

Exploitation and abuse

of international migrants, particularly those
in an irregular situation

A human rights approach

**Exploitation and abuse of international
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situation: a human rights approach**

THEMATIC PAPER



Global Migration Group
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Global Migration Group (GMG)

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Table of Contents

Introduction and purpose.....	3
1. Understanding exploitation	5
1.1. Lack of definition of exploitation.....	5
1.2. Types of exploitation	8
1.2.1. <i>Exploitation amounting to criminal offences: Forced labour and trafficking</i>	9
1.2.2. <i>Labour exploitation</i>	14
1.2.3. <i>Non-labour exploitation, including sexual exploitation</i>	16
1.2.4. <i>Exploitation during the irregular migration process, including by smugglers</i>	20
1.3. Conceptual challenges in understanding exploitation.....	23
1.3.1. <i>'Degree' or 'severity' of exploitation</i>	23
1.3.2. <i>Consent to exploitation</i>	25
1.4. Vulnerability to exploitation.....	28
1.4.1. <i>Migrants in irregular situations</i>	29
1.4.2. <i>Refugees and asylum seekers</i>	33
1.4.3. <i>Age (youth, adolescents and children)</i>	33
1.4.4. <i>Gender</i>	35
1.5. Consequences of exploitation of migrants in irregular situations.....	38
1.5.1. <i>Financial consequences</i>	38
1.5.2. <i>Social consequences</i>	40
1.5.3. <i>Human consequences</i>	41
2. Human rights response to exploitation and abuse of migrants, particularly those in irregular situations.....	43
2.1. A Human Rights based-approach to migration.....	43
2.1.1. <i>International normative framework against exploitation</i>	45
2.1.2. <i>Baseline of human rights for migrants in irregular situations</i>	47
2.2. Prevention: reducing vulnerability to exploitation.....	50
2.2.1. <i>Promote development</i>	50
2.2.2. <i>Prevent irregular migration and promote safe, regular migration</i>	52
2.2.3. <i>Reduce harm in irregular migration</i>	54
2.2.4. <i>Regularization</i>	57
2.3. Prevention: reducing opportunities for exploitation	58
2.3.1. <i>Reduce demand for exploitative goods and services</i>	58
2.3.2. <i>Address exploitative norms and traditional and cultural practices</i>	61
2.3.3. <i>Promote decent work</i>	63
2.3.4. <i>Monitor and regulate</i>	65
2.4. Assistance and Protection of exploited migrants.....	68
2.4.1. <i>Identify exploited migrants</i>	68
2.4.2. <i>Protect exploited migrants from further harm</i>	70
2.4.3. <i>Assist exploited migrants</i>	72
2.4.4. <i>Non-criminalization of exploited migrants</i>	74



2.5. Prosecution and other actions against exploiters	75
2.5.1. <i>Exploited migrants: Right to a remedy</i>	75
2.5.2. <i>Exploiters: Right to a fair trial</i>	77
2.6. Partnerships against exploitation of migrants.....	77



Introduction and purpose

Migration discourse is awash with terms used to categorise migrants. Migrants are referred to as regular, documented, undocumented, smuggled, trafficked, forced, voluntary, migrant workers, and stranded. Child migrants are categorised as accompanied, unaccompanied, separated or left behind. Some describe refugees and asylum seekers as migrants. Terms that were once considered useful become unacceptable because they are considered stigmatizing, or otherwise inaccurate to describe all members of a heterogeneous group of people. Many terms overlap, and a person may change from one category to another during his or her journey, or be given several 'labels' at any given time. Labels can be useful to describe the different experiences, vulnerabilities and rights attaching to a given person, but at the same time the confusion that persists and the diversity of understandings of different actors in the field of migration can result in inaccurate and inconsistent data and responses.¹ More significantly, where initiatives are based on 'categorizing' migrants, some people are necessarily excluded from those categories.

Migrants, particularly those in irregular situations, are highly vulnerable to being exploited during their migration journey or upon arriving in their destination. Yet 'exploitation' is a concept that is not clearly understood. That the core element of trafficking is its exploitative purpose has meant that significant focus on exploitation of migrants has been from a trafficking perspective. The resulting categorization of exploited migrants into those who are victims of trafficking and those who are not has meant that some exploited migrants have been overlooked or deprioritized, irrespective of the fact that they suffered a similar type and level of exploitation as their trafficked counterparts. On the other hand, some exploitative situations have been categorized as 'trafficking' despite the absence of other elements (an 'act' and a 'means') of the trafficking crime required by the internationally agreed upon definition in the Trafficking in Persons Protocol. A foundational assertion of this paper is that the regular or irregular movement of migrants and exploitation of them does not need to fit into the category of trafficking in order to warrant attention and in order to constitute a breach of human rights.²

In practice it is difficult to neatly distinguish between situations in which a person is trafficked and situations in which a migrant is smuggled and subsequently exploited. Aside from the difficulty of establishing links between smugglers and subsequent perpetrators of exploitation, a key reason for the complexity of distinguishing between these phenomena is the lack of harmonized understanding of the concept of exploitation³. This paper focuses on rights-based approaches to addressing the exploitation of migrants, irrespective of the category attributed to them at a given stage of the migration process. While some categorisations (for instance, refugees and asylum seekers and trafficked persons) denote specific protection needs and

¹ See for instance, International Federation of Red Cross and Red Crescent Societies, World Disasters Report 2012: Focus on forced migration and displacement, p.14.

² Kristina Touzenis, 'Trafficking in Human Beings: Human Rights and transnational criminal law, developments and law in practice, UNESCO 2010, p.140.

³ Another is the obvious difficulty of establishing the links, if any, between, and intention of, migrant smugglers and subsequent perpetrators of exploitation.



responses, a key contention of this paper is that all exploited migrants are entitled to protection and assistance, irrespective of their 'label' or migration 'status', because human rights are universal.

Though status should not detract from rights obligations and it must be noted that migrants in a regular situation can also suffer significant exploitation and abuse, throughout this paper, particular attention is given to migrants in an irregular situation given their acute vulnerability to exploitation and the particular challenges they face in accessing their rights.⁴

Section 1 of this paper outlines relevant considerations and challenges in the understanding of exploitation of migrants. Section 2 offers human rights considerations in response. It is beyond the scope of this paper to resolve the conceptual ambiguity surrounding exploitation of migrants, or to outline a definitive framework for response. Rather, the paper offers some discussion questions and considerations towards achieving conceptual and policy coherence in mounting a human rights response to the exploitation of migrants.

⁴ Discussed below at 1.4.1.

1. Understanding exploitation

1.1. Lack of definition of exploitation

It is not clear that all exploitation of migrants occurs in the human trafficking context; migrants who are not trafficked can be and very often are exploited. Less clear is how exploitation is to be understood and applied. The term “exploitation” is understood by some actors as a form of ‘abuse’ in all forms of irregular migration, by others as linked primarily to the exploitation of labour without paying adequate compensation, and by others again as a criminal act perpetrated for profit. The concept is approached through the purview of various actors serving different mandates, resulting in different understandings. There is consensus that exploitation of migrants is a serious and widespread problem, hailing the need for a harmonized operational understanding of what it is. Yet, the absence of such consensus until now, means that some interactions may be labelled as exploitive by some and not be recognized as such by others.

Despite the fact that the term exploitation is widely used in migration discourse, there is no international legal definition of the term, while the concept is amorphous. The definition of trafficking in persons in the Trafficking in Persons Protocol provides a non-exhaustive list of examples of exploitative purposes of trafficking, including

“...at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.”⁵

According to the *UNODC Model Law against Trafficking in Persons*, the Protocol does not require that exploitation in and of itself be criminalized, though forms of it as set out in the Protocol may be the subject of distinct offences in domestic law.⁶ A common understanding of exploitation in the Trafficking in Persons Protocol has been offered as particularly harsh and abusive conditions of work or ‘conditions of work inconsistent with human dignity’.⁷

The IOM Glossary on Migration definition of exploitation lists examples of exploitation also contained in the Trafficking in Persons Protocol:

The act of taking advantage of something or someone, in particular the act of taking unjust advantage of another for one’s own benefit (e.g. sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).⁸

Examples of exploitation provided for in the Trafficking in Persons Protocol and the

⁵ Trafficking in Persons Protocol supplementing the United Nations Transnational Organized Crime Convention, Article 3(a).

⁶ UNODC Model Law against Trafficking in Persons, Vienna, 2009, p.43. Further, as noted in the Model Law, the relevant concepts of ‘forced labour’ and ‘slavery or practices similar’ are both defined in other international treaties that have been widely ratified.

⁷ UNODC, Model Law against Trafficking in Persons, Vienna, 2009, p.36.

⁸ Glossary on Migration, IOM, International Migration Law, 2nd edition, 2011, p.35.



IOM Glossary are non-exhaustive examples. As a result, what constitutes exploitation in practice is determined on a case-by-case basis depending on the individual circumstances at hand.

Defining exploitation

The Oxford dictionary defines ‘exploitation’ as “the action or fact of treating someone unfairly in order to benefit from their work.”

<http://oxforddictionaries.com/definition/english/exploitation?q=exploitation>

The Merriam-Webster dictionary defines ‘exploit’ as “to make use of meanly or unfairly for one’s own advantage”.

<http://www.merriam-webster.com/dictionary/exploiting?show=0&t=1346706276>

Some of the literature distinguishes between the concepts of ‘abuse’ and ‘exploitation’ but they are also often used interchangeably. Some see the distinction between the terms as the profit intended from exploitation; there may be no such profit motive in abuse, e.g. wanton abuse that occurs without motivation or provocation. Others consider exploitation a form of abuse, and others again point to abuse as a means of exploitation. UNICEF for instance notes that sexual ‘abuse’ is sometimes referred to as occurring within the home, but acknowledges that there is no clear agreement on the distinction between sexual abuse and sexual exploitation.⁹ Others consider the concepts to be distinct in that they may both be present but can happen independently from each other. A further delineation is that exploitation is a subset of abuse, i.e. all exploitation is abuse, but not all abuse is exploitation.

Outside of these contexts, despite the proliferation of instruments that are relevant to exploitation of migrants, few of them explicitly address exploitation, leaving the international community with the significant task of elaborating a cohesive response within the framework provided. The Convention on the Rights of the Child (CRC) does mention exploitation explicitly, stressing that the best interests of the child are paramount. In Article 19(1), States parties are mandated to take appropriate measures to protect children from

“all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

In article 32(1) States Parties recognise

“the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

⁹ Inter-Parliamentary Union and UNICEF, ‘Child Protection: A handbook for parliamentarians’, 2004, p.63.



By virtue of Article 34, States Parties undertake to protect children from all forms of sexual exploitation and sexual abuse, particularly exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials.

In relation to these two examples, it is difficult to see how such practices could be anything but exploitative, perhaps implying that the word ‘exploitative’ is used for emphasis rather than for qualification. Article 39 also stipulates the recovery and reintegration of children who have suffered exploitation, among other things. The right of children and young people to be protected from ‘economic and social exploitation’ is reiterated in Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) though no definition is offered on either economic or social exploitation.

Other instruments make no explicit mention of exploitation, with the exception of the International Convention on the Protection of the Rights of All Migrant Workers, and Members of their Families (ICRMW), the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). The ICRMW mentions protection of migrant workers in respect of exploitative rent (article 43(d)). CEDAW promotes legislation to prohibit exploitation of the prostitution of women (article 6), and the CRPD recognizes in its preamble that women and girls with disabilities are at greater risk of exploitation relative to their male counterparts, and devotes Article 16 to freedom from exploitation, abuse and violence.

Ultimately, while a human right of freedom from exploitation is only explicitly guaranteed to children and persons with disabilities, there is nonetheless a framework for implementing measures that can ensure that migrants are protected from exploitation, which will be explored in part 2 of this paper.

Notwithstanding the fact that there is a framework for confronting exploitation, the lack of a universal, harmonized definition of the concept highlights the need to arrive at a common understanding of the concept in the context of migration. Without harmonized understanding of exploitation, and consensus in the guidelines that should be offered in this respect, there is a danger that practitioners may not recognize exploitation when they see it¹⁰, or may see it where it does not exist. A given migrant could therefore be considered exploited in one country where the same treatment does not constitute exploitation elsewhere.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *What are the advantages and disadvantages of the absence of a definition of exploitation?*
 - *Has the absence of a clear definition of exploitation been a hindrance in protection and assistance of exploited persons?*

¹⁰ For example, practitioners may think they can do nothing unless what they encounter can also be understood as trafficking.

- *Has the absence of a clear definition of exploitation been a hindrance to mounting prevention efforts?*
- *Does the lack of harmonized understanding of exploitation hamper cooperation to prevent it?*
- *Should ‘exploitation’ be defined? If so, how?*
 - *Should there be one definition of exploitation or should there be different definitions for different contexts?*
- *Is profit relevant to understanding exploitation?*
 - *If so, is the relevant type of profit only financial?*
 - *If profit is sought for survival, is the activity still exploitation? (for instance, where a parent organizes begging of her own child)*
- *Should ‘abuse’ be defined? If so, how?*
 - *How are abuse and exploitation distinct?*
 - *How do abuse and exploitation overlap?*

1.2. Types of exploitation

In the absence of a definition of exploitation, the language used, for example, in the relevant international instruments, focuses on addressing different (but sometime overlapping) forms of exploitation.¹¹ A criminal law approach is taken to exploitation where it occurs in the context of trafficking and forced labour, and a labour law approach is taken to labour exploitation. There is often reference to the fact that exploitation is more ‘severe’ where it occurs in the context of trafficking or forced labour, raising questions as to the extent to which a ‘degree’ of exploitation is envisaged particularly by the trafficking definition which requires three elements (act, means, exploitative purpose) but is silent as to severity. At the ‘milder’ end of the exploitation spectrum, the term ‘exploitation’ is used in a non-technical sense in the way that an opportunity or a circumstance may be exploited, or ‘taken advantage of’.¹² Yet incidents that occur here may still be addressed by criminal law where they amount to stand-alone crimes. From a labour perspective, ‘exploitation’ is considered to be that which derives profit from the exploitation of a person’s labour or service. However, there are some forms of exploitation that have been acknowledged at the international level that do not fit neatly into this framework; namely those forms of ‘exploitation’ that take place during the migration process, and those forms of exploitation that are anticipated by the Trafficking in Persons Protocol that do not exploit the migrant’s labour as such, notably, sexual exploitation¹³.

Furthermore, it must be noted that dividing exploitative forms into types of exploitation may be useful for understanding exploitation, but it can never be entirely accurate; specific situations of exploitation may straddle these categories at any given moment or oscillate between them in the course of exploitation. The result, as the

¹¹ ‘Slavery and Human Trafficking: International Law and the Role of the World Bank’, Maria Fernanda Perez Solla, April 2009, p.5.

¹² Also see 1.4.1 on ‘Degree’ or ‘Severity’ of exploitation below.

¹³ However, forced sex work can also be regarded as a form of forced labour. The ILO has stated that “coercive sexual exploitation and forced prostitution do come within the scope of the definition of forced or compulsory labour...” (ILO General Survey (2007), page 42 (para. 78)). Accordingly, a number of states do, via labour regulation, define commercial sexual exploitation as exploitation of labour,.

table below shows, is that both criminal law and labour law may be appropriately evoked in response to specific incidents of exploitation.

Table 1: Type of law relevant to type of exploitation

Type of exploitation	Criminal Law	Labour Law	Human Rights Law
Exploitation of the prostitution of others	x	x	x
Sexual exploitation	x	x	x
Forced labour or services	x	x	x
Slavery or practices similar to	x	x	x
Servitude	x	x	x
Removal of organs	x		x
Servile forms of marriage	x		x
Exploitative labour		x	x
Exploitative forms of adoption	x		x
Exploitative traditional practices	?	?	x
Exploitation on route	?	?	x

1.2.1. Exploitation amounting to criminal offences: Forced labour and trafficking

In its most extreme form, exploitation occurs in the context of forced labour or trafficking in persons. Forced labour is a concept that dates back to the 1930 ILO Forced Labour Convention (No. 29). Article 2(1) of that Convention defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” The ILO offers an operational definition of forced labour as:

“...work for which a person has not offered him or herself voluntarily (concept of “involuntariness”) and which is performed under the menace of penalty (concept of “coercion”) applied by an employer or third party to the worker. The coercion may take place during the worker’s recruitment process to force him or her to accept the job or, once the person is working, to force him/her to do the tasks which were not part of what was agreed at the time of recruitment or to prevent him/her from leaving the job.”¹⁴

Paragraph 11 of EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, adds forced begging as a form of forced labour or services as defined in the 1930 ILO Convention No. 29; “[t]herefore, exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur.”¹⁵ It therefore must be stressed that labour can include irregular or informal labour, also extending to

¹⁴ ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.13. See also the 2012 General Survey of ILO’s Committee of Experts, such as 2012 General Survey].

¹⁵ EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, paragraph 11.

‘labour’ that takes place in sectors that are not ‘legal’ in the country in which they are performed (for instance, drug production)¹⁶.

The Trafficking in Persons Protocol supplementing the Transnational Organized Crime Convention defines trafficking in persons as:

“...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation*. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” [Italics added].

From this definition it is clear that there are three elements of the crime of trafficking; the act, the means and the purpose of exploitation, though the ‘means’ element is redundant in cases of child trafficking. In some domestic systems, legislation has conflated exploitation to the offence of trafficking, requiring only that an act be committed for the purpose of exploitation, or even requiring exploitation alone as proof that trafficking has occurred. The result of exploitation becoming synonymous with trafficking is potentially to dilute the serious crime of trafficking.¹⁷

It is also important to note that exploitation does not need to have occurred to establish trafficking. As in any proactive investigation of any crime, the crime does not need to have taken place in order to prove that intention to commit the crime. So too with trafficking, it is enough that a prescribed ‘act’ and ‘means’ be committed *for the purpose* of exploitation. This fact raises challenges of how to distinguish crime types when a situation is intercepted before any exploitation has taken place. In any case, while the ILO Conventions are principally labour law instruments (although they do additionally touch on many other areas of law, including migration law, and criminal law), the Trafficking in Persons Protocol, by virtue of the ‘acts’ set out therein, can also capture those who recruit, transport, transfer, harbour or receive persons, for the purpose of exploitation, which is particularly relevant where an international migration process is involved.

¹⁶ The three elements of the definition are discussed in greater detail in the ILO Committee of Experts 2012 General Survey (pp. 107 & 111) On page 107, the COE makes clear its position that informal and irregular work are encompassed by Convention No. 29’s definition of forced labour:

262. Article 2(1) of Convention No. 29 defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” It follows from the words “all work or service” that the Convention applies to all types of work, service and employment, regardless of the industry or sector within which it is found, including the informal sector. The words “any person” refer to all human beings – adults and children, nationals and non-nationals, including migrants in irregular situations. The forced labour Conventions are therefore applicable to all workers in the public and private sectors, migrant workers, domestic workers and workers in the informal economy....

¹⁷ Kristina Touzenis, ‘Trafficking in Human Beings: Human Rights and transnational criminal law, developments and law in practice, UNESCO 2010, p.146.

The ILO's recent estimates on forced labour (20.9 million people globally) state that human trafficking can also be regarded as forced labour, such that its estimates subsume human trafficking for labour and sexual exploitation.¹⁸ However, while a close relationship between trafficking in persons and forced labour has been acknowledged, the concepts are also considered to be distinct.

In 2007, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) observed that the notion of exploitation of labour inherent in the trafficking definition allows a link to be established between the Trafficking in Persons Protocol and the ILO Forced Labour Convention, 1930 (No. 29). The ILO's CEACR explained the link between the two concepts as follows:

“A crucial element of trafficking is its purpose, namely, exploitation, which is specifically defined to include forced labour or services, slavery or similar practices, servitude and various forms of sexual exploitation. The notion of exploitation of labour inherent in this definition allows for a link to be established between the Palermo Protocol and Convention No. 29, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour...”¹⁹

However, this understanding of trafficking for exploitation as being ‘subsumed’ by the concept of forced labour excludes those exploitative purposes of trafficking which do not involve labour per se (discussed below at 1.2.3). From the perspective of UNODC, forced labour is an exploitative *purpose* of trafficking in persons (where it follows an ‘act’ and a ‘means’) but there are forms of trafficking that would not take place within the labour context²⁰.

In relation to exploitation of children, UNICEF understands exploitative work as that which falls below the minimum standards set out in the ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Exploitation therefore includes:

- a) all forms of slavery or practices similar to slavery, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict (C182, Art. 3(a));
- b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances (C182, Art. 3(b));
- c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties (C182, Art. 3(c));

¹⁸ Global Estimates of Forced Labour, Results and Methodology, ILO, 2012, p.13. It should be noted that this estimate does not include trafficking in adults or children for forced marriage, adoption or organ transplant.

¹⁹ ‘ILO: Eradication of forced labour’, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Geneva 2007, quoted in ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.19.

²⁰ See definition of trafficking in persons, Article 3(a), Trafficking in Persons Protocol.

- d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (C182, Art. 3(d) and C138, Art. 3);
- e) work done by children below the minimum age for admission to employment (C138, Art. 2 and 7).²¹

Given that the ‘means’ element of trafficking in persons does not need to be proven in the case of children, it is difficult to see how any of the above situations could not also constitute trafficking in persons assuming that an act of recruitment, transport, transfer, harbouring or receipt of the child could be found.

Exploiters may enter into arrangements with migrants (for instance, in exchange for migration and work opportunities) that are exploitative in essence or make migrants highly vulnerable to exploitation. A key dimension of forced labour for instance, is ‘unfree recruitment’, entailing both forced and deceptive recruitment. ILO offers the following operational definitions of these two concepts:

Forced recruitment is when, during the recruitment process, constraints are applied to force workers to work for a particular employer against their will – it being understood that poverty and a family’s need for an income are not recognized as indicative of such coercion; the coercion or constraints must be applied by a third party.

Deceptive recruitment is when a person is recruited using false promises about the work. This represents involuntariness insofar as, had the worker been aware of the true working or other conditions, he or she would not have accepted the job.²²

In a trafficking context, ‘recruitment’ is one of the listed ‘acts’ of the definition of trafficking in persons. The act of recruitment may also be by several of the specified ‘means’ (notably, use of force, coercion, deception and fraud) in such a way as to render any consent on the part of the victim irrelevant.

