



Queen Mary University of London, School of Law  
Legal Studies Research Paper No. 272/2018

## **First Perspectives on the Zero Draft (5 February 2018) for the UN Global Compact on Safe, Orderly and Regular Migration**

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In this contribution to the negotiations of a UN Global Compact Migration a number of academics and practitioners based at different institutions and different countries have come together to provide their initial views and comments on the first draft. The objective of this document is to provide an initial response to the Zero Draft from academia and civil society which examine what we consider to be the key parts of the Zero Draft. For each section examined we provide our personal views on the advantages and weaknesses inherent in the approach and some commentary explaining briefly the reasons for our positions. This paper is not intended to be a detailed examination of every aspect of the Zero Draft and should be read together with the Draft.<sup>1</sup>

The emphasis in the preamble of the Zero Draft on existing human rights standards and their applicability to migrants is very important. Indeed, more concentration on the existing UN human rights standards, starting of course with the Universal Declaration of Human Rights (UDHR) and all the conventions which provide specificity to it must be at the centre of the Compact. The Global Compact must be guided by the New York Declaration that was agreed by consensus of Member States at the General Assembly meeting in September 2016. Negotiations on the Compact itself cannot permit a small number of States to alter the content of what was originally agreed. The New York Declaration must provide a framework for the Compact, especially in regard to Human Rights. It would be unacceptable if the final version of the Compact gave even the appearance of moving away from the existing obligations of states to protect and deliver human rights for migrants (as well as citizens). Fuller references to the core international human rights treaties would be welcome here rather than a selective approach taken in preamble 1.

The vision and guiding principles of the Zero Draft include three sections – common understanding, shared responsibilities and unity of purpose. All three reflect a common approach – states must work together on issues around migration as migration is normal, advantageous for countries and part of international prosperity. It is also important that state authorities remember that the only thing which divides their citizens from being migrants (or foreigners) is the international border. Everyone can be a migrant by reason of crossing an international border and residing outside his or her country of nationality. How this person, citizen of one country and subject to the immigration rules of another is treated is a matter of international relations. It is right that the UN is seeking new ways to diminish friction which arises from time to time regarding migrants and to ensure that states deliver their human rights duties including to migrants who are equally the beneficiaries of human rights conventions. The centrality of those human rights obligations needs to be highlighted in the Compact.

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<sup>1</sup> Accessible online here:

[http://refugeesmigrants.un.org/sites/default/files/180205\\_gcm\\_zero\\_draft\\_final.pdf](http://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf).

Given the new focus on information gathering, sharing and knowledge building, which is evident throughout the preamble and draft objectives, the Compact must address the data protection rights of migrants themselves. The necessity of firewalls to ensure that data regarding migrants is not being shared across States without permission, is absent from the current draft but is essential to protect their privacy.

In the following sections, expert academics and members of civil society provide their perspectives on the positive and negative elements of key objectives set out in the Zero Draft. In the final section, there is an overview of the implementation and follow up proposed in the Zero Draft.

### **OBJECTIVE 1: collect and utilize accurate and disaggregated data as a basis for evidence based policies**

Professor Elspeth Guild, Queen Mary University of London

Positive Elements: evidence based policy making. This is a very important aspect of national policy on migration and mobility. Too often policy appears to be developed on the basis of lack of information and personal impressions verging on prejudices. Using real data as the basis of policy development is key to good public policy. Hereby the Global Compact should place individuals at its core (as per Zero Draft, para 13). Gathering data on the costs of migration and reducing the costs of migration should be a core objective in the collection of data as a basis of evidence based policies. As the international community has underlined, migration is excessively priced for the majority (A/68/190, 25 July 2013). What these costs entail, how they are distributed and who encounters them where has so far been insufficiently analyzed, due to lack of sufficient data. This data needs to take into account a) up-front costs for recruitment, but also b) wage, working and social condition differentials in the destination countries, and c) return costs (see the Migrant Premium 2018). The reduction of the migrant premium and associated costs may, under certain conditions (such as prohibited discrimination), not be only a desirable outcome, but an international obligation. Some of these objectives are in the Zero Draft under 1h) such as 'remittance transfer costs, health, education, living and working conditions, wages', but a more extensive data collection is required that covers the full cycle of cost for the variety of migration corridors.

Negative Elements: disaggregated data sharing among states: all people whether they are mobile or sedentary are entitled to the right to privacy expressed in the UDHR and Article 17 ICCPR. The volition to capture data of passengers is evident in various Passenger Name Record agreements, the Trump Travel Bans which are justified on the obligation of all states to provide the US authorities with information about people leaving their countries for the USA. In many states concern about the entitlement of state authorities to cull and manipulate data of citizens is subject to constitutional limitations. But as soon as the citizen is mobile moving across international borders, his or her data is treated in the same way as that of a foreigner (see passenger name record agreements). That some states use mobility as a surrogate to enable them to collect data on their own citizens who have travelled abroad indicates the extent of the problem. National constitutional protections of citizens from the snooping state are not sufficient. This protection of privacy extends internationally through Article 17 ICCPR – the

snooping state is equally prohibited from trying to cull our personal information whether we are citizens or foreigners.

#### *Commentary*

There is a tendency in many states to seek ever increasing amounts of personal data on both their own citizens (often blocked by national constitutions) and foreigners. The convergence of fears about foreigners and risks to society has resulted in a legitimization of the collection of as much data as possible about people, both through obligations on the private sector (such as Facebook, Microsoft etc) to provide data which people have provided for the purpose of access to specific services and through public means. Mobility is one of those areas where some states claim there is a grey space between being a passenger and being a citizen or foreigner entering a state. In that grey area the collection, storage, manipulation and sharing of personal data becomes a contested area.

It would be a worrying development if the Global Compact on Safe, Orderly and Regular Migration adopted an approach that the privacy of people, whether foreigners or citizens, can be collected, stored manipulated and shared irrespective of the human right to privacy. This profound challenge to the right to privacy a right espoused in the UDHR and given constraining force in Article 17 ICCPR must be justified. The objective of orderly movement must not be linked to the collection of personal data. Rather it should be associated with safe travel which brings people to places where the authorities of the destination expect them to arrive. People only arrive in disorderly manners because they cannot arrive orderly (a result of obstacles to ordinary movement in the forms of visas, carriers sanctions and others). Orderly arrival requires states to encourage people to arrive in places where they have plenty of border guards in place rather than diverting some people to risky and uncommon entry points where there are no border guards. It is not wise in a Global Compact to encourage states to have disregard to their obligations to protect the right to privacy of all people, whether citizens or foreigners.

#### **Objective 3: Provide adequate and timely information at all stages of migration.**

Katharine T. Weatherhead, Queen Mary University of London

Positive Elements: This objective provides a basis for developing predictability in migration policies and supporting people to understand the frameworks which impact upon their migration. The objective recognises that information can help to enable access to justice and basic services which is integral to the protection of migrants' human rights.

Negative Elements: The language in this objective privileges a State-centred understanding of information dissemination. Such an understanding limits the opportunities for migrants to make use of information about laws and policies, and widens the risks for information to be dominated by migration restriction efforts.

#### *Commentary*

This objective goes beyond the New York Declaration in considering the place of information in migration and prompts activity which can help people to understand the procedures, rights, and obligations engaged during migration. It expansively commits to information efforts which take into account all stages of migration, including emergency

situations where information should be provided to migrants ‘on an equal footing with nationals’. The objective includes actions which provide for information to be made available about fundamental human rights, international protection, access to basic services, and access to justice, particularly around human rights violations. These features indicate potential for the objective to contribute to migration policies which are accessible from an information perspective and whose human rights protections are open to being called upon.

However, there is room for this potential to be enhanced in later drafts of the Global Compact on Migration. The actions are centred around State measures to *provide* migrants with information about laws and policies, without recognition of people’s rights also to *seek, receive, and impart* information, in the language of Article 19 UDHR. Action which supports migrant efforts to seek, receive, and impart information might include, for example, responding to communication needs that arise from language differences, literacy levels, connectivity issues, and gender. It might also include strengthening the opportunities for people to know about their own personal migration situation, rather than only general laws and policies.

