Rights-based approach to programming

International Organization for Migration (IOM)

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94_15

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CONTENTS

Acknowledgements iii

List of acronyms vii

Introduction to the manual 1

Module 1: Introduction to a rights-based approach 7
- The sources of the rights-based approach 11
- Definition of rights-based approach 16
- The importance of the process and the results of programming 18
- Integrating rights principles into migration projects 19
- Rights-based approach as a tool for advocacy 20

Module 2: Practical guide to a rights-based approach 25
- Application of the rights principles to the process of programming 28
- Rights-based approach in the various programming stages 31
  - 1. Situation assessment and analysis 33
  - 2. Planning and design 43
  - 3. Implementation 61
  - 4. Measure rights and rights-based approach: Monitoring and evaluation 63

Module 3: Basics of International Migration Law 75
- International Labour Law 82
- Refugee Law 85
- International Humanitarian Law 89
- Transnational Criminal Law 96
- Human Rights Law 100

Glossary 123

Annexes
- Annex I. Situation assessment tool 125
- Annex II. Problem analysis tool 128
- Annex III. Examples of indicators 131
- Annex IV. Monitoring tool 144
- Annex V. Checklist for a rights-based approach to programming 146

References 152

LIST OF ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	Arab Charter on Human Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and People's Rights
ACtHPR	African Court of Human and People's Rights
ASEAN	Association of Southeast Asian Nations
CAT	Committee Against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	Human Rights Committee
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CoE	Council of Europe
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organization
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
HRBA	Human Rights-Based Approach
IACHR	The Inter-American Commission on Human Rights
IACtHR	The Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	The International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDP	internally displaced person
IHL	International Humanitarian Law
ILO	International Labour Organization
IML	International Migration Law
IOM	International Organization for Migration
MoL	Ministry of Labour
M&E	Monitoring and Evaluation
NGO	Non-Governmental Organization
NHRI	National Human Rights Institutions
OAS	Organization of the American States
OAU	Convention Governing the Specific Aspects of Refugee Problems in Africa
OHCHR	Office of the High Commissioner for Human Rights
RBA	Rights-Based Approach
ToR	Terms of reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTOC	UN Convention Against Transnational Organized Crime
UNEG	United Nations Evaluation Group
VoT	Victim of Trafficking

Introduction to the manual

INTRODUCTION TO THE MANUAL

The International Migration Law (IML) Unit has developed this manual to assist all IOM staff to take a rights-based approach (RBA) to programming by identifying the international legal standards at play in their projects and by understanding and incorporating rights principles into the actual programming process.

OBJECTIVE

After reading this manual, you will be able to:

- Correctly explain the nature and importance of a rights-based approach and its relevance in IOM programming;
- Recognize the importance of the international legal standards surrounding the rights of migrants and the obligations of States;
- Promote the incorporation of rights principles into the process of programming;
- Effectively apply practical tools to operationalize international standards throughout the programming cycle.

The theoretical and practical guidance provided by this toolkit will make it easier to take a rights-based approach to projects throughout the programming process. However, please remember that the IML Unit is always available to provide further guidance and assistance if necessary.

Who is this manual for?

The manual is primarily for IOM staff involved in project development and management such as Regional Project Development Officers (RPDO) or Project Developers, Regional Thematic Specialists (RTS) or other designated project endorsers, Regional Liaison and Policy Officers (RLPO), Project Managers, and other staff members who are involved in monitoring, reporting on, or evaluating projects. Additionally, the manual is intended to benefit IOM staff who are not directly involved in projects but who wish to acquire a better understanding of the conceptual framework of an RBA and how to apply it in practice. Finally, the manual may also be useful for IOM's implementing partners and other actors working in migration programming.

> "The manual is not directed solely at those working in the field of human rights, humanitarian aid or development. The manual is intended to guide all actors working in the field of migration on international legal standards relating to migrants' rights.

What is covered in the manual?

The **first module** in this manual introduces the reader to the rights-based approach, its history and development. The **second module** consists of a practical guide to the rights-based approach to migration programming. The chapter goes through each relevant stage of the project cycle and emphasizes that an RBA is focused just as much on the process of programming as it is on the results of the project. Additionally, by using practical examples, the manual provides ways in which rights issues can be incorporated into the results of the project and how rights principles can be incorporated into the process of the project.

The **third module** familiarizes or refreshes the knowledge of the readers and relevant IOM staff and implementing partners on IML so that they can easily identify the ways in which migration programming might affect and have an impact on the rights of migrants, as well as the legal issues that may be of relevance for the particular project. It provides an overview of the international legal framework surrounding migration, including the international conventions and treaties, States' obligations and migrants' rights. It outlines the basics of some of the key branches of IML, including:

- International Labour Law
- Refugee Law
- Transnational Criminal Law
- International Humanitarian Law
- Human Rights Law

Furthermore, the Annexes include examples, tools and sources at the end of the manual that may be of assistance and provide practical guidance for a variety of projects.

How should this manual be used?

This manual may be used independently as a guidance tool to learn about IML and the role that legal issues or questions related to rights might play in migration projects. This manual may also be used as a practical guide in conjunction with IOM Project Handbook on how to take an RBA to migration projects and take rights into account throughout the various steps of the project process.

Whatever way one chooses to use this manual, it is recommended to read the chapter outlining the international legal framework to ensure and strengthen an adequate understanding of the rights issues at stake.

> The manual is not intended to be used only for projects with an explicit rights objective. The manual is intended to encourage all staff, including those without an explicit rights objective, to think about how rights issues come into play in their project and to encourage all project developers or managers to incorporate rights principles into all stages of their project process.

Module 1:
Introduction to a rights-based approach

OBJECTIVE

After reading this manual, you will be able to:

- Explain why a rights-based approach is important for IOM and describe the various benefits using RBA to programming;
- Describe the development of the rights-based approach and specify the key elements;
- Identify rights-holders and duty-bearers;
- Understand what the various human rights principles and how they are important throughout the process of programming.

Why an RBA to migration programming?

Rights of individuals have gained prominence as a universal set of norms and standards that are increasingly shaping the programming of the United Nations and other intergovernmental organizations.

Adopting an RBA is highly relevant to migration programming. Migrants are often vulnerable to rights violations because many of them are not citizens of receiving States and both internal and international migrants often live in precarious situations. For example, migrants are often subject to exploitation and discrimination in their ability to access basic services such as education and health care in host and transit States. Compounding this problem, migrants are rarely informed or aware of their rights.

IOM's Migration Governance Framework[1] explicitly acknowledges the importance of ensuring that migration law and policy fulfils migrants' rights. The Framework's first principle is that migration systems need to adhere to international standards and fulfil migrants' rights, in order to ensure that migration is humane and orderly and benefits migrants and society.

As a result, when implementing migration programmes and projects, it is vital to recognize and protect the rights of migrants irrespective of their nationality or migration status, promote that these rights are respected, protected and fulfilled by States and that migrants are aware of their rights.

1 The Migration Governance Framework sets out the essential elements to support planned and well-managed migration. It proposes that a migration system promotes migration and human mobility that is humane and orderly and benefits migrants and society when it adheres to international standards and fulfils migrants' rights, formulates policy using evidence and a "whole-of-government" approach, engages with partners to address migration and related issues; as it seeks to advance the socioeconomic well-being of migrants and society, effectively address the mobility dimensions of crises; and ensure that migration takes place in a safe, orderly and dignified manner.

Some benefits to implementing RBA to migration programming:

- Promote the respect and realization of the rights of all migrants, regardless of sex, age, nationality, migration status, etc.
- Ensure that migrants are at the centre of migration management policies and projects, and that IOM interventions never infringe on migrants' rights.
- Assist duty-bearers, particularly States, to achieve their commitments to protect and secure the rights of migrants.
- Promote results-based programming.
- Increase and strengthen the participation of rights-holders in programming.
- Improve transparency and accountability of IOM interventions.
- Reduce the vulnerability risk factors for migrants, particularly those at risk of marginalization and discrimination, by identifying the rights at stake in programming and the way in which the programme can contribute to the respect, protection or fulfilment of the rights of migrants.
- Tackle unequal power relations underlying discrimination, rights violations and social injustice.

THE SOURCES OF THE RIGHTS-BASED APPROACH

The RBA derives from the human rights-based approach (HRBA) which emerged from prior conceptual frameworks or models of addressing social problems – namely the charity model and the needs-based approach. These frameworks or models were created in the context of development and provide important insight into the reason why a rights-based approach to migration projects is useful for programming in migration contexts.

Charity model

The charity model (sometimes referred to as the generosity model) was the prevailing model for dealing with social problems for many years. It is based on the assumption that those helping the poor knew what their needs were and could satisfy these needs through the provision of donations of money, food, clothing, shelter and medical care.

This model was criticized for many reasons. First of all, while it alleviated immediate suffering, it did not address the underlying systemic problems nor did it develop sustainable solutions for dealing with the problems of the poor or needy. After the beneficiaries' immediate needs were provided for, the poor and needy continued to be poor and needy and were increasingly dependent on the donations to meet their basic needs. Secondly, the charity model perceives beneficiaries as vulnerable individuals who require the assistance of others rather than rights-holders in vulnerable situations who could identify their own needs and actively participate in the process of resolving the social problems they face.[2]

Needs-based approach (NBA)

In an effort to address the above issues arising from the charity model, in the mid-20th century, practitioners began to use the needs-based approach. This approach emphasized the participation of beneficiaries in development projects, in the identification of their needs and the means to alleviate these needs. This model helped to establish a respectful dialogue between those in need and those in a position to assist them.

While this model addressed the criticism made to the charity model in which those in need are passive recipients of charity and depend on philanthropists to address their needs, this model also suffered from short-comings/weaknesses.

2 The Replace Campaign *Introduction to the Rights Based Approach, Replace Campaign*. Available from www.replace-campaign.org/resources/introduction-to-the-rights-based-approach.pdf.

The criticisms of this model included:

- The image of beneficiaries continued to be an image of poor vulnerable people.
- It implied no obligations on stakeholders to uphold the rights of beneficiaries.
- Stakeholders only met the needs of beneficiaries when resources were available.[3]

Human Rights-based Approach and Rights-based Approach

The Human Rights-based Approach (HRBA) is a conscious and systematic integration of human rights and rights principles in all aspects of programming work.

This model emerged as a new model for addressing social problems with the Declaration on the Right to Development, which was adopted by the United Nations General Assembly in 1986. Article 1 of the Declaration states that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.

This declaration marked a new era because it rooted development in human rights, rather than in the provision of charity or addressing the needs of vulnerable peoples.

3 Ibid.

The HRBA has been further entrenched in the programmes and projects of the United Nations since 1986. In 1993 the Vienna Declaration and Programme of Action was adopted by the World Conference of Human Rights. This declaration acknowledged that:

> The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations [...] The organs and specialized agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments.

Importantly, the declaration also stated that "the processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law". Therefore, not only should the United Nations further human rights objectives but the process should conform to rights principles (see page 19).

For these reasons, the former Secretary-General Kofi Annan called for all United Nations agencies to mainstream human rights in their activities and programmes within the framework of their mandates.[4] In order to make sure that all United Nations agencies adopted a human rights-based approach, several agencies developed a common understanding of HRBA in 2003. Under the Common Understanding to HRBA to Development Cooperation,[5] three key points were identified:

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

4 The Office for the High Commissioner for Human Rights (OHCHR) *Frequently asked questions on human rights-based approach to development cooperation*, Annex II; The Human Rights-based Approach, Statement of Common Understanding (Geneva, 2006).

5 UN Practitioner's Portal on Human Rights Based Approaches to Programming, *The Human Rights-based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*.

2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Programmes of development cooperation contribute to the development of the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.

This common understanding firmly established the human rights-based approach as the framework for development programming at the United Nations.

It is important to note that the special agencies at the United Nations have also been taking similar approaches to programming beyond development programming. For example, in 2010, the International Labour Organization (ILO) published a book on the rights-based approach to international labour migration.[6] In this publication, it was emphasized that "migrant workers have the dignity inherent in all human beings and are entitled to the full range of universal human and labour rights enshrined in international instruments" and emphasized that the increasing mobility of workers requires explicit legal regulation.[7]

This RBA manual is inherently related to the IOM Policy on Protection.[8] The Protection Policy sets out that IOM protects migrants "by emphasizing the promotion of their dignity, their well-being and respect for their rights and by adopting a rights-based approach in all its policies, strategies, projects and activities, going beyond simply the physical and material needs of migrants". Therefore, this RBA manual contributes in a crucial manner in ensuring the implementation of the protection policy of migrants of the Organization.

What is the difference between the rights-based approach and the human rights-based approach?

The United Nations has consistently referred to the framework that they use in the context of development as a "human rights-based approach". At IOM, as with the ILO, we refer to a rights-based approach. We have broadened the framework to encompass rights of individuals derived from other sources of international law besides "human rights" such as for example "labour rights" from international labour law. The international legal framework for migrants

6 International Labour Office, *International Labour Migration: A Rights-based Approach* (Geneva, 2010).
7 Ibid. at p. 215.
8 Forthcoming.

is broader and IOM's approach should reflect this scope to acknowledge these rights through its projects.

Therefore, although a HRBA forms a large part of the RBA because most of the rights identified under an RBA are derived from human rights law, one has to look beyond human rights law to other branches of international law relevant to migration. These include international labour law, refugee law, humanitarian law, transnational criminal law, nationality law, etc.

The legal framework used to take an RBA to migration projects will vary, depending on the context in which the project takes place. For example, in order to develop an RBA for projects that address labour migration issues, both international labour law as well as human rights law must be taken into consideration. Similarly, if a project deals with migrants in conflict situations, both international humanitarian law and human rights law must be considered, as well as perhaps refugee law and standards surrounding internally displaced persons (IDPs).

Although an HRBA is integral to developing an RBA, it is necessary to go beyond a human rights law analysis in migration projects. It is for this reason that this manual adopts the term "rights-based approach". Another complementary element to RBA is protection as defined in humanitarian action.

> "The IASC (Inter-Agency Standing Committee) definition indicates protection as "…all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender)."

Protection is at the centre of IOM's humanitarian action. The mobility dimensions of humanitarian crises- or in short migration crises- are a specific concern of IOM as defined by the Migration Crisis Operational Framework (MCOF) a Member States-approved framework for IOM's response to the mobility dimensions of crisis situations. Populations affected by crises include migrants, displaced persons and affected communities.

DEFINITION OF RIGHTS-BASED APPROACH

A rights-based approach is a conceptual framework and methodological tool for developing programmes, policies, and practices that integrate the rights, norms and standards derived from international law. For IOM staff, this means, in practice, that RBA is a conscious and systematic integration of rights and rights principles into all stages of the project cycle, thus:

1. Rights issues at stake in a particular project must be identified and considered throughout each phase of the project:
   - At a minimum, no right of any person should be infringed by any project.
   - When a project's objective can be reached through the furtherance of right(s), those rights must be considered, with possible corresponding outcomes, outputs and activities.
   - When the objective of a project is explicitly to contribute to the promotion/respect/protection/fulfilment of right(s) of migrants, the relevant right(s) must obviously be properly considered.

An RBA to migration programming aims to empower rights-holders to enjoy and claim their rights, and strengthen the capacity of duty-bearers in their obligations to respect, protect, and fulfill those rights.

Although there is no standard universal understanding of how to apply a rights-based approach to projects, it generally entails the following steps:

- The *identification* of all rights-holders and their specific rights on the one hand, and, on the other hand, the duty-bearers who bear the obligation to respect, protect, and fulfill those rights.
- An *assessment* of whether and the extent to which rights are being respected, protected, and fulfilled.
- An intent to work towards *strengthening the capacity* of rights-holders to enjoy and claim their rights, including their human rights, and duty-bearers to meet their obligations.
- The rights principles and standards from the international law guide are integrated into the process of programming.

2. Rights are not only considered as part of the results of a project but also as an integral part of the process of the actual programming. This is done by the application of the rights principles which should guide all phases of the project cycle. These six principles are: universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, and accountability and rule of law.[9]

Who are rights-holders and duty-bearers?

» Rights-holders
Individuals or groups entitled to rights under international law.

- Every individual is a rights-holder and entitled to a myriad of specific rights without discrimination.
- Certain groups of individuals are also entitled to collective rights, (e.g. right to self-determination, right to development, etc.).

» Duty-bearers
Actors which have obligations under international law.

- States or non-State actors (e.g. international organizations) with obligations towards rights-holders;[10] actors that are responsible for respecting, protecting, and fulfilling the rights of rights-holders.
- States are primary duty-bearers under international law and cannot abrogate their responsibilities to rights-holders.

9 See page 19 of this manual for more information on these principles.
10 While States are the primary duty-bearers, international organizations also play an important role in upholding human rights particularly in conflict situations or disasters in which non-State actors are responsible for protecting rights under international humanitarian law.

THE IMPORTANCE OF THE PROCESS AND THE RESULTS OF PROGRAMMING[11]

In an RBA to projects, rights are not only considered at the end of a project as part of the results of the project but are also considered an integral part of the process.[12] In some cases, the rights issues at stake in a project will be clear because there are explicit rights-based objectives. In these projects, the explicit aim of the project is to promote the rights of migrants and/or strengthen the capacity of duty-bearers in their obligations to protect these rights.

EXAMPLE

A project with the objective to "strengthen the right to education for migrant children" has an objective that is explicitly linked to a right.

On the other hand, an RBA can also apply to projects that do not have an explicit rights objective but will have an impact on rights and therefore it is important to identify this link early in the programming process.

EXAMPLE

A project aimed at fulfilling certain immediate needs, e.g. providing water to a group of individuals in an IDP camp, has an impact on these individuals' right to water as included in the right to an adequate standard of living.

Moreover, regardless of whether the objective is a "rights objective" or not, an RBA requires that rights principles are applied throughout the project process and guide the process – from project development to evaluation. Rights principles such as universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, as well as accountability and rule of law (see page 19) should be integrated into the way in which the project is carried out.

11 The manual uses IOM's definitions of the common programming terminology thus: "**Result** is a measurable change, that is, the consequence of a means-ends relationship; The **objective** is the highest broad, realistic goal to which the project can contribute. It seeks to align to a broader, longer-term strategy, whether internal or external; The **outcome** is the intended change in institutional performance, individual or group behaviour or attitudes, or the political, economic, or social position of the beneficiaries; An **output** is the intended change in the skills or abilities of the beneficiaries, or the availability of new products or services as a result of project activities. They are the acquisition of a new service, skill or product as a direct result of the project." (see IOM Project handbook).

12 UNDP *Indicators for Human Rights-based Approaches to Development in UNDP Programming: A Users' Guide*, p. 12. (2006).

INTEGRATING RIGHTS PRINCIPLES INTO MIGRATION PROJECTS

In the Common Understanding to Rights-based Approach to Development Cooperation, the United Nations identified six rights principles that should guide all programmes. The RBA requires that the migration programming process abides by and is guided by these principles. The rights principles elucidated in the Common Understanding are outlined in the box below.

1. **Universality and inalienability**. Human rights are universal and inalienable, which means that all people are entitled to them and they are inherent to the dignity of every person. No one can voluntarily give up their rights nor can others take them away. This is clearly articulated in Article 1 of the Universal Declaration of Human Rights, which states: "All human beings are born free and equal in dignity and rights".

2. **Indivisibility**. Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights, and cannot be ranked, a priori, in a hierarchical order.

3. **Interdependence and interrelatedness**. The realization of one right often depends, wholly or in part, upon the realization of others. For instance, realization of the right to health may depend, in certain circumstances, on realization of the right to education or of the right to information.

4. **Equality and non-discrimination**. All individuals are equal as human beings and by virtue of the inherent dignity of each person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies.

5. **Participation and inclusion**. All people are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized.

6. **Accountability, transparency and rule of law**. States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.

It is critical to consider incorporating some or all of these principles to ensure that both the process and results are emphasized in programming, that service delivery is equitable, participation is inclusive, and that it strengthens the accountability of all actors involved in programming. These principles also ensure that programming is empowering, meaning that the abilities of rights-holders to claim and exercise their rights are enhanced.

RIGHTS-BASED APPROACH AS A TOOL FOR ADVOCACY

One of the benefits of using a rights-based approach to programming is that it can serve as an effective advocacy tool for migrants' rights. The extent to which one can advocate for rights will very much depend on the specific context and situation in which the project is to be implemented as well as the capacity and motivation of the stakeholders involved. There are several ways in which IOM can engage in advocacy, for example:

» Work with governments and other duty-bearers to promote compliance with international standards. The activities which fall under this category include the promotion and assistance in legislative reform and change in policy as well as the provision of expertise and technical assistance on strengthening the implementation of existing laws in order to increase the protection of the rights of migrants. The success and impact of this kind of advocacy will depend on several factors, including:

- *The political will* - Before engaging in advocacy it will be necessary to make an assessment of the relevant governments' position on the issues at stake. Some governments may be unwilling to deal with migrants' rights-related issues because they are considered controversial or politically sensitive. In some situations advocacy may be much more problematic than in others, for instance where a government is overtly resistant to the concepts of human rights or where they are openly denying the rights of a certain part of the population (e.g. non-nationals). While these governments may be difficult or even impossible to work with, others may leave more room for negotiation, in which case it is essential to use advocacy strategically to promote a rights-based approach. In some situations it may be a good idea to focus on one specific right, e.g. the right to health, as an entry point and later expand to the general rights situation of migrants.

- *Contextual problems* - In many situations, there is a political will and a commitment to rights within the government but other factors impede the realization of these rights. Examples include alleged limited resources or extreme poverty in the country, conflicts or natural disasters, or generally weak governance. In such situations, it is important to focus the advocacy on areas where the government may be able to improve the situation rather than focusing on the issues which, due to the particular circumstances, the government is unlikely to be able to change.

- A common argument of many governments is that it is not reasonable to expect them to meet the social and economic rights of non-nationals when they are already too constrained in meeting the needs of their own

nationals due to lack of resources. It is important to note that States can apply legitimate distinctions as long as they can demonstrate that such distinction pursues a legitimate aim and that the means are proportionate. However ensuring access does not need to be particularly costly – it is not a question of having better services, but of not discriminating in access to already existing services. Another perhaps less "elegant" argument is that if a State does not want to guarantee access to these rights to non-nationals, then they can admittedly restrict the access to entering/residence on their territory. This is something they usually would not benefit from, considering how migrants usually improve States' economies and labour markets.

» Other advocacy efforts can involve the duty-bearers and the rights-holders, for example activities to make migrants aware of their rights and help them claim these rights in a legitimate way. In order to do this, it is first important to examine if there are any factors which might constrain the enabling environment for rights-holders e.g. individuals, communities and civil society groups, etc. In some cases it might be necessary to carry out advocacy efforts for an enabling the environment directed at the duty-bearers before engaging the rights-holders.

» It is also necessary to examine and identify any other international, regional, or local actors that could serve as useful partners in any advocacy activity, such as UN agencies that may be present in the area or within the same UNCT as IOM, NGOs, national human rights institutions, and civil society groups. Engaging in effective dialogue and building partnerships with other relevant actors is critical in any sort of advocacy effort and especially where States' rule of law is compromised.

Obstacles and challenges

Advocating for rights will not only be a matter of providing technical assistance and expertise to duty-bearers and rights-holders but it often also involves long negations and consensus-building with challenging governments. Depending on the context, there are various ways to address the obstacles that may come up, for example:

» Strategies for advocating for an RBA, particularly in challenging situations:

- Remember to always respect and be sensitive to the geo-political context and cultural differences. In situations where the local culture seems to be in conflict with human rights try to involve traditional and religious local leaders in a constructive dialogue and possible partnership in advocacy.

- Emphasize the importance of national ownership in a rights-based approach and the importance of participation and inclusion of all stakeholders involved.
- Explain that respecting, protecting, and fulfilling rights will increase States' legitimacy and credibility in the international community.
- Remind governments that they have signed up to international and regional treaties with the intention to incorporate rights in their national legal framework.
- Emphasize capacity-building and promote the efforts as assistance to the governments in meeting their international and regional obligations.
- Assure governments that even in challenging situations, such as during violent conflicts, there are always ways to improve the rights situation (e.g. by ensuring transparency, accountability and rule of law).

In situations where even mentioning "rights" is sensitive, try to promote the benefits of using a rights-based approach such as sustainability and national ownership. If possible, also try to make reference to the rights enshrined in the national constitution and the domestic laws in place. In some cases it may also be necessary to use different words to make statements less sensitive, for example, refer to international "commitments" instead of "obligations". However, although a "rights-language" can be avoided in certain situations it is essential to remember the importance of talking about "rights" and "obligations". Although the subject may be sensitive, it is important to make governments understand that they have committed themselves to such obligations by ratifying instruments and complying with these standards. It is also important to be patient and understand that change takes time and requires progressive work with duty-bearers.

KEY POINTS

This manual is intended to be useful for everyone working for or in collaboration with IOM.

- There are many benefits with using a rights-based approach, the main ones being that it strengthens the capacities of both rights-holders and duty-bearers to enjoy and uphold rights, and that it places those rights at the centre of any migration-related activity.
- A rights-based approach can function as a powerful and effective advocacy tool when working with governments. Dealing with weak or reluctant governments may require different methods of advocacy and one might have to use more diplomatic language which emphasizes national ownership, legitimacy, sustainability, etc.
- The rights-based approach analyses a problem by identifying the enjoyment of rights and obligations involved rather than the immediate needs that should be fulfilled.
- A rights-based approach to programming requires thinking about how the project can respect and further the realization of rights as well as incorporating rights principles into the process of programming.

