

Background Paper Roundtable 2.2

Protection of migrants in all situations

I. Introduction:

Migration has emerged as one of the megatrends that are playing a critical role in framing the global compact of development and global economies. According to the UN Department of Economic and Social Affairs 2015, a significant proportion of the world population – about 3.3 per cent, accounting for some 244 million people – resided outside of their countries of origin in 2015.¹ It is therefore unsurprising that protection-related issues related to this segment of the global community should be the subject of international interest and scrutiny.

Earlier this year, in September 2016, world leaders met at the United Nations Summit for Refugees and Migrants to address the question of large movements of refugees and migrants. At this Summit, the universal human rights and fundamental freedom of migrants were stressed. Migrants were recognized as right holders and States committed to fully protect their human rights regardless of status. Prior to this, in 2005, the UN Member States reaffirmed in the World Summit Outcome their resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families.² Similarly, the High-level Dialogue on International Migration and Development (HLD), held in New York in October 2013 for the purpose of discussing the multidimensional aspects of international migration and development, recognized the relationship between international migration, development and human rights. More recently, in paragraph 29 of the 2030 Agenda for Sustainable Development (2030 Agenda), UN Member States recognized the positive contribution of migrants for inclusive growth and sustainable development. In pursuance of this outcome, UN Member States committed therein to cooperate internationally to ensure safe, orderly and regular migration involving full respect of their human rights and the humane treatment of migrants regardless of migration status.

The issue of protection has been addressed by the GFMD community on a number of occasions. It was first discussed at the Philippines GFMD 2008 Roundtable 1.1 on “Protecting the rights of migrants”, which highlighted the “life-cycle” approach to migrants’ protection and sharing of responsibility between host and origin countries. During the 6th GFMD held in Mauritius in 2012, Roundtable 3.2 on “Migrant Protection as Integral to Migration Management” and Roundtable 3.3 on “Protecting Migrant Domestic Workers – Enhancing their development potential” discussed specific aspects of ‘protection’. The roundtables gave rise to interesting discussions but their scope was limited. A broader exploration of the concept of migrant protection is warranted to clarify first

¹ UN DESA, *International Migration Report 2015*, available at:

<http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf>

² A/RES/60/1 (2005) paragraph. 62.

of all its nature and purpose, opening the way to more focused eventual discussions about the ways and means of extending that protection to those who are in need of it.

The issue of the protection of migrants is multi-dimensional. The migration experience is a complex one covering a process that begins with the departure from the country of origin, through recruitment, in some cases travel through or prolonged stay in a transit country, reception and residence in the country of destination and in some cases return to the country of origin. A proper discussion of the protection needs of migrants must therefore consider the many and diverse facets of that experience, addressing the whole cycle of the migration process and covering the protection of migrants in all situations, irrespective of status and drivers. It is understood that there are migratory circumstances or situations that give rise to particular vulnerabilities and protection needs. To give but two examples: migrants who seek employment overseas may find themselves taken advantage of by unscrupulous recruiters, or they may be exploited for their labour at destination. Unaccompanied minor children may end up in a country of destination where they are excluded from education or health or where they are without parental care at the time when they need it most.

RT 2.2 will discuss these specific vulnerabilities while addressing the protection needs of all migrants. It will seek to identify policy options that aim at protecting and promoting their rights, well-being and safety, while building an enabling environment for all migrants. It will also explore the roles and responsibilities of stakeholders, including governments, the private sector and civil society in ensuring migrant protection.

The discussions will also seek to underline rights and responsibilities of countries of origin, transit and destination to acknowledge, ensure and strengthen the protection of migrants within their jurisdictions as well as their nationals abroad. This background paper does not go into details of the particular vulnerabilities of displaced persons as this is dealt with in Roundtable 3.1. Nonetheless, there is a link between this Roundtable and Roundtables 3.1 and 3.2.

II. Purpose

The purpose of the paper is threefold:

- 1) To outline, in broad terms, international instruments and principles to protect the human rights of migrants
- 2) To identify the particular circumstances or situations that give rise to migrant vulnerability; and
- 3) To broach a discussion on ways and means of enhancing migrant protection.