As it stands, there is a risk that the objective may encourage States to emphasise deterrence in their information activities, rather than commit to developing predictability and certainty as stated. The risk is underpinned by a combination of references to informing migrant decisions, pre-departure orientation, dangers of irregular migration, data gathering and intelligence sharing between States, as well as a lack of reference to independent or trusted information sources. Some people migrate out of desperation, as mentioned in the Secretary General’s report, and information plays a complex role in these cases. Objective 3 would benefit from understanding information dissemination more broadly as an ongoing and non-linear conversation between migration stakeholders.

#### **OBJECTIVE 4: Provide all migrants with proof of legal identity, proper identification and documentation**

Amal de Chickera, Institute on Statelessness and Inclusion

Positive Elements: Firstly, it is a big positive to see such a clear commitment in the Zero Draft to addressing statelessness in the context of migration. Statelessness is an often-overlooked issue, whereas para 18 of the Zero Draft sets out a commitment from the outset to “*equip migrants with proof of legal identity ... at all stages of migration in order to **end statelessness** and avoid other vulnerabilities.*” A second positive is that this objective speaks of “**proof of legal identity**”, and not ‘legal identity’ per se. This is a significant improvement on the Sustainable Development Goals, Target 16.9 which speaks of “*Legal identity for all...*” The phrasing of the Zero Draft is an acknowledgement that every person’s identity is inherent to them, and that the lack of documentation is not to be equated with a lack of legal identity. Given that *inter alia* ‘nationality’ is one component of a person’s legal identity (CRC Article 8.1), this is an important distinction to be made.

Other positives include the emphasis on providing identity documents to all migrants “*by registering migrant births and reaching undocumented populations*”. This commitment is directly linked to existing state obligations to avoid statelessness and

ensure the right to a nationality; and it points to a real world problem, where in many countries, stateless persons and irregular migrants are wrongly denied birth registration.

The commitment to ensuring “adequate, timely, reliable and accessible consular documentation to all migrants”, is also important, given that many migrants become stateless when their own country fails to recognise and protect them. This commitment therefore, addresses one of the most common challenges in the context of statelessness and migration, where an individual is caught between a failure/refusal to take responsibility of the country of origin, and a failure/refusal to identify and protect, of the country of migration. As will be addressed later, the Zero Draft could have taken a more comprehensive position here, but nonetheless, this is a positive element of the text.

Another positive is the commitment to “Abolish requirements to prove citizenship or nationality at service delivery centres to ensure that stateless migrants are not precluded from accessing basic services nor denied other basic human rights”. In practice, stateless people are routinely denied access to basic services and rights because of their lack of a nationality, whereas human rights law is clear that this should not be the case. And so, this is a timely and important restatement of a commitment to respect and protect the universal application of human rights to all persons. The related commitment to issue identity cards to all migrants (regardless of their status), is a practical recommendation, which could increase the likelihood of stateless migrants actually being able to access their rights. However, here too, as will be discussed below, there is a danger in implementation, and a missed opportunity for more comprehensive and sustainable protection.

Negative Elements: The over-reliance on biometrics, without placing equal emphasis on privacy, data protection and the prevention of abuses, is perhaps the biggest concern. Para 18.a. and 18.c. both call for the rolling out and sharing of biometric data, with no reference to guarding against potential abuses. Furthermore, Para 18.g. speaks of issuing all migrants with identity cards, as a means of enabling their access to services and rights. In reality, the rolling out and sharing of biometric data and the linking of the possession of biometric cards to accessing socio-economic rights, has led to many large-scale lapses in relation to the right to privacy, as well as abuses of power by public officials. The experience in India with the rolling out of Aadhar cards is one example. Furthermore, there is a concern that in the absence of connecting up para 18.g. to Objective 12 on status determination, the process of providing stateless persons with identity cards could serve as a precursor to attempted removal, as opposed to protection and integration. Importantly, the emphasis on biometric data runs throughout the Zero Draft and should therefore be addressed at a more fundamental level.

The other concerns related to the Objective 4 text, are less about negative elements, and more about missed opportunities. These are looked at in the commentary below.

### *Commentary*

Objective 4 goes beyond the New York Declaration, by clearly identifying statelessness as a phenomenon that can and must be addressed through the Global Compact, and by providing some concrete and practical guidance on how this can be done. Many of the

positive elements of the text have been discussed above, as has the negative element of emphasis on 'biometric data' with no adequate attention to protection from abuses in this regard.

Upon analysis, the most important take away from the Objective 4 text is that it goes far, but not far enough. It identifies how statelessness can be caused in a migration context, but only offers partial solutions. It provides sound, practical guidance on how stateless people can be protected in a migration context but does not extend this to all stateless people. Where the text would have benefited from direct reference to other Objectives (and where other Objectives should refer to Objective 4), it fails to do so. And so, Objective 4 is both a marker of progress and of missed opportunity.

The text appears to build on dual assumptions that:

1. Providing migrants with the right documentation alone will resolve their statelessness.
2. The overwhelming responsibility to end statelessness lies with the country of origin.

As such, it is largely silent on the more fundamental problem of discriminatory laws, policies and practices which create and perpetuate statelessness (regardless of documentation); and does not re-state the human rights obligation of host states to also play a role in ending statelessness.

Para 18.b. for example, calls for strengthened measures to *"facilitate citizenship to children born in another State's territory in situations where a child would otherwise be stateless, including by allowing women to confer their nationality to their children"*. While this paragraph sets out obligations of the country of origin of the parents of a child born in a third country, it is silent on the obligation of country of birth / migration, to grant nationality to children born on their territory who would otherwise be stateless, which is clearly set out in both the Convention on the Rights of the Child and the 1961 Convention on the Reduction of Statelessness. Furthermore, while it is important that discrimination against women has been set out, an opportunity to be more comprehensive has been missed, both through the failure to emphasise that fathers should also have the right to pass on nationality to children born abroad, and to cover other forms of discrimination (race, disability etc.) which also cause statelessness.

Para 18.d. on access to consular documentation, is also largely positive. However, while it sets out the role of the country of origin to provide consular documentation, it is silent on the responsibility of the host state in the absence of such protection and documentation. Furthermore, the text does not cross-refer this commitment with Objectives 12 (status determination), 13 (detention) and 14 (consular protection). Significantly, the text of all of these Objectives do not refer to statelessness, despite it being of utmost relevance. Had the text approached this issue in a more comprehensive way, it would have made a connection between (lack of) consular protection and documentation and (prohibition of) arbitrary detention, concluding that the host state has an obligation to protect those who have no consular protection or are denied it by their state. This should then lead to referral to a Statelessness Determination Procedure (which should be directly addressed under Objective 12).

Similarly, para 18.f. on abolishing requirements to prove citizenship in order to access rights and services could have gone further, by recommending that such persons are automatically referred to a Statelessness Determination Procedure. It is only through being identified as stateless in a migration context, that durable solutions will ultimately be viable.

### **Objective 5: Enhance availability and flexibility of pathways for regular migration**

Kees Groenendijk, Emeritus Professor of Sociology of Law at the University of Nijmegen

Positive elements: "allowing flexible visa status conversions" under (d) and facilitating regional free movement regimes and visa liberalisation under (b). A number of regions in the world have implemented such regimes such as the European Union, MERCOSUR, ECOWAS and others. This practice reduces friction at borders, provides greater certainty to people moving across these regions regarding their status and clarity on their entitlements which are guaranteed by the participating states together. States and the international community could learn from the positive effects of the practice of existing regional regimes on these points.