KEY WORDS AND TERMINOLOGY

- *Project*: A project can be defined as an activity or set of activities designed to produce a specified set of deliverables within a specified time frame and budget.
- *Programme*: A programme is a set of related projects that are managed and coordinated by one management structure with the aim of achieving higher-level results than projects could achieve on their own.
- *Rights-based approach*: A conceptual framework and methodological tool for developing policies and practices, as well as for projects and that integrate the rights, norms and standards derived from international law as well as rights principles.
- *Rights-holders*: Individuals or groups entitled to rights under international law.
- *Duty-bearers*: State or non-State actors (e.g. international organizations) with obligations towards rights-holders; actors that are responsible for respecting, protecting and fulfilling the rights of rights-holders.
- *Rights principles*: The Common Understanding to HRBA to Development Cooperation identifies some rights principles which should guide all programming in all phases of the process. These are: Universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, along with accountability and rule of law.

Module 2:
Practical guide to a rights-based approach

This module provides practical guidance on how to incorporate a rights-based approach into migration programming. By following the structure of the IOM Project Handbook, this section of the manual provides guidance on where in the project cycle it is essential to consider rights, to explicitly include reference to rights, and to measure the implementation of rights. It will also explain the RBA through practical examples.

OBJECTIVE

After reading this module, you will be able to:

- Give examples of how to incorporate rights principles into the process of programming;
- Explain how to operationalize the rights-based approach throughout the whole project cycle: Situation Assessment and Analysis, Design and Planning, Implementation, Monitoring and Evaluation;
- Use the various practical tools (provided in the annexes) to facilitate a rights-based approach;
- Develop results matrices that are rights-based and know how to make result matrices more explicitly rights-based;
- Understand the difference between rights indicators and RBA indicators.

INFORMATION

In order to facilitate and keep track of how a rights-based approach is incorporated throughout the project cycle, please use the Checklist tool in Annex V.

APPLICATION OF THE RIGHTS PRINCIPLES TO THE PROCESS OF PROGRAMMING

It is worth noting at the outset that for an RBA to programming, it is important to focus both on the result of the programming i.e. *what* is being achieved as well as on the process of the programming i.e. *how* the programme is carried out. In order for the process to be rights-based, the programming must be guided by rights principles throughout the whole project cycle. The following are examples of the application of rights principles into the work of IOM.

Universality, equality, and non-discrimination

Programmatically, incorporating this principle does not mean that IOM cannot focus on specific groups of migrants e.g. children, or certain nationalities or ethnic groups for certain projects. On the contrary, by focusing on groups who are particularly excluded, marginalized, or exposed to certain vulnerability inducing factors, etc., IOM can work towards the realization of relevant rights for everyone. In addition, all programming must be carried out in a way that avoids both indirect and direct discrimination and is additionally sensitive to culture, religion and gender. This may require IOM to target migrant and host populations.

> All people, everywhere in the world, and irrespective of race, colour, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic, are holders of human rights.

Indivisibility and Interrelatedness

Programmatically this means that IOM projects should consider the enjoyment of all rights (civil and political, economic, social, and cultural, as well as those deriving from other branches of IML as explained previously) of migrants in a State or region even though some rights may be of more relevance for specific projects. By doing so, the analysis of situations and strategic responses to migration issues becomes more holistic and comprehensive. Moreover, it is important that a project does not focus on the realization of some rights at the expense of other rights. For example, a project aimed at protecting the right to life of a victim of trafficking (VoT) should not have a negative effect on the VoT's right to liberty.

> All rights are to be regarded as equally important as well as inseparable, and that the realization of one right often depends on the realization of another one. For example, the realization of the right to health may depend on the realization of the right to, inter alia, information, food, education, and equal treatment, etc.

Participation and Inclusion

Some suggestions on how to incorporate this principle include:

- Integrate broad participation during the assessment and information gathering by contacting and speaking with as many different groups of directly and indirectly affected individuals (e.g. women, disabled persons, different religious or ethnic groups, rural populations, migrants, etc.) and civil society organizations as possible.
- Encourage the participation of a variety of stakeholders, particularly the beneficiary target group, in the design of the project in such a way that the participatory process helps address the issue directly. When stakeholders, including beneficiaries, are able to examine problems together, agree on the causes, and develop means to solve the consequences, they are more likely to support the implementation of actions to resolve issues.

> All stakeholders should participate to various extents throughout a project cycle. This requires that both rights-holders and duty-bearers are included in decision making processes and consulted at all stages of IOM projects including the assessment, design, implementation, and monitoring of the project, wherever possible.

Accountability, Rule of Law and Transparency

As a duty-bearer, IOM must be accountable to its beneficiaries by ensuring that their rights are respected, protected and fulfilled throughout its programming. All information about the project, its implementation and results should be disseminated in a way that maintains transparency and respect for the decision-making process of the project.

> All actors involved, including duty-bearers, are answerable for the observance of human rights and must comply with international rights standards. Accountability can function on different levels. For example, States are accountable to individuals on their territory and intergovernmental organizations are accountable not only to individuals but also to the communities in which they work.

INFORMATION

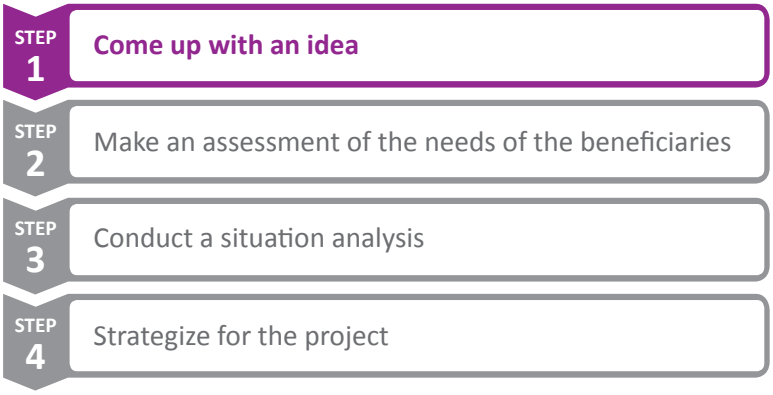
In order to make it easy for IOM staff and in particular for Project Managers, this manual provides a Monitoring Tool which is strongly recommended to be used throughout the project cycle from the situation assessment, planning and design and implementation, to check and record that the project applies an RBA to its process. You can find the tool in Annex IV.

Rights-based approach in the various programming stages

1. SITUATION ASSESSMENT AND ANALYSIS

This part builds upon the conceptualization phase of the IOM Project Handbook. It will show how project developers can integrate migrants' rights issues at an early stage and start thinking about how to incorporate rights principles into the programming processes. The objective is that all IOM projects will be able to integrate a rights-based approach regardless of whether the project has an objective explicitly related to rights.[13]

Suggested steps of the Situation Assessment and Analysis



Step 1: Come up with an idea - Review of Situation and Documents

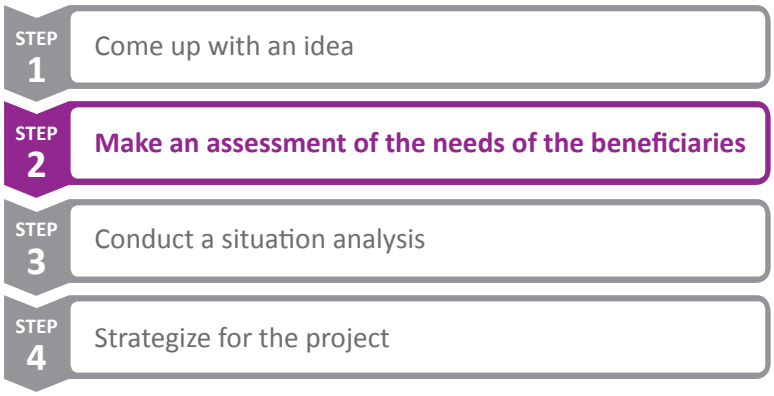
The IOM Project Handbook list a number of situations and documents that may give rise to ideas for new projects. In addition to these, there are other situations or documents that can trigger ideas to rights-related projects.

13 For projects and programmes falling under the MCOF sectors of humanitarian assistance, the situation assessment and analysis should also be guided by the Protection mainstreaming - situation and vulnerability analysis tool.

EXAMPLE

Ideas may arise from the following:

- Issues relating to the implementation of international standards concerning migrants' rights have been raised by any of the UN human rights mechanisms, (e.g. the Universal Periodic Review) or by the UN treaty-bodies (e.g. The Committee on Migrant Workers, the Human Rights Committee, etc.) regarding a particular country or region.
- Concerns relating to migrants' rights have been raised by other relevant international or regional actors such as the Special Rapporteur on the human rights of migrants, the Committee of Experts at ILO, or international NGOs (e.g. Human Rights Watch, Amnesty International or other actors such as the International Catholic Migration Commission (ICMC), Caritas.
- Civil society, grassroots groups, or local NGOs have raised concerns or approached IOM for assistance in setting up a project that addresses specific rights of migrants or specific groups of migrants.
- New national, regional, or international legislation has been developed or is being developed and the State may benefit from a project in order to bring national legislation in line with international standards.
- There is a gap in national legislation or its implementation concerning the protection of migrants or of a specific vulnerable group that includes migrants or mobile populations and the State may benefit from a project aimed at guiding it to take steps to address this gap.
- New ideas following an evaluation of a previous project.



Step 2: Make an assessment of the needs of the beneficiaries

When assessing the potential for the success of the project idea, one of the factors is the needs of beneficiaries. When identifying beneficiaries it is important to try to consider everyone who will be affected by the project and to adequately assess their needs to make sure that the project is as relevant as possible. Needs are almost always related to corresponding right(s). For example, the need of shelter relates to the right to housing and its components and the need to be evacuated is directly linked to the right to leave any country including one's own, and the right to life, etc.

Identifying direct and indirect beneficiaries

Direct beneficiaries are those individuals or entities (can be counted individually) who benefit or receive support that can be attributed to the activities and/or results of the project.

Indirect beneficiaries are those individuals or entities who have no direct contact with the project but who are impacted by the activities and/or results of the project.

When identifying beneficiaries, and whether the project addresses their needs, make sure to consider everyone, to the extent possible, who will be affected by the project – both directly and indirectly. Beneficiaries are the individuals, groups or organizations that benefit from the project. So, as an example, although a project on border management may directly benefit border management officials, it may also have a positive impact on individuals and communities crossing the border even though these individuals are not the primary target group of the project. In any event, a project must not have an adverse impact on the rights of those individuals and communities.

Needs Assessment

» Participatory information-gathering
Involve and consult all beneficiaries, direct and indirect, early on. This means that information should not only be collected from government officials or those who work with international organizations but it should also come from civil society organizations (CSOs), individual migrants and/or migrant communities. Also be sure that you involve beneficiaries who are representative of the target population and can provide diverse perspectives.

If possible, it is highly recommended to gather as many types of information as possible from multiple sources to be able to analyse both the immediate and underlying challenges which can be addressed by the project. For instance, to go back to the example above, if the primary beneficiaries are border management officials, it may also be appropriate to consult other stakeholders such as NGOs or migrant groups to examine the needs of these groups and to see whether these needs are linked to the project. If the need of the border management officials is to strengthen their capacity to control borders, there might also be a need to strengthen the protection of human rights of the migrants who cross the border and this would not necessarily be revealed unless a participatory assessment is carried out.

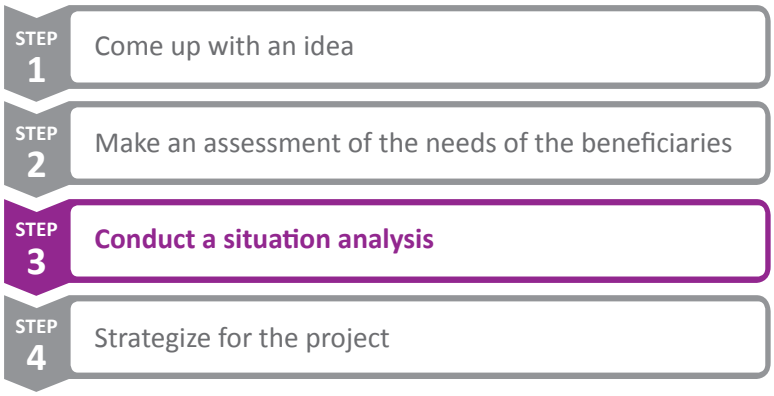
» Non-discriminatory information gathering
When carrying out a needs assessment, data should be appropriately disaggregated preferably on the most common grounds of discrimination recognized in international law e.g. sex, race, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth, or other status. This can reveal which groups are at most risk of having their rights violated and should thus be prioritized.

» Importance of data protection
Throughout the needs assessment process, it is fundamental that all personal data of the beneficiaries is collected, received, used, transferred, and stored in accordance with IN/138: IOM Data Protection Principles[14] and respect the rules surrounding data protection.

INFORMATION

To help make a general situation assessment of the country, this manual provides a Situation Assessment Tool in Annex I.

14 For more guidance on IOM's principles on data protection, see MA/88: IOM Data Protection Guidelines.



Step 3: Conduct a situation analysis

After the beneficiaries and their needs have been identified, it will be time to start analysing the situation from a rights perspective which will later help to identify who should be involved in the project in order for it to be successful.

Stakeholder Analysis

» Identify stakeholders
When performing a stakeholder analysis it is imperative to start by identifying the duty-bearers and rights-holders.

- *Who are rights-holders and duty-bearers?*

  Rights-holders are all individuals, irrespective of their nationality or status.

  - Every individual is a rights-holder and is entitled to all fundamental rights without discrimination.
  - Certain groups can also be rights-holders. For example, for women ensuring that women's right to health entails that appropriate services in connection with sexual and reproductive health must be available.[15] Similarly, children have the right to special protection and assistance provided by the State if they have been temporarily or permanently deprived of their family environment.[16]

  Duty-bearers are State or non-State actors with corresponding obligations towards rights-holders[17] as well as actors that are responsible for respecting, protecting and fulfilling the rights of rights-holders.

15 Article 12(2) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).
16 Article 20(1) Convention on the Rights of the Child (CRC) (1989).
17 While States are the primary duty-bearers, international organizations also play an important role in upholding human rights particularly in conflict situations or disasters in which non-State actors are responsible for protecting rights under international humanitarian law.

States are the primary duty-bearers

- Through their agents (e.g. officials, including law enforcement, border guards, etc.);
- When they privatize the delivery of certain services that may impact upon the enjoyment of human rights e.g. privately run detention centres.[18]

Other non-State actors such as International Organizations, NGOs, and, depending on the project, private individuals (employers, recruiters, etc.)[19] may also be duty-bearers and should never act in a way that is in contrary to international standards.

» Identify the rights of the rights-holders and the corresponding obligations of the duty-bearers relevant to the specific situation.

For any project, it will be essential at an early stage to identify the rights and obligations at stake for several reasons:

- To see what rights and obligations are pertinent to the situation that is being analysed.
- To assess if the situation could be improved if the realization of the rights and the fulfillment of the obligations were strengthened.
- To determine if it is feasible that a potential project could address one or several of the rights and obligations involved.

INFORMATION

To identify the relevant rights and obligations is not an easy task and in many situations, they are not entirely obvious. In order to learn more about IML and rights and obligations, please consult Part 3 of this manual. However, if you have any questions please contact the IML Unit (iml@iom.int) for guidance and advice.

» Assess the level of Stakeholder Involvement
From an RBA perspective, determining the extent of stakeholder involvement will be important for various reasons:

- To make sure that the stakeholders with the greatest influence (positive and negative) on the respect, protection, and fulfilment of rights are involved to the fullest extent possible.

18 OHCHR, *Guiding Principles on Business and Human Rights* (2011) (See principle 5: "States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.")

19 Private individuals are not directly accountable under e.g. human rights law but for certain projects they could still be seen as duty-bearers. For example, if an IOM project is implemented together with employers or recruiters, these individuals would still be duty-bearers under national law.

- Always make sure to include rights-holders. For some projects the involvement of rights-holders could be very high (level 5 (self-mobilization)[20]) but for others it may be sufficient to include them only in consultations (level 321).
- Make every effort to include local CSOs, NGOs, or grassroots groups including community and/or religious leaders when relevant. Again, the level of involvement will depend on the type of the project, but their involvement enhances the level of participation as well as the transparency of the project. Involving these groups early on can also help to tailor the project to best address the rights issues in question.

Problem Analysis

Problem analysis involves identifying the core problem underlying the needs of all stakeholders involved. Please refer to the discussion on the Problem Tree in the IOM Project Handbook.

KEY POINTS

For a rights-based approach, there are two key points that have to be considered:

» Identify the rights which are at stake and determine whether the relevant issue affecting migrants or other stakeholders stems from the fact that these rights are not being respected, protected, or fulfilled by the duty-bearers.

» Identify why the rights are not being respected, protected, or fulfilled. Is it because international instruments have not been ratified? Are administrative barriers present? Do migrants not know how to exercise their rights? Are certain groups being discriminated against? In order to analyse the reasons, please use the tool developed in Annex II.

Keep in mind that you should also identify if there is a certain group of stakeholders who experience more difficulties than other groups such as irregular migrants, women, VoTs, unaccompanied children, etc.

INFORMATION

In order to carry out a problem analysis, please use the Problem Analysis Tool provided in Annex II.

20 Refer to the IOM Project Handbook.
21 Ibid.

STEP 1 Come up with an idea

STEP 2 Make an assessment of the needs of the beneficiaries

STEP 3 Conduct a situation analysis

STEP 4 **Strategize for the project**

Step 4: Strategize for the project

After a situation assessment has been carried out and both rights and obligations have been identified, it is time to set priorities and strategize for the project. For most IOM projects, there are ways to integrate rights concerns regardless of whether the actual objective of the project is explicitly linked to rights or not.

No matter the situation, strategizing from the outset to ensure that the rights of rights-holders are not negatively affected by the implementation of the project is important. All staff during development and implementation should consider the potential positive and negative impacts their projects will have on the rights-holders and the ways in which a potential negative impact of the project can be avoided. Above all, no IOM project should, at any point or in any way, result in a violation of any right.

EXAMPLE

When working on a project in Assisted Voluntary Return and Reintegration, it is important that the return is voluntary and that the return does not put the returnee at any risk of having his or her rights violated. For example, it is vital to never return someone to a place where he or she is at risk of torture, degrading or inhumane treatment, or enforced disappearance, etc. as this would be a clear violation the principle of non-refoulement,[22] or to return a child to a location where this would go against his or her best interest. Similarly, this would also apply to a situation where there would be an indirect risk of non-refoulement such as when an individual is returned to a State which in turn may violate the principles of non-refoulement. Additionally, the project implementer has to set up the mechanisms reviewing each particular case. For instance, to decide if health conditions of a returning migrant allow him/her to return at a given time.

22 For more information on the principle of non-refoulement, please see pages 88 and 104.

In order to fully incorporate an RBA, it will be important to think about which strategies are most effective for improving the situation and for furthering the realization of rights. In some situations it will be necessary to deal with symptoms of a problem and provide direct services to States or rights-holders, rather than dealing with underlying root causes. In other situations it may be more appropriate and effective to promote accountability and the rule of law, advocate for legislative changes, or empower migrants to advocate for their own rights.

» Set rights-based priorities
Some criteria for selecting priority areas for the project may include:

- Any gaps between international standards and national law and policy relating to migrants' rights.
- Gaps concerning the implementation of national legislation in relation to migrants' rights.
- Issues of concern identified by treaty or charter bodies at the international or regional level, the national ombudsperson or commissions, or CSOs.
- Opportunities to work with partners concerned with the rights of migrants and the State.

» Strategizing interventions
After you have selected opportunities or areas for intervention, develop strategic interventions that further the realization of rights. There are a number of ways that projects can improve the situations of rights-holders and strengthen the capacity of duty-bearers, including through:

- Direct delivery of services;
- Research on the rights of migrants;
- Support and facilitation of cooperation across sectors;
- Information dissemination and awareness-raising;
- Training and education;
- Development of standard operating procedures, improvement of operational mechanisms;
- Advocacy and social mobilization;
- Policy advice or advice on development of legislation.

» Select partners
Choosing the appropriate partners for any collaboration may have a significant impact from an RBA perspective. For example, potential partnerships with other relevant IOs, NGOs, CSOs, national human rights institutions, and

trade unions that prioritize the protection of migrants' rights are highly recommended, where possible. Moreover, as local ownership often fosters empowerment, it is recommended to, where relevant, involve the national and local institutions and groups working on the rights of migrants, particularly as these groups or institutions will be able to monitor and follow up on the outcome of the project after it has ended. Improving the human rights situation in a country or region takes a long time and no individual agency's project or programme will, on its own, realize human rights. It is therefore important to think strategically about which partners to team up with to ensure maximum effectiveness and sustainability of the realization of rights.

KEY POINTS

- Make sure to incorporate the rights principles (universality, equality, non-discrimination, indivisibility and interrelatedness, participation and inclusion, along with accountability and rule of law) into the actual process of programming and use the monitoring tool to keep track of this from the beginning.
- At a minimum, ensure that no rights are violated as a result or consequence of the project.
- Make sure to involve both direct and indirect beneficiaries in the needs assessment to get a greater understanding of what the needs are and how to address them. Consult local NGOs and rights groups. Ensure that beneficiaries involved are representative of the target population groups.
- At an early stage, identify who the rights-holders and duty-bearers are and which rights are at stake. Remember to take a holistic approach.
- As far as possible, try to make sure that the project furthers the realizations of the right(s) at stake.
- When selecting partners, make every effort to involve both rights-holder and duty-bearers and target those with the greatest influence over rights. Also consider involving NGOs or local rights groups.

2. PLANNING AND DESIGN

Throughout the planning phase, as in the Situation Assessment and Analysis phase, it is important to consistently keep rights considerations in mind. It is at this stage that rights considerations are integrated into the actual project design.

EXAMPLE

There are various ways to do this:

- By designing your objective, outcomes, outputs, and activities of the results matrix so that they are explicitly aimed at furthering the realization of rights.
- If the objective of the project is not directly linked to a right, it is possible to include an outcome, output, and indicators that are linked to a specific right or rights.

Keep in mind that it is also important to design the project so that the process of implementation is guided by rights principles e.g. participation, non-discrimination, accountability, etc. See page 28.

This section will provide a practical guidance on what is important to include in your project proposal to ensure an RBA.[23]

KEY POINT

When drafting the project documents, ensure that the appropriate terminology is used. When possible, please make sure to use definitions established in international law. This will strengthen the accuracy of the project and avoid any potential confusion about migration-related terms such as, trafficking, irregular migration, migrant workers, refugees, etc. To find the definitions, consult the IOM Glossary which has been translated into several languages such as French, Russian, Chinese, and Albanian to mention a few. In addition, please feel free to contact the IML Unit for assistance.

23 For projects and programmes falling under the MCOF sectors of humanitarian assistance, the situation assessment and analysis should also be guided by the Protection mainstreaming- project development and endorsement tool.

2.1 What to include in the Project Rationale

After you have gone through the various analyses under Situation Assessment and Analysis, you should have a clear rationale. The following is a rights checklist to consider when drafting the project rationale and description:

	YES	NO
The proposal explicitly identifies the rights and obligations involved in the project.		
The proposal explicitly identifies all key groups of rights-holders and duty-bearers involved in the project (directly or indirectly).		
If applicable, the root causes for why rights are not being respected, protected, and fulfilled are identified in the proposal.		
The proposal states clearly how the project contributes to furthering the realization of rights directly and/or indirectly.		
Any possible negative impact that the project may have on rights is identified in the proposal as well as strategies to avoid and limit any potential negative impact or consequence of the project.		
If applicable, the proposal states how the project will empower the rights-holders.		
If applicable, it is stated clearly in the rationale that the most marginalized and vulnerable groups have been identified and how these groups will be assisted by the project.		
If applicable, the proposal states how the project will build the capacity of duty-bearers to respect, protect, and fulfil rights (e.g. the project requires duty-bearers to harmonize policies and national laws with international law) and additionally clearly describes IOM's supportive role in doing so.		
The project is linked to the adoption or adequate implementation of international or regional instruments setting out rights, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the American Convention on Human Rights (Pact of San José); the European Convention on Human Rights; or the African Charter on Human and Peoples' Rights.		
If applicable, it is stated in the proposal how the project aims to strengthen accountability mechanisms at the national and international levels (e.g. complaints and referral mechanisms, reparation programmes, feedback mechanisms, etc.).		

The proposal indicates how the project builds on the recommendations of treaty-based and charter-based procedures of the United Nations. For example: • Reports of the Committee on the Rights of the Child; • Recommendations of the Special Rapporteur on the human rights of migrants; • Shadow reports by non-governmental organizations to treaty bodies' reports by the UN and UN agencies, including reports from peacekeeping missions.		

2.2 Integrating rights principles into the process

It is possible to plan a project in such a way that it incorporates rights principles into the approach of the project. Even where a project does not have an explicit rights objective or outcome, it is possible to ensure that the project itself is carried out in such a way that it respects, protects, and fulfils the rights of migrants. For example, in the planning and designing process as well as project implementation, particular principles should be incorporated to adhere to a rights-based approach.

Planning and design

» The process of planning and designing the project abides by rights principles.
  - The process of planning and designing is participatory and inclusive all beneficiaries may also directly participate in the decision-making process).
  - The process empowers rights-holders even if they are not directly involved in any decision-making process, e.g. through information sharing, consultations, etc.
  - There is transparency and accountability in the process of planning and design.

» The planning and design process particularly engages excluded and marginalized groups and provides the support they need in order to participate meaningfully.