Unscrupulous recruitment intermediaries or agencies can make high profits by charging migrants excessive fees for their services. Recruitment agencies or middlemen in countries of origin and destination may charge exorbitant fees to those they recruit despite the illegality of doing so.²³ Even in the case of legitimate recruiters, a tendency to shift the costs of recruitment from employers to workers has been noted.²⁴ Exorbitant fees paid by migrants in exchange for recruitment services can often indicate vulnerability to exploitation. At the same time, the fact that a

²¹ See for instance, ILO, UNICEF, UN.GIFT, ‘Training Manual to Fight Trafficking in Children for Labour, Sexual and Other forms of Exploitation’, Textbook 1: Understanding Child Trafficking, 2009, p.15.

²² ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.14.

²³ See for instance, ‘For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda’, Human Rights Watch, October 2012, pp.23 – 28.

²⁴ World Migration Report 2010, ‘The Future of Migration: Building Capacities for Change’, IOM, 2010, p.23.

migrant does not pay any recruitment fees to a registered agent could also indicate that a person has entered into a situation of debt, rendering him or her vulnerable to exploitation. For instance, where a domestic worker's recruitment and other costs of bringing him or her to the destination country are borne by the family that will employ the person, he or she may be made to feel indebted to the family as a result.²⁵

Recruiters also may deceive migrants about the nature of the work they will do, the conditions and the wages they will receive, which are often far less than those promised at the time of recruitment. Such agents may facilitate migration of the migrant concerned, begging questions as to whether such recruiters are smugglers, or are traffickers who have committed an act (recruitment) by a means (deception) for the purpose of exploitation. Here it could be argued that the purpose of the act was to benefit directly from the migrant rather than his or her labour, and that any exploitation was incidental to the role he or she played. Yet the recruiter may know that the migrant will possibly be exploited upon arrival in the destination country but turn a blind eye to it, thereby being complicit. Questions then arise as to whether the crime is one of smuggling, trafficking.

or a simple case of migration. Here it also must be noted that while smuggling and migration does not necessarily involve human rights abuse, trafficking necessarily does.

Another exploitative arrangement used in forced labour and trafficking situations is **debt bondage**. Debt bondage is conceptually interesting as it can be considered both a means of trafficking someone into exploitation, as well as an exploitative end in itself. Debt bondage is defined as:

“...the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”²⁶

Put simply, debt bondage involves manipulation of a debt for the services of a person.²⁷ In irregular migration contexts, debt bondage can occur during the migration or recruitment process; for instance, the cost of smuggling services including transportation, forged documentation, and corruption of border officials may be incurred as a debt by the migrant. Additional debts may be incurred in transit or at destination, including for food, accommodation and for securing employment opportunities. Such ‘debts’ will accumulate and inflate to such an extent that the migrant will never be able to pay them off on the basis of the wages he or she earns,

²⁵ See for instance, ‘For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda’, Human Rights Watch, October 2012, p.26.

²⁶ United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956).

²⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956. See also, ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.15.

effectively bonding him or her to work for the exploiter.²⁸ At the point of exploitation, debt bondage is one of the most commonly used means of maintaining people in exploitative situations. Debt bondage is included in the prohibition of servitude contained in the International Covenant on Civil and Political Rights (ICCPR) and thereby, potentially entailed in the broader notion of forced labour.²⁹ Indeed, the ILO explains debt bondage as a dimension of forced labour, whereby the debt may have been contracted at any time during the work history of the worker during recruitment or when the person is already employed.³⁰

In short, it is clear that the concepts of forced labour and trafficking in persons overlap; practically, a person may be trafficked into forced labour, and conceptually the means of trafficking may be an indicator of forced labour. Yet both can also occur independently of the other.

Exploitation is a key element of the definition of trafficking in persons, in that the act and the means of trafficking must be committed for the purpose of exploitation. The following questions are offered for consideration in working towards conceptual and policy coherence:

- *Given that an ‘act’ and a ‘means’ will generally be present in all situations of exploitative forced labour (for instance, recruitment and coercion), how to distinguish between trafficking in persons for forced labour, and forced labour without trafficking? ?*
- *It is a widely accepted principle that laws, particularly criminal laws, must be formulated with sufficient precision to enable persons subject to them to reasonably foresee the legal consequences that may result from a given action. How can exploitation or intention to exploit be proven in the absence of a definition of it?*
- *In cases of trafficking in persons, can intent to exploit be established even where the specific exploitative purpose is not known?*
- *Do forced and deceptive recruitment constitute exploitation, or a means of exploitation?*
- *Can the three elements of trafficking be established when both the means and the end of exploitation are the same?*
- *Can all migrants in irregular situations and in a situation of debt bondage for smuggling services, be considered trafficked?*
- *Is debt bondage exploitative in itself or a means by which exploitation is effected?*

1.2.2. Labour exploitation

In the context of exploitative labour, anything that falls below labour law standards is considered exploitative. At the domestic level, those standards are determined by

²⁸ ‘Fighting Human Trafficking: The forced labour dimensions’, International Labour Office, Geneva, Switzerland, Background Paper, prepared for the Vienna Forum on Human Trafficking, Vienna, 13-15 February 2008.

²⁹ Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, 789, Virginia Journal of International Law Vol. 49:4, p.821.

³⁰ ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.15.

national labour laws in light of the international obligations assumed by the State. At the international level, exploitative conditions are those that fall below international standards as set out for instance in the 186 ILO Conventions. From a trafficking point of view, it is more difficult to establish what level of exploitation would *not* be captured given that no such degree is set. Therefore, it is difficult to determine the point at which exploitation that violates labour standards amounts to exploitation in the trafficking context, or put another way, where it does not.

The challenge of distinguishing between exploitation that reaches the level of forced labour or trafficking and that which is exploitative but does not reach this ‘criminal’ level, is never more present than with respect to commercial sexual exploitation. From a labour perspective there are arguments to suggest that exploitative sex work should be addressed as a sub-set of labour exploitation, or rather that exploitative sex work should be approached as exploitation in any industry.³¹ Given this view, it follows that *coercive* sexual exploitation and *forced* prostitution can be subsumed by the definition of forced labour.³² It is also clear that ‘exploitation of the prostitution of others’ would be captured by the Trafficking Protocol where an ‘act’ has been committed and requisite ‘means’ have been used to vitiate any consent to the exploitation. What is less clear is the point at which the sexual exploitation or prostitution is *not* coercive or forced. A particular challenge is posed by the different moral and cultural attitudes that cloud objective consideration of sex work; where there is a prevailing belief that sex work is innately not free and exploitative, this type of exploitation is inseparable from the means used to bring it about.

The challenge of distinguishing between forced labour or trafficking and other exploitation is also acute in informal and illegal sectors. In the Trafficking in Persons Protocol, exploitation in criminal activities is not explicitly mentioned as an exploitative purpose nor is it excluded. According to EU trafficking directive 2011/36/EU, exploitation of criminal activities means; “exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.”³³ Migrants in irregular situations may be exploited for criminal purposes en route including in drug smuggling in exchange for being smuggled across borders or in response to threats. In destination countries, exploitation can also occur in activities such as drug cultivation and distribution, begging, shoplifting or pick-pocketing. Other criminal activities in which people may be exploited, include illegal hawking of goods particularly in tourist areas, burglary, or even mugging.³⁴

Questions can be raised about how exploitation of migrants in irregular situations in criminal activities would ever *not* constitute trafficking. By way of illustration, a

³¹ See for instance, Frances Simmons and Fiona David, ‘The road to effective remedies: pragmatic reasons for treating cases of ‘sex trafficking’ in the Australian sex industry as a form of ‘labour trafficking’, in *Anti-Trafficking Review*, Issue 1, June 2012, pp.60-79.

³² ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’, ILO, 2012, p.19. See also the ILO Committee of Experts 2007 General Survey.

³³ EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1, and replacing Council Framework Decision 2002/629/JHA, OJ 2002, L 203/1, paragraph 11.

³⁴ See for instance, ILO, UNICEF, UN.GIFT, ‘Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking’, (ILO, 2009), p.30.

person who is recruited (the act) into pick-pocketing (exploitative purpose), by abusing his vulnerability as a migrant in an irregular situation (the means) could be considered a victim of trafficking. But it is untenable to assume that all migrants in irregular situations who are recruited into crime are victims of trafficking or are exploited. This scenario raises interesting questions with respect to the role of consent and the culpability of the exploited person for the crimes he or she commits in the course of being exploited.

A person can be exploited in formal labour, informal labour or even in illegal activities. The following questions are offered for consideration in working towards conceptual and policy coherence:

- *Should commercial sexual exploitation be addressed as a form of labour exploitation or distinct from it?*
- *How to determine whether work undertaken by migrants in irregular situations is exploitative or not?*
- *To what extent is the sector in which the exploitation takes place relevant to understanding exploitation?*

1.2.3. Non-labour exploitation, including sexual exploitation

As flagged above, some forms of exploitation anticipated by the Trafficking in Persons Protocol do not fit neatly into the ‘labour’ framework. For instance, trafficking for the purpose of organ removal, slavery-like practices that take place in private spheres, and sexual exploitation (other than exploitation of the prostitution of others), do not necessarily entail the exploitation of a person’s ‘labour’.

Where exploitation of prostitution of others is involved, the situation is approached within the frameworks discussed above, depending on whether the situation is one of labour exploitation, forced labour or human trafficking. However, the situation is not so clear where the sex acts in contention occur directly between the employer and the alleged victim. Sexual exploitation is often considered distinct from ‘economic exploitation’ that derives a financial or material profit for the exploiter³⁵. As discussed below, young female migrants are particularly vulnerable to sexual exploitation, both due to their gender and due to the fact that they are often working in domestic or unregulated environments where there are significant power differentials between employers and employees and where their social isolation poses a barrier to accessing assistance and protection.³⁶ In such cases, non-consensual sexual acts committed against the migrant constitute standalone criminal offences, irrespective of any labour or trafficking issues. For instance, where an employer of a domestic worker takes sexual advantage over her, the sexual motives of the culprit may be incidental to the labour relationship that exists. However, it can be asked whether a given situation is one of trafficking where the culprit has deliberately brought about the scenario *for the*

³⁵ As noted above, sexual violence or harassment are also used as an indicator of a potential forced labour situation. Taking this approach, the main distinction between forms of sexual exploitation is commercial sexual exploitation and other forms of sexual abuse (without monetary benefit).

³⁶ See for instance, Matthew Gibney, *Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens*, United Nations Development Programme, Human Development Research Paper, 2009/18 (2009), pp.27-28.



purpose of the sexual exploitation, making the domestic work incidental to the sexual motive.

Sexual exploitation and sexual abuse have been defined by the Secretary-General of the United Nations for the purpose of special measures for protection from sexual exploitation and sexual abuse. In this context, sexual exploitation has been defined as:

“...any actual or attempted abuse of a position of vulnerability, deferential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”

Sexual abuse is defined as:

“...the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”³⁷

According to these definitions, sexual exploitation here is done ‘for sexual purposes’, which are ‘including but not limited to profiting monetarily, socially or politically’. No such profit motive is mentioned in respect of sexual abuse. Further the means used in sexual exploitation include actual or attempted abuse of a position of vulnerability, deferential power, or trust, compared to the more overt means in abuse, including force or equally coercive conditions. The distinction drawn here between sexual exploitation and sexual abuse raise questions as to whether or not sexual acts perpetrated for the purpose of sexual gratification can be considered an exploitative purpose of human trafficking.

Another form of exploitation that has been raised as falling outside the ‘labour’ context, is forced marriage, which does not necessarily entail exploitation of labour, although it may. Where a woman is trafficked into marriage, and in that context forced to perform domestic work in abusive conditions, for example, it can be asked whether the marriage was the exploitative purpose of trafficking itself, or whether marriage was the means of trafficking a person into domestic work. There are also cultural implications of this type of marriage, for instance where parents in a country of origin force their daughter to marry a man as a means of facilitating her migration elsewhere and she is expected to perform particular duties to her husband in the context of that marriage. In such situations, cultural norms may provide the space to accept practices that are not accepted by legal norms.

Where people are trafficked for the purposes of exploitation in criminal activities, it must be considered whether illegal activities according to the laws of a given country (ranging from begging and pick-pocketing through to drug cultivation and distribution) can be considered in the labour context. There are few International Labour Conventions governing standards to be applied in criminal ‘work’ meaning that most such cases of exploitation would fall outside the realm of labour and be addressed as forms of trafficking in persons, where the requisite ‘act’ and ‘means’ can be established. The ILO Convention No. 182, however, specifically defines the worst

³⁷ See Secretary-General’s Bulletin on Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13, 9 October 2003, p.1.

forms of child labour to include “the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties”. Similarly, forced begging or other illicit activities, if they involve forced labour, are considered under ILO Convention No. 29.

The **removal of a person’s organs** without his or her consent or following vitiation of their consent is ‘exploitative’ in the sense that it takes advantage of the desperation of donors (to improve the economic situation of themselves and their family) and of the recipients (to prolong or improve their lives). Migrants in irregular situations may be particularly vulnerable to exploitation for organ removal, running out of money en route and being forced to sell what they can in order to continue their journey or pay smuggling fees and debts. It is clear that removal of a person’s organs without his or her consent would constitute a crime, irrespective of whether or not it constitutes trafficking. Where consent has been given but vitiated through the use of means, the offence can be one of trafficking. Where a person is vulnerable though, which a person who needs to sell organs for money clearly is, it must be asked whether he or she can ever meaningfully consent to doing so without being considered exploited.

Adoption has been similarly acknowledged as a potential exploitative purpose of trafficking. Traditional practices in which a child of an economically disadvantaged family is sent to live with wealthier relatives may amount to exploitative labour where the child is made to perform domestic work for instance. At the more organised level are situations of illegal adoption in which babies or young children are taken from their parents and adopted by adoptive parents who may or may not be aware of any illegal means involved, and who do not themselves exploit the child’s labour. Migration issues may be relevant where such adoption occurs at the international level. There are several possible ‘victims’ involved in these situations, including the birth families whose child has been removed from them, unsuspecting adoptive parents, possible middle men facilitating the process, and the adopted person. However, labelling the adopted baby or child a victim of ‘trafficking’ raises complicated issues about the nature of exploitation. Firstly, the means set out in the Trafficking Protocol may not have been used on the victim but on his or her parents; a baby cannot be ‘deceived’.³⁸ Further, the extent to which the baby is ‘victimized’ in a trafficking sense is difficult to quantify; while some may end up in exploitative labour situations working for the adoptive family, others end up in loving homes. The former situation is encompassed by the Trafficking in Persons Protocol, an Interpretative Note to which explains that:

Where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (*d*), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery it will also fall within the scope of the protocol.³⁹

³⁸ Generally in the adoption scenario the means of ‘giving or receiving of payments or benefits to achieve the consent of a person having control another person’ would be the most applicable ‘means’ in situations where parents sell their child to intermediaries. However, where no such payment is made, it must be asked which other ‘means’ have been used.

³⁹ Travaux Préparatoires for the Organized Crime Convention and Protocols, at p.347.

The definition referred in this note of a practice similar to slavery is as follows:

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.⁴⁰

Understanding adoption as a form of trafficking-related exploitation becomes circular in that illegal adoption falls within the Trafficking Protocol if it is a practice similar to slavery, but a practice similar to slavery includes exploitation in its definition. In any case, it is clear that where there is no exploitative purpose of trafficking, illegal adoption does not amount to a slavery-like practice for the purpose of the Trafficking Protocol. However, an argument can be made that illegal adoption can constitute slavery, defined by the Slavery Convention as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁴¹ If the buying and selling of a child is considered to manifest rights of ownership (in practice often by means of ‘giving or receiving of payments to achieve the consent of a person having control over another person’ as set out in the Trafficking in Persons Protocol), then illegal adoption could amount to slavery irrespective of any exploitative intent. The erroneous result of these lines of argument is that illegal adoption for the purpose of exploiting a child’s labour could amount to a slavery-like practice, while illegal adoption with no exploitative or other malicious intent could amount to slavery.

It is unlikely that the drafters of the Protocol intended such a result. Indeed, stepping back from interpretive complications, it is difficult to label the experiences of a child adopted into a loving home as exploitative, and potentially unconscionable to criminalize the actions of his or her adoptive parents particularly where the type of adoption may constitute administrative transgressions rather than criminal acts as such. In some situations, it is clear that families who lose babies to illegal adoption markets and those that adopt them while not victims of trafficking (nor perpetrators) have certainly been exploited by bogus recruitment agencies that have taken advantage of poverty and peoples’ desire to have children.⁴² Yet in general it is difficult to discern whether the acts of the adoptive parents, the birth parents and any middlemen are ‘exploitative’ and if so, of whom. Furthermore some of the acts involved, notably including the middlemen depriving the child of the right to be with his or her family, would be tantamount to other criminal offences. In short, it is unclear what benefit is gained by labelling some situations as ‘exploitative’ for the purpose of trafficking in persons, which would anyway be addressed by other offences.⁴³

⁴⁰ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, 1(d).

⁴¹ Slavery Convention, 1926, Article 1(1).

⁴² See for instance, ILO, UNICEF, UN.GIFT, ‘Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking’, (ILO, 2009), p.30.

⁴³ Illegal adoption is also governed by other international instruments including the Hague Convention on 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *What is the distinction between sexual exploitation and sexual abuse?*
- *Can sexual abuse be the exploitative purpose of trafficking? What would the protection and assistance consequences be of excluding sexual abuse but including sexual exploitation?*
- *Can sexual exploitation for the purpose of sexual gratification rather than profit amount to trafficking in persons (where the act and the means are established)?*
- *What is the benefit of labelling something ‘exploitation’ where it constitutes another stand-alone crime?*
- *In human trafficking contexts, is marriage a legal construct which may only be used to facilitate the exploitation, rather than the exploitation itself?*
- *What is the implication of a person’s consent to an exploitative form of marriage?*
- *What is the benefit of referring to non-labour related ‘exploitation’ as exploitation?*
- *To what extent should illegal adoption be considered exploitative? Whose exploitation is relevant? (i.e. the birth parents, the adoptive parents, the child)*
- *What is to be gained by including illegal adoption as a possible exploitative purpose of the Trafficking in Persons Protocol? What are the possible negative consequences?*

1.2.4. Exploitation during the irregular migration process, including by smugglers

Much of the literature discussing exploitation of migrants speaks to the ‘exploitation’ experienced in the process of migrating irregularly. However, where the term ‘exploitation’ is used in this context, it is perhaps applied as a substitute for specifying the distinct criminal offences that are committed against migrants in irregular situations including, for instance, assault, rape or extortion.

Even before migrants leave home, they may be subject to a degree of ‘exploitation’ by recruitment agencies that overcharge migrants for their services, or misrepresent the journey and the employment waiting for them at the other end.⁴⁴ ‘Exploitation’ has also been used to refer to situations in which corrupt border and other officials who grease passage through borders or turn a blind eye in exchange for bribes or other benefits. Officials have coerced migrants to pay bribes in order to continue their journey, or for the return of their documents, or to be released from detention. Migrants may be robbed, extorted, assaulted, held to ransom, beaten or even raped by traffickers, smugglers, border officials or others during their journey. Women and girls, and also men and boys, may be compelled to exchange sex for smuggling services or basic needs like food or accommodation throughout the journey.⁴⁵ Unscrupulous landlords may take advantage of migrants’ powerlessness to charge exorbitant fees for substandard accommodation. There are even situations of

⁴⁴ See ‘Forced or deceptive recruitment’ below at 1.3.1.

⁴⁵ See for instance, ‘Protection of refugees and other persons on the move in the ECOWAS space’, IOM and UNHCR, January 2011, p.17.



migration ‘agents’ charging migrants to take them to an NGO or other service provider to seek advice on their asylum claim. Such situations have been considered as exploitation, generally of a migrant’s vulnerability.

Migrants who use the services of smugglers are particularly at risk of experiencing such treatment. Smugglers may put lives of migrants in danger, charge exorbitant fees and threaten migrants or their families who fail to pay them, taking advantage of their vulnerability in doing so. Indeed, smuggled migrants are often at heightened risk of being exploited given that they may have incurred debts to smugglers or others and have to pay them off through work. It also must be noted that smugglers ‘exploit’ the needs and desires of people to migrate and their lack of opportunity or possibility to do so regularly. The exploitation of migrants by smugglers is anticipated in the Smuggling of Migrants Protocol, which requires States to treat circumstances that “entail inhuman or degrading treatment, including for exploitation” as aggravating circumstances.⁴⁶ The UNODC Model Law against the Smuggling of Migrants notes that more often migrants are subject to treatment that does not amount to exploitation as included in the trafficking definition, but is nonetheless ‘exploitative’. Examples raised include slum landlords who charge smuggled migrants exorbitant rates for substandard accommodation, or a person who takes smuggled migrants who have become stranded to the nearest water hole, but only in return for all their money and possessions.⁴⁷ However, all of these examples of ‘exploitation’ constitute distinct crimes that should be investigated as such.

These types of exploitation of a migrant’s circumstances or their vulnerability are different to the type of exploitation anticipated by the Trafficking in Persons Protocol. The use of smugglers to facilitate irregular journey can increase migrants’ vulnerability to exploitation, but does not constitute exploitation *per se*. While smugglers derive profit directly from the migrants they smuggle, they do not derive profit through their exploitation as such. In short, if a smuggler exploits a migrant, this would be an indicator but not proof of potential trafficking in persons, which also requires that both an ‘act’ and the ‘means’ elements be established. However, it is not difficult to anticipate how smuggling would readily become trafficking where exploitation is found; the act could be recruitment and the means deception as to that recruitment by representing the journey as one of smuggling when it is in fact one of trafficking. The fact that many trafficked people begin their journeys as smuggled migrants makes determining which crime is being confronted a particular challenge, particularly where the situation is intercepted before exploitation takes place. Smugglers may not have any intention to exploit a migrant after delivering him or her to a country of destination, and yet the migrant subsequently becomes trafficked or otherwise exploited. Alternatively trafficked people may think that they are being smuggled until the point of exploitation, or may know that they are destined to a situation of exploitation.

The fact that many trafficked persons begin as smuggled migrants before falling victim to exploitation has resulted in some trafficked people being misidentified or not identified at all. Victims of trafficking have been misidentified as ‘mere’

⁴⁶ Smuggling of Migrants Protocol, Article 6(3)(b).