Negative elements: It is odd that in 5(a) the model agreements attached to the ILO Migrant Workers Conventions nos. 97 and 147 are not mentioned and the "sector specific standard terms should be developed" without mentioning the work of ILO. Further, it should be stated in 5(e) that "accelerated and facilitated visa processing for employers with a track record of compliance" should be open not only for large (international) companies but also accessible for medium and small firms. Clause 5(f) on temporary and permanent protection does not belong here but in the other Compact. Clause 5(g) on family reunification sounds good but is meagre, since it only mentions removing barriers to the realisation of the right to family life and family unity (thus the absolute minimum), not about removing barriers to family reunification. Moreover, it should be added that work authorisation and access to social services/security is for admitted family members. Such wording would better reflect the human right to family life contained in Articles 17 and 22 ICCPR.*Commentary*

Pathways to legal migration are a key objective for the Compact. States have the first responsibility for their immigration laws but not an exclusive monopoly. The right to non-refoulement is the most well recognised of examples where any state's claim to an exclusive right to admit or not admit foreigners is confounded. It is not only border control but also migration which is a shared responsibility of the international community. This is because all states have a stake in the treatment of their citizens by other countries and must take into account the legitimate concerns of other states about how they treat the nationals of those countries. Responsibility for pathways not only requires a rethinking of interstate relations as central to border control and migration but also the position of the private sector. Companies play a key role in demanding safe pathways for their employees to enter, reside, enjoy family reunification and be protected from expulsion irrespective of their nationality. The private sector has taken its concerns about moving its personnel safely and legally around the world to another international venue – the World Trade Organisation – through the widening of the rules of the General Agreement on Trade in Services. Once again, the choice of the private sector to encourage and actively participate in the adoption of legally binding solutions to new pathways through international commitments of states adopted cooperatively



reveals the fact that migration pathways are part of international relations not an exclusive monopoly of each state.

Pathways for migration need to meet the actual practices within all states. If they do not the result is that people fall into irregularity. Where national immigration rules fail to respect the reality on the ground and most specifically the needs of employers and the legitimate demands of family reunification the result is not that migrants do not come but rather that they live in irregularity with all the negative consequences thereof. Exploitation of migrants is often made possible because of the irregular status of those migrants. Family members whose reasonable desire to live with their families in a host state but whose applications are rejected by that state's authorities for reasons unrelated to the genuine wish to live together, such as income requirements, language tests, visas requirements etc frequently become irregularly present. The negotiation of the Compact needs to take seriously the human rights of migrants as employers, employees, family members and artists and investors and encourage states to widen the pathways for regular migration to meet these shared concerns of the international community and the private sector.

#### **OBJECTIVE 7: Address and reduce vulnerabilities in migration**

Professor Delphine Nakache (University of Ottawa) and Professor Idil Atak (Ryerson University)

Positive Elements: The recognition that migrants face multiple and intersecting forms of vulnerability; the placement of human rights at the centre of states' action, in particular through the commitment to adopt a child-specific and gender-specific approach in their actions. A positive element is also the acknowledgment that there are "legal and practical impediments" in destination states that are conducive to irregular migration and that there needs to be policies in place to prevent such situations. Finally, the emphasis on the role of local authorities in assisting migrants in a situation of vulnerability is most welcome. So is the call for states to establish firewalls between immigration enforcement and public services.

Negative elements: Although it is a positive development that human rights are recognized as an essential part of states' actions, there is no need for the creation of a new, binding protocol to address the protection of vulnerable migrants because the relevant norms already exist and states have already signed/ratified the relevant international and regional human rights instruments. What is needed, however, is a commitment by states to ensure the protection of vulnerable migrants based on these existing instruments as well as effective mechanisms of accountability and oversight. On that note, it is disappointing to see that most of the commitments are formulated with reference to broad human rights protections: they do not identify who are vulnerable migrants, what are their specific protection needs and which approach to be used to fulfill their most pressing needs. In fact, under Objective 7, only children are identified explicitly as a vulnerable group. The situation of many other groups of vulnerable migrants- such as pregnant women, migrants with a disability, mental illness or acute/chronic illness, elderly migrants, LGBTQ migrants and migrants subjected to extreme violence, trafficking, torture etc.- is unacknowledged. As well, the wording of Objective 7 omits the fact that the vulnerability in which migrants find themselves is

mostly constructed by states through policies and practices, such as border controls, interception measures, restrictive migration and asylum rules.

*A word of caution re- the best interests of the child.* The commitment to “uphold the principle of the best interest of the child as a primary consideration” in situations concerning migrant children is a positive step in the right direction. Indeed, Art. 3.1 of the *Convention on the Rights of the Child*, which is the most globally ratified UN human rights treaty, clearly states the right of children to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that affect them. However, Art. 3.1 has also been interpreted as meaning that the best interests of the child must always prevail over any other considerations. This point should be specified so as to avoid any situation where the interest of a child is seen as an important element to be considered, but not as one that should outweigh other considerations.

#### *Commentary*

Vulnerability is a very complex term, which can be understood in a variety of ways and hence can give rise to different kinds of responses. In the context of the Global Compact, the term “vulnerability” focuses on the inherent vulnerability of migrants that stem from such factors as age and gender. This often serves to portray migrants as helpless victims. However, migrants’ vulnerability is also policy-induced and mostly constructed by states and other actors. The non-acknowledgment of this fact effectively shifts the responsibility for the problems faced by migrants away from states. A better understanding of vulnerability is thus crucial in focusing the debate on states’ legal obligations towards migrants. It is essential to develop a framework where the policy-induced or constructed vulnerability of migrants is identified and acted upon. This framework should be built upon existing human rights instruments and should account for the many circumstances in which migrants’ vulnerability is created or exacerbated by states and other actors.

### **OBJECTIVE 8: Save lives and establish coordinated international efforts on missing migrants**

Syd Bolton and Catriona Jarvis Co-Conveners, Last Rights Project

Positive Elements: In general, the proposals outlined in subsections (d) & (e) are welcome. Confidence in the obtaining and analysis of data and in the consequential data-handling, storage and sharing procedures is essential to the efficient and timely investigation and identification of all missing and deceased persons. It is a prerequisite of justice that relatives of the missing and the deceased must have the trust and confidence to engage with investigations and that personal data is handled and maintained in such a way as to prevent its degradation and misuse.

Negative Elements: Without essential procedural and technological safeguards of the data collected, there is a serious risk that 1 – families will refuse to engage with such procedures and/or 2 – families and their missing relatives may be seriously prejudiced by engagement or non-engagement with them.

Inappropriate and inadequate handling and sharing of data may undermine its evidential value and also expose the missing and their families to harm within the host country and/or their countries of origin. It may delay or even defeat the identification of

a person and cause unnecessary and prolonged suffering to their families. It may lead to *refoulement* or the creation of *refugee sur place* claims. It may harm the interests of children as missing or family members of missing relatives and prevent recovery, rehabilitation and redress.

### *Commentary*

The situation of the missing, the bereaved and the dead is of growing concern globally and although some of those concerns are now reflected in Objective (8) of the draft Compact, the many other issues of concern we have identified should necessarily inform a number of other Objectives to a greater or lesser extent. Whilst for the purpose of this note we have confined our brief comments to specific aspects of Objective 8, they are not exhaustive. Objectives 1, 4, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 21 are also of importance to the treatment of the bereaved, missing and the dead and should be seen as inter-related. Our comments should be read in that light.

It is clear from our observations in the Mediterranean and the USA/Mexican border regions, with families and with those assisting families of the missing and the dead that one of their principle concerns is that the information they supply will be used against them or their missing relatives by the police, border officials or other government departments and as a result they are often very reluctant to share information and data either at all, or beyond trusted individuals. This slows down, inhibits and even prevents investigations. Whether states do or do not misuse data, the confidence of families needed to engage in tracing processes is undermined by their lack of trust in how it may be used.

Whenever States gather DNA, ante-mortem and post-mortem data, or other material evidence, such collection, storage, data-interrogation and matching procedures should only be used for the sole purpose of identification of that individual missing person.