Implementation

- The project activities empowers rights-holders even if they are not directly involved in any decision-making process, e.g. through information sharing, consultations, etc.
- The project's activities are non-discriminatory.
- The project's activities are implemented in a culturally, religiously and gender-sensitive manner.
- The partners are chosen with rights principles in mind; for example, choose partners that would allow the project to be inclusive, participatory and reach all potential beneficiaries, including marginalized peoples.

INFORMATION

Please make sure that you don't forget to use the Monitoring Tool in Annex IV developed for this manual in order to keep track of how rights principles are integrated in the process of the project.

2.3 How to produce a Results Matrix with an RBA

The results matrix lies at the "heart" of any project and it is the tool which will help you structure all of the ideas, goals and activities into a logical framework that can be monitored and evaluated throughout the lifespan of the project. By building on to existing results matrices, this section will demonstrate how an RBA can be incorporated. The types of projects and results matrices which will be examined below are:

A. Projects and results matrices with objectives, outcomes, or outputs that explicitly refer to rights

B. Projects and results matrices without explicit rights objectives, outcomes, or outputs but which are linked to rights

C. Projects and results matrices where it is possible to simply change the language slightly to make it more explicitly linked to rights

A. In some result matrices it will be obvious that the project takes a rights-based approach because its results are already inclined to address an issue that involves rights and therefore it has an objective, outcomes and outputs which explicitly refer to rights.

Strengthen the Protection of Vulnerable Migrants in Country A

	Indicators	Baseline/Target	Assumptions
Objective To contribute to comprehensive rights-based migration management approaches that address the needs of stranded, vulnerable and irregular migrants in Country A.	# of migrants in Country A experience whose rights are better protected by the respective governments (disaggregated by age, sex, migration status and nationality and/or other status).		
Outcome The governmental counterparts in the country take steps to adopt a rights-based approach to migration management.	Country A starts accession to the relevant international instruments. New migration policy is adopted and is in line with international standards as verified by an expert.		
Output 1 The relevant governmental counterparts have the knowledge about international standards surrounding the rights of migrants.	# of governmental counterparts trained on the international standards surrounding the rights of migrants. % of participants passing the test by the end of the course.		
Output 2 A comprehensive review of the current legal framework surrounding migration is available to the governmental counterparts.	Report on legislation review of current legal framework surrounding migrants is published and disseminated. % of governmental counterparts who have read the legislation review report.		

In this project, rights have been clearly incorporated already at the objective level and then streamlined down through the outcome and output levels. This will be a possibility for many projects and it is definitely encouraged to think of the opportunity to make the objective explicitly rights-based when possible.

B. Many projects may not have an explicit rights objective. However, because they are linked to a right it is important to include results linked to a right to ensure an RBA mainstreaming approach and to be able to assess an RBA impact during monitoring and evaluation.

Building the Capacities of the Government to Manage Health and Migration: Country B

	Indicators	Baseline/ Target	Assumptions
Objective To improve and strengthen the linkages between migration management and public health in Country B.	The government takes a leading role in improving health issues related to migration. Government shows political will to address main migration and health issues.		
Outcome 1 ***	***		
Output 1.1 ***	***		
Outcome 2 The Government of Country B is committed to strengthen the protection of the right to health of migrants.	The Government makes reference to the access to health care for all migrants (inc. irregular) in its legislation/policies/ regulation/guidelines. Percentage increase in migrants who access health care in Country B.		
Output 2.1 The Government of Country B is familiar with the international standards surrounding the right to health of migrants.	# of governmental counterparts trained on the international standards surrounding the right to health of migrants. % of participants passing the test by the end of the course.		

Output 2.2 Study made available on the issues and recommendations in relation to migrants' right to health in the targeted country.	The availability of a study mapping the main issues and recommendations in relation to migrants' right to health in the targeted country.		
	# of migrants consulted during the development of the study (disaggregated by age, sex, migration status and nationality and/or other status).		

For this project a rights-based outcome and two outputs have been added to the results matrix to involve the duty-bearers directly in the project and thus, strengthen their capacities in relation to their obligations under international standards. In addition, an indicator (see in orange) that measures the actual RBA of the programming has been added. In this example, the indicator measures the level of participation as well as potential discrimination by using appropriately disaggregated data.

INFORMATION

For more information, see section on RBA indicators on page 58.

For other projects it might be sufficient to at least add an output that is rights-based.

Assistance Project for Resettlement of Migrants and Refugees from Country C

	Indicators	Baseline/ Target	Assumptions
Objective To create favourable conditions for the sustainable departure, travel, and integration of migrants.	Number of migrants and refugees assisted		
Outcome Increased capability of family reunion and resettlement cases to establish themselves in new countries.	% of beneficiaries who feel that they are equipped to be successful in countries where they are resettled		
Output 1 Beneficiaries receive safe and dignified departure and travel services.	% of beneficiaries satisfied with services provided (survey)		

Output 2 Beneficiaries are aware of their rights in the new countries and are informed of where they can seek assistance to claim those rights/or in case of violation of their rights.	% of the beneficiaries having received a pamphlet informing migrants about their rights and where to seek assistance in the new countries. % of beneficiaries who say they are aware of their rights and know where they can seek assistance.		

This project, which is very much focused on the direct beneficiaries (those being resettled) has an added RBA output which aims at empowering the rights-holders.

Some projects could potentially be RBA but because no reference is being made to rights it is not apparent.

Capacity-Building for the Government on Labour Migration Management in Country D

	Indicators	Baseline/Target	Assumptions
Objective To contribute to the strengthening of the Ministry of Labour's (MoL) capacity to develop and manage effective labour migration programmes.	% of cases when MoL is consulted on migration management discussions # of evidence-based recommendations put forward by the MoL	Baseline measurement: 0 Target: 85% Baseline measurement: 0 Target: 10	

In this project it is clear that there is an opportunity to involve duty-bearers and discuss rights and international standards as it directly involves duty-bearers (Ministry of Labour) and the programmes set up by them. As the results matrix looks now, it is not obvious that the project will strengthen the protection of rights, although international standards will most likely be part of the discussion in practice. But, by changing the language slightly, it can be more apparent that this project is rights-based. The revised matrix could look like the example on next page:

Capacity-Building for the Government on Rights-based Labour Migration Management in Country D

	Indicators	Baseline/Target	Assumptions
Objective To contribute to the strengthening of the Ministry of Labour's (MoL) capacity to develop and manage labour migration programmes in accordance with international standards.	% of cases when MoL is consulted on migration management discussions # of evidence-based recommendations put forward by the MoL in accordance with international standards	Baseline measurement: 0 Target: 85% Baseline measurement: 0 Target: 10	

C. In many projects there is a link to rights but it is not obvious and by just changing the language slightly it can be more explicitly rights-based.

Emergency Assistance to Irregular Migrants Returning from Country A to Country B

	Indicator	Baseline/Target	Assumptions
Outcome Returning migrants receive life-saving humanitarian assistance in targeted provinces at entry points, transit centres and in host communities.	# of people in need of protection that are referred to protection services # of vulnerable migrants who benefit from return assistance	Baseline: n/a Target: 5,000 Baseline: n/a Target: 10,000	

This project is clearly aimed at protecting the rights of returning migrants but by changing the wording, this could be even more explicit and thus effective. The revised outcome statement could read as follows:

Emergency Assistance to Irregular Migrants Returning from Country A to Country B

	Indicator	Baseline/Target	Assumptions
Outcome The rights to life, adequate standard of living, and health of returning migrants are protected by providing life-saving humanitarian assistance in targeted provinces at entry points, transit centres and in host communities.	# of people in need of protection that are referred to protection services # of vulnerable migrants who benefit from return assistance	Baseline: n/a Target: 5,000 Baseline: n/a Target: 10,000	

2.4 Indicators

Regardless of whether the project is taking a rights-based approach or not, a good results matrix is not complete without measurable and appropriate indicators. This section will not go into detail about how to develop a good indicator as this is covered in the Project Handbook. Instead, this section will look into how to choose indicators that correctly measure the realization of rights as well as indicators that measure the rights-based approach of the project.

KEYPOINT

Disaggregation of data: For most of IOM projects it is recommended to disaggregate by at least age and sex but also migration status and nationality and/or other relevant status.

2.4.1 Rights indicators

What are rights indicators?

A (human) rights indicator is "specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights."[24]

24 OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, p. 16.

Right indicators are important for several reasons, the first and most obvious reason being that it allows us to measure and monitor compliance with rights obligations. Rights indicators are also likely to strengthen the accountability of States and encourage compliance with rights standards and obligations. By developing indicators and measuring systematically the rights of rights-holders or evaluating the success of duty-bearers of upholding the rights of rights-holding individuals, duty-bearers will be more likely to acknowledge failures and successes in upholding the rights of individuals. Another benefit of rights indicators is that they are anchored in the international legal and normative framework, and directly linked to rights. This means that rights indicators make it easier to set specific goals, provide specific measurements, and evaluate the outcome.

What are the sources for rights indicators?

According to the United Nations Development Programme (UNDP) there are three existing approaches to measure rights:

1. As they are laid out in national and international legal documents (rights in principle).
2. As they are enjoyed by individuals and groups in States (rights in practice).
3. Through the generation of official statistics that may not have been devised originally to measure rights, but that nevertheless may serve as important proxy indicators related to rights protection (official statistics).[25]

1. Rights in Principle

In principle, measuring and developing indicators for rights is easy as most of the source data is well known, publicly available, relatively easy to codify into quantitative data, and are arguably the most objective.[26] The source data collected for these indicators can facilitate comparisons, and more importantly, helps in the assessment of a State's commitment to the realization of rights. As many States have not ratified all human rights treaties or other relevant international instruments, a comparison of the various ratified treaties and provisions can provide a useful baseline assessment of a particular State's commitment to different rights. However, it is important to also look at the reservations, if any, made by the State, to make sure that the State recognizes the right and its purpose. Similarly, some States have

25 UNDP, *Indicators for Human Rights-based Approaches to Development in UNDP Programming: A Users Guide* (2006).
26 Ibid. at p. 7.

exception clauses in their national constitutions that allow them to derogate from their obligations to protect certain rights, under certain circumstances or conditions.[27]

2. Rights in Practice

Whilst measuring the State's commitment to rights might be easy, measuring the extent to which these rights are actually enjoyed and exercised by individuals in practice requires a bit more work and it may be necessary to look into various sources of data in order to get a more accurate overview of the situation.

Events-based data include reports produced by governmental and non-governmental organizations, international and domestic ones such as: the United States Department of State's annual Trafficking in Persons Report or Amnesty's annual reports on human rights practices around the world, the Human Rights Watch Reports, as well as other national reports on human rights practices, information collected by media, and reports by international human rights monitoring mechanisms such as the Treaty Bodies (e.g. the Human Rights Committee, the Committee on Migrant Workers) and Special Procedures, such as the Special Rapporteur on the human rights of migrants. This type of data is beneficial as it often uses common definitions based on the human rights framework, which allows for more concrete data which can be linked to specific rights. However, a negative aspect of this type of data is that the accuracy and quality may depend on who produced the report. For example, if parts of the data are based on reports from the State itself, it may underestimate the incidents of human rights violation.[28]

Data based on expert judgements is data generated through combined assessments of a human rights situation with the help of a limited number of informed experts including the media, government reports and reports from NGOs, advocacy groups, academic researchers, social scientists, and managers who are asked to evaluate specific human rights situations in States.[29] It is important to be aware that this form of data is judgement-based and needs to be translated into quantitative data through coding.

27 Ibid.
28 Op. cit. OHCHR, at p. 56.
29 Ibid. at p. 66.

A benefit from using this type of data is that it is easy to collect quickly, however it can also be argued that it is not sufficiently reliable as it is subjective and based on a limited number of opinions.[30]

Survey-based data, as suggested by the name, is data collected by asking a series of standard questions to samples of the population in the State. This information can be both quantitative and qualitative in its form but it will always be based on perceptions, experiences and opinions and thus be of a subjective nature. This type of data allows for an opportunity to examine the populations' views and opinions on the Government and its policies in relation to rights which, in turn, can strengthen the accountability of States towards individuals on their territory.[31] Nevertheless, as with other subjective forms of data, surveys do not always produce reliable indicators for monitoring human rights, and as they usually only involve parts of the population, they may not be considered as adequately representative.[32]

3. Official Statistics

Official statistics are collected by official agencies at national and subnational level based on standardized (international or national) definitions and methodologies.[33] Official statistics often refer to aggregated data sets and indicators based on objective quantitative or qualitative information related to certain rights. To collect this type of information, there are some commonly used sources such as: administrative data (e.g. civil registration systems, national populations systems, and other administrative records), statistical surveys on certain parts of the population, or censuses which are directed at all members of the population. In States where the available resources and capacities exist, official statistics can be a good source of information for indicators. However, as often raised by the treaty-bodies and other monitoring bodies, States commonly struggle with collecting data relevant for measuring human rights. A second problem when the information is recorded and provided for by States is that the information may not always be accurate, reliable and reflect the reality of a situation. It is, thus, recommended to consult any relevant "shadow" reports[34] produced by non-State actors if available.

30 Ibid. at p. 67.
31 Ibid. at p. 65.
32 Ibid.
33 Op. cit. UNDP at p. 8.
34 Shadow reports are a method for NGOs to supplement or showcase new information alongside the mandatory government reports that State parties are required to submit under relevant treaties.

How to use rights indicators in IOM programming?

Rights indicators will be used in projects where the objective, outcome, or output is linked to a specific right or set of rights. The indicators will be applied to measure the enjoyment of the right or rights before the project during the situation assessment, during the implementation, and by the end or after the end of the project to see if the project has successfully contributed to the realization of rights through its implementation.

For the monitoring, it will be essential to include rights indicators explicitly in the results matrix and assign them with a baseline and target. By doing this, the indicators will serve two purposes:

- Tools for the **situation monitoring** as they are measuring the situation in which the project is implemented
- Tools for **performance monitoring** as they are explicitly anchored in the matrix and thus directly linked to the result of the project

Example 1 – Rights in principle:

Objective	**Indicators**	**Baseline/Target**
The project will strengthen the protection of migrant workers in State X.	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is ratified.	Baseline: N/A Target: Yes

This indicator is a simple and straight-forward indicator that measures Rights in principle and it will be easy to find out whether the country has ratified a specific instrument or not. In case the State has already ratified the relevant instrument, there may be a need to measure to what extent the instrument has been incorporated into domestic legislation.

Example 2 – Rights in principle:

Objective	**Indicators**	**Baseline/Target**
The project will strengthen the protection of migrant workers in State X.	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is incorporated into national legislation.	Baseline: Ratified but not incorporated into national legislation. Target: Incorporated into national legislation.

In contrast to the first example, this indicator requires a bit more research as you will need to look into the national legislation as well as the actual content of the instrument. If there is sufficient time, it is recommended to do so as it can be very beneficial to familiarize yourself with the national legislation and it can also provide an opportunity for advocacy and/or to strengthen the capacity of the State. During this assessment it may be useful to look into the Concluding Observations adopted by relevant treaty body on the State as well as the State report submitted to the Committee. You can also always contact the IML Unit and we can carry out a legislation review of the current legal framework and provide recommendations.

Although these types of indicators are very important and useful, it is important to keep in mind that these sorts of changes in national legislation take a long time and will fall outside the control of the project. Therefore, it is only recommended to use these specific types of rights-indicators for objectives and outcomes.

Indicators for measuring rights in practice require slightly more work but will be essential in order to fully grasp the rights situation. These indicators are diverse, they can be quantitative or qualitative, focused on duty-bearers or rights-holders, but they will all try to measure some aspects of how international standards are implemented at a national level.

Rights in practice:

	Indicators	Baseline/Target
Outcome Migrant workers are seeking legal assistance when their labour rights have been violated.	% of cases concerning labour-related claims brought by migrant workers that have been adjudicated within 12 months after the project. % of migrant workers who indicate that they are comfortable seeking assistance from the State regarding violations of their labour rights (data disaggregated by age, sex, migration status). (See section on survey-based data on page 55.)	Baseline: 0 Target: 60% Baseline: 5% Target: 50%
Output Labour inspectors are sensitized to the protection of migrant workers.	# of labour inspectors trained on identification and reporting of labour exploitation. % of trained labour inspectors who have a better understanding of migrant workers' rights under international law after the training (50 asked).	Baseline: 0 Target: 50 Baseline: NA Target: 75%

These are all examples of indicators that are measuring the process of rights in principle as well as the performance of the project. The two first indicators are targeting the perception and change in the rights-holders while the last indicators measures the change and perception of the duty bearers.

INFORMATION

For more examples of rights indicators, please consult Annex III which provides examples for various migration issues.

2.4.2 RBA Indicators

Whilst rights indicators measure the situation of rights and/or the result of a project with a rights-based objective or outcome, RBA indicators measure the extent to which rights principles, most often participation, equality and non-discrimination, and accountability, have been applied to the process of programming for each stage of the project. These indicators will thus be useful for most types of projects regardless of whether or not the objective or outcome is rights-based and they will also be relevant for evaluating a project.

Where will these indicators go?

Just as with the rights indicators, the RBA indicators will be anchored in the result matrix and they will usually be linked to other indicators.

Non-discrimination

By disaggregating the indicator based on the relevant and common grounds of discrimination, the indicator can help avoid, detect, and monitor any potential discrimination against certain groups.

	Indicators	Baseline/Target
Objective To facilitate the Demobilization, Disarmament and Reintegration (DDR) of 500 former combatants into their host communities.	% of former combatants identified that are successfully reintegrated into host communities at project end date (disaggregated by age, sex, ethnic group (subjective) other relevant grounds).	Baseline: 0 Target: 80%

Participation

	Indicators	Baseline/Target
Outcome Humanitarian and protection needs of vulnerable migrants are fully addressed.	% of vulnerable migrants whose humanitarian and protection needs are addressed.	Baseline: 0 Target: 90%
	# of vulnerable female and male migrants who have participated in identifying their humanitarian and protection needs.	Baseline: 0 Target: 40

Example: Accountability

	Indicators	Baseline/Target
Output Increased availability of quality migration health data and evidence through qualitative and quantitative research.	Research on mental health profile of targeted refugees done.	**Baseline:** No **Target:** Yes
	Information about the research and the results distributed among 200 or more of the targeted refugees.	**Baseline:** No **Target:** Yes

Please note that any information sharing must respect the rules surrounding data protection[35] and other rights (right to private life, etc.) of the beneficiaries (in this case the "targeted refugees") must be evidently preserved.

INFORMATION

These are just some examples of what RBA indicators could look like for objectives, outcomes and outputs in various projects. Including specific RBA indicators in the results matrix can definitely be beneficial to the project and makes the project visibly rights-based. Nevertheless, even if it is not feasible to develop rights indicators for the results matrix, it is necessary to keep these in mind and one way of doing this is to use the monitoring tool provided in this manual (please see Annex IV).

35 See *IOM Data Protection Manual* (Geneva, 2010).

What to include in the evaluation section of the Project Proposal?

In addition to what is mentioned it the IOM Project Handbook, it is necessary to indicate if any intended future evaluation will be rights-based. For example, if the rights principles (universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, accountability and rule of law) will be serving as criteria and guidance as well as the general evaluation criteria (relevancy, effectiveness, efficiency, impact and sustainability) (please see section on page 70 for more information).

INFORMATION

For a rights-based evaluation, it is also important to specify that not just the results and progress of achieving the results are evaluated but also the process of how the project has been carried out. The monitoring tool provided in this manual (see Annex IV) can provide useful guidance for these purposes and in case it is used this should also be mentioned in the evaluation box.

KEYPOINTS

- Make sure to use the appropriate terminology when developing the project proposal and please consult the IML Glossary or the IML Unit in case you are unsure about which definitions to use.
- Make sure that, to the extent possible, both rights-holders and duty-bearers are considered and consulted throughout the process of planning and design.
- The process of planning and designing for the project should be guided by rights principles, e.g. participation, non-discrimination, and accountability. It will also be necessary to design the project in such a way that the implementation will adhere to these principles as well.
- Many of IOM's projects may not have explicit rights-based objectives but will most often relate to one or several rights. In order to make this more visible it is often possible to add an outcome or output that is rights-based or sometimes just changing the language will make the approach more apparent.
- When choosing indicators, it is suggested to develop ones that measure both rights in principles and rights in practice.
- If possible, please use RBA indicators that also measure how rights principles have been incorporated into the actual process of the programming. If this is not possible, all projects should still be able to use the monitoring tool (see Annex IV).

3. IMPLEMENTATION

As during the previous stages, at the implementation stage it is important to ensure that the principles and standards based on rights are consistently being respected throughout the project cycle. To ensure that the implementation is carried out appropriately from an RBA perspective, it is essential that the project must have been designed accordingly (please see section on page 46) and ensure that the various rights-based activities, outputs, outcomes and objectives are effectively implemented.

Some of the questions to ask during the implementation stage to make sure that the process is guided by rights are:

Participation

- How are the various stakeholders participating during the implementation of the project?
- Is the implementation of the project empowering all key groups of rights-holders to claim their rights?
- Is the implementation of the project strengthening the capacity of the duty-bearers to fulfil their obligations?
- Do the stakeholders require any additional assistance to participate meaningfully during the implementation of the project?
- Are particularly excluded groups able to participate during the implementation of the project? How is this ensured? (e.g. information about the project distributed in various languages).
- Is the project implemented in a gender-sensitive and culturally sensitive manner?

Equality and non-discrimination

- How does the project ensure equality and non-discrimination and inclusiveness?
- Does the project exclude particular groups during the implementation stage? If yes, what will be the mitigation measures?
- Is there a risk that the implementation of the project discriminates against certain groups?

- Is the implementation of the project targeting discrimination against certain groups? If yes, what will be the mitigation measures?
- Is the implementation of the project fostering equality and empowerment of certain groups?

Accountability, transparency, and rule of law

- Does the implementation of the project assist rights-holders to access complaint or redress mechanisms such as courts, tribunals, Ombudspersons, etc.?
- Does the implementation of the project assist duty-bearers to set up any complaint or redress mechanisms?
- How is transparency and accountability ensured throughout the implementation of the project (e.g. distribution of information regarding the project, etc.)?
- Can stakeholders make any formal complaints regarding the implementation of the project?

INFORMATION

Please make sure to use the Monitoring Tool in Annex IV developed for this manual in order to keep track of how rights principles are integrated in the process of the project.

4. MEASURE RIGHTS AND RIGHTS-BASED APPROACH: MONITORING AND EVALUATION

Monitoring and evaluation (M&E) are individually distinct, although closely linked, elements of programming to facilitate results-based management and ensure that projects are carried out as planned. Moreover, M&E provides the opportunity to learn from mistakes and to make informed decisions regarding any potential changes to the project as well as strengthening the accountability and transparency of the project.[36]

This section[37] looks at:

- What to measure when adopting an RBA and how to do so during M&E?
- How to monitor projects with an objective or outcome linked to rights?
- How to monitor and measure the extent to which an RBA has been incorporated into the process of the project?
- How to evaluate using an RBA and how to integrate rights principles into the process of evaluating?

What to measure during the M&E?

An important feature of the M&E from an RBA perspective is that the focus of the measurement is not placed solely on the results of the project but also on the process of the programming and implementation.

Having said that, for an RBA, there is no "magic equation" on what to measure in all projects and it will depend on the type of the project and the resources available. The various elements which should be measured in an RBA can be divided into:

- **Measuring the rights situation**

  If your objective or outcome is directly linked to improving the rights situation it would be necessary to measure the situation before, during and after the project has been implemented in order to assess if the project has been effective and successful in reaching its results. Measuring the rights situation could also be relevant for assessing the impact of the project even if the objective has not been directly linked to a specific right.

36 For projects and programmes falling under the MCOF sectors of humanitarian assistance, the situation assessment and analysis should also be guided by the Protection mainstreaming- project monitoring and evaluation tool.

37 As M&E are complex activities this section does not attempt to provide in-depth guidance on the area. If you seek more thorough information on M&E please see the relevant chapters in the IOM Project Handbook and the *MA/66 IOM Evaluation Guidelines.*

Measuring rights and Advocacy

Monitoring and evaluating the rights situation provides a great basis for advocacy on rights and it can help in strengthening global and national policies and programmes for migrants' rights, through providing unbiased and credible evidence.

» **Measuring the rights-based approach**

An RBA also requires measuring the process of the programming and its adherence to rights principles. These principles can be incorporated into the results matrix and monitored accordingly or they can be measured without being set out in the matrix by using the monitoring tool (see page 66).

4.1 Rights-based Approach in Monitoring

What is rights-based approach to monitoring?

Monitoring is an established practice of internal oversight that provides management with an early indication of progress, or lack thereof, in the achievement of results, in both operational and financial activities.[38] Generally speaking, there are two types of monitoring which differ depending on the type of project that is being implemented:

The first type is referred to as "situation monitoring" and it measures the broader conditions and changes of a situation before, during, and at the end of the project. This type of monitoring will be relevant for projects which have an objective or outcome directly linked to furthering the realization of rights. For example:

	Indicators	Baseline/Target
Objective The project will strengthen the protection of the rights of migrant workers in Country X.	% of migrant workers who have brought employment related complaints in front of a formal mechanism.	Baseline: 5% Target: 65%
	% of claims that have been heard within 36 months after the end of the project.	Baseline: N/A Target: 50%

38 See *The IOM Project Handbook*.

Outcome 1 Domestic legislation is better in line with international standards surrounding the protection of migrant workers.	National legislation in line with international standards.	Baseline: N/A Target: Yes

Based on the abovementioned example, in order to monitor the progress made in relation to this objective and outcome it will be necessary to measure the situation before, during, and after the implementation of the project.