III. A broad international legal perspective on migrant protection

Protecting migrants is an international legal obligation. States possess the sovereign competence and right to determine admission and residence of non-nationals on their territory, but they also have the primary prerogative and responsibility under international law to protect persons who have entered their territory or come under their jurisdiction.

The Universal Declaration on Human Rights (UDHR) stipulates in Article 2 that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” ‘National origin’ and ‘other status’ clearly specify migrants irrespective of their status. A variety of core human rights treaties protect the human rights of migrants, including the International Covenant on Civil and Political Rights (ICCPR), The International Convention on the Elimination of Racial Discrimination (ICERD), The International Convention on the Rights of Migrant Workers (ICRMW), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of Discrimination against Women (CEDAW).

At the international level, therefore, all of the core human rights instruments apply to everyone on the territory of the signatory states, including non-nationals. In addition to the human rights framework, other branches of international law provide for the protection of migrants. For example, the ILO Convention Concerning Migrations in Abusive Conditions and Promotion of Equality of Opportunity and Treatment of Migrant Workers (N° 143, 1975); the 1951 Convention Relating to the Status of Refugees; UNGA resolutions on Protection of migrants and Violence against women migrant workers; HRC resolutions on Human rights of migrants; the 2000 Protocols against Trafficking and Smuggling; the 2011 ILO Convention concerning Decent Work for Domestic Workers (No. 189); the ILO Forced Labour Protocol and Recommendation (2014); the 1997 Private Employment Agencies Convention (No. 181) and its Recommendation; as well as the Convention on the Elimination of all Forms of Discrimination Against Women (General Recommendation 26 on women migrant workers).

These international instruments are often complemented at the national level, either explicitly or implicitly, by labour laws addressing protection of migrant workers. Furthermore, a number of regional instruments exist that provide protection for migrants. Examples of these include the OAU Convention governing the specific aspects of refugee problems in Africa (1969) and the Cartagena Declaration on refugees (1984), which expand the definition of refugees, as well as the European Social Charter (1961) and the European Convention on the Status of Migrant Workers (1977).³

The 2030 Agenda provides additional guidance through the commitment of UN Member States to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities, without leaving any one behind. Importantly it identifies migrants among the vulnerable who must be empowered and whose needs are reflected in the Agenda. For example:

- Goal 1 aims to ‘End poverty in all its forms everywhere’, i.e. including for migrants in need of economic empowerment. Goal 1.3 includes migrants among “the vulnerable”.
- Goal 8.8 deals with the protection of labour rights and promotion of safe and secure working environments for all workers, including migrant workers, in particular women

³ For an overview of regional mechanisms, including non-binding ones, see e.g. Inter-Parliamentary Union (2015) *Migration, human rights and governance: Handbook for Parliamentarians No 24*.

migrants, and those in precarious employment. Further Goal 8.7 pays special attention on forced labour and child labour.

- Goal 5 seeks to achieve gender equality and empower women and girls. The purpose of Goal 5.1 is to end all forms of discrimination against women and girls everywhere and calls for appropriate measures to ensure that migrant women are treated on an equal footing with migrant men in relation to labour rights. Goal 5.2 refers to the elimination of violence including trafficking and sexual and other types of exploitation which migrant women can experience especially when migrating through irregular channels and/or without appropriate documentation.
- Goal 10.7 calls for the facilitation of orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies. The specific focus in 10.7 (c) is to reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent.

Report A/69/302 of the HRC's Special Rapporteur on the human rights of migrants offers additional insights on specific targets and indicators that can include migrants.

IV. Migrant vulnerability

As migrants move from their country of origin, and – not infrequently – through their country of transit, to reach their country of destination, they can be, and often are, at risk of human rights violations and abuse.

Exploitation of and discrimination against migrants and violations of their rights can occur at any stage of migration, and irrespective of their status, although irregular migrants and low skilled migrant workers and female migrants are particularly affected. Discrimination and violation of migrants' rights are often rooted in xenophobic attitudes in host communities, and some of the challenges include stereotyping of migrants and associating them with negative perceptions such as crimes, spread of diseases and a burden on the social protection and welfare systems.

Unsafe migration has created development problems for individuals, societies and economies alike. It often leads to highly exploitative and abusive situations for migrants. In relation to this, there is an increasing awareness that the capacities of governments to govern cross border movements are not keeping pace with the fast evolving realities of migration and that the management of borders often lacks a human rights based approach. The response to this is all too often the securitization of borders, which creates a new set of risks for migrants.

