



2013 High-Level Dialogue Series

TOWARDS THE 2013 HIGH-LEVEL DIALOGUE ON INTERNATIONAL MIGRATION AND DEVELOPMENT:

MEASURES TO ENSURE RESPECT FOR AND PROTECTION OF THE HUMAN RIGHTS OF ALL MIGRANTS, WITH PARTICULAR REFERENCE TO WOMEN AND CHILDREN, AS WELL AS TO PREVENT AND COMBAT SMUGGLING OF MIGRANTS AND TRAFFICKING IN PERSONS, AND TO ENSURE REGULAR, ORDERLY, AND SAFE MIGRATION

BACKGROUND PAPER

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EXECUTIVE SUMMARY

1. This is the second in a series of four background papers drafted to support preparatory round tables organized to help prepare Permanent Missions at United Nations (UN) Headquarters for the 3-4 October 2013 UN High Level Dialogue on International Migration and Development. Focusing on measures to protect the human rights of migrants, promote orderly migration, and reduce migrant smuggling and human trafficking, this paper presents a concise review of recent research, thinking and policy, highlights gaps, and identifies key questions, in order to provide the basis for discussion and debate.

2. The challenge of protecting the human rights of migrants has grown particularly with the feminization of labour migration, and the growth of irregular migration. Migrants at particular risk are children, domestic workers, those involved in forced labour and migrant smuggling, and victims of human trafficking. The recent global financial and economic crisis has also impacted on the rights of migrant workers; a good example of how a discussion on rights is directly relevant for considering the links between migration and development.

3. There is a wide legal and normative framework for the protection of the rights of migrants, and a wide variety of international, regional, and national organizations and institutions dedicated to safeguarding these rights; and yet around the world migrant workers continue to experience violence, abuse, and exploitation. Four main explanations have been suggested. One is that the existing framework is insufficient: there is no single document consolidating the legal and normative framework on migration and no single UN agency responsible for safeguarding the legal and normative framework on

international migration. A second explanation is that the most comprehensive legal instrument on the human rights of migrants – the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) – has not been widely ratified. A third explanation concerns an implementation gap – because of a lack of political will, capacity, and resources, some states do not deliver the rights contained in the legal instruments to which they are party. A final explanation is that the dynamics and dimensions of labour migration have changed since the main labour standards and conventions were adopted.

4. A comprehensive approach to ensuring regular, orderly, and safe migration would include at least the following 10 key components: assessing labour markets from the migration perspective; regulating admissions and selecting migrant workers; determining conditions attached to employment permits; training of migrant workers and placement services; protection of migrant workers' rights; reducing labour migration costs; strengthening bilateral labour mobility agreements; reducing irregular migration; combating migrant smuggling and human trafficking; and return and reintegration.

5. Migrant smuggling and human trafficking expose migrants to special vulnerabilities, and there is wide consensus on the need to prevent and combat both processes. Very significant efforts have been made to develop a legal and normative framework and implement national laws and policies. Three sets of measures may be suggested to reinforce these efforts. First, measures need to be taken to ensure that the legal and normative framework is more effectively implemented. Second, national laws and policies can be strengthened, by addressing specific gaps and omission in national legislation, coordinating better data collection and sharing, supporting law enforcement, ensuring appropriate assistance for the victims of trafficking; promoting protection-sensitive border management; and enhancing national coordination and consultation mechanisms. Third, effective policies to combat migrant smuggling and human trafficking require significant cooperation between origin, destination and transit states through which irregular migrants move, including the exchange of intelligence, information and data; joint criminal investigations; and specific agreements on return.

6. An overall challenge to protecting the human rights of migrants, promoting regular migration, and reducing migrant smuggling and human trafficking, is that the dynamics and dimensions of migration are changing rapidly, and in effect outpacing developments in the legal, normative, and institutional frameworks. There are four emerging issues of particular relevance in this context: mixed migratory flows, the prospect of migration induced by climate change, the situation of migrants caught up in crises, and the growth of the migration 'business'.

1. INTRODUCTION

This is the second in a series of four background papers drafted to support preparatory round tables organized to help prepare Permanent Missions at United Nations (UN) Headquarters for the 3-4 October 2013 UN High Level Dialogue on International Migration and Development. Together these four papers reflect the topics agreed for the Round tables at the High level Dialogue.¹ All four papers present a concise review of recent research, thinking, and policy developments; identify concrete

¹ General Assembly (2012) A7C.2/67/L.15

recommendations and priorities as appropriate; and are supported by a targeted list of key references to enable further information-gathering and analysis as required. They are intended to provide the basis for discussion and debate at the preparatory round tables, and thus identify key questions for discussion.

This paper is structured in five main parts. After a brief overview of the scale and scope of the current challenge, the paper describes the legal framework on the human rights of migrants and identifies implementation challenges. Next the paper considers measures to ensure regular, orderly and safe migration, providing the outlines of a comprehensive framework. The next part of the paper turns to measures to prevent and combat the smuggling of migrants and trafficking, identifying three specific measures to increase the effectiveness of current efforts. Finally, the paper considers the implications of new issues such as climate change, 'mixed migratory flows', the rising risk of migrants being caught up in crises, and the migration 'business, for protecting the human rights of migrants.