The second and more common type used by IOM staff is referred to as "performance monitoring" which measures progress in achieving specific results in relation to the results matrix. From a rights-based approach, monitoring the process to achieve results is not different from "regular" monitoring. However, as the RBA requires that the approach is also applied to the process of programming this should also be monitored. For certain projects, the logical framework will anchor its RBA to the process explicitly.

	Indicators	Baseline/Target
Outcome 2 Migrant workers feel more confident in seeking justice in front of a formal complaint mechanism regarding employment violations.	% of migrant workers asked who feel that the formal complaints mechanism treat their case fairly. # of migrant workers consulted on the main challenges faced in court/tribunal by migrant workers. (Participation).	Baseline: 12% Target: 70% Baseline: 0 Target: 40
Output Migrant workers know where to seek assistance in case their labour rights are violated.	% of migrant workers who are aware of where to seek assistance in case their labour rights are violated. (Disaggregated on age, sex, migration status, nationality, etc.) (Accountability, non-discrimination). # of CSOs and local migrant groups involved in distributing the information to migrant workers. (Transparency, Inclusion of marginalized groups).	Baseline: 17% Target: 77% Baseline: 0 Target: 15

Providing indicators that makes the incorporation of the RBA in the process visible and measurable is strongly encouraged where possible as it demonstrates a commitment to a fully rights-based programming. However, for some projects this will not be feasible so in order to make sure that all projects in IOM can monitor the RBA of the process, regardless of whether the objective or outcome is linked to a right, a monitoring tool has been developed for this purpose.

4.1.1 Monitoring tool

What is the monitoring tool?

In order to make sure that IOM staff will be able to incorporate and monitor the extent to which the project has incorporated an RBA into the actual process. This manual provides a simple tool, which will help the project manager keep track of the project's achievements. This tool is found in Annex IV.

The monitoring tool is a self-check tool that is easy to use and the idea is that the project manager or other core project staff starts to use it already during the Situation Assessment and Analysis phase to make sure that the RBA has been incorporated from the beginning. The monitoring tool includes various statements covering rights principles such as non-discrimination, participation, transparency, etc. For each one of these statements, the project manager will tick the box "yes" or "no" depending on if the statement is accurate. If the project manager ticks "yes" it will then be important to explain "how" the particular principle has been incorporated. If the project manager ticks "no" there is an option to explain why or mention if it will be addressed. It will be up to the project manager to decide on how much to elaborate on each statement and whether or not any evidence or data should be provided. However, for future reports and evaluations, it will be easier if you try to elaborate a bit more and provide some data or other forms of evidence.

Why should we use this tool?

This tool is not intended to only be used for projects with a rights-based objective or outcome but it is for the benefit of all projects. Even if the project does not touch upon any particular rights, the monitoring tool provides an opportunity for all IOM projects to incorporate, to the extent possible, an RBA to the process of the project. It also provides the opportunity to demonstrate, internally and externally, to what extent an RBA has been incorporated into the project which can be useful for donor reports or evaluations. It is also the only tool that allows the project manager to demonstrate that an RBA is applied to the actual process of the programming as this is usually not anchored in the logical framework. In addition, the monitoring tool supports and is complementary to other institutional Results-based Management tools that are being developed.

Human Rights Principles (*Universality, Participation, Non-Discrimination, Interrelatedness, Transparency and Accountability*)	**During Situation Assessment**	**During Planning and Design**	**During Implementation**
All marginalized and groups at risk have been identified and consulted.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
All stakeholders have been able to participate freely and meaningfully (e.g. CSOs, NGOs, etc.).	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
All data is disaggregated appropriately e.g. by sex, age and applicable prohibited grounds of discrimination or other relevant grounds.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
Steps have been taken to avoid, detect and address any potential discrimination.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
The project has taken steps to identify potential negative effects and/or conflicting right(s) for certain groups/individuals and taken steps to mitigate these effects.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?

4.2 RBA to Evaluations

What is a rights-based approach to evaluations?

In contrast to monitoring which is a continuous process, evaluations are in-depth assessments selectively undertaken at specific stages during the project cycle ex-ante, mid-term, final, and ex-post.[39]

> An evaluation that neglects or omits consideration of [human rights] deprives the UN system of evidence about who benefits (and does not) from its interventions, risks perpetuating discriminatory structure and practices where interventions do not follow UN policy in these areas, and may miss opportunities for demonstrating how effective interventions are carried out.[40]
>
> *United Nations Evaluation Group (2011)*

The same statement can be made in relation to evaluation of IOM projects.[41] It will be easier to carry out an RBA evaluation where the project has already incorporated an RBA throughout the project cycle; nevertheless it is important to try to assess rights issues in the evaluation also for those projects which do not have a rights-based objective or outcome. For example, even if the objective is not to further the realization of a specific right, it may be necessary to evaluate the impact that the project has had on specific rights. A second purpose of the evaluation may be to measure the RBA in the process, i.e. the project's adherence to rights principles, inter alia, participation, accountability, non-discrimination, etc. and evaluate how these principles have been incorporated into the process of the project. This may be possible even if rights issues have not been considered during the design, implementation and monitoring of the project.

39 *MA/66 IOM Evaluation Guidelines*.
40 UNEG *Integrating Human Rights and Gender Equality in Evaluation – Towards UNEG Guidance*, p. 14 (2011).
41 IOM is a member of UNEG.

Preparing the terms of reference (ToR)

Already at the stage of preparing the ToR for the evaluation it is important to consider rights. In addition to the information provided in the IOM Evaluation Guidelines there are certain things one can include in the ToR for an RBA evaluation:

» Participation
Ensure that all of the stakeholders are identified and involved throughout the evaluation and explicitly mention this in the ToR. Stakeholder participation will, in turn, strengthen accountability.

» Participation, inclusion and non-discrimination
Identify in the ToR if the stakeholders are to be consulted together or separately. If consulted together, identify if this can have any implications on some groups who may not feel free to express their views and opinions. If consulted separately, ensure that all groups are treated equally and that their opinions are weighted fairly.

» Disaggregation of data
Avoid treating people as a uniform group (e.g. beneficiaries), but recognize clearly that different groups are affected by an intervention in different ways e.g. depending on sex, race, ethnic group, age, disabilities, income level, sexual orientation, and religious beliefs.[42]

How to incorporate rights into the general evaluation criteria?

For most evaluations there are certain criteria that are used generally as objectives for the evaluation. These are: relevance, effectiveness, efficiency, impact, and sustainability.[43] Although these criteria are rights neutral, it is important to try to consider rights for each one of these objectives. The following table includes some suggestions from the United Nations Evaluation Group (UNEG) on how to integrate rights for each of these criteria:[44]

42 Ibid. at p. 22.
43 See also *The IOM Project Handbook* (Providing additional information on each criterion).
44 Op. cit. UNEG manual at, pp. 26–27.

Criteria	Integrating rights
Relevance	Assessing the rights relevance of a project entails examining how the intervention is designed and implemented to align and contribute to rights, as defined by international and regional conventions; national policies and strategies; and the needs of rights-holders and duty-bearers, both women and men, targeted by an intervention). Results of the intervention should also be relevant to the realization of rights. Some examples of areas to assess include the: » Extent to which the project is aligned with international instruments (e.g. ICCPR, ICESCR, ICRMW, CRC, CEDAW), standards and principles on rights and contributes to their implementation; » Extent to which the project is aligned with and contributes to regional conventions and national policies and strategies on rights; » Extent to which the project is informed by substantive and tailored human rights and gender analyses that identify underlying causes and barriers to enjoying rights; » Extent to which the project is informed by needs and interests of diverse groups of stakeholders through in-depth consultation; » Relevance of stakeholder participation in the project.
Effectiveness	Analysis of a project's effectiveness involves assessing the way in which results were defined, monitored and achieved (or not) on rights and that the processes that led to these results were aligned with rights principles (e.g. participation, non-discrimination, accountability, etc.). In cases where rights results were not stated explicitly in the planning document or results framework, assessing effectiveness in terms of rights is still possible and necessary as projects or programmes will have some effect on rights and should aim to contribute to their realization. In any event, for any project, the analysis should include the extent to which a rights-based approach was incorporated in the design and implementation of the intervention.
Efficiency	The rights dimension of efficiency requires a broader analysis of the benefits and related costs of integrating rights in programming. A key aspect that needs to be considered is that rights involve long-term and complex change processes that require sustained support. While a direct relationship between resource investment and long-term results should be carefully established, the assessment of efficiency should also consider short-term process achievements (participation and inclusiveness, etc.) and medium-term results (developing an enabling environment, building capacity, etc.). Some aspects to consider include the: » Provision of adequate resources for integrating rights in the project as an investment in short-term, medium-term and long-term benefits; » Extent to which the allocation of resources to targeted groups takes into account the need to prioritize those most marginalized.

Impact	Positive impact on rights can be defined as the actual and long-lasting realization and enjoyment of rights by rights-holders and capacity of duty-bearers to respect, protect and fulfill human rights. Impact can be positive or negative, intended or unintended, as well as primary or secondary. For projects that are not primarily focused on rights, it can help detect if the project is reinforcing existing discrimination and power structures that are contrary to human rights. Some aspects that should be considered in such an assessment include: » Whether rights-holders have been able to enjoy their rights and duty-bearers have the ability to comply with their obligations, whether there is no change in both groups, or whether both are more, or on the contrary less able to do so; » Empowerment of targeted groups and influence outside of the intervention's targeted group; » Unintended effects on any groups that were not adequately considered in the intervention design (e.g. migrant belonging to a broader group within which they were not considered as a specific group); » Effective accountability mechanisms operating on rights.
Sustainability	To assess the sustainability of results and impacts on rights, the extent to which a project has advanced key factors that need to be in place for the long-term realization of rights should be studied. Some examples include: » Developing an enabling or adaptable environment for real change on rights; » Institutional change conducive to systematically addressing rights concerns; » Permanent and real attitudinal and behavioral change conducive to rights; » Establishment of accountability and oversight systems between rights-holders and duty-bearers; » Capacity development of targeted rights-holders (to demand) and duty-bearers (to fulfill) rights.

Evaluating the RBA of the process

For a comprehensive evaluation it is not only important to evaluate the result and the impact of a project but also the process and to what extent it has been aligned with the rights principles. This means that an evaluator will look for evidence of how for example, participation, non-discrimination and accountability have been considered throughout the project. Some projects actively look to rights principles to guide the process and will be able to show how they have been incorporated from the beginning to the end. Other projects may adopt a less evident approach and choose to consider rights principles only to make sure that the process is not contrary to rights principles, but will apply them actively throughout the process. The type of evidence of how the rights principles have guided the project will of course depend on the type of project and at what point of the project cycle the evaluation is conducted. However, it is often a good indicator to look if data is disaggregated and on what levels. It may also be useful to look at what sort of consultation and participations have been held during the project and see which stakeholders have been invited to these. For example, if the project has mainly held consultations with the Government but not with NGOs, CSOs, or a broad enough range of individuals or groups of individuals affected by the project, the rights principle of participation has maybe not been considered and applied. If the monitoring tool has been used regularly, it will be easier for the evaluation to be conducted and it will also demonstrate a willingness of the project team to actively use the rights principles.

Who should be involved during the evaluation?

In order to get an accurate overview of a project, its result, impact, success, and how its rights principles have been incorporated, etc., it is essential to get information from all the various stakeholders. Who exactly these stakeholders are will of course depend on the project but it is important that not only those who have a bigger and more active role during the implementation are consulted but also those who may not be part during the implementation but who still have an interest in the project and its impact. Some of the stakeholders that the evaluator may wish to consult during this stage are:

» Duty-bearers
- Government authorities, institutions, officials, funding agencies (decision-makers);
- Programme managers, partners (individual and organizations), staff members (responsibility for the project);
- Private sector, employers, other actors within the context of the intervention (secondary duty-bearers).

» Rights-holders
  - Rights-holders who one way or another benefit from the project: women, men, girls, boys; other groups disaggregated;
  - Rights-holders who are potentially negatively affected by the project: women, men, girls, boys; other groups disaggregated;
  - Other development agencies working in the area, civil society organizations, other organizations and NGOs (other interest groups).[45]

Remember to also incorporate rights principles into the M&E process!

The following are some questions which can be asked during the M&E in order to ensure an RBA of the process:

Participation

» How have the various stakeholders (including both rights-holders and duty-bearers) been involved in planning and designing the monitoring and evaluation of the project?

» Are other individuals or groups, such as local civil society groups or NGOs, involved?

» How have the various stakeholders been involved in determining what type of data should be collected and consulted as to the methodology of collecting the data?

» Are all key groups, particularly the most marginalized groups of rights-holders, involved in the M&E process?

Equality and non-discrimination

» Is the M&E process explicitly designed to detect or measure discrimination against particular groups?

» How does the M&E detect forms of discriminatory practices that may occur during the implementation of the project?

» Is the data collected appropriately disaggregated, e.g. by age, disability, displacement, ethnicity, sex, nationality, migration status, etc. in order to track any gaps in project outputs and outcomes?

45 Op. cit. UNEG manual, at p. 23.

Accountability, transparency, and rule of law

- Are the M&E processes directly linked to any rights e.g. measuring the realization of specific rights?
- Do the M&E processes account for any form of complaint mechanisms and how are complaints received during the M&E dealt with?
- Are the findings from the M&E shared publicly in a transparent manner?
- Are the findings from the M&E used to promote changes in law or policy of the State?

KEYPOINTS

- Depending on the type of project and its objective it must be decided from the beginning what should be measured for the monitoring and/or evaluation. Is it important to measure the rights situation, for example if the objective or outcome is directly linked to improving the rights situation? Should the extent to which the RBA has been incorporated be measured? This last measurement of the RBA in the process will be feasible for most projects.
- Please try to use the Monitoring Tool provided in Annex IV from the beginning of the project. Not only will this help you keep track of how rights principles have guided the project but it will also be very useful for evaluations and donor reports.
- Regardless of whether an internal or external evaluation is carried out, please insist, when feasible, that the evaluation looks at the rights aspect of the project both in terms of the result of the project but in any event (for every project) the process (i.e. application of the rights principles.
- When carrying out an evaluation, to the extent possible and where relevant, please use the recommended guidelines from UNEG on how to integrate rights into the general evaluation criteria such as: relevance, effectiveness, efficiency, impact, and sustainability.
- Make sure to consult all the various stakeholders during the evaluation including both duty-bearers and rights-holders.
- Ensure that the process of both monitoring and evaluation is guided by the rights principles.

Module 3:
Basics of International Migration Law

OBJECTIVE

After reading this module, you will be able to:

- Explain what the various branches of International Migration Law are;
- Identify the key principles and rights in relation to these branches of law;
- Understand the role of the regional frameworks and their main instruments.

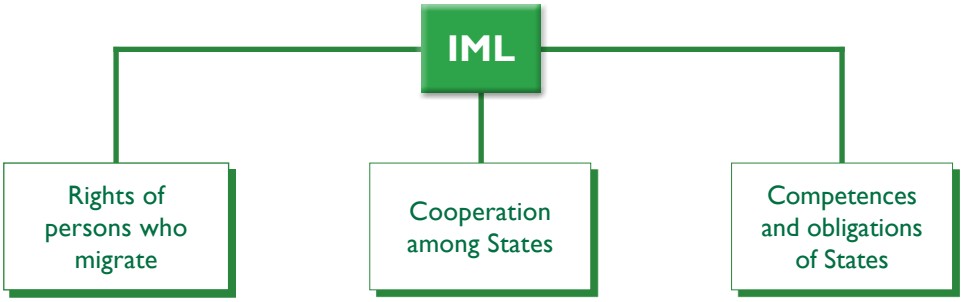
This part of the manual is intended to provide an introduction to international migration law and an overview of the key branches, standards and instruments surrounding migration. It serves as an easy point of reference for IOM staff when incorporating international standards and principles into the projects but please do not hesitate to contact the IML Unit (iml@iom.int) if further guidance and advice is needed.

What is International Migration Law?

Historically, the legislation related to migration has fallen entirely under State sovereignty, and to a great extent "migration" is still very much an issue that States regulate as they see fit. It is very much up to States to determine rules on entry and stay of non-nationals on their territory – apart from certain people who have specific protection needs. However, historically, international norms and standards did not generally "infringe" upon absolute State sovereignty apart from very few exceptions. However, International Law has developed significantly over the past 100 years or so. It is now accepted that the international community sets international standards which States must follow in their dealings with individuals, including migrants, in their jurisdiction or on their territory. This is very clear in relation to Human Rights Law, International Humanitarian Law, as well as International Labour Law. Transnational Criminal Law also sets up standards for cooperation as well as legislative criteria influencing national systems. This all has a direct impact on migration, migrants, and the parameters for how States exercise their sovereignty in relation to migration matters as they have to conform to international standards. Furthermore, as migration movements have changed in scale and pattern, the need for further cooperation among States to manage global and regional migration became apparent. Based on cooperation, international law sets up a basis for better global, regional, and bilateral migration governance. This development has evolved rapidly over the last couple of decades and continues to develop along with the ongoing need for cooperation and the demand for legal guidance on the matter.

> International Migration Law [...] serves the function of piecing together various aspects of international law governing all facets of migration, ensuring international coherence of norms rooted in, and borrowed from, branches of international law as diverse as human rights, [transnational] criminal law, humanitarian law and so on.
>
> *(ed. By B. Opeskin, R. Perruchoud, J. Redpath-Cross (2012) Foundations of International Migration Law, Cambridge University Press)*

As reflected in the aforementioned quote, international migration law (IML) is the international legal framework governing migration and is derived from various sources of public international law. It can be described as consisting of two main elements, described below, and linked with a third which covers the law promoting cooperation among States.[46] To illustrate these components:



Rather than a branch consisting of a set of migration specific legal instruments, IML is an umbrella term used to describe the body of laws, principles, and norms that together regulate the international rights and obligations of States related to migrants.

46 B. Opeskin, R. Perruchoud, J. Redpath-Cross, *Foundations of International Migration Law*, p. 6. Cambridge University Press (2012).

What are the sources of IML?

The two sources of international law that are considered as primary sources for IML are treaty law and customary international law.

» Treaty law
Law codified in written agreements among States, also known as “covenants”, “conventions”, “charters”, “protocols”, “statutes”, etc. They can vary in their formation as multilateral or bilateral, universal or regional agreements. For a treaty to be binding on a State, certain requirements need to be fulfilled:

- The State must formally agree to become a party to the treaty through its ratification or other accepted forms of expressing its consent to be bound.[47]
- The treaty must have been entered into force in order for it to be binding upon all States that have ratified it or adhered to it in any other accepted form.

» Customary international law
The second important source of IML is derived from international custom, recognized by the International Court of Justice statute as "evidence of a general practice accepted as law."[48] A custom must have two elements – an objective element of a general practice and a subjective element of an acceptance of that practice as law – to become part of customary international law. The objective element requires consideration of States’ conduct, also referred to as State practice. This practice should be sufficiently widespread and uniform across States to be able to form a norm. It is possible to deduce State practice from the relevant State’s position on certain matters, in treaties, resolutions, agreements or statements before international enforcement mechanisms, etc.[49] In addition, practice at the national level, such as legislation, policies, and court decisions, is also relevant to determine the existence of a customary norm at the international level. The subjective element, the *opinio juris*, looks at how the State perceives and explains its own behaviour.[50] There can be several reasons for why a State acts in a certain way, such as humanitarian or political reasons. But in order to satisfy the second element, a State must have acted in a certain way because it believed that it was legally required to do so.

47 See Art. 11. Vienna Convention on the Law of Treaties (1969).
48 Ibid. at Article 38(1)(b).
49 V. Chetail “Sources of international migration law” in *Foundations of International Migration Law*, p. 36 (2012).
50 M. Shaw *International Law*, 4th ed., p. 66. Cambridge University Press, (1997).

These two elements must be considered in tandem because the State in question must have acted under the belief that such practice was legally obligatory in order for that practice to be rendered part of international customary law.

KEY POINT

There are certain peremptory norms, known as jus cogens, which are considered to be so fundamental to the international community that they are binding on all States and are non-derogable under any circumstance. Some examples of jus cogens norms include the prohibition of genocide, slavery and torture.

In addition to the above mentioned sources, there are other sources of international law which are important for IML such as general principles of law (principles common to the major legal systems in the world[51]), international and regional jurisprudence, as well as soft law instruments (guiding non-binding instruments).

KEY POINT

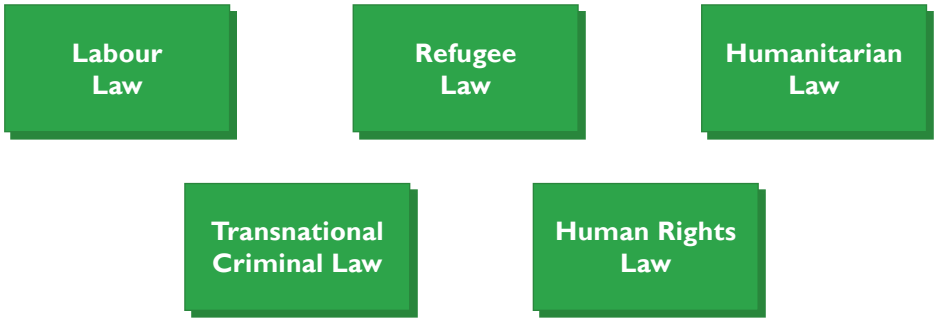
Generally, a treaty or a convention is considered hard law, or binding only upon those States that are a party to it and, thus, these States are required to accept the obligations arising out of the treaty. Declarations and resolutions are considered soft law, which provide further guidance on specific norms but are not legally binding upon States. Therefore, a violation of a treaty is a violation of public international law, whereas acting against provisions included in a soft law instrument would not necessarily implicate a State's international liability. However, it should be noted that resolutions and declarations frequently indicate emerging or existing hard law and therefore, should never be considered as legally superfluous.

51 Op. cit. Chetail, at p. 82.

As already explained, IML is an umbrella term which covers the body of law relevant to migration and depending on the context, borrows principles from several branches of international public law such as:

- Human Rights Law
- Labour Law
- Humanitarian Law
- Trade Law
- Law of the Sea
- Aviation Law
- Transnational and International Criminal Law
- Consular and Diplomatic Law
- Refugee Law
- Nationality Law

Although familiarity with all of these branches is necessary for an IML practitioner, some branches are more integral to and referenced more often than others in the field. This manual highlights the most important aspects of international public law relevant to an RBA to migration. These branches are:



INTERNATIONAL LABOUR LAW

What is International Labour Law?

International labour law is the branch of international public law that governs the rights and obligations of workers, employers, unions, and governments in the workplace. Although States enjoy wide discretion in regulating migration for labour, there are international standards which should be respected. The agency issuing these standards is the International Labour Organization (ILO) which was established by the UN in 1919 on the principle that "universal and lasting peace can be established only if it is based upon social justice."[52] Already at the time of its founding, the ILO identified migrant workers as a group in need of legal protection by stressing in the preamble the "protection of the interests of workers when employed in countries other than their own."[53]

The main sources of international labour law are found in ILO conventions and recommendations. In recent years, case law interpreting this body of law has been established by bodies appointed to oversee the implementation of labour standards. Bilateral treaties also supplement regulations on admission and work conditions of nationals of contracting countries employed in another country. Additionally, the UN human rights treaties and regional conventions also deal with labour matters either directly or from a human rights perspective.

What is ILO?

The ILO is the UN specialized agency dedicated to the promotion of social justice and internationally recognized human and labour rights through the promulgation and oversight of international labour standards. It is the only UN agency with a tripartite structure. This structure brings together representatives of governments, employers and workers to create policies and programmes promoting decent work for all. The labour standards are issued as either conventions, which are legally binding international treaties that may be ratified by Member States, or recommendations, which serve as non-binding guidelines. To date, 189 conventions and 202 recommendations have been adopted on various subjects related to labour. Among these instruments, eight conventions are considered fundamental to the ILO:

52 International Labour Organization, *ILO Constitution*, (1919).
53 Ibid.

- C029 - Forced Labour Convention, 1930
- C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948
- C098 - Right to Organise and Collective Bargaining Convention, 1949
- C100 - Equal Remuneration Convention, 1951
- C105 - Abolition of Forced Labour Convention, 1957
- C111 - Discrimination (Employment and Occupation) Convention, 1958
- C138 - Minimum Age Convention, 1973
- C182 - Worst Forms of Child Labour Convention, 1999

Most States have ratified one or more of these core conventions.

Who does International Labour Law apply to?

International labour law applies to ratifying State parties to the conventions as well as to workers, employers, and unions operating in those countries. In addition, the eight core ILO conventions have been deemed so fundamental to the organization that all Member States are bound by a declaration adopted in 1998 to respect and promote the embodied four categories of principles and rights, whether or not Member States ratified the relevant Conventions. These categories address:

- Freedom of association and the effective recognition of the right to collective bargaining;
- Elimination of forced or compulsory labour;
- Abolition of child labour and;
- Elimination of discrimination in respect of employment and occupation.

How does International Labour Law apply to migrants?

While none of the core ILO conventions specifically address the issue of labour migration, the preamble of the Declaration states that "[…]these rights are universal, and that they apply to all people in all States - regardless of the level of economic development […] ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers."

