

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

Draft outline: General Comment No. 6 on the Convergence between the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Global Compact for Safe, Orderly and Regular Migration

I. Introduction

Many people on the move today fall outside the bounds of legal protection, and are therefore in need of specific interventions for the promotion and protection of their human rights. Vulnerable situations that migrants face arise from a range of situational and personal factors that may intersect or coexist simultaneously, influencing and exacerbating each other and also evolving or changing over time as circumstances change. Migrants may find themselves in vulnerable situations because of the conditions compelling them to leave their country of origin, the circumstances, in which they travel, or the situations they face on arrival, including situations of conflict, or because of personal characteristics such as their age, sex, gender identity, ethnic, national or social origin, disability or health status, among others.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention)¹ – the only global legally binding instrument on migration – and the Global Compact for Safe, Orderly and Regular Migration (the Global Compact)² – a non-binding instrument – are the most important international instruments in the context of migration. They are unique, complementary and mutually reinforcing in advancing migration governance and in promoting and protecting the rights of all migrants, regardless of their migration status.

The Global Compact is primarily a guiding strategic policy instrument, which nevertheless is anchored in norms and standards of international law. It is not a perfect instrument, nor is the Convention. However, the Global Compact is certainly the most comprehensive instrument on migration governance with a human rights-based approach in the history of the international migration. It qualifies as ‘soft law’, which has strategic advantages linked to its flexibility since such agreements are usually easier to negotiate among Member States. The Global Compact is also a guiding policy instruments for the achievement of its objectives, which after all contributes to fulfil the various human rights of migrants and helps to operationalize the provisions of the Convention.

General Assembly resolution 73/326 of 19 July 2019³ regulates the modalities of the International Migration Review Forum (IMRF). In its OP 7 it requests the Secretary-General to ensure that the expertise of the United Nations system, including that of relevant treaty bodies and relevant special procedures mandate holders, is coordinated to support the IMRF, and to facilitate their participation therein.

II. Genesis and historical background of the adoption of the Convention and the Global Compact

- The abuses resulting from trafficking in and smuggling of labour migrants, and the slavery-like conditions that characterised the recruitment of certain migrant workers, led to the drafting of the Convention in 1970.
- In 2016, the General Assembly adopted the New York Declaration for Refugees and Migrants⁴ at the UN Summit for Refugees and Migrants, which formally launched the process for the development of a global compact for migration (and a global compact on refugees).

¹ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>

² Endorsed by the General Assembly on 19 December 2018 in its resolution 73/195: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/doc/N1845199.DOC?OpenElement>

³ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/225/96/doc/N1922596.DOC?OpenElement>

⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/291/97/doc/N1629197.DOC?OpenElement>

III. Current context for the implementation of the Convention and the Global Compact

- The Convention applies to all migrant workers and members of their families and their entire migration process.
- The Global Compact covers all migrants and addresses all aspects of migration from the sub-national, national, and global levels and establishes a framework for cooperation on all aspects of migration.
- The Global Compact is primarily a policy instrument, which is largely rooted in international law standards, and it is also stemming from the 2030 Agenda for Sustainable Development (SDG Target 10.7).
- The Global Compact is the first intergovernmental agreement negotiated to cover international migration in a comprehensive way.
- The Convention guarantees the human rights of migrant workers and members of their families.
- The Global Compact has human rights as one of its guiding principles and refers to rights all throughout the text.
- The Global Compact aims to support the effective and humane management of migration flows.

IV. Convergence of the Convention and the Global Compact in terms of human rights principles

The Sustainable Development Goals (SDGs) call on Member States to make sure that no one is left behind, and sets Target 10.7 to facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.⁵ The Global Compact sets out to achieve these goals in line with international law. It laid the foundations for the creation of a strategy by Member States that protects all migrants in situations of particular vulnerability, through a series of mechanisms, including the availability of regular pathways, as it is provided for in the various objectives of the Global Compact.

