

Ensuring Human Rights of All Migrants, Social Inclusion and Non-Discrimination in the Global Compact

In the New York Declaration, states reaffirmed the principles and purposes of the UN Charter and committed to **“fully protect the human rights of all refugees and migrants, regardless of status”** and “demonstrate full respect for international law and international human rights law...” as they work to improve international cooperation on migration governance. That reaffirmation was both welcome and necessary as a point of departure for negotiating a Global Compact on Safe, Regular and Orderly migration.

In the spirit of SDG 16—to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels—good migration governance and good policy must be built on good faith inclusion of all stakeholders, grounded in fundamental respect for our common humanity and the equal dignity and rights the United Nations Charter and Universal Declaration of Human Rights afford. Specifically, good migration governance and the Global Compact must be based on ratification and full implementation of the existing international human rights standards that states have crafted within the UN context over the past seven decades—and even longer, when it comes to the ILO labor standards that protect our rights at work.

Though they are addressed separately in the panels in the Thematic Consultation on the “human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance,” human rights, non-discrimination and social inclusion are inextricably connected. Non-discrimination in the applicability of rights is at the heart of the international human rights regime and is essential to genuinely inclusive and cohesive societies. The non-discrimination clauses in the two Covenants (and other widely ratified core human rights instruments including CEDAW, CERD and CRC) oblige states to respect, protect and fulfill the civil and political as well as economic, social and cultural rights of migrants on their territory; this is not an obligation that states undertake only by ratifying the Convention on the Protection of All Migrant Workers and Members of their Families. Promoting gender-sensitive perspectives across all aspects of migration governance will be critical to achieving the human rights and full equality of women and girls, in keeping with Goal 5 of the 2030 Sustainable Development Agenda.

Human rights and social inclusion. States cannot credibly promote the social inclusion of those they think they want to include on the one hand, while pursuing policies that pander to populist—and racist, and xenophobic—fears on the other. If we want to talk about “changing the narrative,” we should stop referring to human beings as “illegal.” Branding a human being as “illegal” denies his or her humanity and personhood before the law, and falsely implies that the state on whose territory he or she residing or transiting does not have obligations to protect their human rights.

On top of the violence and injustice done to those whose status is irregular, branding as “illegal” a group of human beings—especially one associated with people marked as racially or ethnically “other”—spills over and attaches to a much wider group of people, perpetuating and exacerbating social exclusion, marginalization and rights deprivations not only on the basis of status *per se* but also on the basis of race or ethnicity. Cohesive societies demand social inclusion of *all* migrants, and respect for the human rights of all, including migrants. As the Committee on Economic, Social and Cultural Rights recently noted, “access to education and to employment are important channels for integration within the host country and will reduce the dependence of refugees or migrants on public support or private charity.”¹

Social and human dimensions of migration. Although the New York Declaration did not address them specifically, health, social protection, social security, child welfare, social cohesion and social dialogue are all major concerns for migrants and for migration governance, as well as for protection of all persons in their human and social nature. Their consideration and inclusion is essential if the compact is truly to take a *whole of government* and *whole of society* approach. Existing international instruments lay out standards for governance in each of these policy areas, with provisions explicitly addressing conditions and needs of migrants. Neglecting human and social aspects in a global framework on migration will render it inadequate to provide necessary and effective implementation guidance for legislation, policy and practice.

Firewalls are legal and policy measures that separate public service provision from immigration enforcement, thereby promoting inclusion. They ensure that migrants can access essential services—including protection by local law enforcement for victims of crimes and witnesses—without fear that doing so will cause immigration enforcement agencies to detain or deport them. In other words, they are an important means of enabling migrants to access their economic, social and cultural rights (to obtain basic services like education, accommodation, and health care) as well as civil and political rights (access to justice and protection of the justice system), although they are not the only ways these rights can be protected.

Access to justice for all migrants is absolutely fundamental to migrant rights and to safe, regular and orderly migration. The fewer rights migrants can access, the more critical it is. It is a basic principle of rule of law and essential to the protection of human rights, yet lack of effective access to justice makes many migrants vulnerable to a variety of forms of abuse and exploitation—and enables perpetrators to act with immunity. While irregular migrants face the greatest obstacles to accessing justice and redress for violations, access even by migrants in a regular situation is often very limited in law and/or practice. Gaps in jurisdiction between countries of origin, transit and destination compound other access problems and should be specifically addressed in the compact.

Detention. Irregular entry and/or irregular stay should be an administrative infraction rather than a criminal offense. As an administrative offense, irregular entry or stay should

¹ Committee on Economic, Social and Cultural Rights, Statement on the Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, 13 March 2017.

therefore not warrant detention—a deprivation of the fundamental right to liberty—but we know that all too often it does.