2. THE SCALE AND SCOPE OF THE CHALLENGE

It has been estimated that half of the world's 214 million international migrants are migrant workers,² of whom a rising proportion is women. The feminization of labour migration has occurred over the last few decades for three main reasons. First, the demand for labour, especially in more developed countries, is becoming increasingly gender-selective in favour of jobs typically filled by women, for example in services, healthcare, and entertainment, and especially as a result of the global care crisis. Second, changing gender relations in some countries of origin mean that women have more independence to work and migrate than previously. Third, there has been a growth in the migration of women for domestic work; organized migration for marriage; and the trafficking of women into the sex industry,³ although it is important to recognize that the trafficking of men is also increasing, especially in certain sectors like the fishing industry.

By definition irregular migrants are hard to count, but their numbers are significant and growing. It has been estimated that there are between 10 and 20 million irregular migrants in the United States (US) alone,⁴ and between 1.5 and ten million irregular migrants in the Russian Federation.⁵ In 2007, the Council of Europe reported an estimate of 4.5 million irregular migrants in the European Union (EU).⁶ Turning to global estimates, the International Labour Organization (ILO) estimated in 2004 that between 10 and 15 percent of the world's immigrant stock were in an irregular situation.⁷ Today this would amount to some 20-30 million irregular migrants.

A particular category of irregular migration comprises migrants smuggled or people trafficked across borders (trafficking also occurs within countries). The global scale of human trafficking across international borders has been estimated as involving between 700,000 and four million people per

² Martin (2010)

³ Koser (2007)

⁴ Terrazas *et al.* (2007)

⁵ Vitkovskaia (2004)

⁶ Council of Europe (2007)

⁷ ILO (2004)

year.⁸ The ILO has estimated that 20.9 million people were in forced labour, including sexual exploitation, from 2002-11.⁹ In the specific cases of migrant smuggling and especially human trafficking, an alternative measure to enumerating the migrants involved is to estimate the profit made by these 'industries'. Human trafficking has been described as the third largest and fastest growing global criminal activity, estimated to victimise millions and net billions.¹⁰ It has been estimated that migrant smuggling and human trafficking together are businesses with a turnover of over ten billion US dollars per year.¹¹

Some migrants are highly-skilled and work at the upper end of the labour market; indeed there is growing competition for a limited pool of global talent among both states and corporations. But *many migrants (including some who are highly-skilled) work in low-skilled occupations, the informal sector, and engage in so-called 3D jobs that are dirty, dangerous, and difficult – for example in heavy industry, agriculture, mining, and forestry.*

Within this wide range of migrant profiles, certain categories are of particular concern with regards to the protection of their human rights, especially children, domestic workers, and those involved in 'forced labour'. Domestic workers, for example, are estimated to comprise up to 10 percent of total employment in some countries, and half of them are migrants, yet most countries exclude domestic work from national labour laws¹² (the legal framework regarding domestic work is considered in the next section). The types of conditions of concern typically include threat or physical harm to the worker; restriction of movement and confinement to the workplace or to a limited area; debt bondage; withholding of payment or excessive wage reductions; retention of passports and identity documents, and threat of denunciation to the authorities where the worker has an irregular immigration status.

Migrant workers with irregular status – both men and women and including the victims of migrant smuggling and human trafficking – are especially vulnerable to exploitation in work. Women are over-represented among migrants with irregular status, one reason being that their residency status is often linked to their marital status or their employment. Because they are confronted with gender-based discrimination, female migrants with irregular status are often obliged to accept the most menial informal sector jobs. Such can be the level of abuse of their human rights that some commentators have compared contemporary human trafficking with the slave trade.¹³ Women in particular also face specific health-related risks, including exposure to HIV/AIDS. More generally migrants with irregular status are often unwilling to seek redress from authorities because they fear arrest and deportation. As a result, they do not always make use of the public services to which they are entitled such as emergency health care. In most countries, they are also barred from using the full range of services available to citizens and migrants with regular status. In such situations, already hard-pressed NGOs, religious bodies and

⁸ Momsen (2004)

⁹ UNGA (2012)

¹⁰ Munck (2005)

¹¹ IOM (2003)

¹² ICMC (2010)

¹³ O'Connell Davidson (2011)

other civil society institutions are obliged to provide assistance to migrants with irregular status, at times compromising their own legality.¹⁴

*The recent global financial and economic crisis has also impacted on the rights of many migrant workers.*¹⁵ Job losses for migrant workers have been recorded around the world, especially in employment sectors that are most sensitive to economic cycles, such as construction, manufacturing, financial services, retail, travel and tourism. Unemployment rates for foreign nationals have increased in many states, and in others labour market policies have been put in place to encourage employers to retrench migrant workers first, and to replace them with unemployed nationals. More significant than unemployment, however, have been deteriorating working and living conditions for migrant workers.¹⁶ There have been reports from around the world of non-payment of wages for foreign workers; and reductions in wages, working days, and the availability of overtime. Sporadic instances of discrimination against migrant workers and a rise in xenophobia have also been recorded.