The Convention, however, not only provides a comprehensive international legal framework for the promotion of the human rights of migrant workers and members of their families, but also remains the best strategy to prevent abuses and address the vulnerabilities that many migrants face. It establishes minimum human rights standards, legally binding upon States parties and that apply to migrant workers and members of their families, irrespective of their migration status. In addition, the Convention reflects the rights spelled out in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and other core human rights treaties and adapts them to the specific situation of the large global population of migrant workers and members of their families. These international human rights instruments should be implemented in synergy, as they present numerous commonalities and complementarities.

Some commonalities and complementarities between the Convention and the Global Compact include the following:

- Decent work and non-discrimination
 - Both texts agree on the importance of the human dimension in their commitments (Articles 17 and 70 of the Convention, Goal 8 of the SDGs and Objective 17 of the Global Compact).
 - The Convention and the Global Compact respect the principles of non-regression and non-discrimination.
- Family reunification
 - The right to family reunification is addressed in both documents (Article 44 of the Convention and Objectives 5(i) and 7(f) of the Global Compact).
- Protection of vulnerable categories of migrants/humane treatment

Migrants are not inherently vulnerable, or lack resilience and agency. Rather, vulnerability to human rights violations is the result of multiple and intersecting forms of discrimination, inequality and structural

⁵ <https://www.un.org/development/desa/disabilities/envision2030-goal10.html>

and societal dynamics that lead to diminished and unequal levels of power, opportunities and enjoyment of rights. As a matter of principle, and in order to ensure that every migrant is able to access appropriate protection of her or his rights, the situation of each person must be assessed individually. OHCHR, working with other UN partners, has led to the development of a set of [Principles and guidelines on the human rights protection of migrants in vulnerable situations](#).

- Both instruments refer to the prohibition of slavery, servitude and forced labour (Article 11 of the Convention and Objective 6 of the Global Compact).
- Article 10 of the Convention protects migrants against torture and cruel, inhuman or degrading treatment or punishment and Objective 21 of the Global Compact mentions related protection in a specific context.
- Objective 7 of the Global Compact addresses and reduces migration vulnerabilities.

- Residence permits
 - Both texts provide for the protection against confiscation or destruction of identity, residence or work documents outside of duly authorised procedures (Article 21 of the Convention and Objective 6 (h) of the Global Compact).

- Remittances
 - The right to transfer income and savings is included in both instruments (Article 47 of the Convention and Objective 20 of the Global Compact).

- Access to an effective remedy
 - The right to an effective remedy is guaranteed by article 83 of the Convention and covered by Objectives 6 and 21 of the Global Compact.

- Reintegration
 - Under Objective 21 of the Global Compact States commit to cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration, which further builds, in more detail, on article 67 (2) of the Convention.

V. Complementarities between the Convention and the Global Compact in terms of migration governance and human rights

- Both texts ensure international cooperation in order to better manage migration and to remain united in addressing common challenges and opportunities (Article 64 of the Convention and Objective 23 of the Global Compact).
- Both texts recognise the granting of the same rights to all migrants, and migrant workers and members of their families, respectively, like the rights of citizens of their countries of residence, and guaranteeing rule of law, due process and access to justice (Article 18 of the Convention and Objectives 6 (j), 7 (c) and (g), 10 (e), 17 (b) and (e)).
- The right to liberty and security of person, protection against arbitrary arrest and detention and a fair trial for migrant workers and members of their families is guaranteed by articles 16, 17 and 18 of the Convention, while Objective 13 of the Global Compact establishes the need to first apply alternatives to immigration detention before resorting to detention.
- Procedural guarantees in cases of return and expulsion are provided for in both documents (Articles 8, 10, 22, 23, 56 and 67 of the Convention and Objectives 14 and 21 of the Global Compact).
- Conditions of employment, work, and equality of treatment are addressed in both texts (Articles 25, 55 and 70 and Objective 6 of the Global Compact).
- The cooperation of States in relation to conditions of migration, return and irregular migration, and the establishment of migration policies straddle across both instruments (Articles 64, 65, 67, 68 of the Convention and Objectives 3 (b), 5 (a) and (h), 6 (b) and (l), 7 (b), (c) and (l), 9, 10 (d), 11 (a), (d) and (g), 14 (a), (b) and (c), 16 (c), 18 (l), 21, 23 of the Global Compact).
- The pre-departure right to be informed is also covered by both texts (Article 37 of the Convention and Objectives 3 (e) and 16 (b) of the Global Compact).
- Both instruments recognize the right to vote and be elected in the State of origin (Article 41 of the Convention and Objective 19 (g) of the Global Compact).

