



## ICRC COMMENT ON THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

Dramatic large-scale movements of migrants and refugees have prompted mixed reactions around the world in recent years. Significant expressions of solidarity and social mobilization have alternated with aggressive displays of anti-immigration attitudes and deep political unease. The human costs of migration, and of certain migration policies, have become increasingly clear.

Most of the 244 million people in the world who have migrated left their home voluntarily and travelled along safe and regular routes to their host country, where they integrated successfully. But a significant minority of people are compelled to leave because of armed conflict, other situations of violence or untenable conditions. These people often experience difficult conditions along migratory routes or upon arrival. Other people leave a safe place in search of better prospects but then face similar difficulties en route and need protection and/or assistance as conditions on their journey deteriorate badly.

### Migrants and the ICRC

The International Committee of the Red Cross (ICRC) has first-hand understanding of the experience and suffering of migrants<sup>1</sup> because of its humanitarian work with migrants in many parts of the world. We welcome the commitment taken by States in the New York Declaration for Refugees and Migrants to develop two global compacts to improve the international response to large-scale movements.

We recognize that States are challenged by the political, social and economic dimensions of migration across borders and that these movements and their management raise difficult questions. How should migration be regulated and governed? How can people's status be properly determined in difficult "mixed flows"? How can vulnerable people be best protected when the reasons for their migration falls into "grey zones" between current legal categories? What are the limits to the number of people a country can receive and successfully integrate? How can returns be made sustainable and not lead to further circular migration? How can conditions be improved or better prospects created in countries of origin?

We approach migration from a purely humanitarian perspective. In other words, our aim is to respond to humanitarian needs and reduce suffering. We urge States to duly consider the humanitarian dimension of movements of migrants and refugees in their policies. This is essential to reduce human suffering, protect vulnerable groups and to weigh the humanitarian impact of migration policies.

### Purpose of this paper

This paper is intended to assist States at the outset of the process to develop and agree the global compact for safe, orderly and regular migration (migration compact). It focuses on key elements we believe should be included in the migration compact. The ICRC will be observing and contributing to discussions, along with the International Federation of Red Cross and Red Crescent Societies and National Red Cross and Red Crescent Societies involved in humanitarian work with vulnerable migrants.<sup>2</sup> We will offer further comments and recommendations to States as the process develops, and we stand ready to assist by sharing our experience and expertise.

### Building on the New York Declaration

The New York Declaration for Refugees and Migrants adopted in 2016 is a significant step in global efforts to improve and align States' policies on responding to large-scale movements of refugees and migrants. If States make good their pledges, the Declaration will lead to a more predictable and humane response. We commend States' commitment to protecting the safety, dignity and human rights of all

migrants, irrespective of their status. We welcome the fact that the Declaration does not look at migration through the prism of security. We also welcome the reaffirmation of the broad application of the principle of *non-refoulement*.

Stronger commitment and action are still required. We hope the migration compact will further strengthen the commitments contained in the Declaration and address its limitations. Most especially, the protection needs of migrants should be acknowledged and addressed. Stronger commitments to preventing family separation, to treating irregular migration as an administrative infraction rather than a crime, to seeking alternatives to detention and ending the immigration detention of children are also needed. States should also commit to communicating information to the families of missing people and improving coordination between forensic services to identify migrants who have died along the way.

We appreciate the reference to the Declaration's link between respect for international humanitarian law (IHL) during armed conflicts and the prevention of forced displacement. This should be mentioned in relation to refugees and migrants. The ICRC also believes that in places where internal displacement and migration are interrelated, a comprehensive and sustainable response to the protection needs of internally displaced persons (IDPs) should be developed. This should pay special attention to the prevention of forced displacement and to the voluntary return and reintegration of IDPs.

We urge States to address these wider elements in the migration compact and to make the Declaration a significant step forward by turning its commitments into effective policy and practice. Addressing the protection and assistance needs of migrants requires States to live by their obligations under international law and to cooperate with other States and international organizations. It also necessitates cooperation with civil society and business.

