

GFMD Thematic Meeting

Mainstreaming of Migration in Development Policy and Integrating Migration in the Post-2015 UN Development Agenda 22 May, Geneva

Migrants, migration, human rights and the post-2015 UN development agenda: Background note by the Office of the High Commissioner for Human Rights

Introduction

The linkages between migrants, migration, human rights and development are complex and multifaceted. Migration is an important economic and social phenomenon, a “mega-trend”, as well as a fundamentally human process involving the often precarious movement of some 214 million people. Both aspects have important implications for human rights-based, sustainable development. In other words, the post-2015 development agenda should pay attention to migrants as well as to migration. The development gains of protecting the rights of migrants are beyond question, and calls are increasing for migration policies to take into account the essential contributions that migrants make to societies and economies. Increasingly, a demand is also being made for the governance of migration at national, regional and international levels to identify the many ways in which migrants may be denied their human rights, and seek to alleviate this vulnerability.¹

OHCHR has a unique mandate from the international community to promote and protect all human rights.² The Office strives to achieve the protection of human rights, to empower people to realize their rights and to assist those responsible for upholding such rights in ensuring that they are implemented. The High Commissioner works to mainstream human rights standards throughout all United Nations programmes to ensure that peace and security, development, and human rights – the three essential pillars of the United Nations system – are interlinked and mutually reinforcing, and that human rights form the bedrock of all UN activities.

Migration is a global thematic priority of OHCHR. The Office’s strategy on migration centres on promoting and contributing to the protection of the human rights of *all* migrants,

¹ On 18 December 2012, the Secretary General’s Policy Committee endorsed a decision that, in order to promote a strong focus on the human rights of migrants in the lead-up to the 2013 High-Level Dialogue and beyond, OHCHR, in consultation with the Global Migration Group (GMG) and other UN system partners, should prepare a concise analytical report by mid-2013 on migration and human rights. This report will be publically available by September 2013.

² The Office of the United Nations High Commissioner for Human Rights (OHCHR) was established by the UN General Assembly on 20 December 1993 by resolution 48/141. The Office is part of the Secretariat of the United Nations and is led by the High Commissioner for Human Rights, who is the principal human rights official of the United Nations. <http://www.ohchr.org>

regardless of their legal status. The strategy asserts that there is an urgent need for coherent, comprehensive and better coordinated frameworks, based on international human rights law, to address migration at national, regional and international levels. Underlying the strategy is therefore recognition of the need to reframe the current global discussion of migration.

OHCHR promotes the integration of human rights norms and standards in all aspects of migration policy, at the national, regional and international level. The Office advocates for a human rights-based approach to migration and the need to ground migration policymaking in the international legal framework, calling on States to respect the internationally guaranteed human rights of all migrants, to protect them against abuse, and to fulfill the rights necessary for migrants to enjoy a safe and dignified life.

OHCHR is building and strengthening its advocacy, analysis and technical assistance on issues of migration and human rights. Recently, the Office has begun to develop capacity-building tools such as learning packages and information materials on key issues; it has conducted research and consultation with a wide variety of stakeholders on migration, and it has highlighted key advocacy issues at the national, regional and international levels. Through its field presences, OHCHR has also increasingly engaged in migration-related human rights work through the promotion of core international human rights instruments³ including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), training activities, advocacy, technical assistance, monitoring and protection, and other initiatives.

OHCHR believes that migrants whose rights are protected, are able to live with dignity and security and, in turn, are better able to contribute to society both economically and socially than those who are exploited, marginalised and excluded.

Contemporary migration is an increasingly complex phenomenon. Motivations for undertaking migration are frequently multidimensional and can change or adjust, particularly as migrants make long and often precarious journeys to countries of destination. Where States invest in repressive measures to curtail irregular migration through policies that do not adapt to changing realities, the result is that more people may be driven to migrate irregularly. Insufficient legal opportunities to migrate add to the compulsion of migrants to rely on smugglers to facilitate movement and can exacerbate the vulnerability of migrants to traffickers and other exploitation.

Migrants and the post-2015 development agenda

³ The core international human rights instruments are; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the International Convention for the Protection of All Persons from Enforced Disappearance, as well as the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)

Migrants are not commodities. Development interventions should not push migrants to migrate as “agents of development” without adequate protection of their human and labour rights. It is important that the post-2015 development agenda looks to the world of work as a key site of interaction between migration and development, acknowledging particularly the vulnerability of low and middle-skilled workers and migrant workers in an irregular situation. But it should also look beyond the workplace; recognising that migration interacts with development in other important public and private spaces. Appropriate policies should thus be directed explicitly at alleviating the vulnerability of such groups as migrant children and migrant women at risk, older migrants and migrants with disabilities; ensuring the access of all migrants to essential services, such as healthcare, education, social security, housing, water and sanitation. The post-2015 development agenda should explicitly recognise that all migrants are entitled to all human rights, and pay particular attention to vulnerable, disempowered and marginalised migrants. Only when conceived in terms of human rights will migration be able to fulfil its potential as an enabler of human development.

The post-2015 agenda must therefore be designed to advance the three closely-related concepts of equity (fairness in distribution of benefits and opportunities), equality (substantive equality, of both opportunity and results, with full protection under law), and non-discrimination (prohibition of distinctions that are based on impermissible grounds and that have the effect or purpose of impairing the enjoyment of rights).

OHCHR is calling for a more enlightened model of development to form the core of the post-2015 agenda, arguing that development should not be only focused on growth, on markets, and on private investment, with relatively little attention to equality, and virtually none to civil, political, economic and social rights. Beyond aggregate economic disparities, the spectre of discrimination against migrants has the dual effect of a denial of their human rights as well as a reduction of their potential contribution to the economic development of the societies in which they live. Ensuring the full participation of all members of society in decision-making processes, enhancing efforts to reduce inequality, and respecting, promoting and protecting all human rights are critical to sustainable development.

The post-2015 development agenda must therefore be a universal agenda, one that does not make artificial distinctions between nations but focuses on human beings and their human rights. Emerging economies and middle-income countries are helping to redefine the global economy, and growing poverty and inequalities in rich countries are challenging economic stereotypes. In the context of contemporary migration, traditional distinctions between countries of origin and destination are beginning to be less relevant. Today, emerging economies and middle-income countries are increasingly host to significant migrant populations, and South-South migration is as important as the movement of people from developing to developed countries. Many countries are now simultaneously countries of origin, transit and destination. Accordingly, the post-2015 agenda should apply to all countries and to all people. It should recognise that migrants do often live in poverty, marginalised and discriminated against in all host and transit countries. Migrants require a specific, equitable and rights-based development approach wherever they live, and

governments and institutions in all countries and at all levels have responsibilities in this regard.

Under their human rights treaty commitments, States are already obliged to aim for universal access to at least a basic level of social rights, dismantle discrimination and achieve substantive equality (beyond mere formal equality of treatment, which may include positive measures or affirmative action for excluded and marginalized groups), and ensure the availability, accessibility, affordability, acceptability, adaptability and quality of services. They are as well bound to undertake positive measures to ensure access to justice, personal security, and free expression, association and assembly. These requirements should be integrated as far as practicable into the post-2015 framework of global goals, targets and indicators, with the ultimate goal of realizing all human rights for all.

Migrants, migration and the human rights framework

The international human rights framework offers a compelling means of putting inequalities at the centre of development policies and practice. This entails a focus on the most vulnerable, disempowered and marginalised.

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. Migrants in an irregular situation are even more vulnerable, as they can be denied access to public services in law, or be unable to access such services in practice through fear of detection.

OHCHR notes that all migrants, including those in an irregular situation, have the same human rights, including economic, social and cultural rights, as anyone else; all restrictions including those based on their nationality or immigration status must pursue a legitimate aim and be proportionate to the achievement of this aim. The tests of equality and non-discrimination apply to the treatment of migrants, including irregular migrants, as they do to others. This is the clear message of the international human rights framework.

Yet, policy-making on migration can be premised on misconceptions. For example, host countries restrict migrants' access to health care on the grounds that they need to protect their welfare systems from abusive claims and deter migration. However, human rights treaty bodies and experts have questioned this claim, on both ethical and factual grounds.⁴ Recent research on the European Union suggests that the causal effect between social welfare spending and migration is statistically insignificant; in other words, there is no evidence of a

⁴ See, for example, Special Rapporteur on the human rights of migrants, J. Bustamante, Annual Report to the Human Rights Council, 16 May 2010, UN Doc. A/HCR/14/30, para. 22.

"welfare magnet".⁵ Similarly, there is a growing body of evidence that administrative detention does not deter irregular migration, and the Special Rapporteur on the Human Rights of Migrants has noted that despite the worldwide introduction of increasingly tough detention policies over the past 20 years, the number of irregular arrivals has not decreased.⁶

State authorities also often assume that the framework of economic, social and cultural human rights requires the government to provide free health care, water, education, food and other goods and services. OHCHR has pointed out, however, that; "As the Universal Declaration of Human Rights states, everyone has the right to social security in the event of unemployment, sickness, old age or other lack of livelihood in circumstances beyond his or her control. However, this does not always mean an entitlement to a hand out. Social security should prevent people from living in desperate situations and help them get back on their feet with a view to giving them opportunities to be free, contributing members of society."⁷

The principles of equality and non-discrimination lie at the heart of international human rights law and connect directly to the principle of universality, which affirms that every human being has fundamental rights.⁸ The human rights mechanisms have called on States to address both *direct* and *indirect* discrimination; when a law, policy or practice appears neutral at face value, but has a disproportionate impact on the rights of migrants. Imposing a rule that children enrolling for school must show a birth certificate, for example, discriminates against irregular migrant children who do not possess such documents or cannot easily obtain them. Fee-based medical systems that have the effect of excluding migrants living in poverty from essential health care might also be discriminatory.

The human rights framework therefore requires States to contemplate a range of practical measures in order to fulfil their obligations, including the dismantling of social barriers that obstruct the full participation of everyone, including migrants, in economic and social life. Other measures could include ensuring that national strategies or plans of action on social security, healthcare, or education consider the situation and needs of vulnerable migrants.

The Committee on Economic, Social and Cultural Rights (CESCR) has directed that a core obligation in relation to the right to health is that States must draw up and implement a

⁵ Martin Kahanec, Corrado Giuliatti, Maritn Guzi and Klaus F. Zimmermann, 'Unemployment Benefits and Immigration: Evidence from the EU', *International Journal of Manpower*, special issue on "Migration, the Welfare State, and European Labor Markets", Vol. 34, No. 1+2, (2013).

⁶ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, A/HRC/20/24, Para. 8. There has been considerable momentum in recent years calling on States to explore effective alternatives to immigration detention, based *inter alia* on the principle of proportionality in international law, which requires detention to be approached as a measure of last resort. WGAD, Report of the WGAD to the 15th session of the Human Rights Council, A/HRC/13/130, 15 January 2010. See also the proceedings and summary conclusions of the OHCHR-UNHCR Global Round Table on Alternatives to Detention, 10-11 May 2011, available at <http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>

⁷ OHCHR, Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights, 2008, p. 20-21.

⁸ Art. 1 of the Universal Declaration of Human Rights (UDHR) recognises that "all human beings are born free and equal in dignity and rights".

national public health strategy and plan of action to protect, respect and fulfil the right to health of disadvantaged and marginalised individuals and groups.⁹

As one practical example, the Committee on the Rights of the Child (CRC) has stated that policies, programmes and measures to protect children from poverty and social exclusion must include children in the context of migration, regardless of their status.¹⁰ In this light, the CRC stated that the capacity of national social protection systems to prevent and address all situations of vulnerability directly or indirectly related to migration should be strengthened and children affected by migration and their families made a specific target group of social policies and programmes, regardless of migration status and without discrimination.

States have specific obligations to children in relation to the right to health. Under article 12, paragraph 2(a) of the International Covenant on Economic, Social and Cultural Rights, they must make necessary “provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”. Additionally, they should “ensure pre-natal and post-natal health care for mothers”.¹¹

A human rights-based approach to international migration and development

There is growing recognition among human rights experts that the access of migrants to health care, education, or social security is not a matter of charity, and not exclusively dependent on the legal status granted to them by states. In addition, they argue that protecting human rights is important in order to promote the social inclusion and integration of migrants, thus enabling them to lead economically productive and culturally and socially enriching lives.

The human rights-based approach constitutes a framework of action, as well as a set of guidelines and tools for migration policy-makers. Remember that a rights-based approach develops the capacity of duty-bearers to meet their obligations at the same time as it enables rights holders to claim their rights.

This requires States to make efforts to disaggregate data to determine who is benefitting, and who is not, to analyse the social and political conditions in which migrants live, to close gaps in the enjoyment of civil, political, economic, social and cultural rights, and to take proactive positive measures to dismantle entrenched patterns of discrimination, particularly on the ground of nationality and legal status, as well as often overlapping grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁹ CESCR General Comment No. 14, the right to highest attainable standard of physical and mental health, 2000, para. 19.

¹⁰ CRC, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, February 2013, para. 88.

¹¹ CESCR, General Comment No. 14: The right to the highest attainable standard of health, 2000, para. 14.

The rights of migrants will remain vulnerable to abuse unless they enjoy protection under the law and are able to demand accountability. The principle of accountability requires States to put in place robust regulatory and independent mechanisms to enforce rights and continuously monitor the situation of migrants. Monitoring will encourage transparency and deter exploitation, collusion and mistreatment. States should provide legal redress through quasi-judicial or judicial mechanisms to enable migrants to enforce their rights against State and non-state actors, without fear of detention and deportation.¹²

A new accountability mechanism: the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The entry into force on 5 May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is an important development. Though the Universal Declaration of Human Rights promised respect of all human rights for all people more than sixty years ago, for a long period economic, social and cultural rights were not given the same attention or status in law. The Optional Protocol addresses this gap and recognizes the justiciability of economic, social and cultural rights on an equal footing with civil and political rights. Practically, in terms of the human rights of migrants, the OP-ICESCR:

- Provides migrants with an international accountability mechanism for addressing violations of their rights.
- Enables the Committee on Economic, Social and Cultural Rights to interpret economic, social and cultural rights in the context of specific cases, thereby clarifying their content and providing guidance to States and courts.

An international complaints mechanism provides an incentive to strengthen national protection of economic, social and cultural rights and will provide a robust standard for the protection of the rights of all migrants. It will require States parties to provide remedies in specific cases, offer guidance to domestic courts and other human rights protection mechanisms, and analyse the substantive content of these rights and the related obligations of States. International case law can also inform national and regional jurisprudence.

Using a human rights-based approach to govern its migration and development policy could mean that a State will not do something, such as subject an irregular migrant to indefinite immigration detention. It could mean that a State will do something, such as enact laws to enable migrant children to access primary education without discrimination. And it means that the State is required to take action when private actors, such as employers or landlords, abuse the rights of migrants.

¹² The Inter-American Court for Human Rights has made clear that, to provide genuine access to judicial guarantees, States have a duty to ensure that no person is at risk of being reported and expelled or detained when exercising this right. Inter-American Court of Human Rights, Juridical condition and rights of undocumented migrants, Advisory Opinion OC-18/03, 17 September 2003, Series A, No. 18, para. 126. In order to give practical effect to this right, the IACrtHR has recommended that all persons should have access to a free public legal aid service.

In accordance with the guidance of the human rights mechanisms, OHCHR recommends specific actions that States can take in accordance with a human rights-based approach.¹³ For example:

In relation to **health**, States should ensure that all migrants, including irregular migrants, have the same access to emergency medical care as nationals. Migrants should have access to essential drugs and medicines and in this context migrant children should receive timely immunization against major infectious diseases. Health care institutions should be prohibited from reporting data on the legal status of their patients to immigration authorities.

In relation to **education**, States should simplify the formalities for enrolling migrant children in school and should not require them to present forms of documentation that migrants in an irregular situation cannot obtain. They should develop educational strategies which strengthen the capabilities of marginalized communities as a whole, while specifically addressing the educational needs of vulnerable migrants within such communities.

In relation to an **adequate standard of living**, States should ensure that all homeless migrants are able to access appropriate shelters irrespective of their nationality or status. Shelters should not be required to report their clients to the authorities. States should adopt legal and administrative measures to ensure legal security of tenure and avoid forced evictions against migrants, particularly where no adequate alternative accommodation is provided.

A human rights-based approach to migration means therefore that policy-makers cannot turn a blind eye to the presence in the country of vulnerable migrants. It means that actions to “combat” irregular migration cannot violate the rights of migrants and that while governments are entitled to defend the sovereignty of the State, they must do so in full respect of their human rights obligations. While policies of criminalisation and exclusion are unlikely to be an effective deterrent to irregular migration, they *are* able to produce widespread and harmful consequences, not only on the human rights and well-being of individual migrants, but also on relations between host communities and migrants in society. This will ultimately have harmful consequences for human development.

A human rights-based approach to migration means that all migrants are rights-holders, and therefore they are entitled to participate in the design and delivery of migration policies, to challenge abuse and human rights violations, and to demand accountability. Ultimately, many migrants will remain on the periphery of development, literally and conceptually, unless they are enabled to participate equally in development.

To these ends, the post-2015 agenda should be explicitly aligned with the international human rights standards and mechanisms, developed in a participatory process, measure both means and outcome, allow for disaggregation to reveal exclusion and inequalities, and be attached to meaningful accountability mechanisms. Clear, transparent and objective criteria

¹³ See for example OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (forthcoming, 2013).

should guide the task of selecting a manageable number of global goals, targets and indicators within a post-2015 agreement, and these should be aligned to human rights treaty obligations.