



Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

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**The European framework (EU, CoE, ECtHR) in
relation with vulnerable migrants**

Limassol, 29 September 2023



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Training of Lawyers on EU
Law relating to Asylum
and Immigration 3

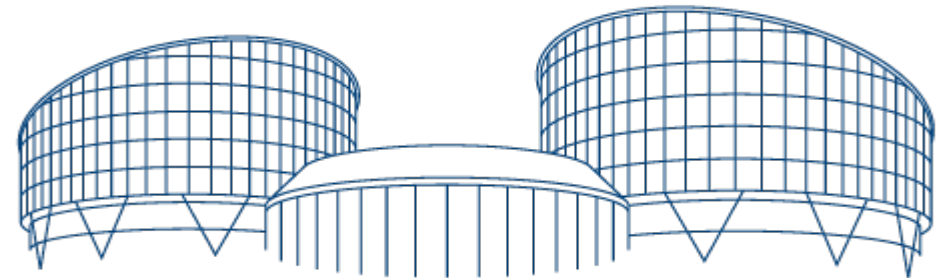
 #TRALIM3

Title: The European framework (EU, CoE, ECtHR) in relation to vulnerable migrants

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

The Notion of Vulnerability

- **Vulnerable people** are defined as **those who**, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, **find it especially difficult to fully exercise their rights before the justice system as recognised to them by law.** The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty.

*Brasilia Regulations Regarding Access to Justice for Vulnerable People approved by the Plenary
Assembly of the Ibero-American Judicial Summit in March 2008*



Reglas de Brasilia

sobre acceso a la justicia de las personas
en condición de vulnerabilidad

Definition of “*Migrant*”

- A definition that has been notably endorsed by the International Organization for Migration (IOM) (not a formal legal definition):

“defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is (temporarily or permanently).”

Part I: Intrinsic Vulnerability of Migrants

The vulnerability of certain groups within the population of migrants

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The vulnerability of migrants as a group

Subpart A: Intrinsic vulnerability of migrants within the judgments of the ECtHR

CASE OF M.S.S. v. BELGIUM AND GREECE (Application no. 30696/09)

“that it must take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously” [232] “In addition, the applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker” [233] Further the Court considered that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible”[263].



Subpart B: Intrinsic vulnerability of migrants within the CoE legal framework

- *“Irregular migrants, as they are often in a vulnerable situation, **have a particular need** for the protection of their human rights, including basic civil, political, economic and social rights.”*
- *“A large number of irregular migrants perish when seeking to enter Europe. For those that make it, many live in dangerous and inhumane conditions. A great number are exploited and many live in fear of being arrested and sent back to their country of origin”.*

Resolution 1509 (2006) Human rights of irregular migrants



Subpart C: Intrinsic vulnerability in the EU legal framework

1. **Directive 2011/95/EU** of the European Parliament and of the Council of 13 December 2011 **on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection**, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) “Qualifications Directive”
2. **Directive 2013/32/EU** of the European Parliament and of the Council of 26 June 2013 on common procedures **for granting and withdrawing international protection** “Asylum Procedures Directive”
3. **Directive 2013/33/EU** of the European Parliament and of the Council of 26 June 2013 laying down **standards for the reception of applicants for international protection** “Reception Conditions Directive”

Part II: The European Legal Framework concerning the vulnerability of certain groups within the population of migrants

Subpart A: The EU legal framework concerning the vulnerability of certain groups within the population of migrants

1. *“vulnerable”*,
2. *“in need of special procedural guarantees”*,
3. or *“with special reception needs”*.

‘Applicant in need of special procedural guarantees’

- **Article 2 (d) of the Asylum Procedures Directive** refers to an ‘applicant in need of special procedural guarantees’ defining him/her as an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances;
- **Recital 29 of Directive 2013/32/EU** justifies why these applicants need procedural guarantees stating that
 - *“Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”*

‘Applicant with special reception needs’

- **Article 2 (k)** of the Reception Conditions Directive defines an *‘applicant with special reception needs’* as a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.
- **Article 21** of Directive **2013/33/EU** provides us with a non-exhaustive list of people who are deemed vulnerable covering *“minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive”*.

Assessment procedures as envisaged by both Directives regarding “*Applicants in need of special procedural guarantees*” and “*Applicants with special reception needs*”

- **Article 24** of the Asylum Procedures Directive, requires EU Member States to assess if an asylum seeker is in need of special procedural guarantees and, if so, provide him or her with adequate support during the asylum procedure.
- **Article 22** of the Reception Conditions Directive requires EU Member States to assess whether or not vulnerable persons have special reception needs whilst also indicating the nature of such needs.

EU legal framework regarding migrants that are unaccompanied minors

- **Article 2 (I)** of the Qualifications Directive defines an ‘*unaccompanied minor*’ as “*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States*”.

Safeguards to be respected when dealing with Unaccompanied Minors within the Asylum Procedures Directive

Article 25

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall:
 - (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU;
 - (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

Safeguards as to the use of medical examinations to determine the age of Unaccompanied Minors within the framework of the examination of an application for international protection (Article 25, paragraph (5) of the Asylum Procedures Directive)

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;
- (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

The EU legal framework regarding migrants who are Victims of Trafficking in Human Beings

- **Article 21 of the Reception Conditions Directive**
- **Article 1 of the of Directive 2011/36/EU (Anti-Trafficking Directive)**
- **Article 2, paragraph (1) of the Anti-Trafficking Directive** seeks to define offences concerning trafficking in human beings namely it covers
“the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.
- **Article 11, paragraph 3 of the Anti Trafficking Directive**

The Anti-Trafficking Directive further sets procedural safeguards for victims of trafficking in human beings in criminal proceedings

Article 12, paragraph (2) of the Anti-Trafficking Directive: ensures that victims of trafficking have access to legal counsel without delay. Such advice and representation have to be free of charge where the victim does not have sufficient financial resources. As reminded by recital 19 of the Anti-trafficking Directive the purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them.

The conditions of the residence of the victims of trafficking in human beings in the territory of the Member States (linking thus the victims of trafficking in human beings with the migrant status)

COUNCIL DIRECTIVE 2004/81/EC

of 29 April 2004

on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

Article 3

Scope

1. Member States shall apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States.
2. Member States may apply this Directive to the third-country nationals who have been the subject of an action to facilitate illegal immigration.
3. This Directive shall apply to the third-country nationals concerned having reached the age of majority set out by the law of the Member State concerned.

By way of derogation, Member States may decide to apply this Directive to minors under the conditions laid down in their national law.

Subpart B: CoE Legal Framework regarding vulnerable migrants

- In this part we shall focus on the Council of Europe Conventions seeking to interpret how each of these conventions protect distinct categories of vulnerable migrants. The categories we shall focus on: Unaccompanied minors, victims of gender-based violence.
- European Social Charter (ESC)
- European Committee of Social Rights (ECSR)

ESC regarding migrants that are Minors/Unaccompanied Minors

- The Charter firstly treats children as individual rights' holders since human dignity inherent in each child fully entitles her/him to all fundamental rights granted to adults. Additionally, the specific situation of children, which combines vulnerability, limited autonomy and potential adulthood, requires States to grant them specific rights, such as those enshrined in the following provisions of the Charter: – **right to shelter Article 31§2**), – **right to health (Articles 8, 11, 7, 19§2)**, – **right to education (Articles 9, 10, 15, 17, 19§§11-12)**, – **protection of the family and right to family reunion (Articles 16, 27, 19§6)**, – **protection against danger and abuse (Articles 7§1, 17)**, – **prohibition of child labour under the age of 15 (Article 7§1 and §3)**, – **specific working conditions between 15 and 18 (Article 7)**.

Article 17 – The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1.
 - a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
 - b. to protect children and young persons against negligence, violence or exploitation;
 - c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

The legal interpretation of articles within the European Social Charter as implemented by the European Committee of Social Rights

The Defence for Children International v. the Netherlands Complaint No.47/2008

- Reconciling the protection of fundamental rights and the constraints imposed by a State's immigration policy

Findings:

- **Article 31§1 ESC** is not applicable and states that: "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote **access to housing of an adequate standard**
- Violation of **Article 31§2 ESC** states that: "With a view to ensuring the effective exercise of the right to housing, **the Parties undertake to take measures designed: 2. to prevent and reduce homelessness with a view to its gradual elimination**"
- Violation of **Article 17§2 ESC**

CoE Legal Framework regarding migrants that are victims of gender-based violence

- The Council of Europe adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence (**Istanbul Convention**).
- **Article 4, paragraph (3) of the Istanbul Convention:** “The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, **migrant or refugee status**, or other status”.

Article 60 and 61 of the Istanbul Convention (strengthening the existing international protection frameworks available to asylum-seeking and migrant women)

Article 60 – Gender-based asylum claims

- 1 Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.
- 2 Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.
- 3 Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

Gender-based violence against women

Article 3 paragraph (d) of the **Istanbul Convention** defines “gender-based violence against women” as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.

Forms of violence against women and domestic violence that should be considered as gender-based violence capable of amounting to persecution

1. Psychological violence (**Article 33**).
2. Stalking (**Article 34**).
3. Physical violence (**Article 35**).
4. Sexual violence, including rape (**Article 36**).
5. Forced marriage (**Article 37**).
6. Female genital mutilation (**Article 38**).
7. Forced abortion and forced sterilisation (**Article 39**).
8. Sexual harassment (**Article 40**).

Article 37 – Forced marriage

Article 37 – Forced marriage

- 1 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.
- 2 Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.

Case Study (Denmark): Forced marriage was seen as a form of persecution under the 1951 Refugee Convention, granting international protection to the victim.

Article 39 – Forced abortion and forced sterilisation

Article 39 – Forced abortion and forced sterilisation

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a performing an abortion on a woman without her prior and informed consent;
- b performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.

Case study (Germany)

Article 61 – Non-refoulement

Article 61 – Non-refoulement

- 1 Parties shall take the necessary legislative or other measures to respect the principle of non-refoulement in accordance with existing obligations under international law.
- 2 Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

Subpart C: Legal Framework of the ECtHR concerning vulnerable migrants

- We shall look at the particular judgments of the European Court of Human Rights dealing with the relevant articles of the European Convention of Human Rights in regards to vulnerable migrants.

Reference of “aliens” within the ECHR

- Few provisions of the Convention and its Protocols explicitly concern “aliens” and they do not contain a right to asylum.
- As a general rule, States have the right, as a matter of well-established international law and subject to their treaty obligations, to control entry, residence and expulsion of non-nationals.
- In *Soering v. the United Kingdom*, the Court ruled for the first time that the applicant’s extradition could raise the responsibility of the extraditing State under **Article 3** of the **ECHR** (**Prohibition of torture**).

