelan refugee migrants and law enforcement officers of all kinds has a transformative potential across a range of social vectors.

## Employment & Sex Work

Recurring themes in the interviews are the lack of access to education, legal services, health services, and work, which can lead very quickly to involvement in sex work, including among underage persons. Twelve minors who are not in school (for a variety of reasons) subsequently have become sex workers. Women and children are vulnerable to sex work and human trafficking, which impact not just the Venezuelan migrant refugee community but Trinidad and Tobago at large. Venezuelans who were registered by the Ministry of National Security between 31st May-14th June 2019, received a Registration Card which authorizes the holder to work legally in Trinidad and Tobago for one (1) year. This card has now expired and only informal assurances of extensions have been made.

There is therefore a risk of further victimization through human trafficking. v

## Educational Access

Figure 1.

## Overall Age Distribution

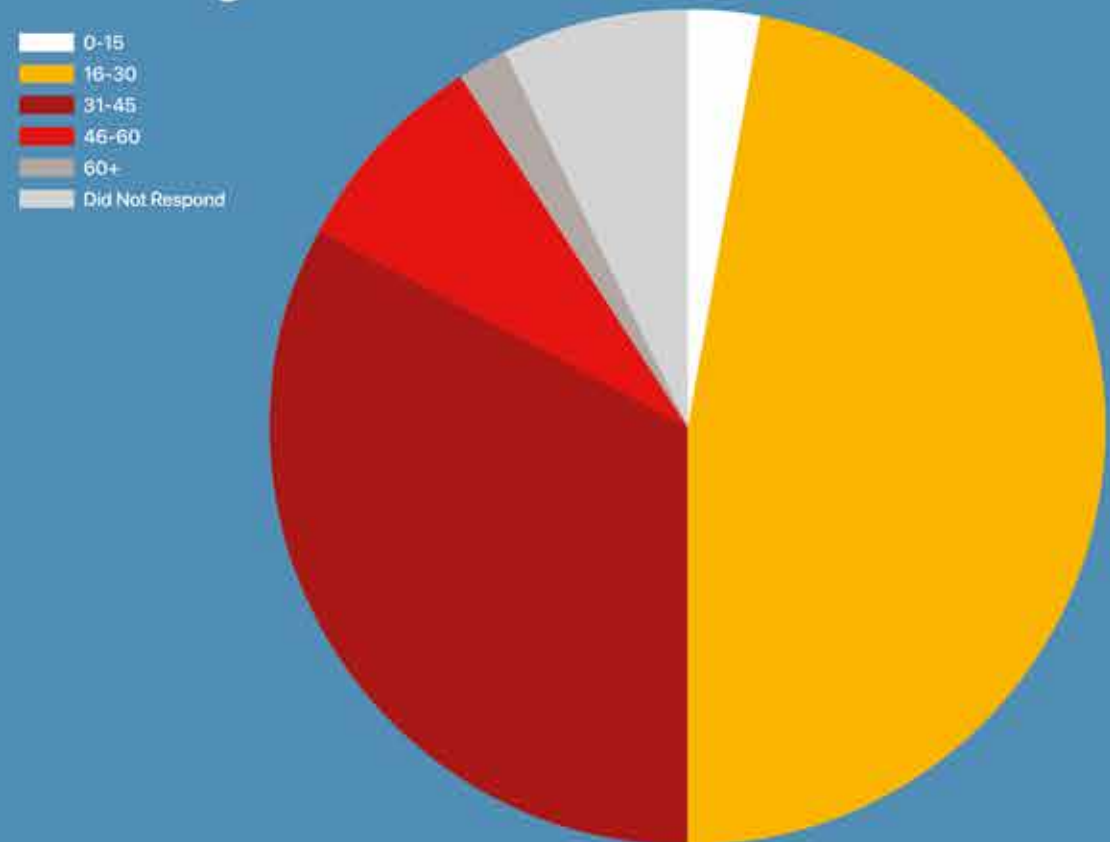


Figure 2.

