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SOFT LAW AND THE PROTECTION OF VULNERABLE MIGRANTS

ALEXANDER BETTS*

ABSTRACT

Since the 1980s, an increasing number of people have crossed international borders outside of regularised migration channels, whether by land, air or sea. Policy debates on these kinds of movements have generally focused on security to the neglect of a focus on rights. In a range of situations, though, irregular migrants, who fall outside of the protection offered by international refugee law and the United Nations High Commissioner for Refugees (UNHCR), may have protection needs and, in some cases, an entitlement to protection under international human rights law. Such protection needs may result from conditions in the country of origin or as a result of circumstances in the host or transit countries. However, this article argues that despite the existence of international human rights norms that should, in theory, protect such people, there remains a fundamental normative and institutional gap in the international system. Rather than requiring new hard law treaties to fill the gap, the article argues that a “soft law” framework should be developed to ensure the protection of vulnerable irregular migrants, based on two core elements: first, the consolidation and application of existing international human rights norm into sets of guiding principles for different groups of vulnerable irregular migrants; and second, improved mechanisms for inter-agency collaboration to ensure implementation of these norms and principles. This article suggests that learning from the precedent of developing the Guiding Principles on Internal Displacement and its corresponding institutional framework can be particularly instructive in this regard.

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

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'voluntary, economic migrant.' Within this context, states' responses have predominantly focused on the security dimensions of irregular migration, attempting to develop unilateral, bilateral and regional measures to reduce irregular movement. What has been far more neglected is an international focus on the protection needs of irregular migrants.

Nevertheless, there has been a gradually growing international concern with the human rights of irregular migrants. Shocking images of migrants in distress have been increasingly evident in the media. In the Mediterranean, the Canary Islands, the Gulf of Aden, the Maghreb, Southern Africa, the US-Mexican border region, the Caribbean, Turkey, the Balkans, and South-east Asia, images of drowning at sea, asphyxiation, physical abuse, harassment, and detention in unacceptable conditions have heightened awareness of the vulnerability of irregular migrants. Consequently, a range of international organisations have begun to debate how best to ensure that irregular migrants receive access to their entitlements under international human rights law.

The UN High Commissioner for Refugees, Antonio Guterres, for example, has described the phenomenon as "people on the move" and outlined as one of his priorities the need to identify where there are protection needs within such irregular population movements.¹ While UNHCR's overriding concern within this context has been to ensure the protection of refugees within broader migratory movements, the High Commissioner has outlined the need to go beyond this and ensure that the international community offers protection to a wider group of people.² Meanwhile the International Federation of Red Cross and Red Crescent Societies (IFRC), International Organization for Migration (IOM), Council of Europe, and International Catholic Migration Commission (ICMC) have all increasingly focused on the question of how to protect a growing range of vulnerable irregular migrants who fall outside the purview of the international refugee protection regime.

In a world in which irregular migrants are often perceived by states as an undesirable security threat, it is often forgotten that irregular migrants have human rights *qua* human beings under international human rights law. This means that people who cross borders are entitled to be treated in a certain way and according to certain sets of norms prior to being returned to their country of origin. Where they have particular vulnerabilities, either as a result of the situation in the country of origin or as a result of circumstances during movement, these may create additional sets of entitlements and

1. Antonio Guterres, United Nations High Commissioner for Refugees, Opening Statement at the High Commissioner's Dialogue (Dec. 11, 2007), in REPORT ON THE HIGH COMMISSIONER'S DIALOGUE ON PROTECTION CHALLENGES, DECEMBER 2007 23 (United Nations High Commissioner for Refugees Policy Development and Evaluation Service 2008), available at www.unhcr.org/research/RESEARCH/47fe0e532.pdf.

2. Jeff Crisp, *Beyond the Nexus: UNHCR's Evolving Perspective on Refugee Protection and International Migration* (UNHCR The UN Refugee Agency, Working Paper No. 155, 2008), available at <http://www.unhcr.org/4818749a2.html>.

obligations under human rights law, which a host state would need to meet prior to the migrants' return. Furthermore, as has been increasingly recognised under international human rights law's notion of "complementary protection," there are also a range of circumstances in which irregular migrants—even if they are not refugees—may have an entitlement not to be forcibly returned to their country of origin but to receive temporary or permanent sanctuary.

