

1. INTRODUCTION

From the perspective of the Office of the United Nations High Commissioner for Human Rights (OHCHR), all global migration governance must be *human rights-based*. The Global Compact for Safe, Orderly and Regular Migration must, therefore, reaffirm and operationalize existing State commitments to uphold the human rights and dignity of all people, regardless of their migration status. At the same time, the Global Compact must ensure specific protection interventions for *migrants in vulnerable situations* who may fall outside the protections of the 1951 Refugee Convention but who are, nonetheless, entitled to the protections of the international human rights framework. Finally, the Global Compact should contain a commitment to an *effective mechanism for monitoring* the implementation both of the commitments made, as well as their operational impact, in order to ensure that the Global Compact continues to respect, protect and fulfil the human rights and human dignity of migrants.

The Human Rights Council has requested the High Commissioner for Human Rights to participate, as appropriate, and contribute to the preparatory process of the Global Compact for Safe, Orderly and Regular Migration, with a view to providing human rights-based input and mainstreaming human rights throughout the Global Compact.¹

2. A COMMITMENT TO HUMAN-RIGHTS BASED MIGRATION GOVERNANCE

Building upon the many substantive commitments of the New York Declaration to respect and uphold human rights,² the Global Compact must now translate aspirational words into a concrete plan of action. This should include an understanding that the existing international human rights framework *is itself a protection framework directly applicable to migrants*.

All migrants are rights-holders and are entitled to equal protection under international human rights law. The nine core international human rights instruments all generally and specifically apply to migrants, whether their status is regular or irregular, and the International Bill of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) makes exceptions between nationals and non-nationals in respect of only two rights, and even then, only in limited circumstances.³

The legal framework of international human rights law and related standards provides authoritative benchmarks for the development of meaningful and practical commitments for action. International law represents the foundation upon which policies and practices on migration and migrants should be built, providing practical guidance to States, and equipping them – and other stakeholders as necessary - with the tools that are needed to govern migration in a manner that upholds the rights of all involved.

¹ Human Rights Council, Resolution on the protection of the human rights of migrants: the global compact for safe, orderly and regular migration, A/HRC/RES/35/17 (2017), para. 18 (a).

² In 24 pages, the *New York Declaration* and its annexes contain over 100 explicit references to human rights.

³ The International Covenant on Civil and Political Rights reserves to citizens the right to vote and take part in public affairs (art. 25), and grants the right of freedom of movement to foreigners provided they are lawfully in a country (art. 12). The Human Rights Committee nevertheless made clear in its general comment No. 15 (1986) that all foreigners may enjoy the protection of the Covenant, including in relation to entry and residence, when issues of discrimination, inhuman treatment or respect for family life arise (para. 5). It is also important to note that the Covenant guarantees to everyone without discrimination the right to leave any country, including his or her own, and to enter his or her own country (art. 12.2 and 4).

By becoming parties to international treaties, States assume obligations and duties under international law to respect, protect and fulfil human rights. This implies practical consequences for municipal authorities and local governments, in order to ensure the effective protection of the human rights of all migrants. States are also responsible for the human rights consequences of actions, or failures to act, by private actors, including corporations, members of civil society and private security contractors. The international human rights framework is clear that, to give effect to these rights and to uphold the fundamental principle of non-discrimination, duty bearers must consider the unique and individual circumstances of each person. A human rights-based approach to migration governance, therefore, is one that is *normatively based* on international human rights standards and that is *operationally directed* to promoting and protecting the human rights of migrants.

The High Commissioner has recently presented to the Human Rights Council a compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law.⁴ That report challenged the notion that there is no comprehensive framework for the protection of migrants, through detailing the extensive body of international law and related standards that provide legal protection for the human rights of all migrants, regardless of their status.⁵ In addition to providing a list of relevant legal standards, the report also sets out the authoritative guidance provided in the general comments and reports of the international human rights treaty bodies and special procedures mandate holders,⁶ as well as guidelines and tools produced by UN entities and other organizations with relevant mandates such as OHCHR, that are in line with international human rights law and are germane to the issue of safe, orderly and regular migration.

3. A COMMITMENT TO PROTECT MIGRANTS IN VULNERABLE SITUATIONS

Member States have pledged to combat with all the means at their disposal the abuses and exploitation suffered by countless migrants in vulnerable situations.⁷ The Human Rights Council has expressed serious concern about the particular vulnerable situations and risks faced by migrants, which can arise from the reasons for leaving their country of origin, circumstances encountered by migrants en route, at borders and at destination, specific aspects of a person's identity or circumstance or a combination of these factors.⁸

As an overarching comment, it should be acknowledged that *all* people can be vulnerable to human rights violations. This includes migrants who enter, live and work in a foreign country in a regular situation as well as those who are in an irregular situation. In many countries around the world, migrants in both regular and irregular situations are subjected to discrimination, marginalization, exploitation, and abuse.