## Age Distribution Male

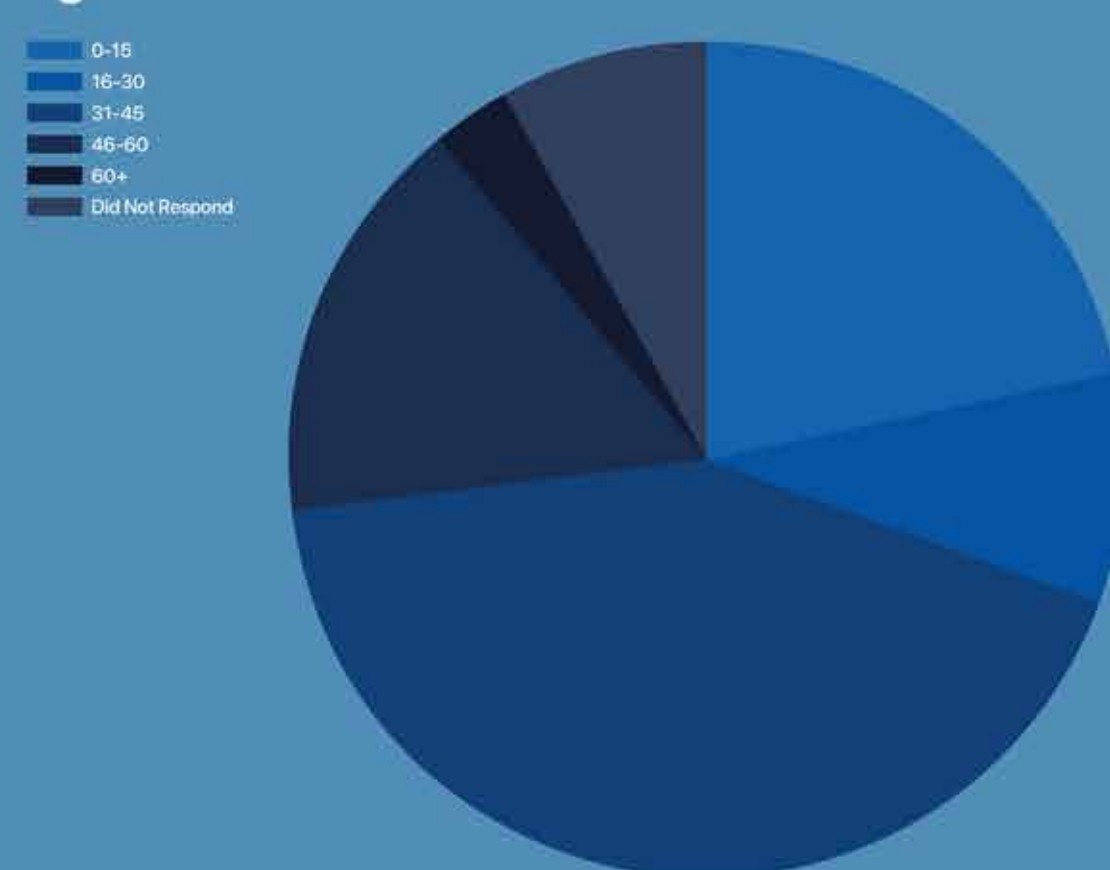


Figure 3.

## Age Distribution Female

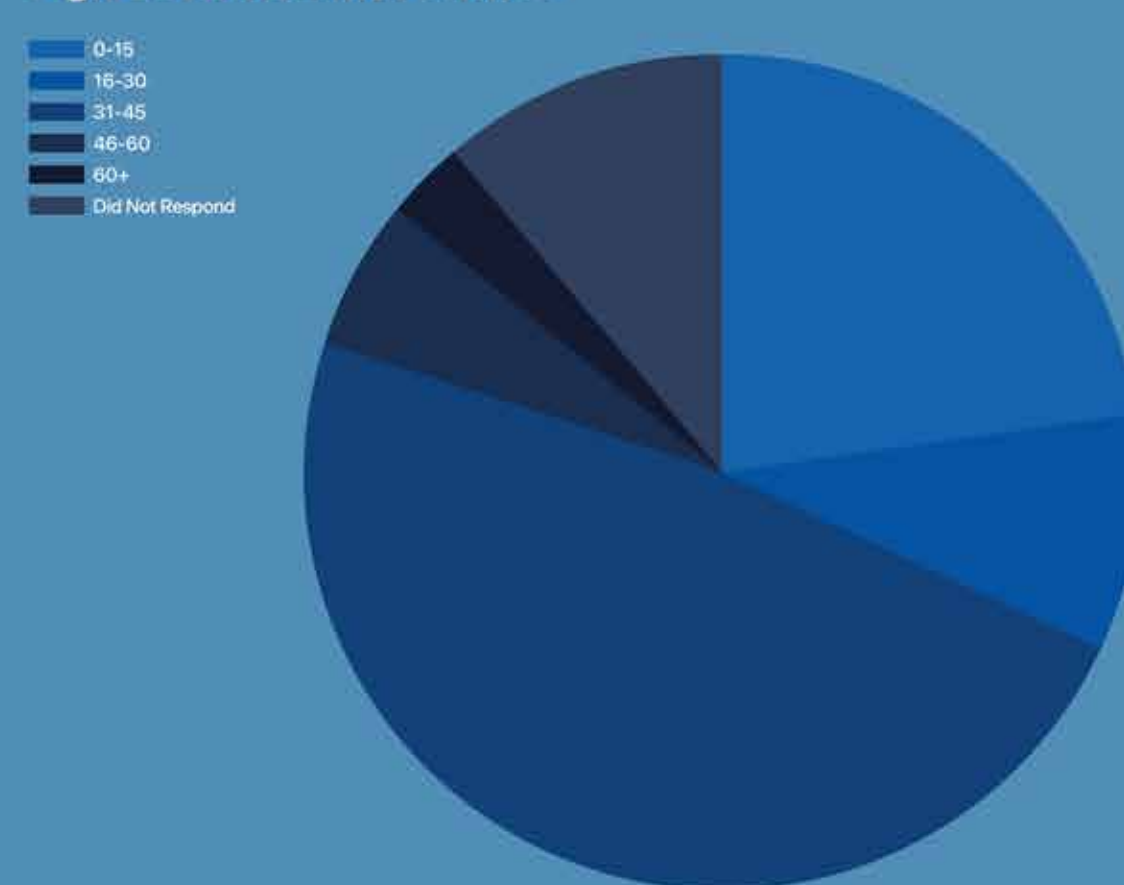


Figure 4.

