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Protection of Migrants' Rights and State Sovereignty

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Paradoxical as it seems, protecting migrants' rights may be the best way to enhance state sovereignty in a globalized world. The protection of fundamental human rights and freedoms should not depend on where one is in the world. However, it is the state's responsibility to uphold human rights through its laws and enforcement.

Migrants are vulnerable to human rights violations because they are not citizens of receiving states and, due to their status, often live in precarious situations. Women migrants have to deal with additional challenges as they face human rights violations based on their migrant status as well as based on their sex. Whether migrants enter states "with authorization or they are undocumented, migrants will generally find their rights diminished in comparison with the citizens of their country of residence."¹ While human rights are inalienable and should not be granted on the basis of citizenship, as part of the notion of state sovereignty, states possess extensive authority to protect their borders and determine their own laws. For example, states have the power to determine the admission of non-nationals into their country, detention of migrants and removal or expulsion of non-nationals.² However, although states have the power to manage migration flows into, through and from their territory, they are obligated by international law to do so in such a way that upholds the rights of individuals within their territory and under their jurisdiction.

There is a fear that protecting human rights and placing the individual at the forefront of migration issues undermines state sovereignty or that putting migration governance firmly within the existing international legal framework may, in some way, be detrimental to state sovereignty. It is, however, important to underline that existing international law does not impose upon states how to govern their migration flows nor does it dictate how to formulate migration policies. In fact, the existing international legal framework actually creates a sustainable basis for having long-term migration governance with respect for the individual, as well as recognizing the states' competence to govern access and stay of non-nationals (with the notable exception of non-refoulement³ cases).

It needs to be more widely understood that state sovereignty is not undermined when states develop migration management laws and practices that protect the rights of both regular and irregular migrants within their territory. In fact, the reverse is the case as illustrated in the examples below.

Migration management laws that protect the human rights of migrants can effectively work to enhance state sovereignty by protecting national security and public order. For instance, by developing laws and practices that protect the human rights of irregular migrants, such as victims of trafficking and smuggling, states can better address issues of corruption⁴ and transnational organized crime⁵ which are often associated with trafficking or smuggling in persons. These laws promote the protection of national security and public order. Furthermore, instituting anti-human trafficking legislation that requires states to protect victims of trafficking from exploitation and assist victims to rehabilitate by providing them with appropriate housing,



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counselling and medical, psychological and material assistance, does not challenge state sovereignty, and does not infringe upon the right of the state to protect its borders and those within them.⁶

Migrant workers offer another example of how upholding the rights and freedoms of both documented and undocumented migrant workers does not undermine state sovereignty but strengthens states. The Core Human Rights Conventions—including the Convention for the Protection of the Rights of all Migrant Workers and Members of their Families—recognizes that all migrant workers are entitled to legal protection within the international human rights regime. The Convention accords both documented and undocumented migrants with civil, social and labour rights.⁷ Regarding irregular migrants, the Convention recognizes that workers who are non-documented or in an irregular situation frequently are employed under less favourable working conditions than other workers.⁸

Managing the migration of workers is fundamental to ensure stability and development of the state, especially in a globalized world where labour mobility, or the movement of people across state borders for employment, is a key feature. This is because migrant workers contribute to the economic and human development of the countries in which they work and where they fill gaps in the labour market and provide essential skills. In the case of migrant care and domestic workers—where women are heavily present—their often invisible and silent work effectively contributes to containing the ‘care crisis’ faced by many developed countries. In addition, migrant workers contribute to their home countries through remittances which contribute to development and poverty reduction.⁹ However, the ability of migrant workers to be economically productive and contribute to the development of both their countries of origin and residence is conditioned by the extent of their integration, as well as by the living and working conditions in the country of settlement.¹⁰ By upholding the rights of migrant workers, states can manage migration in such a way that fosters a stable environment for migrants to live and work so that migration becomes leverage for the development of the state. By effectively protecting migrants (regardless of status), and enabling them to earn decent pay and enjoy decent working conditions, their productivity will contribute to the host country’s economy and to that of the country of origin where a considerable portion of the earnings are likely to be sent.