The fully informed consent of relevant family members must be obtained in writing setting out the extent and purpose of the data collection and use. Any proposed variation of use must require step by step additional written consents. Where it is necessary for such data to be cross-referenced with other data systems, that data must be anonymised or encrypted and handled in such a way that it is not open to misuse, for example for the purpose of taking immigration enforcement actions, criminal prosecution, exclusion from civil registrations, health, welfare, education or employment or where shared with a foreign state, used to persecute or otherwise harm, discriminate against or interfere with relatives in the country of origin.

Both public and private owned data storage systems and handling procedures must be designed in such a way that there are no 'back-door' routes into the data, nor any overriding authorisation procedures which may interfere with the basis on which the data was provided by the families. This should be a matter of explicit legislation as well as system designs for anonymisation, firewalls, encryption and authorised users. Data should not be shared internationally unless the state or organisation with whom the data is intended to be shared demonstrates that it meets these requirements. Breaches of these measures should be treated as a criminal offence.

These proposals are consistent with the International Committee of the Red Cross 2017 recommendations on missing migrants and their families<sup>2</sup>, the 2017 Joint General Comments of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration<sup>3</sup> and the 2009 International Standards on the Protection of Personal Data and Privacy (The Madrid Resolution)<sup>4</sup> with which the Last Rights Project concurs.

### **OBJECTIVE 9: Strengthening the transnational response to smuggling of migrants**

Dr Jean-Pierre Gauci, British Institute of International and Comparative Law

Positive elements: A key strength under Objective 9 is the implicit acknowledgement of the risks inherent in the conflation of smuggling with trafficking, but at the same time the highlighting of the need to address situations of smuggling under aggravated circumstances. This recognises the risks experienced by smuggled migrants and moves away from the assumption of consent.

Negative elements: the objective fails to move the needle forward in efforts to deal with migrant smuggling and instead re-affirms the existing obligations most notably those established under the Smuggling Protocol. This includes criminalisation of smuggling, cooperation and the protection of the rights of smuggled migrants.

As a standalone, Objective 9 does not effectively address the real issue behind migrant smuggling and that is the lack of other pathways for people to migrate. Some commitments in this regard are set out throughout the Draft but it would be important to acknowledge that smuggling happens because it remains the only viable option for most people. This effectively challenges the notion that smuggling happens with the 'consent' of the smuggled migrant.

#### *Commentary*

The emphasis on collaboration, which is of course the underpinning of the entire compact is critically important and anti-smuggling efforts will not succeed without it. That said, any focus on cooperation must acknowledge the limitation of that cooperation especially when such cooperation risks resulting in human rights violations including violations of the principle of *non-refoulement* or the return of people to situations of harm. International human rights law builds inherent limitations to the possibility of cooperation.

The de-criminalisation of irregular border crossings is something that has been achieved in various countries although it ought to be noted that allowing for it to be considered an administrative offence without sufficient safeguards can still result restrictive measures including detention and difficulties in accessing procedures.

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<sup>2</sup> [https://www.icrc.org/sites/default/files/document/file\\_list/missing-migrants-and-their-families.pdf](https://www.icrc.org/sites/default/files/document/file_list/missing-migrants-and-their-families.pdf)

<sup>3</sup> CMW/C/GC/3-CRC/C/GC/22\* - paragraph 17. -

[http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1\\_Global/CMW\\_C\\_GC\\_3\\_CRC\\_C\\_GC\\_22\\_8363\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/CMW_C_GC_3_CRC_C_GC_22_8363_E.pdf)

<sup>4</sup> ICDPPCRD 3 (5 November 2009) -

[http://www.privacyconference2011.org/htmls/adoptedResolutions/2009\\_Madrid/2009\\_M1.pdf](http://www.privacyconference2011.org/htmls/adoptedResolutions/2009_Madrid/2009_M1.pdf)

The shift away from the conflation between smuggling and trafficking remains critically important. Over the years, the conflation has been used to give counter-smuggling measures (intended to keep people from crossing borders generally) the legitimacy enjoyed by anti-trafficking efforts. This said, it must be acknowledged that there are, in some cases, overlaps between the two crimes which must be addressed in order to ensure that individuals received the care and protection they are entitled to.

The text of the Zero Draft manifests a change in the way that smuggled migrants are framed. They are not anymore 'objects' of smuggling (as the Smuggling Protocol frames them), but rather 'victims of aggravated smuggling'. This builds on developments in the human rights field, which have recognized the human rights risks faced by smuggled migrants, including to their right to life and dignity but also the risks of exploitation by smugglers en route. It also builds on the requirement to consider the crime of smuggling to be aggravated if and when it is undertaken in circumstances that endanger the life and safety of the smuggled migrants.

**OBJECTIVE 11: Manage borders in an integrated, secure and coordinated manner**

Elif Mendos Kuşkonmaz, Queen Mary University of London

Positive elements: Understanding border governance as collaboration amongst states, rather than the execution of state sovereignty is a positive element included in Objective 11. This will transform borders as development rather than a barrier, and encourage better relations between neighbouring states. Also, placing the respect of human rights of all migrants as an aspect of border management is a good motion because it will limit states' sovereign exercise over border management.

Negative elements: Despite the reference to human rights, Objective 11 does not mention the respect to the right to privacy and protection of personal data explicitly. This is worrying because if the inclusion of pre-screening measures and the use of modern technology are read together, it is clear that Objective 11 acknowledges the possible use of data mining platforms in relation to risk assessment and biometrics as parts of border controls. These means are particularly serious interferences with the right to privacy and personal data protection because they involve use of a wide-ranging information on individuals which can be used to identify them. Moreover, it is disappointing that Objective 11 does not include a prohibition against discrimination even though it introduces data mining platforms.

*Commentary:*

In general, border management has been seen as an aspect of national security, and thus the exercise of state sovereignty. Therefore, states have relied on the protection of national security and their sovereignty in order to dodge claims against human rights violations by their measures of border governance.

Objective 11, which refers to the cross-border co-operation and the respect of human rights, is welcome because it transforms borders into inter-state governance rather than a sovereign exercise; a move that ensures human rights in border management. However, it does not pay particular attention to the right to privacy and personal data protection when putting new technology at the centre of border governance measures (para. c). Although the reference to 'modern technology' is wide enough to cover all

measures that can emerge in the future, the current trend is the collection and storage of information on individuals crossing the borders, and mining these database to detect those who might pose a threat to national security. This information does not have to derive from the state-controlled documents, and as Objective 11 mentions, can be outsourced to private authorities such as air carriers. Such information gathering and storage encroach upon the right to privacy and personal data protection of individuals, and thus it is disappointing that Objective 11 does not explicitly refer to these rights. This is not to say that the mentioned rights are not recognised in the UN Global Compact on Migration at all. Objectives 1, 3, 8, and 22 refer to these rights as they concern the use of information on individuals, albeit for different reasons. Nevertheless, despite these objective, it is still not clear by what the rules on using personal information would be. The UN Guidelines for the Regulation of Computerized Personal Data (A/Res/45/95) can provide guidance on the matter.

Another point of concern is the lack of prohibition against discrimination. This prohibition is particularly important when data mining platforms are at stake because systemic bias could be embedded in these platforms. The issue becomes all the more troubling due to the lack of transparency involved in the data mining platforms and the question on the accuracy of the information obtained from private authorities (i.e. air carriers) because more often than not the acquisition of this information from individuals is not regulated. OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, to which Objective 11 refers, provides a non-discrimination clause. So do other objectives in the UN Global Compact on Migration (for example, Objective 15). According to the concerns as to the data mining platforms mentioned above, such a clause should not be excluded from Objective 11.

Finally, other questions ensue in relation to the rules on how information obtained will be used. Will this be shared with law enforcement authorities of the state for which individual seeks to enter? What will be the due process rights of individuals against border officials' decision on the basis of the use of technology? Objective 11 references to strengthening due process and oversight of procedures for the border officials' assessment (para. e), but it is important to overtly acknowledge due process and oversight of the use of technology. This is particularly important given that the level of protection afforded to personal information varies in countries.

