

## Summary of GAATW's recommendations for the Global Compact for Migration, September 2017



Global Alliance Against Traffic in Women

### A compact to support rights-based governance of migration

The governance of migration is established in international human rights law, labour law and humanitarian law and the global compact should not undermine this normative framework. At a time when populist politics and xenophobic and racist rhetoric gathers strength and increasing support, the global compact must stand against these threats and commit states to the implementation of migration, labour and humanitarian policies that protect and promote the human rights of all migrants including those in irregular status. Only a rights-based approach will achieve the aspiration of this process – to facilitate safe, orderly and regular migration. Measures such as restricting rights, militarising borders, limiting regular channels of migration, implementing migration agreements that discriminate based on factors such as gender and age, do not stop migration but serve to make it more dangerous, pushing migrants into taking riskier routes and leading to more violations of migrants' human rights, including of migrants in regular situations.<sup>1</sup>

As crossing borders and management of residence and work permits are administrative issues, migrants who enter a country through irregular channels or move into irregular status after entry should not be criminalised. Criminalisation of migration can heighten migrants' risk of being targeted for human rights abuses including trafficking in persons and limit opportunities to seek assistance and access justice. The criminalisation of migration and of migrants in irregular status creates a barrier to individuals who have been smuggled reporting and seeking assistance for human rights abuses.

In the global compact, states should:

- Take the opportunity of the global compact to establish a presumption against immigration detention in law.<sup>2</sup>

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<sup>1</sup> Office of the High Commissioner for Human Rights (OHCHR), in cooperation with the Global Alliance Against Traffic in Women (GAATW), *Expert consultation of Human Rights at International Borders: Exploring Gaps in Policy and Practice* – Background Paper, 22–23 March 2012; P. Oberoi and E. Taylor-Nicholson, *The Enemy at the Gates: International Borders, Migration and Human Rights, Laws*, 2013, 2, 169–186; doi:10.3390/laws2030169

<sup>2</sup> See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para.24; CMW, Concluding observations on the combined second and third periodic reports of Senegal, CMW/C/SEN/CO/2-3, 20 May 2016, para.27(a); Committee against Torture, Concluding observations on the fourth report of Cyprus, CAT/C/CYP/CO/4, 16 June 2014, paras.17(a); CAT, Concluding observations on the fifth periodic report of CAT/C/AUS/CO/4-5, 23 December 2014, para.16; Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/7/4, 10 January

- Establish, publicise, and monitor the implementation of binding firewalls in order to facilitate migrants' access to justice, complaints mechanisms including labour inspection services, and social services.<sup>3</sup>
- Ensure returns are carried out with migrants' voluntary consent and in full respect for the human rights of migrants and in accordance with international law and its procedural safeguards.
- Uphold the principle of non-refoulement.
- Commit to ensuring the safe reception, as well as economic and social re/integration of returnees to enable full enjoyment of their human rights.
- Create a mandate for and resource a platform within the UN to strengthen the human rights-based approach to migration, share information, establish common understandings on cross-cutting issues and facilitate cooperation between the relevant UN institutions.<sup>4</sup>

### **A human rights based global compact, for all migrants, including those in irregular status:**

The global compact must never lose sight of the simple fact that migrants are people and as such are rights-bearers, enjoying all human rights. States have committed and repeatedly reaffirmed to fully protect the human rights of all migrants, regardless of their migratory status, most recently at the UN Summit for Refugees and Migrants that established this process.<sup>5</sup> The international bill of rights applies to both nationals and non-nationals, making exceptions in respect of only two rights, and

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2008, para. 53; Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010, para.58.

<sup>3</sup> Firewalls are advocated within the European Union and recommended by international human rights bodies: EU Fundamental Rights Agency (2013), Apprehension of migrants in an irregular situation, available online at [http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf), preamble; European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, available at [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N16/REC-16-2016-016-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf); Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.54; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, paras.63, 64, 74, 77; CMW, Concluding observations on the initial report of Turkey, CMW/C/TUR/CO/1, 31 May 2016, paras.58(c),(d); ILO Committee of Experts, 2006 General Survey on the labour inspection instruments, paras.78 and 161, available at [http://www.ilo.ch/public/libdoc/ilo/P/09661/09661\(2006\)1B.pdf](http://www.ilo.ch/public/libdoc/ilo/P/09661/09661(2006)1B.pdf); ILO Committee of Experts, Promoting fair migration: General Survey concerning the migrant workers instruments, ILC.105/III(1B), 2016, paras.480-482.

<sup>4</sup> Such as the Standing Panel on Migration and Human Rights recommended in OHCHR, *Improving Human Rights-Based Governance of International Migration*, 2013

<sup>5</sup> UN New York Declaration for Refugees and Migrants, outcome document of the high-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants, A/71/L.1, 13 September 2016, paragraphs 5 and 41

only in limited circumstances.<sup>6</sup> The fundamental principle of non-discrimination that lies at the heart of international human rights law is essential to the exercise and enjoyment of human rights for everyone, including all migrants, throughout their migration.

