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## **Towards a ‘soft law’ framework for the protection of vulnerable migrants**

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## **Introduction**

Since the 1980s, an increasing number of people have crossed international borders outside of formal, regularised migration channels. These irregular movements have taken place by land, air and sea, and are both South-North and South-South. The motives for irregular trans-boundary movement are frequently complex and mixed, and the people moving in irregular ways often do not fit neatly into the category of either ‘refugee’ or ‘voluntary, economic migrant’.<sup>1</sup>

A complex range of often inter-related factors - including the environment and nature, conflict, and the international political economy - contribute to creating the imperatives and incentives for people to leave their countries and cross international borders, sometimes within the region or origin and sometimes trans-continently. The High Commissioner for Refugees has described this phenomenon as “people on the move” and outlined one of his priorities as being to clearly identify where there are protection needs within such irregular population movements.<sup>2</sup>

UNHCR’s overriding concern within this context is to ensure the protection of refugees within broader migratory movements. In accordance with its mandate, UNHCR has a responsibility to ensure that refugees are identified and receive access to protection and







Global Forum on Migration and Development.<sup>19</sup> Furthermore, at the 8<sup>th</sup> Session of the HR Council, a number of states – including Chile on behalf of the Group of Latin

on their application to IDPs. On an institutional level, the process clarified the division of responsibility between international organisations – on both a normative and operational level. It initially developed a ‘collaborative’ approach, which outlined the division of responsibility between UN agencies for IDP protection.

Such a process of ‘soft law’ development could be analogously applied in order to develop the ‘Guiding Principles on the Protection of Vulnerable Irregular Migrants’ and to develop a clear operational division of responsibility among international organisations, analogous to the ‘collaborative approach’. In developing a soft law framework, UNHCR would not take on institutional responsibility for the protection of vulnerable migrants, which would be outside of its normative and operational mandate. However, as a rights-based organisation with expertise in protection, it could play a facilitative role by designing and overseeing the process of negotiation of a soft law framework and a collaborative response to the implementation of that framework.

This paper sets out the case for the development of a soft law framework on the protection of vulnerable irregular migrants. It divides into four parts. Firstly, it sets out the problems with the status quo. Secondly, it outlines the case for a soft law framework. Thirdly, it outlines the case for a collaborative approach to the operational implementation of the framework. Fourthly, it outlines the process through which such a framework would be developed and facilitated at the international level.

### **Problems with the status quo**

In order to make the case that there is a need to develop non-binding standards on the protection of vulnerable migrants, it is important to begin by setting out what the problems are with the *status quo* that a soft law framework would attempt to address. Most obviously, the absence of clear guidelines on the application of the existing legal and normative structure to the situation of vulnerable migrants and the lack of a clear



category with few rights, from which refugees need to be isolated and protected, but towards which states have few other obligations.

However, as Trygve Nordby, the International Federation of the Red Cross and Red Crescent Societies' (IFRC) Special Envoy on Migration, argued at the High

which return may lead to torture, inhuman or degrading treatment or punishment, this obligation may require the state to allow an individual to remain on its territory so long as there is a risk of him or her being exposed to such treatment in his or her country of origin.<sup>24</sup>

In practice, however, many irregular migrants do not receive access to the protection to which they are entitled. At a normative level, the interpretation and application of human rights law to the situation of irregular migrants has been limited. The Office of the UN High Commissioner for Human Rights (OHCHR) has had little capacity to engage in the development of guidelines on the relevance of international human rights law to vulnerable migrants, and the treaty bodies for the various human rights instruments have rarely considered the rights of vulnerable irregular migrants.

On an operational level, there has been no clearly identified division of responsibility between international organisations for ensuring the protection of vulnerable migrants. Consequently, many people with specific protection needs (and entitlements) are subject to blanket removal orders, extended detention, and return without access to the protection or services to which they are entitled. Two analytically coherent groups face threats to their human rights which require that they are not immediately returned to their country of origin but that they are identified and receive access to the specific forms of international protection that they require.

(1) There are gaps in protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution.

There is a growing recognition that forced migration may be influenced by the effects of climate change, environmental degradation or serious economic and social distress. In the case of contemporary Zimbabwe, for example, the people leaving the country in search of asylum rarely meet the ‘persecution’ requirements of the 1951 Refugee Convention. Yet, they are not simply voluntary, economic migrants.

