



Global Migration Group Practitioners Symposium Geneva, 27-28 May 2010

BACKGROUND PAPER

Rooting migration policies in human rights: Ensuring the rights of all migrants and improving human development outcomes

Prepared by OHCHR with contributions from the GMG¹

Introduction

The protection of the human rights of migrants is one of the greatest challenges of today. Yet migration policy-making is often far removed from, or even in contradiction with, international human rights standards. The GMG Symposium is well placed to identify key issues and opportunities as well as obstacles to building better partnerships on migration policy which is firmly rooted in international human rights standards.

Migrants contribute to economic growth and human development in both home and host countries, and also enrich these societies through cultural diversity, fostering understanding and respect among peoples and cultures.

Yet migrants, in particular low skilled and irregular migrants, often suffer exclusion, discrimination and abuse which affect the full spectrum of public life: poor conditions in the workplace and lack of fulfillment of their rights at work (including non-discrimination in employment and occupation, and freedom of association and collective bargaining), arbitrary detention and deportation, lack of access to justice, due process, social services, housing, education and health care, and little or no participation in decision-making processes. This not only violates migrants' human rights, but also hinders their inclusion and integration into the host society, impairing their ability to become fully active members of their new communities.

It is important to ensure that human rights are placed at the front and centre of migration policies, in recognition of the profoundly human nature of migration, and the fact that such policies are being designed to regulate the movement of human beings. The challenge for States as well as other stakeholders, is to ensure that migration policies are both principled as well as responsive to social and political realities.

Migrants and the human rights framework

Founded upon the inherent dignity and equal and inalienable rights of every human being, the principles of equality and non-discrimination lie at the heart of international human rights law. States accordingly have an obligation to respect,

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protect and ensure the human rights of all individuals within their territory, including all migrants regardless of their immigration status.

The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective. International human rights law, therefore, places narrow limits on permissible distinctions and provides that in all cases such distinctions must not interfere with the ability of the migrant to enjoy his or her fundamental human rights.

All migrants, regardless of their status, are entitled to enjoy fundamental civil, political, economic, social and cultural rights. These include the right to life, freedom from torture, protection against arbitrary arrest and detention, access to justice, protection of their rights at work, the right to health, housing, education and adequate food and water. The core international instruments that protect the rights of migrants are:

- Universal Declaration of Human Rights (UDHR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on the Rights of the Child (CRC);
- Convention Against Torture, and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)
- Convention on the Rights of Persons with Disabilities (CRPD)
- ILO Convention (No. 97) concerning Migration for Employment (Revised 1949)
- ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers
- ILO Declaration on Fundamental Principles and Rights at Work

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families offers a specific and comprehensive framework of protection, and applies to all stages of the migration process, including preparation for migration, departure, transit and the period of stay and employment in the States of destination as well as return to the State of origin. In addition to providing binding obligations on states to promote and protect the human rights of migrants, the ratification of fundamental human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers as well as the two ILO Conventions on migration for employment, sends a public message that the state is committed to protecting migrants' human rights.

The Special Rapporteur on the Human Rights of Migrants has been tasked with determining "ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants". The mandate of the Special Rapporteur covers all countries, and does not require the exhaustion of domestic remedies in order to act. In addition, other special procedures of particular relevance to the protection of migrants' rights include the Special Rapporteurs on Trafficking, on Adequate Housing, on Health, on Contemporary Forms of Racism, on Torture, on Violence against Women, on Sale of Children, as well as the Working Group on Arbitrary Detention.

What are some global priorities for international advocacy and action to promote the human rights of all migrants?

Combating xenophobia, discrimination and violence against migrants

In societies around the world, migrants are subjected to discrimination, xenophobia and violence including hate speech and hate crimes. The danger of framing migration within a “security agenda” is that the language of and policy on migration tends to focus on control, restriction and, often, fear. When the military is called out to patrol the streets to respond to migration, or when the declaration of a public emergency or the formation of vigilante groups are the most visible response to migration, human rights protection and social inclusion will suffer. In addition, the shift towards conceptualising migration as a national security issue tends to weaken the role in migration policy-making of those institutions that are responsible for regulating social and labour market policies for the benefit of more cohesive and inclusive societies, such as Labour Ministries and their social partners.

The migrant is often stigmatized as a dangerous, alien presence in society. He or she is targeted in hate speech, harassment and violence and blamed for societal problems, including crime and economic difficulties. Persistent anti-migrant sentiments, often bolstered by official policies of criminalisation and exclusion, create a public atmosphere that is hostile to the presence of migrants. Such sentiments can be reinforced by legislation, regulations and policies to place severe controls on migratory flows, as evidenced by the increasing tendency to criminalize irregular migration.

It is incumbent on the public authorities to ensure that migrants are not stigmatized or vilified, and that successful integration is a goal of migration policy. In particular, there is a pressing need to eradicate racist and xenophobic violence and hate crimes against migrants, asylum seekers and other vulnerable non-citizens, and to prosecute without delay all those convicted of carrying out such violence. There is also a need to promote public awareness and education campaigns which highlight the benefits of migration to society, as well as the universality of human rights, regardless of nationality or immigration status.

