



Issue Brief #1

Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance

Introduction

Migration can be a safe, positive and empowering experience for many migrants and can generate economic, social and cultural benefits for societies in countries of origin, transit and destination.¹ However, many migrants currently face severe human rights violations in countries of origin, transit and destination, especially along irregular migratory routes, not least due to the lack of human rights-based systems of migration governance at the local, national, regional and global levels, especially in countries experiencing crisis.²

The international legal framework represents the foundation upon which a global compact on safe, orderly and regular migration should be built. A global compact which is above all people-centred, human rights-based and gender-responsive would ensure both social inclusion and alignment with the overarching aim of the 2030 Agenda for Sustainable Development to “leave no one behind” and to “reach those furthest behind first” (para 4) as well as the goal of reducing inequalities (Sustainable Development Goal (SDG) Target 10.7 on safe, orderly and regular migration), and promoting decent work for migrant workers, particularly women migrants, (SDG Target 8.8).

Member states have a wide range of obligations arising from all core international human rights instruments to promote, protect and fulfil the human rights of all individuals within their territory and subject to their jurisdiction, including all migrants³. Other obligations arise from international law, more broadly, for example international labour and humanitarian law, and the law of the sea.

In the New York Declaration, UN Member States reaffirmed and committed to fully protect the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, as rights holders, and in full respect for international human rights law and other relevant standards (paragraphs 5 and 41). They also strongly condemned acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against migrants, and the stereotypes often applied to them, including on the basis of religion or belief (para 14). UN Member States also pledged to combat with all the means at their disposal the abuses and exploitation suffered by countless migrants in vulnerable situations, and to address their special needs in accordance with obligations under international law (para 10 and 23).

¹ Note that this issue will be elaborated in more detail in the informal thematic session on contributions of migrants and diasporas to all dimensions of sustainable development, including remittances and portability of earned benefits.

² Migrants in Countries in Crisis Initiative, <https://micicinitiative.iom.int/how-does-initiative-define-%E2%80%98crisis%E2%80%99>.

³ In the absence of a universal legal definition, OHCHR has defined “international migrant” as “any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence”. See OHCHR Recommended Principles and Guidelines on Human Rights at International Borders (2014).

Trends

Much of the world's migration is safe and regular⁴; the majority of the 244 million international migrants recorded in 2015⁵ seek employment opportunities abroad⁶. While difficult to measure given its clandestine nature, estimates indicate that there were 50 million international irregular migrants in 2010⁷, while the data on the impact of irregular migration is lacking. However, as expressed in the New York Declaration, migrants have overwhelmingly made positive economic and social contributions to their countries of destination and origin, while also addressing challenges of demographic imbalances and labour shortages. The Sustainable Development Agenda has reaffirmed the growing recognition that such safe and regular means of migration are the best avenues to reap the benefits of migration for both countries and migrants, as also evidenced in the SDGs.

However, the data on unsafe migration and its implications for human rights is troubling. Since 2014, more than 20,160 women, men and children have lost their lives along migratory routes across the globe. During 2016, 7,763 migrants were reported dead or missing en route, and countless others were never reported or found.⁸ As shocking as these figures are, that we do not know for sure how many people are dying on perilous migratory routes compounds the concern. Such an absence of data and subsequent indicators characterises much of the debate and indeed policy-making on migration. Further, when data are available, they are rarely indicative of human rights circumstances. This lack of data on the rights of migrants risks concealing exclusion, making it difficult to dismantle patterns of discrimination.

Many migrants, notably those in an irregular situation, move, live and work on the edge, disproportionately vulnerable to discrimination, exploitation and marginalization with reduced, or non-existent, means of redress. The vulnerability of migrants to abuse, exploitation and exclusion is exacerbated by too few legal avenues for migration, including for family reunification, study, humanitarian considerations and labour at all skills levels. Despite evidence that regularization can be an effective means to address migrant vulnerability, and to ensure the inclusion of migrants in society, this pathway is used too infrequently.