The exploitation often starts in countries of origin, where migrants may have to pay excessive costs during recruitment, preparation and travel, or worse, may fall into the hands of traffickers or be forced to leave due to human rights abuses. In some countries of origin, migrant workers may be asked to pay extortionate fees to “jump the line”, or they may simply by-pass regular channels and put their lives in the hand of smugglers. Meanwhile, in countries of transit and destination, exploitation, violence and intimidation may occur in various forms ranging from low wages, substandard working conditions to long working hours, denial of labour rights, confiscation of

personal identification and travel documents etc., at the hands of recruiters and/or employers. Access to justice and fair redress are a key challenge for such migrant workers.

Additionally, migrant workers often experience abuse of their economic, social and cultural rights. Lack of access to adequate housing, sanitation, health care, and education constitutes a violation of migrants' human rights. Access to other forms of social protection can also be problematic for migrants. Some migrants have access to healthcare provided through their employment, but this is highly variable, leaving many vulnerable if they experience problems with their health.

In a number of countries, migrants and members of their families, including children, are subject to detention, sometimes under abusive conditions. Undocumented migrants, in particular, are often arrested, detained and expelled without consideration of their individual circumstances and without due process. The right of migrants to liberty and security of person, and the protection from arbitrary arrest and detention are set out in Articles 9 and 10 of the International Covenant on Civil and Political Rights (ICCPR). Many of the rights provided by the ICCPR are reiterated in regional human rights instruments. Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) has laid down guarantees for the protection of migrant workers and members of their families from arbitrary arrest or detention. The Working Group on Arbitrary Detention of the UN Human Rights Council has also discussed the detention of migrants on several occasions and has stated that "Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitute a child right violation"

Migrants travelling through irregular channels or in irregular situations

Lack of regular migration channels and securitization of borders push migrants, including those falling under various vulnerable categories, to travel irregularly. Irregular journeys, across the desert or the sea, transiting through various countries, are fraught with dangers and can be extremely long and traumatic. Many migrants every year lose their lives in crossing international borders.⁴ Those who survive are weakened physically and mentally and become more vulnerable to abuses and violence perpetrated by unscrupulous smugglers, as well as to exploitation by traffickers.

Migrants in an irregular situation are in general more vulnerable to having their rights violated, and although regular migrants also experience harassment, discrimination, exclusion, violence and exploitation, the situation is often worse for migrants in an irregular situation. The latter are more often excluded from health, education, housing or employment. In addition, irregular migrants who experience violations of their rights, discrimination, arbitrary detention, or violence often are often unable to access justice due to their irregular status, or out of fear of deportation, and are thus prevented from accessing any remedies.

Women migrants

Women and girls account for almost half of all international migrants at the global level. Women are increasingly migrating on their own or as heads of households. The drivers of female migration can be linked to gender based discrimination which limits women's opportunities in their countries

⁴ According to IOM, global migrant deaths had reached 5,238 at the end of September this year. See missing migrant project <http://missingmigrants.iom.int/global-migrant-deaths-pass-5200>.

of origin, and acts as a driver of poverty and exclusion from decent work, health or education. For women, migration can offer opportunities for economic independence and empowerment. However, at the same time, it can also lead to exploitation, violence and abuse, which leaves women migrants in vulnerable situations. Especially women migrants in an irregular situation often face violation of their human rights. Lack of information, low levels of skills and the paucity of opportunities for safe migration further exacerbate these challenges, including by increasing women migrants' vulnerability to being trafficked. There is therefore a need for gender-responsive policies, laws and efforts to protect women migrants at all stages of migration. Sexual harassment and sexual violence are particular risks faced by female migrants working in certain labour market sectors. Private agencies recruit many female migrants to work within domestic households that often operate outside the formal economy and in many countries are excluded from labour law protections.

Women migrant domestic workers in particular face a range of human rights concerns, and are often at risk of human rights violations throughout the migration cycle, including sexual and gender-based violence, harassment and abuse; and unjust and exploitative working conditions. Live-in women migrant domestic workers face additional risks, including restrictions on freedom of movement caused by employers' withholding passports and/or confining women to the home; and unsafe and/or unsuitable accommodation. These women, whose workplace doubles as their home, are further marginalized and face severe barriers to accessing justice for the above violations.