## Gender Distribution

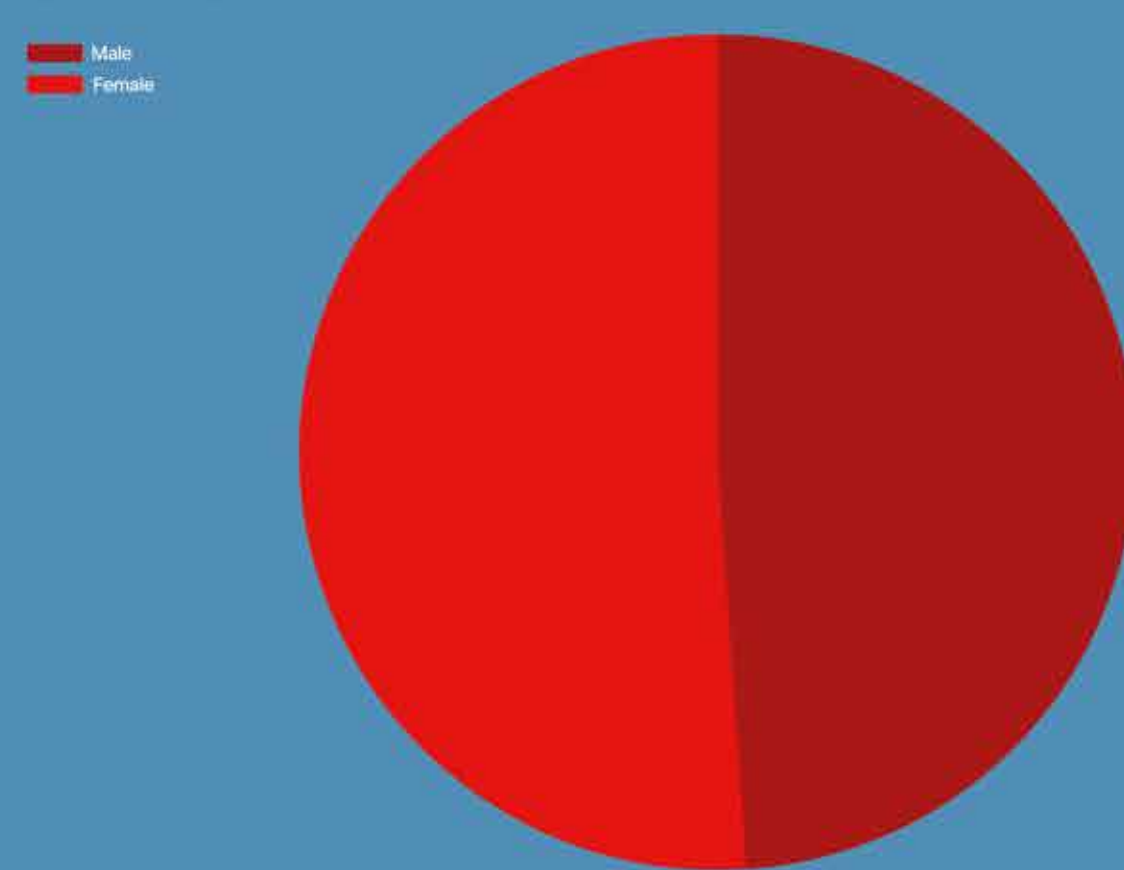




Figure 5.

Age Distribution Table (Raw Data)

Age Range	Female	Male	Total
0-15	01	02	03
16-30	25	21	47
31-45	17	16	33
46-60	02	06	08
60+	01	01	02
Did Not Respond	04	03	07
Total	49	51	100

Figure 6.

Verbally Abusive Sign Posted By Landlord's Wife  
(Location: Curepe)



Figure 7.