Transparency and accountability in the global compact process are vital to its success. To this end, a global compact that respects the human rights of migrants requires the meaningful participation of migrants and civil society organisations in the consultation, drafting, negotiation and implementation of the compact at local, national, regional and international levels. The global compact requires transparent and meaningful accountability mechanisms.

In the global compact, states should:

- Re-commit to respecting, protecting and fulfilling the human rights of migrants without discrimination across the international human and labour rights frameworks, and ensure their actionable commitments are in line with states' existing obligations.
- Where they have not already done so, ratify and implement all international and regional human rights instruments, withdraw any reservations, and reaffirm in policy and practice the human rights of all migrants, regardless of their migratory status.
- Commit to a transparent and meaningful accountability process with the participation of civil society.

### **A gender-responsive compact:**

Half of international migrants are women.<sup>7</sup> However, migration is often described in gendered terms and through the lens of male experiences, while migration policies often ignore women's rights and the reality of their migrations. Furthermore, the gendered focus of laws and policies on trafficking in persons can have the effect of positioning women's migrations as well as women themselves as inherently vulnerable, infantilising them through a connection with children, positioning them overwhelmingly as actual or potential victims of a crime and human rights abuses and questioning the appropriateness of women's ability to working outside the home. These normative perceptions have resulted in discrimination in accessing regular channels of migration for example through

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<sup>6</sup> The ICCPR in Article 25 reserves to citizens the right to vote and take part in public affairs, and in Article 12 reserves the right to freedom of movement within a country to foreigners who are lawfully present within the country. However, in its General Comment No. 15, the Human Rights Committee has guided that a foreigner may enjoy the protection of ICCPR Article 12 even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

<sup>7</sup> United Nations, Department of Economic and Social Affairs, Population Division, International Migration Report 2015: Highlights, ST/ESA/SER.A/375, 2016, available at [http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015\\_Highlights.pdf](http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf)

gendered bans on some migrations, gendered restrictions in MOUs, or in profiling women travellers or migrant workers as trafficked persons.<sup>8</sup>

In the global compact, states should:

- Commit to migration policies and laws that are gender-responsive and respect, protect and fulfil women's rights, in line with women migrants' self-defined best interests.
- Review and amend any gender discriminatory restrictions on migration in law, policy or practice that limit opportunities for women to migrate and ensure gender equity and respect for women's autonomy in relevant policies including those regarding access to visas, residence permits, work permits and other documentation for migration.
- Recognise and respect the agency and human rights of women migrants and not use victimising rhetoric.

### **A compact that addresses the realities of mixed migration:**

Migration realities are complex and do not easily fit the categories we refer to when describing migration and migrants' rights: through linear, intentional stages of migration of individuals whose protection status is clear and stable through their migration. It remains important to uphold existing protections for specific groups established in international law, but it is crucial to recognise that these statuses are not fixed from the outset of the migration and migrants often pass in and out of various legal categories during the course of their journey.

In the global compact states should:

- Seek complementarity with the global compact on Refugees. The two compacts should seek to avoid creating hierarchies of rights holders, which would ignore the complex realities of migrants' lives, and exacerbate damaging and discriminatory discourse around migrants' and refugee rights.

### **A compact that develops a rights-based response to smuggling:**

Smuggling is not necessarily a violation of a migrants' human rights and many migrants experience no difficulties and express gratitude to the facilitators.<sup>9</sup> The involvement of third party facilitators

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<sup>8</sup> Global Alliance Against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, GAATW 2007, in particular the chapters on Nepal and Nigeria; ILO and GAATW, *No easy exit: Migration bans affecting women from Nepal*, ILO, Geneva, 2015; R. Napier-Moore and K. Sheill, *High rise, low pay: experiences of migrant women in the Thai construction sector*, International Labour Organization, Bangkok, 2016, p.20; R. Napier-Moore, *Protected or put in harm's way? Bans and restrictions on women's labour migration in ASEAN countries*, International Labour Organization and UN Women, Bangkok, 2017.

<sup>9</sup> OHCHR, *Situation of migrants in transit*, A/HRC/31/35, 2016, para.56; migrants reported requiring the services of smugglers for their expertise and mostly regarded them as a necessity even if the experience was not a

arises from state policies, which provide insufficient safe and accessible regular pathways for migration and admission across different types of migration and the increased border securitisation including the externalisation of borders.<sup>10</sup> Attempting to address smuggling only through a criminal justice lens cannot work.<sup>11</sup> The global compact offers an opportunity to build a consensus towards a rights-based approach to the smuggling of migrants to realise states' commitment to facilitate migration.<sup>12</sup>

In the global compact states should:

- Ensuring that all measures aimed at addressing irregular migration or the smuggling of migrants do not adversely affect the human rights of migrants, or those who provide assistance to them.
- Committing to opening more regular migration channels that are accessible to all migrants, to reduce the migrants' need to rely on the services of smugglers.