3. MEASURES TO ENSURE RESPECT FOR AND PROTECTION OF THE HUMAN RIGHTS OF ALL MIGRANTS, WITH PARTICULAR REFERENCE TO WOMEN AND CHILDREN

There is a wide legal and normative framework for the protection of the rights of migrants, and a wide variety of international, regional, and national organizations and institutions dedicated to safeguarding these rights. And yet around the world migrant workers continue to experience violence, abuse, and exploitation.

3.1 The Legal Framework

International migrants have rights under two sets of international instruments. The first are the core human rights treaties currently in force, namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention against Torture (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). Second, migrants are provided specific protection in the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), adopted by the UN General Assembly in 1990, and also one of the core human rights treaties. The Convention is intended to reinforce the international legal framework concerning the human rights of migrant workers by adopting a comprehensive instrument applicable to the whole migration process and regulating the legal status of migrant workers and their families. The Convention protects the basic rights of all migrant workers and their families and grants regular migrants a number of additional rights on the basis of equality with nationals. It further provides a framework for interstate cooperation on migration issues.

¹⁴ GCIM (2005)

¹⁵ Koser (2010)

¹⁶ UNGA (2012b)

Migrant workers are also provided rights under international labour law, which includes two specific ILO Conventions concerned with the protection of migrant workers (Nos. 97 and 143). The trafficking and smuggling protocols, supplementing the UN Convention against Transnational Organized Crime, also make reference to protecting the human rights of trafficked victims and smuggled migrants. ILO labour standards have also had a significant impact especially on domestic law in ILO member states. Migrants' rights are also protected under regional treaties (for example under the European Court of Human Rights and the Inter-American Court of Human Rights) and by national laws.

A whole range of institutions and organizations, at the international, regional, and national levels, have responsibility for implementing this legal framework and safeguarding the rights of migrant workers. The ILO is the only UN agency with a constitutional mandate to protect migrant workers, and this mandate has been re-affirmed by the 1944 Declaration of Philadelphia and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. ILO has developed a series of international Conventions to guide migration policy and protection of migrant workers. In all of its work ILO adopts a 'rights-based' approach to labour migration and promotes tripartite participation (governments, employers and workers) in migration policy. While the International Organization for Migration (IOM) does not have a specific protection mandate, its guiding principle is to promote humane and orderly migration for the benefit of all, and it supports numerous projects aimed at protecting the rights of migrant workers around the world.

The protection of migrant workers is also a significant focus for regional organizations, and Regional Consultative Processes (RCPs) on international migration around the world. They are addressed through provisions in numerous bilateral labour agreements between sets of states (although these provisions are not always effectively implemented). At the national level numerous government agencies are dedicated to promoting the legal rights of migrants and protecting them in the workplace. Civil society organizations and trade unions are also very active in this arena.

3.2 Implementation Gaps

A variety of explanations have been offered for why many migrants do not enjoy the rights to which they are entitled, despite the existing legal and institutional framework.

According to some analysts, the existing framework is insufficient. In contrast to refugees, for example, there is no single document consolidating the legal and normative framework on migration. One concrete proposal has been to articulate the legal and normative framework - that is currently dispersed across a number of treaties, non-binding agreements, and policy understandings - in a single compilation of all treaty provisions and other norms that are relevant to international migration and the human rights of migrants.¹⁷ Neither is there a single UN agency responsible for safeguarding the legal and normative framework on international migration and a range of proposals have been made for enhancing the global governance of international migration.¹⁸

¹⁷ GCIM (2005)

¹⁸ Newland (2010)

Most commentators, in contrast, think that the legal framework is sufficient. For some the problem is that the most comprehensive legal instrument on the human rights of migrants – ICRMW – has not been widely ratified. The Convention has been ratified by 46 states and signed by 17 states, but none of them is a major developed country of destination for migrants. Some of the main reasons provided for non-ratification include: the Convention's breadth and complexity; the technical and financial obligations it places on states that have ratified it; the view that it contradicts or adds no value to existing national migration legislation; concerns that it provides migrants (especially those with irregular status) rights that are not found in other human rights treaties; and claims that it generally disallows for differentiation between regular and irregular migrants. The Convention has however recently received further endorsement within the UN system, when in December 2010 the UN Committee on Migrant Workers approved formal jurisprudence that elaborates the rights of migrant domestic workers on the basis of an interpretation of the 1990 Convention. At a conference to mark the 20th anniversary of the Convention on Migrant Workers, the UN Office of the High Commissioner for Human Rights (OHCHR) called for those states that have not yet done so to ratify the Convention.

Nevertheless In many signatory states to the ICRMW migrants still face significant challenges in the labour market. The same is true in non party states to ICRMW where measures to try to ensure that domestic law and regulations conform to international human rights standards have been ineffective. According to this analysis *the real challenge is actually delivering the rights contained in the legal instruments to which states are party. Lack of political will; capacity; and resources have all been identified as reasons for the incomplete implementation of the legal framework.* A range of international organizations including IOM supports institutional capacity-building around the world to promote the rights of migrants. Capacity-building is also required among civil society to increase its effectiveness in lobbying for the rights of migrants and migrant workers; monitoring and reporting on conditions for migrant workers; and providing migrant workers with services. Effective practice also stresses empowering migrants by providing them with information about their rights in the labour market, giving them the identification and rights needed to access banks and other institutions abroad, and developing incentives to encourage migrants to report the worst abuses of their rights.