It is estimated in addition that about half of all migrants worldwide are economically active, which points to the importance of the workplace as a locus for integration measures and to the significant role that stakeholders such as trade unions and employers’ organizations can play in preventing discrimination against migrants, along with government agencies.

Ensuring effective access to economic, social and cultural rights for migrants

Migrants around the world are vulnerable to violations of their economic, social and cultural rights; they are often denied access to public health care, education, to adequate housing, the right to work, and to essential social security. Many migrant workers suffer severe abuse of their rights at work, with women migrant workers subject to multiple discrimination. Indeed, migrants are particularly vulnerable because they are outside the legal protection of their countries of nationality. Moreover, as strangers to a society, migrants are often unfamiliar with national language, laws and practice, and can lack familiar social networks. This makes them less able than others to know and assert their rights.

Measures of immigration control often seek to deter irregular migrants from accessing fundamental economic, social and cultural rights. Irregular migrants will often refrain from utilising public services, such as emergency healthcare or primary education, out of fear of detention and deportation. This is heightened when countries impose a duty on public officials to denounce the presence of irregular migrants. In such cases, even if the human rights of migrants are protected by the law, migrants in an irregular situation may not enjoy these rights in practice. Irregular migrants are in addition often invisible to official integration measures and action plans and strategies on public services, such as housing, health or water and sanitation, leaving these migrants vulnerable to systematic exclusion, discrimination and abuse.

The ILO Multilateral Framework on Labour Migration can be a source of inspiration for policy making. It offers a non-binding comprehensive set of principles and guidelines for a *rights-based approach* to labour migration, including a host of ideas, measures and model practices for improving the human development outcomes of migration processes.

Exploring adequate alternatives to immigration detention

Another trend is the increased recourse by States to the detention of migrants and asylum-seekers. This is often a mandatory measure, often of a punitive nature, and undertaken without adequate guarantees, resulting in migrants being

exposed to unnecessary, prolonged, or (potentially) indefinite detention, which could be arbitrary. It is important to stress that, under international human rights law, and because of the drastic impact of detention on the individual human being, the deprivation of liberty should in all cases be a measure of last resort and as the result of an individual determination. Alternatives to detention must be created where they do not already exist. This is particularly important in the case of vulnerable groups of non-nationals, such as children (both with their families and separated or unaccompanied) and asylum seekers.

The absence of a child and adolescent perspective within migration-related detention policies means that children and adolescents are often treated as adults, in violation of international human rights standards. The Convention on the Rights of the Child states, in addition to general human rights standards and procedures such as the Special Rapporteur on the Human Rights of Migrants, explicitly states that children should only be detained as a measure of last resort. In addition, migrant children should not be detained based on their migration status or that of their parents. Therefore, adopting a child-rights approach, which considers the child's best interests, will require alternative policies to address the migration status of their parents, including measures that facilitate regularization, access to social rights, and family unity, rather than detention and deportation. Moreover, as a general principle, children should not be subjected to forced repatriation, and decisions to return children should only be made in their best interest, through due process of law.

Conditions in immigrant detention centres can also be inadequate, with concerns that migrants who are deprived of their liberty are not treated with humanity and with respect for their inherent dignity. Such concerns include ill-treatment, overcrowding and inadequate access to basic economic, social and cultural rights, such as health care services and education. Detention as an interim measure to ensure the efficiency of migration control policy is not justified.

If administrative detention is deemed in exceptional cases to be necessary, it must be regulated by adequate procedural safeguards. Migrants should be adequately informed about their rights prior to and while in detention, and must have the opportunity to effectively challenge the legality of detention. The ordering of detention itself and the oversight of its legality must be subject to independent judicial review procedures, and a maximum period of detention should be set in law. Once this maximum period has been reached, the migrant should be automatically released. When migrants cannot be returned to their countries of origin for legal or practical reasons, there is a risk of prolonged, even indefinite, detention.

The General Assembly and the Human Rights Council have in recent resolutions expressed concern about the increasing and indiscriminate use of immigration detention as a means of immigration control, calling on States to put an end to arbitrary arrest and detention of irregular migrants and to adopt alternative measures to detention, such as reporting requirements and other non-custodial measures.

The ILO Committee of Experts on the Application of Standards has also recently pointed out that, while preventing clandestine migration is justified, it is important to ensure respect for the fundamental human rights of all migrants. The Committee also underlined that the measures (including sanctions) advocated for the purpose of detecting illegal employment of migrants under ILO Convention No. 143, are targeted at the *demand* for clandestine labour (specifically at the organizers of illicit movements and illegal employment) and not against the migrant workers themselves.

Confronting the criminalization of irregular migrants

In some regions of the world, there is an increasing tendency to criminalize irregular migration. The Working Group on Arbitrary Detention, as well as the Special Rapporteur on the human rights of migrants and other human rights mechanisms, have stressed that criminalizing irregular entry or stay in a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary and prolonged detention, as well as encouraging stigmatization, hostility and xenophobia.