⁴⁷ UNODC, Model Law against Smuggling of Migrants, New York, 2010, p.53.



smuggled migrants, often without receiving the assistance and support they require. Alternatively, in part owing to global pressure to increase prosecution of traffickers, migrants who have been smuggled may be misidentified as trafficked victims, resulting in inappropriate prosecutions for the serious crime of trafficking. In short, “all trafficked persons are also victims of exploitation⁴⁸, yet not all exploited migrants are also trafficked persons.”⁴⁹

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *What is the benefit in using the term ‘exploitation’ where the act referred to constitutes a distinct crime?*
- *Are there any forms of ‘exploitation’ that take place during the migrant smuggling process that do not constitute distinct crimes?*
- *How to distinguish between migrants who are smuggled and those who are trafficked, where irregular movement is intercepted before exploitation has taken place?*

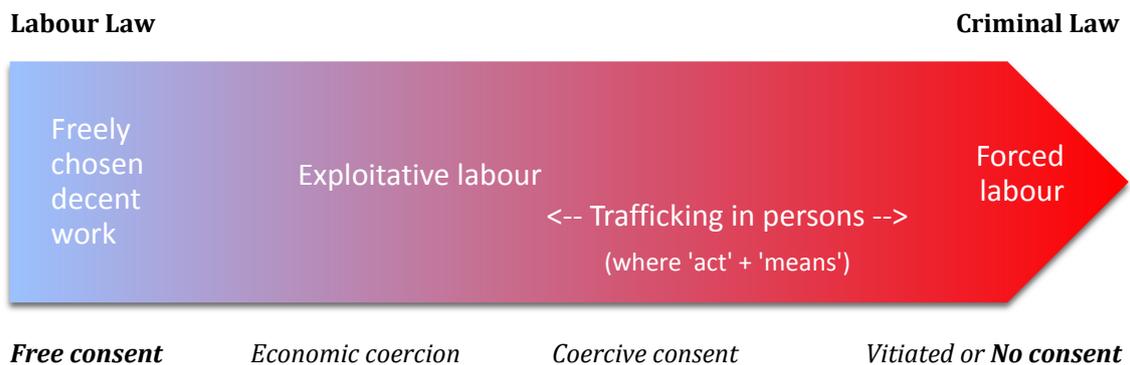
⁴⁸ Noted that, under the Trafficking Protocol, only intent to exploit and not actual exploitation is necessary in order for a person to be “trafficked”..

⁴⁹ ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.69 and p.111.

1.3. Conceptual challenges in understanding exploitation

1.3.1. 'Degree' or 'severity' of exploitation

It may be argued that there is a continuum of exploitation, with what can clearly be identified as forced labour and other forms of severe exploitation at one end, and freely chosen, decent employment at the other. Between these two points along the continuum, there is a range of relationships in which the element of choice is vitiated. Forced labour is clearly at one end of the spectrum. But questions can be asked as to the extent to which exploitation can be measured, and if so, what 'degree' of exploitation is required to establish the purpose element of trafficking in persons, if such a degree is required.



Trafficking in persons is often associated with a high 'degree' of exploitation, such that there is a tendency to focus on conditions of exploitation that are incompatible with human dignity in establishing that trafficking has occurred.⁵⁰ This is so despite the fact that the Trafficking in Persons Protocol does not specify the degree of exploitation required to establish the exploitative element of the trafficking offence. Rather, establishing the offence requires that the 'act' and the 'means' (in cases of adult trafficking) elements be established, and that they be carried out by the alleged trafficker 'for the purpose of exploitation'. The fact that the act and the means must be 'for the purpose' of exploitation, mean that the exploitation need not have been carried out in order for the offence to be established. It is difficult to assess whether the intended exploitation was mild or severe where it has not yet taken place; a challenge that may have a bearing on prosecuting trafficking before the actual exploitation has taken place.

As mentioned above, the Smuggling of Migrants Protocol makes reference to exploitation. Article 6(3)(a) and (b) of the Protocol require States parties to ensure that circumstances that entail inhuman or degrading treatment, including exploitation, are considered aggravating circumstances. UNODC's Model Law against the Smuggling of Migrants notes that 'exploitation' of smuggled migrants may be 'so severe' that it should be appropriately prosecuted as trafficking in persons, or as

⁵⁰ 'The Cost of Coercion', ILO, 2009, p.8. Also see the UNODC Model Law against Trafficking in Persons, Vienna, 2009, which at p.36 offers the working understanding of exploitation in the Trafficking in Persons Protocol as particularly harsh and abusive conditions of work or 'conditions of work inconsistent with human dignity.'

another serious crime such as murder or manslaughter.⁵¹ Here the reference to ‘severity’ as a determining factor of whether abusive or harsh treatment reaches the level of exploitation for the purposes of trafficking is problematic, as it implies that the distinction between crime types is one of degree rather than one of nature.⁵²

It must be considered whether there is a relationship between the *nature* or type of work, and whether or not such work is found to be exploitative. By way of illustration, a frequently cited trafficking scenario is one in which a woman is deceived into thinking she is going to work as a waitress but finds herself instead working in poor conditions as a prostitute. Such a scenario is rarely questioned as pointing to exploitation. But it must be asked whether exploitation would be as readily found in situations where a person is deceived into thinking she is going to work in prostitution but instead finds herself working in poor conditions as a waitress. In respect of the *conditions* of work (in particular wages and working hours); it can be considered for instance, whether being paid \$99 instead of \$100 per client in a sex work context can be considered exploitation in a trafficking scenario. What about \$90? What about \$9? Such considerations raise interesting questions about how the ‘degree’ of exploitation can be separated from the nature and context of exploitation, and the moral subjectivity that may come into play in determining whether exploitation amounts to the type that satisfies the purpose element of the trafficking offence.

Use of the ‘means’ specified in the Trafficking in Persons Protocol act to vitiate the consent of a person to exploitation. Theoretically then, trafficking could be established in situations where the exploitation is ‘mild’, or where exploitation has not yet taken place but is intended. The result is that a person who has endured ‘mild’ exploitation or no exploitation could be considered a victim of trafficking where an act and means were used to traffic him or her for an exploitative purpose, and accordingly be entitled to appropriate assistance, while a person who has suffered severe exploitation outside the context of trafficking may not be, despite being entitled to remedy for human rights violations suffered, irrespective of any trafficking determination.

These issues raise questions about how exploitation is to be understood, and whether it can or should be measured by degrees.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *Should exploitation be measured by degrees? Would this help to distinguish trafficking in persons from other responses to exploitation?*

⁵¹ UNODC, Model Law against Smuggling of Migrants, New York, 2010, p.53.

⁵² Also see 1.6. By way of illustration, where a migrant is sexually exploited by those who are facilitating his or her irregular migration that exploitation may be incidental to the situation or integral in distinguishing a crime of smuggling from one of trafficking. For instance, it may be difficult to distinguish a situation of services provided in lieu of payment to a smuggler, from a situation of grooming for exploitation in a trafficking context. Similarly, servile forms of marriage can also be considered an exploitative purpose of trafficking, but marriage has also been used as a modus operandi for enabling irregular stay of migrants in destination countries. These facts illustrate the challenges of contextualising sexual exploitation in the context of irregular migration.

- *Should the degree of exploitation be dependent on the type of exploitation?*
 - *Is the severity of exploitation comparable across exploitative types of labour and sexual exploitation and exploitation in criminal activities?*
- *What are the consequences of the ‘degree of exploitation’ on protection of victims and culpability of exploiters?*
- *Should the degree of exploitation be established according to the intention of the exploiter or the actual exploitation experienced by the victim?*
- *Should the impact of the exploitation on the victim be relevant to establishing the degree of exploitation?*
 - *For instance, what are the implications for finding that there has been exploitation where it has not had a significant negative impact on the exploited person?*
- *Where the exploitation has not yet occurred, does the type and severity of exploitation need to be known in order to establish trafficking?*
- *How is vitiation of a victim’s consent relevant to establishing the ‘degree of exploitation’?*

1.3.2. Consent to exploitation

Some migrants in irregular situations enter situations they know will be exploitative, yet receive higher earnings and live in better conditions in the exploitative situation than they did before entering into it. As a simple illustration; labour that is exploitative because it falls below the minimum wage may be significantly higher than the minimum wage in the migrant’s country of origin. Persons who are performing such work may know they are doing so in worse conditions than locals or documented migrants would, yet not consider themselves to be exploited as such. UNICEF explains that children do not understand the notion or use the term ‘exploitation’, and may consider themselves to be deriving some benefit from the work.⁵³ The same is true generally given the absence of a harmonized understanding of exploitation, and given that in many cases, the exploited person may indeed receive some benefit from their work. In short, regardless of one’s age, the experience of and perception of exploitation is subjective.⁵⁴ As a result, many exploited persons may have little incentive to leave or be removed from exploitative situations, posing a key challenge to combating such exploitation.

In trafficking and forced labour situations, the victim’s consent is vitiated by the use of any of the listed means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person). The use of means does not need be proven in respect of child victims of trafficking. Yet the fact that consent is irrelevant in trafficking situations does not necessarily mean that the consent was not given; indeed some people may proactively seek out the situations in which they are exploited.

⁵³ See UNICEF, ‘Risks and Realities of Child Trafficking and Exploitation in Central Asia’, p.18.

⁵⁴ See for instance, Mike Dottridge, ‘Young People’s Views on Child Trafficking: Experiences from South Eastern Europe’, Innocenti Working Paper, December 2008, p.22.

In the context of labour exploitation, the consent or non-consent of an exploited migrant is not relevant to establishing whether or not exploitation has taken place; the ILO Conventions set out objective minimum standards, setting aside the need for subjective considerations. Yet at the same time, consent has been offered as the distinction between criminal and non-criminal exploitation. According to this approach, consensual exploitation is addressed through social and labour law, and non-consensual exploitation through criminal law. Where the definitional requirements of the act and purpose of exploitation are met, forms of the latter might be subsumed as human trafficking; in other words all situations in which people are forced or lured into exploitation, irrespective of any movement of victims.

An overlap between non-consensual exploitation and consensual exploitation is noted when economic vulnerabilities result in a person accepting exploitative work arrangements.⁵⁵ Consensual exploitation is expressed as that which typically results from a lack of other economic opportunities, such that the exploited person consents to the exploitation, without being coerced by threats, fraud or deception. This is termed ‘economic coercion’.⁵⁶

The ILO notes that, “the lessons of experience point to a very thin dividing line between coerced and non-coerced exploitation.”⁵⁷ Meanwhile, the Trafficking in Persons Protocol considers the use of ‘means’ to vitiate consent. In trafficking parlance, non-consensual exploitation could be considered to be those forms of exploitation in which ‘means’ of force, coercion or deception are used. However, a challenge of neatly separating these concepts arises from the fact that a prescribed ‘means’ of trafficking in the Trafficking in Persons Protocol is ‘abuse of a position of vulnerability’. In the absence of a definition of abuse of a position of vulnerability, the *travaux préparatoires* to the Protocol offered an Interpretative Note to the effect that abuse of a position of vulnerability “is understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”⁵⁸ UNODC adds to this the need for the trafficker to intentionally use or otherwise take advantage of an individual’s vulnerability (ostensibly including their economic vulnerability) to recruit, transport, transfer, harbour or receive a person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her.⁵⁹

Where exploitation is easy to establish, (for instance in countries where it is considered synonymous with pimping-related crimes), and where there is a low threshold for establishing abuse of a position of vulnerability (for instance, where the

⁵⁵ Johannes Koettl, ‘Human Trafficking, Modern Day Slavery, and Economic Exploitation’ World Bank, May 2009, pp.2-4.

⁵⁶ Johannes Koettl, ‘Human Trafficking, Modern Day Slavery, and Economic Exploitation’ World Bank, May 2009, p.7.

⁵⁷ ‘The Cost of Coercion’, ILO 2009, p.8.

⁵⁸ *Travaux Préparatoires* for the Organized Crime Convention and Protocols, at p.347.

⁵⁹ See UNODC ‘Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons supplementing the United Nations Convention against Transnational Organized Crime’, UNODC, 2012.



presence of vulnerability alone is adequate to assume that consent is vitiated, irrespective of whether or not there is some evidence that the vulnerability has been abused) it is difficult to see how this might not result in trafficking convictions for crimes that, in other jurisdictions, fall well short of human trafficking.

Vulnerability therefore injects a significant grey area into the divide between consensual and non-consensual exploitation.⁶⁰ Given that all migrants in irregular situations can be considered as vulnerable by virtue of their irregular status, all that remains in order to establish trafficking is an ‘act’ and for the exploiter to abuse that or another vulnerability (for instance, the age, gender, disability etcetera) for the purpose of exploiting him or her. Where the state of mind required by the alleged trafficker is mere knowledge of the migrant’s vulnerability, it is difficult to see how an undocumented migrant can feasibly ‘choose’ to undertake exploitative work without being considered a victim of trafficking. Particularly in contexts where all sex work is considered to be exploitative, the question becomes how an undocumented migrant can ever choose to undertake sex work.

Yet not all underpaid migrants in irregular situations are victims of trafficking. Nor are all undocumented migrant sex workers victims of trafficking. In practice, distinguishing between exploitation in trafficking and exploitation outside of trafficking is complicated by the fact that economic vulnerability is a key factor in both situations, and that exploited persons (trafficked or otherwise) may not consider themselves to be exploited. The incentive to make distinctions is arguably driven by the obligations that attach depending on the result; for instance, those who are victims of non-consensual exploitation are trafficked victims entitled to a range of assistance and protection measures given that they are victims of serious crime. The larger this category of people becomes, the more burden there is on the state to support them. On the other hand, political pressure to increase investigations and prosecutions of trafficking in persons may result in several exploitative situations being treated as trafficking even though they may not be.

Therefore, the consensual / non-consensual distinction is not necessarily a useful one in understanding exploitation in practice. While consensual exploitation can safely be asserted as that to be addressed by social and labour law, and non-consensual exploitation (trafficking and forced labour) as that which should attract the attention of criminal law, issues still remain as to the extent to which a migrant in an irregular situation is able to meaningfully consent. Ultimately, there is a thin line between exploitation that has been ‘consented’ to, and that, which has not. In any given situation the key focus should be on protection, including ensuring that all migrants, regardless of their legal status, are entitled to protection, respect and fulfilment of all their human rights, irrespective of where this line is drawn. The human rights of migrants can be violated by both non-State and State actors in a range of circumstances that have little to do with the criminal offence of trafficking; the State bears responsibility to protect human rights of all migrants, irrespective of how incidents are categorized.

The following questions are offered for consideration in working towards conceptual

⁶⁰ See 1.5 below for discussion on vulnerability.

and policy coherence:

- *Can a person consent to his own exploitation?*
 - *What are the ramifications of such consent from a prosecutorial and protection point of view?*
- *What role if any should consent play in determining whether there has been exploitation?*
 - *For instance, what if consent has not been vitiated by the use of any means set out in the Trafficking in Persons Protocol?*
- *Should the fact that a person has actively sought out an exploitative situation have any bearing on how exploitation in this situation is understood?*
 - *Does the type of situation sought make a difference? For instance, should there be any difference in understanding of exploitation if a migrant seeks exploitative work in a restaurant, or seeks work in petty crime?*
- *What is the relationship if any between consent and the exploitative purpose?*
 - *For instance, is consent more likely to have been found for some types of work (such as criminal work) than others (such as sex work?)*
 - *Should consent be harder or easier to vitiate for some exploitative purposes over others?*
- *What are the challenges of establishing exploitation where the victim does not consider him or herself to be exploited?*
- *What role should victims play, if any, in establishing whether or not there has been exploitation?*
- *How to prevent exploitation without undermining the agency people have to pursue options to improve their lives?*

1.4. Vulnerability to exploitation

Vulnerability is a key concept in understanding exploitation. Vulnerability factors may relate to the personal, situational or circumstantial situation of the migrant concerned. Vulnerability factors may be pre-existing or change throughout the migration process. In the context of trafficking-related exploitation, different types of vulnerability have been explained by UNODC as follows:

Personal vulnerability for instance, may relate to a person's physical or mental disability. *Situational vulnerability* may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. *Circumstantial vulnerability* may relate to a person's unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. *Pre-existing vulnerability* may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status. *Created vulnerability* may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural

or religious rituals or practices.⁶¹ [*Italics added*].

UNDP also notes that vulnerability can also relate to environmental or economic ‘shocks’. Where families and communities are not resilient enough to recover from such shocks the individuals within them can become vulnerable to exploitation. OHCHR would add lack of respect for rights, along with pernicious and persistent forms of discrimination, marginalization, and exclusion as factors that can increase vulnerability. Such discrimination would include discrimination on the basis of age, gender, socio-economic status, nationality and other prohibited grounds under international human rights law.

1.4.1. Migrants in irregular situations

Migrants in irregular situations are particularly vulnerable to exploitation relative to their counterparts in regular situations, and are less able to defend themselves against exploitation.⁶² On 30 September 2010, the Principals of the GMG adopted a statement on the Human Rights of Migrants in Irregular Situations. That statement stressed their vulnerability during the migration process and their lack of recourse in the event of exploitation.

Migrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment, and in some cases enslavement, rape or even murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities of countries of origin, transit or destination.⁶³

The particular vulnerability of migrants in irregular situations is also acknowledged by the fact that the mandate of the Special Rapporteur on the human rights of migrants recognizes the “particular vulnerability of women, children and those undocumented or in an irregular situation.”⁶⁴ There is no universally accepted definition of a migrant in an irregular situation - this is determined by national law. An irregular situation, however, generally refers to entering and/or remaining in a country without required documentation. The term therefore also applies to people who begin migrating regularly but their status subsequently changes, thereby finding themselves in irregular situations. Irregularity may occur because of overly complicated or restrictive policies to facilitate migration that push migrants out of the

⁶¹ See UNODC ‘Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons supplementing the United Nations Convention against Transnational Organized Crime’, UNODC, 2012, paragraph 2.3, p.2.

⁶² ‘International Migration and Human Rights’ GMG, 2008, p.18.

⁶³ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, 30 September 2010, Geneva, Switzerland.

⁶⁴ A/HRC/RES/17/12, para. 1(a), Human rights of migrants: mandate of the Special Rapporteur on the human rights of migrants, 2011.

regular sphere into the irregular sphere, or because power to maintain a migrant's regular status rests with employers.

The role of sponsorship systems in fuelling exploitation of migrants.

The situation of labour migrants in many countries is often regulated by a 'sponsorship' system, under which the migrant's status in the country of destination is linked directly to their employment with an identified employer. This system has come under intense scrutiny and criticism for its role in contributing to the vulnerability of migrants to exploitation. Under some sponsorship arrangements, migrants are unable to change employer without their previous employer's consent, regardless of the circumstances. The sponsor may be entitled to confiscate the migrant's passport and prevent him or her from travelling without permission.⁶⁵ The result of residence being tied to employment status is that migrants are easily exploited through their weak bargaining position relative to that of their employers.

Employers can threaten detention and deportation if the conditions they impose are not met. Further, if the migrant wishes to return home, the employer must agree in order to cancel the employment visa. If this official condition is not met, the migrant risks again being found in breach of immigration laws and may simply be detained and deported. Those migrants who do flee situations of exploitation automatically lose their residence status, facing the risk of lengthy detention and deportation, with little access to justice systems or dispute resolution mechanisms. Meanwhile, the fear of losing their regular status and finding themselves in irregular situations can facilitate the exploitation of migrants, such that employers are able to force migrants to work long hours, accept wages below national minimums, or to work in jobs other than the one the worker was hired to perform. As such, the sponsorship system facilitates exploitation of migrants through the ease with which it allows employers to place migrants in irregular situations. Although not the sole cause of migrant exploitation in countries where this system operates, it nonetheless is a significant factor in the equation.

There may be a link between the root causes of irregular migration and root causes of migrant vulnerability to exploitation. More needs to be understood about the extent to which lack of development in a given country of origin promotes mobility, as people seek out opportunities for employment, or whether improved development reduces international migration. War, conflict and environmental disaster promote mobility. Discrimination, marginalization and exclusion can also lead to unprotected and irregular movement of people. In addition, people may simply migrate in pursuit of better educational and economic opportunities. Often such migration incentives are not met with commensurate opportunities to migrate regularly. As a result, people are forced to migrate irregularly and may be exploited. In countries of transit and destination, GMG members agree that restrictive migration policies foster irregular migration and drive migrants into the hands of smugglers, in turn exacerbating their vulnerability to exploitation and trafficking. In the event of exploitation, efforts to

⁶⁵ See for instance, United Nations Economic and Social Commission for Western Asia, 'International migration and development in the ESCWA Region: Challenges and Opportunities', United Nations, 2011, p.28.



sanction migrants for being in an irregular situation result in reduced access to protection and assistance. Furthermore, sanctions for irregularity stigmatize and exclude migrants in irregular situations, also increasing their vulnerability to exploitation.

Exploitation of many migrants is fundamentally linked to their position of irregularity, which in turn impacts their position in the labour market. Migrants may have limited choice as to the type of work available to them, often resorting to work in informal or even illegal sectors and jobs that are characterized by ‘the 3 Ds’; dirty, dangerous and degrading.⁶⁶ Those who work irregularly and those engaged in informal or unregulated sectors of the economy such as sex work and domestic work are particularly vulnerable in some countries.⁶⁷ Such sectors may not benefit from the same level of protective monitoring as other sectors, placing migrants beyond the ambit of the state’s health, safety, minimum wage and other standards. Migrants in these sectors are also less visible to those who could identify their exploitative situation and act to help them. Because of their vulnerability and inability to request assistance from authorities, undocumented and irregular migrants in exploitative labour markets should be identified.⁶⁸

UNDP refers to the locational challenges migrants in irregular situations face. In transit, their remoteness and clandestine travel may mean that they cannot access basic health, education and legal services. Their ‘spatial dislocation’ from economic and social opportunities renders them particularly vulnerable. Their continued dislocation in destination countries poses barriers to governments in providing social protection.⁶⁹ Indeed, even where efforts are made by host States to allow migrants in irregular situations enjoyment of rights to which they are entitled, there are still barriers to migrants doing so. Irregular migrants often try to avoid being identified for fear of being deported, and therefore cannot be effectively assisted, which exposes them even more to exploitation.⁷⁰ Their situation of vulnerability and marginalization can be further exacerbated by State policies that oblige public officials (such as education or health care providers, or even community police officials) to report the presence of migrants in an irregular situation to the immigration authorities. Such policies can also criminalise private organisations or individuals who provide legal or social assistance to such migrants.