Rather, in relation to this dichotomy they are increasingly being referred to within UNHCR as “neither/nor” and within South Africa as “mobile and vulnerable people”. Their situation does not fit neatly within the existing framework of international refugee law. However, it is nevertheless widely recognised that many of the Zimbabweans in South Africa and Europe face specific vulnerabilities that make blanket return infeasible. Indeed, many of these people face serious economic and social stress as a result of near state collapse, the absence of access to shelter, clean water and sanitation, shelter, and the existence of a serious public health crisis in the context of HIV/AIDS.<sup>25</sup>

In many cases, returning these people to Zimbabwe (article 8.1(a)) is not in their best interests (article 8.5) and would be contrary to the levels of protection afforded to them.

Different states offer different levels of subsidiary protection but are wary of offering

trafficking can be addressed. Indeed an authoritative definition of human trafficking exists and there is widespread consensus that states have obligations to ensure the human rights of trafficked human beings.<sup>28</sup> However, what is less clear is how these rights can be operationally accessed in countries of destination and transit in the context of irregular migration.

Furthermore, while UNHCR and national jurisprudence sometimes sees trafficking ‘as persecution’, case law is mixed in its interpretation.<sup>29</sup> Consequently, where trafficked human beings are not seen as refugees, there is a need to consider other forms of subsidiary protection that might be required, in addition to ensuring that operational mechanisms exist for the identification and referral of trafficked persons within mixed flows.

In contrast, there is currently no legal definition of stranded migrants nor a clear consensus on their rights and the mechanisms through which these rights can be met. Grant explains, “migrants become legally stranded where they are caught between removal from the state in which they are physically present, inability to return to their state of nationality or former residence, and refusal by any other state to grant entry”.<sup>30</sup>

Furthermore, Dowd offers a working definition of stranded migrants as “those who leave their own country for reasons unrelated to refugee status, but who become destitute and/or vulnerable to human rights abuses in the course of their journey. With some possible exceptions, they are unable or unwilling to return to their country of origin, are unable to regularize their status in the country where they are to be found, and do not have access to legal migration opportunities that would enable them to move on to another state”.<sup>31</sup>

Stranded migrants exist because of a range of obstacles, including: lack voluntary return, legal bars to involuntary return, statelessness, unclear identity or nationality, prohibited means of removal. While states have clear obligations under international law to protect the rights of those stranded, these are often not met for both normative and operational reasons.<sup>32</sup>

Irregular migrants may also have protection needs that result from being victims of trauma and violence during transit. Those who travel long distances and face serious obstacles to transit often suffer brutal violence and severe traumas during transit. They may be stabbed, shot, starved or thirsted to near-death, raped, doused with chemicals, or abandoned en route<sup>33</sup>. These experiences may hinder their capacity to (re)integrate in the

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<sup>28</sup> Saito, K (2007), ‘International Protection for Trafficked Persons and Those Who Fear Being Trafficked’, Working Paper No. 149, (UNHCR: Geneva); Piotrowicz (2007).

<sup>29</sup> Saito (2007).

<sup>30</sup> Grant (2007), pp. 30-1

<sup>31</sup> Dowd, R (2007), ‘Trapped in Transit: The Plight and Human Rights of Stranded Migrants’, Working Paper No. 156 (UNHCR: Geneva), p. 4.

<sup>32</sup> Grant (2007).

<sup>33</sup> European Commission proposal for ‘The development of international standards and response mechanisms for the reception and care of vulnerable migrants in mixed flows’, EuropeAid/126364/C/ACT/Multi.

host or home country, and therefore require forms of support and protection. ICMC, for example, has highlighted the need to develop mechanisms to ensure that medical, psychosocial, protection and referral services are available at points of embarkation, rescue, arrival and readmission.<sup>34</sup>

Although IOM frequently offers legal advice to states on how to implement IML this is done on an *ad hoc* basis according to where states invite IOM to provide such expertise. IOM's advice and training in this area does not, however, translate into a set of authoritative guidelines on how to operationalise human rights standards in the context of irregular migration.

The absence of a clear framework has negative implications for many states. For example, it means that states frequently offer different standards of subsidiary protection and therefore engage in a 'race to the bottom' in order to avoid being more generous or tolerant than other states in the region. Furthermore, the absence of a clear and transparent human rights framework often undermines public confidence and legitimacy in returns and in cooperation agreements with third countries.