Education Levels

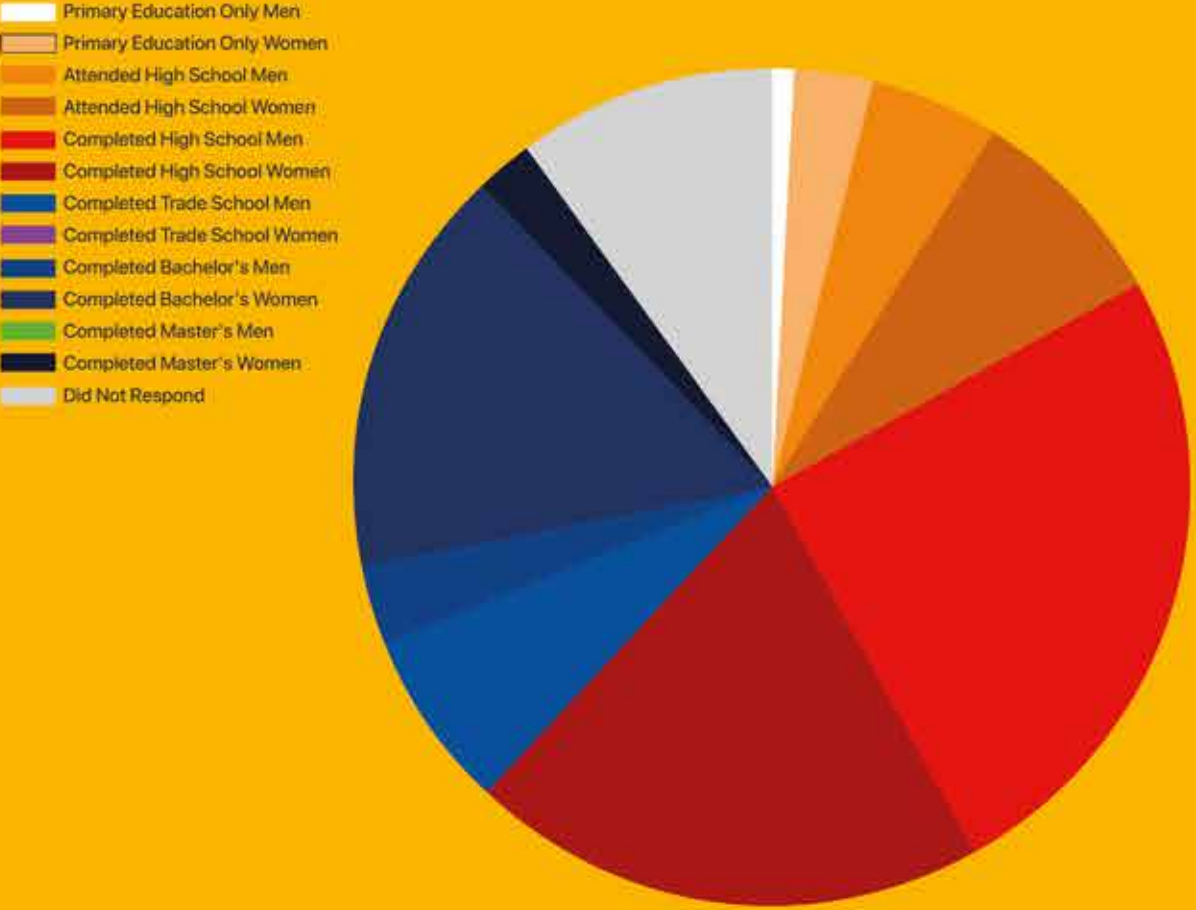


Figure 8.

