

CURRENT TRENDS ON MIGRATION AND HUMAN RIGHTS

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ABSTRACT

Human migration is both a central feature and a driver of our history. In the 20th and 21st centuries, migration has become a global phenomenon and has effectuated a developing global response to the unique situation of migrants, the drivers of migration, and the places that migrants settle in. This article begins by identifying important elements of the present state of migration: migration trends; the diminishing distinction between migrant and refugee during this record period of migration flows, in which people who qualify for refugee status comprise more than half of all migrants; the development of a multilateral framework for migration and migrant's rights; and international actors.

This article then examines the pandemic and concludes by highlighting present and emerging trends—surveying issues that are shaping the field of migration. This article draws on the experience of the present pandemic to highlight practices that are a vital part of states' emergency-response toolkit. In the section on present and emerging trends, this article discusses the gendered experience of migration, child migration, climate change, the state and international institutions, and the criminalization of migration and the externalization of borders. This article presents a dual international and state-level perspective, at times contextualizing its discussion in the context of the United States.

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INTRODUCTION

Recently commemorating its 75th anniversary, the United Nations has celebrated countless major achievements throughout its existence, including the

establishment of an international human rights legal system. Despite its many successes, the global community faces many challenges, such as climate change, transnational crime, a global pandemic, massive flows of migrants and refugees, and recurring attacks against multilateral institutions. In an increasingly globalized world, the movement of people often remains in the periphery of these discussions.

This article reflects on migration and human rights to highlight, contextualize, and analyze contemporary international trends. In recent years, the international community has made strides towards strengthening international migration institutions and international legal frameworks, vital mechanisms for migrant advocacy and protection. Most importantly, recent progress reflects the development of a cooperative approach to consensus-building among states and institutions. The adoption of the Global Compact for Migration in 2018 is a key example of multilateral cooperation. State-level trends and migration upheaval—driven by changing administrations, surges of nativism, conflict, and other factors—demonstrate the continued need to improve our institutions and legal frameworks.

First, this article provides context for the present migration situation by acknowledging the ubiquity of current migration flows and distinguishing them from historical movements. Moreover, the article notes that the distinction between migrants and refugees has become obscured in recent years because of the drivers of migration. It then addresses the role of the United Nations and international agreements that have emerged to address migration. This role includes prominent international agreements involving migration as well as the actions taken by a U.N. Special Rapporteur.

Next, the article discusses how the pandemic has affected migrant rights, policies that affect or specifically target them, and services that they must be able to access. This section calls for greater access to public services without regard to immigration status. Furthermore, the section argues that there is a strong need for regularization processes to ensure uniformity and the ability to integrate vulnerable populations fully into society. Due to the inherent dangers of detention during a pandemic, it also outlines the need for the release of most detained immigrants, especially children, to ensure their health and safety and to meet their fundamental rights. Similarly, the section recognizes that to ensure the health and safety of migrants during the pandemic, there must be guaranteed access to justice, health services, and economic rights. However, it cautions that the pandemic has illustrated the potential for governments to infringe on human rights through broad

executive action under the guise of unchecked emergency powers during emergencies such as a pandemic. Thus, it is critical for the judiciary and nongovernmental organizations (NGOs) to check executive overreach.

Finally, the article discusses international trends in migration. It notes the increasing proportion of female and child migrants and the policy concerns that follow. Additionally, it surveys the growing role that climate change has begun to play in migration patterns. The section also addresses the criminalization of migration, via stricter immigration laws and criminal penalties, and externalization of borders which presents a threat to the human rights of migrants. It argues the importance of a multilateral collaborative approach to addressing migration issues since states have unique needs and goals for migration that cannot be met without international discourse and cooperation. Critically, any policies adopted must focus on the human rights and dignity of migrants.

I. THE INTERNATIONAL MIGRATION CONTEXT

A. *Overview of the Present Migration Situation*

While humanity has regularly seen massive movements of people, present migration flow patterns show simultaneous influxes taking place across multiple continents.¹ In 2019, India, Mexico, and China were the top origin states of migrants.² By 2020, the United States, Germany, and Saudi Arabia were all top destinations for migrants.³ Syria, Venezuela, and Afghanistan were the top sending countries for refugees,⁴ while Turkey, Colombia, and Germany were the top

¹ See U.N. Dep't of Econ. & Soc. Affs., Population Div., *International Migration 2020 Highlights*, U.N. Doc. ST/ESA/SER.A/452 (2020), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesa_pd_2020_international_migration_highlights.pdf.