### THREE KEY MESSAGES FOR THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

This paper urges States to make three concrete commitments in the migration compact:

1. **Do not lower the bar** – States must respect their obligations under international law and ensure that their domestic legislation and procedures contain adequate safeguards to protect the safety and dignity of migrants;
2. **Address the assistance and protection needs of migrants** – their needs must be decisive factors in guiding national and international responses;
3. **Prevent forced displacement in armed conflict and other situations of violence** - ensure greater respect for applicable norms and increase efforts to prevent and resolve these situations which are often the root causes of forced displacement.

The recommendations which follow emphasize specific obligations and humanitarian considerations that the ICRC believes should be reflected in the migration compact. These include recommendations on the principle of *non-refoulement*, use of force, family separation, unaccompanied children, missing people, immigration detention and migrants caught in armed conflicts.

**1. Do not lower the bar – States must respect their legal obligations and ensure that their domestic legislation and procedures contain adequate safeguards to protect the safety and dignity of migrants.**

Some States have shown remarkable solidarity, generosity and judicious self-interest by admitting and hosting significant numbers of migrants and refugees for many decades. Recent years have witnessed a hardening of migration policies. Many States have adopted measures designed to prevent and deter foreign nationals from arriving on their territory, including through the adoption of restrictive admission and stay measures.

Policies and practices that seek to override certain obligations have been presented as a legitimate way to address difficulties in managing large-scale migration or security concerns. The ICRC recognizes that States have legitimate concerns about the impact of migration on their security, economy and social cohesion, and have the sovereign right to regulate migration. But this right is not absolute. State policies, regulations and practice must always uphold migrants' rights and reflect international law. They should also consider other non-binding instruments and standards.

All migrants enjoy protection under international human rights law and other bodies of international law.<sup>3</sup> These legal commitments have been made by States themselves, in recognition that rights must be universally protected and that all individuals deserve protection. Refugees and asylum seekers also enjoy special protection under international refugee law. Specific categories of migrants, such as victims of trafficking or children, are protected under certain international instruments. In armed conflicts, migrants are also protected under international humanitarian law.

- *The migration compact should recognize that States have the responsibility to ensure that the measures they adopt to regulate migration comply with their obligations under international law and the humanitarian imperative of upholding human dignity, life and security of person.*

## **SPECIFIC CONCERNS**

- ❖ ***Migrants must be protected against refoulement.*** It is within the sovereign prerogative of States to regulate the presence of foreigners in their country and to decide on the criteria for admission and expulsion of non-nationals, including those with an irregular status. That prerogative is not absolute and international law contains a number of limits to it, as preventing people from accessing a territory or returning them to another country can have grave or fatal consequences. This recognition underpins the principle of *non-refoulement*. Under conventional and customary international human rights law, this principle extends to all individuals, irrespective of their legal status. It is generally recognized that the principle of *non-refoulement* applies to admission and non-rejection at the border, interdiction (or interceptions) and rescue operations on the high seas.

The prohibition of *refoulement* does not mean that a State must allow everyone on their territory. It entails that before refusing admission to a migrant or returning an individual, States must conduct an individual review assessing carefully and in good faith whether there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights in the country of return. This is especially recognized with respect to the risks of torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or persecution.

Depending on the applicable universal or regional instruments, other risks need to be considered in such decisions. These may include: forced disappearance; the use of capital punishment; trial by a special or *ad hoc* court; flagrant denial of justice; underage recruitment and participation in hostilities, or, in exceptional cases, serious mental or physical illness depending on the quality and availability of health care in the country of return.

- *The migration compact should state that no migrant shall be sent back to a country where there are substantial grounds to believe that he or she would be in danger of being subjected to violations of certain fundamental rights, in particular torture or other forms of ill-treatment, and*

*arbitrary deprivation of life. Anyone alleging a violation of his or her rights is entitled to an effective remedy and to the right to challenge the transfer decision before an independent and impartial body.*

➤ *The migration compact should call upon States to ensure that their domestic legislation and procedures, including at international borders and on the high seas, respect the principle of non-refoulement and contain adequate safeguards to protect the safety and dignity of migrants.*

❖ ***Force may only be used as a measure of last resort and by respecting human rights standards.*** The arrival of large numbers of migrants in a country creates challenges for the authorities. Some have responded by using force to prevent people from entering their territory. This might be seen as a way to manage migration but can create unnecessary suffering and may not respect people's rights. Using force to maintain public order in difficult situations inside State territory also carries risks.