Employment

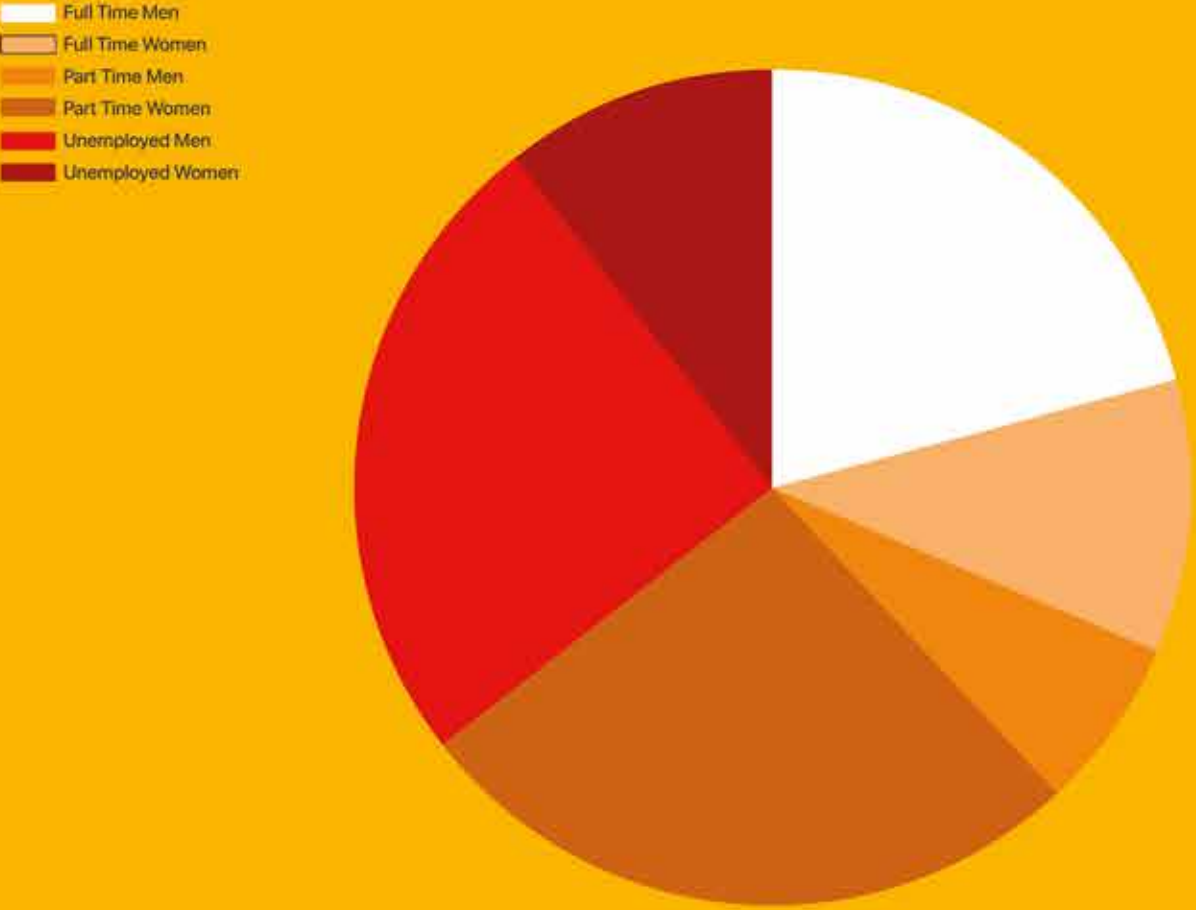


Figure 9.  
Legal Status & Prison

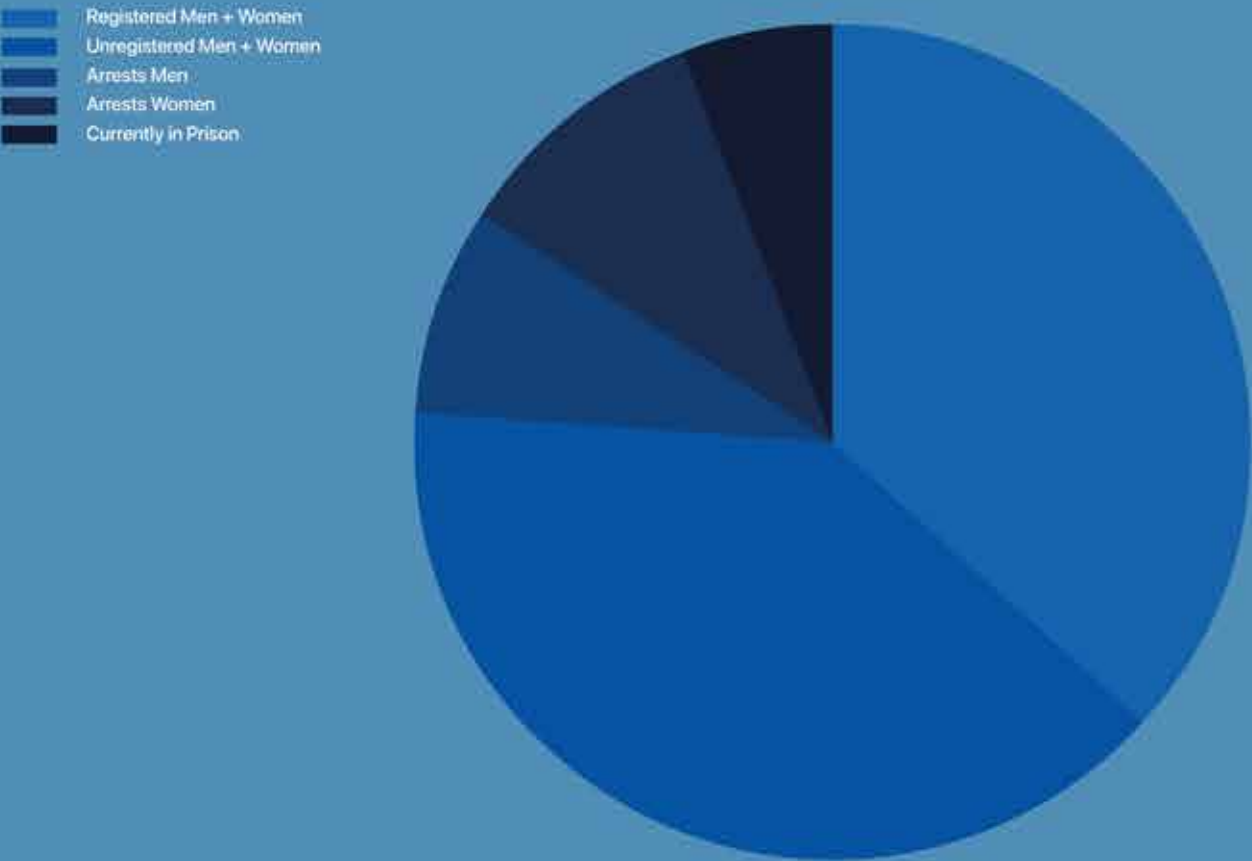


Figure 10.  
Miscellaneous Health Factors

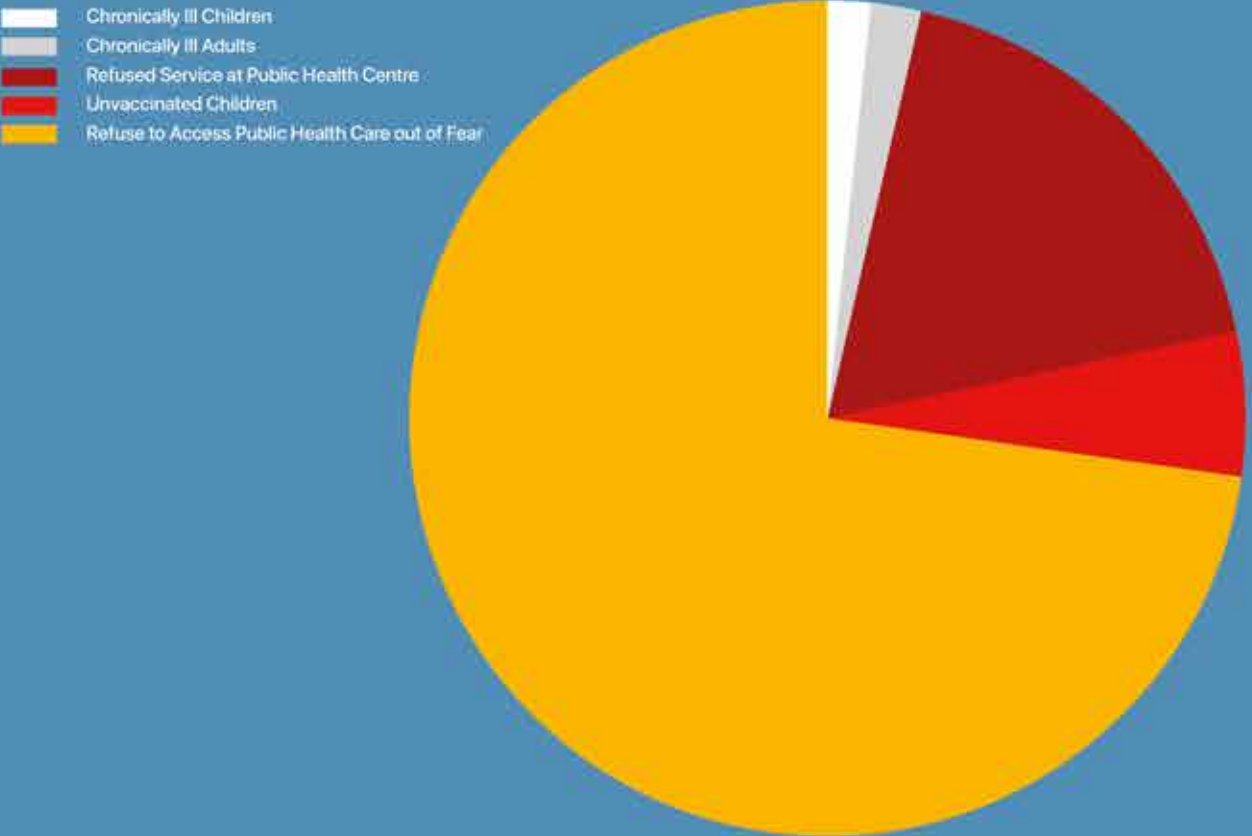


Figure 11.  
Cultural Integration Factors

Factor	Percentage Indicated
Dissatisfied with Police Force	93%
Dissatisfied with Public Health Access	60%
Satisfied with Religious Institutions	90%
Satisfied with Public Transportation	93%
Dissatisfied with Treatment by TT citizens	80%
Attended Cultural Events in TT	90%
Agreed to the statement "I feel a part of TT"	85%
Agreed to the statement "I feel a part of my home country"	80%
Roman Catholic Religious Preference	80%
Unaffiliated Christian Religious Preference	5%
Agreed Education, Legal Status, and Job	93%

Figure 11.  
Cultural Integration Factors

Factor	Men	Women
Feelings of Depression	10	27
Suicidal Feelings	1	6 <small>(includes 5 sex workers)</small>
Want Mental Health Services	0	4
Self-Describe as Happy	17	1
Self-Describe as Unhappy	22	20
Self-Describe as Unsure about Happy or Unhappy	6	6



## Conclusion and Recommendations

This Comparative Legal Analysis sought to provide a framework for relevant international standards with a view to illuminating the legitimate responsibilities placed on the State of Trinidad and Tobago with regard to Venezuelan migrants and refugees. The analysis has examined how international legal norms are applied, or ignored in practice within what is essentially, a domestic legal framework that is outdated and out of step with international standards and best practice.

The State continues to enforce the archaic Immigration Act which contains no provision for asylum seekers, or human rights standards for migrants, ignoring the 1951 Convention and other treaties it has ratified and forcing Venezuelan migrants into illegality. Refugee processes are handled by external actors, the UNHCR and the NGO LWC, which, it is contended, is itself a departure from expected State responsibilities and utilised because of the incapacities and deficiencies of the State. This is exacerbated by the fact that currently, the only existing procedure for a migrant to seek and obtain asylum, is through a voluntaristic, incoherent and uncertain Refugee Policy, unsupported by law, or legal process and girded by a process external to the State. Collaborative mechanisms and procedures between the UNHCR and the Refugee Unit, in order to facilitate the asylum process are steadily eroding and are currently uncertain and inconsistent. This invokes serious due process concerns. Recent attempts through a National Venezuelan Migrant Registration Program, while a humanitarian gesture, have only cemented the voluntaristic character of asylum seeking