Another explanation for the gap between the legal framework and everyday realities for many migrants is that the dynamics and dimensions of labour migration have changed since the main labour standards and conventions were adopted. This is especially with regard to: the decreasing significance of the state in the recruitment of migrant labour and the increasing importance of private agents and intermediaries; the feminization of migrant labour with the overrepresentation of women migrant workers in 'extremely vulnerable positions'; the increasing short-term nature of migration and the expansion of temporary migrant worker programmes; and the growth in irregular migration and the need to balance control measures with measures to facilitate labour migration and to protect migrant workers.

In response one focus is to enhance national protection, for example through national courts applying international human rights law and case law and advisory opinions from regional treaties to cases that come before them. It has also been proposed that supplementary and complementary mechanisms for protection need to be developed. In this regard n enhanced role for UN Special Mechanisms has been

proposed: the Special Rapporteur on the human rights of migrants has a role in improving knowledge of the circumstances of migrants, establishing dialogue with governments, and giving practical effect to human rights principles. At the same time it is acknowledged that the international mechanisms that implement UN human rights treaties remain under-funded.

4. MEASURES TO ENSURE REGULAR, ORDERLY, AND SAFE MIGRATION

*A comprehensive approach to ensuring regular, orderly, and safe migration would include at least the following 10 key components: assessing labour markets from the migration perspective; regulating admissions and selecting migrant workers; determining conditions attached to employment permits; training of migrant workers and placement services; protection of migrant workers' rights; reducing labour migration costs; strengthening bilateral labour mobility agreements; reducing irregular migration; combating migrant smuggling and human trafficking; and return and reintegration.*¹⁹ It is clearly beyond the scope of this paper to provide detailed discussion of each of these elements in turn, and some are covered in more depth both in this paper and other papers in this series. This section nevertheless identifies the key aspects of each of these components, highlighting specific recommendations and significant questions for further discussion.

4.1 Assessing Labour Markets from the Migration Perspective

*The capacity to make an accurate, and regular, assessment of the demand for migrant workers in the labour market is a fundamental requirement for well-managed labour mobility; not just for destination countries in selecting and admitting migrant workers, but also for origin countries for example in terms of providing appropriate training to potential migrants. The two main methods in use are through establishing quotas or through labour market testing.*²⁰

4.2 Regulating Admissions and Selecting Migrant Workers

*Once an assessment of the demand for foreign workers has been made, effective mechanisms are required for regulating admissions and selecting migrant workers. The main models are employment-based immigration programmes and temporary labour migration programmes. Employment-based immigration programmes promote the admission of migrant workers with a view to their settlement in the destination country, and tend to focus on skilled workers. There are three main mechanisms for regulating admission and selecting migrants under these programmes: points systems, work permits, and facilitating foreign students to remain to work and eventually settle after their studies. Temporary labour migration programmes are designed with the intention that migrant workers will return home after the completion of their employment. The main types are: seasonal programmes, sector-based schemes, working holidaymaker schemes, trainee programmes, and domestic workers.*²¹

4.3 Determining Conditions Attached to Employment Permits

¹⁹ IOM (2010)

²⁰ ILO (2009)

²¹ Martin (2007)

States that are employing foreign labour, especially temporarily, need to make clear and transparent decisions about the conditions attached to employment permits, and have the capacity to monitor and enforce these conditions. There is a wide range of experiences relating to the conditions attached to employment permits, as regards their duration and renewability; occupational mobility; procedures governing migrants' rights upon loss of employment; possibilities for permanent residence; family reunion; and other social rights. As a generalization, better conditions are attached to employment-based immigration programmes, and offered to skilled workers than to low and unskilled workers.

4.4 Training of Migrant Workers and Placement Services

While destination countries with a need for labour migrants are developing capacities to manage the orderly admission of workers and guarantees of their associated rights; *there is also a responsibility on origin countries keen to promote labour migration to train potential migrant workers, and to work with destination countries to identify job openings, ensure that qualifications are recognized, and also protect migrant workers' rights.* Although this function is usually fulfilled by the private sector, some governments are also doing this themselves. Increasingly, these activities take place through Migrant Resource Centers (MRCs) based in origin countries.²²

4.5 Protection of Migrant Workers' Rights

Measures to ensure the protection of migrant workers' rights are covered in Section 2 above.

4.6 Reducing Labour Migration Costs

One of the obstacles to the effective matching of labour supply and demand across borders is the upfront costs of labour migration, for example incurred in obtaining information, documentation, health checks, pre-departure orientation and training, and paying for transportation. ILO and UN conventions call for employers to absorb the economic costs of migration.²³ Yet while employers typically pay these costs for professional and highly skilled migrant workers, the migrant-paid share of migration costs tends to rise as skill levels fall. One reason is that destination states increasingly depend on private recruiters to identify foreign workers and match them with job openings in the labour market. There are three broad government responses to private recruitment costs. One is to step up enforcement to eliminate unscrupulous agents. A second is to encourage more legitimate agents to become involved in the migrant brokerage business so that competition gives migrants options and leads to effective self regulation and ratings to guide migrants toward better agents. A third approach is to try to increase the role of public employment service agencies in moving workers over borders in the hope that public agencies are most likely to ensure that minimum standards are satisfied in recruitment and deployment.