Of the estimated 67.1 million domestic workers in the world, 11.5 million, or 17.2 per cent are international migrants. About 73.4 per cent (or around 8.5 million) of all migrant domestic workers are women. South-Eastern Asia and the Pacific host the largest share, with 24.0 per cent of the global number of female migrant domestic workers, followed by Northern, Southern and Western Europe, with 22.1 per cent of the total, and the Arab States with 19.0 per cent.

People with disabilities

People on the move with disabilities face many additional challenges before, during and after their journey and are often among the most vulnerable whether they remain in countries of destination or on the return to their countries of origin, due to physical or communicative barriers. Moreover, there are people who suffer an accident during the journey resulting in a disability. According to the estimates of the World Health Organization, people with disabilities constitute among the 7% and 10% of the world population. This would suggest that there are many millions of migrants who suffer from this particular vulnerability that would need protection, compensation, and assistance for rehabilitation and in reintegrating to a normal life.

Migrant children and adolescents, including unaccompanied minors

Children, including adolescents, and in particular unaccompanied minors, are especially vulnerable as migrants. Some are escaping conflict, poverty and extreme weather, to realize their rights such as access to education or health care, some are seeking to join their families, while others are looking for a better life and a place to call home. They face a variety of risks on the migratory route. Many find themselves in a vulnerable situation by attempting to cross international borders without the required travel documents and may be exposed to serious human rights violations and abuses that can threaten their physical, emotional and psychological health and wellbeing, and may also be

exposed to crimes and human rights abuses, including crimes such as theft, kidnapping, extortion, physical abuse, smuggling and trafficking in persons, including forced labour, and sexual exploitation, and sexual abuse. Their numbers are not likely to fall and thus their protection is a challenge that will continue to require attention.

The rights of migrant children and adolescents, regardless of their status, are set out in the Universal Declaration of Human Rights, the Convention on the Rights of the Child and in Human Rights Council Resolution on Unaccompanied Migrant Children and Adolescents and Human Rights adopted in the twenty ninth and thirty third sessions. The protection and respect for the human rights of each child set out in these international instruments, including as a primary consideration the best interest of the child, need to be ensured through protective measures throughout all the stages of the migratory circuit. In cases of repatriation, this is a moment of vulnerability and possibly extreme trauma in which the children can be re-victimized if specific protective measures are not taken. In crises situations, children and youth are among the most vulnerable. They have the right to have their voices heard and participate in the discussion concerning them.

The way forward?

With the gradual development of a universally applicable human rights framework, including the core human rights instruments, the concept of protection has progressively acquired a broader meaning, stretching well beyond refugee and humanitarian law. The challenge for the international community is to develop effective strategies to address migrant protection needs in practice. Three broad orientations would appear to be necessary.

First is the need for a rights-based approach to migration governance. A rights-based approach is essentially a conceptual framework and methodological tool for developing programs, policies, and practices that integrate the rights, norms and standards derived from international law. For States this means placing the individual at the centre of migration management and recognizing each individual as a rights-holder. States have the legal obligation to protect and promote the human rights of all people on their territory.

Both pre-departure and post arrival awareness raising on safe migration including rights of migrant workers in countries of origin and countries of destination respectively can empower migrants, and particularly women, through improved knowledge of their rights. It can also inform them about their obligations and responsibilities towards the country in which they will reside.

An essential part of this approach consists of setting up of legal frameworks to protect the human rights of all migrants, including the signing, ratification and implementation of relevant international legal instruments of protection, enhancing consular cooperation, and ensuring access to legal remedies.

Bilateral agreements (BLAs) and Memorandum of Understandings (MOUs) between destination and origin countries can also play a critical role in rights promotion and protection of migrant workers between two countries. At the international level, governments have officially recognized the relevance of BLAs and MOUs, referencing them in key documents setting out migrant worker's

rights. For instance, by including explicit provisions for the full protection of the human and labour rights of all migrant workers covered under the agreement and/or by referring to existing standards and normative frameworks to guarantee that such protections will be upheld by the contracting States, national governments can demonstrate a serious commitment to migrant worker's welfare and protection. As a large number of female migrant workers engage in domestic work, in recent years, many BLAs are accompanied by standard employment contracts for domestic workers as a concrete protection measure (Wikramasekara, 2015). There is a common understanding that adopting a standardized employment contract for migrant domestic workers is vital in addressing the problems faced by them. Standard contracts also address the issue of multiplicity of contracts used by different countries and formalizes the employment relationship between the employer and the worker. These actions will go a long way in promoting and protecting the rights of women migrant domestic workers.

Second is the development of comprehensive rights-based migration policies, covering all phases of the migration cycle from departure to return; in terms of the inclusion of all policy domains such as labour migration, family reunification, integration, counter-smuggling and counter-trafficking measures and border management; and in terms of the participation of all key stakeholders such as governments, employers and civil society. Migrants are most at risk when they “fall between” policy domains. Conversely they are most likely to enjoy protection when they can take advantage of safe, orderly and regular migration channels. In this respect, access to essential services is of paramount importance. Migrant vulnerability is multiplied when there is no or reduced access to essential services such as mental or psychosocial health, education or housing.

Third, measures can be introduced to address specific vulnerabilities, which are often context specific. Recent non-binding guidance has been developed through state-led processes to enhance the protection of migrants in vulnerable situations, including the Migrants in Countries In Crisis Initiative and its Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster, as well as the Nansen Initiative and its Agenda for the Protection of Cross-Border Displaced Person in the Context of Disasters and Climate Change.

In this context, it is important to bear in mind the commitment undertaken by world leaders at the 19 September Summit on Large Movements of Refugees and Migrants to address

“...the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.”

The Summit Declaration includes a further commitment to

“consider developing 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. The guiding principles and guidelines will be developed using a State-led process with the involvement of all relevant stakeholders...”

The Declaration takes note of the work of the GMG in this field “to develop principles and practical guidance on the protection of the human rights of migrants in vulnerable situations.”

Guiding Questions

1. *In what ways does your government provide **equal access to legal protections and social services to all migrants**?*
 - a) *How are **labour rights** and safe and secure working environments ensured for all migrants regardless of migration status or gender (SDG target 8.8)?*
 - b) *How are concerns of women migrant domestic workers addressed with reference to safe passage, working conditions and redress of grievances?*
 - c) *How are migrant families, especially children and women, as well as unaccompanied minors provided with **health care, social protection and educational opportunities** in receiving states?*
 - d) *What are the roles of diplomatic missions/labour attachés/consular services to ensure the rights and welfare of migrants at destinations?*
 - e) *What are the **roles of private sector and other stakeholders**?*
2. *In what ways can states – countries of origin and destination – be engaged and supported to collect **disaggregated data on migrants, including by sex, and on the protection of migrants** as set out in SDG target 17.18 on enhancing capacities for reliable data availability?*
3. *What are the critical gaps in existing **regional and international institutions and processes** to support the protection and promotion of all migrants’ rights?*
4. *What are the key inputs or messages the roundtable can submit to the process leading to the global compact on migration?*

Possible Recommendations

1. *Ensure that appropriate legal frameworks are in place to protect the rights of all migrants.*
2. *Develop voluntary guiding principles and non-binding guidelines – as a roadmap how to operationalize these principles – on migrants in vulnerable situations (including in the country of origin, transit and destination).*
3. *Develop national strategies to operationalize the guiding principles and guidelines and set up a multi-stakeholder and a “whole of government” approach to migration governance, covering all policy dimensions of migration and ensuring that “no migrant is left outside” of the framework.*
4. *Make provision to “save lives” policies in crisis situations and ensure that migrants’ lives and safety are protected during the journey, including when travelling by sea.*
5. *Make the journeys safer by increasing inter-state coordination to curb migrant smuggling and opening new regular migration channels..*
6. *Develop policies and procedures to protect migrants and refugees from violence, abuse and exploitation, including as a result of human trafficking or migrant smuggling.*

7. *In line with the New York Declaration of 19 September, ensure that those policies and procedures address, inter alia, child detention and minimum standards on return.*
8. *Ensure that all migrants have access to essential health care services.*
9. *Identify deliverables in the outcome of the roundtable on protecting migrants in all situations within the framework of SDGs*