### **A compact that delivers a rights-based response to trafficking:**

Anti-trafficking legislation, policy and practices are often used to justify and rationalise deterrence policies and strengthen border policing than they are used for addressing human trafficking and providing assistance to trafficked persons. States should accord trafficked persons all human rights, including those to which they are entitled as victims of crime and victims of human rights violations.

In the global compact, states should:

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positive one, see Crawley et al., *Destination Europe?, Understanding the dynamics and drivers of Mediterranean migration in 2015*, Unravelling the Mediterranean Migration Crisis (MEDMIG), Final Report November 2016. p.56

<sup>10</sup> F. Crépeau, UN Special Rapporteur on the Human Rights of Migrants, Fighting Violence against Migrants Through Protecting the Rights of Irregular Migrants: Presentation to the Commission on Crime Prevention and Criminal Justice, UNODC, Vienna, 24 April 2012; General Assembly, Report of the Special Rapporteur on the human rights of migrants, A/71/40767, 20 July 2016, paras.14, 15, 21, 37; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, paras.30, 31, 44, 45, 50; H. Crawley, F. Düvell, K. Jones, S. McMahon, N. Sigona, *Destination Europe? Understanding the dynamics and drivers of Mediterranean migration in 2015*, Unravelling the Mediterranean Migration Crisis (MEDMIG), Final Report November 2016.

<sup>11</sup> The Smuggling of Migrants Protocol, preamble. In its first paragraph, the Smuggling of Migrants Protocol identifies the need to address "socio-economic measures, at the national, regional and international levels" and continues in the second paragraph, with states recalling their commitment "to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned."

<sup>12</sup> In adopting the New York Declaration, states have agreed to consider reviewing their migration policies including policies that criminalise cross-border movements (para.33), with a view to examining their possible unintended negative consequences (para.45). Although they have also committed to review their laws and policy on smuggling of migrants, in line with the international criminal law in this area (para.36), the saving clauses of those laws taken with these other possible reviews offers an opportunity for a more rights-based approach to the smuggling of migrants.

- Ensure the human rights of trafficked person are at the centre of all efforts to prevent and end trafficking and that programmes to protect, assist and provide redress to them are adequately resourced.<sup>13</sup>
- Ensure that any anti-trafficking measures do not adversely affect the rights of trafficked persons.<sup>14</sup>
- Ensure the development and implementation of a credible and rights-based oversight mechanism for the Trafficking in Persons Protocol.

### **A compact that guarantees the right of migrants to decent work:**

Across the globe, women earn less than men for the same work. Furthermore, the work that women do is often not considered or valued as work, falling outside labour protection regimes, while women also subsidise the economy with a disproportionate responsibility for unpaid care work.

Current migration management regimes increase the economic precarity of migrants through for example, the charging of recruitment fees to workers. Migrants, including those in irregular status, are entitled under international human rights law to enjoy the right to work.<sup>15</sup> Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work.<sup>16</sup> The emphasis on temporary and circular migration in many state policies prevent and restrict the movement of migrant workers and increases the risk of abusive and irregular situations where they can be exploited by recruiters, employers and others.

In the global compact, states should:

- Recognise that regular channels of migration may create conditions for trafficking of migrant workers, especially women migrant workers in sectors that are not covered by labour laws, and reform programmes such as temporary, guest-worker, or circular migration programmes to eliminate institutionalised risks such as worker-paid recruitment fees, substandard working conditions allowed under such schemes, and sponsorship schemes tying visas to a specific employer.

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<sup>13</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 1

<sup>14</sup> GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, 2007.

<sup>15</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, paras.5, 47(v). See also, *2030 Agenda for Sustainable Development*, A/RES/70/1, Target 8.8

<sup>16</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), para.47(v).

- Commit to closing the gender pay gap and bring all work, including in the informal sector, under the protection of labour laws and the social protection framework.
- Guarantee decent work for all migrant workers, including protection of rights at work, entitlement to social security benefits and the fundamental rights to freedom of association and collective bargaining.
- Move away from models of temporary migration including circular migration, which undermine migrants' human rights and are contrary to social inclusion and cohesion.
- Eliminate in law and practice the charging of recruitment fees to workers and other forms of economic coercion.
- Ensure that any pre-departure trainings and skills trainings have a rights-based, decent work agenda and do not reinforce gendered power dynamics; trainings should be accessible and affordable for the migrant and not contribute to their debt burden.

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### **The Global Alliance Against Traffic in Women (GAATW)**

GAATW is an Alliance of non-governmental organisations from Africa, Asia, Europe, Latin America and the Caribbean, and North America, that situates trafficking in persons in the contexts of women's rights, migrants' rights, and labour rights. GAATW is committed to work for changes in the political, economic, social and legal systems and structures which contribute to the persistence of trafficking in persons and other human rights violations in the context of migratory movements for diverse purposes, including security of labour and livelihood.

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