4.7 Strengthening Bilateral Labour Mobility Agreements

²² GFMD (2009)

²³ Martin (2010)

Bilateral labour mobility agreements have been identified as a promising mechanism for ensuring that the potential benefits of migration accrue both to origin and destination countries, as well as to migrants themselves.²⁴ While some countries recruit labour on the basis of Memoranda of Understanding (MoUs),²⁵ the majority now rely on bilateral agreements. The main difference between the two is that bilateral agreements are legally binding. Reasons that increasing numbers of countries are signing bilateral labour agreements is that they offer an effective method for regulating the recruitment and employment of foreign workers to mutual satisfaction; they allow for greater state involvement in the migration process; they can be tailored to the specific supply and demand characteristics of the origin and destination countries; and they can provide effective mechanisms for protecting migrants. *Some bilateral agreements have been criticized for not paying due attention to the rights of migrants, In response ILO has identified 24 basic elements that need to be addressed in bilateral labour agreements,*²⁶ while IOM and OSCE have developed a matrix of good practice,²⁷ and ILO, IOM and OSCE have prepared a 'Compendium of Good Practice Policy Elements in Bilateral Temporary Labour Arrangements' for the 2008 Global Forum on Migration and Development (GFMD).²⁸

4.8 Reducing Irregular Migration

There are four main strands to current efforts to reduce irregular migration. One is to develop appropriate policy and legislation at the national level, supported by complementary capacity-building activities, for example training in protection-sensitive border procedures. A second response to irregular migration is information dissemination targeting potential migrants who might be contemplating hazardous journeys and information campaigns aimed at host communities. The establishment and operation of Migrant Resource Centres in countries of origin is an important initiative in this context. Cooperation between states is also critical to reinforcing the understandings of irregular migration forged at the grass-roots level and sharing good practices across countries and regions. At the inter-State level, Regional Consultative Processes (RCPs) provide an important platform for dialogue and cooperation. Finally there is a wide range of programmes and projects to identify the specific needs of vulnerable migrants and provide them with individualized assistance and protection in accordance with fundamental human rights principles.

4.9 Combating Migrant Smuggling and Human Trafficking

Specific measures for combating migrant smuggling and human trafficking are considered in Section 4 below.

4.10 Return and Reintegration

²⁴ World Economic Forum (2009)

²⁵ OECD (2004)

²⁶ Gencianos (2004)

²⁷ <http://www.iom.int/jahia/Jahia/pid/2056>

²⁸ GFMD 2008

Return and reintegration is a critical element of migration management, including as a strategy to prevent or deter irregular migration and maintain the integrity of asylum systems, as well as in promoting circular migration. In spite of its importance, the reintegration of migrants is among the most overlooked policy interventions of the migration cycle. Existing experience with reintegration programmes has tended to focus on providing protection and support to vulnerable humanitarian migrants – such as the victims of human trafficking, returning refugees and internally displaced persons, and in some cases, migrants who have been deported back to their country of origin. These services range from counselling and education (in the case of child victims of human trafficking) to land grants and agricultural equipment (in the case of some returning refugees) to vocational training (for some deported migrants). Recent evidence from developed countries indicates that government-managed worker retraining and skill acquisition programmes are costly undertakings with marginal benefits; and that private sector involvement is essential. Reintegration policies for the families of migrants have also been identified as important – for promoting sustainable return. The development implications of return and reintegration of mobile workers continues to be a focus for the GFMD.²⁹

5. MEASURES TO PREVENT AND COMBAT SMUGGLING OF MIGRANTS AND TRAFFICKING IN PERSONS

People trafficked or smuggled across borders probably comprise a relatively small proportion of irregular migrants worldwide, but they deserve separate attention in the discussion on irregular migration. First, both processes, but in particular human trafficking, expose migrants to special vulnerabilities, even compared to irregular migration. As a result, secondly, there is almost universal consensus that both processes should be stemmed, and the divergences for example between origin and host states, or governments and civil society, or states and the labour market, that often divert policy-making in response to other forms of irregular migration, tend not to apply to migrant smuggling and especially human trafficking. Consequently, thirdly, considerable progress has been made in developing a normative framework, addressing the issues in Regional Consultative Processes, and implementing national laws and policies. It may not be possible absolutely to eradicate migrant smuggling and human trafficking, but there appears to be genuine political will to reduce them to a minimum. This section considers three sets of measures that have been proposed to strengthen these efforts.

5.1 Reinforcing the Legal and Normative Framework

Migrant smuggling and human trafficking have been defined and distinguished in two UN protocols: the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000) and the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), jointly often referred to as the Palermo Protocols. In these Protocols the trafficking of human beings is defined as: ‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’. The smuggling of migrants is

²⁹ GFMD 2009

defined as: ‘the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident.’