Judgments of the ECtHR finding violations of Article 3 ECHR (Prohibition of Torture) in regards to migrants who were unaccompanied minors

- **Article 3** of the **ECHR** states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
- **S.F. AND OTHERS v. BULGARIA** (*Application no. 8138/16*)
- “that the immigration detention of minors, whether accompanied or not, raises particular issues in that regard, since, as recognised by the Court, children, whether accompanied or not, are extremely vulnerable and have specific needs. Indeed, the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. In recent years, the Court has in several cases examined the conditions in which accompanied minors had been kept in immigration detention.”
- **Abdullahi Elmi and Aweys Abubakar v. Malta** (*Applications nos. 25794/13 and 28151/13*)
- “Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not “create ... for them a situation of stress and anxiety, with particularly traumatic consequences”... Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention (*ibid.*).”

CASE OF POPOV v. FRANCE (Applications nos. 39472/07 and 39474/07)

- **Findings - Violation Article 3 ECHR**

“in view of the children’s young age, the length of their detention and the conditions of their confinement in a detention centre, the Court was of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It found that the authorities’ treatment of the children was not compatible with the provisions of the Convention and exceeded the threshold of seriousness for Article 3 of the Convention to be engaged leading to a violation of Article 3 ECHR in respect of their children”

CASE OF POPOV v. FRANCE (Applications nos. 39472/07 and 39474/07)

- 1. view of the children's young age** (namely, aged five months and three years),
- 2. the length of their detention** (over a period of fifteen days)
- 3. and the conditions of their confinement in a detention centre:**

“The applicants described the Rouen-Oissel centre as overcrowded and dilapidated, with a lack of privacy. The detainees lived in constant fear of being deported, thus exacerbating tension that was already acute ... the facilities available in the “families” area of the centre were nevertheless ill-adapted to the presence of children: no children’s beds and adult beds with pointed metal corners, no activities for children, a very basic play area on a small piece of carpet, a concreted courtyard of 20 sq.m. with a view of the sky through wire netting, a tight grill over the bedroom windows obscuring the view outside, and automatically closing bedroom doors with consequent danger for children.),.. the Court was of the view that the authorities failed to take into account the inevitably harmful consequences for the children. “in view of its findings as to the unsuitability of the premises for the detention of children, the Court does not doubt that this situation created anxiety, psychological disturbance and degradation of the parental image in the eyes of the children.”

Case of *Rahimi v. Greece* Ap. No. 8687/08

- *The applicant was an unaccompanied Afghan child who had been detained in an adult detention centre and later released without the authorities offering him any assistance with accommodation. The ECtHR concluded that the applicant's conditions of detention and the authorities' failure to take care of him following his release had amounted to degrading treatment proscribed by Article 3. The Court held that respecting the best interests of the child requires that other placement options than detention be explored for unaccompanied children.*

Judgments of the ECtHR finding violations of Article 5 ECHR (Right to liberty and security) in regards to vulnerable migrants

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

CASE OF O.M. v. HUNGARY (Application no. 9912/15)

- **Findings – Violation of Article 5 § 1 (b) of the ECHR:**

“the Court considers that, in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBTI people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran”.

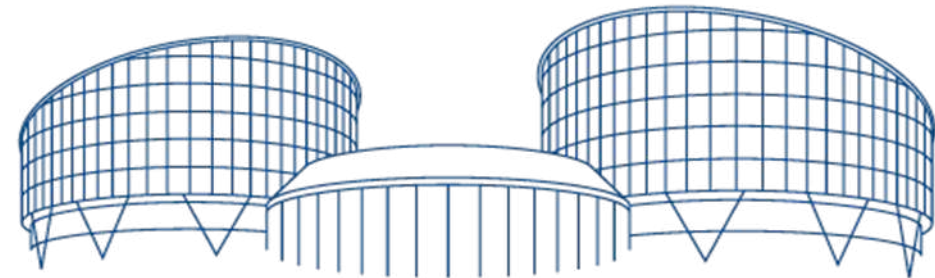


Conclusion

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

Catherine Cosgrave

Migrant workers: trafficking and labour exploitation

Limassol, 29 September 2023



Co-funded the European Union



Migrant workers: trafficking and labour exploitation

Identification and Response in Ireland

TRALVU Seminar, Cyprus,
September 2023

Working for equality

Overview

- **Define Human Trafficking & Awareness of Diverse Forms**
- **Indicators of human trafficking, particularly for labour exploitation**
- **Understanding legal framework**
- **Rights of victims of trafficking**
- **Useful resources**

Immigrant Council of Ireland

- Established in 2001
- Non-governmental charitable organisation
- Independent Law Centre since 2006
- Service Provision
- Education and Training
- Research, Policy, Advocacy and Communications
- [Anti-Trafficking](#)

Human Trafficking (in Ireland)

General

- Human trafficking is generally understood to refer to the trade in and exploitation of an individual for another person's gain.
- Trafficking can occur within a country or may involve movement across borders.
- Anyone can become a victim of human trafficking, regardless of nationality, ethnicity, age, gender or socio-economic status.
- Women, men and children are trafficked for a range of purposes, including forced and exploitative labour in factories, farms and private households, sexual exploitation, and forced marriage.
- Children are especially vulnerable to being targeted by traffickers and being caught in exploitative situations.
- In Ireland the average number of identification of victims per year is between 50 and 120. See Department of Justice Trafficking in Persons [Annual Reports](#).

Legal Framework

International and Regional Legal Framework

- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol)
- UN Convention on the Rights of the Child – Articles 34 and 35
- Council of Europe Convention on Action Against Human Beings of 2005 (Human Trafficking Convention) – Article 4



International and Regional Legal Framework: Labour

- ILO Forced Labour Convention 1930
- ILO Protocol of 2014 to the Forced Labour Convention 1930
- ILO Convention on the Worst Forms of Child Labour, 1999 (No. 182)
- UN Convention Against Transnational Organised Crime
- UN Guiding Principles on Business and Human Rights
- Universal Declaration on Human Rights



EU Law

- Article 153 of the Treaty on the Functioning of the European Union

The EU shall support and complement the activities of Member States in, among other fields

- The improvement of working conditions, working environment, etc
- To protect workers' health and safety
- Conditions of employment for third country nationals legally residing in Union territory

EU Charter of Fundamental Rights Article 5 includes trafficking under heading of prohibition of slavery and forced labour

EU Law – Several relevant Directives

- Posted Workers Directive 96/71/EC
- Directive 2004/81/EC on the residence permit issued to TCNs who are victims of trafficking in human beings
- Employers' Sanctions Directive 2009/52/EC
- [EU Directive 2011/36/EU](#) on preventing and combatting human trafficking (and proposed amendments)
- EU Seasonal Workers Directive 2014/36/EU

Domestic Legal Framework - Ireland

EU Directive 2011/36/EU on preventing and combatting human trafficking is transposed into national law partly by legislation and partly by policy/administrative procedures:

- Criminal Justice (Human Trafficking) Act 2008
- Criminal Justice (Human Trafficking)(Amendment) Act 2013
- Victim identification and National Referral Mechanism
- Administrative Immigration Arrangements for Victims of Trafficking for third country nationals that require residence permission
- Draft General Scheme of Criminal Justice Bill 2022 and Joint Justice Oireachtas Committee PSL Report
- Criminal Justice (Sexual Offences and Trafficking) Bill 2023

EU Directive 2011/36/EU

- Prevent and combat trafficking in human beings and protect victims
- THB recognised as serious crime and gross violation of human rights
- Recognises gender-specific phenomenon of trafficking
- Inherent vulnerability of children
- Penalties for perpetrators
- Victims should be protected from prosecution or punishment for criminal activities compelled to commit

EU Directive 2011/36/EU

- Prevent and combat trafficking in human beings and protect victims
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EU Directive 2011/36/EU contd.

- Provision of assistance, support and protection to victims, including access to legal counselling and free legal representation, on a consensual and informed basis
- Specific measures should be available to children focusing on their physical and psycho-social recovery and on a durable solution
- Infringement proceedings are possible for breach of the Directive
- Failure of a national court to make a reference to the CJEU (where interpretation is not obvious) under Article 267 without any reasoning at all is a breach of Article 6 ECHR

Article 2 – Definition of Offence

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Definition

TRAFFICKING

ACT

Recruitment

Transport

Transfer

Harbouring

Receipt of persons

MEANS

Threat or use of force

Coercion

Abduction

Fraud

Deception

Abuse of power or
vulnerability

Giving payments or
benefits

PURPOSE

Exploitation including

Prostitution of others

Sexual exploitation

Forced labour

Slavery or similar
practices

Removal of organs

Other types of
exploitation

From: UNODC, *Toolkit to Combat Trafficking in Persons*, Global Programme Against Trafficking in Human Beings, 2008.

Article 2 – contd.

A position of **vulnerability** means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

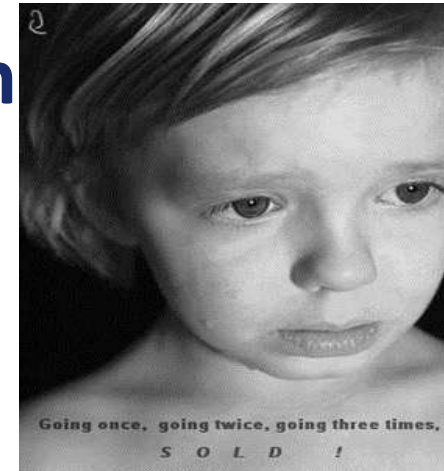
The **consent** of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be **irrelevant** where any of the means in paragraph 1 has been used.

Article 2 – Children

When the conduct involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means in paragraph 1 has been used.

‘Child’ – any person below 18 years of age

Minors cannot consent to being exploited, even in the absence of the threat or use of force, or other forms of coercion, deception, fraud, etc.