➤ *The migration compact should restate that migrants must always be treated with humanity. Whether at borders, in transit or in destination countries, force may only be used as a last resort, when other means remain ineffective or without any promise of achieving the intended result. In line with international human rights law, any use of force must be consistent with the principles and requirements of legality, necessity, proportionality, precaution and accountability. Intentional use of lethal force may only be used when strictly unavoidable in order to protect life.*

➤ *Authorities should avoid using force simply to prevent migrants from reaching borders or to deter them from seeking access to international protection. In all circumstances, including in a detention setting, mediation and de-escalation should be encouraged.*

## **2. Address the assistance and protection needs of migrants – their needs must be decisive factors in guiding national and international responses.**

A significant number of migrants have legitimate protection or assistance needs. Failure to recognize these can lead to further distress. In designing responses and policies, a simplistic separation between migrants and refugees is often being used to distinguish between people who need protection and others who do not. Determining who might need protection is more complicated than simply differentiating between refugees and non-refugees. Some individuals fleeing armed conflict or other situations of violence may not be recognized by all States as being legally entitled to refugee status under the 1951 Refugee Convention but still need protection and might be unable to return home safely. The rights and needs of vulnerable migrants must not be pitted against each other in political arguments over legal status.

Our experience also shows that migrants may become vulnerable en route and require assistance during their journey or in their country of destination. They can be easy targets for abuse, extortion and exploitation because they lack a family network, information or documents. Many suffer accidents or illness and cannot get access to medical care. Some lose contact with their families. Thousands die or disappear along the way every year.<sup>4</sup> Some are detained for entering or remaining in a country irregularly. Some are trapped in a country affected by armed conflict or other violence, which exposes them to new and greater threats. Regardless of their status, many migrants experience difficulties that can affect their physical integrity, mental health and well-being, and that of their families.

The response to urgent human needs like food, shelter or medical treatment or to life-threatening situations, like distress at sea, is often inadequate. This creates unnecessary pain and may violate people's rights, and does not deter movement. We recognise that States have at times been overwhelmed by the scale of needs and that the lack of adequate response sometimes stems from a lack of capacity to respond and not from ill intent. This calls for a greater commitment by the international community to step in to collectively respond to needs and avert suffering when required.

State policies sometimes create further humanitarian needs. The implementation of strict migration and containment policies may not only fail to curtail migration but also induce increasingly complex and risky patterns of mobility. These can result in greater suffering because people may turn to smuggling networks or travel along more dangerous routes. Detaining migrants does not curb migration but can seriously affect people's well-being. To avoid detrimental consequences, States should carefully and regularly assess the potential humanitarian impact of new and existing policies.

Laws, policies and practices should be driven by humanity alongside other legitimate concerns and focus on the suffering, dignity, and safety of migrants at every stage of their journey.

- *The migration compact should acknowledge that all migrants may have protection and assistance needs. Addressing these requires early identification and referral mechanisms for the most vulnerable individuals such as unaccompanied children, elderly people, victims of torture or trafficking, pregnant women, disabled people and people suffering from serious or chronic diseases.*