The vulnerability of migrants in irregular situations is compounded by their situation as non-citizens. As such they are often prevented from enjoying basic labour protections, due process guarantees, security and healthcare, despite states’

⁶⁶ Fact Sheet: Migration and Human Rights, OHCHR, <http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>, accessed on 31 August 2012.

⁶⁷ ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.17. Also see ‘Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.2.

⁶⁸ See for instance, Patrick A. Taran, Gloria Moreno-Fontes Chammartin, ‘Getting at the roots: Stopping Exploitation of Migrant Workers by Organized Crime’, International Labour Office, Geneva, p.9.

⁶⁹ UNDP Human Development Report 2009, pp.21-22.

⁷⁰ UNDP Human Development Report 2009, p.24.



obligations to protect the human rights of all people in their territory, irrespective of their status.⁷¹ They may also be unable to access health services and education and be subject to detention if identified by authorities. They may experience discrimination on racial or other grounds or stigmatization on the basis of their irregularity. Irregular migration and placement of migrants in the labour force is increasingly controlled by organised crime, which represents another key vulnerability factor.⁷²

Migrants are more vulnerable to exploitation where their mobility is hampered by not being in possession of their passports or other travel documents, and may be exploited again when employers demand that migrants pay fees in order to have their passports returned.⁷³ Smugglers, recruitment agents or employers may confiscate passports or other documents from migrants. Migrants in irregular situations become particularly prone to exploitation through the confiscation of their documents. Under such circumstances, the threat of denouncing irregular migrants is a clear means of coercion for the purpose of exploitation. Article 21 of the ICRMW explicitly prohibits the confiscation or destruction of the identity documents of a migrant. It also provides that “[i]n no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.”

Vulnerability of Stranded Migrants

Stranded migrants, both in transit and destination countries, are highly vulnerable to exploitation, irrespective of their legal status. Migrants can become stranded when their legal entitlement to remain in a country expires but they have no means of returning to their countries of origin or of going elsewhere. Due to armed conflict, unrest or general violence, these cases can lead to dangerous situations.⁷⁴

Lack of information concerning migrants living in irregular situations is a key challenge in reducing exploitation. It is almost impossible to accurately estimate how many migrants in irregular situations are within migrant communities, given that censuses and other sources of migration data (including population registers and administrative resources) are believed to significantly undercount these. The challenge of analysing how many of those migrants are or have been exploited is a profound one. According to the migration experts surveyed by the HDR team in compiling the UNDP 2009 Human Development Report on mobility and development, irregular migration was estimated to average around one third of all migrants for developing countries, amounting to some 30 million people.⁷⁵

⁷¹ Statement of the Principals of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, 30 September 2010.

⁷² Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.167.

⁷³ See for instance, ‘For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda’, Human Rights Watch, October 2012, p.28.

⁷⁴ Further clarity is still required regarding the differences between stranded migrants and the situation of, for example, rejected asylum seekers, stateless persons, migrant workers (with or without documents) who are caught in conflict and volunteer to go home, and migrants in conflict situations who cannot be returned home because of the principle of non-refoulement

⁷⁵ Human Development Report 2009, ‘Overcome barriers: Human mobility and development’, UNDP, 2009, p.23.

1.4.2. Refugees and asylum seekers

According to the 1951 Refugee Convention, refugee is a person, who “owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of protection of that country.”⁷⁶ People who are fleeing conflicts or violence are also generally considered refugees, though often under legal mechanisms other than the 1951 Refugee Convention.⁷⁷ An asylum seeker is a person seeking to be admitted to a country as a refugee or is awaiting the decision on their application for refugee status. Asylum seekers tend to be a part of mixed migration flows, and therefore may be in the hands of smugglers, traffickers and others who may exploit them. Refugees may also be caught in similar traps, in secondary flows after they have achieved asylum for livelihood reasons or the purpose of family reunification for instance.

People who are in precarious situations prior to migrating have international are generally more vulnerable to exploitation and abuse because of the forced nature of their movement, their unprepared departure and separation from their family members resulting in lack of support networks and resources, as well as trauma they may be suffering as a result of their experiences. Indeed, vulnerability to exploitation may be owed to characteristics similar to those set out in the 1951 Refugees Convention. Conflict, disaster and violations of human rights increase vulnerability to exploitation.⁷⁸ Where there has been conflict, transition or social instability resulting in a breakdown in law and order, poverty, deprivation and dislocation of the civil population can occur, presenting criminals with opportunities to exploit vulnerable groups. Members of certain ethnic or racial groups may be particularly vulnerable during turbulent times, and may be targeted by exploiters for reason of these characteristics.⁷⁹

The particular protection needs of asylum seekers and refugees emphasise the challenge of addressing exploitation without undermining the ability of people to move in search of asylum.

1.4.3. Age (youth, adolescents and children)

Approximately 35 million migrants are between the age of 10 and 24 years.⁸⁰ Children and adolescent migrants are particularly vulnerable in migration contexts.⁸¹

⁷⁶ Convention relating to the Status of Refugees, Article 1A(2), 1951 as modified by the 1967 Protocol.

⁷⁷ UNHCR, Protecting Refugees and the Role of UNHCR (UNHCR, 2012), p.4 and p.8.

⁷⁸ OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, p.70.

⁷⁹ Office of the High Commissioner for Refugees, Guidelines on International Protection: the application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked, (HCR/GIP/06/07), paragraphs 31-32.

⁸⁰ Factsheet, Adolescents, Youth and International Migration: Facts and Figures (10-24 y/o), UNICEF, Migrant Information, University of Houston, May 2012.

⁸¹ Bustamante, J., Report of the Special Rapporteur on the Human Rights of Migrants for the 11th Session of the Human Rights Council, May 2009.



The intrinsic vulnerability of children based on their evolving capacity including experiences, makes them susceptible to the deceptive offers of recruiters; the GMG notes that unaccompanied and separated children caught up in irregular movements are at particular risk of sexual and labour exploitation.⁸² Girls, whether migrants or not, may also be particularly at risk of exploitative working conditions because parents may be more willing to take their female children out of school and enter them into the workforce. In some societies education is considered wasted on girls who will anyway get married and leave their families; experience in domestic work is considered more useful for their future responsibilities.⁸³

The demand for certain types of exploitation, such as sexual abuse, adoption and marriage, particularly hits children. In the context of labour, children may be specifically demanded due to the perception that they are easier to manipulate and control, and are less likely to exert their rights against their exploiters.⁸⁴

However, one should also bear in mind that children are not a homogenous group even when considered from age-specific points of view, and the age of children is rarely the sole vulnerability factor at stake; other layers of vulnerabilities result from the children's families and their socio-economic context. Experiences of violence and abuse at home or elsewhere may result in low self-esteem. A child may have left school and consequently have only limited education or, have nowhere to live. Children and adolescents may also be inquisitive and adventurous, and may undertake risky migration with insufficient information. Puberty can make young people sexually malleable to exploiters. In short, a range of factors specific to each child, combine to make him or her uniquely vulnerable.⁸⁵

It is important to stress that not all children who work are exploited; the challenge is to protect the rights of working children, while preventing exploitative forms of work.⁸⁶ The challenge for children who are in an irregular situation, or whose parents are in an irregular situation is that they may largely be invisible as a result of lack of documentation and working in spheres in which standards are not implemented.

⁸² International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, Global Migration Group, 2008, p.60.

⁸³ ILO, UNICEF, UN.GIFT, 'Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking', (ILO, 2009), p.25.

⁸⁴ 'Reversing the Trend: Child Trafficking in East and Southeast Asia', UNICEF East Asia Pacific Regional Office, 2009, p.27.

⁸⁵ See for instance, 'Reversing the Trend: Child Trafficking in East and Southeast Asia', UNICEF East Asia Pacific Regional Office, 2009, pp.26-27.

⁸⁶ Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration', A/HRC/15/29, 5 July 2010, p.17, paragraph 72.

Vulnerability of children who stay behind

Not only are migrant children vulnerable, but the children who are left behind in countries of origin by migrating parents are also vulnerable. The global financial crises exacerbated the vulnerability of children who stay behind as families were forced to make cut-backs on education and health-related expenses.⁸⁷ Some children left behind may seek to be reunited with their parents in countries of transit and destination. The lack of means to migrate regularly, means they may turn to irregular channels or use the services of smugglers, becoming vulnerable to exploitation.⁸⁸

Children who are left behind may also experience discrimination given the perception that remittances they receive make them better off than others.⁸⁹ In States of origin, such children may be overlooked by authorities because of the assumption that remittances make them more privileged than those children who do not receive such remittances. The result is that such children may be excluded from policies aimed at reducing vulnerability, and that the care-givers, who may be caring for children in lieu of their parents (such as grandparents) may not receive the benefits they need to adequately do so. These considerations make clear that such left-behind children are likely to leave school early to undertake potentially exploitative work or embark on migration journeys that lead them into exploitation.⁹⁰

1.4.4. Gender

Almost half of all migrants are women, and in some countries women represent the majority of the migrant labour force. It is widely acknowledged that women are particularly at risk to exploitation. The General Assembly in its Resolution 66/128 recognized that “the movement of a significant number of women migrant workers may be facilitated and made possible by means of fraudulent or irregular documentation and sham marriages with the object of migration... and that those women migrant workers are more vulnerable to abuse and exploitation.”⁹¹

Women are recruited into women-specific skilled and low-skilled or lower-skilled jobs in both formal and informal service and manufacturing sectors. Such work includes nursing, teaching, secretarial work, medical practice, managerial jobs, IT work, domestic labour, ‘hospitality services’, restaurant/hotel work, and assembly jobs.⁹² Women and girls are particularly vulnerable to exploitation given the demand for particular types of work, notably in child or aged-care services, hospitality,

⁸⁷ See UNICEF, ‘GMG Fact sheet on the impact of the Economic Crisis on Migration and Children’s Rights’, October 2009, p.1, and UNICEF, ‘GMG Fact sheet on the Impact of Economic Crisis on Migration, Remittances and Children Left Behind’, May 2010, p.1.

⁸⁸ Committee on the Rights of the Child, 2012 Day of General Discussion, ‘*The rights of all children in the context of irregular migration*’, Background Paper, August 2012, p.29.

⁸⁹ Social and Economic Working Paper, ‘Migration, Development and Children Left Behind: A Multidimensional Perspective’, Rodolfo de la Garza, UNICEF, May 2010, i.

⁹⁰ See for instance, Rodolfo de la Garza, Migration, Development and Children Left Behind: A Multidimensional Perspective, UNICEF Policy and Practice, May 2010.

⁹¹ General Assembly Resolution 66/128. Violence against women migrant workers, A/RES/66/128, 9 March 2012.

⁹² See for instance, Jean D’Cunha, ‘Claim and Celebrate Women Migrants’ Human Rights through CEDAW, The Case of Migrant Workers: A UNIFEM Briefing Paper’, UNIFEM, 2005, p.21.

entertainment, domestic and sex work.⁹³ Women may be particularly vulnerable to gender-based violence in these sectors, defined by CEDAW Committee General Recommendation No. 19 as:

“...violence directed against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁹⁴

Gender-based violence is also recognized as form of discrimination that inhibits women’s enjoyment of rights and freedoms on an equal basis to men.⁹⁵ This and other discrimination that women face can sometimes be a driving force for their mobility, which can in turn lead them into the hands of exploiters. At the same time, onerous migration restrictions placed on women relative to men can cause irregular migration. Some countries, in a bid to protect women from exploitation abroad, have imposed blanket bans or severe restrictions on women’s out-migration as a safeguard against such exploitation. Where women must look abroad to access work that enables them to support their families, such policies serve not only to reduce regular migration, but promote irregular migration followed by work in which women are vulnerable to exploitation for having lack of access to services provided to those who use official channels. Such restrictions are difficult to accept or justify from the perspective of equality of opportunity and treatment, a principle enshrined, for example, in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and in Conventions No. 97 and No. 143. There are serious doubts whether restrictions on women’s employment are an effective solution or strategy to address abuse, discrimination and exploitation of women migrants. In countries of destination, discriminatory policies include legislation banning foreign domestic workers from changing to other employers or job categories, mandatory periodic pregnancy testing for migrant women resulting in deportation for pregnant women, and bans on marrying locals.⁹⁶

The General Assembly also expressed concern about the particular vulnerability of women who migrate for work, in that

“...many women migrant workers take on jobs for which they may be overqualified and in which, at the same time, they may be more vulnerable because of poor pay and inadequate social protection.”⁹⁷

⁹³ Also see ‘Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.28, and World Migration Report 2008, IOM, p.10, and Jean D’Cunha, ‘Claim and Celebrate Women Migrants’ Human Rights through CEDAW, The Case of Migrant Workers: A UNIFEM Briefing Paper’, UNIFEM, 2005, p.21.

⁹⁴ UN CEDAW General Committee, *General Recommendation No. 19* (Eleventh session, 1992), paragraph 6.

⁹⁵ UN CEDAW General Committee, *General Recommendation No. 19* (Eleventh session, 1992), paragraph 1.

⁹⁶ See for instance, Jean D’Cunha, ‘Claim and Celebrate Women Migrants’ Human Rights through CEDAW, The Case of Migrant Workers: A UNIFEM Briefing Paper’, UNIFEM, 2005, p.25, p.33.

⁹⁷ Resolution adopted by the General Assembly, 66/128. Violence against women migrant workers, 9 March 2012, A/RES/66/128.



General recommendation No. 26 of the Committee on the Elimination of Discrimination Against Women also draws attention to the specific vulnerability of women migrant workers in countries of origin (both before departure and upon return), transit and destination.⁹⁸

Like many women, women who are migrants face particularly severe ‘morality’ judgments relative to their male counterparts, particularly in relation to sexuality. The result is that in some countries of destination they are stigmatised as ‘sexually available’, and on returning to countries of origin may be further stigmatised by their communities and families. Furthermore, the fact that some jobs such as those performed by domestic workers, sex workers or ‘entertainers’ are done by women from particular countries, can reinforce negative gender, nationality, racial and ethnic stereotypes imposed upon some women. The non-recognition of some of the work that is done in the informal sector and primarily by women entrenches labour market discrimination and further consolidates exploitative terms and conditions of work and stay.⁹⁹

Particular vulnerability of migrant domestic workers to exploitation

Domestic workers are particularly vulnerable given their isolation. The work they perform largely takes place in the private sphere, which is often unregulated and where the migrant often resides with his or her employer. Where domestic workers are exploited, the exploiter is almost invariably the employer. The sexual and physical abuses that domestic workers have endured are well and widely documented.¹⁰⁰ Several incidents of sexual assault have been reported, perpetrated by abusive employers, relatives of employers or others, including other migrants. Often incidents are not reported as migrants fear losing their jobs and stigmatization. Some resort to running away which can further make them vulnerable to exploitation.¹⁰¹ In many countries, domestic work is not specifically addressed by labour laws¹⁰². Exploitation in domestic work is not specifically listed in the Trafficking in Person Protocol, but it is generally accepted that trafficking can occur for this purpose. General Comment No. 1 of the Committee on Migrant Workers concerns migrant domestic workers. ILO Convention 189 on Domestic Workers will enter into force in 2013 to establish standards of decent work for domestic workers¹⁰³.

⁹⁸ General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, paragraphs 9 – 22.

⁹⁹ Jean D’Cunha, ‘Claim and Celebrate Women Migrants’ Human Rights through CEDAW, The Case of Migrant Workers: A UNIFEM Briefing Paper’, UNIFEM, 2005, p.32, p.35.

¹⁰⁰ See for instance, Human Rights Watch ‘Slow Reform: The Protection of Migrant Domestic Workers in Asia and the Middle East’, April 2010, Human Rights Watch ‘Swept Under the Rug: Abuses against domestic workers around the world’, July 2006, Human Rights Watch, ‘They Deceive us at every step: Abuse of Cambodian Domestic Workers Migrating to Malaysia’, December 2011,

¹⁰¹ UNDP, ‘HIV Vulnerabilities faced by women migrants: From Asia to Arab States’, p.20.

¹⁰² See, for example, ILO, “Domestic Workers Across the World: Global and regional statistics and the extent of legal protection”, January 2013

¹⁰³ Under Convention No. 189, States parties are obliged, for example, to ensure that the fundamental principles and rights at work are respected, promoted and realized in relation to domestic workers (Article 3(2) which also lists the four core rights encompassed by the eight ILO fundamental rights Conventions).

The flipside to vulnerability in gender issues, particularly in exploitation occurring in trafficking, is that the tendency to focus on women in sexual exploitation has often resulted in less attention dedicated to addressing other forms of exploitation, with male victims often not being identified or assisted.¹⁰⁴ Men and boys are vulnerable to exploitation in agriculture, in construction work, in mines and as soldiers and yet the gender dimensions at play here are under-addressed relative to those of women in sexual exploitation.

1.5. Consequences of exploitation of migrants in irregular situations

It is not in dispute that the financial, social, governmental and human costs of exploitation outweigh any benefits that may flow from it. However, the direct and indirect profits resulting from exploitation constitute disincentives to combat it and must therefore be understood.

1.5.1. Financial consequences

The United Nations High Level Dialogue on International Migration and Development, the Global Forum on Migration and Development and the Global Migration Group have increasingly emphasized the development potential of migration for both countries of origin and countries of destination. Remittances from migrant workers are often hailed as the great benefit of migration to countries of origin. Indeed, remittances are one of the largest sources of external private finance for development countries.¹⁰⁵ Transfer of remittances as well as skills and expertise (often referred to as social remittances) aids development in countries of origin. Meanwhile, the injection of human capital at varying skill levels can strengthen development in countries of destination.¹⁰⁶ Remittances can reduce poverty and increase development, as in many cases remittances are directly received by the poor. Studies in some countries have shown that families receiving remittances can remain above the poverty threshold, and that children in remittance-receiving families have a lower school dropout rate.¹⁰⁷ Though data is incomplete, it is estimated that inflows of remittances to least developed countries have grown by almost 17 per cent per year between 2000 and 2010, reaching a record level of almost US26 billion in 2010, half of which is estimated to have originated in least developed or developing countries.¹⁰⁸ Remittances sent to least developing countries from developed and transitional

¹⁰⁴ See for instance, World Migration Report 2011, Communicating Effectively about Migration, (IOM, 2011), p.131.

¹⁰⁵ UNCTAD, 'Ad-hoc expert meeting on contribution of migrants to development: Trade, investment and development linkages', Palais des Nations, 29 July 2009, Report of the Meeting, p.4.

¹⁰⁶ See for instance, World Migration Report 2011, Communicating Effectively about Migration, (IOM, 2011), p.107.

¹⁰⁷ United Nations Conference on Trade and Development, Maximizing the development impact of remittances, Trade and Development Board, Trade and Development Commission, Expert Meeting on Maximizing the Development Impact of Remittances, Geneva 14 – 15 February 2011, TD/B/C.I/EM.4/2, 6 December 2010, p.9, paragraphs 17-20.

¹⁰⁸ 'The Least Development Countries Report 2011', United Nations Conference on Trade and Development, 2011, p.69.

economies accounted for a mere 35 per cent of the total, despite the fact that migrants working in those countries typically remit greater sums of money.¹⁰⁹

Yet, the amount of remittances sent by migrants who are in irregular, or even exploitative situations is unclear. It is difficult to disaggregate remittances between those that come from migrants living and working in regular situations and those that do not. Furthermore, it is difficult to count remittances that are sent by undocumented migrants who are often excluded from or avoid formal financial systems fearing that use of banks, post offices or other official financial intermediaries will result in their detection. Therefore, undocumented migrants often transfer remittances through informal channels. Though it is difficult to gauge the extent to which the gains flowing from remittances are the result of irregular migrant labour, legal status is noted as being an important variable in determining the extent to which migrants contribute to their countries of origin.¹¹⁰ This phenomenon has been explained through the correlation between the level of integration of migrants and their preponderance to remit, emphasising the importance of integration for promoting linkages between migration and development.¹¹¹

Given that exploitation largely takes place in hidden sectors, the financial costs and profits of criminal exploitation of migrants in irregular situations is difficult if not impossible to measure accurately.¹¹² However, efforts to identify a benchmark figures reveal the high cost of exploitation. Although many exploited migrants may consider themselves to be profiting financially from their situations relative to the situations they have left, their financial losses can be measured as opportunity costs; namely, the income lost through being in exploitative rather than free employment relationships.¹¹³ ILO attributes the loss of income in coercive situations to two main sources. The first is underpayment of wages by exploiters, in some cases less than minimum wages. The second is generally associated with deductions including exorbitant costs of accommodation, and particularly in trafficking situations, those costs incurred generally in recruitment or even transportation processes.¹¹⁴ ILO estimates that the total amount of unpaid wages to people in forced labour situations amounts to approximately US\$19.6 billion. Additionally, recruitment costs paid by people who are trafficked into forced labour is estimated to amount to US\$1.4 billion. This amount, added to the cost of unpaid wages, approximates a figure of US\$21

¹⁰⁹ UNCTAD Secretariat Calculations, based on World Bank Bilateral Migration and Remittance, 2010 datasheets. 'The Least Development Countries Report 2011', United Nations Conference on Trade and Development, 2011, p.69.

¹¹⁰ United Nations Conference on Trade and Development, Maximizing the development impact of remittances, Trade and Development Board, Trade and Development Commission, Expert Meeting on Maximizing the Development Impact of Remittances, Geneva 14 – 15 February 2011, TD/B/C.I/EM.4/2, 6 December 2010, p.18, paragraph 48.

¹¹¹ *World Migration Report*, (IOM, 2010), p.48.

¹¹² The World Bank has developed *Guidelines for Assessing the Impacts and Costs of Forced Displacement* (2012), that offer a methodology for collecting empirical data. Similar guidance is needed in the context of criminal exploitation of migrants in irregular situations. Also see International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2012: Focus on forced migration and displacement*, pp.202-204.

¹¹³ 'The Cost of Coercion', ILO, 2009, p.31.

¹¹⁴ 'The Cost of Coercion', ILO, 2009, pp.31-32.

billion.¹¹⁵ There is no question then that the cost of exploitation is high. However, it also must be acknowledged that the opportunity costs that an individual exploited migrant pays depends significantly on what his opportunities, and alternatives, are.