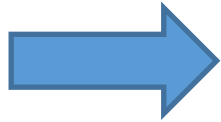
Identification

Adult victims:

Act

Means

Purpose



Child victims:

Act

Purpose



Note:

- No requirement for a transnational element
- Means (for adults) include fraud, deception and abuse of power or vulnerability
 - The purpose will broadly be exploitation

Human Trafficking v Smuggling



Types of Exploitation and

Indicators of Human

Trafficking

Article 2 – Forms of Exploitation

- Exploitation of the prostitution of others
- Other forms of sexual exploitation
- Forced labour or services, including begging, slavery or servitude
- Exploitation of criminal activities (e.g. cannabis production)
- Removal of organs

Indicators #knowthesigns

UN Office on Drugs and Crime – Human Trafficking Indicators

- General Indicators
- Children
- Sexual Exploitation
- Labour Exploitation
- Domestic Servitude
- Begging and Petty Crime

ILO Operational Indicators of Trafficking in Human Beings (Delphi Methodology) including strong, medium and weak indicators

Blue Blindfold – Know the Signs (Ireland)

Indicators Adults

- Unable to move around easily – limited contact with others or usually accompanied
- Fearful and anxious
- Controlled by violence and/or fear of harm to others
- Not in possession of identity documents
- Unfamiliar with the environment
- From particular regions/countries known as source destinations
- Low educational levels
- Had fees paid for transport to country and working to pay back debts

Indicators Children

- Have no access to their parents or guardians
- Look intimidated and behave in a way that does not correspond with behaviour typical of children their age
- Have no friends of their own age, or at all
- Have no access to education
- Have no time for playing
- Live apart from other children in substandard accommodation
- Eat apart from other members of the 'family'
- Engaged in work not suitable for children
- Travel unaccompanied by adults
- Travel accompanied by persons who are not relatives

Indicators Sexual Exploitation

- Be of any age
- Moved around constantly to different brothels/apartments and between countries
- Escorted wherever they go
- Work long hours/few or no days off
- Few personal belongings
- Little or no cash of their own
- Have tattoos or other markings indicating 'ownership' by exploiters
- Sleep where they work
- Live or travel with group but sometimes with women who do not speak the same language
- Only know sex-related words in the local language

Indicators Labour Exploitation

- Work excessively long hours
- Sleep where they work
- No access to earnings
- No employment contracts or pay slips
- Identity documents withheld
- Employer provides work, food, transport and accommodation or substantial deductions made from wages for 'services'
- Little or no freedom to move around
- Lack of protective clothing for work undertaken
- Working in particular sectors including agriculture, fishing construction, mining, entertainment, manufacturing

Types of child trafficking

- **Trafficking for Child Sexual Exploitation (CSE)** is a form of sexual abuse that involves the grooming and/or coercion of young people under the age of 18 into sexual activity.
- **Forced Labour** is where a child is exploited in labour for someone else's gain. It may involve victims being compelled to work long hours, often in arduous conditions, and to relinquish the majority, if not all, of their wages.
- **Forced Begging:** Children, including babies and younger children, can be used as tools for begging. Children may also be forced to beg alone, with the money handed to adults and gangs controlling them.
- **Forced criminality:** Child criminal exploitation (CCE) can be understood as the grooming or exploitation of a child to commit a crime, such as possession of false identity documents, pick-pocketing, shoplifting, burglary, cannabis cultivation, drug transportation and distribution.
- **Forced marriage**, or early marriage, is any marriage where at least one of the parties is under 18 years of age. Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.

Using Indicators

- No full definition because trafficking is a complex crime
- Few victims self-identify as a victim of trafficking
- Attention should be paid – lists are NOT exhaustive
- Try to work backwards – focus on the exploitation and not on transportation

Responding to Victims of Trafficking

Options?

- Criminal justice response? Does person wish to make a statement to the police as a victim of crime?
- Supportive response? What does the individual want or need?
- Child protection response?

Criminal Justice Response

Referral to police – why?

- To give a statement
- For police to investigate and bring a prosecution
- Act as a possible witness in criminal trial
- Victim identification and provision of supports as provided for under the Directive / national law

Ireland - National Referral Mechanism?

- HSE AHTT – care plan
- An GS – statements, investigation, safety planning and AIAs
- Civil Legal Aid Board – advice
- IPAS accommodation

Other Options

Voluntary Return?

Does the person wish to return home, is it safe for them to do so?

- [International Organisation for Migration \(IOM\)](#)
- Embassy/Consular Rep in Ireland

Options contd. (Ireland)

Administrative Immigration Arrangements (AIAs)

Apply to:

- ‘Foreign’ nationals suspected as VOT and Minister required to consider immigration status in Ireland

Provides for:

- ‘Recovery and reflection’ (60 days)
- Temporary Residence Permit (6 months)
- ‘Change of Status’ applications (after 3 years, or sooner if investigation / trial is finished)

Administrative Immigration Arrangements

Things to consider?

- Possible re-traumatisation of VOT
- Requirements to cooperate with criminal investigation or prosecution and no contact with traffickers
- Offences pre-date 2008 Act? Reality of prosecution?
- Exclusions from AIA – only apply to person from outside the EU/EEA and stated to exclude person to applies for international protection.

Options contd.

International Protection Application (Ireland)

- International Protection Act 2015
- Section 14 – unaccompanied children seeking protection – referral to child and family agency
- Section 15(4) - where it appears to the Child and Family Agency, on the basis of information, **including legal advice**, available to it, that an application for international protection should be made on behalf of a child in respect of whom the Agency is providing care and protection, it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make such an application on behalf of the child and to represent and assist the child with respect to the examination of the application.

Options contd.

Other immigration related options? / considerations? (Ireland)

- Application for residence permission under s. 4(7) Immigration Act 2004
- Identity documents?

What is the current situation? Consider all relevant facts – current relationships, children, etc.

Working with victims of trafficking

Key Considerations

- A victim may not (usually does not) self-identify as a victim of trafficking
- May require time and supports to facilitate disclosure
- Early identification and intervention is key
- Consider all the options

Identification and Disclosure

A trafficked person may be reluctant to disclose information owing to:

- Mistrust of others, shame and trauma
- Reluctant to repeat their story: re-traumatisation
- Fear of harm, and not realising that safe alternative options to their situation exist
- Lack of understanding of trafficking, control, or their rights
- Manipulation by their trafficker
- Inability to discuss their trafficking experience due to their lack of life experience i.e. when the victim is very young
- Debt bonding
- Lack of gender appropriate lawyers

Further Information & Resources

[Early Legal Intervention Toolkit](#)

[TRACKS Toolkit](#)

[COALESCE Toolkit](#)

[GRETA, Guidance Note on Preventing and Combatting Trafficking in Human Beings for the Purpose of Labour Exploitation](#)

[IHREC, Second Evaluation of the Implementation of the EU Anti-Trafficking Directive](#)

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Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

Olga Komiti

Migrant children and migrant families

Limassol, 29 September 2023



Co-funded the European Union

Migrant families and migrant children

Terms & Definitions

Migrants, asylum-seekers or refugees?

- All are third country nationals
- Migrants are persons who move for better living conditions
- Asylum-seekers are fleeing persecution and need international protection
- Refugees and subsidiary protection beneficiaries are persons who have been granted international protection

Terms & Definitions

Irregular migrants?

- Movements of people from one country to another may include some persons who are in need of international protection and others who are not. This is likely to be the case when, as often happens, a country of origin is simultaneously affected by human rights violations, conflict, economic decline and an absence of livelihood opportunities.
- Most asylum-seekers or refugees do not have the privilege of securing travel documents or visas and often see themselves forced to resort to smuggling or trafficking networks in a desperate attempt to reach international protection. They have important legal entitlements under international law, even where they may not fulfil national legislative provisions on entry and stay.

Applicability of human rights law

- Most human rights are guaranteed irrespective of an individual's immigration status: they are a function of a person's status as a human being, not as a citizen of a particular state.
- In other words, a person's status as an 'alien' or non-national does not exclude him or her from the protection of human rights law.

International legal framework

Universal Declaration of Human Rights, Article 16:

1. Men and women of **full age**, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the **free and full consent** of the intending spouses.
3. The family is the natural and fundamental group unit of society and is **entitled to protection** by society and the State.

International legal framework

International Covenant on Civil and Political Rights:

- Article 23: The family is the natural and fundamental group unit of society and is **entitled to protection** by society and the State.
- Protection of the family and its members is also guaranteed, directly or indirectly, by Article 17, which establishes a **prohibition on arbitrary or unlawful interference** with the family.
- Article 24 specifically addresses the **protection of the rights of the child**, as such or as a member of a family.

International legal framework

Convention on the Rights of the Child:

- Children (below 18 years old) and families with children are also protected under the UN Convention on the Rights of the Child
- Article 9: States should take all appropriate measures to ensure that a child **shall not be separated from his or her parents** against his or her will, and that applications by a child or his or her parents to enter or leave a state party for the purpose of **family reunification** shall be dealt with in a **positive, humane and expeditious** manner.

International legal framework

1951 Geneva Convention Relating to the Status of Refugees:

- The 1951 Geneva Convention does not refer to the issue of family reunification.
- However, the Final Act of the UN Conference of Plenipotentiaries states that '**the unity of the family ... is an essential right** of the refugee'.

European framework - CoE

European Convention on Human Rights, Article 8:

- “1. Everyone has the **right to respect** for his private and family life, his home and his correspondence.
2. There shall be **no interference** by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

European framework - CoE

European Convention on Human Rights, Article 8:

- According to the case law of the European Court of Human Rights (ECtHR), the right to family life is **not automatic**.
- Migrants must demonstrate that family life cannot be enjoyed 'elsewhere', before it is concluded that refusal to grant them family reunification is in violation of Article 8

European framework - EU

Treaty on the functioning of the European Union:

The Treaty on the Functioning of the European Union (TFEU) states in Article 79(2) that the European Parliament and the Council shall adopt:

- Necessary measures in the areas of 'the conditions of entry and residence
- Standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'.

European framework - EU

EU Charter of Fundamental Rights:

- The EU Charter of Fundamental Rights is applicable to EU institutions and to Member States when they are implementing EU law
- It refers in Article 7 to the right to respect for private and family life (along the same lines as Article 8 of the ECHR)

European framework - EU

EU recast Qualification Directive 2011/95/EU :

- Not applicable to migrants
- Refugees' and 'persons eligible for subsidiary protection' are defined
- 'family members' — extended to the father, mother or other adult responsible for the beneficiary of international protection if the person is under 18 (a minor) and unmarried.

European framework - EU

EU recast Qualification Directive 2011/95/EU :

- The Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union.
- The Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of the Charter, including Article 7.

European framework - EU

EU recast Qualification Directive 2011/95/EU :

- The '**best interests of the child**' should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child.
- In assessing the best interests of the child, Member States should in particular **take due account of the principle of family unity**, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

European framework - EU

EU recast Qualification Directive 2011/95/EU :

- Recital 19: It is necessary to **broaden the notion** of family members, taking into account the different **particular circumstances of dependency** and the special attention to be paid to the **best interests of the child**.
- Recital 36: Family members, **merely due to their relation** to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the **basis for refugee status**.