and migrant protection in Trinidad and Tobago and fall far short of expected treaty obligations. While the courts of the land may be expected to mend these gaps in the application of established law and due process, judicial outcomes through the courts have been slow, hesitant, relatively uninformed about international treaty obligations and sometimes arbitrary, especially in the Magistrates' courts, providing insufficient relief for Venezuelan migrants.

This lack of appropriate legislation, local jurisprudence, or policy, hinders the application of adequate protection avenues for migrants and asylum seekers, with Venezuelans being disproportionately affected. Venezuelan migrants are routinely deported, often without due process and in disregard of the principle of non-refoulement, rendering many at risk upon return. Venezuelan migrants are also increasingly vulnerabilised, with expected rights, both civil and political rights and economic, social and cultural rights, violated with impunity. They are subject to the harshest forms of violation of such rights, such as routine and often lengthy detentions in prisons, treated like convicts and recently, subjected to threats on life due to the Covid-19 pandemic. Humanitarian approaches by the arms of the State are relatively absent, even where the most vulnerable migrants, children, are concerned. Venezuelan migrants experience increasing xenophobia and gender violence and discrimination because of their persistent precarious immigration status and a lack of sensitivity by the state, the courts and the public. There is need for urgent reform of the entire legal infrastructure, beginning with the Immigration Act.

Real-life experiences of Venezuelan migrants provide credible information for policymakers to make decisions for protection of what is clearly a vulnerable, marginalized group, not only because of international responsibilities, but due to humanitarian concern for mankind. This is consistent with a civilized, responsible state.

### 6.1. Recommendations for Legal Reform

To facilitate much needed legal reform, the following recommendations are suggested. The state should<sup>1</sup>:

1. Cognizant of the lack of hard law with specific reference to refugees and asylum seekers, quickly enact legislation that will bring domestic law in conformity to established international law standards under the 1951 Refugee Convention and related Protocol to provide a rational route to asylum seekers, thereby discontinuing the optional, voluntaristic and uncertain policy approach currently in operation and by extension, amending the Immigration Act, or avoiding its jurisdiction with respect to asylum seekers. This is the main and most important recommendation;