1.5.2. Social consequences

The result of exploitation in labour markets is reduced efficiency and equity.¹¹⁶ The result of the influx of cheap and illegal goods and services that may be provided or produced by exploited migrants is that markets become less legitimately profitable, distorted by illicit opportunity rather than driven by market demands and good governance. Yet the tolerance of some States towards exploitation of migrants in irregular situations has also been noted. In some countries, such tolerance approaches official policy seemingly aimed at maintaining marginally productive economic activity that nonetheless provides employment, creates products for exports and derives profits as a result. Further, governments in host countries may also turn a blind eye to irregular workers, because of the short-term advantages for employers and the national economy. Undocumented migrants constitute a flexible workforce that can be easily and cheaply dispensed with during times of economic downturn.¹¹⁷ In some countries, the exploitation of migrants may be critical to building infrastructure and promoting the development of the host country.

Unchecked exploitation of migrants in irregular situations can fuel further exploitation and criminality. Networks of exploiters can span several countries, exploiting not only migrants but also their friends and family members in countries of origin. For instance, migrants may be held for ransom by exploiters, or their dire situation in countries of destination taken advantage of to lure their relatives into similarly exploitative situations. Criminality can also increase where migrants are trafficked for criminal purposes or are exploited in illegal markets for want of regular employment opportunities to do otherwise, and for want of recourse to leave exploitative situations.

Despite concerns that employment opportunities for the domestic population may be reduced by the influx of cheaper, more flexible migrant labour, studies on the impact of immigration on wages have shown little to no such impact in the short or long term. This is due to the fact that migrants are often willing to accept work that locals are no longer prepared to do, such as domestic work, elderly care, service and

¹¹⁵ 'The Cost of Coercion', ILO, 2009, p.32.

¹¹⁶ Johannes Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation', World Bank, May 2009, p.25.

¹¹⁷ See Patrick A. Taran, Gloria Moreno-Fontes Chammartin, 'Getting at the roots: Stopping Exploitation of Migrant Workers by Organized Crime', International Labour Office, Geneva, p.5, and Handbook on Establishing Effective Labour Migration Policies' (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.168, and OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, p.98, and UNDP, Human Development Report 2009, Human Mobility Overcoming barriers: human mobility and development, UNDP, 2009, p.2. Also see International Dialogue on Migration, No. 19, 'Economic Cycles, Demographic Change and Migration', IOM, 2012, p.75. IOM notes that while irregular migration flows did not increase as a result of the financial crises, it is likely that more migrants slipped into irregular situations as a result of losing their jobs, often being the first to be laid off.

hospitality industry work.¹¹⁸ Moreover, there are examples of complementarity as migrant workers provide services such as childcare, which free “domestic” parents to enter the work force. However, it is difficult to ascertain the extent to which the migrants who undertake such work are migrants in irregular situations with little choice by virtue of being exploited. There are also social consequences in countries of origin that are deprived of skilled and productive workforce.¹¹⁹

1.5.3. Human consequences

The most significant cost of exploitation of migrants is the one borne by exploited migrants themselves. In addition to, and as a result of violence, physical, psychological and sexual assault that may come hand in hand with exploitation, significant health risks are posed to migrants.

Expert consultations carried out by the WHO and IOM into migration health revealed their particular susceptibility to health risks specifically noting:

- 1) vulnerability of refugees and displaced populations,
- 2) workplace and occupational health challenges faced by migrant workers, particularly those in irregular situations,
- 3) risks encountered by smuggled migrants and trafficked persons, and
- 4) vulnerabilities and poverty of migrants facing abuse or exploitation.¹²⁰

The WHO notes that “[un]authorized migration flows, mainly triggered by poverty and lack of employment, have continued to have considerable health consequences, with many migrants in an irregular situation lacking access to health services.”¹²¹

Exploited migrants in irregular situations are disproportionately vulnerable to contracting disease and developing mental health problems as a result of the hardships endured during their journey and exploitation. Exploiters of migrants in irregular situations may inflict dangerous working conditions that put lives and safety in jeopardy, and migrants in irregular situations are more likely to endure such conditions out of fear of losing their jobs and being deported. They are also less likely to seek health care and medical treatment fearing that health providers and medical professionals may have a link to immigration authorities (including in the context of “duties to denounce” mentioned above). Despite the obligation of governments to protect the right to health of everyone within their territory, in practice laws and policies often prevent migrants from accessing health services, frequently based on the view that providing unconditional health services to everybody would be a burden

¹¹⁸ Human Development Report 2009, Overcoming barriers; Human mobility and development, UNDP 2009, p.85.

¹¹⁹ For instance, see discussion above of children left behind in section 1.4.3.

¹²⁰ Progress Report, Report by Secretariat, Sixty-third World Health Assembly, Provisional agenda item 11.24, A63/27, 15 April 2010, paragraph 81, p.18, referring to resolution WHA61.17 and ‘Health of Migrants – the way forward’, Report of a global consultation, Madrid, Spain, 3 – 5 March 2010, WHO 2010, p.30.

¹²¹ Progress Report, Report by Secretariat, Sixty-third World Health Assembly, Provisional agenda item 11.24, A63/27, 15 April 2010, paragraph 81, p.18, referring to resolution WHA61.17 and ‘Health of Migrants – the way forward’, Report of a global consultation, Madrid, Spain, 3 – 5 March 2010, WHO 2010, p.9.



on taxpayers.¹²² The consequence of lack of access to health services has an impact not only on migrants themselves (and their children for instance where quality reproductive and maternal care is inaccessible), but also has ramifications on host communities. The cost of deferring basic health care may escalate as migrants' health issues become more significant. There are also public health ramifications where members of the community are not able to access immunisations and treatment for communicable diseases.

Beyond the human costs to exploited migrants themselves, are those borne by their families at home. When a person irregularly migrates in search of employment opportunities to support his or her family, the exploitation may result in the migrant never coming back. More commonly, migrants who fall into exploitative situations are often not able to send money home that the family was relying on for its survival. Where debts are incurred to support the migration process, those debts may be collected from families in countries of origin, or retaliation for unpaid debts meted out against them.¹²³ Those who do return may come back in a reduced physical and mental state that places additional burden on their family and community. Men who have been victims of organ removal may be unable to resume physical labour for instance, detracting not only from his perceived role in his family and society but also from his family's livelihood. Where the exploited person is a child whose education was cut short in order to migrate, the family's prospects of advancing its position in the long term are diminished. Girls who have been or are assumed to have been sexually exploited may have reduced marriage prospects, which can also reduce her family's prospects of advancing within their community.¹²⁴

In short, beyond the individual human rights consequences of abuse and exploitation on exploited individuals (and violations of human rights where such abuse and exploitation is unchecked by the state), people in both destination countries and in countries of origin feel the impacts of exploitation of migrants.

¹²² See for instance, 'International Migration, Health and Human Rights', WHO, OHCHR, IOM, Forthcoming 2012.

¹²³ See for instance, 'For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda', Human Rights Watch, October 2012, pp.38.

¹²⁴ See for instance, ILO, UNICEF, UN.GIFT, 'Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking', (ILO, 2009), p.36.

2. Human rights response to exploitation and abuse of migrants, particularly those in irregular situations

2.1. A Human Rights based-approach to migration

Ultimately, in preventing exploitation of migrants and protecting people who are exploited or are vulnerable to exploitation, concepts and definitions are less important than a harmonized working understanding of the phenomena. From a rights-based protection point of view, exploitation needs to be understood only in so far as that understanding supports a response to exploitation. From a prosecutorial point of view however, exploitation needs to be understood to the extent that convictions of alleged exploiters are just. The result is that there may be a disconnection between exploitation that is broadly construed for protection purposes, but narrowly construed for criminal prosecution purposes. Not all exploiters should be prosecuted as criminals, but all exploited migrants should be protected and assisted.

In the context of migration, members of the GMG stress that human rights are not a matter of choice but are legal obligations under international treaties which bind governments that have accepted them and should be an integral part of all migration governance.¹²⁵ The international community has increasingly stressed the importance of the human rights of migrants. At its 66th session, the United Nations General Assembly called upon States

“...to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability.”¹²⁶

Similarly, the Human Rights Council in Resolution 20/3 on the Human Rights of Migrants stressed “the obligation of States to protect the human rights of migrants, regardless of their status.”¹²⁷ In an April 2012 statement United Nations Secretary-General Ban Ki-moon confirmed that the indivisible core pillars of the United Nations are human rights, peace and security, and development, affirming that “[h]uman

¹²⁵ ‘International Migration and Human Rights’, GMG, 2008, p.99.

¹²⁶ UN General Assembly Resolution 66/172, Protection of Migrants, A/RES/66/172, 29 March 2012, paragraph 1. See also the International Labour Conference, 92nd Session, 2004, Conclusions on a fair deal for migrant workers in a global economy, para. 28: “It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that ILO instruments apply to all workers, including irregular migrant workers, unless otherwise stated”. See http://www.ilo.org/public/english/protection/migrant/download/ilcmig_res-eng.pdf

¹²⁷ Resolution 20/3 on Human Rights of Migrants, adopted by the Human Rights Council on 16/7/2012, A/HRC/RES/20/3.



rights are at the heart of the UN System.”¹²⁸ Applied to the present context then, human rights standards and principles can and must be referred to in navigating through grey terrain of exploitation of migrants.

It has been noted that international migration lacks an institutional framework at the international level; it must now be considered how universal human rights principles can inform such a framework or offer it a foundation while also enhancing the development approach asserted in other fora (discussed below at 2.2.1).¹²⁹

Human rights are universal, inalienable, interdependent and indivisible. A human rights based approach is premised on principles of prevention, non-discrimination, participation, empowerment and accountability based on the international normative framework that identifies rights-holders and duty bearers. As discussed above, a holistic response to exploitation of irregular migration requires that a constellation of policy considerations be aligned, including those concerning migration, development, crime prevention, security and labour. Human rights are offered as the foundation on which these policies should be built. OHCHR notes that:

“...a human rights-based approach provides an extensive baseline of protection for all migrants and constitutes a framework of action and set of guidelines and tools for migration policymakers. Such actions are not only the legal obligations of Governments, they also make sound public policy sense.”¹³⁰

A rights-based approach offers a common language between and among countries of origin, transit and destination as well as with international organizations and other actors including members of the GMG. The standards set out in international human rights instruments, as they apply to migrants in regular or irregular situations, to nationals in countries of origin, transit and destination, and to exploiters of migrants, offer a non-negotiable baseline on which a coherent response can be built. In short, human rights principles are both a means and an end of addressing exploitation of migrants.

Where responses to exploitation of migrants are based on a human rights based approach, those responses could be strengthened to:

- Prevent exploitation, by changing the conditions that give rise to migrants’ vulnerability to exploitation in countries of origin, transit and destination
- Strengthen the criminal justice and other approaches mounted to identify and investigate exploitation of migrants and sanction exploiters
- Improve the protection and assistance of migrants who are exploited, and
- Provide a framework for cooperation.

¹²⁸ Secretary-General Ban Ki-moon, 2 April 2012, New York, Secretary-General’s Remarks at Treaty Body Strengthening Consultation for State Parties, available at <http://www.un.org/sg/statements/index.asp?nid=5967>.

¹²⁹ See Pia Oberoi OHCHR and Patrick Taran, GMPA, Background Paper, ‘An Informal Conversation on International Migration, Human Rights and Governance’, 27 September 2012, p.3 and p.6.

¹³⁰ OHCHR Report 2011, p.74.

2.1.1. *International normative framework against exploitation*

There is no shortage of international human rights standards that address rights and obligations of states in relation to issues of exploitation.¹³¹ A framework for response to exploitation exists in the form of International Human Rights Instruments, the Convention against Transnational Organized Crime and its supplementary Protocols and International Labour Standards. The relationship between these instruments is complex and expertise on their interpretation and implementation exists across a range of GMG members. Individually, these instruments represent different ‘tools’ in the anti-exploitation toolbox. Collectively, they provide a framework for collaborative action against exploitation.

Human rights instruments relevant to the exploitation of migrants include, but are not limited to:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of Persons with Disabilities (CRPD).¹³²
- The 1951 Convention Relating to the Status of Refugees (Refugees Convention) and
- The 1967 Protocol Relating to the Status of Refugees (1967 Protocol).

In addition, the four Geneva Conventions and their Protocols may be relevant where exploitation takes place in the context of conflict.

The human rights of all migrant workers, regardless of their status, is promoted by the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, which are reflected in ILO Conventions and United Nations Human Rights Conventions.

The two key ILO Conventions on labour migration include:

- Migration for Employment Convention (Revised) 1949 (No. 97)
- Convention on Migrant Workers (Supplementary Provisions) 1975 (No. 143)

The ILO Conventions on forced labour are:

¹³¹ Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, 789, *Virginia Journal of International Law* Vol 49:4, p.823.

¹³² UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)

Other relevant ILO Conventions include:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Domestic Workers Convention (No. 189), adopted by ILO on 16 June 2011, to come into force in 2013.
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Furthermore, there are the Protocols supplementing the United Nations Convention against Transnational Organized Crime, namely:

- The Trafficking in Persons Protocol
- The Smuggling of Migrants Protocol.

There are limited explicit references to exploitation in the above instruments¹³³. Article 6 of CEDAW requires States parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of the prostitution of women, and the CRC prohibits trafficking in children as well as the sexual exploitation of children and forced or exploitative labour.¹³⁴ The Convention on the Rights of People with Disabilities also protects freedom from exploitation, violation and abuse in Article 16. Key ILO Conventions include ILO Migrant Workers (Supplementary Provisions) Convention No. 143 and the 1990 Convention which both include provisions intended to eliminate exploitation of migrants and promote a ‘decent work’ agenda. Both explicitly address unauthorized migrant workers and call for international cooperation to address undocumented migration. These instruments provide norms for national legislation for countries of origin and destination, including minimum protections for migrant workers in irregular situations.¹³⁵ The Smuggling of Migrants Protocol and the Trafficking in Persons Protocol supplementing the Convention against Transnational Organized Crime both explicitly refer to exploitation. As mentioned above, the Smuggling of Migrants Protocol requires State Parties to establish exploitation as an aggravating circumstance (Article 6(3)(b)), and the Trafficking in Persons Protocol contains the most extensive description and definition of exploitation and trafficking in persons (Article 3).

¹³³ See also the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000, which contains explicit references to exploitation.

¹³⁴ OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, p.21.

¹³⁵ Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.32.

Yet despite the few specific references to exploitation (or definitions thereof) that are contained in these instruments, they nonetheless offer a strong framework for addressing exploitation of migrants, including those in irregular situations.

2.1.2. Baseline of human rights for migrants in irregular situations

Setting out all human rights considerations as they relate to all migrants has been done elsewhere.¹³⁶ This section sets out to draw attention to specific considerations relevant to exploitation of migrants, particularly those in irregular situations.

Exploitation often occurs in countries of destination, meaning that an exploited migrant will access his or her rights as a ‘non-citizen’, being an “individual who is not a national of a State in which he or she is present.”¹³⁷ There is acceptance in international law that international treaties apply to all individuals within the territory of a State.¹³⁸ Therefore, international human rights treaties can be understood as applying to all individuals regardless of their citizenship and how they came to be within the territory of the State. Migrants in irregular situations, like everyone, have the right *inter alia* to be protected from abuse and exploitation, to be free from slavery and involuntary servitude, and to be free from torture, and cruel, inhuman and degrading treatment or punishment.¹³⁹ They also have economic, social and cultural rights such as the right to health, education and adequate housing. Such rights are guaranteed by international human rights instruments to which the State is party and by customary international law, meaning that even non-signatory States are bound to uphold them.¹⁴⁰ Yet, the reality is that in many States, people in an irregular situation do not enjoy their human rights to the same extent as the domestic population or regular migrants. As a result, many migrants in irregular situations live in fear of being identified and expelled, and are reticent to seek assistance when they fall victim to exploitation.

Implementing the principle of non-discrimination is fundamental to a rights-based response to exploitation. Human rights are universal and apply to everyone without distinction, though certain legitimate distinctions are permitted in relation to some limited rights under some conditions¹⁴¹. The principle of non-discrimination with respect to rights is contained in Article 26 of the ICCPR, Article 2(1) of the ICESCR, Article 1 of the ICERD, Article 7 of the ICRMW and Article 2 of the CRC. The general principle that can be asserted is that human rights attach to all humans on the

¹³⁶ See for instance, ‘International Migration and Human Rights’, GMG, 2008.

¹³⁷ Declaration on the Human Rights of Individuals Who are not Nationals of the Countries in which they Live, General Assembly resolution 40/144, annex, article 1.

¹³⁸ See for instance, article 29 of the Vienna Convention on the Law of Treaties.

¹³⁹ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, 30 September 2012, Geneva, Switzerland.

¹⁴⁰ Also see Resolution 20/3 on Human Rights of Migrants, adopted by the Human Rights Council on 16/7/2012, A/HRC/RES/20/3, affirming the obligation of States to protect the rights of all migrants, regardless of their legal status.

¹⁴¹ While Article 13 of the ICCPR on procedural safeguards relating to expulsion only applies to “lawfully resident” non-nationals, Article 22 of the ICRMW provides for more extensive protection in this regard.

basis of their humanity; where rights are distinguished for reason of a person's immigration status, such a distinction must be reasonably justifiable at law, serve a legitimate purpose and be proportional to the achievement of that purpose.¹⁴²

A strong baseline of assistance to migrants in irregular situations can be found in the international human rights framework. A key standard for exploited migrants who are in irregular situations, is the International Migrant Workers Convention (ICRMW) that notes in its preamble that migrant workers and their families, as non-nationals, are vulnerable to exploitation. The ICRMW applies to prevent and eliminate exploitation of migrant workers and their families throughout the entire migration process; from the preparation to migrate until accessing services in destination countries.¹⁴³ However, despite the utility of this instrument it has not yet been met with commensurate commitment to ratify and use it. To date, ratification of the ICRMW is limited, despite the fact that it offers States a framework for combating illegal and clandestine movement of migrants and their employment.¹⁴⁴ Among the reasons for the low number of ratifications of the IMWC, lack of political commitment and the view of some countries that the Convention fails to adequately differentiate between regular migrants and those in irregular situations are cited.¹⁴⁵ UNESCO notes that the 'political' obstacles include the perception that the ICRMW is superfluous in prescribing rights already guaranteed in international human rights law, as well as the contradictory concern that the ICRMW endows irregular migrants with too many rights which would as a result hinder social integration and efforts against irregular migration.¹⁴⁶ Yet the effect of particular protections for specific people or groups of people should serve to enhance the rights-enjoyment of those groups, while not detracting from or excluding human rights protections owing to those who fall outside of them.¹⁴⁷

Those rights that are to be enjoyed by all migrants, including those who are undocumented or in irregular situations, are contained in Part III of the ICRMW and summarized below.

¹⁴² For more on human rights of non-citizens, see OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, pp.57-60 See also the final report of the Special Rapporteur on the rights of non-citizens to the Sub-Commission of the former UN Commission on Human Rights.

[http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.23.En?Opendocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.Sub.2.2003.23.En?Opendocument)

¹⁴³ B. Opekin, *The Influence of International Law on the International Movement of Persons*, United Nations Development Programme, Human Development Research Paper, 2009/18 (2009), at p.15.

¹⁴⁴ As at 21 October 2012, the ICRMW has only 46 Parties.

¹⁴⁵ B. Opekin, *The Influence of International Law on the International Movement of Persons*, United Nations Development Programme, Human Development Research Paper, 2009/18 (2009), at p.15.

¹⁴⁶ Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families: EU/EEA Perspectives*, (UNESCO, 2007), p.60.

¹⁴⁷ See for instance, 'Human Rights and Migration: Working together for safe, dignified and secure migration', IOM Migration Policy and Research, 2010, p.14.



Right	ICRMW	Other instruments
The right to leave any country and to return to one's country of origin	Article 8	ICCPR Art 12
The right to life	Article 9	ICCPR Art 6 CRC Art 6 SOM 16(1)
Prohibition of torture, cruel, inhuman or degrading treatment or punishment	Article 10	ICCPR Art 7 CRC Art 37 CAT SOM 16(1)
Prohibition of slavery and forced labour	Article 11	ICCPR Art 8 TIP Art 3
Freedom of thought, conscience and religion	Article 12	ICCPR Art 18 CRC Art 14
Freedom of opinion and expression	Article 13	ICCPR Art 19
Prohibition or arbitrary or unlawful interference with privacy, home, correspondence and other communications	Article 14	ICCPR Art 17 CRC Art 16
Prohibition of arbitrary deprivation of property	Article 15	
The right to liberty and security of persons	Article 16 ¹⁴⁸	ICCPR Art 9
Safeguards against arbitrary arrest and detention	Article 16	ICCPR Art 9
Humane treatment in detention	Article 17	ICCPR Art 10 SOM Art 16(5)
Right to procedural guarantees	Article 19	ICCPR Art 14
Prohibition of imprisonment, deprivation of authorization of residence and/or work permit and expulsion merely on the ground of failure to fulfil a contractual obligation	Article 20	ICCPR Art 11
Protection from confiscation and/or destruction of identification card or other documents	Article 21	
Protection against collective expulsion and procedural safeguards in the expulsion process	Article 22	Refugees Art 32, 33 CAT Art 3
Right to recourse to consular or diplomatic protection	Article 23	SOM Art 16(5)
Recognition as a person before the law	Article 24	ICCPR Art 16
Principle of equality of treatment in respect of remuneration and other conditions of work, terms of employment and social security	Article 25	CEDAW Art 11
Right to join trade unions ¹⁴⁹	Article 26	ICCPR Art 22 ICESCR Art 8
Right to equality in social security so far as they fulfil requirements, or reimbursement of contributions made where not allowed	Article 27	ICESCR Art 9
Right to receive urgent medical care required to preserve life or avoid irreparable harm to health	Article 28	SOM Art 16(1)-(3)
Right of a child of migrant worker to a name,	Article 29	ICCPR Art 24

¹⁴⁸ Article 16 also affords all migrant workers and members of their families “effective protection by the State against violence...etc”.