European framework - EU

EU recast Qualification Directive 2011/95/EU :

- Family members' means, **in so far as the family already existed in the country of origin**, the following members of the family who are present in the same Member State :
 - the spouse or his or her unmarried partner in a stable relationship where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
 - the minor children, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
 - the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;

European framework - EU

EU recast Qualification Directive 2011/95/EU, Article 23:

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35.
3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.
4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

European framework - EU

EU Family Reunification Directive 2003/86/EC

- Applies in 25 of 27 EU Member States (excluding Denmark and Ireland).
- Applies to both migrants and international protection beneficiaries
- It mainly concerns reunion of spouses and minor children with a non-EU sponsor

European framework - EU

EU Family Reunification Directive 2003/86/EC

Definition

- "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, **whether the family relationship arose before or after the resident's entry;**

European framework - EU

EU Family Reunification Directive 2003/86/EC

- The sponsor (the person who has been granted the right to reside legally in the country) must have a **residence permit valid for at least one year** and have reasonable prospects of obtaining the right of permanent residence;
- the **family** members must reside **outside** the territory when the application is made;
- public policy, public security or public health are **grounds for rejection**;
- conditions relating to **accommodation, sickness insurance and stable and regular resources** may be imposed;
- Member States may require **integration** measures;

European framework - EU

EU Family Reunification Directive 2003/86/EC

Special provisions for refugees

- may **limit** the special rules to family relationships that **predate** entry to the Member State;
- may authorize family reunification of **other family members** not referred to in Article 4, if they are dependent on the refugee;
- shall authorize the entry and residence of an **unaccompanied minor's first-degree relatives**; his or her legal guardian; or any other family member where there are no relatives or such relatives cannot be traced;
- shall take into account **other evidence**, where a refugee cannot provide official documentary evidence of the family relationship;
- shall **not require the refugee to have resided** in their territory for a certain period of time before having his or her family members join him or her.

European framework - EU

EU Family Reunification Directive 2003/86/EC

Special provisions for refugees

- Third-country nationals are required to provide evidence that they have accommodation, health insurance and resources (material conditions) that can support newly arrived family members.
- This requirement is not set out for refugees
- Member States may request this evidence if the application for family reunification is made after three months of recognition of the refugee status.

European framework - EU

EU Family Reunification Directive 2003/86/EC

Scope:

The Directive does not apply to:

- asylum-seekers;
- applicants for or beneficiaries of temporary protection;
- applicants for or beneficiaries of 'a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States'.

European framework - EU

EU Family Reunification Directive 2003/86/EC

Scope: why are SPBs excluded?

- The FRD was adopted in 2003, prior to the adoption of the Qualification Directive in 2004, when the status of “international protection”, encompassing both refugee status and subsidiary protection status, was established;
- Although when the Qualification Directive was transposed into national law by 2005 EUMS extended FRD to SPB, later on Cyprus deprived SPB from FR rights due to economic considerations (2013).

Greece, Cyprus and Malta fully exclude beneficiaries of subsidiary protection from family reunification, while others, such as Austria, Germany, Sweden and Hungary impose restrictive conditions in this regard due to the 2015 influx.

National Implementation

- Family unity is not ensured for families formed post recognition: children are now granted derivative status but spouses not (short term humanitarian permit, exceptional right to work without other rights).
- Families residing for more than a decade also retroactively affected.
- Family reunification for refugees: long delays, DNA tests required that refugees cannot afford, approvals by the CRMD become obsolete due to Embassies / Consulates requesting further documents.

Children: Definitions

- “Unaccompanied children” are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
- “Separated children” are children separated from both their parents or from their previous legal or customary primary caregivers but not necessarily from other relatives.

Children: gender-related persecution

- Domestic violence
- Early and forced marriage
- Female genital mutilation
- Physical assault
- Rape
- Sexual harassment
- Trafficking
- Transgression of social mores

Children: persecution

- Orphans/ street children/ lack of adult care;
- physical and mental violence, abuse, neglect, and exploitation;
- No access to education, health, child development;
- Under-age / forced military recruitment;
- Commonly 'sent away' by elders;

The refugee definition

- A refugee is a person who:
*“...owing to a 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 to the protection of that country...”*

UNHCR Guidelines

- UNHCR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)
- UNHCR Guidelines on International Protection: : “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)
- UNHCR Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (2006)
- Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009
- UNHCR guidance note on refugee claims relating to female genital mutilation (2009)

UNHCR Guidelines on child asylum claims (para 13)

- Application of the 1951 Refugee Convention criteria in children's claims requires particular awareness of children's rights and child-specific forms of persecution.
- Children are entitled to a range of **child-specific rights** set forth in the Convention on the Rights of the Child which recognize their young age and dependency and are fundamental to their protection, development and survival.

UNHCR Guidelines on child asylum claims (para 13)

- The right not to be separated from parents (CRC, Article 9);
- Protection from all forms of physical and mental violence, abuse, neglect, and exploitation (CRC, Article 19);
- Protection from traditional practices prejudicial to the health of children (Article 24);

UNHCR Guidelines on child asylum claims (para 13)

- A standard of living adequate for the child's development (Article 27);
- The right not to be detained or imprisoned unless as a measure of last resort (Article 37);
- Protection from under-age recruitment (Article 38).

UNHCR Guidelines on child asylum claims (para 48 - 50)

- Many children's claims to refugee status could be analysed in the context of the Convention ground of "membership of a particular social group". Being a child is in effect an *immutable characteristic* at any given point in time. Age and other characteristics may give rise to narrower social groups such as 'orphans', 'homeless children' or 'illegitimate children'.

Imputed political opinion

- the views or opinions of adults, such as the parents, may be imputed to their children by the authorities or by non-State actors. This may be the case even if a child is unable to articulate the political views or activities of the parent, including where the parent deliberately withholds such information from the child to protect him/her. In such circumstances, these cases should be analysed not only according to the political opinion ground but also in terms of the ground pertaining to membership of a particular social group (in this case, the “family”). (UNHCR Child Guidelines, 46)

Common European Asylum System

- Reception Conditions Directive – sets out standards for the well-being of families and children
- Asylum Procedures Directive – procedural guidelines specifically for children
- Qualification Directive – recognises child-specific harm

Cyprus: Guardianship and the care of children

- The Director of Social Welfare Services is responsible to act as a guardian for unaccompanied asylum-seeking children by virtue of the Refugee Law and must take all measures necessary under the given law on the child's behalf and in his or her best interests (Refugee Law, s.10)

Cyprus: Age assessment

- While a procedure was put in place following the intervention of the Child Commissioner, routine referrals to the age assessment process were noted.
- The assessment is not multidisciplinary and is limited to medical assessments with a considerable margin of error.
- The decision cannot be independently challenged, but only if and when the asylum claim is rejected. This deprives children from their reception and procedural rights throughout the refugee status determination process.
- Recent amendments to the Refugee Law introduced a presumption of adulthood in case a child does not consent to the medical test.

Legal representation: administrative stage

The Asylum Procedures Directive (2013) Article 25(1):

- obliges states to as soon as possible take measures to ensure that a representative represents and/or assists an unaccompanied child with respect to the examination of the asylum application
- Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview
- **Article 19(1):** Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances.
- **Article 20:** Free legal assistance and representation in appeals procedures

Cyprus: Legal Representation

- Administrative stages – guardian acts as representative
- International Protection Administrative Court (Child Commissioner – private lawyers)

Education of unaccompanied children

Reception Condition Directive (2013), Article 14 – *mainstream:*

- Special programmes for UASC
- Some children not enrolled in school are attending afternoon state institute classes (τα Κρατικά Ινστιτούτα Επιμόρφωσης)
- Most children not enrolled in school, KIE or other

Jurisprudence

- Standing jurisprudence of the European Court of Human Rights requires states to give effect to the right to family life and family unity through flexible, prompt and effective access to family reunification.
- *Mugenzi v. France*, 10 July 2014, Appl. No. 52701/09, para. 52
- *Tanda-Muzinga v. France*, 10 July 2014, Appl. No. 2260/10, para. 73.

Jurisprudence

- A State's entitlement to control the entry of aliens into its territory and their residence there applies regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there (**Üner v. the Netherlands [GC], §§ 54-60**).
- While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record, such an absolute right not to be expelled cannot be derived from Article 8 (*ibid.*, § 55).

Jurisprudence

- However, very serious reasons are required to justify expulsion of a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country (Maslov v. Austria [GC], § 75).
- Taking into account the applicant's family life and the fact that he only committed one serious crime in 1999, the Court stated that the expulsion of the applicant to Albania and a lifetime ban on returning to Greece violated Article 8 (Kolonja v. Greece, §§ 57-58).
- By contrast, in Levakovic v. Denmark, §§ 42-45, the Court did not find a violation of the "private life" of an adult migrant convicted, after entering adulthood, of serious offences, who had no children, no elements of dependence with his parents or siblings, and had consistently demonstrated a lack of will to comply with the law.

Jurisprudence

The Court also examines the best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination (*Üner v. the Netherlands* [GC], § 58; *Udeh v. Switzerland*, § 52).

The Court has affirmed that the best interests of minor children should be taken into account in the balancing exercise with regard to expulsion of a parent, including the hardship of returning to the country of origin of the parent (*Jeunesse v. the Netherlands* [GC], §§ 117-118).

Jurisprudence

In *M.A. v. Denmark* [GC], the Grand Chamber considered the Article 8 compatibility of a three-year waiting period for applying for family reunion.

It accepted that States had a wide margin of appreciation in this area. In particular, it acknowledged that resource constraints caused by an influx of asylum seekers might justify the prioritisation of Article 3 protection over and above the interests of refugees and persons in receipt of subsidiary protection to family reunification.

It did not, therefore, consider that a waiting period per se offended against Article 8 (see §§ 145-146).

Jurisprudence

However, the discretion enjoyed by States in this area was not unlimited and on the facts of the case before it considered that a waiting period of three years was by any standard a long time to be separated from one's family, when (as in the applicant's case) the family member left behind remained in a country characterised by arbitrary violent attacks and ill-treatment of civilians and when insurmountable obstacles to reunification there had been recognised. This was especially so given that the actual separation period would inevitably be even longer than the waiting period.

Furthermore, beyond very limited exceptions the impugned legislation had not allowed for an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned. Nor had it provided for a review of the situation in the country of origin with a view to determining the actual prospect of return. Thus, the Court found that in the applicant's case a fair balance had not been struck between the relevant interests at stake.



Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

Andriana Kossyva

Migrant women and migrant LGBTI+

Limassol, 29 September 2023



Co-funded the European Union

Migrant/ refugee/ asylum-seeking women and LGBTIQ+ persons

2023

Who are migrant/ refugee/ asylum-seeking women and LGBTIQ+ persons?

- **Migrant:** a person who **moves** from one country to another
- **Refugee:** A person who has been forced to **flee** their country of origin/ habitual residence due to **persecution** on the basis of **race/ religion/ nationality/ political opinion/ membership in a particular social group**, or due to **war or violence**
- **Asylum seeker:** A person whose application for international protection has not yet been examined
- **Woman:** Any person identifying as a woman
- **LGBTIQ+:** Lesbian, Gay, Bisexual, Trans, Intersex, Queer and Questioning persons

Why focus on migrant/ refugee/ asylum-seeking women and LGBTIQ+ ?