## **OBJECTIVE 12: Strengthen procedures and mechanisms for status determination**

Boldizsár Nagy, Central European University

Positive elements: The intention to demand every state to have an “effective, human rights based and protection-sensitive mechanism and procedure” in order to identify all migrants and determine their status is very positive. That entails the welcome preservation of the difference between those in need of (international) protection and those not, a differentiation needed as long as a qualitatively freer global migration regime does not take shape. The text definitely extends to those who are displaced by “disasters and crisis”, which suggests that people fleeing natural disasters, including the (forced) migration induced by slow onset or rapid environmental changes is also subject to a “status determination”, whatever that status may be. The attention to certain

groups with special (procedural) needs, like victims of trafficking, children, persons with gender-sensitivities is exemplary.

Negative elements: The language of the objective is not based on a clear use of terms. Admitting that everything can not be jam-packed into five paragraphs, a short reference to other procedural needs of the migrants (like suffering from PTSD) and to the cross-cultural communication capacities of the first responders and government officials in point b) and c) would be well placed.

It is unclear to whether only the first “referral” phase of status determination is governed by this objective or its intention is to fix the basic principles of all status determination procedures, including those ending in removal from the territory or the opposite, recognition as a refugee. The objective remains silent on the possibility to be legally represented at all stages of the status determination procedures, including those not raising issues of international protection. The objectives of the Compact as presently formulated do not contain cross references either to other objectives of the Compact or to the Global Compact on Refugees (let alone to relevant treaties). In the context of status determination, vulnerabilities addressed in objective 7, detention discussed in objective 13, and the preparation of the Global Compact on Refugees are of particular importance and perhaps should be mentioned in objective 12.

#### Commentary

Groups of humans arriving at the border are mixed, but their entitlements are different, depending on their life facts which must be ascertained as soon as possible. Therefore the intention of the objective to retain the difference between refugees and other migrants is welcome. Similarly the human rights based approach calling for an effective procedure and timely referral is vital in light of the practice of extremely long and occasionally meaningless procedures in some jurisdictions.

However, two types of uncertainties blur the perimeters of the objective:

(a) Does the objective only address the first encounter, the “border moment” when those applying for protection and those not applying may be separated and referred to two different types of status determination procedures, or is the objective covering the substantive status determination procedures as well. Much of the text suggests the first, but the chapeau of the text and the reference to “all stages of the migration cycle” suggests otherwise, as well as subpara c) which speaks of status determination mechanisms “including” - but then not limited to - measures at the border and places of first arrival.

(b) The other type of uncertainty relates to the terms used. The chapeau once refers to “all migrants”, once to “migrants and refugees”. Are refugees migrants or not, in this context? Subpara a) adds asylum seekers to refugees and migrants and also those “displaced in the context of disasters and crisis”. Are asylum seekers not refugees, and therefore are they *not* covered by the chapeau? Unlikely. In light of the EU *acquis* one may ask: “are beneficiaries of subsidiary protection included in the term ‘refugees’ ”? The choice is painful: monotonous use of terms, unattractive to the everyday reader, but legally intelligible or flexible use of the words not allowing claims of legal character to be based on the objective.

The reference to those “displaced” in the context of disaster elegantly circumvents the bitter debates on whether environmental or climate refugees exist and points to the efforts of the [Platform on Disaster Displacement](#) which also transcended those debates.

Keeping the text succinct is important but a few further guarantees perhaps should make into the shortlist. A reference to intercultural education may be similarly important as the human-rights training, as the humane treatment of migrants is preconditioned on the capability of those encountering the arriving migrants to understand their motivations, fears and behavioural patterns. It is an asymmetric situation, the same can not be expected from the migrant, meeting is not at halfway, the authorities and others receiving the migrants must be forward-looking. Access to a lawyer in refugee status determination procedures and in foreign policing procedures possibly leading to expulsion and removal is essential. This guarantee could find its way to the text.

If the objectives will not have cross-references to each-other then the suggestion to refer to at least objectives 7 and 13 is moot. However, in light of the fact that status determination is a juncture between this Compact and the Global Compact on Refugees that relationship should be clarified both in the language used and in the allocation of guarantees between this text and the other Compact.

**OBJECTIVE 13: Use migration detention only as a last resort and work towards alternatives** Dr Justine Stefanelli, British Institute of International and Comparative Law

Positive elements: individualization. This is an excellent and important part of detention regulation. Making the decision to detain on a case-by-case basis which takes into account the individual’s specific circumstances forecloses states’ ability to detain groups of people based on membership in a category, such as ‘foreign national offender’, a practice that is carried out in many states today. It ensures that only people who absolutely need to be detained *are* detained, and contributes to the overall reduction of the use of detention.

Negative elements: Though Objective 13 refers to the need for detention to be “for the shortest period of time”, it is disappointing to see that a maximum period of detention is not part of the Objective. This is exacerbated by the lack of a due diligence requirement, which would ensure that states undertake migration processes with the utmost diligence, whether they be decisions to admit or to deport/remove. Without a maximum, people face indefinite detention and are often reliant upon the will of the state to carry out the relevant process.

*Commentary:*

The use of detention as a tool of immigration enforcement has become a routine part of immigration control, despite evidence of human rights and due process violations in many states. Objective 13, which seeks to ensure that detention is used as a last resort and that the feasibility of alternatives is fully explored, is a welcome addition to the UN Global Compact on Migration. Where detention is used, Objective 13 requires officials to make detention determinations on an individual basis, taking into account whether detention is proportionate and necessary. The inclusion of a necessity requirement is



particularly welcome and is absent from many legal frameworks, such as that of the Council of Europe and its European Convention on Human Rights. The requirement of necessity helps reduce the use of detention by ensuring that alternatives are employed unless a specific case necessarily merits the use of detention, for example, if the individual poses a high risk of flight, or is a genuine and present danger to the community.

Objective 13 also requires states to take detention decisions “in full compliance with due process and procedural safeguards”, another welcome addition, considering that so many states apply an inferior level of due process protections to immigration detainees. Detainees should have, as a minimum, the right to written reasons for detention, an opportunity to respond to any allegations against them and rights of appeal or review.

Despite these positives, Objective 13 lacks a few key provisions on detention. Perhaps most importantly, Objective 13 does not require states to establish a maximum period of detention, but instead states that detention should be “for the shortest period of time”. The lack of a maximum is exacerbated by the lack of a due diligence requirement, which would ensure that states undertake migration processes, whether it be decisions to admit or deportation/removal, with the utmost diligence. Without a maximum, people face indefinite detention and are often reliant upon the will of the state to carry out the relevant process. In addition, an important part of ensuring that detention fully complies with due process is the right to an attorney, legally-aided, if possible. Finally, a right to automatic judicial review of the order to detain would help to ensure that detention is used only when necessary, that it is proportionate, and that due process requirements are respected.

### **OBJECTIVE 15: Provide access to basic social services for migrants**

Dr. Bethany Hastie, Peter A Allard School of Law University of British Columbia, Canada

Positive elements: Incorporation of firewalls. Objective 15 includes, under paragraph (c), a recommendation that “firewalls” are set up between service providers and immigration enforcement agencies. The concept of “firewalls” protects irregularly present migrants, who may desire or need access to public services, by prohibiting the sharing of client information with other public bodies, notably immigration enforcement authorities. Firewalls may be achieved through policies that prohibit information sharing between public bodies, prohibit reporting to immigration or related authorities, or prohibit access to client information by immigration or related authorities. “Firewalls” are essential in order for irregularly present migrants to seek out and use necessary services without the ever-present threat of denunciation and deportation, a threat which is a widely noted barrier for migrants accessing services.