- Illegal or clandestine movements and employment of migrant workers in a regular situation are covered by both documents (Article 68 of the Convention and Objectives 9 and 10 (c) of the Global Compact).
- The rights to protection and assistance from consular authorities are protected as well (Article 23 of the Convention and Objective 14 of the Global Compact).

VI. Filling the human rights and legal gaps in the Global Compact through a concomitant interpretation of the Convention and the Global Compact

The development of general comment No. 6 on the convergence between the two instruments will be a great opportunity to analyse and focus on the legal and human rights-based approach of the 23 objectives of the Global Compact versus the Convention. The Global Compact could certainly complement the Convention on major issues, such as regular pathways for migration, regularisation of migrant workers and members of their families or access to the labour market and reintegration. Moreover, the Global Compact could inform general comment No. 6 on alternatives to detention (Objective 13 of the Global Compact) in relation to articles 16 and 17 of the Convention, concerning migrants' right to liberty and security of person, freedom from arbitrary detention and their intersection with other human rights, in conformity with the Committee's general comment No 5 (2021).⁶

Among other topics, the Global Compact could also bring an added value to the Convention in terms of the implementation of article 68 of the Convention in relation to reducing irregular migration, and eradicating trafficking in persons in the context of migration and smuggling of migrants (Objectives 9 and 10). Although the Convention does not explicitly mention the words trafficking and smuggling the Committee has always provided States parties with recommendations in this regard in its concluding observations following the review of the respective States parties reports. Conversely, for example, the Convention protects the rights of seasonal workers (Articles 57 to 63), whereas seasonal workers are not mentioned in the Global Compact.

VII. What can the Convention bring to the Global Compact in terms of human rights protection of migrants, and vice-versa, what can the Global Compact bring to the Convention in terms of operationalizing the provisions of the Convention and contribute to migration governance?

- The Global Compact promotes the engagement of different actors to participate in the governance of migration namely: diasporas, local populations, civil society, academia, the private sector, parliamentarians, trade unions, national human rights institutions, the media and other relevant actors.
- The rights of children of migrant workers are protected and they acquire the same rights as nationals of their country of residence in the case of migrants in a regular situation (Articles 12, 17, 29, 30, 44, 45 of the Convention); the Global Compact promotes respect for international legal obligations relating to the rights of all migrant children (Guiding Principles (h) in paragraph 15 and Objectives 3, 6, 7, 11, 12, 15 and 16 of the Global Compact).
- The Global Compact integrates gender issues and promotes gender equality and the empowerment of women and girls.
- The Global Compact builds on and stems from the 2030 Agenda for Sustainable Development (SDG Target 10.7). It recognizes the fundamental role that migration plays as a driver of sustainable development overall, and it creates the conditions for migrants and diasporas to contribute to sustainable development in countries where they are recognised (Objective 2).
- The Global Compact provides an opportunity to further promote alternatives to immigration detention as a measure of first resort (Objective 13 of the Global Compact linked to Articles 16 and 17 of the Convention).
- The Global Compact also promotes the adoption of regular migration channels (linked to the labour market) with regard to permit options and regularisation for all migrant workers and members of their families: thus it can be a useful tool for combating the trafficking in, and smuggling of, migrants.

⁶ <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-5-2021-migrants-rights-liberty>

- The Global Compact addresses the right to appropriate assistance and counselling and to have access to referral mechanisms, particularly for migrants in vulnerable, situations, including children and victims of crimes (Objective 12 (b) and (c)).