Moreover, the need for protecting the rights of migrant workers was already recognized when the ILO was created and the constitution of the Organization includes the need to protect the rights of those "working in a country other than their own".[54]

Although most of the ILO conventions are of general application, meaning that they are applicable to all workers including migrants, two instruments have been specifically crafted to address labour migration and the protection of migrant workers. The ILO promulgated two such treaties with accompanying recommendations:

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

Other conventions, although not explicitly addressing migrant workers, will be just as important for the protection of their rights, e.g.:

- Labour Inspection Convention, 1947 (No. 81)
- Maternity Protection Convention (Revised), 1952 (No. 103)
- Workers' Housing Recommendation, 1961 (No. 115)
- Employment Policy Convention, 1964 (No. 122)
- Occupational Safety and Health Recommendation, 1981 (No. 155)
- Termination of Employment Convention, 1982 (No. 158)
- Indigenous and Tribal Peoples Convention, 1989 (No. 169)
- Private Employment Agencies Convention, 1997 (No. 181)
- Domestic Workers Convention, 2011 (No. 189)

54 Ibid.

In addition, the Committee of Experts, which is one of the supervisory bodies of the ILO, has specifically included the concerns of migrant workers in monitoring the implementation of a wide array of international labour standards. The ILO has devised various means of supervising the domestic application of relevant international labour instruments in law and practice. Its system is comprised of two kinds of supervisory mechanisms: The regular system of supervision consisting of a system of examination undertaken by two ILO bodies: (1) the Committee of Experts on the Application of Conventions and Recommendations (CEACR); and (2) the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations. Additionally, there are three special procedures based on the submission of a representation or a complaint: (1) the procedure for representations on the application of ratified Conventions; (2) the procedure for complaints over the application of ratified Conventions; and (3) the special procedure for complaints regarding freedom of association (Freedom of Association Committee). If there are any problems in the application of standards, the ILO seeks to assist countries through social dialogue and technical assistance.

REFUGEE LAW

What is Refugee Law?

Refugee law refers to the body of international legal instruments and international customary law that establish the protection from the international community for individuals who have crossed an international border and are at risk or are victims of persecution in their country of origin. It identifies refugees in need of international protection and the rights to which they are entitled.

What are the sources of Refugee Law?

There are several instruments, international and regional, which contain refugee-specific provisions, however, the primary instruments governing the refugee law principles are:

- Convention relating to the Status of Refugees, 1951
- Protocol relating to the Status of Refugees, 1967[55]

55 The 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope geographically and temporally so that it applies after 1951 and outside of Europe.

Who is a refugee under refugee law?

Article 1(A)(2) of the Refugee Convention defines a refugee as someone who:

KEY POINT

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The definition can be split up into different elements:

» A well-founded fear of persecution for reasons of:

- Race
- Religion
- Nationality
- Membership of a particular social group[56]
- Political opinion

» Additionally, a well-founded fear of persecution can be established if:

- The person is outside his or her country of nationality or not having a nationality (stateless) and being outside the country of his or her former habitual residence, and owing to such fear is unable or, unwilling to avail himself or herself to the protection of that country.

Other Relevant Definitions

It is important to note that other definitions of refugees exist within various other conventions. For instance, in the OAU Convention[57] governing the specific aspects of refugee problems in Africa, the term refugee is defined as follows under Article 1(2):

56 Please note that this term "particular social group" is not defined in the Convention and has been interpreted differently in various jurisdictions. Some jurisdictions have included e.g. sexual orientation, disability, girls at risk of female genital mutilation, etc., under this term.

57 Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") (1969).

KEY POINT

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This definition of the term refugee is broader in scope than the one found in the Convention relating to the Status of Refugees, 1951.

Who is not considered a refugee under the 1951 Convention?

Except for those who do not fall within the definition of the 1951 Convention because they do not meet the criteria, there are other individuals who will not be afforded protection under the convention:

- Those already receiving United Nations protection or assistance;
- Those who are not considered to be in need of international protection because they enjoy the same rights as nationals although they are not formally recognized as nationals of the relevant State;
- Those who are not considered to be deserving of international protection because they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime prior to admission, or any acts contrary to the principles of the UN.[58]

The refugee status and the right to international protection will cease to apply for those who regain the national protection of another country, most commonly their country of origin. International protection may also cease with a fundamental and enduring change in the circumstances that gave rise to a refugee's well-founded fear.[59]

58 See article 1, paras. D, E and F.
59 Article 1(C) of the 1951 Convention Relating to the Status of Refugees (1951).

Examples of important rights under Refugee Law

Refugees are entitled to all rights recognized in Articles 12 through 30 of the Refugee Convention. Under the Convention, these rights can be described as a system of gradations of treatment based on a State's legal recognition of their presence and stay. Some of the refugee rights are also provided by other international human rights law instruments. Where fear of persecution or threat to life or safety arises in the context of an armed conflict, refugee law also intersects with international humanitarian law to safeguard refugees' basic human rights. Two of the most essential rights for refugees and asylum-seekers are:

» **Non-refoulement**

The prohibition of the forcible return of a refugee, including rejection at the border, to his or her country of origin is known as the principle of non-refoulement and forms the cornerstone of international protection.[60] Article 33(1) of the 1951 Convention obliges States not to refoule, or return, a refugee to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The principle applies both to return to the country of origin as well as removal to any other country where a person has reason to fear persecution related to one or more grounds recognized under the Convention or faces the risk of being returned to the country of origin. The principle of non-refoulement is also reflected in the human rights framework[61] and although most States have ratified the 1951 Convention and the 1967 Protocol, it has been argued that non-refoulement is part of customary law and, thus, binding on all States.[62]

INFORMATION

The principle of non-refoulement is not only protected under Refugee Law. Please also see the section on non-refoulement under Human Rights Law on page 104.

60 Ibid. at Article 33.

61 See, Art. 7 of the International Covenant on Civil and Political Rights (ICCPR) (1966), Art. 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) (1984), Art. 16 of the International Convention for the Protection of All Persons from Forced Disappearances (2006), Art. 3 of the European Convention on Human Rights (ECHR) (1950), and Art 22(8) of the American Convention on Human Rights (ACHR) (1969).

62 UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (31 January 1994).

» **Non-penalization of irregular entry**

Although States are not generally obligated under international law to grant asylum, Article 31(1) of the Refugee Convention stipulates that refugees should not be penalised for their illegal entry or stay as long as they present themselves to the authorities without delay and show good cause for their illegal entry or stay. The prohibition on penalties includes depriving asylum-seekers or refugees of their liberty for the mere reason of having entered or stayed illegally. Accordingly, the act of entering a country for the purposes of seeking asylum should also not be considered an unlawful act.

INFORMATION

For more information on the principle on non-refoulement, please see IML's information note on the topic.[63]

INTERNATIONAL HUMANITARIAN LAW

What is International Humanitarian Law?

Both international humanitarian law (IHL) and international human rights law (IHRL) strive to protect the lives, health and dignity of individuals, albeit from a different angle.

International humanitarian law (IHL) (also known as the law of war or *jus in bello*) is the branch of law which applies during armed conflicts, both international and non-international, with the aim to protect the persons not participating in the conflict and their property as well as to restrict certain methods and means of warfare. IHL only applies during the time of an armed conflict and therefore, it neither covers isolated acts of violence nor does it regulate when a State can use force or judge the justness of its cause. IHL sets out the principles and rules governing the conduct of hostilities, which aims at alleviating the worst suffering. Under IHL, no derogation is permitted.

Whereas human rights law is the "general" legal framework applying to everyone, IHL applies to those involved in conflict – either by providing specific protection for those not or no longer actively involved in the hostilities e.g. civilians, prisoners of war, sick or wounded fighters, or by setting up parameters for means

63 International Migration Law Unit (IOM), *Information Note on the Principle of Non-refoulement* (2014).

of warfare protecting those engaged in combat from "excessive" suffering. Thus, the civilian population is protected, including: (a) foreign civilians on the territory of parties to the conflict, notably refugees; (b) civilians in occupied territories; (c) civilian detainees and internees, people deprived of their freedom because of the conflict; and (d) medical and religious personnel or civil defence units.

It should be recalled that human rights law protects all individuals at all times, which means that it continues to apply where IHL does not specifically apply (for example to a situation that is not related to an existing conflict). However, if there is a "conflict" between the two – in times of conflict – IHL will prevail. E.g. human rights law prohibits detention for an undetermined period of time whereas IHL allows for Prisoners of War to be detained "for the duration of the conflict".

Only States who have ratified the Geneva Conventions and their Additional Protocols (see below) are bound by IHL; however, IHL applies to all parties to an armed conflict – both State and non-State actors, such as warring factions involved.[64] In comparison with, for example, labour law and human rights law, IHL does not focus on the rights of the individuals but rather on the obligations of the particular duty-bearers including the involved States and parties to the conflict, which include non-State actors. There are other actors who play an important role in implementing IHL – in particular the International Committee of the Red Cross (ICRC).[65] Another important distinction is that under IHL there is a mechanism called "direct individual responsibility" that is used when assessing violations. This means that the in addition to the State Party, an individual not following international rules can also be held directly accountable.

What are the sources of IHL?

IHL consists of various international rules set by customs and treaties. The main instruments of IHL today are the four Geneva Conventions of 1949, which are almost universally ratified, and their three Additional Protocols. These are collectively the:

64 ICRC *International Humanitarian Law: Answers to your Questions*, p. 12 (Geneva, 2015.).

65 Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights, *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the context of armed conflict,* p. 5 (New York, 2004).

- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864
- Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1906
- Third Geneva Convention relative to the Treatment of Prisoners of War, 1929
- Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949
- Protocol I relating to the Protection of Victims of International Armed Conflicts, 1977
- Protocol II relating to the Protection of Victims of Non-international Armed Conflicts, 1977
- Protocol III relating to the Adoption of an Additional Distinctive Emblem, 2005

The main difference between the aforementioned instruments resides in the type of conflict involved. The four Geneva Conventions and Additional Protocol I apply to international armed conflicts while Article 3 common to all the four Conventions and Protocol II lay out the rules that must be observed by parties to a non-international armed conflict.

Below are summaries of the main principles of IHL, whose goal and "raison d'être" are to protect civilians, including nationals and non-nationals (such as migrants), and other specific categories of persons:

- Distinction between Civilians and Combatants, Civilian Objects, and Military Objectives; prohibition of indiscriminate attack(s);
- Proportionality in Attack Respect for Specifically Protected Persons (e.g. medical and religious personnel, humanitarian relief and peacekeepers, journalists) and Objects (e.g. hospitals, cultural property);
- Prohibited warfare (e.g. use of biological and chemical weapons, use of booby-traps used to attract civilians, starvation of civilians, prohibition to declare that there should be no survivors);

» Fundamental guarantees of Civilians and Persons Hors de Combat (e.g. principle of non-discrimination, prohibition of torture, cruel or inhuman treatment, rape, slavery, collective punishment, murder);

» The wounded and sick must be collected and cared for by the party holding them.

KEY POINT

The rules of international humanitarian law cannot ever be derogated from as they are already developed to deal with emergency situations, namely armed conflicts.

In relation to migrants, the rules of IHL are equally applicable to nationals as well as non-nationals who are affected by an armed conflict. Furthermore, section II of the fourth Geneva Convention specifically addresses the rights and obligations in relation to non-nationals on the territory of a party to the conflict (section II, Aliens within the territory of a party the conflicts). That section of the fourth Geneva Convention deals further with non-nationals who wish to leave the territory, the deprivation of liberty of protected non-nationals, and the equality with nationals in relation to medical attention.[66] It bears noting that non-nationals, or "aliens", can be of "enemy" nationality, i.e. of the nationality of the other party to the conflict, and enjoy the protection specified in the fourth Geneva Convention.[67]

Basic principle and specific rights and protection

First of all, civilian migrants, i.e. who are not participating in the hostilities, can obviously benefit from the protections afforded to civilians under international humanitarian law (IHL).

» **Right to leave the territory/be repatriated (Article 35) and method of repatriation (Article 36)**

- Non-nationals are allowed to leave the territory at the outset of, or during a conflict, if he or she desires to do so. This is unless their departure is contrary to the national interests of the State.

66 See Arts. 35–46 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).
67 ICRC commentary, fourth Geneva Convention, p. 231, section II.

- The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible.
- If refused permission to leave the territory, a non-national shall be entitled to have the refusal reconsidered as soon as possible by an appropriate court or administrative board.
- Departures permitted shall be carried out in satisfactory conditions with regards to safety, hygiene, sanitation and food.
- All costs in connection therewith, from the point of exit in the territory of the party in power shall be borne by the country of destination, or, in the case of accommodation, in a neutral country by the power whose nationals are benefited.

There is thus, for non-nationals caught in a conflict on the territory of another State Party to the conflict, a general right to leave the territory of that State, with possible exceptions coupled together with procedural guarantees.

» **Human treatment during deprivation of liberty (Article 37)**

- Protected persons who are confined, pending proceedings, or serving a sentence involving loss of liberty shall be humanely treated during their confinement.
- As soon as this person is released, he or she can ask to leave the territory, according to what is set up above.

» **Treatment – general principles (Article 38)**

The situations of these protected persons continue to be regulated, in principle, by the provisions concerning non-nationals (aliens) in time of peace. In all cases, the following rights shall be granted to them:

- They must be enabled to receive the individual or collective relief that may be sent to them.
- They must, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- They are allowed to practice their religion.
- If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.

- Children under fifteen years, pregnant women, and mothers of children under seven years shall benefit from any preferential treatment to the same extent as the nationals of the State concerned.

» **Labour – right to employment and the principle of equality (Article 39)**

- Protected persons who, as a result of the war, have lost their gainful employment shall be granted the opportunity to find paid work. That opportunity shall, subject to security considerations, be equal to that enjoyed by the nationals in the residing territory.

- Where a Party to the conflict applies a protected person method of control which results in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, said Party (State where the non-national is) shall ensure his support and that of his dependents.

» **Compulsory labour (forced labour) (principle of equality- specific case of "enemy nationality")**

- Protected non-nationals may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

- If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

- The same working conditions and the same safeguards as national workers, apply to non-nationals, particularly in regards to wages, hours of labour, clothing and equipment, previous training, along with compensation for occupational accidents and diseases.

- If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30 of the same Convention (for example those individuals can make an application to the Protecting Powers, the International Committee of the Red Cross, or the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them).

» **Assigned residence and internment**

- The internment or placing of protected persons in assigned residence may be ordered only if the State where the non-national resides estimates that other measures of control are inadequate and only if the security of the Detaining Power makes it absolutely necessary (Principle of necessity).
- No measures more severe than assigned residence and internment may be ordered.
- In applying the measures of control mentioned in the present Convention, the Detaining State shall not treat as enemy non-nationals exclusively on the basis of their nationality "de jure" of an enemy State, refugees who do not, in fact, enjoy the protection of any government (Article 44).
- The non-national has the right to ask for reconsideration of the deprivation of liberty as soon as possible by a court or administrative board designated by the detaining State. If the non-national's request is denied, the measure must be reconsidered periodically, and at least twice yearly.
- Unless the non-national objects, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence.

» **Transfer - principle of non-refoulement (Article 45)**

- Protected persons shall not be transferred to a State which is not a party to the Convention IV, to ensure consistent protection.
- In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.
- Extradition in pursuance of penal treaties, concluded before the hostilities against persons accused of contravening ordinary criminal law, is nevertheless possible.
- Restrictive measures of freedom must be eliminated as soon as possible after the end of the hostilities; the same applies to restrictive measures on property, according to the law (Article 46).

The information above sets out the essential rules and principles applying to and protecting non-nationals during a conflict affecting the State where they reside.

How is International Humanitarian Law enforced?

The responsibility for prosecuting violations of international humanitarian law by both State and individual non-State actors falls primarily on States. Compliance with this obligation involves enacting national legislation that penalizes the conduct prohibited under international humanitarian law. The domestic law should grant domestic courts jurisdiction over these crimes.

When a State violates international law, it is bound by customary international law to immediately cease the unlawful conduct and to offer appropriate assurances that it will not repeat the illegal actions in the future. The State is also responsible for making full reparations for the inflicted injury in consideration of material and moral damages.

During the last few decades, the responsibility of States for prosecuting and judging violations of IHL (in particular grave breaches and war crimes) has been supported by the establishment of international tribunals, such as the ad hoc tribunals following the conflicts in former Yugoslavia and Rwanda, the "hybrid" criminal tribunals, such as in Cambodia and Sierra Leone, and the International Criminal Court (ICC). The ICC serves at present as a permanent tribunal to prosecute and judge individuals for alleged genocide, crimes against humanity, war crimes, and in the future, possibly, for the crime of aggression.

TRANSNATIONAL CRIMINAL LAW

What is Transnational Criminal Law?

As the name suggests, transnational criminal law is a legal framework addressing unlawful, cross-border "offences whose inception, prevention and/or direct or indirect effects involved more than one country."[68] Accordingly, Article 3(2) of the UN Convention Against Transnational Organized Crime recognizes a crime as transnational when it is committed in multiple States. Even when it occurs in a single State, an offense could be transnational if a substantial part of its preparation, planning, direction, or control takes place in another State;

68 United Nations, *Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems* UN Doc A/CONF.169/15/Add.1 (1995).

it involves an organized criminal group that operates in other countries; or it has substantial effects in another State.

The implicated crimes include, but are not limited to, money laundering, terrorist activities, trafficking in persons, illicit drugs or illicit arms, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trade in human body parts, corruption and bribery of public or party officials.

For the purposes of this manual, this section will focus on the transnational criminal law framework surrounding two crimes which are often mentioned in relation to migration – namely, human trafficking and migrant smuggling.

What are the United Nations Convention against Transnational Organized Crime and the Protocols?

The UN Convention Against Transnational Organized Crime (UNCTOC) resulted from a High-level Political Conference in Palermo, Italy and serves as the primary international instrument for fighting against transnational crime.

Since its entry into force in September 2003, the Convention has been supplemented by three Protocols, collectively referred to as the "Palermo Protocols." Each protocol developed around particular areas of concern:

- Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children
- Protocol against the Smuggling of Migrants by Land, Sea, and Air
- Protocol against the Illicit manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition

The UNCTOC and its protocols are largely aimed at facilitating cooperation between law-enforcement and other agencies of multiple States rather than providing a specific grant of human rights. They foster collaboration through exchanged commitments and encouraged sharing of technical expertise among States.

How is Human Trafficking defined in transnational criminal law?

Human trafficking as defined by the Palermo Protocol on human trafficking 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, or 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."[69]

Human trafficking therefore is composed of three constituent elements involving the act, the means and the purpose. During the process there will be a point where the victim no longer has any real choice but to conform. In the light of the prerequisite of coercion, the trafficked persons are considered victims and their apparent consent or willing participation during any part of the process is irrelevant to its classification as trafficking. Lastly, the motivation behind the activity must be exploitation for direct or indirect financial or other material benefit. It includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

As the Trafficking in Persons Protocol was not created as a rights instrument for victims, it primarily protects the victim's rights through the criminalization and the prevention of trafficking.[70] Nevertheless, the Protocol sets out some provisions relation to the assistance and protection of the victim, e.g. during criminal proceeding, medical and psychological assistance, as well as guidance for States surrounding the status of the victim in the receiving State and the repatriation of victims of human trafficking.[71] In addition, Article 14 of the Protocol states that the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, the principle of non-refoulement and the principle of non-discrimination have to be taken into account as well.

How is Migrant Smuggling defined in transnational criminal law?

Migrant smuggling is defined by the Palermo Protocol against smuggling as "the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident." It is considered a crime against the State that threatens State sovereignty by violating migration laws and public order.

KEY POINT

The definition of smuggling requires the element of a "financial or other material benefit" in order to target organized criminal groups acting for profit, but excludes acts that bring people irregularly across a border for no financial gain – such as the activities of those who provide support to migrants for humanitarian reasons or on the basis of close family ties.

69 Art. 3(a) of The Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000).
70 See Arts. 5, 9, 10 and 11 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons.
71 Art. 6, 7 and 8 of The Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000).

As with trafficking, the Smuggling Protocol developed and established the first agreed upon definition of the offense. The acts that constitute an offense include smuggling migrants, producing, procuring or possessing fraudulent travel or identity documentation for the purpose of smuggling, and enabling a person to remain without legal authorization through illegal means. Pursuant to Smuggling Protocol, States parties must criminalize the intended commission, attempt, complicity and direction of smuggling activities.

Smuggling explicitly requires the unlawful crossing of international borders and although smuggled migrants are often not treated as victims it is important to note that there are provisions addressing the protection and assistance of those who have been subject to the offence.[72] Article 5 of the Protocol also states that migrants shall not be held liable under criminal prosecution for their own smuggling. Nevertheless, the Protocol is silent on the issue of administrative penalties in relation to irregular entry and thus does not prohibit States from making irregular entry an administrative offence.

Important rights and obligations?

It is important to note that although the Palermo Protocols are not rights instruments per se, both trafficked and smuggled persons maintain their rights enjoyed by other migrants arising from international human rights, humanitarian and refugee law. These rights include the right to life, freedom from torture or other cruel, inhumane, or degrading treatment or punishment, and freedom from arbitrary detention. They also benefit from the principle of non-refoulement and cannot be sent to a country where they risk persecution, danger of torture or cruel, inhuman or degrading treatment or punishment.

How is Transnational Criminal Law enforced?

In the absence of supranational law enforcement agencies, enforcement of transnational criminal law is relegated to the national domain. States are obligated therefore to enforce prohibitions on trafficking and smuggling codified in national laws by investigating and prosecuting offences based on an interpretation of the definitions. Domestic courts enforce penalties imposed on traffickers, smugglers, and other perpetrators of transnational organized crimes.

72 Art. 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).

HUMAN RIGHTS LAW

What are human rights?

Human rights are the fundamental rights that every person enjoys regardless of his or her nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Human rights empower and protect individuals against actions that interfere with fundamental freedoms and human dignity by delimiting State power as well as obliging States to take positive measures to guarantee that these rights can be enjoyed by everyone on their territory.[73] Human rights are legally guaranteed by international human rights law and the core principles of human rights are:

» **Universality and Inalienability**
All persons enjoy human rights and they should never be taken away from a person except in specific situations and according to due process. This is reflected by the fact that all States have ratified at least one, and the majority of States have ratified four or more, of the core human rights treaties.

» **Interdependency and Indivisibility**
Human rights are dependent on others fulfilment in order to be exercised. For example, certain social rights such as health and education may be necessary in order to take advantage of certain civil and political rights and a violation of one right might result in violations of several related rights.

» **Equality and Non-discrimination**
States must ensure that human rights are applied and respected without any discrimination based on any grounds, including but not restricted to sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, membership of a national minority, property, birth, age, disability, sexual orientation and social or other status.

Who is bound by them?

Although there are several actors in the world today who have both a positive and negative impact on the enjoyment of human rights of individuals (e.g. organized criminal groups, businesses and corporations, armed groups, and international and non-governmental organizations) the obligations rest with States who are the primary duty-bearers. The obligations of States consist of three categories: the duties to respect, to protect and to fulfil.

73 OHCHR and Inter-Parliamentary Union *Human rights handbook for parliamentarians*, p. 1 (France, 2005).

EXAMPLE

The prohibition on torture or cruel, inhuman or degrading treatment or punishment:

Duty to respect: The police shall not use torture as a method of questioning of suspects (refrain from interfering with the right).

Duty to protect: Take legislative and other measures prohibiting the acts of torture or cruel, inhuman or degrading treatment or punishment (protect individuals from having his or her rights interfered with by others).

Duty to fulfill: Prosecute those who individuals who violate this prohibition as well as provide training and information to officials on the prohibition of torture as well as cruel, inhuman or degrading treatment and punishment (to take positive action to ensure that the right is respected).

The right to the highest attainable standard of health:

Duty to respect: The State shall not prevent doctors or medical staff from treating those in need of medical assistance (refrain from interfering with this right).

Duty to protect: Protect everyone from non consensual medical treatment, such as medical experiments and research or forced sterilization (protect individuals from having his or her rights interferred with by others).

Duty to fulfill: Provide reproductive, maternal (pre-natal as well as post-natal) and child health care.

Where does Human Rights Law come from?

Human Rights Law is established and enforced at the international, regional and national levels.

International human rights framework

What are the key instruments of the International Human Rights Law system?

International human rights law is based on consensus among various States. The main source of International human rights law is legally binding agreements between States. Only States that ratify such treaties after they enter into force are bound to uphold the rights codified in these agreements. Three core human rights instruments form the International Bill of Human Rights:

» Universal Declaration of Human Rights (UDHR)
The UDHR is a milestone document in the history of human rights. Drafted by representatives from all regions of the world with different legal and cultural backgrounds on 10 December 1948, it sets out, for the first time, fundamental human rights to be universally protected in 30 articles with a number of provisions now considered to be customary international law.

Examples of rights recognized as customary international law:

- Right to life
- Freedom from slavery and involuntary servitude
- Freedom from torture and cruel, inhumane or degrading treatment or punishment
- Right to equality before the law and non-discrimination

Almost two decades later, the rights in the UDHR were divided into two covenants based on the perceived differences between negative and affirmative obligations that they imposed on governments.

- International Covenant on Civil and Political Rights (ICCPR)
  The first 20 articles and Article 21 of the UDHR were transformed into binding treaty norms in the ICCPR. They promote civil liberties and political freedoms, including, among others, freedom of expression, equal protection and due process.

- International Covenant on Economic, Social and Cultural Rights (ICESCR)
  Articles 22 through 28 of the UDHR were transposed into binding treaty norms found in the ICESCR. They articulate economic, social and cultural rights, including, among others, rights to work, health and education. Individuals' enjoyment of these rights created affirmative obligations of active State intervention.