Negative elements: While objective 15 commits to ensuring the accessibility of basic social services, including health care, education, housing and social protection, the actionable comments focus most prominently on health care and education, with no substantive commentary on housing, and no mention of other necessary public services, such as legal aid. Migrants are known to face discrimination in accessing housing and shelter, and they are often excluded from eligibility for public legal services and representation. While Objective 15 includes recommendations to ensure non-discriminatory access to and delivery of basic social services, which might include

housing and legal aid, the lack of specific commentary directed towards these services establishes a failure to appreciate the interconnected needs of migrants, and prioritizes very basic services over a holistic approach to managing migrants' needs experiences in a host country.

### Commentary

Objective 15, which commits States to develop “non-discriminatory policies in order to provide migrants, regardless of their migration status, access to and ensure delivery of basic social services, including health care, education, housing and social protection” is a welcome and much-needed recommendation in the UN Global Compact on Migration.

Migrants are often, either formally or practically, excluded from access to public services, including health care, education, housing, legal aid, social benefits such as employment insurance, protection of law enforcement bodies, labour organizations, and others. In some cases, migrants, especially irregularly present migrants, are formally excluded from entitlement to such services under law. In other cases, migrants who pay into public schemes, such as temporary foreign workers, are later deprived of the ability to access those benefits. In many cases, practical barriers to access and delivery of public services arise from discriminatory treatment and, for irregularly present migrants, a fear of denunciation and deportation. It is important to remember that, under international law, migrants have rights that correlate to an entitlement to public services in areas such as health care, education, non-discrimination in employment, and others.

Objective 15 seeks to address the legal and social barriers migrants face in accessing public services by recommending that States develop non-discriminatory policies to ensure access to and delivery of these services, and importantly, by encouraging States to adopt “firewalls” between service providers and immigration enforcement authorities. Firewalls operate to prohibit information sharing between service providers and immigration enforcement authorities, in order to alleviate the fears that migrants, especially irregularly present migrants, may have in seeking out services they may need. Firewalls can be achieved by prohibiting access to client information by immigration authorities, prohibiting service providers from reporting client information and immigration status to immigration authorities, and other measures. This is a significant step forward in alleviating the practical barriers migrants may face in accessing public services.

However, Objective 15 does not define the concept of “firewalls” or provide detailed guidance on how States can operationalize firewalls, nor to what bodies they should attach. This diminishes the potential impact that this recommendation might have, considering that there are many measures of varying effectiveness that could be encompassed within the concept of “firewalls”, and given the many different kinds of public services that migrants may need access to. For example, while a “firewall” measure might prohibit mandatory reporting on client immigration status by service providers, a more effective measure would prohibit both voluntary and mandatory reporting. In addition, while objective 15 focuses on pressing public service needs, such as health care and education, firewalls ought to be in place for a broad array of service providers, including in respect of legal aid, housing, labour inspectors, and others.

Finally, “firewalls” contemplate the prior collection of immigration status information, which may not be necessary in all circumstances, and which could have been set out in a complementary actionable comment to bolster the underlying purpose of the recommendation.

Objective 15 provides specific guidance on issues of access to health care and education, which undoubtedly represent pressing needs for many migrants. However, by prioritizing these services, and failing to mention other important services, such as access to legal counsel, Objective 15 fails to fully appreciate the interconnected needs and experiences that migrants have which could be addressed through access to a broad array of public services. Practical barriers for migrants accessing public services are documented in relation to legal aid, protection of law enforcement, housing, social assistance and public insurance schemes, and labour organizations, among others. Needs related to these service areas may also be interconnected; for example, a temporary migrant worker who is experiencing abusive treatment may require assistance from legal counsel, temporary social assistance benefits, and potentially even shelter if they live in employer-provided housing. A holistic approach to ensuring non-discriminatory and safe access to public services would highlight the interconnected and myriad needs migrants have, and emphasize the need for a response that acknowledges and accounts for the array of public services that might, together, provide an effective response to migrants’ needs.

Finally, Objective 15 prescribes that States should enact laws to explicitly prohibit discrimination on “all grounds, including race, colour, descent, or national or ethnic origin”. While this is an important recommendation, and migrants are often subject to discrimination based on these grounds, this recommendation would have been strengthened by prohibiting discrimination on the grounds of citizenship status, in at least areas of fundamental and emergent need, such as access to basic or emergency health care, primary education, emergency shelter, immediate police assistance, and others. Although migrants’ access to public services should avoid a prioritization or hierarchy, as noted above, excluding migrants from fundamental and emergency services on the basis of citizenship status produces particularly serious consequences. In relation to, at a minimum, services that are reflective of fundamental and universal rights under international law, non-discrimination ought to include citizenship status as a protected ground.

### **Objective 17: Eliminate all forms of discrimination and promote fact-based public discourse to shape perceptions of migration**

Kathryn Allinson, PhD Candidate Queen Mary, University of London

Positive elements: ‘Eliminating all forms of discrimination and promoting fact-based discourse’. The language is positive and highlights the abhorrence of discrimination whether it be ‘expressions, acts or manifestations of racism, racial discrimination, xenophobia or related intolerance against all migrants’ and encouraging States to ensure they have adequate legal frameworks in place to prevent, punish and remedy such acts is an important step. Taking forward the NY Declaration’s commitment to eradicating xenophobia and racism is essential in promoting a positive dialogue around migration. The attention to the role of the media, especially through honest and fact-based reporting, is important in the current climate of populism and right-wing rhetoric. The

focus on local level, community-based approach to preventing discrimination is also important as it is at this grass-roots that real change in perceptions can begin.

Negative elements: The proposed action is quite coercive and engages the private sector in particular. The focus on 'shaping perceptions in public discourse' while positive, is only one part of eliminating discrimination. It is worrying that Objective 17 does not highlight the legal principle of non-discrimination, by which States are bound to treat migrants equally to citizens, as the starting point of eliminating discrimination. While the first sentence of para 35 could relate to obligations on States to eliminate discrimination in their policies, and part (e) proposes regional complaint mechanisms, the principle of non-discrimination and its centrality in this issue is not made clear. The commitment to eliminating discrimination must start here.

*Commentary:*

On the one hand, the objective aspires to be 'in conformity with international human rights law' (IHRL) but on the other it fails to address the role of the State in applying its laws non-discriminatorily towards migrants. Nowhere else in the zero draft is discrimination explicitly focused on although it is mentioned in objective 13 relating to detention, in objective 15 in relation to access to social services and objective 16(d) to promote inclusion. The centrality of the principle of non-discrimination in the application of IHRL and in eliminating discrimination is undisputed, yet inadequately addressed in Objective 17.

The focus appears to be on how State's can reduce discrimination within their society. It fails to address the centrality of non-discrimination of migrants in the application of the law and protection of their rights as outlined in Article 2 of ICCPR and HRC Gen Comm No 15 (1986). If State's stopped undermining the principle of non-discrimination in their application of the law towards migrants, then public discourse and perceptions would follow. State's cannot just 'talk the talk' of non-discrimination, they must also stop using a migrant's status as a mechanism for denying or limiting their access to human rights and protection.

Discrimination is the basis of migrant vulnerability as it undermines their access to human rights protection and pushes them into a position of vulnerability. A migrant's vulnerability to refusal of admission or removal based upon their status, are key to justifications for discrimination. It is this vulnerability that leads them to accept limitations on their wider gamut of rights. State's justify this denial of rights by classifying a difference between migrants and citizens, where no such difference is permitted under international law.

As a result, while Article 17 takes an important step towards eliminating discrimination towards migrants within society, this cannot be done without first a change in the practises of States in ensuring their compliance with international legal standards relating to the principle of non-discrimination. Only then can real change start to happen in public policy and discourse.

**OBJECTIVE 18: Invest in skills development and facilitate recognition of skills, qualifications and competences**

E. Fornalé, F. Cristani, A. Yildiz, World Trade Institute, University of Berne, Switzerland

Positive elements: It is very positive that the draft includes reference to migrant workers at all skills level. This can make a significant contribution to prevent the so-called de-skilled phenomenon and to fill existing protection gaps between highly skilled and low skilled migrant workers and it can open up possibilities for cross-border employment to an increase number of migrants workers. Similarly, the recognition of global standards and standardized documentation is crucial for migrant workers.