- All human rights and fundamental freedoms are **universal**, **interdependent** and **interrelated**, and their **full enjoyment** needs to be guaranteed for migrant, refugee and asylum-seeking women and LGBTIQ+
- The migration/ asylum experience is **diverse**. Women and LGBTIQ+ persons experience them in a different way than cis/ heterosexual men
- Current international **human rights standards apply to everybody** and further efforts are needed to assess the **prevention and protection gaps** as regards migrant/ refugee/ asylum-seeking women and LGBTIQ+

- Women and LGBTIQ+ persons are **vulnerable to violence/discrimination that is specific to them** as women/LGBTIQ+, or that **impacts them disproportionately** (in their countries of origin, during their journey, in transit, in the destination country)
- Women and LGBTIQ+ persons face **specific difficulties** and **structural barriers** in overcoming such violence/discrimination and in accessing their rights
- **Intersecting** barriers, discrimination, violence need an intersectional approach

EU legal framework

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, “Istanbul Convention”, 2011)

Article 3 – Definitions

- **Violence against women** is a human rights violation and a form of discrimination (**physical, sexual, psychological** or **economic** harm or suffering to women - threats, coercion, deprivation of liberty, in public or private spaces)
- **Domestic violence** can be **physical, sexual, psychological** or **economic**
- **Gender** as the **socially constructed** roles
- **Gender-based violence** violence on the basis of gender or that affects women disproportionately
- **Victim:** violence against women or domestic violence
- **Girls** included

- **Article 5 - State obligations and due diligence**

States and their authorities, officials, agents and other actors must refrain from **engaging** in gender-based violence against women and must take **measures** necessary to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-state actors.

Chapter III – Prevention

- **Article 12 - General obligations**

States should aim to **eradicate prejudice, customs, traditions and practices** which are based on stereotypical roles for men and women; they should implement the necessary **legislative measures** to prevent violence against women, taking into account the **specific needs** of persons made vulnerable by certain circumstances; States should **engage men and boys** in prevention work, and adopt a **human rights and victim centred approach**.

Chapter IV – Protection and support

- **Article 18 - General obligations for protection and support Measures:**

- **gendered understanding** of violence
- **human rights and victim-centred approach**
- **integrated approach** that takes into account the relationship between victims, perpetrators, children and their environment
- **avoids secondary victimization**
- aims at **empowerment** and the **economic independence** of women
- allows for a range of **support services** on the same premises
- **addresses the needs of vulnerable persons**, including child victims
- **Support services shall not be dependent on pressing charges or testifying against a perpetrator.**

Chapter V – Substantive law

- Article 29 - Civil lawsuits and remedies
- Article 30 – Compensation (both the perpetrator and from the State)
- **Article 31 - Custody, visitation rights and safety**
Incidents of violence should be taken into account in the determination of **custody and visitation rights of children** not to endanger the victim or the children.
- **Article 32 - Civil consequences of forced marriages**
Forced marriages should be voided, annulled or dissolved without financial or administrative burden.

- **Article 33 – 40 Criminalisation of gender-based violence**

Types of violence to be criminalised:

- psychological violence
- stalking
- physical violence
- sexual violence, including rape
- forced marriage, including luring an adult or child to enter the territory of another state with the aim of forcing them into marriage
- female genital mutilation (FGM)
- forced abortion and forced sterilization
- sexual harassment (verbal, nonverbal, or physical).

- Article 38.a **FGM** as a form of violence against women
- Definition: “excising, infibulating or performing any other mutilation on the whole or any part of a woman’s labia majora, labia minora or clitoris”
- Measures against it
- A **criminal offence** (doctors or anybody)
 - Pressure or coercion to do it “voluntarily”

- Article 41 - Aiding or abetting and attempt
- Article 42 - Unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”
- Article 43 - Application of criminal offences (irrespective of the relationship between victim and perpetrator)
- Article 46 - Aggravating circumstances
 - offence against current or former spouse or partner
 - Repetition
 - in the presence of a child;
 - extreme violence
 - severe physical or psychological harm
- Article 48 - Prohibition of mandatory alternative dispute resolution processes

Chapter VI – Investigation, prosecution, procedural law and protective measures

- **No delay**; take into account the rights of the victim (art. 49)
- States can **continue investigating and prosecuting** a crime under the Convention, even if the victim withdraws their statement/complaint. (art. 55)
- Victims have the right to **free legal aid**. (art.57)

Chapter VII – Migration and asylum

- **Article 59 – Residence status**

Victims can be granted an **autonomous residence permit**, irrespective of the duration of the marriage or partnership.

- **Article 60 - Gender-based asylum claims**

GBV should be recognised as a **form of persecution** and ground for granting asylum.

- **Article 61 - Non-refoulment**

Victims of gender-based violence shall not be returned to any country where their life might be at risk or where they may be subjected to torture or inhuman or degrading treatment.

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime

Minimum standards on the **rights of victims of crime**, independently of residence status, gender, sexual orientation:

- **identification** (“regardless of whether an offender is identified, apprehended, prosecuted or convicted”)
- access to **information**
- (specialist) **support**, including “providing shelter and safe accommodation, immediate medical support, referral to medical and forensic examination for evidence in cases of rape or sexual assault, short and long-term psychological counselling, trauma care, legal advice, advocacy and specific services for children as direct or indirect victims”
- (legal) **protection**, including from retaliation & re-victimisation
- access to **justice** (the right to be heard, legal aid)
- **compensation**

Recommendation CM/Rec(2022)17 of the Committee of Ministers to member States on protecting the rights of migrant, refugee and asylum-seeking women and girls

- Migrant, refugee and asylum-seeking women and girls as a **diverse** group.
- They constitute **more than half of the migrant population** in Europe.
- Persisting **gender inequalities** in both countries of origin and destination affect their migration/ asylum experience.
- Migration, asylum and integration policies should be **gender sensitive**, including specific protection and support mechanisms.
- The recommendation brings together the provisions of existing Council of Europe and international standards and the policies that can best ensure the empowerment and protection of the rights of migrant, refugee and asylum-seeking women and girls.

Recommendation Rec(2002)5 on the protection of women against violence

- Recommends that member states take **measures** (legislation, policies) **to protect victims and to prevent GBV**
- It gives member states a **list** of measures they can take to protect victims' interests in practice, safeguard their rights and prevent GBV.

Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building;

- It gives member states a **list of measures** they can take: gender equality, gender mainstreaming, education, civil society, media, conflict prevention, conflict resolution, security, peace building, empowerment
- It recommends that member states **adopt and implement** such measures

Recommendation CM/Rec(2019)1 on preventing and combating sexism

- Member states to implement **legislative measures**, applicable to all media, which define and **criminalise incidents of sexist hate speech**, and include reporting procedures and appropriate sanctions.
- It comprises a comprehensive **list of measures** both to prevent and to condemn sexism, and it calls for specific action in areas such as: language and communication; internet and social media; media, advertising and other communication methods; workplace; public sector; justice sector; education institutions; culture and sport and the private sphere. Countries are **encouraged to pass legislation** that condemns sexism and criminalises sexist hate speech. It also requires that countries **monitor the implementation** of anti-sexist policies at national level and report back periodically to the Council of Europe.

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Criminalisation of hate speech

- “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”

The International Labour Organization Domestic Workers Convention No. 189 (2011)

- It affirms the **fundamental rights of domestic workers**, establishing **minimum labour standards** for them, including decent living conditions and effective **protection** against all forms of abuse, harassment and violence.
- It requires states to take a series of **measures** to guarantee decent work for domestic workers.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”, 1979) and its Optional Protocol (1999), as well as relevant CEDAW General Recommendations specifically related to this recommendation

- To **eradicate discrimination against women** in all fields (individual, institutional, systemic), both in the public and private sphere (employment, health, education, political rights, reproductive rights)
- It recognises both **state** and **non-state actors** when violation of rights occurs
- State obligation for **respect, protection, promotion, and fulfillment of human rights**
- States to ensure the **prevention, investigation, and sanctioning** of private acts of discrimination.
- Corrective and positive **measures**; enabling conditions and affirmative actions.
- **Eliminating stereotyped** roles on the basis of gender
- Safeguarding **equality** before the law

UNHCR “Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”

- “**Gender-related persecution**”: interpretation of the refugee definition from a gender perspective
- “**gender**” and “**sex**”
- Gender may influence, or dictate, the **type** of persecution or harm suffered and the **reasons** for this treatment.
- Well-founded fear of **persecution** for reasons of race, religion, nationality, membership of a particular social group or political opinion.

- **Transgression of social or religious** norms may be analysed in terms of religion, political opinion or membership of a particular social group
- Women as members of a particular social group (past vs now)
- Non-state agents of persecution (past vs now)
- Discriminatory laws (e.g. adultery in Iran)

- GBV claims generally include, but are not limited to:
 - Acts of sexual violence
 - Family/ domestic violence
 - Coerced family planning
 - Female genital mutilation
 - Punishment for transgression of social norms
 - Discrimination on the basis of sexual orientation/ gender identity
 - Trafficking
 - Honour crimes
 - Discrimination amounting to persecution
- It sets **measures** to be taken during **RSD**

GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

- Human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity.
- Criminalisation of sexual orientation
- No state protection
- Non-state agents
- Transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group

- LGBTI individuals may be targeted for:
 - killings
 - sexual violence
 - honour crimes
 - GBV violence
 - physical attacks
 - torture
 - arbitrary detention
 - societal disapproval (accusations of immoral or deviant behaviour, isolation)
 - denial of the rights to assembly, expression and information
 - discrimination (in employment, health, education) amounting to persecution
 - criminalisation

- **Intersecting** factors: sex, age, nationality, ethnicity/ race, social or economic status and HIV status
- It sets **measures** to be taken during **RSD**
- **Self-identification** as an indication
- The applicant's **testimony** is the most important element (no medical test)

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

- **Sexual orientation:** “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender”
- **Gender identity:** “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms”
- It sets **measures** for the protection of LGBTIQ+ persons

- Principle 22:
 - “Everyone lawfully within a State has the right to **freedom of movement and residence** within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person’s entry, egress or return to or from any State, including that person’s own State.”
 - “States shall: Take all necessary legislative, administrative and other **measures** to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity.”