What is more, we find that measures that should protect migrants are used against them. Administrative detention by its nature should be non-punitive, but in fact its use often deprives migrants not only of liberty but of the most fundamental due process rights that the criminal justice system guarantees, falling into a legal black hole, effectively barred from contact from the outside world including family members and those able to provide legal assistance. This has been shown to be seriously damaging to migrants' mental health.

We need alternatives to detention—in the first instance, liberty, unless something else *proportional* is specifically required by the individual circumstances of a case. And we need an expeditious end to all detention of children for purposes of migration status determination, with alternatives to detention for parents when this is in the best interest of the child and is necessary to keep the family unit together.

Returns. In using their prerogative to determine who may stay on their territory as grounds to return irregular migrants to their country of origin or a third country, states must ensure that this return does not constitute refoulement as expressed in the Torture Convention, the Refugee Convention, or more broadly under customary international law. States are obliged not to return a person to a country where she or he could reasonably expect to face serious human rights violations. **States should consider that given the stigma attached to return, especially involuntary return, such things as visits to their family home by police or immigration officials following arrival might jeopardize their standing in their community and thus their ability to provide for their livelihood and thus a sustainable life.** And that very idea of involuntary return and “reintegration” into a third country where a migrant has never been “integrated” but has only transited through is nonsensical and incompatible with fundamental rights.

States of origin and transit too have an obligation to respect, protect and fulfill the human rights of their citizens and those on their territory. This includes pursuing policies that will facilitate the creation of decent work opportunities for the country's population. While the benefits of remittances—including millions upon millions of remittances from irregular migrants—can be useful to this process, states of origin must strive for development that gives people options for decent work at home, options to remain as well as options to migrate.

Destination states should not use bilateral agreements with states of origin and transit to condition aid on those states keeping people from leaving their territory. Human beings have a right to leave a country, and border externalization jeopardizes this right. Bilateral agreements may also threaten regional free mobility regimes, hampering regional development in countries of the Global South; this is critical in a world where the majority of migration takes place within regions—the vast majority in some cases.

Regularisation. Providing opportunities for people who are already productive and law-abiding members of their communities to regularize their status and remain is preferable in many ways to involuntary return, not just for migrants but for the society as a whole, including by supporting the move from informal to formal work, which benefits workers and

society as a whole. Many migrant workers lack regular status, for a variety of reasons including having had an asylum claim rejected, having experienced a change in family situation (including due to leaving an abusive partner), or having overstayed a visa after a regular entry. Although their irregular status makes their circumstances precarious, they may be more or less integrated into their community, including through family ties, may have learned the language, etc. In most major developed destination countries, the numbers of people—mainly working people—in such a situation will far exceed what even stepped up return policies could accommodate. In situations where migrants prefer to remain in irregular status despite the risks it imposes, there are likely to be serious underlying problems with the restrictions of available regular pathways that should themselves be addressed.

Migrants should never have to give up human rights to get a job, and countries of origin should not have to subsidize the social costs of low wages in destination countries. Much has been made of the demographic changes that will take place in the coming years and decades—both the labor and skills shortages that will affect many developed countries with ageing populations, and the increase in working-age populations in many developing countries beyond what domestic (and regional) labor markets are anticipated to be able to absorb. Many proposals call for addressing these situations by promoting temporary or circular migration—increasing regular but highly restrictive opportunities for migrants to go to another country to work for a period of time, sometimes leaving and re-entering several times, but often being unable to remain, or to change employers without violating their status, or to bring family members with them. Opportunities for regular migration under such conditions in a North-South context represent efforts to import “labor without people”—a concept antithetical to respect for human and labor rights not to mention “decent work.” In fact, such conditions shift the costs of social reproduction and social protection from the wealthy developed states benefiting from cheap labor onto the developing states that must bear the cost of educating the migrant worker’s children, providing healthcare and other forms of social protection to the migrant worker’s family and to the worker himself or herself upon return. This approach is incompatible not only with SDG Goal 8.8, but with the very spirit of Goal 10, to reduce inequality within and between countries, and SDG 10.7 must be read within that context.

In the coming decades, respect for human rights should imply respect for and attempts to accommodate the diverse mobility aspirations of migrants and prospective migrants to the greatest extent practical when governing and regulating human mobility. Migrants will have diverse preferences for returning temporarily or permanently to a country of origin or another country and will often respond to labor market demands and opportunities. Including the perspectives of migrants as stakeholders and rights-holders in the Global Compact will contribute to a cooperative and sustainable future for migration governance.

The Global Coalition on Migration (GCM) is a multi-sectoral coalition of large regional networks of migrant and migrant-led organizations in Europe, Africa, Asia and the Americas, together with labor, policy, and faith-based organizations. The Coalition serves to bridge its members’ work at national and regional levels with global governance processes.