The problem, however, is that although these human rights standards exist, and states have signed up to them, they are rarely fully implemented in states' responses to irregular migration. Neither the rights that all irregular migrants are entitled to—nor the additional entitlements and obligations that arise from specific vulnerabilities—are clearly understood and recognised by states. Nor is there any clearly defined international institutional responsibility for ensuring the implementation of these rights and obligations.

Within the context of irregular migration, international human rights law has implications on two different levels. First, it implies a set of entitlements that all migrants have as human beings—on which the majority of the articles and contributions in this symposium focus. Second, and this is the area on which this article focuses, it implies that states may have additional obligations toward migrants with particular vulnerabilities. Indeed, beyond refugees, there are two analytical groups of irregular migrants who may be considered to have specific protection needs, which may in some cases imply a need for non-return and temporary or permanent sanctuary. There are people with protection needs: i) due to conditions in the country of origin which are unrelated to conflict or political persecution; or ii) due to protection needs arising as a result of movement.

In both of these analytical categories, legal norms already exist that apply to the human rights of vulnerable migrants. International migration law offers a compendium of international legal obligations that relate to migration. Within this overarching framework, international human rights law, in particular, highlights a range of obligations that states already have toward vulnerable migrants.³ However, despite the fact that many relevant norms already exist, there are nevertheless two major gaps in the protection framework for vulnerable migrants that need to be addressed. First, there is a lack of clear guidance on the application of existing human rights norms to the situation of vulnerable irregular migrants. Second, there is a lack of clear division of responsibility among international organisations for protection of vulnerable migrants, especially on an operational level. These gaps pose problems both because they lead to unfulfilled protection needs and to a lack

3. See generally, *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007); *COMPENDIUM OF INTERNATIONAL MIGRATION LAW INSTRUMENTS* (Richard Perruchoud & Katarina Tomolova eds., T.M.C. Asser Press 2007).

of guidance for states on how to respond to these protection needs.

A number of prominent legal scholars, notably Stephanie Grant and the incoming Deputy High Commissioner for Refugees, T. Alexander Aleinikoff, have already argued that soft law can play an important role in consolidating existing norms into a clear and transparent understanding of the application of existing human rights norms to the situation of migrants.⁴ In this regard, the international community's experience of developing a 'soft law' framework for the protection of internally displaced persons may offer a particularly instructive precedent.⁵ There is longstanding acknowledgement that there is a significant normative and institutional gap in the international community's response to internally displaced persons' (IDP) protection. As with the situation of vulnerable migrants, the relevant human rights and international humanitarian law norms existed with a similar absence of clear guidelines for their application to IDPs and a lack of consensus of the appropriate division of organisational responsibility across the UN system.

This paper, therefore, sets out the case for the development of a soft law framework on the protection of vulnerable irregular migrants. It is divided into four parts. Part one sets out the problems with the status quo. Part two outlines the case for a soft law framework (or frameworks). Part three outlines the case for developing a clear division of responsibility between existing international organizations in order to operationally implement the framework. Finally, part four outlines the process through which such a framework—or series of frameworks—would be developed and facilitated at the international level.

THE LIMITATIONS OF THE EXISTING INTERNATIONAL INSTITUTIONAL FRAMEWORK

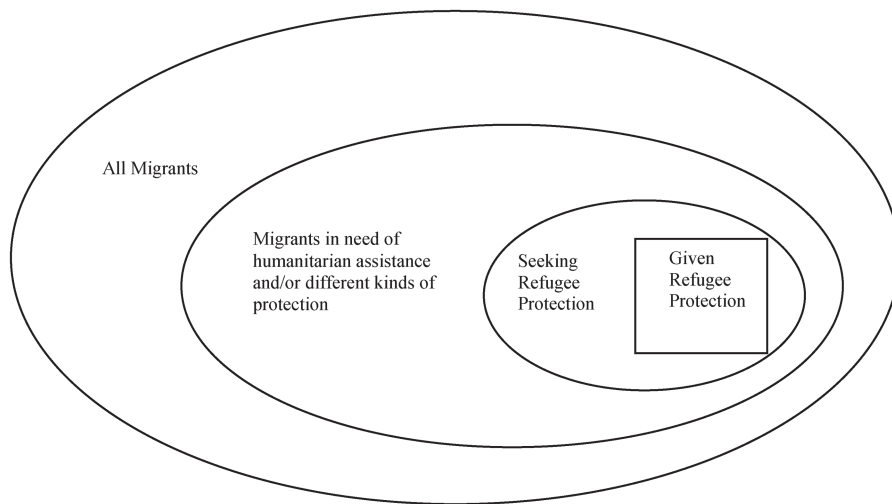
At the international level, there is no clearly defined institutional framework for the protection of vulnerable irregular migrants. This contrasts with the institutional structures that exist in relation to the protection of refugees or regular labour migrants. In relation to the former, international refugee law provides a clear normative and legal framework for the identification and protection of refugees, and the UNHCR has the main normative and operational responsibility for ensuring that refugees receive access to the