Regardless of their classification, there is no heirarchy of rights included in these instruments. All human rights are interrelated and indivisible because the improvement of one right facilitates advancement of the others. Furthermore, the many multilateral human rights treaties promulgated under the auspices of the UN draw from and elaborated on these rights to specialise in addressing particular issues and groups of concern. Principal ones among them include:

- International Covenant on Civil and Political Rights, 1966 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD)
- Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984 (CAT)
- Convention on the Rights of the Child, 1989 (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICRMW)
- International Convention on the Rights of Persons with Disabilities, 2006 (CRPD)
- International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (ICPED)

How does International Human Rights Law apply to migrants?

Both the Human Rights Committee (CCPR) and the Committee on Economic, Social, and Cultural Rights (CESCR) have clarified that the rights in their respective covenants, with a few exceptions,[74] are of general application and, thus, they apply to everyone on the territory of the States parties irrespective of their migration status.[75] With a few exceptions, the rights protected under the nine core human rights treaties apply to all people regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, etc. However, in some situations, States may differentiate, derogate and limit certain human rights:

- Differential application
  In exceptional cases, some of the human rights instruments make distinctions between nationals and non-nationals as well as between regular and irregular migrants.

EXAMPLE

The right to vote (Article 25, ICCPR) – expressly applicable only to citizens.

The ICRMW makes some distinctions between the rights enjoyed based on the status of the migrant worker and his or her family: **Right to join trade unions (Article 26)** – applicable to regular and irregular migrant workers and members of their families but **Right to form trade unions (Article 40)** – applicable to regular migrant workers and members of their families.

74 Article 25 of ICCPR only refers to "citizens" and Article 13 ICCPR only applies to "non-nationals lawfully on the territory." In addition, Article 2(3) of ICESCR states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

75 See CCPR General Comments No. 15 and No. 31, CCPR/C/21/Rev.1/Add. 13, para. 10, and CESCR General Comment No. 20, E/C.12/GC/20, para. 30.

» Derogations and limitations on rights

When discussing human rights applicable to migrants, a State's obligation to uphold a particular right may depend on the circumstances. In exceptional cases, where a public emergency threatens the life of a nation, that State can derogate, or temporarily depart, from some of its obligations under human rights law. An example of this type of derogable right is the right to peaceful assembly. The derogation must be proportional and must not be inconsistent with a State's other obligations under international law or introduced on a discriminatory basis. However, there are some rights which can never be derogated from, for example:

- The right to life
- Prohibition of torture or cruel, inhuman or degrading treatment or punishment
- Prohibition of slavery
- Recognition before the law
- The right to freedom of thought, conscience and religion

Furthermore, certain human rights can be limited when such limitations are provided for by law and are necessary for the protection of national security or public safety, etc. In contrast to derogation, the right is not taken away but continues to be valid in a limited manner. Examples of these rights are the right to freedom of expression and the freedom of association. The possibility of limiting and the reasons for the limitation are specified in the provision on the right itself.

Examples of important rights for migrants

The following are some important human rights which will be of particular importance for individuals during the migration process:

» **Protection from non-refoulement**

Many international and regional human rights instruments set out an absolute prohibition of torture and other ill-treatment.[76] The equally absolute obligation of non-refoulement is directly derived from these instruments. Non-refoulement dictates that under no circumstances may a migrant be expelled to an area when there are substantial grounds to believe that there is a real risk that he or she will face torture or cruel,

76 Article 7 ICCPR. See also Article 3 ECHR; Article 2 CAT; Article 5(2) ACHR.

inhuman, or degrading treatment or punishment.[77] International bodies and monitoring mechanisms have found violations of the principle of non-refoulement based on the prohibition of torture, cruel, inhuman, or degrading treatment or punishment in a variety of settings, including: extended time awaiting execution after a death sentence, indiscriminate violence in the country of return, expulsion of a person seriously ill and close to death to a State where the necessary health care is not available, when a person cannot count on the support of his or her family members, death sentence imposed as a consequence of an unfair trial, multiple rapes, harmful practices such as female genital mutilation, degrading conditions during detention, and living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basic needs.[78]

Non-refoulement applies to migrants regardless of status. The principle of non-refoulement applies to every person, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not.

» **Freedom of movement**

Freedom of movement is a foundational human right protected by several of the core human rights instruments.[79] It is a multifaceted right with domestic and international application. Applied internally within a State, the right has been understood to protect the ability of all nationals, regular migrants, and stateless persons to choose their place of residence within the territory and to move freely within the State. It also entitles an individual to remain in his or her country of origin.[80] In relation to extraterritorial movement, individuals also have the right to leave any country, including his or her own country. However, freedom of movement neither provides for the right of inter-State movement nor similarly ensures admission to every country. It only recognizes that right upon entry to a country of origin. Freedom of movement can only be limited as provided by law and

77 See CAT, *Mutombo v. Switzerland*, Communication No. 13/1993, 18 November 1993, U.N. Doc. A/49/44 at 45 (1994), at 9.3; CCPR, *Maksudov and Rakhimov v. Krygyzstan*, Ibid., at 12.4; IACtHR, *Lori Berenson-Mejía v. Peru*, 25 November 2004, Series C No. 119, at 100.

78 See ex multis, *ECtHR, Öcalan v. Turkey*, Application No. 46221/99, Judgment 12 May 2005, at 175; CAT, V.L. v. Switzerland, Communication No. 262/2005, 20 November 2006, U.N. Doc. CAT/C/37/D/262/2005, at 8.10; CCPR, *Kaba and Kaba v. Canada*, *Communication No. 1465/2006*, 21 May 2010, U.N. Doc. CCPR/C/98/D/1465/2006, at 10.1, 10.4; ECtHR, M.S.S. v. Belgium and Greece, Application No. 30696/09, Judgment 21 January 2011, at 233–35, 363–68.

79 Art. 13, Universal Declaration of Human Rights (UDHR), Art. 12, ICCPR, Art. 5, International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)(1965), Art. 15, CEDAW, Art. 39, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990), Art. 18 Convention on the Rights of Persons with Disabiltiies (CRPD) (2006).

80 CCPR, Concluding Observations: New Zealand, 75th sess., UN Doc CCPR/CO/75/NZL (7 Aug 2002), para. 12.

is necessary to protect a legitimate State interest in a way that is consistent with other treaty obligations.[81]

» **Right to liberty[82]**

All persons' entitlement to treatment with humanity and respect for the inherent dignity of the human person is particularly important for addressing migrants' vulnerability to apprehension and detention for failure to obtain proper immigration status. They maintain these rights regardless of whether they are deprived of their liberty by being held in prisons, hospitals, administrative detention centres, or elsewhere. The right to liberty serves as a safeguard against both unlawful and arbitrary detention. When a person is apprehended, the right to liberty also implicates other rights to legal protections and assistance. All persons must be timely informed of the reasons for his or her arrest and any charges against them in a language he or she understands.[83] Article 16(7) of the ICRMW also requires informing consular or diplomatic authorities of the detention and detained migrant of their right to contact and speak with these consular or diplomatic authorities. Any recourse to detention, even where a detention is based on national security concerns, must be taken on a case by case basis rather than amounting to a blanket policy to detain and subject an individual to judicial oversight. The Working Group on Arbitrary Detention found that administrative detention of migrants for irregular status should only be the last resort under the principle of proportionality. The maximum period of detention as well as the grounds for administrative detention must be clearly defined and exhaustively enumerated in legislation.[84] The ICRMW and ICCPR also recognize the rights of migrants to challenge the unlawfulness of their detention in legal proceedings and to compensation for wrongful arrest or detention.[85]

81 CCPR General Comments, No. 27, paras. 13–14.

82 Art. 3, UDHR, Art. 9, ICCPR, Art. 37, CRC, Art. 16, ICRMW, Art. 14, CRPD, also see CPED.

83 Article 16(5) ICRMW.

84 U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010), para.59; see also , U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008), paras. 50, 65; Report of the Working Group on Arbitrary Detention: Annex II, Deliberation No. 5 - *Situation regarding immigrants and asylum-seekers*, UN Doc E/CN.4/2000/4 (28 December 1999), p. 30. U.N. Human Rights Council, Report of the *Special Rapporteur on the Human Rights of Migrants,* U.N. Doc. A/HRC/20/24 (2 April 2012), para. 69.

85 Art. 16, ICRMW, art. 5, ICCPR, see also *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).

» **Right to nationality**[86]

While granting nationality falls within the prerogative of States, a State cannot arbitrarily deprive an individual of this right. It also protects a person's right to transmit nationality to a child regardless of sex or marital status or right to change nationality.[87] As a protected right by several of the core human rights instruments, every child enjoys the right to acquire a nationality.

» **Right to family life**[88]

Article 23(1) of the ICCPR, which is mirrored by several of the subsequent instruments, views the family as the "natural and fundamental group unit of society and is entitled to protection by society and the State." The definition of a dependent relative, however, varies by the cultural notions of family prevalent in the State party. The right to family life underlies States' grant of derivative status to dependent relatives. Under the CRC and ICRMW, States are also encouraged to facilitate the reunification of families by allowing members of the family to enter and leave the State.[89]

» **Right to work and the enjoyment of just and favourable conditions of work**[90]

Article 6 of the ICESCR provides that everyone has the right to work and make a living from a profession as he or she has chosen freely. The right to work is essential for realizing other human rights and forms an inherent part of human dignity. Closely linked to the right to work is the right to just and favourable working conditions in Article 7 in respect of e.g. fair and equal wage, safe and healthy working conditions, rest and decent working hours. In addition, the right to work relates directly to Article 8 of ICESCR which provides the right to form or join a trade union. The ICRMW is of particular importance as it elaborates on these rights in relation to migrant workers and members of their families providing, inter alia, equality with nationals in relation to remuneration, conditions of work,[91] protection against dismissal and unemployment benefits,[92] and the right to transfer earnings to support their families in another State.[93]

86 See also, art. 15 UDHR, art. 24(3) ICCPR, art. 5(d)(iii) ICERD, Arts, 7-8 CRC, Art. 9 CEDAW, Art. 29 ICRMW, Art. 18 CRPD.
87 Committee on CRC, *Concluding Observations: United Kingdom*, 31st sess., UN Doc CRC/C/15/Add.188 (9 Oct. 2002), para. 23.
88 See e.g. Arts. 12, 16 UDHR, Arts. 17, 23 ICCPR. Art. 9 CRC, Arts. 22–23 CRPD.
89 Art. 10, CRC, Art. 44, ICRMW.
90 See also, Arts. 23-24 UDHR, Art. 5(e)(i) ICERD, Art. 11 CEDAW, Art. 32 CRC, ICRMW, Art. 27 CRPD.
91 Art. 25 applies to all migrants, irrespective of migration status.
92 Art. 54, only applies to regular migrant workers.
93 Art. 47, only applies to regular migrant workers.

» **Right to education**[94]

Under Articles 13 and 14 of the ICESCR everyone has a right to education, including the right to free primary education. Both the CESCR and the Committee on the Rights of the Child (CRC) has reaffirmed that the right to education applies to all children regardless of migration status and for children who are displaced they should have a right to access to education is maintained during all phases of the displacement cycle.[95]

» **Right to health**[96]

Article 12 of the ICESCR recognizes that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This right consists of both freedom and entitlements such as: the right to be free from medical experiment or non-consensual medical treatment, or the entitlement to medical treatment and health services. The CESCR has stressed the importance of underlying factors in relation to the enjoyment of this right such as: safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.[97]

In relation to access to health care, the ICRMW states that all migrants and members of their families, irrespective of migration status, have a right to emergency care, whilst regular migrants and their families enjoy equality with nationals in accessing health services. However, the CESCR has clarified that States parties are under an obligation to respect the right to health of everyone by, inter alia, refraining from denying or limiting equal access for all persons, including asylum-seekers and irregular immigrants, to preventive, curative and palliative health services.[98]

94 See also, Art. 26 UDHR, Art. 5(e)(v) ICERD, Art. 10 CEDAW, Arts. 28,29,and 32 CRC,Arts. 30, 43, 45 ICRMW, Art. 24 CRPD.
95 CRC General Comment No 6, CRC/GC/2005/6, para. 41.
96 See. Art. 25 UDHR, Art. 12 CEDAW, Art. 5(e)(iv) ICERD, Art. 24 CRC.
97 See CESCR General Comment No. 14, E/C.12/2000/4, para. 11.
98 Ibid. para. 34.

How are the International Human Rights Law instruments supervised?

The nine core human rights treaties have separate committees of independent experts who monitor and supervise the implementation their respective conventions:

- Human Rights Committee (CCPR)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Committee on the Elimination of Racial Discrimination (CERD)
- Committee on the Elimination of Discrimination against Women (CEDAW)
- Committee against Torture (CAT)
  - Subcommittee on Prevention of Torture (SPT)
- Committee on the Rights of the Child (CRC)
- Committee on Migrant Workers (CMW)
- Committee on the Rights of Persons with Disabilities (CRPD)
- Committee on Enforced Disappearances (CED)

Each State party is also under an obligation to submit periodic reports to the relevant treaty body on how the rights are being implemented. These reports are then examined by the corresponding Committee in the presence of a State party's delegation. Based on the dialogue, the Committee will then publish its concerns and recommendations, referred to as "concluding observations".

Some of the treaty bodies also have the authority to consider individual complaints[99] against States parties which are accused of violating provisions of relevant convention, for example:

EXAMPLE

Communication 1833/2008, X v. Sweden (CCPR)

The applicant was a documentary film-maker and artist in Afghanistan and an active member of the Communist Party. He was imprisoned by the Mujahedin for his political views, held for six months without trial and subjected to torture. When he was able, he fled to Sweden and applied for asylum. His asylum claim was rejected, and the authority would not reopen it even when he revealed he was bisexual and feared persecution due

99 CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESCR and CRC.

to his sexual orientation. The applicant was then deported to Afghanistan. The applicant alleges his forcible removal was a violation of Articles 6 and 7 of the ICCPR, the right to life and right to be free of torture. The Committee found that the forcible removal was a violation given the treatment of homosexuals and bisexuals in Afghanistan. The Swedish authorities claimed they rejected his claim because his sexuality was brought up late in the asylum process, not because of a decision on the merits. The Committee was of the view that insufficient weight was given to the applicant's claim that he would face torture if returned to Afghanistan and thus there had been a violation of articles 6 and 7.

Communication No. 416/2010, Ke Chun Rong v. Australia (CAT)

The complainant was a Chinese citizen who claimed to be a regular practitioner and leader of Falun Gong. The complainant stresses that when the Chinese authorities made Falun Gong illegal in 1999, his Falun Gong materials were confiscated by the police, who threatened to close the business he had opened in his home village. The claimant was later arrested and detained by the police in Fuqing City Detention Centre because he was a Falun Gong group leader and had organized Falun Gong practitioners to protest against the detention of one of their members. The complainant states that he was held in detention for 16 days, and was interrogated and tortured nearly every day. The complainant fled to Australia and in 2005 he applied for a Protection Visa but his application was refused and an expulsion order was issued. The complainant claimed that this forcible return constituted a violation by Australia under Article 3 of the Convention, since he would be exposed to a high risk of further torture. The Committee held that in determining whether there were substantial grounds for believing that the complainant would face a foreseeable, real, and personal risk of being subjected to torture if deported to his country of origin, the State party had failed to duly verify the complainant's allegations and evidence, through proceedings meeting the State party's procedural obligation to provide for effective, independent and impartial review as required by Article 3 of the Convention. Accordingly, the Committee concluded that the deportation of the complainant to his country of origin would constitute a violation of Article 3 of the Convention.

Furthermore, some of the treaty bodies[100] may also initiate country inquiries if they receive reliable information indicating that the rights contained in the Conventions are being systematically violated by the State party.

Finally, the Committees publish general comments which range in subject but provide important guidance on the provisions of the conventions and how they should be interpreted. Although these documents are not considered hard law, they provide guidance on hard law and can, thus, not be disregarded by States parties. Some of the important general comments on migrants are:

100 CAT, CEDAW, CRPD, CED, CESCR and CRC.

- HRC General Comment 15 on the position of aliens under the ICCPR, 1986
- CESCR General Comment 20 on non-discrimination in economic, social and cultural rights, 2009 (Art. 2, para. 2)
- CERD General Recommendation 30 on discrimination against non-citizens, 2004
- CEDAW General Recommendation 26 on women migrant workers, 2008
- CRC General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin, 2006

Additionally, there are other mechanisms which are important for the protection of the human rights of migrants on the international level:

- The Human Rights Council
  Established in 2006 by the General Assembly resolution 60/251, the Human Rights Council is the principal United Nations intergovernmental body responsible for human rights. It is made up of 47 Member States and the human rights records and voluntary human rights pledges and commitments of candidate States are taken into account when electing Member States. The Council's Member States serve for three years and are not eligible for immediate re-election after two consecutive terms. The Council meets for at least three sessions per year in Geneva to promote the full implementation of human rights obligations undertaken by States; to contribute to the prevention of human rights violations; to respond promptly to human rights emergencies; address violations of human rights including gross and systematic violations; and promote effective coordination and the mainstreaming of human rights within the United Nations system.

- The Universal Periodic Review
  The UPR is a unique State-driven human rights mechanism through which the Human Right Council periodically reviews the fulfilment of the UN's 192 Member States' human rights obligations and commitments in a four and a half year cycle.[101] The review is a cooperative mechanism based on an interactive dialogue between the State reviewed and the Human Rights

101 For more information on these mechanisms, consult OHCHR's website on the human rights bodies available from www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

Council during which the State has an opportunity to declare what actions it has taken to improve the human rights situation and fulfil its obligations under human rights law.

» The Special Procedures of the Human Rights Council
The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights in relation to particular countries or territories on thematic issues. For the purpose of this manual it is important to mention the Special Rapporteur on the Human Rights of Migrants who is mandated to, inter alia: examine ways and means to overcome the existing obstacles to providingfull and effective protection of the human rights of migrants; request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families; report regularly to the Council, according to its annual programme of work, and to the General Assembly, at the request of the Council or the Assembly.

Regional human rights framework

Many of the same rights established in international human rights law are similarly protected through regional human rights frameworks. At this time, there are three regional treaty-based systems for the adjudication and reparation of human rights violations committed against individuals: the European, African, and Inter-American systems. These three regional systems were each established under the auspices of a larger intergovernmental organization for regional cooperation: the Council of Europe (CoE), African Union, and Organization of American States (OAS), respectively. Two other regional human rights bodies, the newly created Arab Human Rights Committee in the Middle East with the ACHR, and the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights in Southeast Asia, also exist. However, these regional bodies do not decide individual complaints and are, therefore, not considered judicial.

Europe

What are the key instruments of the European Human Rights Law system?

The main human rights treaties promulgated and supervised within the European system are:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- European Social Charter (ESC)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)
- Framework Convention for the Protection of National Minorities
- Charter of Fundamental Rights of the European Union

How are Human Rights Law instruments supervised in the European system?

The human rights framework in Europe consists of two separate institutions, namely the Council of Europe and the European Union.

- **Council of Europe**

  Founded in 1949, the CoE is made up by 47 Member States. The CoE is built upon the three fundamental values of democracy, human rights, and the rule of law. The main human rights bodies of the CoE are the European Court of Human Rights (ECtHR), Committee of Ministers, Parliamentary Assembly, and the Commissioner for Human Rights. The ECtHR is a permanent court which functions both in an advisory capacity, issuing interpretations of the ECHR; and as a judicial mechanism for individual or inter-State complaints of human rights violations against a Member State.[102]

102 For more information on the ECtHR and its case law see the website available from www.echr.coe.int/ECHR/homepage_en.

Following are some examples of important cases from the European Court of Human Rights:

EXAMPLE

Hirsi Jamaa and Others v. Italy, ECtHR, No. 27765/09, 23 February 2012

The applicants were part of a large group of migrants, including asylum seekers and others, who were intercepted by the Italian coastguard on the high seas while within Malta's search and rescue area. The migrants were immediately returned to Libya under an agreement concluded between Italy and Libya, without any opportunity to apply for asylum. No record was taken of their names or nationalities. The ECtHR noted that the situation in Libya was well-known and easy to verify on the basis of multiple sources. The court therefore found that the Italian authorities knew, or should have known, that the applicants, when returned to Libya as irregular migrants, would be exposed to treatment in breach of the ECHR and that they would not be given any kind of protection. The Italian authorities also knew, or should have known, that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, which included Somalia and Eritrea. The ECtHR reaffirmed that although the applicants had failed to ask for asylum, such an omission did not exempt Italy from complying with its obligations under Article 3 of the ECHR. It reiterated that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees. The court found that the transfer of the applicants to Libya therefore violated Article 3 of the ECHR because it exposed the applicants to the risk of refoulement.

Popov v. France, ECtHR, No. 39472/07 & 39474/07, 19 January 2012

The applicants were Kazakhstani nationals, accompanied by their two children who were born in France in 2004 and 2007 respectively. They had fled persecution in their country because of their Russian origin and Orthodox faith, applied for asylum, but their application was rejected, as were their applications for residence permits. In preparation for their deportation, the family was detained for two weeks in an administrative detention centre. The Applicants claimed that this detention amounted to violations of Articles 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life) of the ECHR. The Court held that, although the family was separated from other detainees, the detention facilities were not sufficiently child-friendly and the environment, promiscuity, stress, insecurity and hostile atmosphere in these centres were bad for young children. The Court found that the authorities had not measured the inevitably harmful effects on the children of being held in a detention centre in conditions that exceeded the minimum level of severity required to fall within the scope of Article 3. There had therefore been a violation of Article 3. Additionally, the French authorities had not sought to establish whether any alternative solution, other than administrative detention, could have been envisaged. The Court accordingly found a violation of Article 5 § 1 (f) in respect of the children. Moreover, as no removal or detention order had been issued against the applicants' children but only against the adult applicants, the children could not challenge their detention. The Court accordingly found a violation of Article 5 § 4 (right to speedy review of the lawfulness of detention) in respect of the children. Finally the Court considered that the child's best interests called

not only for families to be kept together but also for the detention of families with young children to be limited. In the applicants' circumstances, two weeks' detention in a closed facility was disproportionate to the aim pursued. The Court accordingly held that there had also been a violation of Article 8.

» **European Union**

Separate from the CoE, the European Union (EU) is a political and economic union originally formed by six Member States in 1957. The number of Member States has since more than quadrupled to 27 Member States today. Although the European Court of Justice and the European Parliament are main bodies for the protection of human rights under the Charter of Fundamental Rights of the European Union, the ECtHR remains the leading body for the enforcement of human rights within Europe.

EXAMPLE

Case C-648/11(ECJ) 6 June 2013

Two minors of Eritrean nationality (MA and BT) and a minor of Iraqi nationality (DA) applied for asylum in the United Kingdom. No member of their families was legally present in another member State of the EU. The United Kingdom authorities established that they had already lodged applications for asylum in other member States: in Italy (MA and BT) and in the Netherlands (DA). Under the Dublin II Regulation the competence in relation to asylum is reserved to a single member State and therefore, it was decided that the minors would be transferred to those States, which were considered responsible for examining their asylum applications. Nevertheless, the Dublin II Regulation provides that where an applicant for asylum is an unaccompanied minor, the member State responsible for examining the application is to be that where a member of his family is legally present. In the absence of a family member, the member State responsible is to be where the minor lodged his application for asylum. The regulation does not specify whether it should be where the applicant first lodged his complaint, or the most recent application lodged in another State. The Court determined that, in the light of the 'best interests' principle, since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another member State.

Africa

What are the key instruments of the African Human Rights Law system?

Some of the important instruments on human rights in Africa include:

- African Charter on Human and Peoples' Rights (ACHPR)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as "the Maputo Protocol")
- African Charter on the Rights and Welfare of the Child (also "the Children's Charter")

How are Human Rights Law instruments supervised in the African system?

The African human rights system is governed by the African Union. The first enforcement mechanism established for the protection of human rights by the African Union is the quasi-judicial African Commission on Human and People's Rights (ACmHPR). The ACHPR has six Special Rapporteurs who gather information about specific human rights issues including: Extra-judicial, Summary or Arbitrary Executions; Freedom of Expression; Human Rights Defenders; Prisons and Conditions of Detention; Refugees and Internally Displaced Persons; and Rights of Women. Since 2004, the African Court of Human and People's Rights (ACtHPR) has served as a judicial mechanism with an advisory jurisdiction and authority to address individual complaints.[103] Additionally, a Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons was also created. Another important mechanism, particularly in relation to children, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) monitors and reports on States' implementation of the Children's Charter. In addition there are specific mechanisms for the west, south and eastern African regions namely ECOWAS Community Court of Justice, the SADC Tribunal, and the East African Court of Justice.

Following are some examples of important cases from the African human rights mechanisms:

103 For more information on the work of the Court, see ACtHPR's website available from www.african-court.org/en/.

EXAMPLE

IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya (ACERWC) 002/09, 22 March 2011

Following Kenyan independence in 1963, the Nubian ethnic group who had been forced to remain in Kenya by the pervious colonial government were for a long period of time consistently treated by the government of Kenya as "aliens." The rationale behind this treatment was that the Nubians, according to the Government, did not have any ancestral homeland within Kenya, and as a result could not be granted Kenyan nationality. The Complainants alleged that the refusal by the Kenyan Government to recognise the Nubians' claim to land is closely linked with the Government's denial of Nubians to Kenyan citizenship. It was particularly difficult to make the right to nationality effective for Nubian children as so many Nubian descents in Kenya who are parents have difficulty in registering the birth of their children. As a result, this had a negative impact on the children's right to access education and health care. The Complainants therefore claimed to the Committee that their rights under Article 6, in particular sub-articles (2), (3) and (4) (the right to have a birth registration, and to acquire a nationality at birth) as well as Article 3 (prohibition on unlawful/unfair discrimination) were breached. Additionally, as a result of these two alleged violations, The Nubians submitted a list of "consequential violations" including Article 11(3) (equal access to education) and Article 14 (equal access to health care) to the court.

Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) / Angola (ACmHPR) 292/04, 22 May 2008

During an alleged campaign with the objective of expelling foreigners from Angola, the complainants, who are of Gambian nationality, alleged that they were arbitrarily arrested, detained, and later deported from Angola without any legal protection. The complaint further alleged that those expelled were maltreated due to their nationalities and origin, and in the process the Angolan authorities confiscated their official documents, including passports, visas, residence permits, and work authorisation. In some cases, money was demanded from them, and those who could not afford these tariffs were seriously beaten. In addition, it was claimed that the claimants together with other non-nationals were detained in inhumane conditions lacking any medical attention, food, and adequate sanitation. It was also alleged that the Angolan Armed Forces raided villages where the victims resided. They were arrested in their homes as well as on the streets at checkpoints. There was no arrest warrants issued or any reason given for the arrests. Moreover, the victims were not provided access to courts of law in order to challenge the reasons for their arrests. Victims' property was seized and those burglarized were denied access to take their property during the alleged deportation. Thus, the complainants alleged that Angola had violated articles 1, 2 (Right to Freedom from Discrimination), 3 (Right to Equality before the Law and Equal Protection of the Law), 5 (Prohibition of Torture and Cruel, Inhuman and Degrading Treatment), 6 (Right to Personal Liberty and Protection from Arbitrary Arrest), 7(1)(a)(Right to Fair Trial), 12 (4) (Due Process before Expulsion), 12 (5) (Prohibition on Mass expulsion), 14 (Right to Property), and 15 (Right to Work) of the African Charter on Human and Peoples' Rights. The Commission held that there had been violations of all of these provisions except Article 3 (2) in relation to the claimants.

The Americas

What are the key instruments of the Inter-American Human Rights Law system?

The instruments establishing the foundation for human rights in the Inter-American region are:

- Organization of American States Charter
- American Declaration of Rights and Duties of Man
- American Convention on Human Rights

How are Human Rights Law instruments supervised in the Inter-American system?

The promotion and protection of human rights in the Americas is embedded in the OAS which was established by the OAS Charter in 1948. The first mechanism established to observe and protect human rights in the American region was the The Inter-American Commission on Human Rights (IACHR) in 1959. The IACHR is a quasi-judicial body with several functions, inter alia, deals with individual complaints of human rights violations, conducts investigations, and reports on specific States/thematic issues.[104] In 1979 the OAS established the Inter-American Court of Human Rights (IACtHR), a judicial body functioning in both an advisory[105] and adjudicative capacity as the ECtHR in Europe and the ACtHPR in Africa. The American system also provides a Rapporteurship on the Rights of Migrants with a mandate that focuses on the respect and guarantee of the rights of migrants and their families, asylum-seekers, refugees, complementary protection seekers and beneficiaries, stateless persons, victims of human trafficking, IDPs and other vulnerable groups within the context of human mobility.

Following are some examples of important cases from the Inter-American Court on Human Rights:

104 For more information on the functions and mandate of IACHR see the website available from www.oas.org/en/iachr/mandate/functions.asp.

105 In relation to migration see the IACtHR's Advisory Opinion OC-18 of 17 September 2003 on the Juridical Condition and Rights of Undocumented Migrants.

EXAMPLE

Vélez Loor v. Panama, (IACtHR), 23 November 2010

In November 2002, Panamanian police arrested Jesús Vélez Loor, an Ecuadorian national, for entering the country without appropriate documentation. He was subsequently transferred to a detention facility and sentenced, without legal representation or awareness of the proceedings against him, to two years imprisonment for entering Panama illegally multiple times. Vélez Loor testified to the Court that while imprisoned, he was subjected to tear gas, burns, sexual abuse, and beatings resulting in a cracked skull. Desperate to ameliorate his situation, Vélez Loor started a hunger strike and partially sewed his mouth shut. After Vélez Loor had endured deplorable conditions and abusive treatment for ten months, the Ecuadorian Consulate and Panamanian immigration authorities arranged his deportation, sending him back to Ecuador in September 2003. Although he reported his torture and the Panamanian Office of Foreign Affairs initiated an investigation, Panama made no further efforts to investigate Vélez Loor's abuse.

The Court held that first of all, in relation to the initial arrest and detention, Panama had violated Article 7 (5) of the American Convention on Human Rights and that the guarantee provided for by Article 7 (5) must be satisfied as long as the detention or arrest of a person is based on his or her immigration status, in accordance with the principles of judicial control and procedural immediacy. Moreover the Court held that the arrest was arbitrary and violated Article 7 (3) given that it did not contain the grounds and reasons for the need to issue it, according to the facts of the case and the particular circumstances of Mr Vélez Loor. In addition, it would seem that the arrest warrant of irregular immigrants was automatically issued after the initial arrest, without consideration of the particular circumstances. Furthermore, Panama had violated Article 7 (6) of the Convention in relation to Article 1(1) (non-discrimination) given that it did not guarantee that Mr Vélez Loor could exercise the available remedies to question the lawfulness of his arrest. In relation to Article 8 (Fair trial guarantees) the Court recalled that the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status and Panama had failed to provide the accused with the right to defence before the administrative instance, in which it was decided the application of the penalty of deprivation of liberty, had negative effects on the entire proceeding. Thus Panama was in violation of the right to a hearing contained in Article 8 (1) of the Convention and the right to be assisted by a counsel contained in Articles 8 (2)(d) and 8 (2)(e) of the Convention, in relation to Article 1(1). The Court also noted that Mr Vélez Loor was denied the right to consular assistance due to the fact that the sanctioning administrative procedure did not allow implementation of consular assistance as part of due process of law. In relation to the condition of the detention: firstly, the Court held that the fact he was held together with people awaiting criminal trial and/or are serving time for the commission of a crime, in addition to the horrific conditions of the facilities indeed constituted a cruel, inhumane, and degrading treatment contrary to the human being which contravened with Articles 5(1) and 5(2) of the American Convention, in conjunction with Article 1(1). The Court also found that Panama violated Vélez Loor's rights under the Inter-American Convention to Prevent and Punish Torture. Finally, the Court ruled that Article 67 of Panama's 1960 Decree Law No. 16, which allows punitive sanctions for violation of migration laws, was incompatible with the Convention when used as a basis for arbitrary incarceration. Rather, the Court held that States should only detain migrants sparingly and on an exceptional basis, for the shortest time and using the least restrictive means possible.

EXAMPLE

Case of the Yean and Bosico Children v. The Dominican Republic (IACtHR)
8 September 2005

Dilcia Yean and Violeta Bosico were girls of Haitian descent born in the Dominican Republic from mothers with Dominican citizenship. The Dominican Registry Office, however, refused to issue birth certificates for the children even though the Dominican Constitution recognises that every child born in Dominican territory is a Dominican citizen. The Inter-American Commission on Human Rights filed an application with the Inter-American Court of Human Rights, alleging that the Dominican government's discriminatory policies had rendered Yean and Bosico stateless and forced them to live in very vulnerable circumstances. The Commission alleged numerous violations of the American Convention on Human Rights, and presented evidence that – among other things – Bosico had been unable to attend school for one year because she did not have an identity document. The Court found that the Dominican Republic had acted arbitrarily and contrary to the best interests of the child in denying Yean and Bosico birth certificates, which amounted to a violation of their rights to a nationality and to equal protection under Articles 20 (Right to Nationality) and 24 (Right to Equal Protection of the Law) of the American Convention on Human Rights. Moreover, because the children did not have a nationality, the Court looked to the CRC for interpretive guidance and found that the children's rights to protection under Article 18 of the American Convention had also been violated as they were not recognised by the country they lived in and, hence, could not receive social assistance. Finally, the Court ruled that in violating these rights, the Dominican Republic had further exposed Yean and Bosico's families to a great deal of uncertainty and insecurity, and had thus violated family members' right to humane treatment under Article 5 of the American Convention.

National legislation

The first step for the State to make sure that human rights are respected and protected is to have adequate legislation in place. The domestic legal system is the principal framework for implementing a State's legal obligations to uphold the rights of individuals who are its nationals or are within its territory or subject to its jurisdiction. These rights may be codified in a variety of legal instruments including legislation, policies, regulations or national constitutions. In any of these forms, the relevant instruments should reflect international standards binding upon States and the State's obligations under international and regional law. Its provisions should also ensure that persons legally entitled to rights enjoy them on an equal basis with others.

Most human rights violations can be addressed at a state level in courts or by other complaint mechanisms, which comply with the requirement of independency and impartiality set forth in international law, and by addresseing a human rights complaint adequately the States can avoid being held responsible for violating these rights. Nevertheless, where domestic remedies fail to address rights abuses,

both mechanisms and procedures for individual complaints or communications available at the regional and international levels help ensure local enforcement and compliance with international standards. Many States will also have national human rights institutions (NHRIs) established for the promotion and protection of human rights.[106] It is important to be familiar with the national legislation as well as the international standard on a specific area related to the planned programmes and activites of the office. Through advocacy and capacity-building, the programme can encourage ratification of existing international instruments as well as proper incorporation and implementation of standards from ratfied instruments, which in turn will strengten the protection of the rights of migrant in the country or region.

KEY POINT

The accountability mechanism does not have to be a court or arbitration mechanism as in most judicial systems today. International Law does not impose methods for implementing standards and the effective implementation will also depends on respect for local tradition and systems. The important thing is that rights are effectively implemented in a meaningful way and that individuals have the possibility to seek redress and enjoy true respect for their rights.

106 To provide more guidance for NHRIs, the UN has adopted the so called Paris Principles by GA resolution A/RES/48/134, 20 December 1993.

GLOSSARY

Beneficiaries	the individuals, groups, or organizations that benefit from the project.
Direct beneficiaries	those individuals or entities (can be counted individually) who benefit or receive support that can be attributed to the activities and/or results of the project.
Duty bearers	State or non-State actors (e.g. international organizations) with obligations towards rights-holders; actors that are responsible for respecting, protecting and fulfilling the rights of rights-holders.
Indicators	qualitative or quantitative factors or variables to measure achievement or to reflect expected changes.
Indirect beneficiaries	those individuals or entities who have no direct contact with the project but who are impacted by the activities and/or results of the project.
Objectives	the most significant, realistic goal to which the project can contribute.
Outcomes	the intended changes in institutional performance, individual or group behaviour or attitudes, or the political, economic, or social position of the beneficiaries.
Output	the intended changes in the skills or abilities of the beneficiaries, or the availability of new products or services as a result of project activities.
Programme	a set of related projects that are managed and coordinated by one management structure with the aim of achieving higher-level results than projects could achieve on their own.
Project	an activity or set of activities designed to produce a specified set of deliverables within a specified time frame and budget.
Results	a measurable change, that is, the consequence of a means-ends relationship.
Results matrix	a useful tool for developing performance indicators and adapting such indicators to a project's local context so as to determine the progress of a particular project.
Rights-based approach	a conceptual framework and methodological tool for developing policies and practices, as well as for projects that integrate the rights, norms, and standards derived from international law as well as rights principles.
Rights-based approach indicators	measure the extent to which rights principles, most often participation, equality and non-discrimination, and accountability, have been applied to the process of programming for each stage of the project.
Rights indicators	specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.
Rights-holders	the individuals or groups entitled to rights under international law.
Situation monitoring	a type of monitoring that measures the broader conditions and changes of a situation before, during, and at the end of a project.

ANNEX I. SITUATION ASSESSMENT TOOL

OBJECTIVE

This tool is intended to help make a general situation assessment of the country where the project is intended to be implemented.

SITUATION ASSESSMENT

GENERAL CONTEXT	
Name of country	
Region	
Capital city	
Other major cities	
Population	
Religions	
Languages	
Ethnic groups	

HISTORICAL AND POLITICAL CONTEXT	
Recent or current conflict (internal or international); civil unrest, etc.)	
Current security level (as per UNDSS)	
Recent political transition	
Political parties	
Relationships with neigbouring countries	
Membership in political/military/ regional alliances	
Average national income	

MIGRATION CONTEXT	
Net migration rate	
Emigrants (%)	
Immigrants (%)	
Migrants as a percentage of immigrants/emigrants (disaggregated by sex)	
Children under 18 as percentage of immigrants/emigrants	
Unaccompanied children as percentage of immigrants/ emigrants	
Returned unaccompanied children in the country	
Number of refugees (disaggregated by sex)	
Number of IDP (disaggregated by sex)	

DEVELOPMENT CONTEXT	
GDP per capita, PPP (USD)	
Human Development Index (HDI), ranking	
Gender-Related Index (GDI, GEM), ranking	

INSTITUTIONAL CONTEXT	
National plan of action concerning migration adopted (e.g. on labour migration, TiP, smuggling, etc.)	
Existing national human rights institutions, commissions	
Ombudsperson	
Active NGOs working on migration related issues	
Active CSO working on migration related issues	
Principal labour unions	
Principal authorities in charge of immigration/emigration	

LEGAL CONTEXT	
Legally sanctioned discrimination (based on race, colour, gender, language, religion, opinion, origin, sexual orientation, other status)	
Signed/ratified/acceded to:	Human Rights Instruments:* ☐ ICERD ☐ CAT ☐ ICCPR ☐ CAT Op. ☐ ICCPR Op. 1 ☐ CRC ☐ ICCPR Op. 2 ☐ ICRMW ☐ ICESCR ☐ ICERPD ☐ CEDAW ☐ ICERPD Op. ☐ CEDAW Op. ☐ ICPAPED ☐ 1951 Refugee Convention/1967 Protocol Geneva Conventions: ☐ I ☐ II ☐ III ☐ IV ILO Instruments: ☐ No. 97 ☐ No. 143 ☐ No. 189 ☐ UNCTOC ☐ Trafficking Protocol ☐ Smuggling Protocol Regional Instruments: Europe ☐ ECHR ☐ Protocol 4 ☐ Protocol 7 Inter-Americas ☐ ADRDM ☐ ACHR Africa ☐ ACHPR ☐ ACRWC ☐ ACHPR-WOMEN ☐ AU Refugee Convention ☐ The Kampala Convention League of Arab States ☐ Revised Arab Charter on Human Rights
Relevant treaty reservations	
Status of treaty reporting	
National laws concerning migration	

* Definitions of acronyms in the beginning of manual.

ANNEX II. PROBLEM ANALYSIS TOOL

OBJECTIVE

This tool is intended to be used for the Problem Analysis and it can help reveal which areas the intervention should focus on and who the beneficiaries and other stakeholders should be included.

Identify the international and regional conventions, treaties and instruments that address the relevant issue facing migrants

Has the State signed or ratified these instruments?

(If the State has not yet signed or ratified, examine if there are any lobby or advocacy activities for ratification being carried out by any other agencies, organizations or civil society groups.)

Human Rights Instruments:*

- ☐ ICERD
- ☐ ICCPR
- ☐ ICCPR Op. 1
- ☐ ICCPR Op. 2
- ☐ ICESCR
- ☐ CEDAW
- ☐ CEDAW Op.
- ☐ CAT
- ☐ CAT Op.
- ☐ CRC
- ☐ ICRMW
- ☐ ICERPD
- ☐ ICERPD Op.
- ☐ ICPAPED
- ☐ 1951 Refugee Convention/1967 Protocol

Geneva Conventions:

☐ I ☐ II ☐ III ☐ IV

ILO Instruments:

- ☐ No. 97
- ☐ No. 143
- ☐ No. 189
- ☐ UNCTOC
- ☐ Trafficking Protocol
- ☐ Smuggling Protocol

Regional Instruments:

Europe
- ☐ ECHR
- ☐ Protocol 4
- ☐ Protocol 7

Africa
- ☐ ACHPR
- ☐ ACRWC
- ☐ ACHPR-WOMEN
- ☐ AU Refugee Convention
- ☐ The Kampala Convention

Inter-Americas
- ☐ ADRDM
- ☐ ACHR

League of Arab States
- ☐ Revised Arab Charter on Human Rights

* Definitions of acronyms in the beginning of manual.

Is there discrimination against migrants or certain groups of migrants?	☐ YES	☐ NO
Explanation of discrimination and affected groups, including those who face double discrimination:		
Do national policies or laws reflect international standards?	☐ YES	☐ NO
Policies and laws which do not reflect international standards:		

Identify national policies, laws, and actions taken by the State to address the issue		
Assess whether national policies and laws exist and if yes, do they effectively address the issue in question?		
Are certain groups, e.g. irregular migrants, domestic workers, implicitly or explicitly excluded from the relevant policy or law?		
Is irregular migration criminalized under national law?		
Are the national policies and laws implemented in practice? *(If not, what are the reasons for this? Lack of knowledge? Lack of resources? Discrimination or xenophobia?)*		
Have any of the UN treaty-based bodies (e.g. Migrant Workers Committee) or charter-based bodies (e.g. Special Rapporteur on the Human Rights of Migrants) made any recommendations or raised any concerns regarding State policies, laws and actions involving the issues?		

Identify potential capacity gaps of duty-bearers in fulfilling their obligations	
Identify the causes of the capacity gaps (e.g. lack of resources, knowledge gaps, fragmentation of migration management across State agencies, etc.).	Causes
Address the root causes for why these rights are not protected and the structural factors impeding the rights holders' ability to claim their rights and the duty bearers' capacity to meet their obligations (e.g. discrimination, migrants fear authorities, etc.)	Root causes
Assess the level of awareness that public officials and authorities have of the relevant issue as well as of the rights and obligations involved.	☐ High ☐ Medium ☐ Low ☐ None

Identify potential gaps in the capacity of rights-holders in claiming their rights		
Assess the extent to which rights-holders are aware of their rights.	☐ High ☐ Medium ☐ Low ☐ None	
Do some groups have a better knowledge about their right than others?	☐ YES	☐ NO
Groups with better knowledge: Groups with less knowledge:		
Are the rights-holders able to access information about their rights?	☐ YES	☐ NO
Do the rights-holders enjoy access to justice? (access to courts and tribunals or other complaint mechanisms such as an Ombudsperson)	☐ YES	☐ NO
Potential shortcomings:		
Can rights-holders access legal representation?	☐ YES	☐ NO
Are there any other underlying reasons for why the rights-holders cannot claim their rights? For example, discriminatory or xenophobic attitudes.	☐ YES	☐ NO
	Underlying reasons	

ANNEX III. EXAMPLES OF INDICATORS

OBJECTIVE

This tool has been developed to provide examples of various RBA indicators that can be used for common types of projects such as Counter-Trafficking, Labour Migration, Health, Alternatives to Detention, and projects concerning Children, or Discrimination, etc. These indicators are just intended to give ideas for indicators and they can be used for all levels depending on the Objective, Outcomes, and Outputs. The indicators have been divided into:

Rights in Principle (as they are laid out in national and international legal documents); and

Rights in Practice (as they are enjoyed by individuals and groups in States). For more information see the section on indicators in the Manual.

For most of IOM's projects it is recommended to disaggregate by at least age and sex, but also migration status and nationality and/or other relevant status.[107]

107 Whenever possible all indicators should be appropriately disaggregated preferably on the most common grounds of discrimination depending on the context and as recognized in international law e.g. sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. This can reveal which groups are at most risk of having their rights violated and should thus be prioritized.

TRAFFICKING IN PERSONS

Rights in Principle			
Ratification of the Palermo Protocol on Trafficking.	Domestic laws amended to better reflect international standards.	Formal cooperation mechanism established for coordinated efforts to prevent, detect and respond, and sanction trafficking.	Domestic laws including provisions on the protection and assistance to VoTs.
Ratification of other relevant international or regional human rights instruments (e.g. ICCPR, ICESCR, CEDAW, ICRMW, etc.).	Domestic laws in place criminalizing THB and related crimes.	National policies established to provide appropriate direct and comprehensive assistance to VoTs.	Domestic laws providing for compensation of VoTs.
Domestic laws and/or policies in place to address THB.	The punishments of THB are sufficiently severe in proportion to other crimes.	Domestic laws imposing punitive measures on companies that are using trafficked labourers.	Domestic laws include a provision on non-liability of VoTs.
Domestic laws and/or policies in place to address THB which focus on women and/or children.	Domestic laws in place including provisions on prevention of THB.	National Plan of Action enacted that includes prevention, comprehensive assistance, and prosecution of THB.	Domestic law provisions which prohibit criminalization of VoTs.
National definition of Trafficking reflects the definition in the Palermo Protocol.	# of reports submitted by the State to the treaty- bodies (e.g. CCPR, CESCR, CMW, CEDAW, etc.) including information on trafficking.	Guidelines established for identification and referral of VoTs.	State has a Programme of Action on implementation of Business and HR Guiding Principles.
# of changes to the domestic laws to bring it in line with international standard in relation to trafficking.	National law provides corporate responsibility for using the work of VoTs.	Private Recruitment Agencies are prohibited by law to charge service fees from migrants.	Business/Civil Law requires business to conduct supply chain check.

Rights in Practice			
Report prepared on the State by the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of slavery, or the Special Rapporteur on trafficking in persons, especially women and children.	Proportion of the general public with basic level of awareness of trafficking.	Proportion of VoTs referred to direct assistance by labour inspectors.	# of VoTs/beneficiaries provided with assistance (e.g health and psychosocial care, housing, and material assistance).

Concluding observations on the State prepared by the CCPR, CEDAW, or CMW.	% of the target group/ beneficiaries who can identify the message behind the campaign.	Proportion of VoTs referred to direct assistance by police officers and % of these who received direct assistance by the project.	# of VoTs/beneficiaries enrolled in formal education/vocational training.
# of complaints on the State brought to e.g. CCPR or CEDAW in relation to trafficking.	State budget allocated to assistance for VoT.	Proportion of trained police officers police officers/ prosecutors/judiciaries or other legal personnel/ other beneficiaries who report applying the skills, knowledge, and resources to anti-trafficking efforts in their work.	# of VoTs returned to their country of origin.
% of migrants working .unregulated or exploitative industries.	Availability of victim friendly testimony options (remote, video, conferencing, etc.).	# of police officers/ prosecutors/ judiciaries or other legal personnel/ other beneficiaries who have been trained on THB.	# of VoTs whose return to their country of origin was voluntary.
# of formal complaints of THB made to the police.	Victims are included into national system of witness protection and not discriminated because of their status as migrants.	# of labour inspectors/beneficiaries trained on THB.	% of VoTs whose return was consistent with international protection standards (security assessment, family tracing completed).
# of complaints of THB tried in court compared to the # of cases of THB resulting in a conviction.	Level of satisfaction of VoTs who have received direct assistance (e.g. medical, psychosocial, employment training, family counselling, etc.).	# of VoTs/beneficiaries using legal service.	% of VoTs who were given temporary residence permit.
# of companies punished for using trafficked. labourers.	# of hospitals with doctors and staff specialized in treating victims of sexual violence, labor exploitation, with knowledge of THB.	# VoTs/beneficiaries who have received compensatory damages for the harm done to them.	# of VoTs assisted in returning back home and provided with reintegration support in the project.
# of appropriate shelters (not detention facilities) for VoTs, national and non-nationals.			

LABOUR

Rights in Principle			
Ratification of relevant human rights instruments (e.g. ICCPR, ICESCR, CEDAW, CMW).	Migrant workers enjoy equality with nationals at work (e.g. remuneration, working hours, conditions, etc.).	Regulations and codes of conduct in place for private/State recruitment agencies.	Domestic law provides for family reunification for migrant workers and their family members.
Ratification of relevant ILO instruments (e.g. No. 97, No. 143, No. 181 (private agencies), No. 189 (domestic workers)).	Labour regulations in place on the protection of migrant workers.	Mechanisms in place to monitor recruitment agencies.	Procedures established for regularising migrant workers in an irregular situation.
The definition of a "migrant worker" is in line with ICRMW.	Complaint mechanism established from which migrant workers can seek assistance in case of discrimination, exploitation or ill treatment by their employers.	Punitive measures against recruitment agencies for non-compliance.	Cooperation and coordination mechanisms between sending and receiving States.
Domestic laws in accordance with international standards.	Guidelines developed to help consumers distinguish between good/services that have been produced through exploitation vs. fair labour conditions.	Legislation provides punitive measure against those who employ irregular migrants.	Registration mechanisms for established for migrant workers in both sending and receiving State.
Labour law provisions apply equally to non-nationals.	The legislation requires businesses paying all the outstanding fees and allowances to migrant workers employed in irregular situation.		Integration of gender-sensitive approaches into labour migration policy.
Labour law provisions apply equally to domestic workers.	Legislation imposes reporting requirements to the migration authorities on labour inspectors.		
Labour law provisions apply equally to irregular workers.	Legislation prohibits punitive measure against irregular migrants who work without a work permit/visa.		