Negative elements: It can be dangerous to avoid making clear that all migrant workers, regular or irregular, have access to recognition procedures. In the content of each sub-commitment no reference to the aim to include regulated/not-regulated professions. There seems also to lack a reference to what kind of recognition the Zero Draft is addressing, whether professional or academic or other, as it can be confusing to treat them all the same. Moreover, the present sub-commitments do not seem to pay attention to the distinction between temporary and permanent migration when dealing with skills recognition.

*Commentary:*

*Substantial level:* the majority of recognition approaches/techniques aim to ensure the equivalence among different regulatory systems. Several attempts to put in place harmonization have failed. There needs to be established a more gradual process that can aim to harmonise in the future but is more realistic. The focus on “innovative instruments” is very relevant. This can promote the development of new strategies and re-new the attention on the current implementation, quite problematic, of existing instruments.

*Procedural level:* The instruments mentioned are very well suited for ensuring the recognition of highly skilled migrant workers. It is less clear under which agreement low-skilled migrants workers can be really included. The potential of MRAs can be more beneficial if there is a connection with migration measures.

What appears very positive is the clear recognition of the need to put in place a normative framework at the international level that can support the recognition process in a structural way. The reference to existing instruments, as bilateral labour mobility and mutual recognition agreements, or new approaches, as global skills partnership, is a good sign in this direction. In fact, these instruments, with their ‘mutual component’, have the potential to promote a progressive reallocation of regulatory authority from the host country to the country of destination in recognition of the qualifications and skills of migrant workers.

To be more inclusive the recognition process needs to include a broader set of participants. The identification of the ‘relevant stakeholders’ national governments should engage with are not very clear. There is a complete absence of any reference to professional organizations: it can be extremely difficult to implement any kind of agreement/procedure if they are not involved in the establishment of the procedure for regulated professions. Their involvement may overcome protectionist mindset. Employers: need to be trained and involved too, to be ready to recognize acquired competences in particular in unregulated sectors.

There are some gaps however; skills recognition/skills matching: increase data collection through meticulous analysis of market needs to be emphasized, it is not possible to fully assess what skills to what level are needed – to mitigate skills shortage and to create a global platform on skills. The overall skills matching system seems to stand a bit in the background: in particular, it is not very clear whether it also includes the improvement of local training (in host countries) for migrants with foreign qualifications in order to make them meet the local professional standards

Best Practices: increase data collection of existing approaches/practices to get an overview on what it is really working and what affect their implementation. Explore the potential implications to adopt a top-down or bottom-up approach. What role for compensatory measures? These instruments can fill potential gaps and allow migrant workers to acquire missing competences. Additional data on existing practices is needed.

Education: it seems to lack a coordination with training and education system differences in education systems at the national level should be addressed as a first step. Build global skills partnerships amongst countries that strengthen *training capacities* it is yet not very clear whether it includes also the issue of education, and who should participate in the ‘skills partnership’

Financial mechanisms are needed to increase partnership in skills development, training and certificate programmes. In addition, the role of recruitment agencies and the issue they receive payments from migrant workers rather than employers - which give labour recruiters an incentive to place workers who pay the largest fee rather than those with the best skills for the job – seems to be not adequately addressed.

Overall, the topic of recognition seems to be a little fragmented in the Zero Draft: we can find some hints also in Objective 19, actionable commitment c) and h), as regards knowledge and skills transfer of migrants and diasporas, in Objective 21, actionable commitment i), as regards the issue of skills recognition in case of readmission and reintegration and in Objective 5, actionable commitments e) and h), as regards the possibility to reduce visa processing timeframes in order to foster efficient and effective skills-matching programmes and the explicit involvement of the ‘private sector and trade unions’ in skills-matching procedures; however, in Objective 18 these topics are not either mentioned or fully addressed, making it questionable their efficient and structured implementation.

**Objective 19: Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries.**

Tugba Basaran, Centre d Etudes sur les conflits, la liberte et la securite, Paris; visiting scholar Harvard University

Positive elements: It is important to empower migrants and diasporas and harness their benefits for the Sustainable Development Goals.

Negative elements: Migrants and diaspora financial contributions account already to more than three times the official development assistance and more foreign direct investments to almost every developing country. The contributions of migrants and

diasporas should not be used as a substitute for other forms of assistance and investments or as a way to diminish responsibilities of international cooperation. Further, it needs to be underlined that diasporas are citizens of their respective countries, a point of contestation in public and popular discourse, particularly in times of securitization. Hence it is useful to employ a wording that emphasizes the citizen component, such as migrant and citizens (with diasporic links).

### *Commentary*

In many countries which perceive themselves as destinations for migrants, in particular for migrants from less wealthy countries, the issue of integration is vivid. The underlying assumption of the public policy of integration of migrants is that migrants should become part of civil society in the country where they live and should not only comply with the laws (criminal, civil and administrative) but adapt to the social norms which are dominant in their 'host' country. Yet, a definition of integration is as elusive as the definition of diaspora. What does it mean to be integrated? How is this measured? What does a migrant need to do to be integrated? All of these questions depend on what the definition of integration is. There have been some efforts to design tools to measure integration which have been well funded by institutions but nonetheless have been much criticised by the academic community. At the crux of the debate is the elusive definition of integration – the lack of clear content to definitions used means that the measurements are flawed. One approach adopted by some researchers is to carry out surveys of whether citizens consider that migrants are integrated but this approach is equally flawed as the person interviewed in effect becomes the arbiter of what integration means.<sup>5</sup>

**Objective 20: Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants** Tugba Basaran, Centre d Etudes sur les conflits, la liberte et la securite, Paris; visiting scholar Harvard University

Positive elements: The zero draft correctly underlines that the cost of remittances is too high and needs to meet the 3 percent target, set for the SDGs. It rightly emphasizes how the reduction of the cost of remittances requires 'removing obstacles to non-bank remittance providers' and ensuring that measures 'to combat illicit financial flows do not impede migrant remittances'.

Negative elements: It needs to be stressed that the cost of remittances should not be dependent of the legal status of the person, whether citizen or migrant, regular or irregular. Full financial inclusion in both origin and host country should be promoted. This includes the inclusion of non-bank remittance and/or alternative regulations as well as the availability of the required documentation for accessing formal channels for remittances.

Further, family remittances should be understood as person-to-person transfers: sender and receivers of personal remittances should not be disadvantaged as 'representatives' of a country. Particularly recent propositions to tax remittances, to collect taxes for a border wall, to enhance sanctions or to show other forms of disagreement with the government and/or policies of a remittance-receiving state are offensive to individual

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<sup>5</sup> Paas, Tiiu, and Vivika Halapuu. "Attitudes towards immigrants and the integration of ethnically diverse societies." *Eastern Journal of European Studies* 3.2 (2012).

needs. Personal remittances should be exempted from inter-state political factors and reasons.

*Commentary:*

In spite of progress, the cost of remittances remains above the 3 percent target set in the Sustainable Development Goals, with substantial variances across the globe. The average cost of remittances is close to 8 percent, ranging to up to 20 percent in some of the highest cost corridors in Sub-Saharan Africa and Pacific Islands (WB 2016). These are unnecessary losses, particularly for low-income migrants. Fostering financial inclusion of migrants, both in countries of origin and destination, expanding the outreach of financial markets, reducing regulatory and security obstacles and enhancing technological innovations are crucial for faster, safer and cheaper transfer or remittances.

**OBJECTIVE 21: Cooperate in facilitating dignified and sustainable return, readmission and reintegration**

Dr. Izabella Majcher, Global Detention Project, Geneva

Positive elements: The reiteration of the prohibition of collective expulsion; prioritization of the voluntary return over forced return; agreements for return to the person's country of origin; guardianship for children.

