**Human Rights Council Resolution A/HCR/35/L.28 on the Protection of the human rights of migrants: the global compact for safe, orderly and regular migration**

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Best practices must be founded on stable legal grounds which are compatible with international human rights law. Best practices which exceed these minimum standards are well worth diffusion but standards which some states present as 'best' but which are of dubious compatibility with international legal standards to which they have adhered need to be discarded by the international community.

We will be publishing a book entitled Migration and Human Rights in the 21st Century (Routledge, August 2017) which contains the detail of States’ international human rights obligations and their sources in international human rights law. We strongly recommend this forthcoming book to you to ensure that all practices which are proposed as ‘good’ fulfil the requirement of exceeding the existing international human rights obligations of States. Any practice which is recommended as ‘good’ must pass this threshold to be taken into account and diffused by the international community. Practices which grudgingly (and sometimes questionably) reach the minimum threshold of international human rights obligations towards migrants should not be promoted as ‘good’. We would also suggest that ‘existing principles, good practices and policies’ need to be understood from the perspective of the upholding on international human rights law. Principles, practice and policies which fail to achieve this legal threshold but achieve short term political objectives of states where some politicians promote anti-migrant rhetoric cannot be classified as ‘good’.

Just to remind the international community what are the legal standards which apply to migrants founded in international human rights law we draw your attention to the following:

**Summary of Key International Human Rights of Migrants**

*‘We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.’ ’ New York Declaration of the UN General Assembly 19 September 2016’[[4]](#footnote-2)*

The New York Declaration reaffirms the UN member States’ commitment to full protection of the human rights of migrants regardless of status. This solemn undertaking of all States in the UN General Assembly engages more than words – it reinforces the obligation which States already have in accordance with international human rights treaties and the Universal Declaration to take the necessary actions (and refrain from actions which are inconsistent) to uphold all human rights of migrants. This means not just those human rights which seem, to some state officials, unproblematic, but all human rights of migrants no matter whether they may seem complicated, politically sensitive or contrary to State policy, which itself is eternally ephemeral. Human rights are solid and have real consequences for State authorities and migrants. They are not simply political promises to the international community, they are obligations which are also instructions to all officials including judges, (and touching also the private sector and civil society) regarding how to carry out their tasks. If State border or migration authorities fail to conduct their activities in accordance with the State’s international human rights obligations then it will be for the judges (and other complaints mechanisms) to hold them to those legal commitments and for lawyers to assist migrants in bringing their cases before a court of tribunal. Supra national remedies also exist and are very important particularly as regards standard setting but the heavy lifting of human rights compliance takes place at state borders and within their jurisdictions.

This contribution examines the pressing issues which migrants encounter in their daily life from the perspective of the correct application of international human rights obligations. It covers ten key situations where migrants and State authorities enter into contact and tension and where migrants may need to be able to rely on their international human rights to obtain a just resolution. In these closing pages, we review the state of international human rights law as regards these ten subject areas and provide a short summary of the existing state of international law. All of these human rights are also upheld in the New York Declaration. So the purpose of this conclusion is to provide the reader (who may be short of time) with a check list of human rights of migrants from which the Global Compact must build.

**Right to Legal Personhood:**

*‘Everyone has the right to recognition as a person before the law’ New York Declaration of the UN General Assembly 19 September 2016[[5]](#footnote-3)*

To ensure migrants are protected from ‘civil death’ and their rights are respected, States are required to acknowledge legal documentation from the country of origin of migrants, even if the administration in that country is far from reliable, or provide mechanisms for issuing documentation which enable the migrant to prove who they are and legally to participate in the host society.

**Rights at the Border:**

*‘Recognizing that States have rights and responsibilities to manage and control their borders, we will implement border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law.’ New York Declaration of the UN General Assembly 19 September 2016’[[6]](#footnote-4)*

In order to comply with their obligations in international human rights law, States have a responsibility to adopt and implement border governance policies which are not discriminatory based on any prohibited grounds including nationality, race, colour, religion, political or other opinion, sex, gender identity, language, age or economic and social situation.

**Immigration Detention:**

*‘We will also pursue alternatives to detention while these assessments [admission, stay, removal] are under way.’ New York Declaration of the UN General Assembly 19 September 2016’[[7]](#footnote-5)*

To protect the human rights of migrants, States must exhaustively enumerate in their legislation the permissible grounds, procedures and conditions for detention which comply with State obligations under international human rights law.

