

What do we mean by ‘protection’ for migrants?

Defining ‘protection’ under international law In 2016, acknowledging the need for a “strategic, comprehensive and collective approach to protection”, the **Inter-Agency Standing Committee (IASC)** produced a common policy on protection, which defines protection as: *all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. International Human Rights Law, International Humanitarian Law, [and] International Refugee law)*. This definition incorporates:

- Protection under **International Humanitarian Law (IHL)**, which applies to situations of **armed conflict** as addressed principally in the four 1949 Geneva Conventions and their Additional Protocols of 1977.
- Protection under **International Refugee Law (IRL)**, which applies to persons who meet the **refugee definition** under international, regional, or domestic laws, or under the mandate of the United Nations High Commissioner for Refugees (UNHCR).
- Protection under **International Human Rights Law (IHRL)**, which applies to **all persons at all times**, and is grounded in the Universal Declaration of Human Rights (UDHR) and the 9 core international human rights instruments.

International Human Rights Law provides an important protection framework applying **equally to all migrants** and protects all civil, political, economic, social and cultural rights under the two Covenants, including a number of universally binding and non-derogable norms such as the principle of *non-refoulement*. IHRL also provides legal protection to particular groups according to specific treaty instruments. IHRL therefore establishes **obligations which States are bound to respect, protect and fulfil** including, in some cases, protection from return. Yet, due to a lack of operationalization of these standards, millions of migrants continue to face significant human rights **protection gaps**, including: the growing number of migrants affected by **climate change**, including the adverse impacts of slow onset events; migrants impacted by **food insecurity**; the millions of migrants currently fleeing acute **economic crises**, or lacking access to fundamental rights such as **health, education or family**; migrants facing **abuse, violence and exploitation** as they move and stay; and migrants seeking protection from other **serious human rights violations**.¹

Responding to the protection needs of migrants under international human rights law States have a legal obligation under IHRL to respond to the protection needs of migrants, including a particular duty of care to migrants in vulnerable situations.² These obligations can be fulfilled through a comprehensive, practical and **human rights-based approach** to migration governance that should include the following actions:

1. Identification and assessment of protection needs. States should put in place mechanisms and allocate resources to ensure that the IHRL protection needs of all migrants can be assessed individually and with due process, as a complement to asylum determination mechanisms. This should include the specific protections owing to migrants in vulnerable situations, for example: migrants at risk of torture or irreparable harm requiring protection from refoulement; victims of torture, trauma, gender-based violence or trafficking requiring rehabilitation, physical and mental health services and access to justice; and children requiring best interests determination procedures in order to ensure their right to family life, survival and development.

*The Convention on the Rights of the Child requires States to establish mechanisms for the “robust individual assessment and determination of the **best-interests of the child**” before any decision is taken to return a child, in order to ensure the child’s proper care and enjoyment of rights. (General Comment No. 22)*

*The Special Rapporteur on Torture has recommended States establish mechanisms to identify **victims of torture** “through adequate screening” and independent medical evaluation. (A/HRC/37/50)*

¹ Note that there is no internationally agreed definition of “serious”, “gross” or “grave” violations of human rights. Some non-exhaustive examples referenced in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993, include torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, xenophobia, poverty, hunger and other denials of economic, social and cultural rights.

² See, Global Migration Group (GMG), *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, 2018.

2. Mechanisms for entry and stay based on human rights protection grounds. States should establish mechanisms for entry and stay for those migrants who are considered to have protection needs prohibiting their return under IHRL, including where based on *non-refoulement*, as well as, inter alia, the rights to health, family life, best interests of the child, and torture rehabilitation. Such mechanisms could include administrative and legislative mechanisms to grant legal status to migrants who cannot return, in the form of temporary, long-term or permanent protection status designed to uphold international human rights law.

In the case of Paposhvili v. Belgium (App. No. 41738/10) the ECtHR found that access to “sufficient and appropriate” medical care must be available in the country to which a person is being returned in order to prevent a breach of the principle of non-refoulement.

*Costa Rica prohibits return on the basis of the **best interests of the child** for unaccompanied children or persons whose age cannot be determined with certainty. (Migration Law No. 8764, art 65)*

*Peru’s migration law incorporates **non-refoulement** under IHRL by granting residency to “foreigners in the country, who do not qualify for asylum or refugee status, [but] who face a life-threatening situation or one of great vulnerability in the event that they leave Peru.” (Legislative Decree No. 1350 of 2017)*

*The Committee against Torture has recommended that **victims of torture** “should not be removed to a State where adequate medical services for their rehabilitation are not available or guaranteed.” (General Comment No. 4)*

*Austria extends a combined residence and work permit when such a measure is necessary for the preservation of **private and family life** within the meaning of article 8 of the ECHR. (Federal Act on Granting of Asylum, para. 55)*

3. Mechanisms for entry and stay based on discretionary grounds. In the case of migrants who are not considered to have protection needs—where return is legally possible—return might still not be a desirable option based on individual considerations. States should therefore develop or strengthen discretionary mechanisms for entry and stay based on a migrant’s individual circumstances including practical reasons.

*Under **Brazil’s** Migration Law (Law 13.445/2017, art. 30), residence can be granted to persons that demonstrate, inter alia, the need for health treatment, study or work-related reasons, humanitarian reasons, or having been victim of trafficking.*

*In 2017, the Geneva Canton in **Switzerland** launched a 2-year pilot programme entitled “Papyrus” which aims to regularize the status of irregular migrant workers who meet specific criteria on a case-by-case basis.*

***Italy** prohibits the return of pregnant women and women who are caring for an infant under six months old. (Italy, Legislative Decree 286/1998, Article 19(1))*

4. Regularization and alternative pathways to return. Even where returns are legally and practically possible, it is clear that the removal should not be the only, or even preferred, migration governance option. Based on a consideration of the needs of broader society as well as migration governance imperatives, States should consider periodic regularization schemes and enhance regular migration pathways as alternatives to return, including educational pathways and labour migration pathways at all skills levels.

***Morocco** initiated two regularization campaigns beginning in 2014 with the aim of providing secure legal status to undocumented migrants on their territory. This includes women, men and children regardless of the initial reasons for entry who had lived in Morocco for at least 5 years.*

*In 2014, **Canada** launched the Caregiver Program, which allows foreign caregivers and their dependents to obtain permanent residence status after completing two years of full-time employment.*

*The **European Union** Directive on the Right to Family Reunification provides for family reunification subject to basic income, housing and health insurance conditions, recognizing that family unity creates socio-cultural stability and promotes economic and social cohesion.*