² U.N. Dep't of Econ. & Soc. Affs., Population Div., *International Migration 2019: Report*, U.N. Doc. ST/ESA/SER.A/438, at 6 (2019), https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/InternationalMigration2019_Report.pdf.

³ U.N. Dep't of Econ. & Soc. Affs., Population Div., *International Migrant Stock 2020*, U.N. Doc. POP/DB/MIG/Stock/Rev.2020 (2020), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesa_pd_2020_international_migrant_stock_documentation.pdf; *Top 25 Destinations of International Migrants*, MIGRATION POL'Y INST. (2020), <https://www.migrationpolicy.org/programs/data-hub/charts/top-25-destinations-international-migrants>.

⁴ A sending country is "a country from which people leave to settle abroad permanently or temporarily." INT'L ORG. FOR MIGRATION, GLOSSARY ON MIGRATION 90 (Richard Perruchoud and

receiving countries.⁵ Between 2010 and 2019, the three largest bilateral corridors were refugee movements related to the Syrian Civil War.⁶ Mass migration factors, including episodic drivers, such as increased conflict and the growing threat of climate change, have become inextricable from regular migration drivers such as poverty, and these episodic and climate drivers are occurring across the globe.

The conditions of migrants' human rights in many countries are arguably worse today than ten years ago. Historically, it was more common for one major geopolitical crisis, such as World War II,⁷ to cause mass displacement. Today, there are multiple causes of current displacement events, but displacement due to violence and conflict are notably at a record high.⁸ In 2020, the number of people forcibly displaced due to persecution, conflict, violence, human rights violations, and events seriously disturbing public order had grown to 82.4 million, the highest number on record.⁹ Notably, this statistic is more than double that of 2010 numbers.¹⁰ Moreover, refugees accounted for the largest class of migrants between 2010 and 2019, whereas economic migrants seeking work opportunities had previously constituted the largest class of migrants.¹¹

Nevertheless, these challenges have prompted positive initiatives, such as multilateral coordination and cooperation efforts at the United Nations, including the adoption of the Global Compact on Migration. The Global Compact reaffirms that migrants are entitled to universal human rights, and it maintains these rights as

Jillyanne Redpath–Cross eds., 2nd ed. (2011), <https://www.corteidh.or.cr/sitios/observaciones/11/anexo5.pdf>.

⁵ *Global Trends: Forced Displacement in 2020*, U.N. HIGH COMM'R FOR REFUGEES (2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020> [hereinafter *Global Trends*]. A "receiving country" is a "[c]ountry of destination or a third country. In the case of return or repatriation, also the country of origin. Country that has accepted to receive a certain number of refugees and migrants on a yearly basis by presidential, ministerial or parliamentary decision." GLOSSARY ON MIGRATION, *supra* note 4, at 79.

⁶ *Global Trends*, *supra* note 5.

⁷ On the effects of WWII, see James L. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 MICH. J. INT'L L. 3, 5 (1982).

⁸ INT'L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 2020 51 (Marie McAuliffe and Binod Khadria eds., 2020), https://www.un.org/sites/un2.un.org/files/wmr_2020.pdf.

⁹ See *Global Trends*, *supra* note 5, at 6.

¹⁰ *Id.*

¹¹ See *Migration Today: Understanding Where Migrants Came from, Where They Settled, and Why*, COUNCIL ON FOREIGN RELS.: WORLD101, <https://world101.cfr.org/global-era-issues/migration/migration-today> (last visited Nov. 18, 2021).

one of the main foci throughout the Compact.¹² Initiatives are emerging to increase civil society's awareness of the present migration situation. In 2008, Argentina, Canada, Mexico, and the United States were the only countries in the Americas that had a significant number of NGOs focused on protecting the rights of immigrants. Over the past decade, greater civil society—including academic engagement with migrant rights—has led to an enormous expansion of civil society work on migration; nearly all Latin American countries now have NGOs working to solve migration issues.¹³ Therefore, despite the current critical state of migration, the issues migrants face are propelling a diverse number of actors to influence migration policy—a consequence that is expected to generate positive results in the short and long-term.

