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**Keynote Address**

**TOWARDS THE 2013 HIGH-LEVEL DIALOGUE ON INTERNATIONAL  
MIGRATION AND DEVELOPMENT: THE LEGAL INTERNATIONAL  
FRAMEWORK IN PLACE TO PROTECT MIGRANTS**

**Roundtable 2: "Measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children, as well as to prevent and combat smuggling of migrants and trafficking in persons, and to ensure regular, orderly, and safe migration".**

**New York, 20 February 2013,**

**10:00 am – 13:00 pm, Conference Room 2 (NLB), United Nations, New York**

## INTRODUCTION

Good morning,

It is my great pleasure, in my capacity of the Special Rapporteur on the human rights of migrants, to be able to address this distinguished room of migration policy makers and advocates, at this preparatory round table organised to help prepare for the 2013 UN High Level Dialogue on International Migration and Development.

I very much welcome the High Level Dialogue as an important opportunity for the widest range of actors, including States, intergovernmental organisations and CSOs, to come together to discuss migration in a multilateral setting.

Seven years after the first High Level Dialogue on Migration and Development, it will be a unique opportunity to take stock of the progress accomplished in the global discussions about migration policies worldwide, and to outline issues that still need academic research, policy developments at national, regional and global level. In particular, I believe it is an important moment to reflect on the mainstreaming of human rights into all aspects of the migration debate, and I welcome the fact that the General Assembly has clearly recognised, in both its resolutions in the 2nd and 3rd committees, the importance of human rights as a cross cutting issue for the High Level Dialogue. I am particularly heartened by the fact that the HLD will have a roundtable specifically dedicated to measures to ensure respect for and protection of the human rights of all migrants. I note however, that human rights must be a cross cutting issue that inform all discussions at the high level dialogue: Indeed, in line with the human rights based approach, the pursuit of migration as an inclusive, equitable and sustainable process can only take place when human beings become the central concern of migration policy-making.

Today, however, I am going to focus more specifically on Roundtable two, and set the scene for our two panel discussions:

1. Measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children;
2. Measures to prevent and combat smuggling of migrants and trafficking in persons, and to ensure regular, orderly, and safe migration.

I will thus address the relevant international legal framework and specific measures that can be taken in each of these areas.

### **Some comments about categorisation**

Before I do so however, I would just like to address one aspect of the topic of the Roundtable at the outset. The full title of this roundtable, as you are well aware, is:

*Measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children, as well as to prevent and combat smuggling of migrants and trafficking in persons, and to ensure regular, orderly, and safe migration.*

Whilst I welcome this roundtable wholeheartedly as a positive step in mainstreaming human rights into the agenda of the HLD, I wish to clarify that it is incredibly important that in our work we are vigilant not to encourage blurring of categories such as migration, smuggling and trafficking in human beings.

The topic thus clearly distinguishes between firstly, a focus on promoting human rights of migrants, whilst secondly, combatting smuggling and trafficking. It is thus important that these two issues are sufficiently delinked, otherwise, the conflation of the topics may falsely give the impression that irregular migration is a criminal offence, in line with trafficking or smuggling, and the conflation of the issues may contribute to the undue criminalisation of irregular migration.

Furthermore, it is important to distinguish between smuggling and trafficking; 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. While trafficking always is, smuggling is not per se a crime against migrants. Indeed, we sometimes celebrate some smuggling operations, such as the “underground railway” that drove escaped American slaves to Canada or the one portrayed in the film “Casablanca”.

I am thus pleased that today's meeting has been organised around two interlinked but separate panels, and I suggest that, in the framing of the discussion at the round table, human rights, smuggling and trafficking should be discussed as separate issues.

### **Some comments about terminology**

In line with the human rights based approach, the pursuit of migration as an inclusive, equitable and sustainable process can only take place when human beings become the central concern of migration policy-making.

In this regard, I would like to make specific mention of the question of terminology. In my work as Special Rapporteur, I have intentionally emphasized the importance of using the term "irregular migration", and "migrants in an irregular situation". This is in accordance with relevant international consensus and human rights standards. In light of the fact that irregular migration is not a crime, the use of the expression 'illegal migrant' should be avoided at all costs. The UN General Assembly Resolution No. 3449 of 9 December 1975 recommended that stakeholders avoid using the term 'illegal' to describe migrants in an irregular situation.

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.

This is of paramount importance in the context of the High Level Dialogue. Given the diverse nature of migration and the plethora of institutions engaged on diverse aspects of regional migration, a coherent framework, which insists on human rights at its core and which avoids language which can undermine a human rights approach, is key to the effective protection of the human rights of migrants.

**Question: To what extent is the existing legal, normative, and institutional framework appropriate for protecting the rights of migrants in the context of future trends in international migration?**

All migrants, by virtue of their human dignity and without discrimination, and with very few and narrowly defined exceptions, are protected by international human rights law. Except for

two, they enjoy all civil, political, economic, social and cultural rights guaranteed by the international human rights charter.