- Principle 23:
 - “Everyone has **the right to seek and enjoy in other countries asylum from persecution**, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.”
 - It sets **measures** for the protection of LGBTIQ+ persons in the asylum procedure

Legal basis for the protection of LGBTIQ+ persons (EU)

- Article 21 of the **EU Charter of Fundamental Rights** clearly **forbids discrimination** based on sexual orientation
- Article 19 of the **Treaty on the Functioning of the European Union** allows action to **combat discrimination** against LGBTIQ+ persons
- The **Amsterdam Treaty** (1997) expanded the **grounds** protected against discrimination in EU law, including sexual orientation. It also includes sex, race, ethnic origin, religion, belief, disability, and age.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- A general framework to guarantee **equal treatment at the workplace** irrespective of religion/ belief, disability, age or sexual orientation
- It covers both **direct** (differential treatment based on a specific characteristic) and **indirect discrimination** (any provision, criterion or practice which is apparently neutral but puts the people in the above categories at a disadvantage compared to others)
- It applies both to the **public** and the **private** sector
- Protection from unfair treatment when **applying** for a job
- Protection from **harassment**(name-calling, jokes) at the **workplace**
- Protection from refusal of promotion/ training & from **dismissal**

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

- It obliges member states to adopt relevant anti-discrimination **legislation** in the areas of:
 - social protection (including social security and healthcare)
 - education
 - access to and supply of goods and services available to the public (including housing)

The Free Movement Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States)

- Under the definition of '**spouse**' and '**members of the family**' and the recognition of same-sex marriages/ partnership agreements

The Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification)

- In connection with the **entry and residence rights** of LGBTIQ+ third-country nationals

The Qualification Directive (Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted)

- Granting **international protection** on the basis of belonging to a *specific social group*, including explicit references to sexual orientation and gender identity.

Case Law

- **UK - Supreme Court, 7 July 2010, HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31**
 - Homosexuals as members of a particular social group
 - Concealment of sexuality → denial of identity as a fundamental right
 - No condition to take steps to avoid persecution

- **United States Immigration Court, Baltimore, Maryland – Matter of A-T- (Mali)**
 - past FGM as a basis for refugee protection
 - ongoing medical, psychological, and sexual problems
 - fear for forced marriage
 - FGM as an act of the past, once vs ongoing process
 - women’s rights to bodily integrity and autonomy = human rights
 - cooperation of experts, concerned citizens, civil society

Challenges & recommendations

- EU law to **extend protection for LGBTIQ+ beyond the employment** area, to cover fields such as health, education, housing, and fully recognise same-sex marriages/ partnerships
- Migrant and refugee women and LGBTIQ+ come from **different** cultural, ethnic, language and religious **backgrounds** → communication
- **Specialised services**, tailored to their needs
 - Effective representation
- **Training** of legal experts (lawyers, judges) and other professionals
- Taboos, trauma, stigma, concern for others → **concealment** of identity
- **Trauma** → communication → referral

- Terminology, **inclusive language**
- In risk of **re-victimization**, (trafficking, exploitation, violence), re-trauma:
 - Prevention
 - New grounds for protection/ resident permit
 - New legal proceedings
- Burden of proof
- Confusion about legal proceedings → clarity
- Personal perceptions (past experiences, corruption in countries of origin, pessimism)

- Financial barriers:
 - legal aid availability
 - social benefits/ services, etc.
- Intersections of vulnerabilities
- Trust

Challenges in Cyprus

- Women as members of a particular social group
- Credibility in LGBTIQ+ claims
- FGM
 - future risk (burden of proof)
 - indication of gender oppression



Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

Stephie Karagiorge

**Migrants with disability, elderly migrants and
migrants with diseases and trauma**

Limassol, 29 September 2023



Co-funded the European Union

Migrants with disability, elderly migrants and migrants with diseases and trauma

DEFINITIONS

Vulnerable Persons

The Reception Conditions Directive (2013/33/EU) obliges EU Member States to take into account the specific situation of vulnerable persons.

“[M]inors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation” (Article 21)

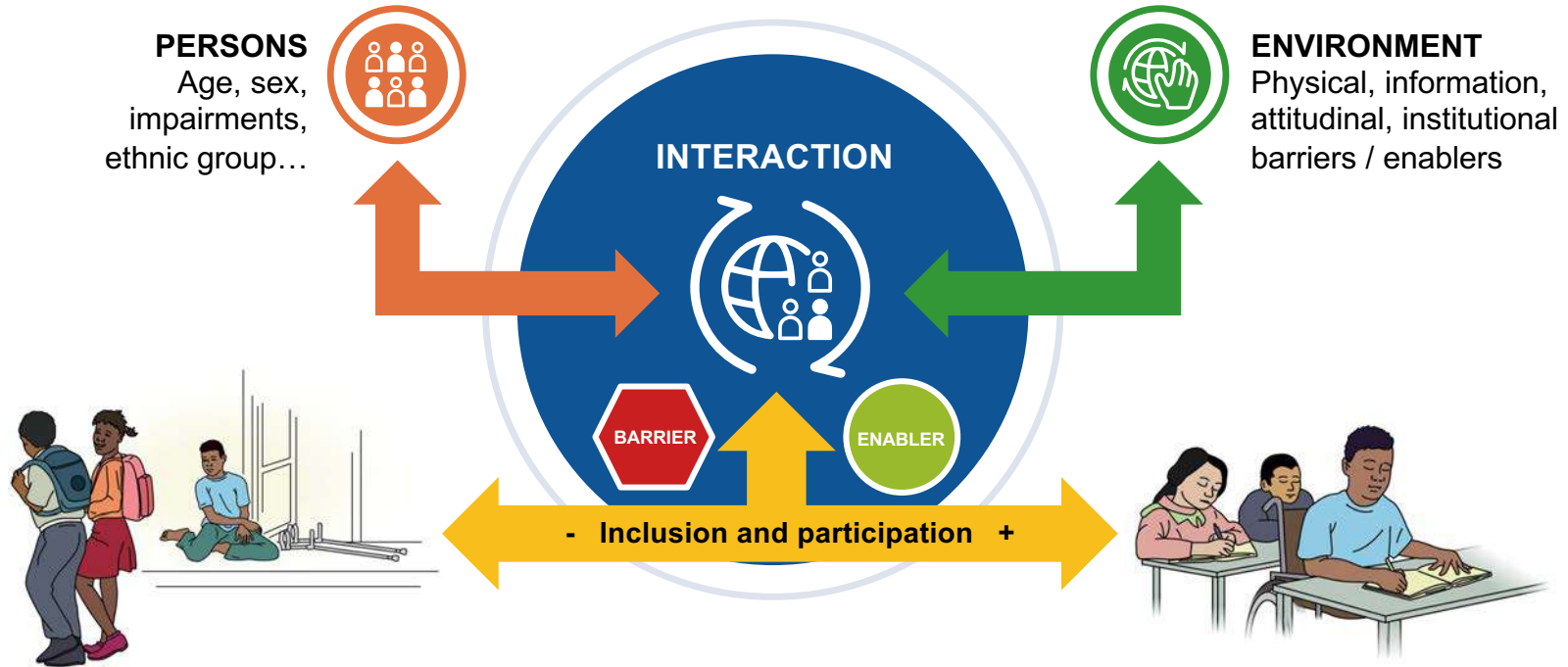
Persons with Disability

Convention on the Rights of Persons with Disability

Article 1: Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

“... disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”

What is disability?



**Persons
with
disability
are not a
homogenous
group**





Elderly Persons

An older person is defined by the United Nations and the World Health Organization as a person who is over **60** years of age.



Trauma – Long Term Impacts

“Trauma” is what happens when an individual is exposed to actual or threatened death, serious injury, or sexual violence and as a result, experiences overwhelming stress (fear, hopelessness, helplessness).

<p>It can impair memory:</p> <ul style="list-style-type: none">• General memory loss• Dissociation of specific traumatic memories into incoherent parts <p style="text-align: center;"></p> <p>This can affect credibility assessment</p>	<p>Victims may experience intrusive flashbacks but have difficulty articulating what they are feeling</p> <p style="text-align: center;"></p> <p>This can affect a victim’s ability to provide useful information</p>	<p>A victim can be retraumatized by processes that inquire about past traumatic events, like the RSD process</p>
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“Traumatic events” experienced by persons on the move

- Forced displacement from home;
- Sexual and gender-based violence;
- Trafficking and severe exploitation, abuse;
- Witnesses violence or death involving others, including loved ones;
- Child abuse (including psychological);
- Emergency situations like armed conflict or shipwreck.



A. LEGAL INSTRUMENTS

❖ Convention on the Rights of Persons with Disabilities

Article 11 - States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of **persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.**

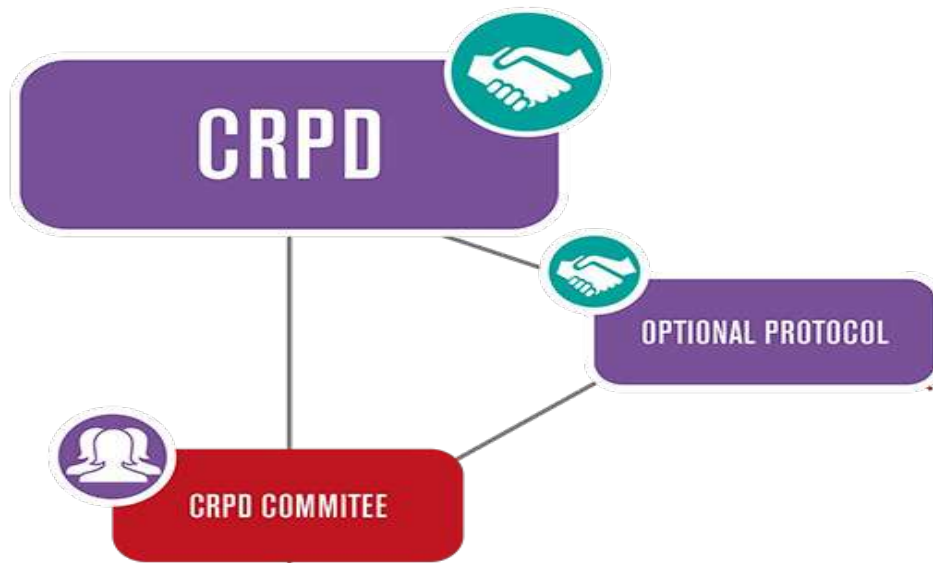
Article 1 - Persons with disabilities are entitled to a "full and equal enjoyment of human rights", which includes the right to access and participation in all proceedings, including the asylum or RSD process and by providing reasonable accommodations (Article 2).

Obligations for States under A.11

- Ensuring **equal access to asylum** by acknowledging disability-specific forms of persecution in national asylum laws and procedures.
- Providing additional **procedural safeguards** in asylum procedures.
- Providing **reasonable accommodation** for asylum-seekers beyond procedural requirements.
- **Granting access to rights and national systems** for refugees with disabilities.
- Granting **protection** under national legislation **against discrimination** on the basis of disability.



CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)



CRPD COMMITTEE



CRPD



OPTIONAL PROTOCOL



STATES REPORTS

GENERAL
COMMENTS

EARLY-WARNING
MEASURES

URGENT
PROCEDURES

INDIVIDUAL
COMPLAINTS

INQUIRIES

PARALLEL REPORTS

Cyprus and the CRPD

- Cyprus signed the Convention in 2007 and ratified it in 2011. In March 2017, the Council of Ministers extended disability schemes **only** to refugees with disabilities (following intervention)
- Asylum-seekers are **not** entitled **to** a series of **social benefits** granted to nationals such as:

Child benefit; student grants, given to nationals who secure a position in university; and the single parent benefit.

Benefits and services aimed to help disabled persons: special allowance for blind people; mobility allowance; financial assistance schemes for the provision of technical means; aids; care allowance schemes for paraplegic persons

No special needs benefits are afforded to vulnerable asylum-seekers, including asylum-seekers with disabilities.

Concluding Observations to Cyprus 2017

“The Committee is deeply concerned about the precarious situation of refugees and asylum-seekers with disabilities in the State party and also notes with concern that the RSD procedures are not accessible.

*While noting the indication of the State party delegation that refugees with disabilities are entitled to the same disability support schemes and benefits — including wheelchairs, care and information — as Cypriot citizens with disabilities, the Committee notes with concern that equal access to these support schemes and benefits is **not available** for asylum seekers.”*

B. Common European Asylum System

EU recast Reception Conditions Directive 2013/33/EU

Article 22: Assessment if 'applicant with special reception needs'

Article 19: Provide healthcare, including emergency care and essential treatment of illnesses and serious mental issues, including mental health care

Article 17: Grant the right to material reception conditions guaranteeing subsistence and protecting physical and mental health

Article 25(1): Persons subjected to torture, rape or serious acts of violence must receive including medical and psychological care.

Identification of vulnerable applicants in Cyprus

The Cyprus Refugee Law (9KΔ) provides for an identification mechanism in line with the APD & RCD:

- Individual assessment
- Notification to the Asylum Service
- Medical report

SOME DISABILITIES LOOK LIKE THIS



SOME LOOK LIKE THIS



Identification & referral in Cyprus

Increase in staff



Lack of expertise and training

Vulnerability Assessments



New Vulnerability Form - restrictive

Findings of Vulnerability
Assessments



Primary focus on special reception
needs

Social Welfare Service



Confined role

Referral Pathways



Lack of mechanism to address
identified needs

Access to mental health services



Insufficient capacity of State services

EU recast Asylum Procedures Directive 2013/32/EU (Para 29)

- Certain applicants may be in need of special procedural guarantees due, inter alia, to their age....disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.
- Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Procedural barriers in accessing RSD

Applicants with disabilities may have **difficulty to recall and recount** what happened to them or what they fear in their country of origin =

a finding of **lack of credibility**



Procedural Standards

for Refugee Status Determination
under UNHCR's Mandate

- lack of understanding of the RSD process and ensuing obligations
 - fear or distrust of authorities
 - impaired memory
- traumatic nature of the events underlying his/her claim,
 - reduced attention and concentration
 - mood disturbances
 - diminished cognitive functions
- lack of accommodations to address these challenges

Implementation of special procedural guarantees in Cyprus [Article 10A]

- Cases allocated to an examiner trained to deal with vulnerable cases - five specialized case officers.
- If requested, usually in writing, a social advisor or psychologist can escort a vulnerable person to the interview (but limited capacity)

- Level and type of support not specified in law
- No set procedure / guidance for examiner to request support for applicant (medical or psychological)
- Cases not identified as vulnerable and examined by caseworkers without necessary training
- Specific interview techniques not systematically used.
- Lack of quality control – different outcomes.

C. International Protection

Persecution and ill-health

- ❖ Persons with disabilities and other health considerations may be granted international protection on the ground of persecution under the 1951 Refugee Convention.
 - ❖ Although disability is **not** one of the Convention grounds.

Country Z not allowing access to health care to persons living with HIV Aids

The failure of State W to implement the CRPD requirements to make accommodations for persons with disabilities

The individual assessment of whether applicants of this profile face a reasonable degree of likelihood of persecution is to be conducted while taking into account **risk-impacting circumstances**, including:

- Nature and visibility of the mental or physical disability
- Perception by the family and by the surrounding society



Persecution as cumulative acts of discrimination

Systematic denial of socio-economic rights (e.g. health/education) & applicant's personal circumstances → persecution on cumulative grounds.



Severity and/or repetitiveness of the acts or accumulation of various measures:

- Cumulative or additive discrimination - two or more forms of discrimination happen at the same time but are not related to each other.
- Intersectional discrimination - where two or more forms of discrimination interact in such a way that they are inseparable.

Discrimination on the basis of disability



- **Adverse distinction:** differentiation or labelling resulting in inequality
- **Exclusion:** not accessing a space, service or activity due to barriers
- **Restriction:** limitation to rights

Refugee Convention Grounds

Both personal and environmental factors should be considered when assessing the vulnerability of an individual in the context of a claim for international protection:

- Age and related life cycle stage
- Ethnicity
- Religion
- Geographic and temporal location
- Political opinion

Persecution could be for reasons of **membership of a particular social group**, defined by an innate characteristic and distinct identity linked to their stigmatisation by the surrounding society.

Case Study - Religion

If country's way of life is dominated by religion, culture might be promoting the belief that disability is a sign of black magic, creating a hostile environment, as seen in Ghana, Nigeria, and Pakistan.

Autistic boy from Pakistan had obsessive-compulsive disorder. Cited fear of persecution due to psychosocial disability. In Pakistan, was forced to undergo various **degrading mystical treatments** consistent with the 'curse of Allah' which is how the Islamic majority in Pakistan viewed his condition. This treatment stemmed from the **shared cultural and religious beliefs** surrounding those with a disability in Pakistan.

Article 3 ECHR

Prohibition of torture, or degrading treatment, or punishment

ECtHR has repeatedly stressed that not all serious or life-threatening illnesses of applicants would meet the real risk criterion of Article 3 ECHR but that the application of Article 3 for medical cases requires a **very high threshold** = meaning exceptional medical circumstances.



Paposhvili v Belgium [41738/10]–

1. ‘Severity Threshold’

“....situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although **not at imminent risk of dying**, would face a **real risk**, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a **serious, rapid and irreversible decline** in his or her state of health resulting in **intense suffering** or to a **significant reduction in life expectancy**.”

2. Availability of health-care

If severity threshold met



Assess if illnesses can be treated and if medication is available in country of origin



If required treatment and/or medication are not available in the country of origin, a return to the said country would violate Article 3 ECHR.



3. Accessibility of health-care

Geographic

Economic

Political

- **Proximity** of medical facilities and pharmacies to the individual's place of residence;
- Physical **ability** of applicant to reach facilities;
- Influence of security situation in country of origin;
- Availability of **transport**;
- Necessary frequency of travel to the medical facility;
- **Costs** of transportation;
- Other barriers to travel/move to the specific region

Country of Origin Information

- **Principles for Conducting COI research on disability**

(Asylos & ARC Foundation 2021)

- Need for better COI on persons with disability to be used in international protection procedures
- Absence of relevant COI leads to misconceptions about disability issues in the international protection legal sector
 - contributes to rejection of meritorious claims.



- **EUAA MEDCOI Database**

Legal interaction between CRPD & Refugee Convention

- Fundamental opportunity to improve the conditions of refugees with disabilities under international law.
- Could high thresholds required to obtain refugee status be mitigated by the guidelines of the CRPD? (Art. 2 – reasonable accommodation – substantive equality facilitator)



Z.H. v Sweden [CRPD]

- An Afghan national who applied for international protection in Sweden presented a medical report with diagnosis of PTSD, psychotic mental health problems and suicide risk due to death threats in Afghanistan.
- The Swedish Migration Agency rejected his request and noted that the applicant could receive psychiatric treatment and medication in Kabul.



CONVENTION
ON THE RIGHTS
OF PERSONS
WITH DISABILITIES

- Based on health care reports on Afghanistan, the CRPD held that there was a lack of resources, trained professionals and infrastructure.
 - Committee noted that Sweden should have required individual assurances as the applicant left Afghanistan at a young age and could face difficulties in accessing health care.

Committee Recommendations:

1. Review the applicant's case taking in to account its obligations
2. Publish the present views and circulate them widely in an accessible manner and to take measures to prevent similar violations in future.

THANK YOU



Training of lawyers on European Law relating to vulnerable groups of migrants (TRALVU)