B. The Blurring Distinction Between Migrant and Refugee

A byproduct of the present migration period is the blurring of the clear distinction that once existed between migrants and refugees. A refugee is someone who has forcibly fled their home country due to a serious risk of persecution or conflict.¹⁴ They must have a well-founded fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion.¹⁵ Refugees are entitled to protection under international law and cannot be expelled or returned (the principle of *non-refoulement*) to where they face persecution.¹⁶ In

¹² Global Compact for Safe, Orderly and Regular Migration, ¶¶ 1–2 (July 13, 2018), https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf [hereinafter GCM].

¹³ See Geoff Ramsey & Kristen Martinez-Gugerli, *How Regional Civil Society Organizations are Showing Solidarity with Fleeing Venezuelans*, WOLA: ADVOCACY FOR HUM. RTS. IN THE AMS. (Sept. 28, 2021), <https://www.wola.org/analysis/how-regional-civil-society-organizations-showing-solidarity-fleeing-venezuelans/>; Asylum Access, *Civil Society In Latin America: Redefining a Regional Approach to Refugee Policy*, YOUTUBE, at 0:36–0:50, 3:13–3:46 (Apr. 25, 2018), https://youtu.be/zeiC9ie_BEM; Mario Santillo, *The Relation between the Civil Society and the Governments in the Migratory Processes in South America*, INTER-AM. DEV. BANK, at 4 (Apr. 6, 2005), <https://publications.iadb.org/publications/english/document/The-Relation-Between-the-Civil-Society-and-the-Governments-in-the-Migratory-Processes-in-South-America.pdf>.

¹⁴ U.N. High Comm'r for Refugees, *Convention and Protocol Relating to the Status of Refugees*, at 3 (Dec. 2010), <https://www.unhcr.org/en-us/3b66c2aa10>.

¹⁵ *Id.*

¹⁶ *Differentiation Between Migrants and Refugees*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (2018), <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf>.

contrast, there is no internationally accepted definition of a migrant.¹⁷ However, the United Nations High Commissioner for Human Rights defines a migrant as “any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence.”¹⁸ This definition generally encapsulates noncitizens who do not receive refugee or asylum status.¹⁹

The circumstances that qualify individuals as refugees, as opposed to those falling under the broader category of migrants, have become increasingly blurred due to the global proliferation of drivers of cross-border movement. Individuals who flee because they are threatened by persecution or conflict in their home countries are generally qualified as refugees under international law.²⁰ However, migrants may leave their home countries for various compelling reasons that are not afforded the same status. For instance, migrants may choose to leave to pursue work opportunities, education, or to be with family.²¹ Yet, they may also leave to escape poverty, climate change, or other serious threats that do not fall within the scope of qualifications for refugee status as they are usually understood.²² The situation is further complicated for these latter categories of migrants because their situations merit some form of international legal protection but fall short of qualifying for refugee status.²³ Consider a migrant whose home and community have been destroyed by repeated natural disasters. If they cannot afford to continue rebuilding, their best option may be to leave home, but if they seek opportunities in a new country, they will likely not be afforded refugee status.

This inability to qualify for refugee status leaves migrants whose situations fall below the threshold for refugee status in legal limbo. Issues such as integrating into a country, and the prospect of deportation, undermine stability and impose unacceptable threats, such as the possibility of family separation.²⁴ For instance,

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ This distinction is widely recognized among states and civil society. *See, e.g., Refugees, Asylum-seekers and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (last visited Nov. 26, 2021).

²⁰ *Differentiation Between Migrants and Refugees*, *supra* note 16.

²¹ *Refugees, Asylum-seekers and Migrants*, *supra* note 19.

²² *Id.*

²³ U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, ¶ 89, U.N. Doc. A/70/59 (Apr. 21, 2016), <https://undocs.org/A/70/59> (“Migrants caught in crisis situations are doubly vulnerable, as they are often invisible as non-nationals and face difficulties in accessing humanitarian assistance. They are largely unaccounted for in the current humanitarian architecture.”).