Further, human rights violations against migrants are often linked to deep-seated attitudes of prejudice and xenophobia. What has accelerated negativity towards migrants is the perception of an increased influx of irregular migration, combined with the lack of trust in state capacities to deal with such influxes. Recent years have witnessed a resurgence of xenophobic attitudes and violence towards foreigners, as migrants become scapegoats for fears about terrorism, crime, unemployment, the viability of welfare systems and even the integrity of national culture and identity. But the vast majority of these claims are built on misperceptions, prejudice and fear, rather than grounded in evidence. While migration can bring economic challenges in the near term⁹, economic research demonstrates how migrants tend to complement rather than compete with citizens in the labour market, generating greater overall productivity.¹⁰ The available evidence also shows that migrants tend to commit fewer crimes than native-born populations and that immigration is not linked to increased crime rates.¹¹ The common notion that migrants are an unjust burden on health, education

⁴ In Safety and Dignity: addressing large movements of refugees and migrants; A/70/59, paragraph 87

⁵ DESA, Trends in International Migration, 2015:

http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf

⁶ ILO Global Estimates on Migrant Workers, 2015, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_436343.pdf

⁷ IOM Global Migration Trends Factsheet, 2015: http://publications.iom.int/system/files/global_migration_trends_2015_factsheet.pdf

⁸ IOM, Missing Migrants Project, available at: <https://missingmigrants.iom.int/>.

⁹ Report of the Special Representative of the Secretary-General on Migration, "The Sutherland Report", A/71/278.

¹⁰ Mette Foged and Giovanni Peri, "Immigrants' effect on native workers: new analysis on longitudinal data", Institute for the Study of Labour discussion paper, No. 8961, 2015.

¹¹ See for example Robert Adelman et. al, *Urban crime rates and the changing face of immigration: Evidence across four decades*, Journal of Ethnicity in Criminal Justice, Volume 15, 2017 (Issue 1).

and other social services is challenged by evidence that migrants contribute more in taxes and social contributions than they receive in benefits.¹²

Issues

a. Protecting the human rights of all migrants: access to justice; detention; the wellbeing of children

Migrants often face a range of barriers to access justice, including in national courts, tribunals and monitoring and complaints mechanisms. Such barriers may include a lack of local language skills, limited information about their rights and means of redress, restrictions on movement including detention, fragmentation of different rights across various judicial and non-judicial mechanisms, a lack of guarantees for due process, a lack of access to a competent lawyer or interpreter, lack of legal aid and lack of legal status or identity.¹³

Migrants in an irregular situation often face additional legal and practical barriers that undermine their rights and freedoms, rendering them disproportionately vulnerable to discrimination, marginalization and abuse. A lack of "firewalls" between immigration enforcement and public services is an important barrier in this regard. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.¹⁴ Without prejudice to the sovereign prerogative to order their removal, the very presence of such migrants under their jurisdiction places certain obligations on national authorities, including the primary obligation to acknowledge their presence and accept their right to claim rights.¹⁵

Detention of irregular migrants is increasing around the world, alongside states stepping up returns and readmissions of migrants in irregular situations to their countries of origin.¹⁵ Far from being used as a last resort, immigration detention is often routine and, in some cases, mandatory. In many cases, procedural safeguards for such detention are fewer than for criminal detention, including a lack of measures to determine the arbitrariness of arrest and continued detention. Migrants may be exposed to poor conditions in detention, including space, food, water and sanitation. Migrants in detention often suffer violence, including sexual and gender-based violence, and a deterioration in their physical and mental health. Whatever the objective of detention, the evidence is clear that it does not offer a form of deterrence¹⁷, given the high numbers of people who migrate again following unsustainable return, often in more perilous conditions.¹⁸ Evidence also shows that migrants are less likely to violate immigration procedures if their basic needs are met through legal avenues, they are not at risk of detention or refoulement, and they can remain hopeful regarding future prospects.¹⁹

While there is a lack of data on how many children are detained globally, estimates indicate that hundreds of thousands of children are currently detained on immigration grounds.²⁰ Further, evidence

¹² See OECD, *Is Migration Good for the Economy?*, May 2014, available at:

<http://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf>.

¹³ For a more detailed discussion, see A/71/285, para. 80.

¹⁴ Committee on Migrant Workers, general comment No. 2 (2013), para 24.