## SPECIFIC CONCERNS

- ❖ ***Family separation should be prevented, and the needs of unaccompanied children must be addressed.*** Many migrants lose contact with their families and family separation is pervasive along migratory routes. These experiences can leave lasting scars. The number of unaccompanied children is also substantial and many endure severe hardship.<sup>5</sup>
  - *The migration compact should provide for States to take all feasible measures to prevent family separation, including during management of border crossings, rescue operations at sea and disembarkation procedures, and medical evacuations. When family members are separated, measures should be taken to reunite them wherever possible and with no delay.*
  - *The migration compact should also provide for States to ensure the registration of unaccompanied children, and focus on reducing risks of neglect and exploitation, notably by making a proper individual assessment of their situation and needs.*
- ❖ ***The fate and whereabouts of the missing should be clarified.*** Thousands of migrants go missing every year. Many die along migratory routes and are never identified – their remains buried in anonymous graves in countries of transit and destination. The families of missing migrants are left waiting for answers. States can take concrete measures to alleviate the pain of the families.
  - *The migration compact should urge States to set up transregional coordination channels and to communicate information about missing people to their families, in compliance with basic rules of data protection, and improve coordination between forensic services to identify migrants who have died along the way.*
- ❖ ***Detention should be a measure of last resort.*** The detention of migrants is being used for several reasons: because of their irregularity; during asylum clarification procedures; before return after due process, or in perceived threats to public order. Restrictive migration policies often result in the systematic detention of irregular migrants regardless of their personal circumstances and for prolonged periods. This is in contradiction with the right to liberty and security of person. Conditions in detention may raise serious humanitarian concerns. Detention facilities can be overcrowded and might not meet international standards. The detention of children is especially alarming because their developmental needs cannot be met in these settings. Unaccompanied children are often held while their age and status are being determined.
  - *The migration compact should specify that detention should not be used for the management of migration. It should be a measure of last resort, with liberty and alternatives to detention always considered first. A decision to detain should only be taken on the basis of an individual assessment; it must not be based on a mandatory rule for a broad category of persons. Any*

*detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. Furthermore, the rights of detainees must be respected and a number of key procedural safeguards observed, including a periodic review of the justification of continued detention, as required by existing law or as a matter of policy and good practice.*<sup>6</sup>

- *The migration compact should state that the detention of vulnerable groups – such as children, victims of torture or trafficking, disabled people, people suffering from serious or chronic diseases, and elderly people – should be avoided. The migration compact should also reiterate that in all actions concerning children, the best interests of the child shall be a primary consideration.*

**3. Prevent forced displacement<sup>7</sup> in armed conflict and other situations of violence - ensure greater respect for applicable norms and increase efforts to prevent and resolve these situations which are often the root causes of forced displacement.**

Armed conflict and other situations of violence are major drivers of forced displacement. Increasing efforts to prevent and resolve conflicts and other violence are essential means to protect populations affected and address the root causes of forced displacement.

Respect for the rules of international humanitarian law, in situations of armed conflict, and/or for international human rights law (IHRL) in other situations of violence can prevent the forced displacement of people within their country or across borders. Respect for such rules also means that those already displaced suffer less and more people are able to return home at an earlier stage.

In situations of armed conflict, IHL expressly prohibits the forced displacement of civilians for reasons related to armed conflict. Compliance with other rules of IHL, such as the prohibition of attacks directed against civilians and civilian objects or of indiscriminate attacks, the use of starvation as a method of warfare or depriving civilians of other objects indispensable to their survival, can help prevent or minimize displacement. In other situations of violence, respect for people's human rights contributes to preventing forced displacement.<sup>8</sup>

Securing greater respect for IHL and IHRL can thus have a major impact on the scale and suffering involved in displacement.

- *The migration compact should reaffirm the obligation of States and parties to armed conflicts to respect and ensure respect for IHL, in line with Article 1 common to the Geneva Conventions of 1949.*
- *The migration compact should reaffirm the obligation of States to respect, to protect and to fulfill human rights.*

#### **SPECIFIC CONCERN**

❖ ***Migrants caught in armed conflicts require particular attention.*** All migrants, including those who have left a safe place, can find themselves trapped in areas affected by armed conflict during their journey or in their country of destination or residence. As civilians, migrants caught up in conflicts are protected under IHL. Migrants may be particularly vulnerable in such situations because they often have no local community to rely on for protection or assistance. They sometimes face hostile attitudes on the part of the local population and may not have prospects for effective consular support.

