



PROTECTION OF THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF MIGRANTS AND THE SPECIFIC NEEDS OF MIGRANTS IN VULNERABLE SITUATIONS

Building upon the New York Declaration for Refugees and Migrants adopted on 19 September 2016, the Global Compact for Safe, Orderly and Regular Migration (GCM) will set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. The GCM should make an important contribution to global governance and enhance coordination on international migration. For the consideration of Member States, the Thematic Papers, developed by IOM, outline core topics and suggestions to inform actors involved in the broad 2017 consultation process that will lead to the inter-governmental negotiations and final adoption of the GCM.

INTRODUCTION

The vast majority of States have ratified international instruments reflecting the principle that all persons, including all migrants irrespective of their migration status, are entitled to have their human rights respected, protected, and fulfilled. Yet there are too many instances in which migrants are subject to abuse, exploitation, discrimination, and other severe human rights violations. This in large part is due not to the absence of international instruments, but the lack of the effective implementation of those instruments and appropriate international cooperation.

EXISTING PRINCIPLES

The normative framework

The nine core **international human rights** treaties apply to all persons, including migrants. These are: the International Covenant on Economic, Social, and Cultural Rights;¹ the International Covenant on Civil and Political Rights;² the International Convention on the Elimination of All Forms of Racial Discrimination;³ the Convention on the Elimination of All Forms of Discrimination against Women;⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁵ the Convention on the Rights of the Child;⁶ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;⁷ the International Convention for the Protection of All Persons from Enforced Disappearance;⁸ and the Convention of the Rights of Persons with Disabilities.⁹ With the exception of very few political rights, migrants have the same rights as non-migrants, simply by being human beings. Moreover, international customary law, which applies to all States, including those that have not ratified relevant treaties, lays down certain rights and prohibitions that apply to all persons, including migrants. In times of conflict, the **international humanitarian law** norms applicable to non-combatants also apply to non-combatant persons, including migrants.¹⁰

Transnational criminal law addresses criminal actions related to migration, particularly in the United Nations Convention against Transnational Organized Crime and its Protocol against Smuggling of Migrants



by Land, Sea and Air, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The smuggling protocol aims to combat migrant smuggling and promote cooperation amongst State Parties, while protection provisions for migrants are cross-referenced in other international conventions. The trafficking protocol aims to prevent and combat trafficking in persons, protect and assist victims of trafficking with full respect for their human rights, and promote cooperation amongst State Parties. The rule of law, and the effective implementation of legislation act as guarantors for a safe and enabling environment in which crime is reduced and victims given redress.

International labour law is of particular relevance to the rights of migrant workers. The Convention concerning Migration for Employment “applies to the whole labour migration continuum from entry to return, including the conditions governing the orderly recruitment of migrant workers. It also articulates the principle of their equal treatment with national workers regarding working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the convention.”¹¹ The Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers calls on States to suppress clandestine movements of migrants for employment and illegal employment of migrants and the organization of such movements, and to provide for equality of opportunity and treatment of legally resident migrant workers and their families with regard to employment, access to social security, trade union membership, cultural rights, and individual and collective freedoms for persons. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (which is also an international human rights instrument) establishes a comprehensive rights framework for migrant workers and their families and guidelines for promoting legal and humane migration channels.

The 2030 Agenda for Sustainable Development

The 2030 Agenda (often abbreviated as “Sustainable Development Goals” or “SDGs”) is unequivocally anchored in human rights and is “to be implemented in a manner that is consistent with the obligations of States under international law” (para 18). This means that any gaps or ambiguities should be resolved in accordance with the requirements of international human rights law.

One of the Agenda’s key principles is to “leave no one behind” and “reach those furthest behind first” (para 4). It further calls for the follow-up and review processes for the SDGs to be based upon evidence and data disaggregated by “income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts” (para 74, and Target 17.18).