While these protocols have been widely accepted – there are currently 117 signatories to the ‘Trafficking Protocol’ and 112 to the ‘Smuggling Protocol’ - clearly ratification is not yet universal and further efforts are required to ensure greater ratification.

A number of other areas where reinforcement of the legal and normative framework may be required have been identified. One concerns the clear legal distinction between the crimes of migrant smuggling and trafficking in people, when in reality a clear distinction cannot be made in every case. This occurs in particular where migrants do not pay a smuggler in full before migrating, which means they arrive in the destination country in debt to the smuggler. This in turn opens up the possibility of exploitation. This is not a case for re-writing the Palermo Protocols or revising the definitions contained within them. But it does point towards the need to apply the normative framework with flexibility and sensitivity.

Another debate concerns the level of protection offered. During the negotiations for the Palermo Protocols the Offices of the United Nations High Commissioner for Refugees (UNHCR) and the UN High Commissioner for Human Rights (OHCHR) inserted a ‘savings clause’ to ensure that the instruments did not undermine the rights, obligations and responsibilities of states under international human rights and humanitarian law, including in particular the principle of *non-refoulement*. There are concerns, however, that the two protocols may be used to undermine the refugee protection regime.³⁰

5.2 Strengthening National Laws and Policies

5.2.1 An integrated policy framework

There is a general consensus on the main elements required for an integrated and effective policy framework to prevent and combat migrant smuggling and human trafficking.³¹ *First, states must prosecute the perpetrators, including those who recruit and harbour trafficked persons, and confiscate these perpetrators’ assets. Second, they must reduce the demand for the services of smuggled and trafficked people, both by means of information campaigns and educational initiatives, and through the strengthening of national law. The reinforced regulation of marriage, tourist and adoption agencies is of particular importance in this respect. Third, action against those who are engaged in migrant smuggling and human trafficking must go hand-in-hand with effective protection for their victims, including ensuring consistent standards and facilitating decision-making in the asylum system.* Policies focused on migrant smuggling and human trafficking should also be integrated into wider measures to combat irregular migration more generally, and with due respect to the rights of the individual and within a general human rights based approach. These include: prevention measures encompassing law enforcement strategies, diversion into legal channels, and addressing root causes; regularization for unauthorized migrants; and detention and deportation.

³⁰ Gallagher (2002)

³¹ GCIM (2005)

5.2.2 National laws and policies

A number of weaknesses in national responses to migrant smuggling and human trafficking have been identified. First, while many states have passed national legislation certain omissions and gaps have been found to recur in existing national laws. *Recurrent omissions concern procedures governing the identification of victims of trafficking and guarantees for the principle of non-punishment of victims of trafficking. Notable gaps include policies to address the demand for human trafficking, and the contentious issue of the residency status for victims of trafficking.*³²

Furthermore, national legislation and policies on migrant smuggling are far less developed than those on human trafficking. Despite the separate UN Protocol, most countries do not have specific laws and policies on migrant smuggling. Even where they do national enforcement policies remain weakly developed and implemented. In particular there is no consistency on strong penalties for migrant smugglers across nations. At the regional and national levels combating migrant smuggling is normally included as one objective for laws and policies aiming more generally to reduce irregular migration, for example through strengthening borders.³³

5.2.3 Data

Very few countries undertake systematic collection of data on migrant smuggling or human trafficking. Even where they do conceptual and practical problems preclude the availability of reliable data. Different states, for example, define migrant smuggling and human trafficking in different ways, and migrants can shift overnight between regular and irregular status and from smuggled migrants to the victims of trafficking. There is also a series of more practical problems. Human trafficking is generally an under-reported crime, with victims scared of reprisals from traffickers or penalization by the state. Most sources agree that the majority of irregular migrants – including those who are smuggled or trafficked are not recorded. Another problem is access to data – however limited it may be - that has been collected. In many states such data are collected by enforcement agencies and are not made publicly available. Alternatively, information and data that may establish a person's irregular status are frequently dispersed between different agencies such as government departments, the police and employment offices, making cooperation and access to data difficult. International cooperation on data collection is even more problematic. There is no authoritative source on global trends and numbers in irregular migration, and the available sources are not comprehensive. In this regard it is worth noting the IOM Counter-Trafficking Module that includes a global database.

5.2.4 Law enforcement

Another integral component of stemming migrant smuggling and human trafficking is criminal investigation. In a number of countries agencies responsible for the investigation of financial crime have extended their functions to also investigate organized crime including human trafficking. An alternative model is to establish new units. There has been some international cooperation in developing

³² Vienna Forum (2008)

³³ Brolan (2002)

investigative capacities: Interpol facilitates, coordinates, and provides technical advice for national investigative structures, as does the South East Asia Cooperation Initiative Regional Centre for Combating Trans-border Crime (SECI). *Robust investigative capacities nevertheless are mainly found in developed countries, and common problems in less developed countries have been found to include a lack of resources, limited technical expertise, and corruption.*

5.2.5 Services for the victims of trafficking

The needs of trafficking victims may differ from those of smuggled migrants, but some common approaches are required. *Awareness-raising* is of particular importance in order to provide victims with information on the protection, assistance and other services that are available to them. Likewise, the *training of prosecutors, judges, police officers, border guards, labour inspection units and social workers* is also required, so as to strengthen the capacity of states to provide victims with adequate and appropriate protection. Given the number of women and children (including unaccompanied minors) who are smuggled and trafficked from one country to another, such services must evidently be provided in a *gender and age-sensitive manner*.³⁴ They must also be fine-tuned to address the different levels of exploitation and abuse that are involved in the discrete, but often interconnected, crimes of migrant smuggling and human trafficking.