For example, in the EU context, partnerships with non-EU states of embarkation and readmission – such as Djibouti, Mauritania, Somalia, Turkey, Yemen, or the Mahgreb states are often subject to public scrutiny and criticism because it is unclear whether those partnerships and the readmissions are subject to blanket return orders, on the one hand, or a system which respects the human rights of migrants, on the other hand. Clear guidelines would offer transparency, legitimacy and facilitate the *de facto* harmonisation of standards across states.

On an operational level, the absence of a clear division of responsibility between international organisations means that states have no clearly defined source of institutional support in ensuring the protection of vulnerable migrants. Each state varies in terms of how it identifies and refers vulnerable migrants, having to take on significant responsibility for identification and protection.

A more clearly defined institutional allocation of responsibility, on the other hand could make the process of identification, referral, protection, and return both more efficient and more o

particular area. The value of soft law is that it can provide clear and authoritative guidelines in a given areas, without the need to negotiate new binding norms.

The development of a soft law framework has been applied to address gaps in international protection in the past. In particular, there was a longstanding recognition that there were gaps in IDP protection, which ultimately led to the development and negotiation of a set of Guiding Principles on Internally Displaced Persons between 1992 and 1998. During that period, the Representative of the UN Secretary-General for IDPs, Francis Deng, worked together with the legal support of Walter Kaelin and the backing of a small number of states to identify existing normative gaps in IDP protection.

Having identified the gaps, they drew upon existing international human rights and international humanitarian law norms to draft a set of Guiding Principles that were subsequently adopted by states as a non-binding framework for interpreting their obligations towards IDPs. These Principles have subsequently been relatively effective in filling protection gaps and meeting the demand of states for clear guidelines and a clear institutional division of responsibility for IDP protection.

In many ways, the situation of vulnerable irregular migrants is analogous. The international community has reached point at which there is consensus that the international protection of ‘people on the move’ is no longer simply about refugees. There is a growing recognition that there is a significant gap – at both the normative and especially the operational level with respect to a number of groups of vulnerable irregular migrants.

However, as with the IDP case, the relevant human rights norms already exist; they simply require consolidation and application, and a clear division of operational responsibility between international organisations. As with the development of the guidelines on IDP protection, a soft law framework for the protection of vulnerable migrants would have two main features: it would be non-binding and it would clarify the application of the exiting legal and normative obligations to initiative’s areas of protection.

### *Non-binding nature*

The current historical juncture does not represent an auspicious political climate within which to develop new norms. Few powerful states are pre-disposed to the negotiation of binding, multilateral norms through a UN framework, and, in the context of state concern with migration and security, this reluctance is even greater with respect to negotiating binding agreements in relation to the rights of non-citizens.

In the area of migration, states’ reticence to engage in the development of binding norms is evident in a number of areas. The limited number of signatories and ratifying states for the UN Treaty on the Rights of Migrant Workers, the voting patterns at the UN General Assembly in relation to the outcome of the first Global Forum on Migration and Development (GFMD), and the growing use of regional consultative processes (RCPs)





nature of migration means that interpreting and implementing the rights and protection needs of ‘people on the move’ presents a challenging set of protection issues that OHCHR and the existing treaty bodies are unable to meet alone.

Consequently, there remains a gap in the interpretation of how existing human rights standards apply to the situation of vulnerable irregular migrants. In addition to input from OHCHR the development of a common understanding of the application of human rights law to irregular migrants would require the input of those actors – such as UNHCR – who have experience of operationalising a rights-based framework for a particular group of people on the move, as well as actors with complementary operational experience in the area of migration, such as IOM and the IFRC.

The context of clarifying the application of existing norms to the situation of irregular migration could open up new possibilities for states to develop a range of efficient and equitable practices for addressing irregular migration, while ensuring that these were consistent with international human rights standards and the needs of the most vulnerable migrants. For example, the inter-state debates on the development of the Guidelines might consider new types of subsidiary protection, which might be temporary in nature, which could be afforded to different categories of vulnerable migrant.

Similarly, the context of inter-state dialogue could allow exploration of new forms of burden-sharing, which might enable states to ensure that temporary protection is provided, although possibly in a context that is de-linked from the territory on which the migrant’s protection needs are assessed. This would ensure that rather than the Guidelines imposing a ‘blank cheque’ protection obligation on states, they empowered states to meet their existing human rights obligations in the most efficient and equitable manner possible.