The SDGs recognize the vulnerability of migrants to exploitation and abuse, specifically through the targets related to countering human trafficking: Target 5.2 (eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation), Target 16.2 (end abuse, exploitation, trafficking and all forms of violence against and torture of children), and Target 8.7 (take immediate and effective measures to eradicate forced labour, end modern slavery



and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms).

The Migration Governance Framework

The first principle of IOM's Migration Governance Framework (MiGOF)¹² is adherence to international standards and the fulfilment of migrants' rights: "humane and orderly migration requires compliance with international law. The obligation to respect, protect and fulfil the rights of individuals is paramount and applies to all individuals within a State's territory, regardless of nationality or migration status and without discrimination, in order to preserve their safety, physical integrity, well-being and dignity. Protecting the rights of individuals includes combatting xenophobia, racism and discrimination, ensuring adherence with the principles of equality and non-discrimination, and ensuring access to protection."

Migrants in vulnerable situations

While the documents described above expressly recognize the obligation to protect and uphold the rights of migrants and address the needs of the most vulnerable, they do not define a vulnerable migrant or a migrant in a vulnerable situation. While some organizations have developed internal definitions, to date there is no internationally recognized definition, which contributes to potential protection gaps. This is addressed in the Sutherland Report,¹³ which proposes efforts to develop a working definition of 'migrants in vulnerable situations'; and survey the applicable international legal frameworks and non-binding instruments to identify protection gaps.¹⁴

The New York Declaration, adopted by the United Nations General Assembly following the 19 September 2016 High Level Meeting on Large Movements of Refugees and Migrants, also refers to the vulnerabilities of migrants to exploitation and abuse, and notes State's' commitments to "protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times." In the New York Declaration, States commit to consider the development of non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance.¹⁵

The Migrants in Countries in Crisis (MICIC) Initiative generated voluntary guidelines and effective practices for States and other stakeholders to follow to protect and assist migrants in particularly vulnerable situations -- those where they are caught in conflict or natural disasters.¹⁶ And, the Nansen Initiative, a State-led consultative process, resulted in the development of a protection agenda addressing the needs of people displaced due to natural disasters and the effects of climate change.¹⁷

The Global Migration Group's Principles and Guidelines, supported by practical guidance on the protection of human rights of migrants in vulnerable situations within large and/or mixed movements,¹⁸ recognize that there are multiple sources of migrant vulnerability. It provides a concise draft set of principles, guidelines, and practical guidance on protection of human rights in large and/or mixed movements, with a particular emphasis on the human rights protection gaps experienced by migrants in vulnerable situations.



ISSUES

The drivers behind migration are complex and multi-faceted, but avenues for safe and regular migration are limited. Without legal avenues, migrants may turn to irregular and unsafe migration routes, often with the help of smugglers who deceive migrants about costs, risks, transportation methods, routes, and conditions of travel. Migrants are frequently abandoned *en route* and even at sea, forced into unsafe vessels, and abandoned at destinations they had no intention of going to. These dangers are evidenced by the 7,495 reported deaths of migrants in 2016,¹⁹ and illustrate that migration governance has not kept pace with the growing impact of international migration, with the result that many migrants face significant rights violations in transit, at their destination, and during or following return. Because States and concerned organizations often have limited capacity to identify migrants in vulnerable situations the protection needs of many migrants are often overlooked.

Once at their destination, migrants may continue to face violence, abuse, and other rights violations. Many - regular and irregular, international and internal - also face language barriers, challenges to integration, and xenophobia. They may be targeted by unscrupulous employers, landlords, and service providers who take advantage of their limited knowledge of local conditions and reduced bargaining power. Often, irregular migrants are unable or unwilling to access social services due to fear of detection, even if they are legally entitled to them. Given this situation, many migrants who have successfully reached their intended destination remain vulnerable to trafficking and other forms of exploitation.

Existing approaches and gaps

The international human rights framework is a broad and legally binding set of standards which protects all individuals, and is the result of decades of negotiation by the international community of a system in which individuals can live safely. There is thus no lack of legal protection, but there is an acute lack of implementation of that legal protection when it comes to vulnerable migrants.