5.2.6 Secure border management

Certain components of broader strategies for secure border management are especially relevant for combating migrant smuggling and human trafficking, which often depend on fraudulent documents and illicit border crossings. These include improved frontier and pre-frontier management, for example through passenger pre-inspection, the deployment of Immigration Liaison Officers, Advanced Passenger Information agreements, and carrier sanctions; and improved personal documentation for migrants, including identity cards, machine readable codes on passports and travel documents, and the use of biometrics.

5.2.7 National coordination and consultation mechanisms

To assist intra-governmental coordination on combating smuggling and trafficking, such governments as Australia, the Philippines and the United States have created inter-ministerial mechanisms to deal with the multifaceted policy issues of the phenomena. *Effective national policies also require consultation with civil society, especially migrant groups.*

5.3 International Cooperation

Effective policies to combat migrant smuggling and human trafficking require significant cooperation between origin, destination and transit states through which irregular migrants move, including the exchange of intelligence, information and data; joint criminal investigations; and specific agreements on return. Migrant smuggling and human trafficking is high on the agenda of most regional consultative processes, which provide a forum for formal and informal dialogue and policy development.

³⁴ UNGA (2012c)

Capacity-building is also an important component of international cooperation. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process), for example, has supported the development of National Action Plans through information-sharing, joint capacity-building actions, and practical workshops. The '5 plus 5' process has organized training workshop in Libya and Morocco on counter trafficking and smuggling. Australia's capacity-building activities in Asia include five-year regional project to strengthen law enforcement, enhance judicial and prosecutorial responses, and improve policy, legal, research and outreach capacity. The US Government provides extensive support to counter-trafficking capabilities worldwide.

International organizations are also increasingly involved in capacity-building initiatives in this area. The UN Office on Drugs and Crime (UNODC) has launched the UN Global Initiative to Fight Human Trafficking (UNGIFT) to provide a framework for cooperation and create common tools against trafficking in persons. IOM, ILO, UNHCR, UNICEF, OSCE, UNODC all also provide technical support to states in their efforts to comply with international standards and establish migration management systems.

6. EMERGING CHALLENGES

Besides the challenges already enumerated in this background paper, *another challenge to protecting the human rights of migrants, promoting regular migration, and reducing migrant smuggling and human trafficking, is that the dynamics and dimensions of migration are changing rapidly, and in effect outpacing developments in the legal, normative, and institutional frameworks. This final section briefly considers four emerging challenges.*

6.1 Mixed Migratory Flows

Mixed migratory flows describes a situation where migrants moving for broadly different reasons – whether as refugees, migrants, victims of trafficking, or unaccompanied or separated children, move alongside each other. They use the same routes and means of transport. They employ the services of the same smugglers and purchase fraudulent documents from the same suppliers. Often they are hoping to reach the same countries of destination.

The people involved in mixed movements, whether they are refugees or migrants, experience many of the same hazards and human rights violations in the course of their journey. These include detention and imprisonment in unacceptable conditions, physical abuse and racial harassment, as well as vulnerability to theft, extortion, impoverishment and destitution. Those who travel by boat are at risk of interception, abandonment and drowning at sea, while those who move by land may be returned or transferred to remote and dangerous locations. People on the move who lose or destroy their identity documents may be unable to establish their nationality, become effectively stateless and find it very difficult to return to their own country. In response to the growth of irregular and mixed migratory movements, many states have introduced measures that are intended to prevent certain groups of foreign nationals from arriving

and remaining on their territory. These measures are often indiscriminate in their application and make it very difficult for refugees to enter a country where they can apply for asylum.³⁵

In response to the phenomenon of mixed migratory flows, and reflecting a particular concern for access to asylum systems, the Office of the UN High Commissioner for Refugees (UNHCR) has developed a 10-Point Plan of Action on Refugee Protection and Mixed Migration, which identifies protection gaps for refugees and other people of concern at various stages of mixed migratory movements. IOM's approach has focused on concrete capacity-building including for implementing the 10-point Plan of Action, through direct assistance to migrants, helping develop policy and legislation, training government officials, disseminating information, and promoting cooperation and partnership. Other organizations are also actively involved in trying to protect the rights of migrants in mixed migratory flows, including the International Federation of Red Cross and Red Crescent Societies (IFRC), the European Union (EU) and Mediterranean Transit Migration Dialogue (MDM), and the Council of Europe and African Union (AU), as well as regional cooperation frameworks such as the Bali Process.