²⁴ *See id.* ¶ 32.

without the protections of refugee status, migrants can be deported back to their country of nationality or citizenship,²⁵ even if they have never been there or lack the tools to navigate that country.²⁶ This is, of course, despite the fact that the above-mentioned principle of non-refoulement may apply to individual cases.

Adding to this legal instability, numerous countries impose serious obstacles on migration into their borders. These obstacles result in many people remaining in legal limbo as migrants, often undocumented; this legal limbo extends to some people who qualify as refugees under international law.²⁷ When individuals are undocumented, it becomes much more difficult to support themselves because opportunities such as work authorization may be limited.²⁸

In response to this common element of the migrant experience, the United Nations has repeatedly called for states to conduct thorough regularization processes that ensure migrants are documented and not merely residing in a state temporarily (discussed in Section II).²⁹ Regularization is a policy tool that establishes a process by which migrants are granted either temporary or permanent

²⁵ UNHCR, *Protecting Refugees: Questions and Answers*, U.N. HIGH COMM'R FOR REFUGEES | USA (Feb. 1, 2002), <https://www.unhcr.org/en-us/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>.

²⁶ See, e.g., *The Deported*, HUMAN RIGHTS WATCH (Nov. 28, 2017), <https://www.hrw.org/blog/feed/the-deported#>. In a case that attracted national attention in the U.S., Immigration and Customs Enforcement deported Jimmy Aldaoud to Baghdad, Iraq even though he had no familial connections, could not speak Arabic, and was struggling with health issues that the traumatic move, to a place he had never been before, exacerbated. Mr. Aldaoud struggled to adjust and manage his medical needs, and he died two months after being deported. Alissa J. Rubin & Nicholas Bogel-Burroughs, *ICE Deported Him to a Country He'd Never See. He Died 2 Months Later*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/us/iraq-jimmy-aldoud-deport.html>.

²⁷ See, e.g., REFUGEES IN LEGAL LIMBO: ANOTHER OVERLOOKED CASUALTY OF EXTERNALISING ASYLUM AT ANY COST, EQUAL RTS. BEYOND BORDERS (2021), https://equal-rights.org/site/assets/files/1297/hias-equalrights-refugees_in_legal_limbo_final.pdf (documenting how Syrian refugees' asylum applications have been stymied by European Union states' externalization of borders, and concluding that the same effects will soon extend to asylum seekers from Afghanistan, Somalia, Pakistan and Bangladesh).

²⁸ See, e.g., Jonathan Petts, *Everything You Need to Know About U.S. Work Permits (EADs): What They Are, Who Is Eligible, and How to Apply*, IMMIGRATIONHELP.ORG (Aug. 21, 2020), <https://www.immigrationhelp.org/learning-center/how-to-apply-for-a-work-permit-employment-authorization-ead>.

²⁹ E.g., Pablo Ceriani Cernadas (UNICEF LACRO Regional Consultant on the Protection of the Rights of Children and Adolescents in the Context of Migration), *Migratory Regularization as an Essential Condition for the Comprehensive Protection of the Rights of Children in the Context of Human Mobility*, U.N. CHILDREN'S FUND, LATIN AM. AND CARIBBEAN REGIONAL OFFICE (May 2020), https://www.unicef.org/lac/media/14401/file/Technical_note_migratory_regularization_and%20children_rights.pdf.

legal status.³⁰ According to the current state of international law, states do not have a general obligation to conduct regularization processes under typical circumstances.³¹ Despite the lack of a general obligation, many human rights bodies have stressed that there are some circumstances, such as the present migration period, when the process of regularization becomes indispensable in many countries.³² Regularization is especially relevant for managing movement and integration during elevated migration periods, such as the present one, because of the many simultaneous causes for mass movements of people. It addresses the many reasons that migrants leave their home countries, such as humanitarian motivations or family ties, and offers a path to legal status.

The United Nations has been dealing with issues concerning refugees since its inauguration, but it has failed to address the issue of migration until very recently. Although the muddled boundary between refugees and migrants complicates

³⁰ Diego Acosta, *Undocumented or Irregular Migrant Workers Under the Model International Mobility Convention: Rights and Regularization*, 56 COLUM. J. TRANSNAT'L L. 274, 275–76 (2017).

