

**ELEVENTH COORDINATION MEETING ON
INTERNATIONAL MIGRATION**

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**CONTRIBUTIONS TO THE 2013 HIGH-LEVEL DIALOGUE
ON MIGRATION AND DEVELOPMENT¹**

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¹ The views expressed in the paper do not imply the expression of any opinion on the part of the United Nations Secretariat.

A. INTRODUCTION

The Special Rapporteur on the human rights of migrants considers that the complex nature of migration, with its multiple facets, including the developmental, economic, and political aspects, precludes us from focusing the debate on the human rights aspect. The Special Rapporteur notes that many gaps remain in relation to the respect, protection and fulfilment of the human rights of migrants. The purpose of this paper is to highlight some of these gaps.

B. PREPARATIONS FOR THE HIGH LEVEL DIALOGUE

The Special Rapporteur was invited to contribute to the background paper for HLCP consideration for the High Level Dialogue. In his submission, the Special Rapporteur focused on some of the important gaps regarding the human rights of migrants, which are manifest in a number of spheres:

1. Knowledge gap

Overall, the Special Rapporteur remains concerned about the lack of knowledge about the human rights framework as it applies to migration. From the inter-governmental level, down to the management level on the ground, he observes a lack of understanding of the human rights framework in approaches to migration management. In particular, he is concerned about a lack of appropriate human rights terminology, including the blurring of categories such as migrant smuggling/trafficking in human beings. While trafficking by definition includes exploitation and entails a number of serious human rights violations, smuggling is essentially the service of moving people from point A to point B, and does not necessarily involve any human rights violation.

In this regard, he would like emphasize the importance of avoiding stigmatising expressions such as ‘illegal migrant’ or ‘illegal migration’; preferable expressions are ‘irregular migration’ and ‘migrants in an irregular situation’. This is in accordance with relevant international human rights standards. Although it may be an administrative offense, irregular migration is not a crime: the use of the expression ‘illegal migrant’ should therefore be avoided at all costs.

Using incorrect terminology that negatively depicts individuals as ‘illegal’ contributes to the negative discourses on migration, and further reinforces negative stereotypes against migrants. Moreover, such language legitimates a discourse of the criminalisation of migration, which in turn, contributes to the further alienation, marginalisation, discrimination and ill treatment of migrants on a daily basis.

With these overarching points in mind, in particular the Special Rapporteur further notes gaps in relation to some key areas of migration:

a. Detention

As the Special Rapporteur observed in his first thematic report to the Human Rights Council (A/HRC/20/24), detention of migrants in an irregular situation is becoming increasingly widespread, and States use a wide range of reasons to justify these practices, in particular that of deterrence. However, the right to liberty and security of person is applicable to all

deprivations of liberty, including immigration control. Legitimate objectives for detention are the same for migrants as they are for anyone else: when someone presents a risk of absconding from future legal proceedings or administrative processes or when someone presents a danger to their own or public security. Thus detention should never be mandatory, it should only be a means of last resort, and, if used, personalised reasons must be put forward by States to justify a detention and such reasons should be clearly defined and exhaustively enumerated in legislation.

Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language and therefore understand why they are detained, or be aware of ways to challenge the legality of their detention. This may lead to situations in which they are denied key procedural safeguards, such as prompt access to a lawyer, interpretation/ translation services, means of contacting family or consular representatives and ways of challenging detention.

Furthermore, immigration detention remains far less regulated and monitored than criminal detention, leaving migrants at risk of, inter alia, prolonged detention, inadequate conditions and mistreatment. Migrants are sometimes detained in unacceptable substandard conditions and victims of violence, including sexual violence and abuse.

The Special Rapporteur is concerned that migrants are detained in a wide range of places, including prisons, police stations, dedicated immigration detention centres, unofficial migration detention centres, military bases, private security company compounds, disused warehouses, airports, ships, etc. Privately run migrant detention centres pose particular difficulties in terms of monitoring. Where detention regimes are in place, States must ensure that migrants are kept in dedicated detention centres, which are adequately monitored, and should under no circumstances be detained in prisons or other criminal facilities together with persons imprisoned for a criminal offence.

Attention also needs to be paid to categories of migrants which may have particular protection needs in detention. Women migrants who are detained are vulnerable to sexual violence. Pregnant women migrants are often detained. Also children are detained for immigration purposes, including unaccompanied children: in principle, children and families with children should never be detained, as adequate alternatives to detention should be put in place. Victims of trafficking are often detained if not properly identified, and sometimes are in fact prosecuted if they violate immigration laws and regulations, relating to irregular entry or use of false documents. Detention can be particularly damaging to vulnerable categories of migrants, including victims of torture, unaccompanied older persons, persons with a mental or physical disability, and persons living with HIV/AIDS. Stateless persons do not benefit from the consular or diplomatic protection of a State, often do not possess identity documents and do not have a country to which to be returned, and are therefore especially vulnerable to prolonged detention.

b. Criminalisation of irregular migration

In 2008, the former Special Rapporteur presented a report to the Human Rights Council on the criminalisation of irregular migration. Criminalising irregular entry and/or stay can lead to unnecessary detention, prevent migrants from accessing such key rights as health or housing, and can encourage stigmatisation, hostility and xenophobia against migrants.

c. Xenophobia

Lack of understanding about the human rights of migrants makes them an increasingly vulnerable group, easily targeted. The Special Rapporteur observes that, as a result of this lack of information and understanding, migrants are increasingly subject to xenophobia, anti-migrant sentiment, hate speech and hate crimes, which in and of themselves are human rights violations, and can lead to further serious human rights abuses, particularly when physical violence is involved.