Entering a State in an irregular manner, without a valid visa, or overstaying a work, tourist or student visa, should be considered administrative infractions and not criminal offences. Often irregular migrants have been in a country for several years, earned an honest living through hard work which is frequently carried out in substandard and abusive conditions. Infractions of immigration rules do not make a person a criminal, and it is important that this understanding is reflected in a State's migration policy. In this regard, States should aim to design and implement migration policies that could include regularization mechanisms for irregular migrants.

Finally, it should be noted that the current economic crisis has had serious consequences for the human rights of migrants, with some states putting in place harsh, and at times abusive, migration laws and regulations including, harsh deportation and detention policies, violent raids against irregular migrants, abuse at borders, and the criminalization of irregular migrants.

Key challenge – protecting the rights of irregular migrants

Member agencies of the GMG advocate against the association of irregular migration with criminality, an association which encourages a climate of xenophobia and hostility towards migrants. Thus, the term “illegal immigrants” should be avoided and replaced by the internationally accepted terms of “irregular” (or in some situations “undocumented”) migrant, which more accurately describe the situation of not having, or having lost, the proper documents allowing them to reside in a given territory or to work there.

Irregular migration is generally a response to the needs of labour markets. Among other things, it should be clearly understood that most workers who work without proper immigration documents perform jobs which are perfectly legal, and much needed in the countries in which they work, such as building houses and taking care of children, the sick and elderly. Hence, one important means of curbing irregular migration is to ensure adequate access to regular forms of migration in order to be able to meet local labour market needs. Instead of putting the blame on migrants who find themselves in irregular employment situations, government policy should concentrate on reducing the need for and combatting irregular employment.

Unfortunately, rather than addressing the root causes of the problem, policies and measures to address irregular migration tend to focus solely on tightening migration and border controls. Apart from having proved largely ineffective in many situations, such measures present a range of human rights problems on their own. A key step to instituting migration policies that are rooted in human rights is to balance policies which seek to deter or prevent irregular migration with those that protect the rights of all migrants on the territory, including those in an irregular situation.

Key questions for discussion

Migration is an essentially multidisciplinary issue, and policy on migration is inevitably influenced by a range of actors. Thus it is an area to which partnership should come naturally. Yet, concerns in relation to safeguarding national sovereignty, in addition to other factors such as lack of coordination within and between States as well as with other actors, are leading to fragmented migration policy-making, which can have serious consequences for the protection of migrants.

The GMG Symposium offers an ideal opportunity to discuss in some depth the operational and normative issues related to partnerships in the sphere of migration policy-making, and in particular how to ensure that such partnerships result in policies that are premised on international human rights norms and standards.

Issues that might therefore be considered for further discussion by the GMG Symposium include:

(a) Coherent policy-making is essential in the sphere of migration. How can States be assisted in achieving policy coherence, and establishing dialogue within and between States on migration policy that is grounded on human rights principles?

(b) How can countries of origin and destination work together to ensure that migrants are provided with adequate training and information about the conditions they should expect to find in their countries of employment, as well as information about their rights in the country of destination, their access to consular authorities and accessible channels to report abuse and pursue legal and other remedies? How to ensure that other key partners such as NGOs are included?

(c) Migrants are often not included in the formulation and implementation of national strategies and plans of action on such issues as access to employment and public services, including health, housing and education. How can States be encouraged to develop specific legislation and administrative policy on migration that is based on human rights principles, and include migrants in existing national plans and strategies? What are some concrete steps that can be taken to ensure that migrants themselves are included in migration policy-making as key partners?

(d) What are some examples of dialogue and cooperation between government agencies and businesses, employers' associations, chambers of commerce and trade unions, and migrant worker associations, as well as recruitment and placement agencies to ensure that regulatory standards and private sector practice effectively protect migrants' rights?

(e) National Human Rights Institutions (NHRIs) and similar institutions are often indispensable partners in promoting the human rights of migrants, providing they are mandated to investigate the human rights situation of migrants and intervene with government to protect and promote the rights of all migrants. What are some best practices in this regard?

(f) What are some of the specific activities that GMG member agencies can carry out in partnership to promote the human rights of migrants within migration policies? What particular strategies might be helpful to encourage the ratification of core international human rights instruments?

(g) Migrants, particularly irregular migrants, are often "invisible" in official statistics. This invisibility can make them more vulnerable to discrimination within public policies and practices, exploitation and abuse. There is a pressing need to collect more and better data on migration, including disaggregated age and gender-sensitive information. How can better partnerships between States and other stakeholders, including the member agencies of the GMG, facilitate this?

For further information: www.globalmigrationgroup.org

About the GMG

The GMG is an inter-agency coordination group, established by the United Nations Secretary-General in early 2006. It brings together the Heads of agency and technical level experts of 14 UN organizations, the IOM and the World Bank and aims to enhance the overall effectiveness and coherence of the normative and operational response of its members and member states to the opportunities and challenges presented by international migration. The GMG has produced a number of joint outputs, including compilations and guidance material, and its members regularly work together in different constellations to provide countries with operational support. Apart from sustaining inter-agency cooperation in the field of international migration, the GMG and its members regularly contribute to the Global Forum on Migration and Development (GFMD), the United Nations periodical deliberations on international migration and development, and to regional cooperation processes and fora.