2. Update legislation to provide for a more contemporary approach to migrants in general, that is in sync with international human rights norms;
3. Ensure that new legislation on asylum seekers and refugees, in keeping with international standards, specifically provides for economic, cultural and social rights, such as the right to work and access to education;
4. A coherent educational program should be developed with the Law Association and the UWI, to provide continuing legal education to train attorneys-at-law in contemporary norms of international law as they relate to refugees, asylum seekers and migrants;
5. Pending legal reform by the enactment of domestic law on refugees and asylum seekers, the State should undertake to implement fully, the 2014 Refugee Policy, given that it lays the foundation for appropriate law and outlines comprehensive set of rules, rights norms and standard operating procedures in various phases in accordance with the 1951 Refugee Convention;
6. Continue the collaboration with the UNHCR to conduct RSD, placing more responsibilities on the State as envisaged under international law, but allowing the UNHCR to adopt an observer role within the national committee responsible for the refugee status determination process. This will also involve continued and consistent dialogue and policy planning between the state, its Immigration Division, the LWC and the UNHCR;
7. Devise a humanitarian approach to undocumented migrants who do not qualify for asylum but who are in the country and vulnerable, in keeping with the state's obligations under ILO Conventions and generally recognised international standards on migrants, which emphasise that migrants are not criminals and are entitled to basic human rights;
8. As a short term measure, formally expand the national migrant registration period to allow those who have not registered to be given the opportunity to do so and to extend the stay of registered migrants;
9. Train first responders in International Refugee Law in order to establish standards to which immigration and law enforcement officials can be held;
10. Enable standardisation of sentencing for migrants for immigration offences;
11. Develop over the long term migration policies that create reasonable opportunities to apply for legal resident status;
12. As an interim measure, pending legislation, provide a more coherent and certain approach to the 2014 Refugee Policy, which purports to adhere to the 1951 Refugee Convention and enable its implementation;
13. Discontinue the use of detention as a default option for migrants and utilise alternatives to immigration detention, such as Orders of Supervision;
14. Discontinue the illegal use of prisons and prison rules for migrants who are unavoidably detained;
15. Reduce the periods of detention where detention is unavoidable to a period that is proportionate and reasonable;
16. Prohibit deportation and detention where asylum is pending;
17. Prohibit or restrict the use of security bonds and deposits for asylum seekers when an Orders of Supervision are applied, as was previously the policy;

<sup>1</sup> Other agencies have developed recommendations. For example, M. Teff, supra, n 240, recommends: "Invest in information systems and enable UN agencies to collect relevant data on the numbers of migrants, their skills, and their specific vulnerabilities and needs;" "The United Nations should: Build the capacity of local Trinidadian organizations to engage more with refugees, asylum seekers, and migrants, and help them to access core funding."









18. Provide for continuous legal and human rights training and sensitisation for the police, immigration officials, coastguard and members of the judiciary to promote understanding of the state's obligations pertaining to the right to seek asylum, the asylum process, refugee entitlements, and the rights of migrants, particularly with regard to due process;
19. Work toward better awareness of the obligations of the State toward ratified treaties in international law through the hosting of seminars and workshops, in collaboration with academia;
20. Immediately provide for the right to access of legal representation for migrants, eliminating hurdles for lawyers;
21. Remove restrictions on access to immigration detention centres for independent monitors, attorneys, medical personnel, and staff of relevant non-governmental organizations (NGOs);<sup>v</sup>
22. Eliminate delays and facilitate voluntary repatriation to home countries for migrants where they freely choose this option;
23. Provide for all migrant children to attend primary and secondary school in keeping with their right to education, regardless of their legal status;
24. Educate health-care providers on the governmental policy for migrants to have healthcare, thereby eliminating a practical hurdle to the right to health;
25. Upgrade the current access to healthcare beyond emergency care, to include life-saving surgeries where needed;
26. Put administrative mechanisms in place (including training), to secure citizenship for children born of migrant parents as entitled under law;
27. Invest in public awareness campaigns to eliminate xenophobia against migrants;
28. Provide training for NGOs/ CSOs in legal issues to support their work and ensure that CSOs are included in the planning of asylum mechanisms, including the new UNHCR-IOM-led Regional Platform;
29. Integrate Venezuelan migrant workers into national strategic and sustainability plans, such as agricultural development, in a structural program;
30. Design and implement an anti-xenophobia campaign to better integrate Venezuelan migrants into the society; and
31. Design and implement a survey of professional skills among the Venezuelan migrant population to better utilise their expertise in the national interest.

## APPENDICES

### Appendix A

#### - UNHCR'S PROCEDURES AND PRACTICES IN REFUGEE STATUS DETERMINATIONS

#### CORE STANDARDS FOR DUE PROCESS IN MANDATE RSD

<p>All asylum seekers should have sufficient access to UNHCR staff, RSD procedures, be able to obtain information and support to help them present their refugee claims.</p> 	<p>A qualified Eligibility Officer should handle individual RSD Interviews.</p> 
<p>There should be procedures to identify and lend assistance to asylum seekers who are deemed to be vulnerable.</p> 	<p>A decision review process in place for applicants who were not successful which should be handled a different Officer who first decided the claim.</p> 
<p>RSD applications should be processed efficiently.</p> 	<p>Consistency throughout the entire organization with regards to the procedures in the RSD process that define substantive rights.</p> 
<p>Staff involved in the RSD procedures are required to have sufficient training, qualifications and supervision so that they can carry out their duties properly</p> 	<p>Every element of the RSD procedures should be in conformity with established UNHCR policies relating to confidentiality, standards of treatment of vulnerable asylum seekers, and gender and age sensitivity.</p> 



# THE RSD PROCEDURAL STANDARDS

Issuing documents to asylum seekers and refugees	Issuing Registration of Applicants for RSD	Standards for reception of asylum seekers and refugees	Scheduling of RSD interviews and appointments
Conducting and documenting interviews in RSD	RSD file management	Participation of third parties/legal representatives	Preparing written RSD Assessments
Review of RSD decisions	Appeal procedures	Notification of decision in RSD procedures	Procedures for accelerated RSD processing
Processing derivative status applications	Examining the application of the exclusion clauses	Procedures for cancellation/ revocation and cessation of refugee status	Closing and re-opening RSD files
Qualifications and training of staff who are involved in RSD	Preserving confidentiality in RSD procedures	Supervision and oversight in RSD procedures	Gender and age sensitivity in RSD procedures

## Appendix B

### PROCESSES UNDER THE 2014 NATIONAL POLICY TO ADDRESS REFUGEE AND ASYLUM MATTERS

A National Policy to Address Refugee and Asylum Matters was formulated and Approved by the Cabinet in 2014. The Policy provides for a three phased approach to implementation of the refugee status determination process (RSD0). It envisages collaboration between the UNHCR and the Government of Trinidad and Tobago for the purposes of RSD.

