

Evolving frameworks of international human rights law related to migrants in irregular situations

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Introduction

It is a matter of debate whether indeed the frameworks are ‘evolving’ in relation to the protection of migrants in irregular situations.

I will start my presentation with a look at how international human rights law conceives of irregular migrants, and go on to look specifically at a recent statement of the CESCR, as well as the recent guidance of other relevant treaty bodies. I will lastly present the views of the recent multilateral frameworks in relation to the protection of irregular migrants, and conclude with a potential way forward in operationalising the human rights of migrants in irregular situations.

What does international human rights law say about irregular migrants?

The starting point of the framework is the principle of non discrimination and equal treatment. “Everyone” and “all” people are entitled to all the rights set forth in the international bill of rights.

International bill of rights makes distinctions between citizens and non-citizens (and between different groups of non-citizens) only in relation to freedom of movement and political rights (on the latter, the Human Rights Committee has noted that protections will arise where the control of entry or residence implicates issues of discrimination, refoulement, right to family life. Also everyone has the right to leave any country).

Treaty monitoring bodies and other human rights mechanisms have consistently described irregular migrants as a vulnerable group entitled to particular protection.

States are obliged to ensure that any differences of treatment for irregular migrants (cf. citizens or regular migrants) serve a legitimate objective, and that

any action taken to achieve that objective must itself be necessary and proportionate. In view of their particular vulnerability, exclusion and disadvantage, indeed States should take care that measures to respond to their situation do not cause or perpetuate harm.

More specifically, international human rights law provides protection to irregular migrants in relation to Economic, social and cultural rights (The essential minimum content of each right should be preserved in all circumstances and the corresponding duties extended to all people under the effective control of the State, without exception.)

Immigration detention

Xenophobic violence and access to justice

Right to family life

Etc

It is important at this stage to recall the key elements of a human rights-based approach:

- Universality
- Inalienability and indivisibility (all migrants, without exception)
- Interdependence (the fulfilment of one right will often depend on the realisation of another)

From an operational perspective, the approach further includes the elements of (to guide States in *how* to implement the framework):

- Non-discrimination
- Participation/empowerment
- Accountability

Thus while irregular entry and stay constitute administrative matters, they are not crimes *per se* against persons, property or national security. Without prejudice to the sovereign prerogative to order their removal, the very presence of such migrants under their jurisdiction imposes certain obligations on national authorities, including the primary obligation to acknowledge their presence and accept their right to claim rights.

The recent statement of the Committee on Economic, Social and Cultural Rights is instructive, and might provide some clues as to the forward direction of the

human rights treaty bodies in this regard: “All people under the jurisdiction of the State concerned should enjoy Covenant rights. That includes asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular.” The statement goes on to note that the Committee has made clear from its past guidance that protection from discrimination cannot be made conditional upon an individual having a regular status in the host country. Indeed, due to their precarious situation, asylum seekers and undocumented/irregular migrants are at particular risk of discrimination.

Further, the statement guides strongly that the enjoyment of the Covenant rights should not depend on the legal status of the persons concerned. It observes that the lack of documentation frequently makes it impossible for parents to send their children to school, or for migrants to have access to health care, including emergency medical treatment, to take up employment, to apply for social housing or to engage in an economic activity in a self-employed capacity. That situation, says the Committee, cannot be tolerated.

Evolving understandings of the international human rights mechanisms

A number of human rights treaty bodies have recently specifically focused on the situation of migrants, including those in an irregular situation:

CRC Day of General Discussion recommendations (2012)

CMW General Comment No. 2 (2013)

[OHCHR Principles and Guidelines on Human Rights at International Borders 2014]

CESCR statement on refugees and migrants (2017)

Joint General Comment of the CMW and the CRC on children in the context of migration (2017)

While States have the prerogative to order the removal of people who have no right to remain, certain enforcement measures in relation to irregular migration, such as data sharing/lack of firewalls, or conducting immigration enforcement in schools, hospitals or courthouses have a negative and often disproportionate impact on the effective exercise of their human rights. Irregular migrants face in addition a range of other barriers to accessing their human rights.

This is where the concept of governance comes in; in other words, States are enjoined to contemplate how they could give effect meaningfully to their obligations under international law?

For example, take the case of returns:

States have an obligation to ensure that no person is returned to a place where he or she would be at risk of torture or other serious human rights violations, including enforced disappearance and serious forms of discrimination. The principle of non-refoulement and the prohibition of arbitrary or collective expulsion are cornerstones of international human rights law and apply to all migrants, wherever they are, and regardless of their migratory status.

To give effect to this principle, all migrants have the right to an individual assessment, in accordance with due process and fair trial guarantees. Such an assessment would require an in-depth, substantive understanding of their situation and the risks that they might face upon removal.

I should note in addition that international human rights law does also speak to the sustainability or durability of returns. We know that when migrants are sent back to countries in which they face the same conditions that compelled them to leave, they will have nothing to return to, and no reason to stay. States are called therefore to implement measures that will enable all returning migrants to enjoy their human rights in their countries of origin, including their entitlements to personal security, health care, an adequate standard of living, decent work, education, and justice. Effective and tailored reintegration programmes that address the different needs of women, men and children should be put in place and all returned migrants should have access to effective complaints mechanisms and remedies.