However, migrants in an irregular situation are often disproportionately affected by human rights violations when compared to nationals of a State, or even when compared to other migrants in a regular situation. In 2010, the Global Migration Group expressed its deep concern about the human rights of irregular migrants, concluding that they are more likely to face discrimination, exclusion, abuse and

⁴ OHCHR, Report on the compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law, A/HRC/36/42, available as an advanced, unedited version at: <http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>

⁵ See A/HRC/36/42.

⁶ The guidance of treaty bodies and special procedures has authority on several grounds. Firstly, it is legally binding to the extent that it is based on binding international human rights law. In addition, the treaty bodies were formally mandated and created under the provisions of the treaty they monitor; while the mandates of special rapporteurs are created and defined by States through the Human Rights Council. Both groups of experts benefit from their close collaboration with States in the system. Finally, the recommendations of treaty bodies and special procedure mandate holders acquire authority when international and regional judicial institutions reference them.

⁷ New York Declaration, para 10.

⁸ Human Rights Council, Resolution on the protection of the human rights of migrants: the global compact for safe, orderly and regular migration, A/HRC/RES/35/17 (2017), para. 4.

exploitation.⁹

It is important to note that migrants often show considerable resilience and agency throughout their migration. Rather, the vulnerable situations that migrants face have often been created for them by others through law, policy and practice, and vulnerability to human rights abuses is shaped by a number of factors, both internal (personal) and external (situational or environmental). A human rights-based approach to migrants in a vulnerable situation would therefore seek to ensure that responses aim above all to empower migrants, rather than stigmatizing them and denigrating their agency.

As co-chair of the Global Migration Group's Working Group on Human Rights and Gender Equality, OHCHR has led the development of a draft set of "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations". The GMG's draft Principles and Guidelines identify three general circumstances which frequently give rise to vulnerability within the context of migration. The High Commissioner has been requested by the Human Rights Council to submit a final version of these Principles and Guidelines to its 37th session in March 2018.

"Migrants in vulnerable situations" can be understood as a concept related to:

❖ **A vulnerable situation arising from the reasons for leaving countries of origin**

Vulnerability may arise due to the drivers of a person's migration, especially when external circumstances force migrants into "non-voluntary" or precarious movements. For example, when people migrate due to poverty, separation from family, lack of access to fundamental human rights (including education, health, food and water, and decent work), as well as xenophobia, violence, gender inequality, or the wide-ranging consequences of natural disaster, climate change (including slow-onset events) and environmental degradation. The New York Declaration for Refugees and Migrants emphasizes that many people move, indeed, for a combination of these reasons.¹⁰ And these reasons may inhibit the ability of migrants to return to their countries of origin in safety and dignity.

❖ **A vulnerable situation occurring in the context of the circumstances encountered by migrants en route, at borders and at destination**

Vulnerability is also shaped by the particular circumstances in which migrants find themselves once they are in the process of undertaking their journey and at destination. These external factors in large part determine the degree to which migrants are susceptible to discrimination, exploitation and abuse. For example, people are often compelled to utilize dangerous means of transportation in hazardous conditions and to resort to the use of smugglers and other types of facilitators, which can place them in situations of exploitation and other abuse. Such a journey can be marked by hunger, deprivation of water, a lack of personal security and lack of access to medical care. The inadequate and often harsh conditions in which irregular migrants are received at borders can violate rights and further exacerbate vulnerabilities. Responses, such as the arbitrary closure of borders, denial of access to asylum procedures, arbitrary push-backs, violence at borders committed by State authorities and other actors (including criminals and civilian militias), inhumane reception conditions, a lack of firewalls, and denial of humanitarian assistance, increase the risks to the health and safety of migrants, in violation of their human rights. Many migrants can spend long periods of time in irregular and precarious conditions, unable to access justice and at risk of a range of human rights violations and abuses.

❖ **A vulnerable situation related to a specific aspect of a person's identity or circumstance**

Finally, as people move, some individuals are at a heightened risk of human rights violations due to unequal treatment or discrimination based on factors such as age, gender, ethnicity, nationality, religion, language, sexual orientation or gender identity, or migration status. Certain people, such as pregnant women, persons in poor mental or physical health, persons with disabilities, older persons, or children,

⁹ Statement of the Global Migration Group on the human rights of migrants in an irregular situation, 30 September 2010. See also OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (2014), p. 36.

¹⁰ New York Declaration, para. 1.

are deserving of specific protection from States because of their unique physical and/or psychological circumstances.

The concept of a “migrant in a vulnerable situation” must, therefore, be understood as *a range of factors—both internal and external (embodied and situational) —that are often intersecting, can coexist simultaneously, and can influence and exacerbate each other.* Factors that generate vulnerability may cause a migrant to leave his or her country of origin in the first place, may occur during transit or at destination regardless of whether the original movement was freely chosen or not, or may be related to a migrant’s identity or circumstances. These situations of vulnerability may change over time as the circumstances of a particular migrant change or evolve during the course of their migration. The vulnerability of migrant children, for example, to physical, psychological and/or sexual abuse and exploitation, is exacerbated when immigration enforcement policies are allowed to override child rights.¹¹ The criminalization of migrants who enter a country or remain in it irregularly exacerbates migrants’ social exclusion and pushes them to live in even more precarious conditions.¹²

The draft GMG Principles and Guidelines attempt to assist States and other relevant stakeholders to provide protection to all migrants who are in situations of vulnerability, and who are thus entitled to call on a heightened duty of care. It is an attempt to guide States on how to operationalize the human rights framework, drawing in addition on examples of promising practice from around the world.