¹⁵ Statement by the Committee on Economic, Social and Cultural Rights, *Duties of States towards refugees and migrants* under the International Covenant on Economic, Social and Cultural Rights, para. 11.

¹⁵ International Detention Coalition, *Does Detention Deter?*, Briefing Paper, April 2015, available at:

http://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf.

¹⁷ A/HRC/31/35

¹⁸ Mitchel, Grant, Sampson, Robyn, *Journal on Migration and Human Security*, "Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales", 2013; and De Genova, N.; Peutz, N. (eds.) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*. (2010).

¹⁹ Note that these issues related to the governance of international borders and returns will be elaborated in more detail in the informal thematic session on International cooperation and governance of migration in all its dimensions, including at borders, on transit, entry, return, readmission, integration and reintegration. Also see Emily Bowerman, *Risks encountered after forced removal: the return experiences of young Afghans*, *Forced Migration Review* Issue 54, February 2017.

²⁰ International Detention Coalition, "There are alternatives: a handbook for preventing unnecessary immigration detention," 2011, p. 007

shows that even short periods of detention are extremely harmful for children.²¹ There is growing international consensus that detention constitutes a child rights violation and always contravenes the principle of the best interests of the child.²²

b. Ensuring social inclusion and cohesion in the context of migration

Ensuring inclusion, protecting rights and valuing the contributions of migrants are essential aspects of building cohesive societies. In this respect the conditions of inclusion for migrants should be defined by the international human rights framework, including protection of their economic, social and cultural rights, in particular education, health, social security, and adequate housing.²³ The inclusion of migrants leads to better outcomes for society as a whole. While policies of criminalization and exclusion are unlikely to be an effective deterrent to irregular migration, they *are* liable to produce widespread and harmful consequences, not only for the human rights and well-being of individual migrants, but also for social inclusion and relations between host communities and migrants in society. This in turn can contribute to ongoing negative narratives about migrants.

Being and staying healthy is a fundamental right of every human being, and is an essential precondition for all people to work, be productive, contribute to economic and social development in both countries of origin and destination, and improve livelihoods. Yet, many migrants lack access to equitable social and health services and financial protection for health. They are frequently subject to discrimination on the basis of their nationality, gender, migratory or health status. Other barriers to accessing health services include high costs, language and cultural differences, administrative hurdles, the inability to affiliate with local health financing schemes, and a lack of information about health entitlements. While migrants do not disproportionately bring disease as they begin their journeys, the conditions they face in transit and in destination countries can contribute to ill health.

Barriers to migrants having access to adequate housing as well as to education and to social security have similarly pernicious effects on social inclusion and cohesion. For instance, even where the universal right to education is recognized in law, its implementation is inconsistent. Millions of migrant children around the globe, including in high-income countries, spend years out of school or never get a formal education. Migrants also face difficulties obtaining adequate housing due to lack of information, cultural/linguistic barriers or other barriers stemming from legal status. Yet, migrants' access to education and housing on an equal basis with nationals, regardless of migration status, is essential to challenging discrimination, exclusion and xenophobia against migrants.

Many international migrants work in isolated and largely unregulated sectors such as agriculture, hospitality and domestic work, which are characterized by poor working conditions, and in jobs which, in many countries, have been largely deserted by national workers; all these factors exacerbate their exclusion from society. Migrant children, especially those in an irregular situation, are particularly vulnerable to child labour and other forms of exploitation.²⁴

c. Confronting all forms of discrimination, including racism, xenophobia and intolerance against migrants

Messages of xenophobia have increasingly permeated political movements and media in many countries, resulting in a climate of rising violence against migrants and ethnic and religious minorities, fuelled in some cases by government policies and practices. There has also been a rise in the use of demeaning, commodifying or sweeping language to describe migrants; the false attribution of criminality or of negative social characteristics; and even more problematic and violent language

²¹ L. Briskman, D. Zion and B. Loff. 2010. Challenge and collusion: health professionals and immigration detention in Australia. *The International Journal of Human Rights* 14(7): 1092–1106.

²² OHCHR press release, "Children and families should never be in immigration detention – UN experts", 14 December 2016.

