

## Protecting the rights of migrants in irregular situations

In the New York Declaration, Member States reaffirmed that **all migrants are rights holders**, regardless of status (para. 5), and committed to improve the integration and inclusion of all migrants, with particular attention to access to education, health care, justice and language training (para. 39).

**What protections do States owe migrants in an ‘irregular’ situation?** Human rights are inherent to all human beings. Importantly, these **rights are not tied to one’s citizenship or nationality**. The very presence of migrants within a State’s jurisdiction—whether in a regular or irregular status—imposes obligations on the State to acknowledge their presence, and allow them to claim their human rights.<sup>1</sup> More specifically, States are obliged to **respect, protect** and **fulfil** the human rights of all migrants on their territory or under their effective control, including irregular migrants. It is important to note that protecting economic, social and cultural rights, such as the right to health, housing or education, is closely linked to social inclusion and integration of migrants, which in turn enables them to lead economically productive and culturally and socially enriching lives. States have already committed to provide legal identity for all, including birth registration (SDG target 16.9), which is a crucial step towards ensuring that migrants are able to exercise their rights and access basic services.

**Human rights protection interventions for migrants in irregular situations** The following **human rights-based interventions** are critical to protect the human rights of migrants in irregular situations:

**1. Ensure non-discriminatory access to economic, social and cultural rights and associated services.** The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the rights to health, education, social security, decent work, and an adequate standard of living including housing for all people. While international human rights law (IHRL) recognizes that some rights might only be progressively realized, to the maximum available resources, this does not mean that States may indefinitely postpone taking action. A State that is constrained by a lack of resources still has a duty to take deliberate, concrete and targeted steps towards meeting obligations, including concrete actions to protect the most disadvantaged or marginalized groups in society such as migrants in irregular situations. Moreover, the Covenant imposes a number of obligations of immediate effect, and requires that minimum essential levels of each right should be preserved in all circumstances. States are also prohibited from taking retrogressive measures i.e. downgrading or limiting existing levels of enjoyment of the right.

State authorities often assume that the guarantee of economic, social and cultural rights requires them in all circumstances to provide free health care, water, education, food and other goods and services. This is not the case, however States must contemplate a range of measures to ensure access to these rights and use all appropriate legislative, administrative, judicial, economic, social and educational means to do so. This can range, for example, from ensuring that facilities, goods and services are available at affordable prices, to providing benefits to marginalized groups of migrants, to ensuring non-discriminatory availability of and access to services, to dismantling social barriers that prevent the participation of migrants in the delivery of the right. Even when resources are severely constrained, vulnerable members of society, including migrants in irregular situations, must be protected, and the cost of targeted programmes to protect the rights of such groups need not be high.

*The **2030 Agenda for Sustainable Development**, includes a commitment to ensure the “full respect for human rights and the humane treatment of migrants regardless of migration status”, including, inter alia: Social protection 1.3; Access to basic services 1.4; Health 3.8; Education 4.1-5; Decent work 8.8; and Access to justice 16.3.*

*In August 2013, the Government of **Thailand** made a low-cost health insurance policy available to all migrants, regardless of their status. In addition, a special insurance policy costing 365 baht per year (about US\$ 12) was also made available for migrant children up to seven years of age. The package is the same as that received by Thai citizens covered by the Universal Health Coverage Scheme, including access to immunization services and antiretroviral drugs.*

<sup>1</sup> CESCR, *The Duties of States Towards Refugees and Migrants under the ICESCR*, February 2017, para. 11.

## 2. Clearly separate the provision of services from immigration enforcement for the enjoyment of rights.

Migrants in irregular situations often fear detection and deportation, and are therefore reluctant to claim their fundamental rights unless there are measures in place (“firewalls”) which allow them to interact freely with public servants such as the police, labour inspectors, social workers, school personnel and health care professionals, as well as courts, tribunals and National Human Rights Institutions. Migrants should be able to claim their rights, including by reporting discrimination, violence, hate crimes, and other abuse without fear of repercussions regarding their migration status, such as being identified, arrested, detained and deported. Far from interfering with a “whole-of-government” approach, such measures allow specific departments to carry out their duties effectively, and with the wider community in mind, such as allowing people to safely report crimes to police officers, and to seek medical treatment before health conditions become chronic.

*The **European Commission Against Racism and Intolerance (ECRI)** published guidelines in May 2016 that urge European governments to “ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes”.*

*In **Sweden**, confidentiality rules are the same for non-citizens as they are for citizens, both for access to health care and education. In practice this means that educators and health care workers are not allowed to disclose confidential information—including migration status—unless specifically requested by a Court, prosecutor, police officer or tax authority.*

**3. End the use of detention as a migration management tool.** Many States currently approach migration governance primarily from an enforcement or border control perspective, as a means of deterring irregular migration or enforcing compliance with migration laws. Yet, evidence questions the deterrent effect of such detention, and a number of programs are demonstrating that alternative measures to detention are equally, or even more effective, at ensuring compliance with States’ enforcement aims. At the same time, there is increasing evidence that immigration detention has serious negative impacts on the physical and mental health of migrants, is often unlawful or arbitrary, and reinforces misleading negative stereotypes of migrants. Under IHRL, detention must always be an exceptional measure, and its use in the context of migration must be consistent with the non-derogable prohibition of arbitrary detention, which requires the measure to be strictly necessary and proportionate to a legitimate State aim, and accompanied by full due process guarantees. The UN Working Group on Arbitrary Detention has stated that criminalising irregular migration is not a legitimate State aim justifying the use of detention. Similarly, the Committee on the Rights of the Child has highlighted that “the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child.”<sup>2</sup> States should, therefore, end the criminalisation of irregular migration and work to end all immigration detention by implementing non-custodial, community-based alternatives to detention that fully protect and respect the human rights of irregular migrants.

*Article 2 of **Ecuador’s** Human Mobility Law prohibits the immigration detention of children and extends that protection to the child’s parents or caregivers.*

*Article 111 of the Regulations for **Mexico’s** National Child Rights Law states “At no time will migrant children or adolescents, regardless of whether or not they are traveling with adults, be deprived of their liberty in Immigration Stations or in any other immigration detention centre.”*

*As part of a “Sanctuary City” policy, authorities in **New York City** have committed to providing free legal assistance to all irregular migrants who are detained or facing deportation.*

*The **City of Barcelona’s** Migrant Care and Hosting Department have developed a unique alternative to detention for irregular migrants that includes the provision of a legal identity document protecting migrants from arrest and detention.*

<sup>2</sup> UN Committee on the Rights of the Child, *Joint General Comment No. 23 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 5.