Rights in Practice			
Report prepared on the State by the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of slavery, including its causes and its consequences.	% of the complaints heard in court/ tribunal on the right to work, including just and safe working conditions made by migrant workers which resulted in a conviction or other punitive measure against the employer.	# of complaints of discrimination made to the Ombudsman by migrant workers.	Migrant workers in an irregular situation have access to basic services (e.g. health care, legal services, housing, education, etc.).
Concluding observations on the State prepared by the CESCR, CEDAW, or CMW.	# of exploited beneficiaries provided with direct assistance thanks to the project.	# of trade unions, NGOs and civil society groups involved in the protection of the right to work for migrants.	Migrant service centres established providing assistance and information to migrant who want to emigrate.
# of received complaint on the right to work, including just and safe working conditions made by migrant workers.	# of employers punished for labour law violations with respect to irregular migrants.	Migrant workers are able to join and seek assistance from trade unions.	Migrant service centres established providing assistance and information to migrant workers in the country.
# of complaints investigated on the right to work, including just and safe working conditions made by migrant workers.	# of death and serious injuries of migrant workers caused at work.	# of labour inspectors trained on THB and forced labour.	# of business participating in employment programmes for vulnerable groups.
# of complaints heard in a court/tribunal on the right to work, including just and safe working conditions made by migrant workers.	# of convictions for forced labour.	% of exploited migrant workers who have been referred to direct service by labour inspectors.	% of migrant workers who can send remittances back to their country of origin.
# of migrant workers receiving compensation for outstanding salaries and/or compensation for injury or suffering at work.		Migrant workers in a regular situation have access to basic services (e.g. health care, legal services, housing, education, etc.).	# of irregular migrant workers reported to the migration authorities by labour inspectors.

HEALTH

Rights in Principle			
Ratification of relevant human rights instruments (e.g. ICESCR, ICRMW, CEDAW, CRPD).	National policy or plan of action in place addressing the right to health of migrants.	All migrants, irrespective of status, can qualify for public/private health insurance.	Bilateral agreements with State X include provisions on the health of migrants.
Ratification of relevant ILO instruments in relation to occupational health (e.g. No. 155, No. 161, No. 167, No. 171, No.187, etc.).	National policy on the right to health based on WHA resolution 61.17.	Legislation and regulations provide irregular migrants can access primary health care.	The legislation imposes travel restrictions for people living with HIV.
# of reports submitted by the State to the treaty- bodies (e.g. CESCR, CMW, CEDAW, CRPD, etc.) including information on the implementation of the right to health of migrants.	# of official frameworks/ policies on migration health in place based on the operational framework of the WHA Resolution 61.17.	Legislation providing protection from expulsion of pregnant women.	Domestic law is in line with international guidelines and does NOT impose compulsory HIV testing for migrant workers or other groups.
Domestic law recognizes the right to preventive, curative and palliative, non-discriminatory and universal access to health services, regardless of migration status.	National health strategy includes indicators on migrant health.	Regulations or codes of conducts for health personnel requires treatment to be culturally and gender sensitive.	Health screening for visa or travel purposes is in line with WHO standards / does not restrict entry for health conditions that are not of public health concern.
# of changes made to the Domestic laws to bring it in line with international standards on health.	# of indicators in the National health strategy on migrant health.	# of health-related policies that specifically address gender-related needs of migrants.	Immigration policies impose health screening of migrants upon entry (testing for HIV, TB, pregnancy, etc.) for the purpose of ensuring access to services, not to limit entry.
Domestic laws and regulation provides for access to health care for all migrants irrespective of their migration status.		# of policies responding to gender-based violence (GBV).	Legislation does not prescribe reporting requirements of medical staff treating irregular migrants.
Domestic laws provide migrants with access to preventative, curative and rehabilitative mental health services.			
Domestic laws and regulations on immunization apply to all migrants in equality with nationals.			

Rights in Practice			
Report prepared on the State by the Special Rapporteur on the human rights of migrants, or Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.	Ratio of migrants seeking medical assistance to migrants receiving treatment # of complaints made on the right to health of migrants to NHRIs, Ombudsman, or other formal complaint mechanisms.	Budgetary support for linguistically appropriate health services, interpreters and information and education.	Migrant women have access to reproductive health care, including access to pre- and post-natal care.
Concluding observations on the State prepared by the CESCR, CEDAW, CPRD or CMW.	# of migrants compensated for violations of their right to health.	# of local NGOs providing health care to migrants.	Ratio of migrant women satisfied to migrant women unsatisfied with the sexual or reproductive health care.
The State regularly consults with a wide range of representatives of the following groups when formulating, implementing and monitoring health policy: NGOs, community leaders, migrant groups, private sector, health personnel.	# of deaths of migrants/ seriously worsened condition of the health of migrants due to not being able to access health care.	Information on accessing health care distributed in various languages in migrant communities.	# of health providers trained on migration health.
# of State initiatives on providing access to primary health care for all migrants.	# of migrants who are covered by public/private health insurance.	# of migrants who know where to seek medical assistance and what rights they have in relation to their health.	# of health practitioners who have been trained on migration health.
Migrants are required to pay a disproportionately higher cost for health care (services and goods) compared to nationals.		Sending State provide information and pre-departure training of migrants.	% of migrants who have experienced xenophobia or discrimination when seeking medical assistance.
% of migrants having access to potable water/nutritious food/adequate housing and other underlying health determines.		# of migrants receiving mental health counselling in equality with nationals.	# of irregular migrants reported to the migration authorities by health personnel.
Migrants and nationals have equal access to essential drugs.		# of migrant sex workers experiencing stigmatization when seeking health care.	

# of migrants vaccinated against the community's major infectious diseases in equality with nationals.	# of migrants subject to compulsory HIV/AIDS screening.
# of migrants denied entry based on a condition of health (HIV, disability, pregnancy, etc.).	
# of GBV cases reported in a given time period; % of reported cases that are addressed/resolved; % change in # of GBV cases reported.	
# of health workers who undergo training on responding to GBV incidents.	

CHILDREN

Rights in Principle			
Ratification of CRC, and the two optional protocols to the CRC, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography.	# of reports submitted by the State to the relevant ILO monitoring mechanisms to e.g. Conventions No. 138 and 182.	Migration legislation and policy includes provisions on the protection of migrant children.	Domestic laws prohibit detention of migrant children or families with children.
Ratification of relevant ILO instruments e.g. No. 138, No. 182, etc.	Domestic laws in line with CRC (including the principles of best interests, rights to be heard, etc.).	Domestic laws banning worst forms of child labour.	Domestic laws on children includes migrant children and recognizes migrant children's' rights to education, health, housing, etc. in equality with nationals.
# of reports submitted by the State to the CRC including information on the implementation in relation to migrant children.	# of changes to the Domestic laws to bring it in line with international standards on children.	Domestic law sets minimum age for work not less than 15 and not less than 18 for hazardous work.	

Rights in Practice			
Report on the State prepared by Special Rapporteur on the sale of children, child prostitution and child pornography, Special Rapporteur on trafficking in persons, especially women and children, Special Rapporteur on the right to education, Special Rapporteur on the human rights of migrants, etc.	# of trafficked children who are returned and reintegrated. % of these children who are not re-trafficked after 18 months.	% of children and parents who demonstrate increased knowledge of safe migration and precautionary actions for migration (e.g. investigating legitimacy of job offers).	Separated children who have been reunited with their families.
Concluding observations on the State prepared by CRC.	# of criminal cases brought against employers who are operating against laws on child labour and % of which resulted in convictions.	% of target children who know where and how to formally report a violation of their rights.	# of migrant children who have been separated from their parents by State action and % of these in which the best interests principle has been the primary consideration.
# of registered unaccompanied and separated minors in the State.	# and % of migrant children who experience sexual violence who are referred to support services within an appropriate time frame (e.g. 2 weeks from reporting).	% of children who report that local support services (e.g. immigration authorities, labour inspectors, social workers, care staff, Police, courts, etc.) are child friendly.	% of unaccompanied or separated migrant children who have been place in a satisfactory alternative care placement.
% of children who are born in the State to migrant parents receive birth certificate.	# of children receiving compensation for violations of their rights.	% of migrant children who are satisfied with the level of their participation in decisions that affect them.	% of unaccompanied or separated children who access support services (counselling, medical, legal, etc.).
# of migrant children enrolled in formal education.	% of children and parents who demonstrate increased knowledge in transit and destination areas of trafficking risks (e.g. main purpose for child trafficking and ways in which children are recruited).	% of migrant children who experience xenophobic or discriminatory attitudes in school.	Reduction of child mortality of migrant children.
# of under-age migrant children removed from child labour and enrolled in education or vocational training.		% employers who demonstrate increased knowledge and changed attitudes towards under-age or hazardous child labour.	Reduction in malnutrition of migrant children.

ALTERNATIVES TO DETENTION

Rights in Principle			
Ratification of relevant instrument (e.g. ICCPR, CMW, CAT, CRC, etc.)	Domestic laws and policy considers immigration detention as an exceptional measure that can only be justified for a legitimate purpose.	Domestic laws and regulations specify that the conditions of detention must be humane and dignified and that all other human rights are respected, protected and fulfilled whilst in detention.	Appropriate screening procedures in place to identify vulnerable groups (children, VoTs, disabled migrants, etc.) and appropriate mechanisms established to respond to their needs (e.g. open accommodation, alternative care, etc.). Regulations provide for adequate conditions of detention facilities in line with international guidelines.*
Ratification of the Optional Protocol of the Convention against Torture ("OPCAT").	Domestic laws recognizes that immigration detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose and the maximum period for detention is clearly set out.	Process established for initial and periodic review of detained cases before a judicial or administrative body independent of the authorities who ordered initial detention.	Men and women are kept separate in the detention facilities.

* Including: Heating during the cold season; Fans and ventilators during the hot season; Sanitary installations; Adequate bathing and shower facilities; Separate beds with clean and appropriate bedding; Separation of men and women; Families kept separate from other detainees; Separation between administrative detainees and persons awaiting trial or persons with criminal convictions; Food of nutritional value taking into consideration religious dietary practices; Appropriate medical treatment, and where needed, psychological counselling; Access to education for children; Recreational activities; Religious services.

The constitution recognizes the right to liberty and security of all persons on their territory.	Domestic laws set out procedural guarantees surrounding detention in accordance with international standards, inc. access to judicial review.	Domestic laws and regulation identifies certain groups which should not be detained e.g. refugees and asylum-seekers, children, families with children, elderly, VoTs, disabled persons or persons with health problems, victims of torture.	Families (with children) are kept separate from other adults in detention facilities.
# of changes to the Domestic laws to bring it in line with international standards on restrictions of liberty.		Detention facilities where families are kept are child friendly.	
Domestic laws and policy provides for alternatives to detention for irregular migrants.		# of policies addressing gender-related needs of migrants in detention.	

Rights in Practice			
Reports on the State prepared by the Subcommittee on Prevention of Torture (SPT), Working Group on Arbitrary Detention (WGAD), the Special Rapporteur of the human rights of migrants, etc.	# and % of migrants registered in immigration detention centres.	# of migrants who have challenged their detention in front of a court.	# of complaint made of violence or ill-treatment by officials during detention and % of the complaints investigated.
# of individual complaints on the State brought to CCPR or CAT, or the Working Group on Arbitrary Detention (WGAD) concerning detention of migrants.	% of detained migrants who have been informed of the reasons of the arrest and detention as well as provided information about his or her rights in a language he or she understands.	# of detained migrants who have access to feel legal representation.	# of complaint made of violence or ill-treatment by other detainees during detention and % of the complaints investigated.
Proportion of communications from WGAD concerning immigration detention responded effectively by the Government.	# of families with children/ unaccompanied minors in immigration detention centres.	% of staff in detention facilities who have received training on the human rights standards applicable to detention.	# of complaints brought in front of courts regarding their detention and the % of these where migrants have received compensation.

# of migrants enrolled in any alternatives to detention.	# of migrants who have experienced violence or any ill-treatment during their time in detention.
Access to detention centres and detainees by external monitoring and supervision (e.g. by IOM, UNHCR and local NGOs, etc.) is facilitated by the State.	# of detained migrant women and girls, men and boys, who have experienced sexual violence or harassment during detention.

XENOPHOBIA, DISCRIMINATION, RACISM

Rights in Principle			
Ratification of relevant human rights instruments (e.g. CERD and CMW).	Constitution recognizes the principles of non-discrimination and equality.	Domestic laws ensure equal access to justice for everyone, including irregular migrants.	Criminal code providing stricter penalties for crimes with xenophobic or racist elements.
# of reports submitted by the State to the treaty-bodies (e.g. CERD, CPPR, CMW, etc.) including information on xenophobia, discrimination, and or racism.	# of changes to the Domestic laws to bring it in line with international standards on xenophobia, discrimination and racism.	Domestic laws impose adequate penalties for xenophobic and racist attacks, including hate crimes.	National action plan adopted on combatting xenophobia, discrimination, and racism.
Domestic laws prohibit all forms of xenophobia, discrimination, and racism.			

Rights in Practice			
Report prepared on the State by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Independent Expert on minority issues, the Special Rapporteur on the human rights of migrants, the Working Group of Experts on People of African Descent, or Special Rapporteur on the rights of indigenous peoples.	# of individual complaints submitted to CERD involving xenophobia, discrimination, racism against migrants.	# of formal complaints made by migrants concerning xenophobic and racist attacks and % of which were investigated.	% of migrant victims of discrimination, xenophobia, and/ or racism provided with legal aid.
	Proportion of received complaints on cases of direct and indirect discrimination against migrants investigated and adjudicated by the NHRI, an Ombudsman or other mechanism.	# of cases concerning xenophobic and racist crimes against migrants tired in court and % of which led to a conviction.	# of target population (e.g. border officials) trained on implementing a code of conduct for the elimination of discrimination against migrants.

ASSISTED VOLUNTARY RETURN AND REINTEGRATION

Rights in Principle	
Domestic law in the State of Origin punishes nationals who have left the country irregularly.	National plan of action in the State of Origin has been adopted to support returnees.

Rights in Practice			
# of migrants requesting return have received counselling before.	# of migrants requesting return have been informed about their rights and where to seek assistance upon return.	Proportion of returnees employed within 18 months after the return.	# of migrants who receive pre-departure orientation on gender-related issues.
			# of initiatives on migrant integration that address gender issues.

ANNEX IV. MONITORING TOOL

OBJECTIVE

This simple tool is intended to help the project manager keep track of how the project has incorporated an RBA. The monitoring tool is a self-check tool that is easy to use and the idea is that the project manager or other core project staff starts to use it already during the situation assessment and analysis phase to make sure that the RBA has been incorporated from the beginning. The monitoring tool includes various statements covering rights principles such as non-discrimination, participation, transparency, etc. For each one of these statements, the project manager will tick the box “yes” or “no” depending on if the statement is accurate. If the project manager ticks “yes” it will then be important to explain “how” the particular principle has been incorporated. If the PM ticks “no” there is an option to explain why or mention if it will be addressed. It will be up to the PM to decide on how much to elaborate on each statement and whether or not any evidence or data should be provided. However, for future reports and evaluations, it will be easier if you try to elaborate a bit more and provide some data or other forms of evidence.

Human Rights Principles (*Universality, Participation, Non-Discrimination, Interrelatedness, Transparency and Accountability*)	**During Situation Assessment**	**During Planning and Design**	**During Implementation**
All marginalized and groups at risk have been identified and consulted.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
All stakeholders have been able to participate freely and meaningfully (e.g. CSOs, NGOs, etc.).	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
All data is disaggregated appropriately e.g. by sex, age and applicable prohibited grounds of discrimination or other relevant grounds.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
Steps have been taken to avoid, detect and address any potential discrimination.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?
The project has taken steps to identify potential negative effects and/or conflicting right(s) for certain groups/individuals and taken steps to mitigate these effects.	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?	Yes ☐ No ☐ How? If no, why? Will this be addressed and how?

ANNEX V. CHECKLIST FOR A RIGHTS-BASED APPROACH TO PROGRAMMING

SITUATION ASSESSMENT AND ANALYSIS

☐ **When coming up with an idea for a project, have any of the following been consulted: Reports by any of the UN human rights mechanisms, non-governmental organizations (NGOs), civil society organizations (CSOs) and grassroots organizations?**

When thinking about new ideas for a project, it may be useful to look if any issues relating to the implementation of international standards concerning migrants' rights have been raised by any of the UN human rights mechanisms (e.g. the Universal Periodic Review), by the treaty bodies, or other international or regional actors (e.g. the Special Rapporteur on the human rights of migrants, the Committee of Experts at the International Labour Organization, or NGOs regarding a particular country or region). It could also be useful to look if there are any discussions regarding the development of a national or regional legislation or policy, as the project could support this initiative.

☐ **Is the needs assessment of the direct and indirect beneficiaries participatory and non-discriminatory?**

When identifying indirect and direct beneficiaries, it is first of all important to consider everyone who will be affected by the project. When carrying out the needs assessment, it is also important to involve and consult all beneficiaries – direct and indirect. This means that information should not only be collected from the State but also from NGOs and CSOs, among others.

☐ **Is the data appropriately disaggregated?**

When carrying out a needs assessment, data could be disaggregated preferably on the most common grounds of discrimination recognized in international law relevant to the context, such as sex, race, colour, language, religion or conviction, political or other types of opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. As a minimum, data should be disaggregated by age, sex and migration status (if applicable). This can reveal which groups are at most risk of having their rights violated and should thus be prioritized.

☐ **Have the rights-holders and duty-bearers been identified?**

☐ **Have the relevant rights and corresponding obligations been identified?**

☐ **Have the international and regional conventions, treaties and instruments that address the relevant issue facing migrants been identified?**

Examine if the relevant State has signed or ratified these instruments. If the State has not yet signed or ratified, examine if there are any lobby or advocacy activities

for ratification being carried out by any other agencies, organizations or civil society groups.

- ☐ **Are the State's laws and policies on the relevant issues in line with international standards?**

  Making such assessment can sometimes be a bit difficult and time consuming. One option is to look at what the UN treaty bodies say about the implementation of their instrument in the State concerned as well as consult NGO shadow reports. The International Migration Law (IML) Unit is also available to assist with legislation reviews and guidance.

- ☐ **Is there a pattern of discrimination against migrants or other groups of society?**

  When making an assessment of discrimination, it will be necessary to look if the discrimination is supported by law or if discrimination occurs in practice. Often, the national laws may be in line with international standards however the State may be aware of discrimination against certain groups but failing to address the issue.

- ☐ **Have marginalized groups been identified and is their participation during the situation assessment ensured?**

  What is considered to be a marginalized group will depend on the context of the country and often involves those living in extreme poverty, disabled persons and persons living with diseases, irregular migrants, refugees, internally displaced persons, stateless persons, minorities, indigenous peoples and others. In order to identify marginalized groups, it is important to involve relevant NGOs, CSOs, rights groups or networks at an early stage. It is also essential to make sure that these actors are included and consulted throughout the process.

- ☐ **During the situation assessment, has any potential negative effect of the project on certain groups been identified?**

- ☐ **Is the strategy of the project to further the realization of certain rights?**

  In some situations it will be necessary to deal with the symptoms of a problem and provide direct services to States or rights holders, rather than deal with underlying root causes. In other situations, it may be more appropriate and effective to promote accountability and the rule of law, advocate legislative changes, or empower migrants to advocate the protection or upholding of their own rights.

- ☐ **Who will be able to see the result of the analysis and have access to gathered data?**

  In order to make sure that all relevant stakeholders can participate meaningfully during the situation assessment, it is essential to distribute information about the assessment, the data gathered and the plan for intervention. However, please keep in mind that some information is sensitive and should never be shared externally. For example, it is fundamental that all personal data of the beneficiaries is collected, received, used, transferred and stored in accordance with IN/138: IOM Data Protection Principles.

PLANNING AND DESIGN

- ☐ **Is the appropriate terminology being used in the project proposal?**
  When possible, please make sure to use definitions established in international law. This will strengthen the accuracy of the project and avoid any potential confusion about migration-related terms such as *trafficking*, *irregular migration*, *migrant workers* and *refugees*. To find the definitions, consult the *IOM Glossary*, which has been translated into several languages such French, Russian, Chinese and Albanian. In addition, please feel free to contact the IML Unit for assistance.

- ☐ **Does the project proposal describe the rights at stake in the project, the rights-holders and duty-bearers, and the underlying reasons why the applicable rights are not being enjoyed?**

- ☐ **Does the project proposal identify any potential negative effect that the project may have on the rights of certain groups? Are there any mitigating strategies in place and are these explicitly mentioned in the project?**

- ☐ **Is the planning and designing process participatory and non-discriminatory?**
  Ensure that all stakeholders are involved throughout the process. For example, make sure to consult relevant NGOs, CSOs, rights groups and networks. The planning and design process should engage particularly excluded and marginalized groups and provide the support they need in order to participate meaningfully.

- ☐ **In the results matrix, is the objective explicitly rights-based?**
  In some results matrices, it will be obvious that the project takes a rights-based approach (RBA) because it is the objective, outcome or output that explicitly refers to rights. For example:

  Objective
  To contribute to comprehensive rights-based migration management approaches that address the needs of stranded, vulnerable, and irregular migrants in targeted sending, transit and receiving countries.

- ☐ **If the objective is not explicitly rights-based, is it linked to a right? Can a rights-based outcome be added or can the language be modified to make it more rights-based?**
  For example, the following objective is not explicitly rights-based, but it is linked to a right, namely the right to health.

  Objective
  To improve and strengthen the linkages between migration management and health in the targeted country.

To make the project more rights-based, one option is to add a rights-based outcome:

Added Outcome
The Government of the targeted country is committed to strengthen the protection of right to health of migrants.

Sometimes it will be sufficient to just modify the language. For example:

Outcome
Returning migrants are provided with life-saving humanitarian assistance in targeted provinces at entry points, in transit centres and in host communities.

Modified Outcome
The rights to life, adequate standard of living, and health of returning migrants are protected by providing life-saving humanitarian assistance in targeted provinces at entry points, in transit centres and in host communities.

☐ Is the project using rights indicators?

A (human) rights indicator is "specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights."[108]

Rights indicators are important for several reasons. The first and most obvious reason being that it allows us to measure and monitor compliance with rights obligations. Rights indicators are also likely to strengthen the accountability of States and encourage compliance with rights standards and obligations.

☐ Is the project using RBA indicators?

While rights indicators measure the situation of rights and/or the result of a project with a rights-based objective or outcome, RBA indicators measure the extent to which human rights principles – most often participation, equality and non-discrimination, and accountability – have been applied to the process of programming for each stage of the project. These indicators will thus be useful for most types of project regardless of whether or not the objective or outcome is rights-based and they will also be relevant for evaluating a project.

108 Office of the United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations/Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2012), p. 16.

IMPLEMENTATION

- ☐ **How are the various stakeholders participating during the implementation of the project?**
  It may be necessary to also consider if the stakeholders require any additional assistance to participate meaningfully during the implementation of the project. This could vary from small financial contributions to allow individuals to travel to and from meetings to making sure to plan well in advance so that people can organize themselves early on. The key to meaningful participation is the dissemination of relevant information.

- ☐ **Are particularly excluded groups able to participate during the implementation of the project? How is this ensured?**
  For instance, information about the project should be distributed in various languages and, if possible, make use of local CSOs, NGOs, rights groups and networks to make sure that information about the project can reach everybody.

- ☐ **Is the implementation of the project strengthening the capacity of the duty-bearers to fulfil their obligations and empowering rights-holders to claim their rights?**

- ☐ **Is the project implemented in a gender-responsive and culturally sensitive manner?**

- ☐ **Is there a risk that the implementation of the project leads to discrimination or stigmatization of certain groups?**
  This is particularly a risk if a proper analysis of the potential negative effect of the project has not been carried out during the situation assessment. Examples of this could be when one group is allowed to benefit from the project but another one is not. This could lead to jealousy and negative attitudes towards the beneficiaries of the project.

- ☐ **Is the implementation of the project targeting discrimination against certain groups?**

- ☐ **Does the implementation of the project assist rights-holders to access complaint or redress mechanisms such as courts, tribunals, ombudspersons and so on, or assist duty-bearers to set up any similar complaint or redress mechanisms?**

- ☐ **How is transparency and accountability ensured throughout the implementation of the project?**
  How is information about the implementation of the project disseminated? Through the Internet? Via the radio? Through newsletters? Does the project allow for any forum where the project can be discussed with the public? Can beneficiaries make suggestions or complaints regarding the implementation of the project?

MONITORING AND EVALUATION

- ☐ **Throughout the project, is the rights situation monitored as well as the performance of the project?**
  Monitoring the rights situation, also referred to as "situation monitoring", measures the broader conditions of and changes in a situation before, during and at the end of the project. This type of monitoring will be relevant for projects that have an objective or outcome directly linked to furthering the realization of rights as it will be linked to the performance of the project.

- ☐ **As the project manager, are you using the monitoring tool provided in the manual?**

- ☐ **Does the term of reference indicate that the evaluation will integrate rights into the general criteria for evaluation, such as relevance, effectiveness, efficiency, impact and sustainability?**[109]

- ☐ **How have the various stakeholders (including rights-holders and duty-bearers, local civil society groups and NGOs) been involved in planning and designing the monitoring and evaluation of the project?**
  It may, for example, be important to consult various stakeholders about what type of data should be collected and as well as the methodology of collecting the data. To the extent possible, make sure that the most marginalized groups of rights-holders are involved in the monitoring and evaluation processes.

- ☐ **Are the monitoring and evaluation processes explicitly designed to detect or measure discrimination against particular groups?**
  For example, monitoring and evaluation may be designed to detect any forms of discriminatory practices that may occur during the implementation of the project or as a result of the project.

- ☐ **Is the data collected appropriately disaggregated, such as by age, disability, displacement, ethnicity, gender, nationality, migration status and so on?**

- ☐ **Do the monitoring and evaluation processes account for any form of complaint mechanisms and how are complaints received during monitoring and evaluation dealt with?**

- ☐ **Are the findings from monitoring and evaluation shared publicly in a transparent manner?**

- ☐ **Are the findings from monitoring and evaluation used to promote changes in law or the policy of the State?**

109 The United Nations Evaluation Group has provided guidance on how to do this in *Integrating Human Rights and Gender Equality in Evaluation – Towards UNEG Guidance* (2011).

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