These rights extend to all migrants, whatever their administrative status. This was affirmed by a recent resolution of the General Assembly (65/212) on the Protection of Migrants, where the international community “reaffirms the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status”. This principle is replicated in the two Covenants (ICCPR and ICESCR) which explicitly refer to “national origin” as a prohibited ground of discrimination in the enjoyment of civil, political, economic, social and cultural rights. The fundamental tenets of international human rights law – non-discrimination and equality of treatment – have to be fully applied to migrants, just as they are to any other marginalised group in society. Ensuring the prohibition of discrimination in law and practice has been identified as a key challenge in ensuring protection of the human rights of migrants at the national level.

The human rights standards contained in the Universal Declaration of Human Rights, the two international human rights covenants, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and other international human rights instruments as well as related normative standards of other branches of law, particularly international refugee law and international labour law, provide a solid framework for policy-making on migration.

The application of these standards in relation to migration has been further developed by other specialised bodies, including UN treaty bodies and special procedures as well as the ILO supervisory bodies. The Human Rights Council and the General Assembly (Third Committee) adopt resolutions each year which consider respectively the human rights of migrants, and the protection of migrants and of women migrant workers. The General Assembly (Second Committee) also considers the issue of “international migration and development” in a separate process.

In addition, migrants are also protected by other normative standards in more specialised fields of law.

The ILO has numerous instruments concerning international labour law. This includes, among others, the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and other pertinent instruments such as the Private Employment Agencies Convention, 1997 (No. 181) and the Domestic Workers Convention, 2011 (No. 189), as well as the accompanying Recommendation No. 201, and the HIV and AIDS recommendation, 2010 (No. 200). Humanitarian law and refugee law are also very relevant, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Moreover, international criminal law plays an important role, in particular with regard to the protection of victims of human trafficking and of smuggled migrants, including the Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air.

### **Gaps in practice**

Despite this normative framework, there remain, however, significant gaps in practice, including in relation to the protection and promotion of the human rights of migrants in an irregular situation, and the protection of labour rights of migrant workers.

Let's take just one example (of many). The Covenant on Economic, Social and Cultural Rights which provides, "everyone" is entitled to the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has further clarified that the obligation to respect the right to health requires that States refrain from denying or limiting the equal access of migrants in an irregular situation to preventative, curative and palliative health services.<sup>1</sup> In addition, health experts agree that enabling migrants to access early diagnosis and follow-up services makes sense from a public health perspective.

Nevertheless, migrants, and in particular irregular migrants face discrimination, exclusion, are often prevented in law and in practice from being able to access adequate healthcare. Other rights such as the right to housing, or education, or freedom of association experience

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<sup>1</sup> CESCR, General Comment No. 14, Right to Health, para. 34.

similar implementation gaps – migrants are often prevented from renting decent accommodation, or from exercising their right to freedom of association. Others will not report crime to the police or will not send their children to school, out of fear of being deported.

### **A sufficient normative framework**

There has been some discussion that the gaps in policy and practice are due to the fact that, in the absence of widespread ratification of the ICRMW, there is no single document consolidating the legal normative framework on migration and no single UN agency responsible for safeguarding the legal and normative framework.

Although the ICRMW is an important treaty, which should be much better ratified, I respectfully disagree. Given the breadth of concerns ranging from health to human rights, to labour, to refugees, to trade, to the environment, among others, the legal and normative framework affecting international migrants could not be built as nor unified into a single instrument, treaty or mechanism. Similarly, the centrality of pertinent aspects of migration/migrants in mandates and on agendas of most government ministries and of most UN departments and specialized agencies makes difficult obtaining comprehensive national or global systems or mechanisms for coordination and cooperation.

In my opinion, there is a sufficient normative framework in place, which should uphold the rights of migrants. The main question is that of its implementation.

### ***A weak institutional framework***

Regarding the institutional framework, while noting the important work of the Global Migration Group as the inter-agency coordination body on migration, I remain concerned about a lack of a coordinated international approach to migration which has as its core a respect for human rights. Many institutions have something to say about migration, but the human rights of migrants are not the core preoccupation of many.

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.

**So the question remains: Why do so many migrants continue to suffer abuse, exploitation and violence, despite a comprehensive legal framework and extensive institutional response?**

Lack of understanding about the human rights of migrants makes them an increasingly vulnerable group, easily targeted. 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.

Other marginalised groups in the past, such as women, detainees, minorities, indigenous peoples or LGBTIs, have politically mobilised and progressively rallied their political elites before gaining some recognition. We must understand that this will not happen for vulnerable migrants, as they do not benefit from the standing of citizens in the local political debate: they don't vote, they rarely mobilise politically, they rarely complain officially. For fear of being deported, they try to become invisible and won't stick their head out. When something bad happens, they try to move on. They are the objects of the debates on migration policy, rarely subjects in the discussion. Even in countries with an electoral democracy, there's little electoral incentive in protecting the rights of vulnerable migrants, when electoral gains can often be made through migrant-bashing. We should not conclude that politicians who do not strenuously defend migrants' rights have no moral compass: we should simply acknowledge that the lack of electoral incentive is much stronger. Indeed, in several countries, the best institutional defenders of migrants' rights have been the courts, which have applied, without electoral pressure, the human rights of all equally to migrants, and declared many public policy choices to be against human rights.