Negative elements: The lack of explicit reference to the principle of *non-refoulement* (paragraph (e) is not sufficiently clear); silence about the right to respect for family and private life developed in the host country; possibility to return children to "reception and care arrangement" in third countries rather than to their families; enhanced "cooperation on identification" with the countries of origin without adequate safeguards.

*Commentary:*

Objective 21 enshrines several laudable principles yet, in overall, it places disproportionately more attention on the process of return and post-return reintegration than the legal safeguards preventing return. Besides the Refugee Convention's scheme of protection addressed in the Global Compact on Refugees, international human rights law provides for a number of safeguards precluding return. As the recently appointed UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, stressed in front of the General Assembly in October 2017, while "refugees need protection according to the 1951 refugee convention [...] all migrants need the protection of their rights according to international human rights law." This brief commentary addresses these three stages of return.

First of all, return cannot be carried out if it would violate the prohibition of *non-refoulement*. By virtue of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the International Covenant on Civil and Political Rights (ICCPR), no person can be sent to a country where he faces a risk of torture or ill-treatment. This prohibition is absolute. Every person is afforded the protection from *refoulement*, irrespective of the person's conduct. Secondly,



pursuant to article 17 of the ICCPR, migrants should not be returned if it would constitute a disproportionate interference with their family and private life developed in the host state. If children are involved, the principle of the best interests of the child under article 3 of the Convention on the Rights of the Child may weigh against expulsion of one of his parents. Paragraph (e) falls thus short of states' international human rights obligations. The mention of due process guarantees in the same paragraph is welcome. Indeed, article 2(3) of the ICCPR lays down the right to an effective remedy, which in the context of return entails the provision of sufficient information about factual and legal reasons for one's return, possibility to challenge return decision, and suspensive effect of appeal. Depending on the case, the right to an effective remedy may also require granting legal and linguistic assistance.

In terms of the process of return, it is commendable that paragraph (d) prioritizes voluntary return over forced removal. Yet, allowing the person to leave without escorts is not merely ethically sound but directly implied from the principle of proportionality, premised upon the very rule of law. It is laudable that Objective 21 requires safe, human rights-based and dignified return. In the context of forced return, these principles are translated into the compliance with the strict necessity and proportionality test in relation to the use and amount of restraint methods and force. The prohibition of ill-treatment and unlawful deprivation of life under articles 6 and 7 of the ICCPR entails also effective investigation into allegations of unlawful force applied during deportation. Cooperation on identification, focused on in paragraph (b), raises several protection concerns and should never be sought in relation to rejected asylum seekers. Readmission agreements, dealt with in paragraph (a), should be applicable only based on individual assessment of any risks awaiting the person upon return. The prohibition of *refoulement* precludes any generalized lists of safe countries. It is noteworthy that paragraph (a) speaks about agreements on return to one's own country. Yet, the terms of paragraph (g) tend to point that the return to a third country is not excluded in Objective 21. Return to a so-called safe third country poses a risk of chain *refoulement* and may only be carried out following a case-by-case assessment of safety of the particular country for the particular person. In terms of return of children, regrettably, paragraph (g) reflects the language of the EU Returns Directive and allows return of children to broadly phrased "reception and care arrangement." Objective 21 rightly underscores the prohibition of collective expulsion. Indeed, by virtue of article 13 of the ICCPR, states are bound to assess the individual circumstances of every migrant returned in a group. Monitoring, addressed in paragraph (f), is a crucial safeguard against ill-treatment and should be carried out during removal and upon arrival to the destination country.

Finally, the post-return reintegration phase is properly developed in Objective 21. In fact, half of the paragraphs emphasize sustainable reintegration. It is commendable that Objective 21 highlights that safety upon return, economic empowerment, and inclusion are necessary for sustainable reintegration and calls for provision of legal, social, and financial support to returnees. Likewise, addressing the needs of communities to which migrant returns is very welcome.

### ***Effective Implementation Follow Up and Review***

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Following the objectives, the Zero Draft turns to implementation and follow up. The Zero Draft acknowledges at the outset that the Compact will be a non-legally binding, cooperative framework which builds on the Member States commitments in the New York Declaration. So within this framework of non-legally binding commitments, the follow up is necessarily framed in terms of the undertaking of states to comply with their voluntarily given commitments. Still, the Draft uses the language of actionable commitments which indicates that the UN and its Member States depend on all states carrying out their duties as set out in the Compact. Highlighting capacity building is useful from one perspective in that it is an indication of the importance of implementation. However, capacity building must not be an excuse to criticize countries and regions for establishing free movement regions without border and passport controls on movement of persons. Where countries and regions implement such passport control free regimes this must be accepted as compatible with the Compact. Pressure should not be placed on any state to harden its border controls on the movement of persons merely because some other country, often not even sharing a border with it, is reluctant to admit people entering or suspected of entering their territory from that country. The commitment of all states to uphold the UDHR and the ICCPR includes delivering the right of all persons to leave a state irrespective of the nationality of the person leaving or whether the destination state has agreed a priori to the person's entry there (Article 12(2) ICCPR).

The Zero Draft also recognizes the need to form partnerships with civil society, migrants and diaspora groups. This is very important to ensure that there is consensus within society on the rights of migrants. Not infrequently some interior ministries become distanced from the day to day realities of movement of persons – both their own citizens and the citizens of other countries. Civil society can be a useful partner in assessing the needs and priorities of migrants.

The Draft recognizes that the Compact will provide substantial impetus to the UN to engage with migration and calls for the investment of resources in the area. This includes strengthening the role of IOM but with the proviso that it is fully within the UN system, which must mean that IOM formally undertakes to respect UN human rights standards and ensure its actions are fully compliant. Further, the Draft calls for a State-led process for advancing international dialogue on migration with specific reference to some existing UN institutions. Peer-to-peer assessment of implementation of UN objectives can be a very effective way to encourage compliance with States' voluntarily made commitments. The Human Rights Council's Universal Periodic Review is an excellent example of how valuable such peer-to-peer approaches can be; even a cursory look at the latest review of countries in January 2018 reveals that the issue of migration and state compliance with human rights standards in respect of migration is a recurring theme. States pose probing questions to one another about compliance with human rights standards which permit the airing of concerns, the reiteration of standards and review of national practices in a positive and State-led process. Utilising the findings of the UPR to inform state-to-state review of migration commitments contained in the Compact and human rights standards might be useful; it would also avoid the risk of duplication between the Compact and the work of the Human Rights Council. It might include adding an additional reporting function to the mandate of some Council experts – for example, the Special Rapporteurs on migrants, on the right to health, to food, to

education, on violence against women, and on trafficking - to enable them to contribute to the Compact's follow up and review process.

Further, regarding follow up and review, the Zero Draft proposes a road map of institutions and deadlines for review of the Compact. This is most welcome. The choice of venue is one for the UN to determine, however it seems appropriate to develop existing venues and extend their capacities and responsibilities. Also, the inclusion of a place for regional developments is very important. It is clear that the liberalisation of migration and border controls on the movement of persons seems to benefit from regional agreement which may be more easily achieved than at the UN level. The possibility of knitting together regional migration and border control free (or light) regimes is tantalising and possibly very fruitful. In this respect greater coordination of existing regional institutions regulating free movement, border cooperation, but also regional human rights and refugee protection frameworks would be welcome. As the cases of the European Union and of ECOWAS show, regional integration framework, with their consolidated institutional base, broad mandate and genuine regional ownership may provide fertile anchors for comprehensive regional migration governance – more than the relatively loosely institutionalized, frequently externally driven Regional Consultation Processes highlighted in the final section of the Zero Draft.

These comments are initial and do not cover the full extent of the Zero Draft. The contributors, in their personal capacities, have provided a snapshot of their preliminary views. We welcome the debate and negotiation of the Compact in the months to come and remain at the disposal of the international community to provide more analysis and comment.

14 February 2018