4. E.g., Stefanie Grant, *International Migration and Human Rights*, GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, Sept. 2005, available at <http://www.gcim.org/attachements/TP7.pdf>; T. ALEXANDER ALEINIKOFF, *International Legal Norms on Migration: Substance without Architecture*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 467-479 (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007).

5. E.g., SIMON BAGSHAW, *Responding to the Challenges of Internal Forced Migration: The Guiding Principles on Internal Displacement*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 189-202 (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007); CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* (Cambridge University Press 2004); THOMAS G. WEISS & DAVID A. KORN, *INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES* (Routledge 2006).

rights to which they are entitled.⁶ In relation to the latter, a range of International Labour Organization (ILO) Conventions set out the rights of regular migrant labour and the ILO oversees and advises on states' implementation of these Conventions.⁷ In contrast, irregular migration is conventionally treated as a residue category with few rights, from which refugees need to be isolated and protected, but toward which states have few other obligations.

However, as Trygve Nordby, the IFRC Special Envoy on Migration, argued at the High Commissioner's Forum in December 2007, the picture of who has a right to international protection is more complicated than simply distinguishing between refugees and non-refugees. As he suggested, one can identify four groups that comprise irregular migratory flows. As the third layer of the diagram he presented highlights, the neglected group of vulnerable irregular migrants requires greater consideration:⁸



Indeed, irregular migrants have rights and, correspondingly, states have obligations towards irregular migrants who reach their territory or are under their jurisdiction. Irregular migrants are entitled to human rights both *qua* human beings (under international human rights law) and *qua* migrants (under the existing treaties designed to guarantee rights to migrants). Furthermore, insofar as the situation of irregular migrants means that their own

6. See, e.g., GIL LOESCHER, ALEXANDER BETTS, & JAMES MILNER, *THE UNITED NATIONS COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY* 98-120 (Routledge 2008).

7. See generally, STEPHEN HUGHES, *INTERNATIONAL LABOUR ORGANIZATION* (Routledge 2009).

8. Trygve Nordby, Special Envoy on Migration for the IFRC Sec'y Gen. and Sec'y Gen. of the Norwegian Red Cross, Keynote Address at the UNHCR Dialogue on Protection Challenges (Dec. 11, 2007), available at <http://www.ifrc.org/docs/news/speech07/tn111207.asp>.

states are unwilling or unable to provide fundamental human rights (such as the right to life), returning those migrants to a country in which there is good reason to believe that these rights would not be met would amount to a violation of those rights by the returning state. Ergo, destination and transit states have obligations under international human rights law to ensure that irregular migrants who are within their jurisdictional control have access to international protection where it is required to safeguard human rights. In situations in which return may lead to torture or 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.⁹

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.¹⁰ 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.¹¹ 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.

Protection Needs Resulting From Conditions in the Country of Origin

First, there is a growing range of irregular migrants who may have 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 environmental change, state fragility and livelihood failure. In the case of Zimbabwe, for example, very few of the estimated more than 2 million people to have left the country in search of asylum between 2005 and 2009 have met the 'persecution' requirements of the 1951 Refugee Convention. Yet, they are not simply voluntary, economic migrants. Rather, in relation to this dichotomy they are

9. JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 19-52 (Oxford University Press 2007).

10. Interview with Pia Oberoi, OHCHR in Geneva, Switz. (Jul. 2008) (on file with author).

11. *Id.*

increasingly being referred to within UNHCR as “neither/nor” and within South Africa as “mobile and vulnerable people.” Indeed, they might be considered to be “survival migrants”—persons who are outside their country of origin because of an existential threat to which they have had no access to a domestic remedy or resolution. 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, and the existence of a serious public health crisis in the context of HIV/AIDS.¹²