²³ OHCHR, *The economic, social and cultural rights of migrants in an irregular situation*, 2014, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

²⁴ This issue will be further elaborated in the context of the informal thematic session on 'Irregular migration and regular pathways, including decent work, labour mobility, recognition of skills and qualifications, and other relevant measures'.

that could directly incite hatred against migrants. Negative public attitudes towards migrants result in barriers to their social inclusion, challenges policy-making to protect and assist them and requires a high degree of political will and social insight to address.

Migrants' fear of exposure and possibly detention and deportation if they confront xenophobia, racism and intolerance, including through outreach to police authorities, is also a key barrier. Many will not report crimes, including hate crimes, for fear of repercussions or simply out of distrust of authority. For the same reasons, others will not access medical services following bias-motivated attacks. Even when migrants do bring complaints, existing justice processes may be ineffective because of linguistic and cultural barriers. Migrants may be more exposed to biased law enforcement, harsher sentencing, custodial segregation and discriminatory decision-making.

d. Addressing the specific needs and guaranteeing the human rights of migrants in vulnerable situations

Although they fall outside the specific legal protections afforded to refugees, many migrants are nonetheless in vulnerable situations and entitled to a heightened duty of care by the State precisely because they may need particular attention to be paid to the respect, protection and fulfilment of their human rights.

The concept of a “migrant in a vulnerable situation” refers to a range of factors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. Situations of vulnerability may change over time as circumstances change or evolve. Crises within countries can further exacerbate some of the factors having an impact on the conditions of vulnerability of migrants. These factors could relate to

- i) Migrants' reasons for leaving their place of origin, i.e. the drivers of “non-voluntary” precarious movements, such as extreme poverty, lack of access to human rights such as education, health, and decent work or the adverse effects of climate change and environmental degradation²⁵;
- ii) The circumstances that they encounter en route, at borders and at destination, such as violence including sexual and gender-based violence, abuse and exploitation, hunger, lack of personal security or of access to essential health services; and/or
- iii) A particular aspect of their identity or circumstance such as age or gender, sexual orientation and gender identity, religion, health or disability status.²⁶

Analysing and exploring the parameters and limits of such situational and/or embodied vulnerability presents an opportunity to understand the diversity of migratory experiences and to provide law, policy and practice responses which are designed to protect their human rights.

Migrant women and girls in vulnerable situations and at particular risk include pregnant women, new or breastfeeding mothers, lesbians and bisexual, transgender and intersex women, older women and women with disabilities. Many children in the context of migration are invisible and extremely vulnerable; they are not formally registered with the child protection authorities, best interest assessment and determination procedures are rarely carried out in decisions related to migrant children who are outside the asylum context, and guardianship procedures are often lengthy or non-functional. For children born in a migratory context, there may be a risk of statelessness due to the additional hurdles they may face in establishing their nationality. Many migrants in vulnerable situations are exposed to ill-health and migrants with pre-existing chronic health conditions

²⁵ The New York Declaration for Refugees and Migrants emphasizes in addition that many people move for a combination of these reasons (para. 1).

²⁶ OHCHR report on the promotion and protection of the human rights of migrants in the context of large movements, /HRC/33/67, para 15. See also GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (draft), available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx>.

experience interruptions in their care when they move without medicines or health records and encounter barriers in accessing health services.

Ways forward

To remain true to the promise of the New York Declaration, the global compact should strive to foster a human rights-based approach to migration, premised on the principles of universality, indivisibility and interdependence, participation, non-discrimination and accountability.²⁷

The first step towards ensuring migration policies that are grounded in human rights norms and standards is to ratify and implement all international and regional human right instruments and related conventions, and to reaffirm in policy and practice the fundamental importance of respecting, protecting and fulfilling the human rights of all migrants. Where migration policies and measures reinforce and contribute to a logic of exclusion and criminalisation of migrants, this in turn can exacerbate xenophobic stereotypes and actions.

Effective protection and inclusion of migrants will depend on ensuring that societies as a whole are invested in the success of this endeavour. This necessitates policy considerations for host communities that are, in some cases, facing a plight similar to that of migrants in terms of social exclusion or poverty. Therefore policies related to migration, including those related to inclusion and non-discrimination of migrants as well as those directed to respecting, protecting and fulfilling their human rights, must include the participation of all actors with a stake in the outcome, including local governments, trade unions, employers' organizations, national human rights bodies, private sector, recruitment agencies, security and justice service providers, civil society and youth organizations and migrants themselves (including representative groups of migrant women and children).