The working document of the 2014 Refugee Policy addresses two scenarios in which the State through the Immigration Department would collaborate with the UNHCR and its agent the LWC. The first scenario details what would occur if an asylum seeker presents himself or herself to the Honorary Liaison, the LWC. In the event that this happens, the LWC will register the asylum seeker and conduct an initial screening within three days of receiving the asylum seeker. Additionally, the LWC will aim to present the asylum seeker to the Immigration Division within one day of the initial screening, after which, the Immigration Division will register the asylum seeker and issue an order of supervision.

v

Subsequent to this, the Ministry of Foreign Affairs will be informed by the Immigration Division accordingly while the LWC will assess the needs of the person concerned and assist, where necessary. The asylum claim will then be referred by the LWC to the relevant section of the UNHCR Regional Office in Port of Spain and the UNHCR will make arrangements to interview the asylum seeker. Findings from this interview will be presented to the Immigration division within sixty working days from the date of transmission by LWC.

#### LWC receives asylum-seeker and conducts pre-screening



If the individual expresses a fear, or the LWC perceives such a fear of return to his country of origin or last habitual residence, the LWC will

1. Apply its own internal procedures which include providing counselling on the asylum process to the applicant
2. Ensure the applicant, or the applicant's guardian, signs a Memorandum of Understanding should they choose to apply for asylum
3. Open an individual file and make copies of the applicant's documents, if any (e.g. identification/travel documents)
4. Evaluate the protection risks and psychosocial needs of the asylum-seeker
5. Forward all relevant documentation (1) to register the applicant with the UNHCR, which shall issue an asylum-seeker certificate.
6. Forward all relevant documentation (2) and information on the asylum-seeker to the identified Primary Points of Contacts at the Immigration Division.

*If the asylum seeker is an unaccompanied or separated child, the LWC will immediately contact the relevant authority and see guardianship and temporary care arrangements in line with the best interests of the child. Steps a.-f in part (ii) will then follow.*

#### RELEVANT DOCUMENTATION (1)

- ✓ Copy of biodata page of passport and, or any other identification, where available
- ✓ Registration documents
- ✓ Other certificates as necessary

The second scenario details what would occur if the Immigration Division is first notified, instead of the Honorary Liaison. In this case, the Division would arrange for accommodation and arrange for an initial screening within three days. Subsequent to this initial period, the Immigration Division registers the asylum seeker and determines whether detention is necessary or whether an Order of Supervision should be issued

**RELEVANT DOCUMENTATION (1)**

- ✔ A letter introducing the asylum-seeker and requesting issuance of an order of supervision
- ✔ Copy of biodata page of passport and/or other identification, where available
- ✔ Asylum-seeker certificate
- ✔ Other pertinent information

If the individual expresses a fear, or the Immigration Officers perceives such a fear of return to his country of origin or last habitual residence, the Immigration Officer will contact one of the identified Primary Points of Contacts at the Refugee Unit, Immigration Division.

One of the identified Primary Points of Contact at the Refugee Unit, Immigration Division will then contact the LWC to inform the individual

The Refugee Unit will then conduct a pre-screening interview, ideally within 48 hours (especially for ports of entry cases and place the person on an Order of Supervision in the care of the LWC

Should the asylum-seeker be an unaccompanied or separated child, the Immigration Division will immediately contact the relevant authority and place the child on an order of supervision, in the care of the relevant authority.

The LWC will then apply its own internal procedures as outlined in scenario 1a-f.

**PART 2 – IMMIGRATION PROCEDURES**



**The Refugee Unit- Immigration Division will:**

1. Receive notification regarding the individual claim for asylum
2. Conduct a background check on the person
3. Conduct an interview and place the individual(s) on Order(s) of Supervision), pending the outcome of the UNHCR's refugee status determination procedure
4. Create an individual file (hard and soft file)

- However, if the individual is not an asylum seeker, the Immigration Division will implement its usual procedures

If the individual is recognised as a refugee, the Immigration Division will Update the file accordingly  
Continue to renew the order of supervision, ideally with greater intervals afforded

If the individual is not recognised as a refugee, the Immigration Division will implement its usual procedures.

**PART 3 – REFUGEE STATUS DETERMINATION PROCEDURES**

**The Refugee Unit- Immigration Division will:**

The UNHCR shall conduct the status determination as soon as reasonably possible and communicate the decision to the asylum-seeker:

- a. If a positive determination has been made, a letter shall be presented to the refugee, in person, communicating this decision;
- b. If a negative determination has been made, a letter shall be presented to the asylum-seeker, in person, communicating the denial, in the first instance.
- c. The asylum seeker has the option to appeal a first instance denial within thirty calendar days of receipt of the decision. After a review of the appeal, the UNHCR shall communicate the decision of the appeal to the asylum-seeker:
- d. If the first instance denial has been overturned, a letter shall be presented to the refugee, in person, communicating this decision;
- e. If the first instance denial has been upheld, a letter shall be presented to the asylum-seeker, in person, communicating the final denial

**PART 4 – ON-GOING CASE MANAGEMENT**

Post registration, case management shall be ongoing and cooperation and communication amongst all parties shall be with the aim of providing resolution to asylum-seeker and refugee concerns and facilitating access to rights to the extent possible.





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