In many cases, returning these people to Zimbabwe would be a clear violation of human rights, such as the right to life, and would again expose those migrants to extreme levels of economic and social distress. At the moment, however, there is neither clear consensus nor authoritative guidelines on the appropriate response to such “neither/nor” situations. Different states offer different levels of subsidiary protection but are wary of offering disproportionately generous standards of protection for fear of taking on a disproportionate protection responsibility. In Southern Africa and Europe, Zimbabweans therefore have little access to protection due to the narrow interpretation of international protection instruments. UNHCR has discussed forms of subsidiary (or “temporary”) protection that might be appropriate in such situations.¹³

Related issues arise from people moving irregularly as a result of severe environmental distress. In the context of climate change, which may exacerbate other causes of forced migration, there is also little understanding or consensus on the human rights and protection requirements of people fleeing serious economic and social distress.¹⁴ However, as with the “neither/nor” situations described above, it is conceivable that such people may face a threat, to right to life at one extreme or to their economic and social rights, which requires some form of subsidiary international protection. The “sinking islands” phenomenon highlights an extreme situation in which return would not be possible. Yet it is also important for the international community to consider the normative and legal standards of protection that are applicable to irregular migrants in less clear-cut situations of environmental

12. TARA POLZER, RESPONDING TO ZIMBABWEAN MIGRATION IN SOUTH AFRICA- EVALUATING OPTIONS 4-26 (Forced Migration Studies Programme 2007), available at <http://www.lhr.org.za/sites/lhr.org.za/files/zimresponses07-11-27.pdf>.

13. See generally, Alexander Betts & Esra Kaytaz, *Working Paper: National and International Institutional Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime*, (UNHCR, Working Paper No. 175, 2009).

14. VIKRAM ODEDRA KOLMANNSKOG, FUTURE FLOODS OF REFUGEES: A COMMENT ON CLIMATE CHANGE, CONFLICT AND FORCED MIGRATION (Norwegian Refugee Council 2008), available at http://www.nrcfadder.no/arch/img.aspx?file_id=9904602.

change which result in severe economic and social distress.¹⁵ Furthermore, a range of situations in which UNHCR was required to become involved in offering protection following natural disasters—as a result of tsunamis, earthquakes and floods—highlight an additional source of protection needs that are not met by the 1951 Convention.

Protection Needs Arising As a Result of Movement

Second, there are also gaps in protection needs arising as a result of movement. Given the dynamic nature of trans-boundary movement, people's circumstances often change dramatically during transit, irrespective of the initial reasons they left their country of origin. Refugee status is rarely accorded to people whose vulnerabilities emerge as a result of movement. A number of groups of people whose circumstances change during transit nevertheless require international protection as a result of the experiences they undergo during movement. In particular, three groups of vulnerable migrants have specific protection needs that are frequently neglected by destination and transit countries' attempts to control irregular migration: people who face trafficking, trauma and violence, or become stranded migrants. In each case, though, these vulnerable groups of migrants have clearly defined rights that entail obligations for destination and transit countries.

There is a clearly defined legal framework addressing the human rights of trafficked human beings, which was reinforced by the Palermo Protocol to the UN Convention against Trans-national Organized Crime (UNTOC). The protocol offers a clear framework within which prevention, protection, and prosecution in relation to human 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.¹⁶ 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.¹⁷ 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

15. See generally, Jane McAdam, *Climate Change "Refugees" and International Law* (University of New South Wales, Presented at NSW Bar Association Oct. 24, 2007), available at <http://www.greencrossaustralia.org/media/81272/mcadam%20nswba.pdf>.

16. See generally, Kaori Saito, *International Protection for Trafficked Persons and Those Who Fear Being Trafficked*, United Nations High Comm'r for Refugees, Research Paper No. 149, December 2007; Ryszard Piotrowicz, *Trafficking of Human Beings and their Human Rights in the Migration Context*, in *INTERNATIONAL MIGRATION LAW* 275-291 (Ryszard Cholewinski et. al. eds., 2007).

17. See generally, Saito, *supra* note 16.

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 or on 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.”¹⁸ Furthermore, Dowd offers a working definition of stranded migrants as

[T]hose 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.¹⁹

Stranded migrants exist because of a range of obstacles, including: a lack of voluntary return, legal bars to involuntary return, statelessness, an unclear identity or nationality, and 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.²⁰

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.²¹ These experiences may hinder their capacity to (re)integrate in the host or home country and therefore require forms of support and protection. International Catholic Migration Commission, for example, has highlighted the need to develop mechanisms to ensure that medical, psycho-social, protection and referral services are available at points of embarkation, rescue, arrival and readmission.²² The existence of blanket removal orders, extended detention, and return without necessary medical, psychosocial or legal support often

18. Stefanie Grant, *The Legal Protection of Stranded Migrants*, in INTERNATIONAL MIGRATION LAW 29, 30-31 (Ryszard Cholewinski et. al. eds., 2007).