¹⁴⁹ Article 26 is somewhat limited as compared with the equivalent provisions in the ICCPR and ICESCR, which refer to the right of everyone to form and join trade unions. Both provisions also refer to ILO Convention No. 87.



registration of birth and nationality		CRC Art 7
Right of a child to access to education on the basis of equality of treatment	Article 30	ICESCR Art 13 CRC Art 28, 29
Respect for the cultural identity of migrant workers and members of their families	Article 31	ICESCR
Right to transfer to the State of origin earnings, savings and personal belongings upon termination of their stay	Article 32	
Right to be informed of the rights arising from the Convention and dissemination of information	Article 33	

The principle of *non-refoulement* must also be mentioned. Recognized as a principle of customary international law, the principle of *non-refoulement* prevents States from returning any person regardless of their status to a place where they would be at risk of torture (by virtue of Article 3 of the Convention against Torture) or where they would be at risk of persecution (by virtue of Article 33 of the 1951 Convention relating to the Status of Refugees). Article 14(1) of the Trafficking in Persons Protocol and Article 19(1) of the Smuggling of Migrants Protocol states that nothing therein shall affect other rights, explicitly including the principle of *non-refoulement*.

2.2. Prevention: reducing vulnerability to exploitation

The enjoyment of human rights empowers rights-holders, reducing their vulnerability to abuses of their rights. Here it is not attempted to discuss all human rights that can reduce vulnerability to all types of rights abuse and violations. Instead, focus lies on those specific rights that empower migrants against exploitation.

2.2.1. Promote development

In its 2009 Human Development Report titled ‘*Overcoming barriers: human mobility and development*’, UNDP emphasized the need to make mobility an integral part of development strategies. Similarly, development has been widely acknowledged as instrumental in increasing the positive aspects of migration and reducing the negative impact. In relation to exploitation of migrants, the policy message is that the benefits of migration should be harnessed to strengthen development, which in turn can be harnessed to reduce irregular and exploitative migration. In this context it also must be acknowledged that while development is a key preventative measure reducing criminal exploitation of migrants before they leave countries of origin, broader development can also be a contributing factor to irregular, and sometimes forced migration. Large-scale development projects such as dams and infrastructure can account for large numbers of people being displaced, particularly where they result in man-made disasters.¹⁵⁰ This consideration highlights the fact that a development approach to migration alone is ineffective in addressing exploitation of migrants. While human rights can help strengthen the development gains of migration, they can also help to minimize losses. In this sense, human rights are an essential component in a positive model of pro-development migration governance, to ensure that migrants

¹⁵⁰ See International Federation of Red Cross and Red Crescent Societies, World Disasters Report 2012: Focus on forced migration and displacement, pp.14-18 and Chapter 5, pp.145-173.

are not just considered as agents of development but as bearers of human rights and the reason that development is necessary.

Yet, a human rights-based approach has been noted as missing from the discourse on the migration-development nexus.¹⁵¹ Rights are fundamental to getting at the root causes of migration, empowering people to improve their lives, protecting them from exploitation and giving them access to justice and assistance in the event that they are exploited. A rights-based approach is not incompatible with a development-based approach; the two approaches are both essential to comprehensively respond to exploitation of migrants.

The Special Rapporteur on the human rights of migrants, Professor François Crépeau, has called for increased attention to the nexus between protection of the rights of migrants in irregular situations and development. He notes that deprivation of the right to development is a push factor for migration, and that cheap labour markets are pull factors. Unless human rights (and labour rights) considerations are inserted into efforts to fight this cheap labour market, irregular migration and exploitation of those who undertake it will continue, and the development benefits of migration will not be fully reaped.¹⁵²

The GMG stresses that protecting human rights is not only a legal obligation but is also a matter of public interest and intrinsically linked to human development.¹⁵³ All persons have economic, social and cultural rights, including rights to health, adequate standards of living, social security, adequate housing, education and just and favourable conditions of work. The right to work, enshrined in Article 6 of the ICESCR, notes that realization of this right includes “...policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.” If people are unable to enjoy these things in their own countries, it is inevitable that they will be pressured to seek such opportunities elsewhere.¹⁵⁴ It is also inevitable that the full development benefit of their migration cannot be reaped unless agents of those benefits enjoy human rights.

In its Resolution 66/172, the UN General Assembly made the following statement:

Requests Member States, the United Nations system, international organizations, civil society and all relevant stakeholders, especially the United

¹⁵¹ See for instance, ‘Gender, Migration and Development – Emerging Trends and Issues in East and South-East Asia’, UNIFEM East and South-East Asia Regional Office, Bangkok, Thailand, p.19; also Piyasiri Wickramasekara, “Development, Mobility and Human Rights: Rhetoric and Reality” in *Refugee Studies Quarterly*, 2009, Vol. 28, No. 4, pp. 165-200.

¹⁵² Presentation by Professor François Crépeau, Special Rapporteur on the human rights of migrants, 9 February 2012, ‘Preparing for the 2013 High-Level Dialogue: A Human Rights Perspective’, on the occasion of the Tenth Coordination Meeting on International Migration, Population Division – United Nations Department of Economic and Social Affairs New York, 9-10 February 2012.

¹⁵³ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, 30 September 2010.

¹⁵⁴ See for instance, ‘International Migration and Human Rights’, Challenge and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights’, Global Migration Group 2008, p.5.



Nations High Commissioner for Human Rights and the Special Rapporteur of the Human Rights Council on the human rights of migrants, to ensure that the perspective of the human rights of migrants is included among the priority issues in the ongoing discussions on international migration and development within the United Nations system, and in this regard underlines the importance of adequately taking into account the human rights perspective as one of the priorities of the informal thematic debate on international migration and development, held in 2011, as well as in the High-level Dialogue on International Migration and Development, which will take place during the sixty-eighth session of the General Assembly, in 2013, as decided by the Assembly in its resolution 63/225 of 19 December 2008.¹⁵⁵

It is clear that human rights of migrants must be subsumed into migration and development discussions. The only question remaining is how.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *Generally, how can a human rights approach complement and contribute to migration and development discussions?*
- *Specifically, how can a human rights approach reduce exploitation of migrants to enhance the role that migration plays in development?*
- *What are the risks and disadvantages to incorporating a rights-based approach to migration and development?*

2.2.2. Prevent irregular migration and promote safe, regular migration

As discussed at 1.4.1, irregular status is a key factor of vulnerability to exploitation. The most conceptually straightforward but practically challenging way of preventing exploitation of migrants in irregular situations, is to prevent irregular migration itself. The ICRMW requires States to cooperate to prevent and eliminate irregular migration. In its preamble, the ICRMW states that “the human problems involved in migration are even more serious in the case of irregular migration” being therefore convinced that “appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.” Article 68 of the ICRMW invites States parties to collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures States parties should take in this respect include:

- (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;
- (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

¹⁵⁵ UN General Assembly Resolution 66/172, Protection of Migrants, A/RES/66/172, 29 March 2012, paragraph 9(e).

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

Similarly, Article 3 of Part 1 of ILO Convention No. 143 also requests States to adopt measures to suppress clandestine movements of migrant workers, including by taking measures against the employers and the organizers of such movements. Combating trafficking in persons and smuggling of migrants is of course essential in this context; increasing availability of regular migration opportunities to meet real labour market needs at all skills levels decreases dependency on criminal networks and resulting vulnerability to abuse and exploitation.

It is clear that a human rights approach to preventing exploitation of migrants in irregular situations, aims to achieve its goal without undermining the right of persons to leave or return to their own country. *Prima facie*, everyone has the right to freedom of movement, as entailed in article 12 of the ICCPR, article 15(4) of CEDAW, article 8 of the ICRMW, article 18 of the Convention on the Rights of Persons with Disabilities, and article 23 of the Refugee Convention. Similarly, the right to work is also protected by the international human rights regime, notably Article 6 of the ICESCR, and also applies to everyone¹⁵⁶. Promotion of safe migration is therefore a key means not only of preventing exploitation but also of preventing irregular migration itself.

Preventing irregular migration without an approach that seeks to provide adequate safe migration channels will only drive migrants in irregular situations further underground, increasing opportunities for traffickers and smugglers and increasing migrants' risk of being exploited.¹⁵⁷ A workshop on trafficking and exploitation hosted by IOM in June of 2009 noted the following:

Inadvertent conflict may arise between migration policies that seek to exclude irregular migrants and policies that aim to protect the human rights of exploited migrants, including trafficked persons. It is important to consider that overly restrictive migration regimes can contribute to increasing irregular

¹⁵⁶ See also General Comment No. 18 on the right to work of the Committee on Economic, Social and Cultural Rights, observing that denying migrants access to the right to work would need proper justification under the application of the non-discrimination principle. See paragraph 18 of the General Comment: "The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the ICRMW should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise." Consequently, it could be argued that the absence of lawful labour migration channels for employment sectors in which there is an evident demand for migrant workers, thus leading to the considerable presence of migrant workers in an irregular situation in those sectors, is a question that needs consideration in the light of this principle.

¹⁵⁷ See for instance, Patrick A. Taran, Gloria Moreno-Fontes Chammartin, 'Getting at the roots: Stopping Exploitation of Migrant Workers by Organized Crime', International Labour Office, Geneva, p.6 and 'International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, Global Migration Group, 2008, pp.43-44.

migration, and thus fuel trafficking in persons and exploitation of migrants.¹⁵⁸

The ILO supports giving consideration to expanding avenues for regular labour migration, taking into account labour market needs and demographic trends in accordance with Conventions Nos. 97 and 143, as well as Recommendations No. 86 and 151.¹⁵⁹ Temporary migration models have been suggested as offering such avenues. Temporary schemes for migration, often established through bilateral agreements, allow migrants to travel abroad in a regulated fashion with monitored working conditions and the opportunity to develop skills that can be transferred to home countries.¹⁶⁰ Circular migration particularly has been touted as a ‘win-win’ model of temporary migration for both migrants and the societies they leave and those they go to. However, there are also suggestions that the benefits of circular migration to migrants themselves are highly exaggerated including in relation to fundamental human rights, such as access to health care and other services or to the right to family life. Additionally, there is evidence to suggest that poor management of such models can provide increased opportunities for recruitment agencies, intermediaries and employers to exploit migrants, particularly where migrants are tied to specific employers and where migrants incur high costs for migration opportunities.¹⁶¹

The key lessons learnt in relation to temporary or any migration schemes that are introduced to provide regular avenues for migration is that more research needs to be conducted to analyse the human rights (including labour rights) impact of various temporary migration models. Regular migration avenues must be designed not only in consideration for their possible economic gains for host countries and the development gains for origin countries, but also in consideration for their possible human rights gains and losses for migrants themselves.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can regular migration fight irregular migration?*
- *How can a human rights approach reduce irregular migration?*
- *How can irregular migration be addressed without violating human rights?*

2.2.3. Reduce harm in irregular migration

While the existence of viable alternatives to irregular migration and efforts to proactively discourage migration in migrant-hosting communities should be a fundamental necessity, awareness-raising among would-be migrants in countries of origin is essential to warn them of the dangers of exploitation inherent in irregular migration processes, as well as the dangers of being exploited in destination

¹⁵⁸ IOM International Dialogue on Migration No. 16, Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM, 2010, p.79.

¹⁵⁹ ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, Principle 5, p.12.

¹⁶⁰ Meeting the Challenges of Migration; Progress since the ICPD, UNFPA, p.52.

¹⁶¹ Piyasiri Wickramasekara, ‘Circular Migration: A Triple Win or a Dead End’, Global Union Research Network / ILO, 2011, pp.34-35.



countries¹⁶². Governments are primarily responsible for promoting and supporting safe migration and for equipping migrating nationals with information they need to protect themselves from exploitation in the course of migrating, particularly the risk posed by criminal facilitators of such migration (noted by Article 15 of the Smuggling of Migrants Protocol). Such information needs to be disseminated prior to migration, so migrants are able to identify and resist exploitative situations as they arise, and they need to be informed of services available in the event that they fall victim to exploitation.¹⁶³ Migrants should be empowered with information about the risks of exploitation by living irregularly in destination countries. Included, should be information about human rights, and how to report violations and seek effective redress in the event that rights are violated.¹⁶⁴

Reducing exploitation risks among migrants who migrate irregularly includes combating trafficking in persons and smuggling of migrants. The General Assembly acknowledged the link between trafficking and smuggling, and the risk of exploitation in its 66th Session, encouraging Member States that have not yet done so to

“...enact domestic legislation and to take further effective measures to combat international trafficking in persons and smuggling of migrants, recognizing that these crimes may endanger the lives of migrants or subject them to harm, servitude or exploitation, which may also include debt bondage, slavery, sexual exploitation or forced labour, and also encourages Member States to strengthen international cooperation to combat such trafficking and smuggling.”¹⁶⁵

Migrants travelling in irregular situations are acutely vulnerable to exploitation and abuse, particularly at borders where corrupt officials may abuse or exceed their power and prey on the vulnerability of migrants for personal gain. Where crossing a border without authorization is criminalized, migrants can be exposed to human rights violations including prolonged periods of detention, discrimination or even inhuman treatment by border guards. There has been increased global emphasis on implementing the Smuggling of Migrants Protocol supplementing the United Nations Transnational Organized Crime Convention. However, emphasis is often placed on preventing smuggling of migrants without protecting the rights of migrants in accordance with the stated purpose of the Protocol. Furthermore, criminalization of illegal entry may undermine the identification of people who have protection needs as asylum seekers or refugees and those who may be victims of crime, including trafficking in persons, or those who may otherwise be exploited.¹⁶⁶ These factors highlight the essentiality of reinforcing a rights-based approach to combating

¹⁶² See Parts III and VI of the ICRMW, and particular the right of all migrants to information in Article 33

¹⁶³ See for instance, ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.87.

¹⁶⁴ See for instance, International Dialogue on Migration, No. 19, ‘Economic Cycles, Demographic Change and Migration’, IOM, 2012.

¹⁶⁵ UN General Assembly Resolution 66/172, Protection of Migrants, A/RES/66/172, 29 March 2012, paragraph 8.

¹⁶⁶ See ‘Background Paper for the Expert consultation on human rights at international borders: exploring gaps in policy and practice, 22-23 March 2012’, OHCHR and GAATW, pp.9-10.



trafficking in persons and smuggling of migrants¹⁶⁷, as is envisaged by both Protocols. In relation to the rights of migrants in irregular situations, the GMG has made the following statement:

“Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfil the rights necessary for them to enjoy a life of dignity and security.”¹⁶⁸

These points come into sharp focus when considering the plight of women migrants, for reason of their particular vulnerability as discussed at 1.4.4. Consequences of the assumption that women are more vulnerable to trafficking than men, are firstly that male victims may not be identified, and secondly that efforts to protect women from exploitation may result in restrictions on their migration. The effect may be that women who have little choice but to migrate in search of employment that they cannot find at home, may resort to smuggling services and fall into the hands of exploiters. Where interventions are crafted with consideration of the human rights impacts, the result would be more nuanced approaches effectively empowering women to protect themselves from exploitation, without trespassing on their right to leave their country in search of work.¹⁶⁹

Reducing vulnerability of women migrants

While women account for around half of the people who migrate and are increasingly doing so to be the primary breadwinners for their families, they are disproportionately affected by exploitation. The fact that they often undertake jobs in service or welfare sections is often due to their lack of education to pursue alternative opportunities at home or elsewhere, emphasising the need to place more focus on prevention of exploitation, through gender equality and women’s empowerment and zero tolerance for their exploitation including in trafficking contexts. ILO Convention No. 97 on Migration and Employment refers to equality of treatment regarding employment of female migrant workers¹⁷⁰. Furthermore, CEDAW sets out a framework to empower women, notably by addressing socio-economic and political marginalization that compels them to migrate for work (Articles 1 – 16). Specifically relevant are Article 5 on discriminatory gender role and trait stereotypes, Article 10 on equal rights to education, Article 11 on equal right in employment and Article 15 on equality before the law.

¹⁶⁷ Article 5 of the Smuggling of Migrants Protocol provides that migrants should not be liable for criminal prosecution for the fact of having been the object of migrant smuggling.

¹⁶⁸ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, 30 September 2010.

¹⁶⁹ See for instance, UNIFEM, Migration and Trafficking: Links and Differences, p.4.

¹⁷⁰ See also ILO Convention 189 on domestic workers.

The above considerations highlight the essentiality of human rights in both interventions to combat criminal smugglers and trafficking that take advantage of migration, as well as in development approaches. Development considerations are essential to address push factors, and ensure that the gains of migration are maximized. Criminal justice responses are necessary to intercept smuggling and trafficking that can lead to exploitation and other crimes perpetrated against migrants. The human rights of individual migrants cannot be sacrificed on the altar of these objectives, but must be central to achieving them.

The following question is offered for consideration in working towards conceptual and policy coherence:

- *How to empower would-be migrants and migrants who are already in irregular situations to avoid the risks of exploitation, without promoting irregular migration itself?*

2.2.4. Regularization

Given that irregularity makes migrants particularly vulnerable to exploitation, regularization is therefore considered a key means of stopping exploitation of migrants in irregular situations. However, like all migration policies, any regularization policies must be effectively and equitably managed, and such management should take rights-impacts into consideration¹⁷¹.

Experiences of regularization have varied significantly. Some studies have shown that migrants' income will increase following their regularization, and allow them to use their skills more productively, but there may be no positive impact on wages or prospects for migrants with no or low education. While regularization is also considered to increase access to social protection and services, prevent marginalization and improve integration into society, regularization has not always resulted in improved lives for migrants; regular migrants can also be exploited. For instance, where regularisation means that migrants incur responsibilities including having to pay for their work permit and declare their income, the result is loss of flexibility.¹⁷² Furthermore, where regularisation is linked to one employer or a specific sector, vulnerability to exploitation can increase.¹⁷³ These considerations point to the importance of taking a rights-based approach to regularization.

It is also important to ensure that States are not deterred from upholding their human rights obligations out of concern for incurring obligations to regularize migrants who are in countries irregularly. Article 35 of the ICRMW explicitly states that the enjoyment of rights does not imply a right to regularization of undocumented migrants; rights can and should be afforded to undocumented migrants, regardless of their prospects for regularization.

However, regularization may be obligatory in some situations, notably concerning children. Article 23 of the ICCPR recognizes the right to family life. The ICRMW

¹⁷¹ See PICUM's Standpoint on Regularisation, http://picum.org/picum.org/uploads/file_/PICUM%20Standpoint%20on%20Regularisation.pdf

¹⁷² See for instance, 'Human Development Report', UNDP, 2009, p.48.

¹⁷³ For instance, see Box on Sponsorship systems above.

also makes reference to the family in articles 14 and 44. Articles 7, 8 and 9 of the CRC further recognize child-specific rights including family unity, the right of the child to a name, registration at birth and nationality, as well as not to be separated from their parents against their will. The principle of the best interests of the child derives from Article 3(1) of the CRC, and ensures that in all actions taken in respect of children, the best interests of the child shall be the primary consideration. This applies regardless of their status. Further, the Committee on the CRC in General Comment No. 6 makes clear that the best interests of the child should be the primary consideration with respect to children.

Particularly with regard to unaccompanied children, if best interest determination procedures find that it is not in the best interests of the child to be repatriated to the country of origin but should remain in the transit or destination country, then he or she should be granted residence status. The result of course is that parents or other family members should also be granted regular migration channels and status to uphold family reunification in the destination country.¹⁷⁴ The challenge in upholding this right is protecting it from being seized as a *modus operandi* of facilitators of irregular migration the result of which can be that children are made to undergo dangerous journeys and face exploitation and abuse at the hands of smugglers and others en route. These risks highlight the need to reconcile efforts to combat smuggling and trafficking with regularization policies, and to assess the rights-impact of all approaches taken.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *What are the impacts on human rights of regularization policies?*
- *How to protect regularization policies from being taken advantage of by criminal smugglers and traffickers as a *modus operandi* of their crimes?*

2.3. Prevention: reducing opportunities for exploitation

2.3.1. Reduce demand for exploitative goods and services

A key means of preventing exploitation of migrants is to implement systems that effectively undercut the profitability of exploitation. Protecting the rights of undocumented migrants undermines incentives of exploiters to encourage their irregular movement for labour purposes. Related is the importance of consistent monitoring of migration channels (including asylum procedures) to ensure that they are free from abuse by criminals in the exploitation of migrants in irregular situations.

The Migration for Employment (Revised) Convention 1949 (No. 97) and the Migrants Workers (Supplementary Provisions) Convention 1975 (No. 143), and their accompanying Recommendations offer a framework for labour migration policy and minimum standards. Part I of Convention No. 143 calls for the suppression of irregular migration and trafficking for labour exploitation and the detection of informal employment of migrants, with the aim of preventing exploitation. This

¹⁷⁴ UNICEF Written Submission, 2012 Day of General Discussion Committee on the Rights of the Child, The rights of all children in the context of International Migration, 'Children in the Context of Migration and the Right to Family Life', p.9.

protection of the rights of undocumented migrants therefore is not only anchored in their human rights and obligations flowing from them, but also undercuts the profitability of exploiting them.

There are two types of ‘demand’ for exploitation of migrants in irregular situations. One type is employer demand for cheap and exploitative labour. The other is consumer demand for cheap and exploitative goods or services. Criminal exploiters who fall into neither category may also directly create demand for exploited victims from which they derive their criminal income. None of these types of demand, nor the concept of demand itself are well understood.¹⁷⁵ Specifically, “...the reasons for social acceptance and tolerance of discrimination and exploitation also need to be examined, for example why consumers of products and services provided by exploitative labour, and more generally the public, tacitly accept this exploitation.”¹⁷⁶ The Commentary on OHCHR’s Recommended Principles and Guidelines on Human Rights and Human Trafficking also offers applicable guidance. Guideline 7.1 requires States and others to

“...analyse the factors that generate demand for exploitative commercial sexual services and exploitative labour, and take strong legislative, policy and other measures to address these issues.”

A distinction has been drawn between consumer and primary demand, and derived demand by exploiters. The former category is comprised of people who actively or passively consume products or services of exploited labour, for instance, tourists who buy t-shirts made by exploited people. This type of demand is considered to not directly influence exploitation in trafficking contexts, because the tourist does not specifically ask traffickers to exploit children and so cannot be considered an accomplice in the trafficking.¹⁷⁷ It must be asked whether the same is true in situations where the service provided is sexual and the consumer is a client paying for sex; in such a case the consumer would arguably be paying for exploitative sexual services. The latter type of demand is ‘derived’ demand driven by those who stand to make a profit, including pimps and brothel owners, intermediaries, factory owners or farmers who exploit labour to maximise their profits.¹⁷⁸ The extent to which consumers should be held liable for exploitation is highly contentious and arguably depends on the individual circumstances and instances of exploitation.