d. Migrant Children

The Special Rapporteur attended the Committee on the Rights of the Child's 2012 Day of General Discussion on children in the context of migration, where he delivered the opening statement. Migrant children continue to be a particularly vulnerable category of migrants. In 2009, the former Special Rapporteur presented a report to the Human Rights Council on the protection of children in the context of migration. He noted that children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration process, and that the lack of distinction between adult and child migrants is a major challenge. Better knowledge about the rights of these children, and the obligation to protect them is paramount.

e. Economic Social and Cultural Rights

In 2010, the former Special Rapporteur presented a report to the Human Rights Council on the rights to health and adequate housing in the context of migration. He emphasized that the enjoyment of these rights by all individuals in society regardless of their citizenship, nationality and immigration status is not only an end in itself as a matter of entitlement, but also a crucial means to ensure equitable human development and social integration of migrants in host societies.

f. Borders

Some States have responded to irregular migration by intensifying border controls, in some cases "externalising" border controls to countries of origin and transit, using bilateral agreements and/or aid in order to transform these countries into a buffer zone to reduce migratory pressures on receiving States, without any accompanying measures to ensure the respect for the human rights of migrants in the process.

2. Capacity gaps

In a similar vein, the Special Rapporteur notes that there appears to be a lack of trained personnel across the board, in both governments and intergovernmental organisations who work on migration issues from a human rights perspective. The financial crisis, which led to budget constraints in a number of States, has had a negative impact on the resources devoted to migration issues. In this context, he observes a need for increased training of public officials at all levels, including within Ministries, but also on the technical level including police, border guards, immigration officers and detention centre staff, on the human rights of migrants.

3. Coordination gaps

While noting the important work of the Global Migration Group as the inter-agency coordination body on migration, the Special Rapporteur remains concerned about a lack of a coordinated international approach to migration which has as its core a respect for human rights. There is a need to strengthen and reaffirm the essential role of the Global Migration Group, with increased focus on the human rights of migrants. There is also a need for greater involvement of the UN in the global debate on migration, which seems difficult to achieve as long as the Global Forum on Migration and Development (GFMD) remains a State-led process, focusing on migration and development, without enough attention being given to the human rights of migrants. The Special Rapporteur attended the 2011 GFMD in Geneva and the 2012 GFMD in Mauritius.

In light of the upcoming High Level Dialogue and the importance of mainstreaming human rights in all international governance processes on migration, the Special Rapporteur decided to focus his 2013 annual report to the General Assembly on analysing global governance processes on migration, in particular with a view to analysing whether human rights are effectively mainstreamed in these processes. This will include an analysis of the GFMD which, although a non-binding forum, is currently the leading global forum in which States discuss migration management.

C. SUGGESTIONS FOR THE HIGH LEVEL DIALOGUE

The Special Rapporteur suggests that the HLD should have an explicit and cross-cutting focus on the human rights of all migrants, including the human rights safeguards surrounding the detention of migrants. More specifically, the HLD could invite Member States to explore alternatives to immigration detention, and address some of the other gaps noted above. In particular, the HLD should promote real recommendations to States in the fields identified, including on means to progressively abolish the administrative detention of migrants, and providing concrete recommendations about securing all the relevant procedural safeguards for all migrants in detention. In this context, he refers to the recommendations of his report to the Human Rights Council (A/HRC/20/24, paras 68-78).

In addition to issues relating to detention, the Special Rapporteur further proposes that the High Level Dialogue focuses on a number of other key human rights concerns relating to migrants:

- Ensure awareness-raising on the human rights of migrants among the general public, and specific training to professionals dealing with migrants. Take all the necessary measures to combat xenophobia and xenophobic violence against migrants. States must develop a public discourse that fosters inclusiveness, non-discrimination, recognition of diversity and pluralism as social assets, etc. They should develop legislation, policies and practices to that effect, and empower all their institutions, including their human rights institutions, to implement and monitor such legislation, policies and practices.
- Ensure a consistency in terminology, including avoiding the use of the expression ‘illegal migration’, keep the distinction between trafficking and smuggling clear, and ensure that irregular migrants, including smuggled migrants, are not criminalised.
- Irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property or national security. Irregular migrants are not criminals per se and should not be treated as such.
- Ensure effective protection of the human rights of children in States of origin, transit and destination, at every stage of the migration process and in all migration management procedures. Children should always be treated as children first and foremost, and the principle of the best interest of the child should always guide all decisions regarding children, whatever their administrative status and circumstances. Avoiding the detention of migrant children, and giving them access to appropriate education and health care services should be key objectives.
- Ensure the enjoyment of all economic, social and cultural rights, including the rights to education, health and adequate housing, for all migrants, including irregular migrants.
- While States have the power to admit or deny the entry of foreigners, they have an obligation to respect the human rights of all migrants in the process. Unless otherwise specified in rare cases, human rights are not reserved for citizens: they benefit everyone who is on their territory or within their jurisdiction, whatever their administrative status and circumstances.
- Migrants need access to recourse to independent institutions on all the issues which they must face due to their migration status. States should increase and adequately fund legal aid programmes to support effective access of migrants to courts and tribunals, especially administrative tribunals that deal with labour and immigration matters. Appeals and judicial controls should always suspend deportation proceedings until the matter is finally settled. This is essential to ensure that migrants will actually use the system to protect their rights and not be driven further underground, where exploitative practices thrive.