19. Rebecca Dowd, *Trapped in Transit: The Plight and Human Rights of Stranded Migrants*, United Nations High Comm’r for Refugees, Research Paper No. 156, Jun. 2008, at 4.

20. See generally, Grant, *supra* note 18.

21. 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, (on file with the author).

22. International Catholic Migration Commission, *Improving Responses to Boat People and Other Migrants Injured or Traumatized Crossing Borders* (2007), available at <http://www.icmc.net/>.

undermines vulnerable migrants' access to these sources of support and protection.

Finally, forcibly expelled migrants may also face human rights violations and vulnerability. The situation of Congolese migrants forcibly expelled from Angola to the Democratic Republic of Congo (DRC) illustrates this. Between 2003 and 2009, around 300,000 to 400,000 Congolese were expelled in successive waves, often linked to elections within Angola.²³ The conditions of deportation have been brutal, often leading to systematic rape and torture.²⁴ With little advocacy or assistance in the Southern regions of the DRC, access to protection, shelter and health facilities has been limited, and migrants have relied mainly upon local NGOs and churches. The situation of expelled Congolese highlights the growing complexity of the protection needs of migrants which are not adequately met under the status quo.²⁵

THE CASE FOR A 'SOFT LAW' FRAMEWORK

'Soft law' represents a form of non-binding normative framework in which existing (often 'hard law') norms from other sources are consolidated within a single document. Soft law guidelines may, for example, be compiled through drawing upon experts or through facilitating an inter-state agreement on the interpretation of how existing legal norms apply to a particular area. The value of soft law is that it can provide clear and authoritative guidelines in 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 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

article/urgent-call-international-response-boat-people-and-other-migrants-injured-or-traumatized-cro.

23. United Nations Office for the Coordination of Humanitarian Affairs (2009), 'Point Sur Les Expulsés d'Angola au 15.10.09' (on file with the author).

24. Doctors Without Borders, *Ten Women Tell of Their Angolan Ordeal*, Dec. 13, 2007, <http://www.doctorswithoutborders.org/news/article.cfm?id=2232&cat=field-news> (last visited Mar. 28, 2010).

25. United Nations Office for the Coordination of Humanitarian Affairs, *Congolese Expelled From Angola*, DR Congo Situation Report No. 1, 21 Jul. 2008, [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EDIS-7GSQM9-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EDIS-7GSQM9-full_report.pdf/$File/full_report.pdf) (last visited Mar. 28, 2010).

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.²⁶

In many ways, the situation of vulnerable irregular migrants is analogous. The international community has reached a 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, application, and a clear division of operational responsibility between international organisations.

The aim of a soft law framework on vulnerable irregular migrants would be to offer an authoritative clarification of the application of existing international human rights law standards to the situation of vulnerable irregular migrants. It would need to set out the circumstances under which host states (and the international community) hold an obligation to not forcibly return migrants to their country of origin, and the types of protection and assistance that would be available. Importantly, such a framework could be a single framework or—alternatively, and perhaps more realistically—a series of short framework documents offering authoritative guidance to states for different particular groups of vulnerable irregular migrants.

As with the development of the guidelines on IDP protection, a soft law framework (or series of frameworks) for the protection of vulnerable migrants would have two main features: it would be non-binding and it would clarify the application of the existing legal and normative obligations to the initiative's areas of protection.

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

26. E.g., Simon Bagshaw, *Responding to the Challenges of Internal Forced Migration: The Guiding Principles on Internal Displacement*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 189-202 (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007); CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* (Cambridge University Press 2004); THOMAS G. WEISS & DAVID A. KORN, *INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES* (Routledge 2006).

consultative processes (RCPs) that bypass multilateral forums all exemplify the resistance of states to agree new norms in relation to migration.