The broadly construed concept of exploitation in the Trafficking in Persons Protocol captures all exploiters, with the arguable exception of end users. Indeed, “[b]ecause the definition encompasses both the bringing of the person into exploitation as well as the maintenance of that person in a situation of exploitation, it is... difficult to

¹⁷⁵ In the context of trafficking, see OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, p.97.

¹⁷⁶ Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights Approach, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p.96.

¹⁷⁷ ILO, UNICEF, UN.GIFT, ‘Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking’, (ILO, 2009), p.23.

¹⁷⁸ ILO, UNICEF, UN.GIFT, ‘Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of Exploitation: Understanding child trafficking’, (ILO, 2009), p.23.

identify an exploiter who would not be caught within its scope, through the requirement of national criminalization, become subject to domestic prosecution.”¹⁷⁹ Beneficiaries of exploitation (for instance, people who purchase products which have derived from exploitative labour or use exploitative services such as aged care or sexual services) may be aware of exploitation and be wilfully blind to it, but they cannot necessarily be said to be perpetrators of the exploitation.

Questions remain as to the point at which a beneficiary becomes an exploiter; how liable is the person who procures a life-saving organ from an exploited person? Or a parent who adopts his or her child through illegal channels? Is a teenager who buys a t-shirt produced by exploited labour more culpable after an information campaign than before? In exploitation that falls short of criminal exploitation the question is not as onerous, but in criminal exploitation the requisite *mens rea* or state of mind of the alleged beneficiary is crucial in establishing their culpability. These considerations highlight that irrespective of any prosecutorial goals or possibilities with respect to consumers of exploitative goods and services, prevention of exploitation requires social and other interventions in addition to criminal justice responses.

Indeed, it is clear that consumer demand can and should be addressed as a preventative means. Employers who reap high profits from exploitation of their labour forces have little incentive to improve standards and reduce exploitation, but those profits can only be reaped where the products they offer are consumed. This fact shines light on the potential of consumers to reduce or even prevent exploitation of labour forces. The ILO stresses that implementation and enforcement of labour standards for workers, including migrants in irregular situations, rests ultimately on the willingness of consumers to pay higher prices for products or not to demand certain illicit goods and services at all.¹⁸⁰

There have been several significant consumer-based movements, particularly in industrialized countries¹⁸¹. Fair trade initiatives and trafficking-free product labelling have increased. Increased pressure from consumers has led to corporate codes of conduct and increased corporate social responsibility, and in turn, corporations have harnessed the competitive advantage of ethical supply chains for marketing purposes. Increased willingness of consumers to consume ‘ethically’ must be met with increased information that empowers them to do so, highlighting the need for labelling and codes of conduct to be supplemented by impartial monitoring of production. The commercial advantages to corporations who free their labour forces of exploitation must also be better understood and promoted.

Key challenges are presented in reducing demand in sectors that are relatively hidden from scrutiny. Consumers of services provided by domestic workers for instance, are

¹⁷⁹ Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, 789, *Virginia Journal of International Law* Vol. 49:4, p.814.

¹⁸⁰ See for instance, ‘Fighting Human Trafficking: The forced labour dimensions’, International Labour Office, Geneva, Switzerland, Background Paper, prepared for the Vienna Forum on Human Trafficking, Vienna, 13-15 February 2008.

¹⁸¹ See, for example, IOM’s Buy Responsibly campaign, an anti-trafficking campaign that intended to raise the awareness of consumers to labour trafficking and exploitation, and encourage them to ‘buy responsibly’ by pushing retailers for more information about products.

ultimately the employers themselves. The result is that those who demand such services have the most capacity to improve labour conditions, yet the least incentive to do so. Challenges in domestic settings are nuanced, being affected by cultural considerations that bear on both the demand for domestic labour and the relationships between the worker him or herself and the consumer of his or her work. For instance, what is considered acceptable in the demands made and treatment of domestic workers in one culture may be entirely unacceptable in another, yet the private nature of domestic work and increased mobility of people means that migrants may be being exploited behind closed doors in several countries around the world. The ILO Domestic Workers Convention, 2011 (No. 189) requires States to take effective measures to promote and protect the human rights of domestic workers and should be emphasised as a means of reducing demand for exploitative domestic work.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can parameters for accountability for exploitation of migrants be set?*
- *To what extent can and should consumers of exploitative goods and services be considered culpable for exploitation?*
- *What mental state should be required by consumers in order to make them culpable? Is knowledge of exploitation adequate or should the consumer be required to have the requisite intent to exploit a specific person?*
- *Should the same standards be applied for all forms of exploitation or should accountability depend on the type of exploitation?*

2.3.2. Address exploitative norms and traditional and cultural practices

Raising awareness of potential migrants is discussed above as a means of empowering them against exploitation. Cultural attitudes that lead to exploitation highlight the fact that awareness must also be raised among potential exploiters. In some societies including migrant societies, social inequalities and prevailing attitudes about class, ethnicity, gender, race or caste can mean that discriminatory attitudes and exploitive practices are normalized. Certain relationships may be such as to amount to abuse of the human rights, for instance, owing to abusive treatment of migrants, yet not be considered as such because of the prevalence of such situations and attitudes in society. In these instances, criminal prosecution of perpetrators may have little deterrent effect in societies where such practices are the norm, highlighting the need for education and awareness raising to bring about attitudinal changes.¹⁸²

The treatment of women migrant workers sheds light on the cultural factors at play in exploitative relationships. The vulnerability of women to particular types of exploitation may be owed to perceptions about the relative weakness of women; certain ethnic or racial groups may be targeted for exploitation as a result of cultural or racial prejudices relating to the sexuality, servility or work capacity, and demand for exploitative prostitution may be owed to discrimination on the grounds of both race and gender. A human rights response obliges States to challenge discriminatory

¹⁸² See for instance, Human Rights and Migration: Working together for safe, dignified and secure migration', IOM Migration Policy and Research, 2010, p.89.



attitudes that fuel such demand.¹⁸³ Rights-based approaches to demand reduction include measures to address discriminatory attitudes, beliefs and practices. Guidance on addressing demand for exploitation of migrants can be drawn from analogous efforts vis-à-vis trafficking-related exploitation. Mandatory article 9(5) of the Trafficking in Persons Protocol requires States parties to

“...adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking.”

In efforts to change attitudes and practices that are exploitative, an important consideration is to ensure that the result is sustainable and does not result in cultural losses. Considerations of cultural relativity point to the fact that cultures should evolve organically, but approached from an international human rights point of view, it must be borne in mind that while human rights protect cultural rights, culture and tradition can never justify human rights abuses, including exploitation.¹⁸⁴

In countries of transit and destination, negative perceptions of migrants should be counteracted to combat attitudes that can lead to violence, discrimination and exploitation. Notably, xenophobia in several countries can increase the vulnerability of migrants to exploitation and abuse, both during their journeys and in destination countries, particularly where they are travelling or remaining in countries irregularly. The fact that irregular migration is a political issue in many countries around the world has meant that many migrants are unwittingly implicated in political discourse.¹⁸⁵

Human rights offer a framework for addressing these contributing factors to exploitation. Human rights are premised on the equality of all people. The human rights framework therefore requires States to analyse and address inequalities in enjoyment of human rights. In the short and medium term, States should therefore consider the relationship between cultural and traditional attitudes and exploitation, and ensure that migrants in irregular situations are included in legal and policy responses aimed at addressing xenophobia. By virtue of Article 7 of CERD, States Parties have undertaken to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices that lead to racial discrimination and, like the ICESCR to promote understanding, tolerance and friendship among all nations and racial or ethnical groups. Such rights obligations offer a basis on which States can build in addressing attitudes that lead to exploitation and abuse of migrants.

¹⁸³ OHCHR, Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of the High Commissioner for Human Rights, New York and Geneva 2010, p.101. Also see E/ CN.4/2006/62/Add.3, para. 21.

¹⁸⁴ See for instance, Training Manual to Fight Trafficking in Children for Labour, Sexual and other forms of exploitation, Facilitators' Guide, ILO, UNICEF, UNGIFT, 2009, p.14

¹⁸⁵ See for instance, International Labour Office (ILO), International Organization for Migration (IOM), Office of the United Nations High Commissioner for Human Rights (OHCHR), In consultation with Office of the United Nations High Commissioner for Refugees (UNHCR), *International Migration, Racism, Discrimination and Xenophobia*, August 2001.

There are untold challenges in discouraging exploitative practices in cultural frameworks where discriminatory attitudes are ingrained, and where exploiters benefit from exploitation. However, unless steps are taken to directly address such discrimination, efforts in response to exploitation will only ever be reactive (and punitive in nature) rather than preventative.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can a rights-based approach be taken to address cultural and traditional norms and practices that fuel demand for exploitation?*
- *How can the link between xenophobia and exploitation of migrants be better understood and addressed?*

2.3.3. Promote decent work

Everyone has the right to an adequate standard of living,¹⁸⁶ the right to social security,¹⁸⁷ and the right to just and favourable conditions of work.¹⁸⁸ Included in the concept of the right to ‘just and favourable conditions of work’, is non-discrimination, fair wages, safe and healthy working conditions, and reasonable working hours. Work must be ‘decent work’ which respects the rights of workers in terms of safety conditions and remuneration, and provides an income allowing workers to support themselves and their families. The ILO Decent Work Agenda promotes access for all to employment, fundamental principles and rights at work, engagement in tri-partism and social dialogue and an adequate level of social protection.

Exploitative work is the antithesis of decent work. The *ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration*, promotes the development of policies that create decent work for all people of working age.¹⁸⁹ The 1998 ILO Declaration on the Fundamental Principles and Rights at Work underlines four fundamental labour standards that form an essential basis for combating exploitation in the context of labour:

- Freedom from all forms of forced or compulsory labour
- Freedom from discrimination in respect of employment and occupation
- Freedom from child labour, and
- Freedom of association and the effective recognition of the right to collective bargaining.¹⁹⁰

¹⁸⁶ See Article 11 of ICESCR, Article 27 of the CRC, Article 28 of the Convention on the Rights of Persons with Disabilities, and Article 23 of the Refugees Convention.

¹⁸⁷ See Article 9 ICESCR, Article 26 CRC, Article 27 ICRMW.

¹⁸⁸ Article 7 ICESCR, Article 11 CEDAW, Article 5 ICRD, Article 25 ICRMW.

¹⁸⁹ ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, ILO, 2006, p.5.

¹⁹⁰ ILO Declaration on Fundamental Principles and Rights at Work Declaration, 1998, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>. See also ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.75.

Countries of origin have positive obligations to take steps to protect these rights, thereby reducing the need for people to migrate in search employment opportunities elsewhere. As with increasing opportunities to migrate regularly, increasing opportunities to work will not entirely prevent exploitation, but it will increase peoples' prospects of being able to remain in their home communities and support their families, thereby decreasing their vulnerability to exploitation.¹⁹¹ Vocational and skills training programmes should be accordingly designed to match training with market opportunities, in line with human rights considerations including age and gender considerations, and protection from abuse and exploitation.

In countries of destination, upholding rights for native workers means removing unfair competition that comes about through exploitative labour, which at the same time deprives migrants of equitable remuneration for their work. The IMCW notes that “workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.”¹⁹² Granting basic human rights to migrants removes incentives employers have to employ vulnerable and therefore cheaper labour over native workers. The result is that in labour terms, non-discrimination against migrants in a given country benefits not only those migrants, but also citizens of that country.¹⁹³

Employers' and workers' organizations also play a crucial role in preventing exploitation, including by identifying and raising awareness among members of the risks of exploitation. Employers particularly can explore opportunities to employ vulnerable people, and ensure that production lines are free of exploitation by regulation.¹⁹⁴ Freedom of association and the right to collective bargaining are examples of rights that serve to empower migrants to access other human rights, and participate in the formation of policies. The extent to which migrant workers in irregular situations are included in social dialogues is unclear and the extent to which their interests are represented by trade unions varies. But it is clear that a human rights based approach can seek to enhance their involvement by promoting the right to organise among all people, whether they are in regular or irregular situations.

The following question is offered for consideration in working towards conceptual and policy coherence:

- *How can a decent work agenda be harnessed for the benefit of migrants in irregular situations, without supporting irregular migration or employment of migrants in irregular situations?*

¹⁹¹ ILO, UNICEF, UN.GIFT, ‘Training manual to fight trafficking in children for labour, sexual and other forms of exploitation: Action against child trafficking at policy and outreach levels’, (ILO, 2009), p.10.

¹⁹² ICRMW, preamble.

¹⁹³ See for instance, Human Development Report, UNDP, 2009, pp.43-48.

¹⁹⁴ See for instance, ILO, UNICEF, UN.GIFT, ‘Training manual to fight trafficking in children for labour, sexual and other forms of exploitation: Action against child trafficking at policy and outreach levels’, (ILO, 2009), pp.12-14.

2.3.4. Monitor and regulate

Governments have the primary responsibility to prevent exploitation in line with their international human rights commitments. Policies should be designed to both reduce exploitative practices, and crucially, to identify families at risk of falling victim to exploitation, by monitoring work places, schools, health facilities and social protection systems.

The Trafficking in Persons Protocol prosecutes the recruitment of a person with the use of specified means for the purpose of exploitation. The ILO's Private Employment Agencies Convention 1997 (No. 181) sets out specific provisions to regulate private employment agencies. Article 66 of the ICRMW restricts the right to undertake operations for the recruitment of migrant workers to the public services of the country of origin, or where bilateral agreements exist, to the public services of countries of employment. Private recruitment agencies should only be allowed to recruit migrant worker if they have obtained authorization to do so by public authorities, and then only under their supervision. Recruitment agencies should be adequately regulated so that migrants are not given misleading information or exposed to exploitation.¹⁹⁵

Ensuring safe recruitment processes involves regulating private recruitment agencies by informing them of domestic and international laws and monitoring them to reduce the potential for recruitment and exploitation of migrants in irregular situations.¹⁹⁶ Measures and procedures for accountability should be put in place as well as those that ensure safe living and working conditions.¹⁹⁷ Regulation should be approached in such a way that encourages compliance. It has been noted that cumbersome and rigid regulations can promote their abuse and breed corruption, and can force both agencies and migrants themselves out of regular channels into irregular ones. This fact hails the need to develop regulations that are realistic and stimulate informal recruiters to establish a legitimate business, rather than the other way around.¹⁹⁸

As has been stated above, a key defence against exploitation is to undermine the basis on which such exploitation is profitable. Convention No. 181 is based on the principle that private employment agencies should not charge, directly or indirectly, in whole or in part, any fees or costs to workers. The Migration for Employment Convention (Revised), 1949 (No.97) and the Migrant Workers (Supplementary Provisions Convention), 1975 (No.143) also provide guidance on the monitoring of recruitment, with a view to ensuring some level of protection for migrant workers through labour migration, interaction with recruitment agencies and migration processes (including those facilitated by traffickers and smugglers).¹⁹⁹

¹⁹⁵ International Migration and Human Rights, GMG, 2008, p.103.

¹⁹⁶ 'Human Rights and Migration: Working together for safe, dignified and secure migration', IOM Migration Policy and Research, 2010, pp.39-40.

¹⁹⁷ 'International Migration and Human Rights', GMG, 2008, p.103.

¹⁹⁸ Dovelyn Agunias, Human Development Research Paper 2009/22, 'Guiding the Invisible Hand: Making Migration Intermediaries Work for Development', p.33.

¹⁹⁹ See generally ILO 'Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement', 2005, Chapter 4 Monitoring Recruiters and other Auxiliaries, pp.31 – 37.

However, distinctions between informal recruitment networks, illegal recruiters and criminal organizations can be difficult to make, meaning that people who fall victim to fraudulent recruitment may fall largely beyond the purview of the government.²⁰⁰ Regulation of recruitment processes will therefore only go so far to reduce vulnerability of those migrants who seek to migrate and work irregularly. Workplaces and employers must therefore be monitored to ensure that exploitation including forced labour and trafficking is not taking place. Principle 10 of the ILO *Multilateral Framework on Labour Migration, Non-binding principles and guidelines* for a rights-based approach to labour migration, states that:

“The rights of all migrant workers... should be protected by the effective application and enforcement of national laws and regulations in accordance with international labour standards and applicable regional instruments.”²⁰¹

To this end, it notes the particular relevance of ILO Labour Inspection Convention, 1947 (No. 81), the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129) and Conventions No. 97 and No. 143. The key supervisory tool for ensuring application of labour standards is labour inspection. Indeed, the absence of labour inspection to monitor and enforce equality of treatment and decent work conditions for migrant workers is associated with higher instances of employment of migrants in irregular situations, and their exploitation.²⁰²

States must also regulate working conditions in the informal economy, including domestic and agricultural work, and must monitor compliance by private sector employers with legislation on working conditions through an effectively functioning labour inspectorate.²⁰³ Particularly acute challenges are present when considering goods and services that are in domestic or even ‘hidden’ sectors. In many countries, domestic workers are often not protected by labour laws, meaning that migrants in irregular situations who provide domestic services are increasingly marginalized and the exploited among them are less likely to be identified and removed from their exploitative situations. Furthermore, overrepresentation of women in such roles results in increased vulnerability to exploitation and abuse including gender-based and sexual violence.²⁰⁴ In the case of sex work, rather than being regulated the industry may even be criminalized, heightening the vulnerability of the people who work within it to being prosecuted rather than removed from exploitative situations. As a result, the market for such services becomes illegal and entirely unregulated.

Given that migrants who are working irregularly on the fringes of the labour market, fall beyond the scope of state labour regulation, it is imperative that policies to curb unauthorized employment be supplemented by efforts to ensure minimum standards

²⁰⁰ ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.114.

²⁰¹ ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, ILO, 2006, p.19.

²⁰² Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.6.

²⁰³ International Migration and Human Rights, GMG, 2008, p.30.

²⁰⁴ ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.82.

of protection including basic human rights, for all migrant workers regardless of their status.²⁰⁵ Governments in countries of origin and destination should attempt to connect with migrant networks to learn about incidents of exploitation so as to strengthen their monitoring and regulations processes. This approach is in keeping with the ILO's *Multilateral Framework on Labour Migration* principle 7 that governments and social partners should consult with civil society and migrant associations on labour migration policy. To this end, the ILO offers guidelines that social partners, civil society and migrant associations that promote rights and welfare of migrant workers should be identified for consultation and support, and networking encouraged among them.²⁰⁶ The extent to which governments can support activities of undocumented migrants must be approached realistically; by supporting migrant groups and networks, policies will indirectly strengthen avenues by which migrants can report exploitation and claim basic rights and provide migrants a forum for accessing support.²⁰⁷

Simplification of regulation

As a result of the recognition of corporate responsibility, there has been a proliferation of Corporate Social Responsibility standards by transnational corporations.²⁰⁸ Compliance with such standards can pose particular challenges for many suppliers in developing countries, notably because of the complexity of such standards, the lack of harmonization between different standards, capacity constraints and the competition costs of compliance. UNCTAD's 2012 World Investment Report flags the need to simplify standards and their application. The report notes that transnational corporations send suppliers auditing questionnaires...

...that can be more than 20 pages, covering up to 400 items. Suppliers that have more than one factory have to fill in a questionnaire for each facility. Furthermore, many questions are formulated using non-specific terms. Questions such as "Are all workers free to leave your employment upon giving reasonable notice?" are very common. If the customer does not define in specific terms what is meant by "reasonable", the answer will be, at best, difficult to produce, and at worst, meaningless. Because processes in each company differ, it might not be possible to answer a question with a simple "yes" or "no", yet the questionnaires rarely provide suppliers the option for further explanation.²⁰⁹

These considerations hail the need for standards against exploitation to be disseminated alongside guidance and capacity building initiatives that equip good faith employers of vulnerable people to comply with them in day-to-day operations.²¹⁰ In short, there is a greater prospect of human rights being protected, if they are understood.

²⁰⁵ 'Handbook on Establishing Effective Labour Migration Policies' (Mediterranean Edition), 2007, OSCE, IOM, ILO, p.2.

²⁰⁶ ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, p.14.

²⁰⁷ Human Development Report 2009, UNDP, pp.43-48.

²⁰⁸ See for instance United Nations Human Rights Council (HRC), Resolution 8/7, "Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises," June 18, 2008 and HRC, Resolution A/HRC/17/L.17/Rev.1, "Human rights and transnational corporations and other business enterprises," June 16, 2011.

²⁰⁹ World Investment Report 2012: Towards a new generation of investment policy, UNCTAD, 2012, p.93.

²¹⁰ See 'Corporate Social Responsibility in Global Supply Chains', in World Investment Report 2012: Towards a new generation of investment policy, UNCTAD, 2012, pp.93 - 95.

Finally, having identified exploitation, the State must take steps to ensure that it does not continue. Article 68(2) of the ICRMW provides that States of employment shall take all adequate measures to eliminate employment of migrant workers in an irregular situation, including, wherever appropriate, sanctions on employers of such workers²¹¹. This provision is to be read in conjunction with the provisions contained in Article 35 and Article 69(1) which provides that “States parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.”²¹²

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can a rights-based approach strengthen monitoring and regulation to prevent exploitation of migrants?*
- *To what extent should labour monitoring and regulation be tied to migration monitoring and regulation, particularly vis-à-vis migrants in irregular situations?*

2.4. Assistance and Protection of exploited migrants

2.4.1. Identify exploited migrants

Identifying migrants in irregular situations who are victims of trafficking or exploitation is complicated by the challenge of understanding the international definition of trafficking in persons, and the absence of an international definition of exploitation. Accordingly, those actors who are in a position to assist potentially exploited migrants will be aided by guidance as to protection and assistance needs, rather than being required to apply unclear technical definitions to complex situations. Given that exploitation of migrants may not necessarily be related to human trafficking, the protection and assistance needs of victims of exploitation and victims who have not been formally recognised as trafficked are likely to be similar.²¹³

The OHCHR Recommended Principles and Guidelines on Trafficking advise that guidelines should be put in place for relevant state authorities and others involved in identifying trafficked persons, and that migrants and other groups who might be vulnerable to trafficking receive information that enables them to seek assistance when needed.²¹⁴ Best practice is to ensure that identification mechanisms include not only victims of trafficking but also presumed victims of trafficking.²¹⁵

The ILO and the European Commission have jointly offered operational indicators of trafficking in persons (the Delphi Indicators) for labour and sexual exploitation.