While the human rights framework establishes rights and protection for all human beings, existing frameworks to protect and assist migrants tend to be structured around particular *categories* of protected persons; specifically refugees, asylum seekers, and trafficked persons. Similarly, while there is a growing recognition of the need to identify and protect migrants in vulnerable situations, existing definitions of vulnerability tend to focus exclusively on membership in groups (e.g., women, children, and youth), with little recognition that vulnerabilities vary significantly within groups. Basing “vulnerability” solely on membership in a particular group is at best simplistic, at worst discriminatory. Such an approach obscures the many factors that may protect an individual from, or expose him or her to violence, exploitation, abuse, and rights violations that may bear no relation to their membership of a group. It also downplays the agency and resilience of individuals and their abilities to overcome vulnerabilities. It may even exacerbate protection gaps, as protection actors may be blind to the needs of those who are not members of a group deemed vulnerable.



Therefore, there is a need to analyze the risk and protective factors that contribute to the vulnerability or resilience of individual migrants, migrant families, and communities and to develop a more nuanced understanding of migrants as social actors in broader contexts. Similarly, a more nuanced understanding of the risk of violence, exploitation, abuse, and rights violations is required. Individuals, families, and communities are likely to be more or less vulnerable to each risk, depending on a wide variety of social, cultural, economic, political, and environmental factors. Humanitarian crises may intensify exposure to risks and therefore contribute to the vulnerability of migrants.

A more complete understanding of these issues would guide the international community in the development of the Global Compact for Migration and of non-binding guiding principles and voluntary guidelines on the treatment of migrants in vulnerable situations as mentioned in the New York Declaration.

SUGGESTED ACTION

Respecting, protecting and fulfilling migrant rights is not a threat to an existing social order but an underlying guarantee of cohesion, respect and future development. A holistic approach to migration governance should take into account all the potential benefits migration can bring, including in terms of economic growth, managing demographic changes, cultural diversity, social integration, personal freedom and respect for the rule of law.

There is a pressing need for the international community to agree on a common definition of vulnerability which recognizes each individual migrant's particular situation, the factors that contribute to their vulnerability, and the factors that contribute to their resilience. IOM proposes a model that defines vulnerability within a migration context as the diminished capacity of an individual or group to resist, cope with, or recover from violence, exploitation, abuse, and violation(s) of their rights. It is determined by the presence, absence, and interaction of factors and circumstances that (a) increase the risk of, and exposure to, or (b) protect against, violence, exploitation, abuse, and rights violations.

This definition is applicable to individual migrants, families, groups, and communities affected by migration. It requires a thorough assessment of the factors that both increase vulnerability and contribute to protection. That is, it is the interplay of factors at the individual, household, community, and structural levels, as well as any situational factors that arise, that either increases or decreases the vulnerability of individuals, households, communities, and groups to violence, exploitation, abuse, and rights violations. These factors are:

Individual factors

Factors such as age, sex and gender; status in society; past experiences; beliefs and attitudes; emotional, psychological, and cognitive characteristics; and physical and mental well-being. These individual characteristics can contribute to a migrant's level of vulnerability or resilience, and mediate the ways in which individuals respond to their environments.



Household and family factors

Factors including one's role and position within the family, and family histories and experiences are important in determining vulnerabilities as families are typically the first resort for individuals seeking support, particularly for children and youth. Families offer both risk and protective factors against violence, exploitation, abuse, and rights violations.

Community factors

Individuals and their families are situated within a broader physical and social community context, and are affected by the broader community's economic, cultural, and social structure and their position within it. Communities with strong social support networks and resources can offer protection, whereas those that discriminate against certain members of the community may increase risk.

Structural factors

Broadly speaking, structural factors like historical, geographic, political, economic, social, and cultural conditions and institutions at the national, regional, and international level that influence the overall environment in which individuals, families, communities, and groups are situated. These structural conditions can play a significant role in shaping migration decisions.