However, in the case of the protection of vulnerable migrants there is no need to develop new norms through multilateral agreement. The norms within international human rights law exist. However, as was the case with IDPs, non-binding guidelines are required for the implementation and operationalisation of these norms. The guidelines would help states by offering an authoritative and agreed upon interpretation of the existing standards, while identifying any normative or operational gaps. Over time, the guidelines may become hard law through states adopting them in domestic legislation, as has occurred with IDPs. However, this would only take place at states' own pace and discretion—there would be nothing inherently binding about the guidelines. This non-binding nature would mean that states would have guidance on how to ensure the human rights of irregular migrants. It would mean that they hold no obligation to implement the norms and maintain the freedom to comply or not with the interpretation of the guidelines, although they would, of course, continue to be bound by the underlying hard law treaties that were consolidated.

Although human rights norms relevant to the protection of vulnerable irregular migrants exist and states have already become signatories, there are gaps in their interpretation and application and a need to more fully operationalise these norms within a migration context. Agreeing on an authoritative legal interpretation of existing human rights standards in the context of informed empirical analysis would help clarify the scope and application of the existing norms. Although human rights obligations have relevance for the situation of vulnerable irregular migrants, they have rarely been applied.

Although it has recently set up an in-house task force on migration, the Office of the High Commissioner for Human Rights (OHCHR) has limited staff capacity working exclusively on migration issues. Meanwhile, it tends to focus on advocating for the ratification of the International Convention on the Protection of the Rights of All Migration Workers and Members of the Families, rather than on trying to ensure that the human rights of migrants are addressed across the treaty bodies for the other human rights instruments. Consequently, the treaty bodies have a mixed record on considering the human rights of migrants, with the Committee on Economic, Social and Cultural Rights (CESCR), the Committee against Torture (CAT), the Human Rights Committee (CCPR), and the Committee on the Elimination of Racial Discrimination (CERD) being the main treaty bodies offering some guidance on the rights of irregular migrants.²⁷ However, aside from institutional

27. Interviews with various members of OHCHR staff, Geneva, Switz., Jul. 2008 (on file with author). For an overview of OHCHR's migration activities, see *OHCHR and Migration*, <http://www2.ohchr.org/english/issues/migration/taskforce/> (last visited Mar. 28. 2010).

capacity, the limitation of relying on OHCHR to develop normative interpretation on the protection of vulnerable migrants is that it lacks an operational presence of experience in the realm of migration. Indeed, the dynamic 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 the United Nations High Commissioner for Refugees—who have experience 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 the International Organization for Migration (IOM) and the International Federation of Red Cross and Red Crescent Societies (IFRC).

Clarifying the application of existing norms to irregular migration could open up new possibilities for states to develop a range of efficient and equitable practices for addressing irregular migration, while ensuring consistency 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 and 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.

IMPLEMENTATION AND INTER-AGENCY COORDINATION

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 protection. At the level of international organisations, there remains an operational gap with respect to the protection of vulnerable migrants, in particular, which organisations should have responsibility for interpreting the application of rights and obligations in particular situations and which should be responsible 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 field 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 Principles, the process of IDP norm development during the 1990s also led to the creation of an inter-organisational division of labour for implementing the rights of IDPs. Initially referred to as the ‘collaborative approach,’ through which a range of UN and non-UN agencies shared responsibility for IDPs, this eventually became the ‘Cluster’ approach, whereby 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. Such a ‘collaborative approach’ has been piloted in a context relevant to the protection of vulnerable irregular migrants: the ‘Lampedusa model,’ within which IOM, UNHCR, IFRC, Save the Children, and the Italian Government have worked together to ensure that refugees and irregular migrants’ rights are met.²⁸

Different types of mechanisms are available to enhance inter-agency collaboration to address existing gaps. The consensus among states is that the existing structure of inter-agency coordination on migration, the Global Migration Group (GMG), is an effective vehicle for dialogue but cannot be expected to lead to focused inter-agency collaboration. Hence, four other models for collaboration might be considered:

- *Model 1:* Extending the use of the ‘cluster approach’ developed by the Inter-Agency Standing Committee in 2005 in the context of UN humanitarian reform. This is the approach used to divide lead agency responsibility for different aspects of IDP protection, for example. However, the effectiveness of the cluster approach has been criticised in numerous contexts.
- *Model 2:* The appointment of a Special Representative of the Secretary-General (SRSG) on the Protection of Vulnerable Irregular Migrants (or a series of SRSGs on different aspects of the problem) to advocate for migrant protection and to ensure that existing agencies fill existing gaps in protection as and when they arise.
- *Model 3:* The creation of a small, streamlined agency structure with a secretariat—along the lines of UNAIDS—to fill the existing gap by working with and drawing upon existing expertise.
- *Model 4:* The development of different joint standard operating procedures between agencies. One recent example of this is relevant to the protection of vulnerable irregular migrants is in the area of

28. Interview with Udo Janz, Deputy Director of Europe Bureau, UNHCR, in Geneva, Switz. (Jul. 2008) (on file with the author).

human trafficking in which UNHCR and IOM have developed 'Joint Standard Operating Procedures in Counter-Trafficking' in late 2009.