### **The case for a ‘collaborative approach’**

In addition to developing a clear and authoritative interpretation of the application of existing human rights norms to the situation of vulnerable migrants, there is also a need to establish who is responsible for ‘doing’ protection. Indeed, at the level of international organisations, there remains an operational gap with respect to the protection of vulnerable migrants. In particular, which organisations should a) have responsibility for

Interpreting the application of rights and obligations in particular situations; b) have responsibility for being present in the field to ensure access to rights. Most importantly, there is a need for greater clarity in terms of which organisation is responsible, as a filed level, for ensuring that mechanisms of identification, referral, protection, solutions, and return are available to states.

Here, the IDP precedent is again instructive. Alongside, the Guiding Principle, the process of IDP norm development during the 1990s also led to the

the division of protection, care and maintenance, food provision, and security of IDPs, for example, was clearly allocated across different UN agencies. There is a need for a similarly clear operational allocation of responsibility in relation to the protection of vulnerable irregular migrants.

advice and engage in information-sharing with other organisations which would take on direct operational responsibility for the protection of vulnerable irregular migrants.

### *IFRC*

The International Federation of the Red Cross and Red Crescent Societies (IFRC) has become increasingly involved in addressing the humanitarian needs of vulnerable migrants. The IFRC has, for example, been involved on an *ad hoc* basis in providing humanitarian assistance to vulnerable migrants in the context of the Mediterranean crossings to Europe. The national Red Cross and Red Crescent societies have provided counselling, identification, referral, and identified subsidiary protection needs.

At the opening of the 30<sup>th</sup> International Conference on the Red Cross and Red Crescent in November 2007, international migration featured on the agenda for the first time. As the President of the International Committee of the Red Cross (ICRC), Dr Jacob Kellenberger acknowledged in his opening statement, “Among the topics [addressed by the conference], there is one which is not completely new but appears for the first time in a prominent way on the agenda of the International Conference of the Red Cross and Red Crescent, the issue of international migration”.<sup>39</sup>

The delegates to the conference passed a Resolution on ‘International Migration’, agreeing that the Red Cross and Red Crescent Societies should play a role in addressing the humanitarian needs of vulnerable migrants, irrespective of their legal status. The Resolution, for example, “calls upon the components of the [Red Cross] Movement to seek to give more prominence to the humanitarian consequences of migration and “requests the ICRC and the IFRC...to support th

convenes in order to establish an institutional position with respect to discussions at the

## *NGOs*

A range of NGOs have been significantly involved in the protection of vulnerable irregular migrants on both an operational and an advocacy level. In many situations, NGOs are the first organisations to enter into contact with vulnerable migrants and refugees upon arrival.

In different geographical contexts, different NGOs have particular operational expertise which could be drawn upon both in developing and implementing the Guiding Principles. Save the Children has been involved in a number of areas, particularly in Lampedusa, where they have been part of the collaborative "Lampedusa model". Caritas Djibouti has been particularly active in the Gulf of Aden, the Jesuit Refugee Service Malta (of whom Katrine Camilleri was named 2007 UNHCR Nansen Award winner for her work on mixed migration and detention) and the Spanish Commission for Refugee Aid, for example, have played a prominent role in their respective regions. Meanwhile, ICMC has offered significant leadership and coordination amongst NGOs at the policy level.

## **The facilitation process**

As with the IDP process during the 1990s, the facilitation process for the soft law framework would have two core purposes: a) to develop 'Guiding Principles on the Protection of Vulnerable Irregular Migrants' and b) to establish a clear division of international organisational responsibility for ensuring the protection of vulnerable irregular migrants.

The process for developing such a soft law framework would involve two main elements: i) analysis and ii) inter-state consultation. In the first instance, the process would require significant input from expert advisors, especially on legal level but also on a political level. This would be necessary to analyse existing normative gaps, and to explore mechanisms for applying and implementing norms.

In the case of the development of the Guiding Principles for IDPs, Walter Kaelin and his team did significant legal and normative analysis that was made available to states and contributed to persuading them of the need for a new set of Guiding Principles. This analysis was supported by academics such as Roberta Cohen at the Brookings Institute.

In the second instance, the IDP experience also sheds light on the need to work with states and to develop informal negotiation among states in order to build up consensus on the core elements of the framework. In the IDP case, the process of developing the guiding principles was overseen by the Secretary-General's Representative, Francis Deng, and supported by a small coalition of sympathetic states, notably Austria.