- *The migration compact should call on States to recognize the specific vulnerability of migrants caught up in armed conflicts and take all necessary measures for their protection.*

The ICRC's mandate and exclusively humanitarian mission is grounded in international law, the Statutes of the International Red Cross and Red Crescent Movement and resolutions of the International Conference of the Red Cross and Red Crescent. We work together with National Societies to guarantee that vulnerable migrants receive the protection and assistance they require. We play a leading role in the Movement's protection work, notably by visiting detained migrants, restoring family links, clarifying the fate and whereabouts of missing people and supporting their families, and ensuring proper and dignified handling of human remains and other forensic services.

The ICRC does not try to prevent or encourage migration. We focus on responding to the needs of the most vulnerable migrants all along their journey, from when they leave their country to when they arrive in their country of destination. What distinguishes us, as a Movement, from other humanitarians is: our proximity to vulnerable migrants through our network of responders along migratory routes and our distinct vulnerability based approach that focusses on addressing the needs of migrants regardless of why they fled and where they are. We seek to ensure that all individuals receive the protection they are entitled to under international and domestic law, including the special protection afforded to certain categories of people such as refugees and asylum seekers. However, while legal status determines individual rights, the ICRC's response is driven by migrants' needs.

Our work with migrants is guided by our mandate and by Resolution 3 of the 31st International Conference of the Red Cross and Red Crescent in 2011.<sup>9</sup> It encourages States and the Movement to work together to respond to the suffering and needs of migrants and requests States "to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status".

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<sup>1</sup> The ICRC, like the rest of the International Red Cross and Crescent Movement, uses a deliberately broad description of "migrants" to include all people who leave or flee their home to seek safety or better prospects, and who may be in distress and need protection or humanitarian assistance. Migrants may be workers, students and/or foreigners deemed irregular by public authorities. They can also be refugees, asylum seekers and/or stateless persons. We seek to ensure that all migrants, including refugees and asylum seekers, receive the protection they are entitled to under international and domestic law, but we adopted an inclusive description to reflect our operational practice and emphasize that all migrants are protected under several bodies of law.

<sup>2</sup> "Vulnerable migrants" refers to migrants in need of humanitarian assistance and protection. This includes migrants who find themselves in a situation of danger, for instance, because they are caught in a situation of armed conflict or other situations of violence, are in distress at sea or on land, or lack access to essential services. It also includes specific categories of people, such as children, elderly persons, disabled persons or victims of trafficking.

<sup>3</sup> These include international criminal law, labour law, consular law and the law of the sea.

<sup>4</sup> From 2014 to 2016, over 18,000 migrants have died or gone missing. In 2016 alone, nearly 7,500 fatalities were reported, including over 5,000 on the Mediterranean and 1,100 in North Africa. Countless others were not reported. (International Organization for Migration, Missing Migrants Project: <https://missingmigrants.iom.int/world-fatalities-migrants-refugees-approach-7500-2016-three-year-total-tops-18501>).

<sup>5</sup> Nearly 90,000 unaccompanied children claimed asylum in EU Member States in 2015 (Eurostat, 2 May 2016). During the first semester of 2016, some 26,000 unaccompanied children arrived in the United States (UNICEF: [https://www.unicef.org/honduras/sue\\_os\\_rotos.pdf](https://www.unicef.org/honduras/sue_os_rotos.pdf)).

<sup>6</sup> For an overview of key elements that States should consider with respect to immigration detention, see the 2016 ICRC policy on immigration detention: <https://www.icrc.org/en/document/migrant-detainees-icrc-policy>.

<sup>7</sup> As a general term, "forced displacement" refers to the movement across international borders of refugees and asylum seekers. It also includes internally displaced persons. This encompasses individuals forcibly displaced worldwide as a result of persecution, armed conflict, generalized violence, or human rights violations. This term is also used more specifically to refer to the prohibition under international humanitarian law of forced displacement of the civilian population by parties to armed conflict, unless the security of the civilians involved or imperative military reasons so demand.

<sup>8</sup> The Guiding Principles on Internal Displacement prohibit the "arbitrary" displacement of persons, including in situations of armed conflict and of generalized violence.

<sup>9</sup> *Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion*: <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-3-2011.htm>.