Spyros Papalexis

Migrants with individual types of vulnerability

Limassol, 29 September 2023

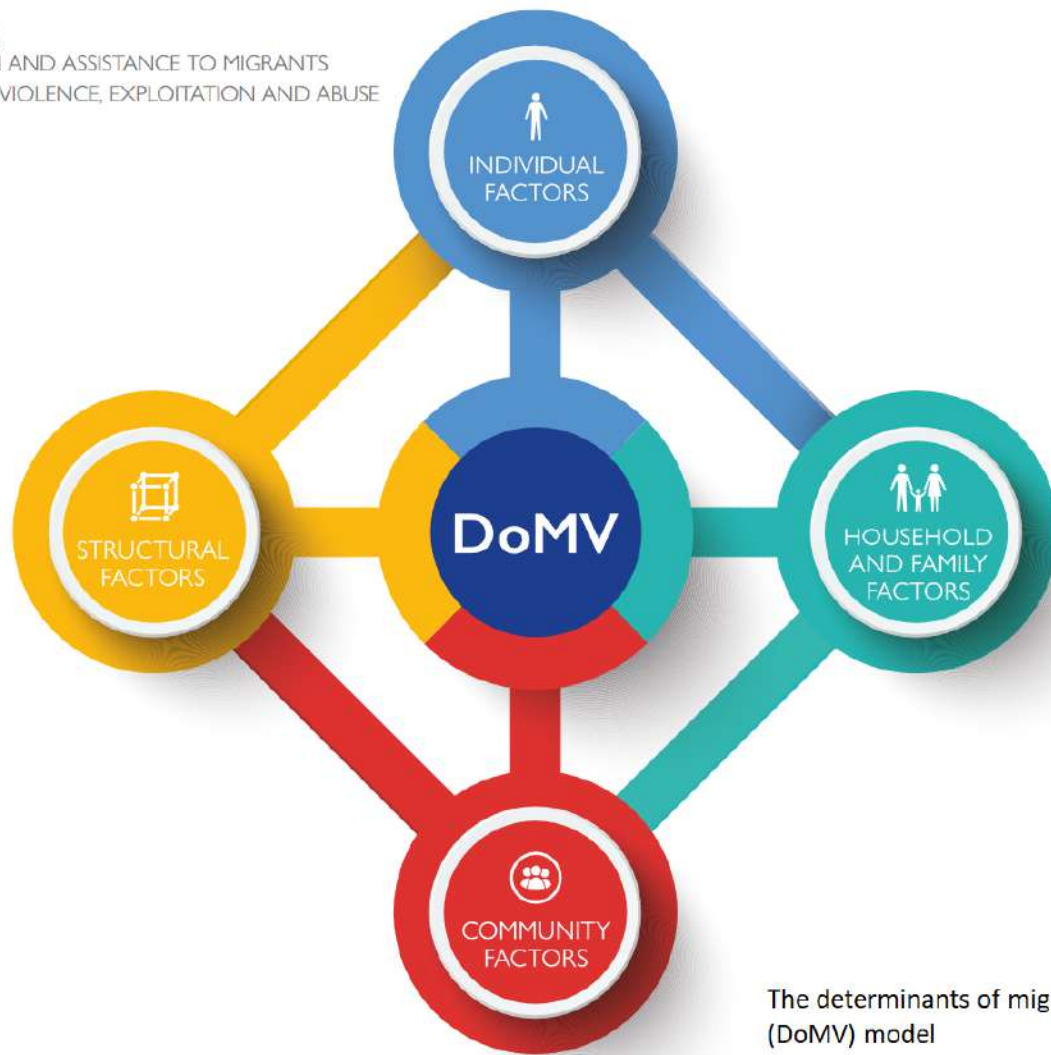


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MIGRANTS WITH INDIVIDUAL TYPES OF VULNERABILITYs

Definition

“Migrant vulnerable to violence, exploitation or abuse” means a migrant or group of migrants exposed to or with experience of violence, exploitation or abuse within a migration context and with limited capability to avoid, resist, cope or recover, as a result of the unique interaction of individual, household/family, community and structural characteristics and conditions.



The determinants of migrant vulnerability
(DoMV) model



INDIVIDUAL FACTORS

- Status in society
- Physical and biological characteristics
- Histories and experiences
- Beliefs and attitudes
- Individual emotional, psychological and Cognitive characteristics
- Physical and mental health and well-being



HOUSEHOLD & FAMILY FACTORS

- Family size
- Household structure
- Socioeconomic status
- Migration histories
- Employment
- Livelihoods
- Education levels
- Gender discrimination and family dynamics



COMMUNITY FACTORS

- Availability of quality educational opportunities
- Health care and social services
- Equal access to resources
- Livelihood and income-generating opportunities
- The natural environment
- Social norms and behaviors

STRUCTURAL FACTORS

- Histories of colonization and conflict
- Political systems
- Migration policies and governance
- Respect for human rights
- The rule of law

Interaction of Risk & Protective Factors

The overall **Vulnerability** of individual migrants and the households, families, communities and groups to which they belong is the result of the **Interaction of Multiple Risk & Protective Factors at Different Levels**

Panacea



Panacea was an anthropomorphic secondary goddess of Greek mythology, intertwined with the notion of healing (or herbal medicine) for any disease. Over time, Panacea came to be called an **ideal remedy to cure all diseases**.

Can law be a panacea for all cases?

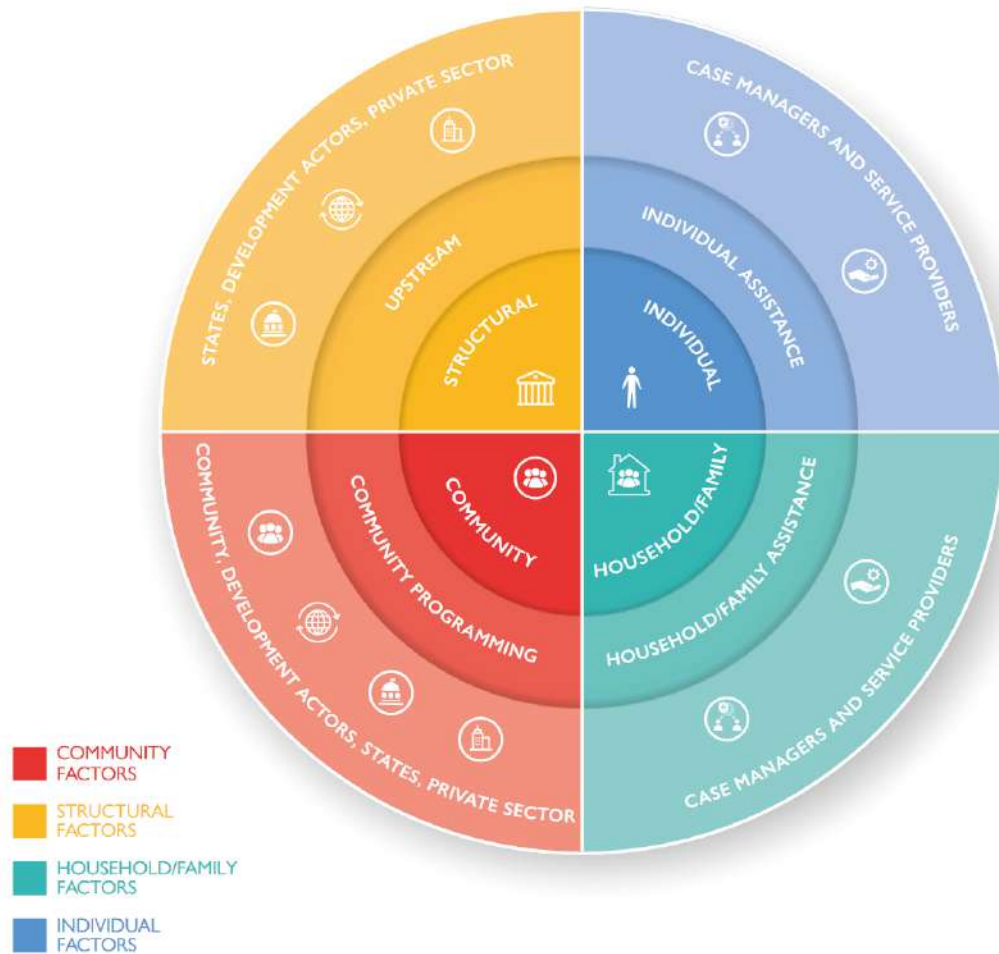


Figure 1.2

Programmatic responses and relevant players at each level



Programmatic Responses at the INDIVIDUAL LEVEL

- Safe shelter or accommodation
- Physical and mental health care
- Legal and consular assistance
- Education, skills development and training
- Livelihood and income-generating opportunities
- Opportunities for regularization of immigration status, family reunification, complementary protection, humanitarian and other legal statuses
- Challenges to immigration detention
- Return and reintegration services and support
- Counseling on safe migration practices



Programmatic Responses at the HOUSEHOLD/FAMILY LEVEL

- Family tracing and assessment
- Best interests assessments and determination for child migrants
- Alternative care arrangements for unaccompanied child migrants
- Responses to domestic or gender-based violence within the family
- Family reunification services
- Family counseling
- Livelihood and income-generating opportunities
- Education



Programmatic Responses at the COMMUNITY LEVEL

- Efforts to change community attitudes and beliefs about age, sex, race, ability, personal characteristics
- Efforts to encourage full and equal participation of boys and girls in education
- Public information campaigns about safe migration processes
- Capacity development programs
- Community development programs



Programmatic Responses at the STRUCTURAL LEVEL

- Improvements to national migration laws and policies
- The development and implementation of policies for safe and regular migration, including labor mobility
- the pursuit of pro-poor and equitable development policies
- Improvements to the rule of law and respect for human rights
- Barriers to discrimination against specific groups

PROPOSAL

for Migrants with Individual Types of Vulnerability

The setting up of a **Committee** which should:

- * Be Flexible, Broadminded, Open to challenges
- * Possess Broad Knowledge & Skills
- * Act with a Humanitarian Attitude

The Committee will be called upon, on a case-by-case basis, to cooperate with Multiple governmental and non-governmental organizations

Both the Composition of the Committee and the Number of its Members should Change to meet the requirements of each case

The members of the Committee could therefore be drawn upon lists of external partners in the appropriate specialties

PROPOSAL

for Migrants with Individual Types of Vulnerability

The submission of the relevant application could suspend the execution of administrative measures of temporary detention and forced return (deportation)

Applicants should place themselves at the absolute Disposal of the committee and remain voluntarily in Areas specially adapted for such cases

Applications for inclusion in the special Protection Regime should be examined in the Shortest possible time

THE 20 PRINCIPLES

IOM Principles and Guidelines on the human rights protection of vulnerable migrants

- 1: Ensure that human rights are at the center of efforts to address migration in all its phases, including responses to large and mixed movements.
- 2: Counter all forms of discrimination against migrants.
- 3: Ensure that migrants have access to justice.
- 4: Protect the lives and safety of migrants and ensure that all migrants facing risks to life or safety are rescued and offered immediate assistance.
- 5: Ensure that all border governance measures protect human rights.
- 6: Ensure that all returns fully respect the human rights of migrants and comply with international law.
- 7: Protect migrants from torture and all forms of violence and exploitation, whether inflicted by State or private actors.
- 8: Uphold the right of migrants to liberty and protect them from all forms of arbitrary detention. Make targeted efforts to end unlawful or arbitrary immigration detention of migrants. Never detain children because of their migration status or that of their parents.
- 9: Ensure the widest protection of the family unity of migrants; facilitate family reunification, prevent arbitrary or unlawful interference in the right of migrants to enjoy private and family life.
- 10: Guarantee the human rights of all children in the context of migration, and ensure that migrant children are treated as children first and foremost.

THE 20 PRINCIPLES

IOM Principles and Guidelines on the human rights protection of vulnerable migrants

- 11: Protect the human rights of migrant women and girls.
- 12: Ensure that all migrants enjoy the highest attainable standard of physical and mental health.
- 13: Safeguard the right of migrants to an adequate standard of living.
- 14: Guarantee the right of migrants to work in just and favourable conditions.
- 15: Protect the right of migrants to education.
- 16: Uphold migrants' right to information.
- 17: Ensure that all responses to migration, including large or mixed movements, are monitored and accountable.
- 18: Respect and support the activities of human rights defenders who promote and protect the human rights of migrants.
- 19: Improve the collection of disaggregated data on the human rights situation of migrants while protecting personal data and the right to privacy.
- 20: Ensure human rights-based and gender-responsive migration governance.



**MIGRANTS WITH INDIVIDUAL TYPES
OF VULNERABILITY**