²¹¹ See also Article 6 of ILO Convention No. 143.

²¹² Also see OHCHR, ‘The International Convention on Migrant Workers and its Committee’, Fact Sheet No. 24 (Rev. 1), 2005, p.9.

²¹³ ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.13.

²¹⁴ OHCHR Recommended Principles and Guidelines, Guidelines 2(1), 2(3), 2(4), and 8(2).

²¹⁵ Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights Approach, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p.47.

Indicators are relevant to six identified dimensions of the trafficking definition: deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination and abuse of vulnerability at destination.²¹⁶ UNODC and UN.GIFT have developed indicators of trafficking in persons that include general indicators and specific indicators of situations of domestic servitude, begging and petty crime in addition to sexual and labour exploitation.²¹⁷ Trafficking in persons for the purpose of organ removal is not mentioned. UNODC's indicators are intended to enable both practitioners and lay people to identify potential cases of human trafficking. The ILO has also provided a set of operational indicators of forced labour to offer a basis for a clear and common set of criteria to identify forced labour in practice to support the collection of national statistics on forced labour. One set of indicators assesses the element of 'involuntariness' in a situation of forced labour and the second is to assess the 'penalty or menace of penalty', as entailed in the ILO Forced Labour Convention (No. 29).²¹⁸ The dimensions of forced labour that the indicators are offered against include 'unfree recruitment', 'work and life under duress' and 'impossibility of leaving employer'; where indicators show the presence of any of these dimensions, a person can be considered a victim of forced labour.²¹⁹ As a good practice, it has been asserted that both the UNODC and the European Commission-ILO Delphi indicators need to be more widely disseminated, tailored and adjusted, and systematically used.²²⁰

It is interesting to note that most indicators in both UNODC and ILO tools are indicators of trafficking or forced labour during the exploitation phase. Given that early identification of potential victims of exploitation is a cornerstone of preventing it, it must be considered whether indicators should be developed not only for exploitative situations of trafficking in persons and forced labour, but also for vulnerabilities to trafficking and forced labour, as well as for the process of migration, particularly irregular migration, that can lead to such exploitation. Exploitation of migrants often takes place in hidden sectors or the private sphere; yet there are steps throughout the process that leads to such situations that come into view, including during the recruitment and migration phases. These moments should be approached as opportunities for early identification of people at risk prior to exploitation.²²¹

A significant challenge of identifying migrants who are exploited or who are vulnerable to being exploited is that they may not want to be identified. Many people seek out situations in which they know they will be exploited, for lack of options or perceived lack of options to do otherwise. This being the case, migrants themselves attempt to evade identification in fear of losing their incomes and their residency

²¹⁶ European Commission – ILO Delphi indicators, September 2009, p.3. Note also IOM's Screening Form, which predates all of these efforts and remains the most widely used.

²¹⁷ UNODC/UN.GIFT, Human Trafficking Indicators, see http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf

²¹⁸ 'The Cost of Coercion', ILO, 2009, p.21 and p.29.

²¹⁹ 'The Cost of Coercion', ILO, 2009, p.27.

²²⁰ Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights Approach, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p.48.

²²¹ See for instance, ILO, UNICEF, UN.GIFT, 'Training manual to fight trafficking in children for labour, sexual and other forms of exploitation: Action against child trafficking at policy and outreach levels', (ILO, 2009), pp.34-35.

status where their employment is tied to their status, or may fear deportation where they are in irregular situations. Dependencies on traffickers or other exploiters are relevant here; where exploiters are ‘protecting’ victims with irregular status from authorities, the identification and removal of a person from an exploitative situation may be a process rather than an immediate action.²²²

Increased emphasis on the sectors in which women migrants are often exploited is needed, particularly where those sectors are hidden. However, in emphasising particularly vulnerability of women, care must be taken to ensure that male victims of exploitation are not overlooked. Where exploitation is ‘feminized’, the result may be that male victims of exploitation may not identify themselves as such, nor be identified by others. Indeed, the identification of men and boys remains low despite the fact that the number of identified cases involving men trafficked into forced labour is growing.²²³ Gender-based approaches must therefore highlight how both women and men, and girls and boys are affected by exploitation without focusing on specific vulnerabilities to the exclusion of others.²²⁴

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can indicators be developed to prevent exploitation?*
- *How can indicators of exploitative situations better shed light on whether a situation is one of forced labour or trafficking for the purpose of forced labour?*
- *Should different indicators be provided for different actors (for instance, trade unions, labour inspectors, employees in industries prone to exploitation)?*

2.4.2. Protect exploited migrants from further harm

As was discussed at 1.2.4, migrants may be subject to violence, abuse and exploitation during irregular migration processes at the hands of traffickers, smugglers or others. Article 16 of the ICRMW Convention and Article 19 of the ICCPR set out the right to liberty and security of persons, including the entitlement to effective protection by the State against violence, physical injury, threats and intimidation whether by public officials or private individuals. Article 6(5) of the Trafficking in Persons Protocol and Article 16(1) and (2) of the Smuggling of Migrants Protocol also clarify that States must ensure the physical safety of such persons. States have an obligation to address physical and sexual abuse of migrants, including those in an irregular situation; article 7 of the ICCPR provides for security of persons, while Article 16 of CAT protects the right to be free from cruel, inhuman and degrading treatment. The Human Rights Committee explains that article 7 of the

²²² Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights Approach, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p.48, referring to EU Experts Group on Trafficking in Human Beings, Report, 2004, p.102.

²²³ Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights Approach, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p.48

²²⁴ See for instance, ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.89. For more on the feminization of labour migration, also see ‘Handbook on Establishing Effective Labour Migration Policies’ (Mediterranean Edition), 2007, OSCE, IOM, ILO, pp.19-20.

ICCPR requires States to afford everyone protection from acts prohibited by article 7 “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”²²⁵ and notes that states are obliged to “prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”²²⁶ The fact that States must act to curtail the actions of non-state actors is also confirmed by the Committee Against Torture (the expert body that reviews compliance with the CAT), which explains that states are obligated to “exercise due diligence to prevent, investigate, prosecute and punish” acts of ill-treatment by private actors.²²⁷

Consistent failure to prevent, investigate and prosecute crimes committed against migrants amounts to unequal and discriminatory treatment. In the landmark European Court of Human Rights case of *Rantsev v Cyprus and Russia* the Court held that

“...in order for a positive obligation to take operational measures...to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked or exploited... In the case of an answer in the affirmative, there will be a violation of article 4 of the Convention [prohibition of slavery or forced labour] where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.”²²⁸

This finding of the Court shows that States are not only obliged to remove people from situations in which they are being trafficked or exploited, but also from situations in which they are at risk of being trafficked or exploited.

In addition to rights abuses perpetrated by smugglers, traffickers and others during migration, migrants – particularly those who are migrating irregularly – are acutely vulnerable to abuses by officials in position of power. At its 66th meeting the General Assembly adopted a resolution on the protection of migrants, in which it requested States

“...to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants, inter alia, arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa,

²²⁵ General Comment No. 20 (replacing General Comment No. 7) concerning prohibition on torture and cruel treatment or punishment 2. (Article 7), 3/10/1992, paragraph 2.

²²⁶ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

²²⁷ Committee against Torture, General Comment 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (2008), para. 18.

²²⁸ European Court of Human Rights, *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010, para 286.



including their transit through national borders.”²²⁹

Yet despite clear principles, in practice non-citizens often do not enjoy the same respect for their rights as citizens, particularly where they are in the process of attempting to enter a country irregularly. The practical challenges in affording migrants in irregular situations equal rights as those enjoyed by citizens or even regular migrants must be balanced alongside the challenge of migration governance, hailing the need for law enforcers including immigration and border officials and others to receive training not only to detect and intercept trafficking and smuggling situations, but also to receive effective training that is aimed at reducing racism, racial discrimination, xenophobia and related intolerance in border areas, particularly in respect of immigrants, refugees and asylum seekers.²³⁰ Racism, xenophobia and discrimination proliferates stigmatization and further discrimination which can manifest in weakened response by criminal justice practitioners whose special responsibilities do not make them immune from societal attitudes.

In the context of facilitated irregular migration, it is important that measures aimed at combating migrant smugglers, do not undermine the rights of migrants themselves. The objective of the Smuggling of Migrants Protocol is to prevent and combat smuggling, while protecting the rights of smuggled migrants. Article 16(1) of the Smuggling of Migrants Protocol contains mandatory protection provisions, including obligations to protect the right to life, and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It also obliges States to take measures to protect migrants from violence inflicted on them in the course of being smuggled (Article 16(2)) and to provide assistance to migrants whose lives are endangered in the course of being smuggled (Article 16(3)). The fact that smuggled migrants may be people in need of international protection is anticipated by the Smuggling of Migrants Protocol which affirms that the Protocol does not affect other rights, obligations and responsibilities of both States and individuals under international humanitarian law and human rights law, specifically noting the principle of *non-refoulement*. In short a rights-based approach to addressing exploitation of migrants stresses that efforts to combat criminals who exploit migrants, cannot compromise the rights of those migrants.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can human rights of migrants be strengthened during migration, particularly at borders?*
- *What are the human rights obligations of states of origin for their citizens during migration?*

2.4.3. Assist exploited migrants

States of destination in particular face the challenge of implementing policies that assist all migrants, without encouraging increased irregular migration and exploitation

²²⁹ UN General Assembly Resolution 66/172, Protection of Migrants, A/RES/66/172, 29 March 2012, paragraph 4(e).

²³⁰ See for instance the Outcome Document of the Durban Review Conference, 2009, para. 75.

of it. The complexity of irregular migration phenomena and the exploitation that migrants may be subjected to means that segmenting assistance issues from trafficking and wider exploitation issues may leave gaps in migrant protection and assistance.

There are several international principles and guidelines relevant to providing assistance to victims of trafficking. Article 6 of the Trafficking in Persons Protocol requires States to consider that measures are taken to protect trafficked persons from further harm. It also gives trafficked persons access to shelter, housing, counselling, information, medical, psychological and material assistance, legal advice and employment, education and training opportunities in accordance with the age, gender, and special needs of victims, particularly those among them who are children. Article 14 of the Trafficking in Persons Protocol also prescribes that protection and assistance measures are not to be applied in a way that is discriminatory to persons on the ground that they are victims of trafficking in persons, in accordance with the principle of non-discrimination. This begs the question whether or not migrants who are exploited but not trafficked are entitled to these same assistance measures, particularly where non-trafficked exploited migrants are in irregular situations.

A human rights based approach would find a basis for this full package of assistance for non-trafficked but exploited migrants. However, in practice, certain assistance programs may only be available to trafficked persons, despite the fact that a non-trafficked person may have experienced the same type and level of exploitation, and resultant harm. Service providers may therefore be faced with the dilemma of either erroneously labelling a person as ‘trafficked’, or denying him or her the assistance that he or she needs following exploitation. Human rights approaches should emphasise the need to provide assistance to all persons who require such assistance, regardless of their status as trafficked or not. As above, the human rights principle of non-discrimination and equality of treatment should underpin understandings of assistance of migrants in irregular situations according to which exploited migrants would enjoy human rights, irrespective of their race, colour, sex *or other status*.

The baseline of rights outlined above at 2.1.2 enjoyed by all migrants irrespective of their status, offers guidance on the assistance that must be provided to all exploited migrants. In addition to protecting migrants from further harm (discussed above at 2.4.2), States must also provide urgently required assistance to migrants.

The role of non-governmental organizations in providing assistance to migrants is essential and should be supported, particularly where migrants in irregular situations are reticent to reach out to State authorities for support in fear of detention or other reprisal on the basis of their irregular status.²³¹

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How can assistance be strengthened for migrants who have been exploited but not trafficked, particularly for those in an irregular situation?*

²³¹ See for instance, ‘Human Rights and Migration: Working together for safe, dignified and secure migration’, IOM Migration Policy and Research, 2010, p.113.



- *Should the degree of exploitation correlate with the degree of assistance provided, or should migrants' status as trafficked or other crime victims be the sole determinant in eligibility for assistance?*

2.4.4. Non-criminalization of exploited migrants

Though crossing borders without the requisite documents for doing so should be considered an administrative offence, some States have criminalized irregular migration. The result is that migrants in irregular situations become more vulnerable to human rights violations and exploitation, discrimination against them is exacerbated and their access to protection is compromised. The fact that rights are violated by States' failure to investigate and prosecute crimes committed against migrants in irregular situations, and by the abuses committed against them by border officials and other State actors who fail to uphold international protection obligations is also exacerbated where irregular migration is criminalized. Criminalization of migrants in irregular situations is further acknowledged to make little strategic sense as a means of either deterring people from migrating irregularly, or combating exploitation of them. Rather, the opposite is true. The Special Rapporteur on the human rights of migrants, Professor François Crépeau, observes that the result of criminalizing migrants themselves and imposing simple penalties on employers who exploit them serves only to entrench cheap labour markets as a pull factor for irregular migration.²³²

Article 31(1) of the Refugees Convention clarifies that penalties should not be imposed on refugees for their illegal entry or presence in a country where they have come directly from a territory where their life or freedom was threatened, and present themselves without delay to authorities and show good cause for the illegal entry or presence. Principle 7 of the OHCHR Recommended Principles and Guidelines is clear that trafficked persons should not be criminalized, either for the illegality of their entry or residence nor for any crimes they have committed in the course of being trafficked.

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”²³³

Similarly, Article 5 of the Smuggling of Migrants Protocol states that migrants should not be liable to criminal prosecution for the fact of having been smuggled, though the Protocol does not prohibit States from prosecuting them for other crimes, ostensibly including illegal entry.

²³² Presentation by Professor François Crépeau Special Rapporteur on the human rights of migrants, 9 February 2012, ‘Preparing for the 2013 High-Level Dialogue: A Human Rights Perspective’, on the occasion of the Tenth Coordination Meeting on International Migration, Population Division – United Nations Department of Economic and Social Affairs New York, 9-10 February 2012.

²³³ OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 7.

As points of principle then, non-criminalization of illegal entry of refugees and trafficked persons is clear, as is non-criminalization of smuggled migrants for ‘being smuggled’, and non-criminalization of crimes in the course of being trafficked. However, the application of these principles in practice is fraught with complexity. Particularly challenging is the principle of non-criminalization of migrants who are not trafficked, but may have been involved in unlawful activities as a direct consequence of being exploited.

The Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo, recently pointed out the relationship between criminalization and the failure of States to identify victims in need of protection, who are instead identified as smuggled migrants or undocumented workers. This phenomenon, she notes, is complicated by the problem of “imperfect” victims who may have committed crimes willingly or as a consequence of being exploited.²³⁴ This challenge of distinguishing between victims and perpetrators is arguably exacerbated in the case of identifying non-trafficked victims of exploitation who are in irregular situations; not only have such persons possibly committed crimes in the course of being exploited but also may have deliberately sought to enter and/or remain in a country without being authorized to do so. The stigmatization that results from lack of understanding about the reasons as to why this may be so, exacerbates their vulnerability and poses potential barriers to their access to assistance.

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *How are non-criminalization considerations different in situations where exploited people are trafficked, and situations in which exploited people are not trafficked?*
- *How can the criminal culpability of exploited migrants be determined for conduct that they commit in the course of being exploited?*
- *How can a rights-based approach clarify responses to exploitation of migrants in criminal activities?*

2.5. Prosecution and other actions against exploiters

2.5.1. Exploited migrants: Right to a remedy

The right to a remedy for victims of human rights violations is essential, and often referred to in providing assistance to victims of human trafficking. There have been some positive steps in this direction, including civil actions and private actions brought by victims against traffickers, followed by mandatory restitution as part of sentencing. Non-trafficked migrants who are exploited may find themselves in situations similar to those of trafficked people in that they may have been exploited

²³⁴ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p.7, paragraph 24.

for little or no payment over a long period of time, have incurred debts and may have suffered injuries of contracted illnesses that require medical attention.²³⁵

The ILO Committee of Experts has noted that victims of forced labour must have access to justice and obtain compensation for the harm they have suffered.²³⁶ Similarly, the OHCHR Recommended Principles state that “[t]rafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies.”²³⁷ It becomes clear then that regardless of whether a person is trafficked, where an exploitative situation can be identified as a human rights abuse, and a right to a remedy is identified in a treaty, then failure to provide such remedies becomes an additional breach of that instrument, meaning that States can be held responsible for both the individual violation that gives rise to the remedy and the breach of the right to a remedy.²³⁸

A human rights response to exploitation of migrants, particularly those in irregular situations, ensures that all exploited migrants have access to justice regardless of whether or not they are considered ‘victims’ of human trafficking or forced labour. The right to an effective remedy for violations of human rights is enshrined in several instruments.²³⁹ Specifically, the ILO Conventions on Migrant Workers (No. 97 and No 143) as well as the ICRMW set standards to ensure that migrants are not deprived of their right to be paid for work they have performed, irrespective of their irregular status (Article 25(3)). A similar provision is found in ILO Convention No. 143 (Article 9(1)).

The following questions are offered for consideration in working towards conceptual and policy coherence:

- *Should access to justice be dependent on victim status or on harm?*
- *How can a human rights-based approach improve access to justice for migrants who are exploited, but not trafficked?*

²³⁵ OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking; Commentary, p223.

²³⁶ ILO Committee of Experts, Commentary on Article 25, *ILO Forced Labour Survey 2007*, p.75 at para. 139.

²³⁷ OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 9.

²³⁸ OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking; Commentary, p.225.

²³⁹ See in particular article 8 of the Universal Declaration of Human Rights, 1 article 2 of the International Covenant on Civil and Political Rights, 2 article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court. Also see UN General Assembly Resolution 66/172, Protection of Migrants, A/RES/66/172, 29 March 2012, paragraph 4(j).

2.5.2. Exploiters: Right to a fair trial

A human rights based approach does not only speak to the victim's right to seek and have justice served but also refers to principles of fairness which must apply to uphold the rights of accused persons. Not all exploiters of migrants should be criminally prosecuted and attempts to do so may thinly distribute scarce criminal justice resources without necessarily achieving any significant deterrent or rehabilitative impact. This is particularly so when exploitation is culturally or traditionally ingrained. As discussed above at 2.3.2, non-prosecutorial interventions are required which also find guidance in human rights instruments. Changing attitudes, including for instance, those that ingrain gender inequalities and manifest in violence against women, as well as those that ingrain racial, ethnic and other inequalities can also reduce exploitation.

Types of exploitation that do not constitute criminal exploitation may be met with sanctions and penalties prescribed by labour laws when they happen in the sphere of labour. Where criminal prosecution is required to combat exploitation that amounts to trafficking or forced labour, those prosecutions should be pursued carefully and in accordance with human rights. The key human rights relevant to ensuring a fair trial derive from article 14 of the ICCPR, article 5(a) of ICERD, article 15 of CEDAW, article 18 of the ICRMW, article 12 and 13 of the ICRPD and regional human rights instruments.

Global political pressure to prosecute traffickers may result in approaches that focus more on achieving prosecution than they do on delivering justice for concerned parties. Where exploitation is seen as synonymous with trafficking in the absence of the 'act' and the 'means' element for instance, the result can be that exploiters may be convicted for the serious crime of trafficking, even where exploitation takes place outside of that context. As was discussed in part 1 of this paper, not all exploitation constitutes trafficking or forced labour. A human rights-based approach therefore, can operate to ensure that efforts to end impunity for traffickers do not amount to misuse of trafficking offences as a shortcut to addressing the complicated and nuanced issue of exploitation of migrants.²⁴⁰

The following question is offered for consideration in working towards conceptual and policy coherence:

- *How can a human rights approach improve the quality of prosecutions of exploiters?*

2.6. Partnerships against exploitation of migrants

The complexity of multifaceted issues of exploitation of migrants, particularly those in irregular situations, underscores the need for cooperation; not just to bring together

²⁴⁰ See for example, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p.23, paragraph 101.



expertise at the policy level but on the ground in efforts to prevent exploitation and protect and assist exploited migrants. The range of actors necessary to achieve a comprehensive response highlights the complexity of effective cooperation.

Even at the national level, several different parts of government in any given State are required to address aspects and consequences of migration, including exploitation.²⁴¹ Beyond the national level, more actors again are necessarily involved. Efforts to address exploitation would therefore be more efficiently conceived and implemented where a ‘one stop shop’ is in operation, so that all relevant arms of government can expedite common action. Response would also benefit from a harmonized policy framework that both supports coordination and removes gaps that are susceptible to exploitation.

As is true of States, non-State actors would have a greater success at reducing exploitation if their understanding of it and responses to it were harmonized. Thus far, differences of conceptual understandings have meant that efforts have not been as complementary as they could be because of duplication, and opportunities to align responses with respective strengths have been missed.

The growing importance of migration and the high stakes for human rights that result from exploitation of migrants, particularly those in irregular situations, makes effective coordination urgent. Such coordination does not mean repeated references to its importance and regular coordination meetings, but requires urgent and good faith decisions on respective strengths, synergies and collective ways forward. In this context it has been noted that:

“...the multi-causal nature of and the necessarily multi-disciplinary responses to contemporary migration make a compelling argument for creating a holistic and comprehensive space to debate migration, in order to ensure effective protection of the rights and decent treatment of all migrants, regardless of legal status and categorisation, as well as to encourage coordination and cooperation.”²⁴²

In the meantime, on the specific issue of exploitation of migrants, all actors should play to their strengths in their response to exploitation of irregular migration. The GMG was founded to bring together international agencies to promote the application of relevant instruments relating to migration, and to encourage better coordination on the issue of migration. The result of bringing policies and approaches into alignment in a human rights framework would not only mean that policy responses are streamlined, but would also mean that donors would not be able to strategically prioritise projects that fall outside this framework, and would be equipped to choose implementing partners based on their substantive expertise and operational suitability. These considerations in mind, GMG members have explained their core strengths and expertise vis-à-vis exploitation of migrants in the tables below.

²⁴¹ Pia Oberoi and Patrick Taran, ‘Background Paper for an Informal Conversation on International Migration, Human Rights and Governance’, OHCHR, GMPA, 27 September 2012, p.4.

²⁴² Pia Oberoi and Patrick Taran, ‘Background Paper for an Informal Conversation on International Migration, Human Rights and Governance’, OHCHR, GMPA, 27 September 2012, p.4.



The following question is offered for consideration in working towards conceptual and policy coherence:

- *How can a human rights based approach offer a framework for responding to exploitation of migrants?*