Whichever model(s) of collaboration one implemented, a number of existing international organisations and NGOs have important relevant experience that could allow them to play some role in a formal collaborative approach.

THE FACILITATION PROCESS

As with the IDP process during the 1990s, the facilitation process for the soft law framework would have two core purposes: first, to develop 'Guiding Principles for the Protection of Vulnerable Irregular Migrants' and second, 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: analysis and inter-state consultation. In the first instance, the process would require significant input from expert advisors, especially on a legal level but also on a political level. This input 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.²⁹ In the second instance, the IDP experience also sheds light on the need to work with states and to develop informal negotiation among states to build 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.³⁰

Secretariat

A process for developing a set of Guiding Principles could be facilitated by any combination of UNHCR, IOM, OHCHR, and IFRC, for example. However, it would be more focused if one of these organisations were to take the lead. While UNHCR might not necessarily seek to become significantly operationally involved in the protection of vulnerable migrants, it might nevertheless play an important facilitative role. At the High Commissioner's Dialogue in 2007, for example, UNHCR was invited by states to play a

29. THOMAS G. WEISS & DAVID A. KORN, *INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES* 71-103 (Routledge 2006).

30. Simon Bagshaw, *Internally Displaced Persons at the Fifty-Fourth Session of the UN Commission on Human Rights, Mar. 16-Apr. 24 1998*, 10 INT'L J. REFUGEE L. 548, 548 (1998).

“convening role,” and the High Commissioner offered to convene an initial meeting in follow-up to the Dialogue.³¹ This follow-up process could be used to decide on future organizational arrangements and to determine which agency would take the lead facilitating role.

The main convening organisation could then convene a small secretariat to work on the development of the Guiding Principles, which could comprise staff from the agencies with relevant legal and analytical experience, as well as others on secondment from other organisations, governments or academia. As with the Guiding Principles on IDPs, it would be crucial to identify both an excellent and authoritative lawyer who could play the ‘Walter Kaelin-role’ and a charismatic political figurehead who could play the ‘Francis Deng-role.’ This secretariat could oversee the development of the norms, work to gradually build inter-state consensus on the need for and value of the Guiding Principles, and chair inter-state meetings. Evolving out of the High Commissioner’s Dialogue, UNHCR could then convene a Working Group of interested parties to develop the Guiding Principles and the basis of the Collaborative Approach. This Working Group could comprise UNHCR, OHCHR, the Special Rapporteur on the Human Rights of Migrants, IOM, IFRC, International Committee of the Red Cross, ILO, interested states, and ICMC and other interested NGOs, for example.³² It would 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.

31. António Guterres, UNHCR High Commissioner, Address at the High Commissioner’s Dialogue on Protection Challenges (Dec. 12, 2007) *available at* <http://www.unhcr.org/protect/PROTECTION/476146702.pdf>. Historically, UNHCR has been at its most successful when playing a facilitative and catalytic role, whether across the UN system or in developing norms in relation to refugees. *See, e.g.*, G. LOESCHER ET AL., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES: THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY (Routledge 2008) 23, 38-46; Alexander Betts & Jean-Francois Durieux, *Convention Plus as a Norm-Setting Exercise*, J. REFUGEE STUDIES 509 (2007).

32. The idea of establishing such a Working Group has been suggested by the Netherlands and publicly supported by the High Commissioner. In his closing statement at the Dialogue, the High Commissioner said, “Although we have discussed the gaps a great deal, we have not analyzed them in-depth. Many observed that there are contexts in which UNHCR can appropriately play a ‘convenor role,’ specifically where the preservation of protection space is at issue. My idea, building on the suggestion just made by the Netherlands, would be to establish an informal working group, involving IOM, ICRC, the IFRC, OHCHR, the ILO, the NGO community and perhaps UNDP. The informal working group should take a more in-depth look into this question of existing gaps, the different agencies that operate and how better cooperation and partnership can address these gaps. This more concrete analysis should take place in an open framework. I would be willing to act as a convenor of such a group, which in my view should not be composed just of agencies. I think States, from different parts of the world, need to be involved.” António Guterres, UNHCR High Commissioner, Address at the High Commissioner’s Dialogue on Protection Challenges (Dec. 12, 2007) *available at* <http://www.unhcr.org/protect/PROTECTION/476146702.pdf>.