The question of protection and of guaranteeing rights of migrant workers (regular as well as irregular) is not just a migration governance question. It encompasses labour legislation, labour inspection, health and general human rights. Traditional practices of managing migration exacerbate the vulnerability of migrants. Take the selective application of labour laws in certain sectors, such as agriculture, construction, or domestic service. Migrant workers run a gauntlet in crossing borders to work in labour intensive sectors for wages well below legal or industry minimum standards often to be denied even these by unscrupulous employers who, instead, conspire to arrange their deportation when they are no longer needed. This is a problem of exploitation, and yet the victims of these scenarios, the migrants, are generally more likely to be penalized for their minor role than are employers who profit from illegal cheap or even free labour. Protecting migrants from such exploitation and abuse is not only a question of protecting the individual for the individual’s sake, or of taking the moral high ground. It is an international legal obligation. Having sectors of the labour market that deny employers’ labour rights or violate labour codes (at times even criminal codes) encourages criminal behavior by employers, undermines the rule of law and creates unfair competition for the national labour force. Developing effective laws that manage migration in such a way that upholds the rights of migrants benefits both the migrant and society as a whole. Respect for the international legal framework thus leads to enhanced respect for the individual as well as for national legislation and institutions.



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The examples above illustrate that state sovereignty is not undermined when states develop migration management laws and practices that protect the rights of particular kinds of migrants, such as victims of trafficking, smuggled migrants and migrant workers. State sovereignty is also not challenged when states uphold particular human rights of all migrants within their territories. For example, international human rights instruments clearly articulate the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health,”¹¹ and, in particular, require states to take steps to ensure the healthy development of the child, treat diseases, and create conditions that would assure that medical services would be provided to everyone in their territory in the event of sickness.¹²

To comply with international human rights law, states must provide health services to migrants as well as their own nationals. In practice, states often strain to fully realize the right to health of migrants, particularly those in irregular situations, by excluding migrants from national health systems, limiting access to emergency health care or selectively providing medical assistance to migrants.¹³ Many believe that requiring states to provide basic health care to non-nationals and extending health care to migrants (especially undocumented or irregular migrants) will place an extraordinary burden on limited state resources and undermines the sovereign interest of states by ‘dictating’ where to allocate state resources and requiring states to take positive action to ensure that non-nationals have access to these resources. However, the benefits of extending the right to health care to all migrants greatly outweigh the costs to states.

The World Health Organization (WHO) has found that inclusive approaches to the right to health care and addressing the health needs of migrants can “improve their health status, avoids stigma and long-term health and social costs, protects global public health, facilitates integration and contributes to social and economic development.”¹⁴ Most migrants are healthy young people who become increasingly vulnerable to ill health due to the conditions surrounding the migration process.¹⁵ Although this is particularly true for migrants who leave their country of origin involuntarily and for irregular migrants, WHO lists other risk factors that contribute to ill health including poverty, discrimination, language, cultural differences, administrative hurdles and legal status, which affect the health of all migrants.¹⁶

By ensuring migrants’ access to adequate health care, states can facilitate the integration of migrants into their state and ensure that they remain healthy contributing members of society. Inadequate access to health services can exacerbate health conditions and increase risks to public health, which generates greater health care costs for the state in the future. Proactive public health policies and legislation that provide access to already existing health care services to migrants, “particularly in terms of health promotion and disease prevention can reduce both the future demands for health care and also subsequent expenditures.”¹⁷

Protecting and respecting the rights of all individuals, including migrant women and men, most certainly does not mean infringing upon the state’s sovereign right to determine migration policies. Having a rights based approach does not only benefit the individuals concerned, but promotes respect for the rule of law for existing institutions and thus benefits both states and individuals.

Notes

1 “Migration and International Human Rights Law,” International Commission of Jurists (2011), p. 29.



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- 2 International Covenant on Civil and Political Rights; Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live; International Convention for Migrant Workers and Their Families, Article 16.
- 3 International Organization for Migration, *Glossary on Migration* (Geneva, 2011) defines non-refoulement as a “principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedoms may be threatened.”
- 4 United Nations Office on Drugs and Crime, “The Role of Corruption in Trafficking in Persons”, Issue Paper (2011).
- 5 United Nations Office on Drugs and Crime, “Organized Crime involvement in trafficking in persons and smuggling of migrants”, Issue Paper (2010).
- 6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 7.
- 7 Ibid.
- 8 Convention for the Protection of the Rights of all Migrant Workers and Members of Their Families (Preamble).
- 9 Office of the United Nations High Commissioner for Human Rights, “Migration and Development: A Human Rights Approach”, pp. 8-9.
- 10 Ibid.
- 11 International Covenant on Economic, Social and Cultural Rights, Article 12(1).
- 12 Ibid, article 12(2).
- 13 International Organization for Migration, *International Migration, Health and Human Rights* (Geneva, 2013), p. 50.
- 14 World Health Organization, “Health of Migrants—The Way Forward: Report of a Global Consultation”, (2010), p. 5.
- 15 Ibid, p. 9.
- 16 Ibid.
- 17 Ibid, p. 42.