Turning now to the recent history of multilateral frameworks, in relation to the human rights of irregular migrants

In 2005, the independent Global Commission on International Migration stated that irregular migration will not be stemmed by restrictive policies alone, calling on States to address the drivers of irregular movement and to provide migrants with regular migration opportunities.

In 2010, the Global Migration Group in a joint statement by its Principals expressed its deep concern about the human rights of irregular migrants,

concluding that they are more likely to face discrimination, exclusion, abuse and exploitation and asserting that “The irregular situation which international migrants may find themselves in should not deprive them either of their humanity or of their rights.” Formulated under OHCHR’s chairpersonship of the Group, this was not an uncontroversial exercise, even within the UN System.

The Member States of the **Human Rights Council** have also engaged with the protection of irregular migrants through the annual resolution on the ‘human rights of migrants’, notably in the thematic focus of this resolution on migrants in transit (2015), and migrants in the context of large movements (2016). Somewhat unexpectedly, the Council did request a panel discussion in 2009 on immigration detention, although there was no follow-up and for many years the Council approached the issue of migration cautiously. Nevertheless, successive resolutions spoke to the human rights of all migrants “regardless of status”.

2013 High-Level Dialogue Declaration: States recognised the need for international cooperation to address, in a holistic and comprehensive manner, the challenges of irregular migration to ensure safe, orderly and regular migration, with full respect for human rights (para. 5). They also reaffirmed the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status.

New York Declaration: In a more comprehensive statement, with over 100 explicit references to human rights, States acknowledged the complex nature of irregular migration. For example, they pledged to ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders. And they stressed the State prerogative to “take measures to prevent irregular border crossings.” Thus while remaining cautious in regard to the specific protection needs of irregular migrants as a category of persons, the New York Declaration did cement its recognition of an emerging concept – that of “migrants in a vulnerable situation”.

States pledged to address, in accordance with their obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants. They noted that the global compact must explicitly contain content related to the effective protection of the human rights and fundamental freedoms of migrants, including women

and children, regardless of their migratory status, and the specific needs of migrants in vulnerable situations.

While paragraph 52 of the compact commits States to an intergovernmental process to develop guidelines on the protection of migrants in vulnerable situations, paragraph 51 acknowledges the expert process in this regard that had already begun under the auspices of the Global Migration Group.

Let me conclude then with a brief presentation of the draft Principles and Guidelines on the human rights protection of migrants in vulnerable situation, which the Office of the High Commissioner for Human Rights has led. The Human Rights Council has recently expressed serious concern about the particular vulnerable situations and risks faced by migrants, which can arise from the reasons for leaving their country of origin, circumstances encountered by migrants en route, at borders and at destination, specific aspects of a person's identity or circumstance or a combination of these factors.

The concept of a “migrant in a vulnerable situation” can be understood as *a range of factors—both internal and external (embodied and situational) —that are often intersecting, can coexist simultaneously, and can influence and exacerbate each other.* Factors that generate vulnerability may cause a migrant to leave his or her country of origin in the first place, may occur during transit or at destination regardless of whether the original movement was freely chosen or not, or may be related to a migrant's identity or circumstances. These situations of vulnerability may change over time as the circumstances of a particular migrant change or evolve during the course of their migration.

(Clearly, it should be acknowledged that *all* people can be vulnerable to human rights violations. This includes migrants who enter, live and work abroad in a regular situation as well as those who are in an irregular situation. In many countries around the world, migrants in both regular and irregular situations are subjected to discrimination, marginalization, exploitation, and abuse.)

The draft GMG Principles and Guidelines attempt to assist States and other relevant stakeholders to provide protection to all migrants who are in situations of vulnerability, and who are thus entitled to call on a heightened duty of care. It is an attempt to guide States on how to operationalize the human rights

framework, drawing in addition on examples of promising practice from around the world.

- establish practical and effective mechanisms to assess the individual situation of all migrants at borders and ensure that enough competent experts are present at borders to complete human rights-based screenings and referrals. (Principle 5, Guideline 5)
- guarantee that any migrant who is asked to consent to a voluntary return process must be fully and meaningfully informed of the choice he or she makes, having access to up-to-date, accurate and objective information, including in relation to the place and the circumstances to which he or she will be returning (Principle 6, Guideline 3)
- establish explicit and binding firewalls enabling migrants to report crimes and participate in criminal justice proceedings (Principle 7, Guideline 5)
- end the immigration detention of children (Principle 8, Guideline 6)
- provide guidance on how to operationalize the principle of the best interests of the child for migrant children who may not be making a claim for asylum under the 1951 Refugee Convention (Principle 10, Guideline 2), and
- ensure that any evictions or planned relocations of migrants comply fully with international human rights law and only occur after through effective consultation with those who will be affected (Principle 13, Guideline 3)