*Secretariat*

A process of developing a set of Guiding Principles could be facilitated by any

enable the secretariat to keep interested parties and states up-to-date with the secretariat's progress and allow the gradual development of consensus around the Guiding Principles. Once the draft of the Guiding Principles was prepared, it could be affirmed by states acknowledging that they accept the Guiding Principles as a non-binding framework on the application of international human rights law to the situation of vulnerable irregular migrants.

### **Issues for further consideration**

In the process of developing the soft law framework, a range of issues would need to be carefully considered by the secretariat and the working group. Some of the key issues and ambiguities that would need to be considered would include but not be limited to the following.

#### *Which vulnerable irregular migrants?*

One of the greatest challenges of developing a soft law framework would be to define 'vulnerable irregular migrants' with a sufficient degree of precision to allow the development of international consensus. At the outset, this article highlighted two main groups of vulnerable irregular migrants for whom there are significant protection gaps: a) those whose protection needs arise during transit (trafficked persons, stranded migrants,

### *What levels of protection?*

One of the key considerations of the process would be to identify what types and levels of protection should be made available to different groups of vulnerable irregular migrants. Which rights would be involved and what would be the content of the protection provided to different groups of vulnerable migrants? These are central issues that the process would need to address.

The forms of subsidiary protection that were made available would not need to be expressed in the language of refugee protection and would not necessarily need to offer permanent or even long-term protection. Rather, in many cases, it may be sufficient to identify forms of temporary protection of the type made available to Kosovar refugees evacuated from Macedonia in 1999 or through Australia's Temporary Protection Visa.

South Africa, for example, uses its domestic migration law to provide a form of subsidiary protection to certain non-refugees by occasionally offering 'temporary regularisation' or irregular migrants. Such an approach might allow states to meet immediate protection needs on a humanitarian basis without tying themselves to providing indefinite sanctuary or permanent residence to vulnerable migrants.

### *What operational mechanisms?*

One of the main goals of the process would be to identify operational mechanisms for ensuring that protection was available to vulnerable migrants. While the relevant international human rights norms may exist, adequate processes for operationalising those rights do not.

In particular, best practices on referral, identification, initial treatment and counselling, protection, durable solution, and return would need to be developed. The most efficient and effective practices could be informed by input from organisations who have considered many of these issues such as ICMC, IFRC and IOM. Different groups of irregular migrants would probably require different types of operational response.

### *What burden-sharing?*

The protection of vulnerable migrants could be linked to some form of burden-sharing mechanism. Vulnerable irregular migrants identified on a given state's territory would not necessarily remain have to remain on the territory of that state. Rather, protection could be de-linked from territory and forms of temporary or subsidiary protection provided through resettlement.

The USA, for example, has begun to play a small but important role in resettling refugees from Malta in order to reduce the burden on one transit country and to provide Malta with an incentive to improve its reception and protection standards. There would be a need for third countries to similarly underwrite the protection costs borne by transit countries that identify vulnerable migrants. Furthermore, in cases where durable solutions other than



return were required, it would be important to ensure that responsibility for providing these was equitably distributed between states.

*What division of international organisational responsibility?*

A central contribution of the process would be to ensure a clear division of international organizational responsibility for the protection of vulnerable irregular migrants. As has been noted, UNHCR, IFRC, IOM, and OHCHR may all have different types of contributions to make. Similarly, other members of the Global Migration Group – such as ILO or UNCTAD - and a range of NGOs might also be involved in taking on aspects of the normative or operational implementation of the Guiding Principles.

As with the development of the Guiding Principles for IDPs, however, the specific division of responsibility should be kept separate from deliberations on the actual soft law framework, and would probably come afterwards. Such a division of responsibility might follow the Collaborative approach or the later Cluster approach adopted in order to divide international responsibility for the protection of IDPs.

**Conclusion**

The discourse on international protection in the context of human mobility now goes far beyond a focus just on refugees. Refugees represent just one group of ‘people on the move’ who have protection needs and to whom states have obligations under

to states, while also allow a set of common understandings and practices on issues such as ‘temporary protection’, ‘burden-sharing’ and ‘durable solutions’ for vulnerable irregular migrants to emerge. As with IDPs, it could also lead to the creation of a ‘collaborative approach’, clearly outlining the organisational division of responsibility for the protection of vulnerable migrants.

In order to facilitate the development of a common approach to the protection of vulnerable migrants