The Principles and Guidelines contain a wealth of detail on potential *actionable commitments* for the Global Compact, including commitments inter alia to

- establish practical and effective mechanisms to assess the individual situation of all migrants at borders and ensure that enough competent experts are present at borders to complete human rights-based screenings and referrals. (Principle 5, Guideline 5)
- guarantee that any migrant who is asked to consent to a voluntary return process must be fully and meaningfully informed of the choice he or she makes, having access to up-to-date, accurate and objective information, including in relation to the place and the circumstances to which he or she will be returning (Principle 6, Guideline 3)
- establish explicit and binding firewalls enabling migrants to report crimes and participate in criminal justice proceedings (Principle 7, Guideline 5)
- end the immigration detention of children (Principle 8, Guideline 6)
- provide guidance on how to operationalize the principle of the best interests of the child for migrant children who may not be making a claim for asylum under the 1951 Refugee Convention (Principle 10, Guideline 2), and
- ensure that any evictions or planned relocations of migrants comply fully with international human rights law and only occur after through effective consultation with those who will be affected (Principle 13, Guideline 3)

4. A COMMITMENT TO IMPLEMENTATION, MONITORING AND ACCOUNTABILITY IN THE CONTEXT OF “SAFE, REGULAR AND ORDERLY MIGRATION”

From a human rights perspective, it is important to ensure that the rights and circumstances of the human being - the migrant - are at the centre of any attempt to define what would constitute ‘safe, regular and orderly’ migration.

‘Orderly’ migration governance, for instance, should ideally refer to migration measures (including those related to entry, exit and return) that are non-discriminatory in purpose and effect, and that provide predictability for migrants as well as States in order to guard against migration policy responses that

¹¹ OHCHR, *Migrants in Transit*, p 10.

¹² OHCHR, *The economic, social and cultural rights of migrants in irregular situations*, 2014, p 14.

are arbitrary or unlawful. The characteristic of ‘orderly’ should not merely operate as a synonym for control and prevention of movement, in the absence of a holistic analysis of migration routes and contexts and the individual circumstances and protection needs of people on the move. Migration that takes place through authorized channels of ‘regular’ migration and in full respect of the rule of law is more likely to promote and protect the human rights of migrants, and in this regard States are encouraged to cooperate to put in place accessible and regular migration channels that respond to the needs of economies and societies.¹³ In the ultimate analysis, the Global Compact should aim above all to ensure migration that is ‘safe’; for migrants, regardless of their status, and for the communities that they leave behind and into which they arrive (as well as those through which they transit). Safety in this context would refer not just to physical security, but more broadly to the proliferation of an environment in which dignity and human rights are respected, protected and fulfilled.¹⁴

The High Commissioner has called on States to regularly review progress in implementing the commitments made under the Global Compact, including through establishing or strengthening independent internal and external mechanisms to monitor the human rights impact of laws, policies and practices relevant to migrants.¹⁵

National strategies or plans of action would be an effective means to deliver on the commitments undertaken within the context of the Global Compact, particularly where these are human rights-based, include guidance or review mechanisms and are supported by a technical expert body. A whole-of-society and whole-of government approach should be followed in the development and implementation of such action plans.

The United Nations Special Rapporteur on the human rights of migrants has suggested that systematic follow-up and review of the Global Compact could be conducted at the global level during the General Assembly High-Level Dialogues on International Migration and Development. At a minimum, the Global Compact should establish a forum for implementation, monitoring and accountability which is grounded in the UN system and accessible to all stakeholders, including migrants themselves. This participation should be meaningful, including in terms of access to information. A regular and periodic review by an independent body with an explicit human rights protection mandate would promote adherence to the international normative framework. Finally, explicit links should be made between the means of implementation established within the Global Compact and the human rights mechanisms, in order to ensure coherence and to set out pathways to accountability and access to justice, including through individual complaints mechanisms.¹⁶

¹³In its preamble, the International Convention on the Rights of All Migrant Workers and Members of their Families notes that “[T]he human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights”. See also Committee on Migrant Workers, General Comment No. 2: rights of migrant workers in an irregular situation and members of their families (2013), para. 17.

¹⁴ See A/HRC/36/42, p. 16.

¹⁵ A/HRC/36/42, para. 37 (g)

¹⁶ See also Quaker United Nations Office, Towards a human rights-based global compact on safe, regular and orderly migration: implementation, monitoring and accountability mechanisms, June 2017.