Protecting the right to information is a key element of empowerment for all migrants; enabling them to access relevant information and support, in a language and format they understand, can harness their ability to make informed decisions and claim their own rights, including through effective access to justice.

To ensure that their migration policies are not creating inequalities or otherwise obstructing the enjoyment of human rights, and to encourage safe, regular, human rights-based and gender-responsive migration policies, States should monitor the effects of these policies and actions through gathering disaggregated data (at a minimum by age, sex and migratory status) in line with confidentiality and data protection principles.²⁸

In working towards the compact, there will be no avoiding discussions on the treatment of migrants in irregular situations. In this regard, it is important to keep in mind that irregularity enhances vulnerability and that therefore human rights protection must lie at the heart of policy options considered in addressing this phenomenon.

Commitments

The following represent a non-exhaustive set of practical and action-oriented commitments, in line with the New York Declaration and the Sustainable Development Agenda, that could be made by States and other stakeholders within the global compact:

1. Strengthen or establish official mechanisms to monitor, investigate and ensure accountability for human rights violations and abuse of migrants, and ensure that all migrants have equal and effective access to justice and effective remedies.

²⁷ See Report of the Secretary-General A/68/292, para. 12

²⁸ See Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health.

2. Review policies that criminalize cross-border movements, and establish a presumption against immigration detention in law including through legally prescribing human rights-compliant, non-custodial, community-based alternatives to detention.
3. Establish national action plans for the elimination of child immigration detention involving government authorities, civil society, and other relevant actors, including children themselves. Provide guidance on the practical operationalization of the principle of the best interests of the child for all migrant children. Establish safeguards to avoid the separation of children from their parents or caregivers, and automatically refer the care of unaccompanied migrant children to child protection authorities.
4. Ensure all migrants have access to universal health coverage on the basis of non-discrimination, including financial risk protection, access to quality essential health-care services and safe, effective quality and affordable essential medicines and vaccines. Special attention should be given to those with specific health needs such as those with communicable diseases including HIV and those who are in need of sexual and reproductive, occupational, mental and psychosocial health care.
5. Ensure that no child in the context of migration is left behind in timely accessing quality education.
6. Develop and implement clear and binding procedures and standards on the establishment of “firewalls” between immigration enforcement and public services at all levels, in the fields of access to justice, housing, health care, education, social protection and social and labour services for migrants
7. Commit to establishing partnerships with political leaders and parties, media, private sector, local communities, trade unions and other public actors, to promote tolerance, and respect for all migrants, regardless of their status. Introduce public education measures, child rights education programs and education curricula, and conduct targeted awareness campaigns in order to combat prejudice against and the social stigmatization of migrants. Support the UN TOGETHER initiative which promotes respect, safety and dignity for all migrants.
8. Promulgate robust anti-discrimination and equality legislation that protects migrants from all forms of discrimination including on grounds of nationality or migrant status, establish national specialized bodies in this respect, and develop benchmarks for the elimination of xenophobia against migrants. Provide accessible legal, medical, psychological and social assistance to migrants affected by racism, xenophobia and intolerance. Guide anti-discrimination and integration policies based on migrants’ experiences and testimonies.
9. Develop guidelines and implement agreements with national human rights protection bodies, legal aid and service providers and other relevant actors to ensure timely and effective screening and referrals for migrants in vulnerable situations. Such procedures should as relevant be prior to, apart from, or alongside assessments to establish an asylum claim.
10. Ensure meaningful human rights protection of all migrants in vulnerable situations, establish a common conceptual understanding of migrants in vulnerable situations, and in this regard commit to implement the results of a state-led process to develop non-binding principles and voluntary guidelines, as called for in paragraph 52 of the New York Declaration, drawing upon the comprehensive guidance provided in the Global Migration Group’s draft *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations* as well as other related initiatives such as the Migrants in Countries in Crisis and the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative.