

Global compact on migration

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RECOMMENDATIONS FOR A COMPACT WITH A RIGHTS-BASED APPROACH
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Global compact on migration

Recommendations for a compact with a rights-based approach

A development model with a human rights perspective implies access to rights, social inclusion and the integration of migrants.

Migration policies implemented by states can be the origin of multiple violations and inequalities and deepen exclusion. Or, they can promote and protect the rights of migrants of both sexes. This is why it is critical that these policies be reviewed as countries agreed to do in the New York Declaration:

“We will consider reviewing our migration policies with a view to examining their possible unintended negative consequences” (New York Declaration for Refugees and Migrants, September 19, 2016, para. 45).

Given that migratory procedures and mechanisms determine the institutional and social treatment of migrants, we propose that four aspects be re-thought: migratory regularization; procedures for expulsion or deportation cases; use of detention for migration reasons as the main source of criminalization of migration; and measures to ensure access to justice for migrants who were victims of crimes or human rights violations.

The proposals in this document are rooted in our experience in Latin America. We work both on identifying the institutional obstacles that can hinder access to migrants' rights, as well as on developing concrete proposals to remove these obstacles and incorporate international human rights standards into our countries' migratory policies. Beyond the debates that organizations such as ours may have with government officials over implementation and modification of these policies, our experiences show that far from being principles alone, these standards can inform, guide and define concrete migratory policy mechanisms. To that end, we suggest guiding principles, lines of action, objectives and specific measures that the Global Compact should include.

Guiding principles

- A. Reviewing migration policies: Every government is responsible for reviewing its migration policies and international cooperation agreements to ensure migrants' lives, personal integrity and rights.
- B. Eliminating policies that discriminate against migrants: States should eliminate measures that stigmatize and criminalize migrants or foment xenophobia and racism.
- C. Promoting human rights of migrants located in the destination country: Each state, on its own or through cooperation efforts, must develop policies that ensure social inclusion, recognize rights and provide access to justice, particularly through migratory regularization policies.
- D. Ensuring migrants' effective participation in government decisions that have an impact on their lives and those of their families: Governments must design and ensure access to information and due process, especially in those procedures and processes that could lead to deportation or expulsion.

Lines of action

- 1. Promote the development of migratory regularization policies and programs as mechanisms for migrants' protection, social inclusion and access to rights.
- 2. Establish procedures and minimum criteria for cases of expulsion or deportation that guarantee due process and judicial oversight.
- 3. Review mechanisms and practices that criminalize migration and contribute to stigmatization and discrimination, such as detention for migratory reasons.
- 4. Create mechanisms that guarantee migrants who are victims of crimes and human rights violations access to justice, truth and comprehensive reparation.

Lines of action

1

Line of action

Promote the development of migratory regularization policies and programs as mechanisms for migrants' protection, social inclusion and access to rights.

measures

at a global level

1. Approve new regional agreements that facilitate regularization of nationals from the signatory countries.

at a local level

1. Promote regulations and laws, mechanisms and practices establishing that the state's first response should be migratory regularization, not detention and deportation or expulsion.
2. Encourage the revision of regularization-related laws and regulations so that irregular migration is not an impediment to initiating residency procedures.
3. Promote the incorporation of objective and non-discriminatory criteria for access to regularization, with a gender perspective and protection of vulnerable population groups.
4. Provide adequate information and advice to foster migration regularization and prevent irregularity.
5. Foster simplification of regularization procedures so they are clear, accessible and affordable.

1 migratory regularization

Objective

Reduce migrants' extreme vulnerability and exclusion from rights due to their irregular status—in transit and in the territory of destination—by reforming regularization procedures.

Why?

Around the world, reality reveals that restrictive regularization procedures do not reduce irregular migration but rather act as obstacles to a decent life. They can complicate renting an apartment, obtaining formal employment, registering children for school, receiving medical attention, opening a bank account or accessing justice.

In order to prevent and reduce rights violations, it is necessary to develop broad and permanent programs and policies with clear, affordable and accessible procedures that guarantee access to documentation and migratory regularization.

There is no evidence that regularization policies lead to an increase in migration. On the contrary, in countries where such policies were implemented, people's entry levels held steady and the main impact was on those already in the territory. In this type of experience, regularization became the government's main response to migratory irregularity.

Sustainable Development Goals (SDGs) that this line of action contributes to

Goal 8

Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

8.7) Take immediate and effective measures to eradicate forced labor, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labor, including recruitment and use of child soldiers, and by 2025 end child labor in all its forms.

Goal 10

Reduce inequality within and among countries.

10.2) By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic situation or other status.

10.7) Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.

Goal 16

Promote just, peaceful and inclusive societies.

16.9) By 2030, provide legal identity for all, including birth registration.

Good practices

Implementation-related problems aside, some states have already developed policies that are in tune with this line of action.

In 2003, Argentina was one of the first countries to recognize migratory regularization as an obligation of the state and a right of migrants in an irregular situation (Law 25.871, art. 17).

In Brazil, the regularization of documents is one of the principles and guidelines of the country's migratory policy (Law 13.445, 2017, art. 3, V).

Uruguayan law 18.250 of 2008 also established the obligation “to provide migrants with the information needed for their regularization in the country” (Law 18.250, art. 9).

The government of Peru “favors migratory regularization as a permanent action that facilitates the protection of individuals and prevents or corrects situations that infringe upon or affect human dignity as well as their rights and liberties” (Legislative Decree No.1350, 2017, art. XII).

International standards

The Declaration of Principles and General Guidelines of the South American Conference on Migration mandates “to highlight the migratory regularization conventions signed between Member States of the conference and to encourage the negotiation and signing of new agreements, regulatory policies, cooperation programs and courses of action that will facilitate regularization” (Ninth South American Conference on Migration, September 21-22, 2009, para. 5).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families established that “every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law” and that “States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist” (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, AG 45/158, December 18, 1990, arts. 24 and 69).

The United Nations Special Rapporteur on the human rights of migrants highlighted the fact that “creating opportunities for regularizing the situation of non-documented migrants constitutes, in his view, a rights-based alternative to managing irregular migration without resorting to its criminalization” (United Nations, A/65/222, August 3, 2010, para. 56).

Measures for global and regional levels

1. Approve new regional agreements that facilitate regularization of nationals from the signatory countries.

These agreements should materialize into shared rules on regularization procedures and access to residency that simplify and harmonize documentation requirements. It is important to consider the possibility that the agreements be transformed into national legislation.

Why?

Spaces for regional integration can help to develop migration policies based on social inclusion. The regional criteria for regularization can be an objective parameter that facilitates access to a residency permit and reduces bureaucratic obstacles in a non-arbitrary manner.

Good practice

The Mercosur Residency Agreement signed in 2002 by member countries and associate members Bolivia and Chile—which was later extended to most of the associate member countries—establishes shared rules for residency permit processing procedures in the signatory states for all citizens of the countries that form part of the trade bloc, facilitating residency and simplifying requirements. Laws in Argentina, Brazil and Uruguay include regularization parameters based on regional agreements (Argentina, Law 25.871 of 2003, art. 23; Brazil, Law 13.445 of 2017, arts. 30.II.a and 111; Uruguay, Law 18.250 of 2008, art. 34).

Measures for national and local levels

1. Promote regulations and laws, mechanisms and practices establishing that the state's first response should be migratory regularization, not detention and deportation or expulsion.

The authorities must create procedures that offer sufficient information and establish a reasonable period during which an individual can regularize his or her situation once its irregularity has been verified.

Good practice

Argentina's migration law established that upon verifying that a foreign person has misrepresented the reasons for which his or her entry to the country was authorized or has remained in the country past the agreed term of stay, he or she has 30 days to regularize his/her situation. To do this, the individual must be given notice in writing, in an understandable manner, of the consequences that will result from said immigration status. (Argentina, Law 25.871 of 2003 and Regulatory Decree 616/2010, art. 61).

2. Encourage the revision of migratory regularization-related laws and regulations so that irregular migration is not an impediment to initiating residency procedures.

Good practices

Brazil's migration law establishes that "a residency permit may be granted regardless of migration status" (Brazil, Law 13.445 of 2017, art. 31, para. 5).

In Peru, the law determines that "foreigners with an irregular migratory status can request that entry impediments be lifted and/or can regularize their situation in accordance with the provisions set forth in the regulation" (Peru, Legislative Decree No. 1350, art. 36).

3. Promote the incorporation of objective and non-discriminatory criteria for access to regularization, with a gender perspective and protection of vulnerable population groups.

Family unity Contemplate family unity in a broad sense, paying special attention to the situation of migrants who have children or close relatives residing in the country, or who are the partners of nationals or children of nationals, or resident migrants.

Why?

The right to family life in the context of migration requires specific procedures so it can be exercised.

Good practice

In Brazil, residency may be granted to those who meet the criteria for family reunification, including a spouse or partner, without any discrimination; to the child of a migrant beneficiary of a residency permit or who has a Brazilian child or migrant child beneficiary of a residency permit; relatives in the ascending and descending line up to the second degree or the sibling of a Brazilian or of a migrant beneficiary of a residency permit; or those who have a Brazilian national under their trusteeship or guardianship (Brazil, Law 13.445 of 2017, arts. 30 and 37).

Children and adolescents Establish regularization criteria that contemplate the situation of children and adolescents, especially unaccompanied minors.

Work Establish regularization criteria that contemplate the different work modalities under an employment contract or self-employment.

Why?

Self-employment, without a formal employment contract, is an increasingly widespread modality worldwide. Establishing a regularization category for self-employment is a way to promote migratory regularization of those individuals who do not have a formal job and, at the same time, it creates possibilities for the migrant's inclusion in the formal employment sector at some point, which he/she cannot access as long as his/her migratory status remains irregular. Another goal of reducing the informal job market is to preserve minimum job protection standards for nationals and foreigners.

Good practice

In early 2013, the Argentine government created two specific regularization programs for migrants from Senegal and the Dominican Republic – countries that do not benefit from the Mercosur's regional agreements. These programs were limited to certain dates of entry into the country and enabled a temporary migratory category for

“autonomous workers,” based on the payment of self-employment tax. In the case of people from the Dominican Republic, the program was responsible for 60% of temporary residencies between 2004 and 2013.

Duration of stay Establish criteria for regularization that contemplate how long the migrant has stayed in and his/her ties to the destination country.

Why?

This is a necessary measure for resolving cases of migrants who were unable to access regular residency through other channels, and who continue and will remain in the destination country.

Humanitarian grounds Establish regularization criteria that contemplate humanitarian grounds for granting residency. It is necessary to take into account: those who need international protection and who—because they are not refugees or asylum seekers under the terms defined by international human rights law or international refugee law—are covered by the principle of non-refoulement; those who suspect that upon being forced to return to their country of origin they will be subjected to human rights violations; women and girls who have been victims of gender violence; victims of crimes and human rights violations, including, but not limited to, the trafficking or smuggling of persons or other forms of exploitation; people from any country undergoing serious or notable institutional instability, an armed conflict, large-scale calamity or environmental disaster; those who cite health reasons that would put them or a family member at risk if forced to return to their country of origin due to lack of medical treatment; stateless persons and refugees who resided in the country and their condition ceased; and people who must intervene in the recognition or recovery of a corpse.

Why?

In general, there are no specific mechanisms for regularization on humanitarian grounds, which represents an obstacle to obtaining a residency permit for migrants who have serious reasons for not being able to return to their country of origin. Therefore, the situation calls for the creation of broad criteria that government officials can rely on to regularize their status. In order for this criteria to be operational, it is important to define and characterize the most common cases covered by this concept.

Good practice

Peru's migration law establishes that residency is authorized "for foreigners in the country, who do not qualify for asylum or refugee status, who face a life-threatening situation or one of great vulnerability in the event that they leave Peru or those who require protection in response to a serious threat or act of violation or infringement of their fundamental rights. In the same way, it shall be applicable to refugee and asylum seekers or those who have migrated due to natural and environmental disasters; or for those who have been victims of human trafficking or smuggling; or for unaccompanied children and adolescents; or stateless persons. It also applies to persons who are not in the national territory in exceptional situations of humanitarian crisis recognized internationally, and request to come to Peru to obtain protection" (Peru, Legislative Decree No. 1350 of 2017, art. 29.2.k).

International standards

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, drawn up in view of the United Nations Convention against Transnational Organized Crime, encourages states to consider adopting legislative or other appropriate measures that permit victims of human trafficking to remain in their territory, temporarily or permanently, if they so wish (United Nations, A/RES/55/25, November 15, 2000, art. 7).

4. Provide adequate information and advice to foster migration regularization and prevent irregularity.

Promote informational campaigns and policies with a territorial approach aimed at helping migrants so that the processes are effective.

Why?

Developing government programs to advise migrants on regularization processes increases the effectiveness of regularization policies. These measures also entail forms of interaction between government authorities and the migrant population where the police logic of persecuting irregular migration does not apply.

Good practices

In Argentina, the territorial approach program offered information and advice on migration procedures. Through frequent visits to areas with a high concentration of migrants, its objective was to solve the problems of documentation by initiating and/or completing the migration regularization process. Between this program and others, more than 1.5 million people were able to regularize their status.

Paraguay's migration office organizes migration regularization sessions aimed at foreign nationals from signatory countries to the Mercosur residency agreement (in force for Argentina, Brazil, Paraguay, Uruguay, Bolivia, Chile, Peru, Ecuador and Colombia). During these sessions, a mobile team from the migration office sets up in different localities, to process the migration documents of foreign residents from the region.

5. Foster simplification of regularization procedures so they are clear, accessible and affordable.

Change of category Promote mechanisms that allow for movements and changes in regularization categories according to the migrant's de facto status.

Why?

The fact that regularization mechanisms are based on watertight categories like “work,” “study” or “family reunification” makes them inadequate for responding to the reality of life of migrants of both sexes, who end up losing their regular migratory status over time. To address the dynamics of people's lives, it is imperative that the regularization mechanisms established contemplate a change in category without a loss of regular status, taking into account their duration of stay and previous procedures, without requiring that procedures be reinitiated.

Documentation requirements Develop guidelines or protocols to discourage practices that demand impossible or absurd documentary evidence; for example, requesting authorization from both parents for children with only one parent, or proof of domicile or monthly income statements from people who cannot access housing or a job due to their irregular situation.

Delivery of documentation Establish territorially decentralized systems for delivering local documentation to the migrant person that are unified with national documentation and registry offices.

Affordable rates Ensure rates are affordable and that there are simple exemption processes in place for migrants with limited resources or on humanitarian grounds.

2

Line of action

Establish procedures and minimum criteria for cases of expulsion or deportation that guarantee due process and judicial oversight.

measures

at a global level

1. Promote the revision of any bilateral, regional or multilateral mechanism or agreement that violates migrants' rights to liberty, life and physical integrity, including the principle of non-refoulement.
2. Promote, in regional forums, training for judges and other public officials who deal with migration procedures, at the federal, provincial and municipal levels, on issues such as a country's compulsory removal procedures based on an approach that promotes guarantees of due process, access to justice, international protection and protection of family life, as well as the rights of children and adolescents.

at a local level

1. Establish the procedures and practices necessary to fortify the state's capacity to avert, under all circumstances, mass or collective expulsions or deportations.
2. Strengthen the design and implementation of due process guarantees in all migration proceedings that could lead to compulsory removal from the country, whether administrative or judicial: the right to an individual interview, access to legal counsel specialized in refugee and migration-related matters, consular assistance, an interpreter or translator, a well-founded ruling and appeals mechanisms.
3. Encourage the revision of regulations and practices related to expulsions and deportations in order to put an end to specially expedited summary proceedings that endanger a serious and fair evaluation of the migrant's situation insofar as they represent an obstacle to his or her defense.

4. Promote the incorporation of judicial review of administrative decisions that may lead to the expulsion of migrant persons.
5. Promote the incorporation of objective criteria to impede actions of expulsion or deportation in cases involving situations of international protection, humanitarian grounds, local ties, family unity and victims of crimes or human rights violations, as well as children and adolescents. Measures for the implementation of the principle of non-refoulement should also be strengthened.

2 oversight of expulsions

Objectives

Keep migrants with family, community, employment, academic or social ties from being returned to their country, given the profound impact such a measure may have on their lives and social and economic development.

Prevent people from being returned to countries where their lives and physical integrity are endangered.

Ensure an individual evaluation in all cases of expulsion or deportation, and that the migrant is guaranteed access to information, a free, public legal defense, effective participation in the decision, and access to justice and judicial review of the action taken.

Sustainable Development Goals (SDGs) that this line of action contributes to

Goal 10

Reduce inequality within and among countries.

10.7) Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.

Goal 16

Promote just, peaceful and inclusive societies.

16.1) Significantly reduce all forms of violence and related death rates everywhere.

16.2) End abuse, exploitation, trafficking and all forms of violence against and torture of children.

16.3) Promote the rule of law at the national and international levels and ensure equal access to justice for all.

Good practices

The Constitution of the Republic of Ecuador guarantees the non-refoulement of persons to countries where their lives or those of their families are at risk and prohibits the expulsion of groups of foreigners since it establishes that migratory processes must be individualized. The law governing migration states that deportation procedures or those that affect migration status pertain to individuals. (Constitution of the Republic of Ecuador, art. 66, subsec. 14; Organic Law on Human Mobility, 2017, art. 2).

The Uruguayan state acknowledges as an inalienable right of migrating people and their relatives without prejudice to their migration status, the right to (...) due process and access to justice. It guarantees means of recourse with a suspensive effect in procedures to revoke residency permits and for expulsion measures (Uruguay, Law 18.250/2008, arts. 1, 49 and 53).

In Bolivia, migrants have the right to an interpreter if they do not speak the language they are to be tried in (Bolivia, Law No. 370 of 2013, art. 15).

In Brazil, free legal counsel, a statement of defense and the right to an appeal with a suspensive effect are guaranteed in deportation and expulsion cases (Brazil, Law 13.445, arts. 51, 55 and 58).

International standards

Bodies of the Inter-American Human Rights System have stressed on several occasions the need to regulate and restrict the discretion of states in relation to the guarantees provided in administrative procedures. In particular, the Inter-American Court of Human Rights considers that “the person subjected to [an expulsion

procedure] should be given the following minimum guarantees: a) be expressly and formally informed of the charges against him or her and of the reasons for the expulsion or deportation. This notification must include information about his or her rights, such as: i) The possibility of stating his or her case and contesting the charges against him or her; ii) the possibility of requesting and receiving consular assistance, legal assistance and, if appropriate, translation or interpretation; b) in case of an unfavorable decision, the alien must be entitled to have his or her case reviewed by the competent authority and appear before this authority for that purpose; and c) the eventual expulsion may only take effect following a reasoned decision in keeping with the law that is duly notified” (Inter-American Court of Human Rights, case of Expelled Dominicans and Haitians v. Dominican Republic, 2014, para. 356).

Measures for global and regional levels

1. Promote the revision of any bilateral, regional or multilateral mechanism or agreement that violates migrants’ rights to liberty, life and physical integrity, including the principle of non-refoulement.

2. Promote, in regional forums, training for judges and other public officials who deal with migration procedures, at the federal, provincial and municipal levels, on issues such as a country’s compulsory removal procedures based on an approach that promotes guarantees of due process, access to justice, international protection and protection of family life, as well as the rights of children and adolescents.

Measures for national and local levels

1. Establish the procedures and practices necessary to fortify the state’s capacity to avert, under all circumstances, mass or collective expulsions or deportations.

2. Strengthen the design and implementation of due process guarantees in all migration proceedings that could lead to compulsory removal from the country, whether administrative or judicial: the right to an individual interview, access to legal counsel specialized in refugee and migration-related matters, consular assistance, an interpreter or translator, a well-founded ruling and appeals mechanisms.

3. Encourage the revision of regulations and practices related to expulsions and deportations in order to put an end to specially expedited summary proceedings that endanger a serious and fair evaluation of the migrant's situation insofar as they represent an obstacle to his or her defense.

Effective systems to notify migrants of decisions should be established, with a reasonable time frame and a suspensive effect on those decisions so that an appeal may be filed.

Good practice

In Brazil, all deportation proceedings must be preceded by personal notification specifying the verified irregularities, establishing a deadline for regularization of no less than 60 days, which may be extended. Procedures conducive to deportation guarantee the right to an appeal with suspensive effect, and the Public Defender's Office must be notified so it can provide the migrant with assistance in all deportation-related administrative procedures (Brazil, Law 13.445 of 2017, arts. 50 and 51).

4. Promote the incorporation of judicial review of administrative decisions that may lead to the expulsion of migrant persons.

Expulsions, deportations and border rejections should only be carried out once the decision is final and approved by a judge who has analyzed the rights at stake.

International standards

In accordance with article 14 of the International Covenant on Civil and Political Rights (ICCPR) and article 25 of the American Convention on Human Rights, states must ensure the right to an effective judicial remedy before an independent and impartial body in order to guarantee the rights at stake. On several occasions, decisions within

the framework of the Inter-American Human Rights System transferred government obligations in effective judicial appeal matters to deportation-related migration proceedings (Inter-American Commission on Human Rights, case of Riebe Star and others v. Mexico, 1999, paras. 79 to 82, and also Inter-American Court of Human Rights, case of Expelled Dominicans and Haitians v. Dominican Republic, 2014, paras. 395 to 397).

5. Promote the incorporation of objective criteria to impede actions of expulsion or deportation in cases where these measures have negative implications for the lives and rights of migrants of both sexes, like those involving situations of international protection, humanitarian grounds, local ties, family unity and victims of crimes or human rights violations, as well as children and adolescents. Measures for the implementation of the principle of non-refoulement should also be strengthened.

Good practices

Ecuador's law on human mobility incorporates the international principle of non-refoulement and states that "a person cannot be returned or expelled to another country, whether his or her country of origin or not, where his/her rights to life, liberty or integrity or those of his/her relatives are at risk of being violated because of ethnicity, religion, nationality, ideology, gender, sexual orientation, affiliation to a certain social group, political convictions, or when there are well-founded grounds that they are in danger of being subjected to grave human rights violations" (Ecuador, Organic Law of Human Mobility, 2017, principles, art. 2).

In Brazil, repatriation/return, deportation or expulsion of any individual is prohibited if there are grounds to believe that it would put their life or personal integrity at risk. Also prohibited are the repatriation of refugees or stateless persons (whether a formal or de facto status), unaccompanied minors under 18 or those separated from their family—except in cases in which it is proven more favorable for the guarantee of their right or the reuniting of the family—or those who need humanitarian assistance. In addition, expulsion is prohibited if the individual: has a Brazilian child under his/her guardianship or economic or socio-affective dependence; has a Brazilian person under his/her guardianship; has a judicially or legally recognized spouse or partner who is a resident in Brazil, without discrimination of any kind; entered Brazil at 12 years of age or

younger, having resided in the country since; is more than 70 years old and has resided in the country for more than 10 years, considering the seriousness and grounds of the expulsion order (Brazil, Law 13.445 of 2017, arts. 62, 49 §4 and 55).

International standards

The Inter-American Court of Human Rights has affirmed that the expression international protection comprises: (a) the protection received by asylum seekers and refugees on the basis of the international conventions or domestic law; (b) the protection received by asylum seekers and refugees on the basis of the broadened definition of the Cartagena Declaration; (c) the protection received by any foreign person based on international human rights obligations, and in particular the principle of non-refoulement, as well as complementary protection or other forms of humanitarian protection; and (d) the protection received by stateless persons in accordance with the relevant international instruments (Inter-American Court of Human Rights, Advisory Opinion OC-21/14, August 19, 2014, para. 37).

3

Line of action

Review mechanisms and practices that criminalize migration and contribute to stigmatization and discrimination.

measures

at a global level

1. Encourage the revision of bilateral, regional or multilateral agreements on the trafficking and smuggling of persons and on combating drug trafficking to eliminate provisions that entail the criminalization of migration. Consider the development of protection mechanisms for migrants who are victims of these crimes that include alternative reparation measures in lieu of returning them to their country of origin, such as the granting of visas and residency permits on humanitarian grounds, and guarantees against the deprivation of liberty.
2. Promote the revision of bilateral, regional or multilateral agreements on border externalization that condition international development cooperation on the containment of migratory flows.

at a local level

1. Promote the revision and modification of laws and regulations that consider irregular migration a crime.
2. Implement the necessary measures to eliminate state action aimed at the persecution of irregular migration, especially internal migratory control operations aimed at identifying, detaining and expelling migrants found in an irregular situation.
3. Ensure the non-regression principle in relation to the use of detention on migratory grounds. On the one hand, strengthen regulations and practices in those countries where detention on the grounds of a person's migration status is not an applicable mechanism. On the other hand, work progressively to ensure the exceptionality and then put an end to all forms of detention on the grounds of migration status in the countries where it occurs.

3 non-criminalization of migration

Objective

End the stigmatization, discrimination and exclusion of migrants caused by the automatic association between migration and crime. In particular, it is necessary to revise mechanisms and institutional practices such as the categorization of migration as a crime, the persecution of irregular migration, and detention for migration-related reasons.

Why?

Although they are usually seen as mechanisms to discourage migration, their effectiveness is questionable: around the world, migratory flows have remained basically stable and, in some cases, they have increased. On the other hand, the social impact of these measures is enormous because they intensify prejudices, segregation and social conflicts and often lead to an increase in violence. Their effects are deeper in specific groups, like children and adolescents.

Sustainable Development Goals (SDGs) that this line of action contributes to

Goal 10

Reduce inequality within and among countries.

10.3) Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.

Goal 16

Promote just, peaceful and inclusive societies.

16.2) End abuse, exploitation, trafficking and all forms of violence against and torture of children.

16.a) Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.

16.b) Promote and enforce non-discriminatory laws and policies for sustainable development.

Good practices

Brazil's Law No. 13.445 from 2017 establishes the non-criminalization of migration in article 3.III.

In Uruguay, Law No. 18.250 does not include the possibility of detention for migratory reasons.

International standards

The United Nations Special Rapporteur on the human rights of migrants said, "Criminalizing irregular migrants for the offence of being in a country without adequate documentation made all migrants, regardless of immigration status, potentially vulnerable to racist or xenophobic acts. As a result, migrants were often subject to

xenophobic outbreaks of abuse and violence.” The Special Rapporteur highlighted that the use of criminal justice measures to manage migration curtailed their access to basic social rights, particularly health care, education and housing (United Nations, A/HRC/17/33, March 11, 2011, para. 25).

Measures for global and regional levels

1. Encourage the revision of bilateral, regional or multilateral agreements on the trafficking and smuggling of persons and on combating drug trafficking to eliminate provisions that entail the criminalization of migration. Consider the development of protection mechanisms for migrants who are victims of these crimes that include alternative reparation measures in lieu of returning them to their country of origin, such as the granting of visas and residency permits on humanitarian grounds, and guarantees against the deprivation of liberty.

Why?

International cooperation on human trafficking and migrant smuggling is important to prevent abuse and exploitation and to discourage the use of highly dangerous migration routes, thereby reducing the violence they generate. However, these policies tend to focus on the development of security measures and the fight against crime and are rarely truly focused on the protection of crime victims. In general, as a result, the individuals seeking to migrate are returned to their countries of origin.

Good practice

Although implementation problems persist, people who are victims of or witnesses to a serious crime in Mexico have the right to request a visa or a residency permit to follow up on the complaint and the investigation of the case. In 2016, 1944 people had access to migratory documentation because they were victims or witnesses to a crime in Mexico.

2. Promote the revision of bilateral, regional or multilateral agreements on border externalization that condition international development cooperation

on the containment of migratory flows. Specifically, revise measures that establish the faculties and encourage transit countries to detain migrants and militarize their borders to prevent irregular migration.

Good practice

In the Southern Cone, there are no international cooperation agreements that are conditioned upon measures that hinder migration, nor are there international border externalization agreements that limit passage across the region's borders. This type of cooperation generates the intensification of control mechanisms in countries that are not exclusively destinations and that operate as borders or "buffer states" for the arrival of migrants and refugees to other states. Experience shows that these states have not only been unable to contain flows – they have further aggravated the violation of refugees' and migrants' human rights.

Measures for national and local levels

1. Promote the revision and modification of laws and regulations that consider irregular migration a crime. Particular attention should be paid to ensure that irregular migration is considered, at most, an administrative offense, with proportional penalties for this type of offense.

Good practice

The principles of Ecuador's Human Mobility Law prohibit criminalization: "No person shall be subject to criminal sanctions for their human mobility status. Any migratory offense will be of an administrative nature."

Legislative decree 1350 of Peru establishes in its article VII that the state must formulate and execute its migration policy on the principle of non-criminalization of irregular migration.

International standards

The United Nations Special Rapporteur on the human rights of migrants affirmed that: "crossing a border without authorization should not be considered a crime but

an administrative offense” (United Nations, A/HRC/7/12, February 25, 2008, para. 60). On the other hand, the United Nations Working Group on Arbitrary Detention has sustained that “criminalizing entry by irregular means into the territory of a State transcends the legitimate interest of States to control and regulate illegal immigration and gives rise to unnecessary detentions” (United Nations, A/HRC/7/4, January 10, 2008, para. 53).

2. Implement the necessary measures to eliminate state action aimed at the persecution of irregular migration, especially internal migratory control operations aimed at identifying, detaining and expelling migrants found in an irregular situation.

Civilian authorities Adopt the necessary measures to discourage security forces, in the framework of their crime prevention functions, from developing administrative functions related to migration procedures, such as those related to controlling the regularity of a person’s stay in the country. In this regard, civilian migration bodies need to be established.

Why?

When security forces are the authorities charged with controlling irregular migration, they often associate migration with crime. The use of racial profiling in the fight against crime and the treatment of irregular migration as a criminal matter constitute a discriminatory act.

International standards

According to the Inter-American Commission on Human Rights (IACHR), “decisions in the area of migration cannot be left to non-specialized administrative or police officials. Public officials responsible for such decisions must be accountable before the law, to superiors and to any horizontal control bodies charged with reviewing decisions” (IACHR, Annual Report 2000, chap. 6: “Migrant workers”, para. 99 A).

Reporting by civil servants Put an end to measures and practices that encourage public officials to report irregular migration and establish administrative sanctions for a public official refusing to assist a person due to his or her migration status.

Why?

As the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families emphasized in its General Comment No. 2, the use of health care as an instrument to control migration would prevent migrant workers with irregular status from using health services for fear of expulsion. Migration control operations in or near health care centers have an equally frightening impact.

Good practice

In Uruguay, “migration irregularity will in no case prevent the foreign person from having free access to justice and health facilities. The authorities of these centers will implement the necessary services to provide migrants with information so they can regularize their status in the country” (Uruguay, Law 18.250, art. 9).

Discourage xenophobic discourses and the use of racial profiles in migration policies among state authorities. Training should be implemented for public officials, especially security forces and judges, on irregular migration as a simple administrative offense.

3. Ensure the non-regression principle in relation to the use of detention on migratory grounds. On the one hand, strengthen regulations and practices in those countries where detention on the grounds of a person’s migration status is not an applicable mechanism. On the other hand, work progressively to ensure the exceptionality and then put an end to all forms of detention on the grounds of migration status in the countries where it occurs.

For those states that deprive foreigners of their liberty on the grounds of their migration status, this should only be possible in an exceptional manner and for the sole purpose of executing an expulsion order reviewed, on an individual basis, by an independent and impartial judge or court. The existence of detention centers encourages the use of detention on the grounds of migration status and, consequently, their closure is a first step to guaranteeing its exceptional use.

Good practices

Currently, there are no specialized detention centers for migrants in the Southern Cone (in South America). In the face of migration irregularity, the practice is not detention but

the order to regularize their status. Countries such as Bolivia, Brazil, Chile, Paraguay and Uruguay do not use detention for migratory reasons as a central instrument of their migration policies, nor do they have detention centers for this purpose.

International standards

In the case of *Vélez Loor v. Panama*, the Inter-American Court of Human Rights established the incompatibility with the American Convention on Human Rights of using punitive measures of deprivation of liberty to control migratory flows, particularly those of an irregular nature. Specifically, it determined that the detention of an individual owing to failure to comply with immigration laws should never be for punitive purposes so that the measures of deprivation of liberty should only be used when they are necessary and proportionate in a specific case in order to ensure the appearance of the person at the immigration proceedings or to guarantee the implementation of a deportation order and only for the shortest time possible (Inter-American Court of Human Rights, case of *Vélez Loor v. Panama*, 2010, paras. 171 and 208).

Presumption against detention Encourage the revision of laws and regulations and agreements to establish the presumption against the detention of migrants on migratory grounds and encourage administrative and judicial bodies to act in favor of liberty.

Detention of children Ensure the prohibition of the detention of children and adolescents on migratory grounds.

International standards

The Committee on the Rights of the Child has established that in accordance with article 37 of the Convention on the Rights of the Child and the principle of the best interests of the child, unaccompanied or separated children should not be deprived of their liberty on migratory grounds. The United Nations Special Rapporteur on the human rights of migrants, who has argued that the detention of a child is never in the best interest of the child, has also made a statement to this effect (Committee on the Rights of the Child, General Comment No. 6, 2005, para. 61; United Nations, A/65/222, 2010, paras. 100 to 106).

Final expulsion ruling Strengthen the necessary mechanisms so that detention is closely linked to a final expulsion ruling, meaning it is no longer actionable or susceptible to review by a judge.

Due process Foster and establish the necessary measures so that an expulsion order is issued under the rules of due process, with an analysis of the migrant's de facto status and the potential impact on their rights.

Awaiting a decision in liberty Encourage the necessary regulations to guarantee that a migrant remains free while awaiting a final expulsion ruling.

Concrete risk elements Foment the necessary mechanisms so that the decision to detain a person is legitimate only if it is justified by concrete risk elements and to ensure that it cannot occur automatically.

Progressive closure of detention centers Provide orientation for the actions needed to achieve the progressive closure of migrant detention centers.

4

Line of action

Create mechanisms that guarantee migrants who are victims of crimes and human rights violations access to justice, truth and comprehensive reparation.

measures

at a global level

1. Encourage the adoption of bilateral, regional or multilateral agreements that establish mechanisms to access transnational justice and reparation for migrant victims of crimes or human rights violations, especially to assist them and keep them informed when they are not in the territory where the events took place or their relatives are in another country.
2. Promote and bolster bilateral, regional or multinational agreements that establish the necessary data collection and systematization mechanisms to ensure the cross-referencing of information on a large scale for the purpose of locating and identifying missing migrants. In the same regard, protocols for identification, notification and repatriation of remains should be adopted.

at a local level

1. Promote the revision of existing obstacles so that migrant victims of crimes or human rights violations can access justice.
2. Encourage the regulations and practices necessary to ensure due process, the right to defense and access to free legal counsel for migrants who file reports of violations. Access to an interpreter in their language will be especially taken into account.

4 access to justice

Objective

Guarantee access to justice, the right to truth and comprehensive reparation for victims of crimes and human rights violations along migratory routes.

Why?

The disappearance of migrants, massacres, exploitation and extortion need a response, both nationally and multilaterally, to prevent impunity.

Migrants face different obstacles to accessing justice, either because there are no specialized authorities or institutions, or because existing institutions do not have a systematic and organized form of taking action, or due to a lack of human or financial resources. The lack of mechanisms for establishing themselves in the country and thus being able to file a complaint and collaborate with an investigation as it runs its course is another concrete obstacle. Without being able to regularize and access a residency permit, albeit a temporary one, migrants decide not to report abuses – often for fear of the consequences of having an irregular migratory status. The inability of the state to investigate and punish these crimes contributes to their impunity and perpetuation, and to the spread of violence in society.

Sustainable Development Goals (SDGs) that this line of action contributes to

Goal 16

Promote just, peaceful and inclusive societies.

16.2) End abuse, exploitation, trafficking and all forms of violence against and torture of children.

16.a) Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.

16.b) Promote and enforce non-discriminatory laws and policies for sustainable development.

Good practice

Despite grave implementation problems, the federal Attorney General's Office in Mexico created the Unit for the Investigation of Crimes for Migrants, tasked with investigating federal crimes committed against or by migrants in that country. Due to a lack of technical, human and financial resources, some cases have not yet resulted in verdicts or other impacts in terms of justice for migrant victims of crime in Mexico or their relatives in other countries. However, this specialized body could have concrete results if it can overcome the obstacles to its proper functioning [Source: Fundar, "Access to justice for migrants in Mexico," 2017].

International standards

In regard to the specific migrant population, in its report on Citizen Security, the IACHR said "whenever persons identified as members of vulnerable groups are injured and there is a general pattern of negligence and lack of effectiveness to process and punish the perpetrators, the State not only fails to comply with its obligation to clarify an offence but also fails to comply with its duty to prevent degrading practices."

Furthermore, "that general and discriminatory judicial ineffectiveness also creates a climate that is conducive to [...] violence, since society sees no evidence of willingness

by the State, as the representative of the society, to take effective action to sanction such acts” (IACHR Report on Citizen Security and Human Rights, 2009, para. 68).

Measures for global and regional levels

1. Encourage the adoption of bilateral, regional or multilateral agreements that establish mechanisms to access transnational justice and reparation for migrant victims of crimes or human rights violations, especially to assist them and keep them informed when they are not in the territory where the events took place or their relatives are in another country.

Special consideration should be given to agreements that promote action taken by consular representations and cooperation between prosecutors in situations involving crimes or violations of migrants’ rights.

Good practices

Migrants and their families in Guatemala, Honduras, El Salvador and Mexico have proposed a transnational mechanism to access justice, search for disappeared migrants and access reparation measures developed by the state. This proposal was developed by Mexico, although, due to a lack of technical, human and financial resources assigned to the mechanism and to the Unit for the Investigation of Crimes for Migrants (UIDPM), the agreement has not yet resulted in verdicts or other impacts in terms of justice for migrant victims of crime.

2. Promote and bolster bilateral, regional or multinational agreements that establish the necessary data collection and systematization mechanisms to ensure the cross-referencing of information on a large scale for the purpose of locating and identifying missing migrants. In the same regard, protocols for identification, notification and repatriation of remains should be adopted.

Good practice

The Forensic Commission of Mexico was created in 2013 to identify the remains of the victims of the San Fernando and Cadereyta massacres. The working team composed of the Attorney General's Office, groups of relatives, the Argentine Forensic Anthropology Team and human rights organizations has made progress in searching for and identifying victims. In 2014, the remains of ten Honduran victims identified in the massacre of 49 people in Cadereyta, Nuevo León, and another Honduran victim of the massacre of 72 migrant people in San Fernando, Tamaulipas, were returned to their families.

Measures for national and local levels

1. Promote the revision of existing obstacles so that migrant victims of crimes or human rights violations can access justice.

Reporting and investigation mechanisms The creation of mechanisms that facilitate the reporting and investigation of crimes and human rights violations, especially the creation of specialized prosecutors and ombudsmen as well as protocols for action.

Resources The allocation of the necessary resources for legal defense and investigation.

Training The training of the officials in charge of the situation of migrants.

Regularization of victims and witnesses The establishment of mechanisms for migratory regularization and protection of victims and witnesses, giving them the possibility of remaining in the country with a regular migratory status until their case is resolved.

2. Encourage the regulations and practices necessary to ensure due process, the right to defense and access to free legal counsel for migrants who file reports of violations. Access to an interpreter in their language will be especially taken into account.

International standards

According to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the responsiveness of judicial and administrative

processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims (GA, Resolution 40/34, November 29, 1985, art.6).

Centro de Estudios Legales y Sociales – CELS

This document was prepared by the Centro de Estudios Legales y Sociales (known in English as the Center for Legal and Social Studies), and is the result of the collective efforts of the following organizations:

Centro de Derechos Humanos de la Universidad Diego Portales – Chile

This center promotes the study of human rights and runs a clinic specialized in public interest litigation and another in migration and protection of refugees. The legal clinic for migrants and refugees promotes strategic litigation, research and the development of community-based activities as mechanisms to facilitate the effective exercise of migrants and refugees' human rights.

www.derechoshumanos.udp.cl

Conectas – Brazil

Its mission is to promote respect for human rights and contribute to the consolidation of the rule of law in the Southern Hemisphere—Latin America, Africa and Asia. To fulfill its mission, the organization has developed programs and projects at the national, regional and international levels that include the issue of migrants and refugees' rights.

www.conectas.org

Fundar. Centro de Análisis e Investigación – Mexico

Fundar is a plural, independent and interdisciplinary organization dedicated to researching issues related to democracy and citizen participation. Its work includes the promotion of a comprehensive migration policy that effectively protects the rights of migrants.

<http://fundar.org.mx>

Comisión Argentina para los Refugiados y Migrantes (Caref) – Argentina

Caref has worked for the rights of migrants, refugees and asylum seekers since 1973. It provides professional services of counsel, guidance, training and social and legal assistance and promotes actions that help define government policies. Since 2002, in partnership with CELS and the Law School at the University of Buenos Aires (UBA), it has run an Immigrant and Refugee Rights Legal Clinic that advises and sponsors 300 cases a year on average.

www.caref.org.ar

Asylum Access

Asylum Access is an international nonprofit dedicated to making human rights a reality for refugees. Asylum Access empowers refugees in Africa, Asia and Latin America to assert their legal rights so they can live safely, work, send their children to school and rebuild their lives. Our innovative model uses integrated strategies to help refugees access their rights: individual and community legal empowerment, policy advocacy and global systems change. Together, these strategies improve refugees' lives today and build a better world for refugees tomorrow.

www.asylumaccess.org

Centro de Estudios Legales y Sociales (CELS) – Argentina

CELS is an organization that works for the promotion and protection of human rights on a broad agenda that includes the defense of the human rights of migrants. Among other regional and international processes in which it has participated, CELS contributed to the Recommended Principles and Guidelines on Human Rights at International Borders of the United Nations High Commissioner for Human Rights. Together with Caref and other organizations, it participated in the reform of Argentina's Migration Law in 2003, and the drafting of its regulatory decree in 2010.

www.cels.org.ar

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Financed by Open Society Foundations

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Centro de Estudios Legales y Sociales

Global compact on migration:
Recommendations for a compact
with a rights-based approach.

Buenos Aires, January 2018.

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