**Irregular Status:**

*‘We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times.’ New York Declaration of the UN General Assembly 19 September 2016’[[8]](#footnote-6)*

To protect the human rights of migrants, States should establish procedures for regularly assessing, improving, and monitoring the extent to which the human rights of all persons are equally enjoyed by migrants with irregular status

**Rights of Residence, Termination of Residence and in respect of Removal:**

*‘We will continue to protect the human rights and fundamental freedoms of all persons, in transit and after arrival.’ New York Declaration of the UN General Assembly 19 September 2016’[[9]](#footnote-7)*

States have a duty to ensure the liberty of movement within the country to anyone lawfully residing, nationals or aliens, at the same conditions. If carrying out removal, States are obliged to strictly follow the procedure prescribed by law and evaluate all the individual circumstances that may impede it.

**Economic, Social and Cultural Rights of Migrants and Migrant Inclusion:**

**‘**We recall that our obligations under international law prohibit discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ *New York Declaration of the UN General Assembly 19 September 2016’[[10]](#footnote-8)*

States are under a duty to review policy, law and practice to ensure that the economic, social and cultural rights of all categories of migrants are respected, protected and fulfilled, in line with States' commitments under international human rights law to secure the human rights set out under international treaty law to everyone.

**Rights at Work:**

***‘****We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration-related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.’ New York Declaration of the UN General Assembly 19 September 2016’[[11]](#footnote-9)*

Rights at work must be guaranteed to migrant workers on equal footing with national workers in accordance with the principle of non-discrimination, equality before the law and equal protection of the law.

**Family Life and the Migrant:**

*‘We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities.’ New York Declaration of the UN General Assembly 19 September 2016’[[12]](#footnote-10)*

States must pay due regard to the international legal principle that the family (however that concept is understood by the State concerned) is the fundamental group unit of society, and therefore it is entitled to be protected. All of the rights flowing from that status need to be considered when States construct new laws and policies, and States should ensure that the rights apply equally to citizens and non-citizens, without discrimination.

**Freedom of Thought, Belief and Religion and Freedom of Expression and Opinion:**

*‘Gathered today at the United Nations, the birthplace and custodian of these universal values, we deplore all manifestations of xenophobia, racial discrimination and intolerance. We will take a range of steps to counter such attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence.’ New York Declaration of the UN General Assembly 19 September 2016’[[13]](#footnote-11)*

Migrants must not be obliged to reveal their thoughts, beliefs and opinions through, for example, examination of social media as part of an immigration process. Although migrants cannot be penalised for their thoughts, beliefs, religion or opinions, there is no such protection for hate speech. States are required to ensure that migrants are protected against discrimination based on their religion, belief or political opinions. This includes taking steps to prohibit hate speech against migrants.

**The Right to an Effective Remedy, the Right to an Effective National Procedure against Arbitrary Removal and the Right to a Fair Trial:**

*‘Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross- border movements.’ New York Declaration of the UN General Assembly 19 September 2016’[[14]](#footnote-12)*

In cases concerning removal or return of migrants, international human rights law requires a judicial remedy prior to removal or return. This remedy must consist of an independent and thorough national judicial scrutiny comprising facts and law. Evidence presented by migrants must be taken seriously and examined carefully.

**Concluding Comment**

Migrants have internationally agreed human rights. States are under a legal duty to ensure these rights are delivered and respected. All State authorities must ensure that their activities are consistent with their States’ international human rights obligations, including as regards migrants. There are three cardinal rules which arise from migrants’ human rights:

First, having the nationality of another state does not justify worse treatment by States (or the private sector) than the treatment accorded to citizens.

Secondly, migrants without national immigration documents are human beings with human rights.

Thirdly, the denial of rights, including to migrants, on the basis of colour, religion or other prohibited ground is wrong and prohibited by international law.

1. Queen Mary University of London, Radboud University Nijmegen [↑](#footnote-ref--1)
2. Radboud University Nijmegen [↑](#footnote-ref-0)
3. London School of Economics [↑](#footnote-ref-1)
4. A/71/L.1 para 5. [↑](#footnote-ref-2)
5. A/71/L.1 para 13. [↑](#footnote-ref-3)
6. A/71/L.1 para 24. [↑](#footnote-ref-4)
7. A/71/L.1 para 33. [↑](#footnote-ref-5)
8. A/71/L.1 para 41. [↑](#footnote-ref-6)
9. A/71/L.1 para 27. [↑](#footnote-ref-7)
10. A/71/L.1 para 13. [↑](#footnote-ref-8)
11. A/71/L.1 para 57. [↑](#footnote-ref-9)
12. A/71/L.1 para 57. [↑](#footnote-ref-10)
13. A/71/L.1 para 14. [↑](#footnote-ref-11)
14. A/71/L.1 para 33. [↑](#footnote-ref-12)