Issues to Consider

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:

1) *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: those whose protection needs arise during transit (for example, trafficked persons, stranded migrants, those who suffer trauma and violence during transit) and those whose protection needs arise from reasons other than conflict or persecution (for example, those fleeing severe economic and social distress such as state collapse, environmental change or natural disaster). Nevertheless, the process of developing the Guiding Principles would need to clearly define what it means by vulnerable irregular migrants and a choice would need to be made as to which of these groups the framework addresses. Would it simply be the former groups, on which agreement would be more likely, or would it include the latter group? The challenge of including the latter group would be that there remains a lack of analytical consensus on issues such as climate change-related migration. Further consideration would be required in order to identify those who might be considered vulnerable migrants. Meanwhile, economic and social rights remain far more contested than civil and political rights as a basis for protection claims.³³ Another consideration would be whether ‘vulnerable migrants’ would include only those who cross an international border or also those who remain within their country of origin, such as those in IDP-like situations. Serious consideration would therefore need to be given to the definition of a vulnerable irregular migrant and to which groups the Guiding Principles addressed. Irrespective of these concerns, it seems logical and practically desirable that the broad area of vulnerable irregular migration would be better addressed through a series of different sets of guiding principles.

2) *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

33. Michelle Foster, *Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*, 2009 NEW ZEALAND L. REV. 257, 265-66 (2009).

vulnerable irregular migrants. Which rights would be involved and what would be the content of the protection provided to different groups of vulnerable migrants? The forms of complementary or 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' to irregular migrants.³⁴ 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.

3) *What Operational Mechanisms?*

One of the main goals of the process would be to identify operational mechanisms for ensuring that protection is 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 solutions, 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.

4) *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 have to remain on the territory of that state. Rather, protection could be de-linked from territory and forms of temporary or subsidiary protection could be provided through resettlement. The United States 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.³⁵ 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

34. See Betts, *supra* note 13.

35. Interview with Udo Janz, Deputy Director of Europe Bureau, UNHCR, in Geneva, Switz. (Jul. 2008) (on file with the author).

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

5) *What Division of International Organisational Responsibility?*

A central contribution of the process would be to ensure a clear division of international organisational 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 the United Nations Conference on Trade and Development—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 international human rights law. However, there remain significant gaps in the protection of vulnerable irregular migrants. The situation of irregular migrants in a number of high profile cases—the Mediterranean, the Atlantic, Gulf of Aden, Zimbabweans in South Africa, and Congolese expelled from Angola—serves to illustrate these gaps. Beyond refugees, two groups of vulnerable migrants face currently unfulfilled protection needs: people with protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution and people with protection needs arising as a result of movement.

In both cases, there is no need to develop new binding norms. The broad international instruments already exist in international human rights law. However, two problems remain. First, on a normative and legal level, there is an absence of interpretation and application of these norms to irregular migration. Second, on an operational level, there is no clear guidance on how to implement those norms efficiently and equitably, or on the appropriate division of responsibility between international organisations.

A new soft law framework could contribute to addressing these gaps. It could facilitate the development of clear guidelines on the protection of vulnerable irregular migrants and offer states greater institutional support in efficiently ensuring that these protection needs are met. The precedent of developing a normative framework on the protection of IDPs during the

1990s offers a useful illustration of the contribution a soft law framework might offer. The framework itself could provide authoritative but non-binding guidance to states, while also allowing 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 the 'Guiding Principles on the Protection of Vulnerable Irregular Migrants,' a process similar to the IDP process would be required. This could be co-convened by, for example, any combination of UNHCR, OHCHR, IFRC, and IOM. However, in order to ensure clear leadership and direction, it would make sense for a single organisation to take on that facilitative role. Whichever organisation took on this role could then convene a small secretariat to facilitate the analytical and political process of developing the Guiding Principles. The secretariat's work could be usefully guided by drawing upon the lessons and insights of the process of developing the Guiding Principles on Internal Displacement.