Situational factors

Factors that can change quickly, such as family separation and reduced access to resources resulting from a humanitarian crisis, can increase the exposure of individuals, families, and communities to violence, exploitation, abuse, and likelihood of rights violations. As there is tremendous variation in the circumstances of individuals, families, groups, and communities, it is not possible to identify all potential situational factors that may have an impact on vulnerability, but it is important to note their existence and potential impact.

Migration policy responses should seek to recognize and address factors at each of these levels:

- 1) At the **individual level**, migrants who are vulnerable to or have experienced violence, exploitation, abuse, or other rights violations require responses that directly address their immediate needs and the particular risk factors that contribute to their vulnerability. Responses can include safe, dignified, short-term shelter or longer-term accommodation; physical and mental health care and psychosocial assistance; civil documentation and legal and consular assistance; life and coping skills training; education, skills development and training; livelihoods and income generation opportunities; return and reintegration services and support; and improving awareness of safe migration practices.
- 2) At the **household level**, possible actions include: improving identification of migrants in vulnerable situations and referral of vulnerable migrants for protection and assistance services; family tracing and assessment services; best interests determination and reunification services



for children; alternative care options; providing for children in a fair and equitable manner; addressing interpersonal and domestic violence; improving levels of care and maintenance of elderly and disabled household members; livelihood and income-generating opportunities; family counselling services; addressing attitudes and beliefs on the value of equitably distributing resources and investments in child welfare and development.

- 3) **Community-level** programming tends to require medium-to longer-term approaches involving changes to broader social, economic, environmental, and cultural factors. Policy responses could include efforts to ensure that community leaders and members: view women and girls as full and equal participants in the cultural, social, economic and political life of the community; encourage full and equal participation of boys and girls in education; encourage and support safe migration processes and the value of informed migration; possess the skills, knowledge, and resources necessary to adapt to, mitigate, and reduce the effects of human-made and natural crises, climate change and environmental degradation; and have the capacities and resources to invest in improvements to social infrastructure.

- 4) At the **structural level**, programming tends to be longer term and is typically the domain of national governments and regional or international institutions. While it may be possible to identify structural factors that contribute to individual, household, and community vulnerability, it is not usually possible to effect structural changes in a manner or in a timeframe that would lead to any immediate reduction of vulnerabilities. States and other stakeholders should work to implement adequate migration governance and rights frameworks, thereby recognizing the universality of human rights and migrants as rights-holders, and offer adequate protection for migrants. They should also put in place policies, programmes, and frameworks for safe and regular migration, including labour mobility, to help ensure equitable distribution of the benefits of national development; guarantee respect for the human, social, economic, and labour rights of citizens and migrants; work to reduce discrimination against marginalized groups; improve bilateral cooperation measures to respond to cross-border migration flows; improve access to justice in a manner similar or equal to nationals; and uphold the rule of law.

¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁴ <http://www.un.org/womenwatch/daw/cedaw/>

⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>

⁸ <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>

⁹ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

¹⁰ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

¹¹ <http://www.globalmigrationgroup.org/content/labour-migration-legal-framework>



¹² IOM's Migration Governance Framework, adopted by the Council in November 2015, seeks to present, in a consolidated, coherent and comprehensive way, a set of three principles and three objectives which, if respected and fulfilled, would ensure that migration is humane, orderly, and benefits migrants and society.

¹³ Report of the Special Representative of the Secretary General on Migration, United Nations General Assembly, A/71/728, 3 February 2017

¹⁴ Report of the Special Representative of the Secretary General on Migration, United Nations General Assembly, A/71/728, 3 February

¹⁵ United Nations General Assembly, *New York Declaration for Refugees and Migrants*, 13 September 2016.

¹⁶ Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster, June 2016, <https://micicinitiative.iom.int/guidelines>

¹⁷ Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (December 2015)

¹⁸ <http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>

¹⁹ <https://missingmigrants.iom.int>