³¹ See U.N. Dep't of Econ. & Soc. Affs., Population Div., *International Migration Policies: Data Booklet 2017*, U.N. Doc. ST/ESA/SER.A/395, https://www.un.org/en/development/desa/population/publications/pdf/policy/international_migration_policies_data_booklet.pdf (reporting that only “[o]ne third of all Governments (34 per cent) have taken measures to regularize their legal status through defined schemes or conditions”); See also Claire McGovern, *EU Regularization Programmes: An Effective Tool to Manage ‘Irregular Migration’?*, U.N. UNIV.: OUR WORLD (Aug. 30, 2014), <https://ourworld.unu.edu/en/eu-regularization-programmes-an-effective-tool-to-manage-irregular-migration> (stating that wide-scale regularization programs are a contentious topic amongst European nations).

³² See Acosta, *supra* note 30, at 275 (“Numerous international organizations, ranging from the Inter-American Commission on Human Rights, to the Parliamentary Assembly of the Council of Europe, to the U.N. Special Rapporteur on the Human Rights of Migrants, have considered regularization as a vital policy tool to deal with migration regulation.”). Among statements that international actors have issued, see, e.g., *IACHR Welcomes Measures to Provide Protection to Venezuelan Migrants in Peru*, INTER-AM. COMM’N H.R. (Apr. 4 2017), http://www.oas.org/en/iachr/media_center/preleases/2017/043.asp (“At a time when the building of walls and the closure of borders is being encouraged, it is critical for the protection of migrants and refugees that States provide legal and safe channels for people to migrate, and promote regularization of migration for those who have been forced to recur to irregular migration channels.”); John Greenway, *Regularisation Programmes for Irregular Migrants*, COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY (July 6, 2007), <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11614&lang=EN> (“regularisation programmes . . . can provide a solution for the human rights and human dignity of irregular migrants”); François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Labor Exploitation of Migrants*, U.N. Doc. A/HRC/26/35 (Apr. 3, 2014), <https://undocs.org/A/HRC/26/35> (“[R]egularization is the most effective measure to address the extreme vulnerability of many irregular migrants, particularly for migrants who have lived in a country for a long time, or who came as infants, or who are working and thus contributing to the society in which they live.”).

efforts at the domestic and international level, the United Nations recently implemented important changes that have produced significant reforms vis-à-vis the issue of migration.

C. International Agreements and Reforms Concerning Migrants, Vis-à-Vis the United Nations

1. Convention on the Rights of Migrant Workers and Their Families

In 1990, the United Nations adopted the Convention on the Rights of Migrant Workers and Their Families,³³ which now has fifty-six States Parties.³⁴ The Convention reaffirms the rights of migrant workers and their families, and it strives to establish universally applicable norms.³⁵ The Convention incorporates and builds on existing United Nations human rights instruments³⁶ and follows the traditional human rights treaty framework.

Importantly, the Convention recognizes the rights of migrant workers throughout the entire migration process, which includes preparation for travel, transit, the entirety of the stay abroad, and the return to one's country of origin.³⁷ It is important to extend protection through each of these stages because migration is a complex process which can affect migrants and their families for lengthy periods of time. While the Convention does not create new rights, it reasserts basic human rights such as the right to life, freedom from cruel or inhumane treatment, protections under the law, as well as freedom of thought—and it contextualizes these existing rights within the migration context.³⁸

However, refugees receive protections that migrant workers do not, and although refugees can be thought of as a sub-category of migrants, it is important to recognize that the Convention does not touch upon the existing international refugee law framework. One key legal distinction is that refugees may not be

³³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, U.N.T.S. 3 [hereinafter CMW].

³⁴ *13. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4 (last updated Nov. 18, 2021).

³⁵ CMW, *supra* note 33, at pmb1.

³⁶ *Id.*

³⁷ *Id.* at art. 1, ¶ 2.

³⁸ *Id.* at Part III.

returned to the countries that they fled from due to threat of conflict or persecution.³⁹ No such general protection is guaranteed for migrant workers, which means that many nonregularized migrants operate under the continual prospect that the host country's government may order their deportation to their country of origin. There are, however, limitations to the attribution of a state to deport a migrant, including but not limited to the principle of non-refoulement.