VIII. Access to justice for migrants

Access to justice is a fundamental right and a precondition for the enjoyment of all other rights. Migrants must have total and complete access to the legal system within the countries they reside, regardless of their legal status, to ensure that their rights are fully protected. Key components of the right to access to justice can be found throughout the Objectives of the Global Compact:

- Objective 7 (g) of the Global Compact reaffirms States' commitment to ensure access to legal assistance and representation in legal proceedings and that the delivery of justice is impartial and non-discriminatory.
- Objective 10 (e) of the Global Compact establishes that all migrants regardless of their migration status, must have access to justice and be able to safely report crimes without fear of detention, deportation or penalty.
- Objective 10 of the Global Compact also envisages the development of gender-responsive and child-sensitive migration policies by promoting access to justice and effective remedies, in particular in cases of gender-based violence, including sexual violence, exploitation and abuse.
- Objective 13 (d) and (e) of the Global Compact facilitates free or affordable legal advice by a qualified lawyer for all migrants that are in, or may be subjected, to detention and ensures those migrants are informed about the reasons for their detention.
- Objective 11 of the Global Compact ensures that migrants are able to ensure due process at international borders, migrants must be able to access adequate procedures at all stages of the migration journey, including access to asylum hearings at the border.

Migrants' right to access to justice afforded by the Convention:

- Article 18 of the Convention provides migrant workers and members of their families who are charged with a criminal offence the right to be informed of the charge against them, adequate time and facilities to prepare their defence and to have legal assistance assigned to them, if they do not have any, nor the means to pay for it.
- Article 18 of the Convention also states that in the case of children, their age shall be taken into account in criminal proceedings.
- Article 83 of the Convention ensures that migrant workers and members of their families reporting violations of their rights under the Convention shall have an effective remedy, and their cases reviewed and decided by judicial, administrative or legislative authorities.

IX. Impact of the COVID-19 pandemic on the human rights of migrants

The COVID-19 pandemic has changed our way of working, and this reminds us, more than ever, that the effective protection of the rights of all migrant workers and members of their families under the Convention, regardless of their migration status, should be a priority for all States.

States parties undertake, in accordance with the international human rights instruments, to respect and ensure to all migrant workers and members within their territory or subject to their jurisdiction, the rights provided for in the Convention without distinction on any kind, including their nationality. Migrant workers often face overcrowding and lack of access to basic services in immigration detention, putting them at high risk of infection with the coronavirus disease. States parties must take all measures to prevent the outbreak of COVID-19 in such settings, including by considering alternatives to detention, such as release. In order to respect the inherent dignity of migrant workers deprived of their liberty, States parties are obliged to ensure adequate conditions in line with applicable international standards, including the provision of adequate sanitary, bathing and shower facilities; adequate food and drinking water and access to qualified medical personnel. States parties must ensure separate facilities for men and women, and ensure the provision of gender-specific health care services; any response to the COVID-19 pandemic must therefore include migrant workers in a non-discriminatory manner and prevent stigmatization or marginalisation. COVID-19 does not discriminate against any person; hence, States parties must not discriminate in their response.

- In view of the vulnerabilities that migrant workers faced in particular during the COVID-19 pandemic, general comment No. 6 will include a section on protective measures for migrant workers during emergencies (in general) as migrant workers are indispensable in keeping economies and markets functioning during an emergency, such as during the COVID-19 pandemic. Migrant workers also helped in devising strategies for the COVID-19 response and recovery, including vaccine development. Therefore, the Convention can afford protection to migrant workers, especially during such emergency situations. The Global Compact also refers to situations of emergencies (e.g. Global Compact Objective 7(j), Objective 14(e)(f)).

X. **Conclusions**

- Under the Global Compact, States committed to a number of concrete actions that contribute to the respect, protection and fulfilment of the human rights of migrants, including those set out in the Convention.
- The objectives of the Global Compact take into account a more up-to-date context and propose an interpretation of the Convention in light of current global migration issues.
- The Global Compact proposes a number of tools for the implementation of the Convention, i.e. measures and actions that can contribute to the operationalization of the provisions of the Convention and expand on the interpretation of certain rights and minimum standards set by the Convention.

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