In this regard, there is an urgent need to counter the increasing social acceptance of xenophobic and anti-immigrant discourse which de-humanizes the movement of individuals in search for a better life behind populist terminologies such as "flocks", "flows", "waves" of people. In such discourse, the individual has no face, no name, no place and no rights. It also severely undermines public understanding of the positive contribution that migrants as



engines of new experiences, perspectives and ideas bring to a country's social and economic development.

**What are the key components of a comprehensive approach to migration management that guarantee migrants' human rights?**

I suggest nine points.

1. *Decriminalisation*: Irregular entry or stay should never be considered criminal offences: they may constitute a small administrative offence, but are not per se crimes against persons, or against property, or against national security. Irregular migrants, even smuggled migrants, are not criminals per se and should not be treated as such.
2. *Detention*: We should move away from considering systematic or large scale detention as a legitimate tool in combatting irregular migration. Apart from being inefficient at deterring migration for the most part, overcrowding inappropriate detention facilities doesn't respond in any way to the drivers of international migration. It may satisfy populist agendas and create business opportunities for security companies, but this is its only real achievement.
3. *Discourse*: We should ensure awareness-raising on the human rights of migrants among the general public, and specific training to professionals dealing with migrants. We should take all the necessary measures to combat negative perceptions of migrants and xenophobic verbal and physical violence against migrants. States must develop a public discourse that fosters inclusiveness, non-discrimination, recognition of diversity and pluralism as social assets, and avoid the criminalising and "otherising" terminology.
4. *Children*: we should ensure the 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, appointing legal guardians to unaccompanied migrant children, and giving them access to appropriate legal representation, education and health care services, should be key objectives.

5. *Trafficking*: We should fight human trafficking by empowering the victims and ensuring them a stable, sustainable, long term administrative status, upon which to rebuild their shattered lives and restore their dignity.
6. *Smuggling*: We should fight smuggling rings, but not but targeting migrants primarily, through detention in particular. We should recognise that the smuggling market is the direct consequence of the barriers we pose to human mobility. Policies that have the effect of driving irregular migration further underground create more vulnerability for migrants and actually empower smugglers and create opportunities for human rights violations. We unfortunately too many deaths of migrants at sea, in deserts or in mountainous regions. Finding ways to facilitate human mobility, even for low skilled workers, would go a long way to reduce the attractiveness of smuggling rings. Empowering migrants is the only way to ensure that they will be the allies of law enforcement agencies in the fight against criminal rings.
7. *Access to justice*: Migrants need access to recourse to independent institutions on all the issues which they must face due to their migration status. They should be empowered as rights holders. 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. National human rights institutions should be empowered, in jurisdiction, in expertise and in funding, to take on the issue of the protection of human rights of all migrants, including irregular migrants, and to fight against their discrimination. Appeals and judicial controls should always suspend deportation proceedings until the matter is finally settled.
8. *Labour rights*: Action on the pull factors is too often forgotten as a policy tool. Vulnerable migrants such as temporary migrant workers migrate because temporary labour opportunities are open to them, often in “dirty, difficult and dangerous” work environments: destination States need them. Irregular migrants also respond to the important unrecognised labour needs and underground labour markets that exist within destination States for their work, at the exploitative wages and work conditions that local employers are offering, an exploitation which is rarely adequately combatted because it increases the competitiveness of economic sectors with low profit margins. Reducing irregular migration should start by decreasing the pull factors and fighting labour

exploitation, thus recognising migrant workers as workers first and foremost and empowering them to fight for their own rights.

9. *Civil society organisations*: We should support much better, through better funding as well as by treating them as partners in policy making and policy implementation, all the civil society organisations which work tirelessly at helping migrants navigate their journey or their lives in the destination country. They contribute to empowering migrants, thus helping them to resist exploitation and criminal rings. They should be treated as allies of State authorities and not threatened as accessory to criminal activities.

## **CONCLUSION**

More generally, States should recognise that migration is the normal state of mankind and that migration will happen, no matter what, managed when the conditions are ripe, unmanaged when we do not address the push and pull factors. We all need to be better educated on this and States have a responsibility in not fuelling anti-immigrant sentiment and reinforcing prejudices and stereotypes.

While States have the power to admit, to deny entry or to return of foreigners, they equally 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, without discrimination, whatever their administrative status and circumstances.

Empowering individuals to fight for their own rights, by giving them access to the social, political and legal tools they need to protect their dignity, has always been a winning strategy. Helping migrants fight trafficking rings and smugglers' violence en route, supporting their fight against labour exploitation in destination States, and supporting the civil society organisations networks that help migrants would go a long way towards reducing human rights violations.