6.2 Climate Change and Migration

A second new challenge is emerging in the context of climate change.³⁶ While there is no consensus on numbers, it is expected that the overall scale of migration will increase significantly as a result of the effects of climate change, although it will often be difficult to distinguish environmental from other factors that cause migration. People moving inside their own country as a result of the effects of climate change would fall within the definition of IDPs as described in the 1998 Guiding Principles on Internal Displacement. *But there are important gaps in the legal and normative framework as regards people who cross an international border. These people would not qualify as refugees under the 1951 Convention definition, but neither would they be economic migrants. The status of these persons remains unclear in international law.* The same is the case for people who may have to leave low-lying island states that become uninhabitable as a result of the effects of rising sea levels. They would be in a legal limbo as neither migrants nor refugees. It is also unclear whether they would be legally defined as stateless, as under international law statelessness means to be without nationality, not without state.

Proposals to fill this legal gap are currently being discussed at a variety of levels. The prospects for a new international treaty or a protocol to the 1951 Refugee Convention are slim and also have significant shortcomings. Instead efforts at the multilateral level are focusing on the development and consolidation of normative principles that can inform regional or national laws and policies on environmental migration. One example is the Nansen Principles. A range of proposals is also being considered at the level of national policy, in various countries. One is to develop a new humanitarian category for environmental migrants. A second model is to amend existing legislation to provide temporary protection or refugee-like protection. A third model is to use existing labor migration programmes to extend migration opportunities to people vulnerable to or affected by environmental change.

³⁵ Crisp (2007)

³⁶ UNGA (2012c)

6.3 Migrants in Crisis

A third issue that has attracted growing attention, especially in the aftermath of the revolution in Libya, is the situation of *migrants caught up in crises*. In recent years, significant numbers of non-citizens have been displaced by conflict, violence, and disasters, in countries where they reside and work. They include migrant workers and irregular migrants, but also asylum seekers and refugees. They have been displaced for example by invasion in Lebanon in 2006, xenophobic violence in South Africa in 2008, revolution in Libya in 2011, civil war in Cote d'Ivoire in 2011, and flooding in Thailand also in 2011.

While there has been very little research on the experiences of non-citizens during crises, *it is reasonable to suppose that many of them may be more vulnerable to displacement, and suffer its consequences more acutely, than local populations*. Reasons include that they may not speak the local language or understand the culture, they may lack job security, they may lack a social safety net, and they may have insecure legal status - or in the case of irregular migrants no legal status. In some of the recent examples of non-citizens caught up in crisis they have been affected as bystanders to the crisis, whereas in other cases they have been deliberately targeted. Equally it may be harder for displaced non-citizens to resolve their displacement, especially if they are unable or unwilling to return to their country of origin, and they may face specific challenges in regaining property, employment, and identification cards in the country where they have been displaced. Even where they can return to their countries of origin, they may face significant reintegration challenges there too.

Currently the rights of non-citizens in crisis are not explicitly stated in existing laws, conventions, or standards, although states are responsible for anyone under their jurisdiction or in their territory. Instruments that cover displacement do not deal with non-citizens; while those that cover non-citizens do not deal with displacement. Neither is responsibility for protecting and assisting non-citizens during crisis clearly ascribed. A number of recommendations have been made to address this protection gap.³⁷ One requirement is for a clear articulation of the legal rights of displaced non-citizens. Second, a more predictable response by international agencies is needed. Third, both origin and destination states also need to develop a greater capacity to respond. Finally, corporations that employ significant numbers of overseas nationals should develop standard operating procedures on protecting and evacuating workers; establish risk assessment units; and establish senior chief security officer positions tasked with ensuring the safety of all workers in the event of emergencies.

6.4 The Migration 'Business'

Despite the very significant progress reported here in developing laws and policies to combat migrant smuggling and human trafficking, both phenomena remain substantial, notwithstanding evidence from certain countries that policy interventions have reduced their scale. One reason is that *migrant smuggling and human trafficking are complex processes that evolve in response to policies*. They take on different organizational forms, follow a 'business' logic, and are driven by financial profit. The IOM identifies the following characteristics of migrant smuggling operations: a broad transnational reach; an ability to create or use diverse networks of service providers to help in various stages of the process; an

³⁷ Koser (2012)

ability to influence government officials at many levels; access to large sums of money at many locations; ties with other criminal enterprises; and the ability to shift areas of operation according to 'market' conditions. Policy frameworks need to be flexible enough to respond to the changing character of migrant smuggling and human trafficking. In turn ongoing research is required to understand the dynamics of the processes.

7. CONCLUSION

This paper is intended to provide the basis for a round table discussion to assist Permanent Missions at UN Headquarters prepare their contributions and participation at the 3-4 October 2013 UN High Level Dialogue on International Migration and Development, where one of the four agreed Round tables will focus on measures to protect the human rights of migrants, promote orderly migration, and reduce migrant smuggling and human trafficking. The paper has provided an overview of the scale and scope of the challenge. It has sought to explain why many migrants do not enjoy their full human rights despite a wide legal framework and extensive institutional response. It has provided the outline of a comprehensive framework for promoting regular, orderly, and safe migration, emphasizing that countries of origin and destination have equal responsibility in trying to achieve this goal. The paper has considered specific measures to strengthen the policy response to migrant smuggling and human trafficking. Finally, and looking to the future, it has identified new trends that will further challenge the capacity of states and international organizations to safeguard the rights of migrants.

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