Notably, the Convention is the least ratified among all major human rights treaties.⁴⁰ Virtually all of the States Parties to the Convention are countries of origin and all of them are classified as low-income or middle-income countries.⁴¹

Despite the low number of ratifications, the Convention has had positive effects on the rights of migrant workers. Human rights treaties can still have political and social influence in countries that have not ratified the Convention.⁴² Some experts argue, for instance, that the Convention has improved the human rights of migrant workers from Mexico, which is a party, in the United States, which is not a party.⁴³ Thus, countries of origin can still effectuate change despite the reluctance of many wealthy destination countries to ratify the Convention.⁴⁴

The failure of all major sending and receiving countries to ratify the treaty has detrimental impacts, as well. With little participation, the Convention cannot effectively provide a global framework and minimum level of administrative and legal guarantees concerning the rights of migrant workers, as it aims to.⁴⁵ The

³⁹ *The Deported*, *supra* note 26.

⁴⁰ Martin Ruhs, *The Human Rights of Migrant Workers: Why Do so Few Countries Care?*, 56 AM. BEHAVIORAL SCIENTIST 1277, 1281 (2012).

⁴¹ See *Status of Ratification Interactive Dashboard*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (June 18, 2021), <https://indicators.ohchr.org/> (click the "select a treaty" dropdown menu and select "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families"); *Immigrant and Emigrant Populations by Country of Origin and Destination*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-and-emigrant-populations-country-origin-and-destination> (last visited Nov. 19, 2021). Countries of origin are countries where migrants are originally from as opposed to destination countries where migrants settle. Ruhs, *supra* note 41, at 1281.

⁴² Ruhs, *supra* note 40, at 1286.

⁴³ *E.g., id.* (citing to GABRIELA DÍAZ & GRETCHEN KUHNER, MEXICO'S ROLE IN PROMOTING AND IMPLEMENTING THE ICRMW, *in* MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS 219, 219–46 (Ryszard Cholewinski et al. eds., 2010), who "suggest that Mexico's ratification of the CMW helps its efforts to advocate and promote the rights of Mexican migrants in the United States even though the United States has not ratified the convention.").

⁴⁴ *Id.* at 1285.

⁴⁵ *Id.* at 1286.

shortcomings of the Convention contributed to the need for additional international attention to the rights of migrants.

2. *Global Compact for Migration*

In 2015, the number of migrants and asylum-seekers arriving in Europe swiftly rose to 1.3 million, compared with approximately 600,000 in the prior year.⁴⁶ The greatest number—approximately thirty percent—of migrants and asylum-seekers that year arrived from Syria, followed by Afghanistan and Iraq.⁴⁷ In total, more than half of migrants who arrived in Europe in 2015 held citizenship in one of those three countries.⁴⁸ Experts attribute the surge largely to the conflict in Syria and to political instability in the broader Middle East region.⁴⁹ Many individuals fled to escape violence or persecution, while others were driven by economic insecurity or other factors, which may have been influenced by the ongoing conflict.⁵⁰

The massive influx of human migration to Europe sparked the European Union to engage with countries of origin and move towards creating a global compact on migration. The United Nations first constructed an instrument addressing migration and followed that by fashioning and adopting the Global Compact for Safe, Orderly and Regular Migration in 2018.⁵¹ The Compact aims to mitigate the driving factors of migration that inhibit people from living and thriving in their countries of origin, while also reaffirming the human rights of migrants and addressing the vulnerabilities that arise when individuals do leave their country of origin.⁵² One hundred and fifty-two states, more than three-quarters of the United Nations Member States, subscribed to the Global Compact, with twelve states abstaining and only five states opposing it.⁵³ Although the Global Compact is not a human

⁴⁶ *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RSCH. CTR. (Aug. 2, 2016), <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Clare Cummings et al., *Why People Move: Understanding the Drivers and Trends of Migration to Europe* 25 (Overseas Dev. Inst., Working Paper No. 430, 2015), <https://cdn.odi.org/media/documents/10485.pdf>.

⁵⁰ *See id.* at 26.

⁵¹ G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, ¶ 1 (Dec. 19, 2018).

⁵² *See GCM, supra* note 12, ¶¶ 8-9.

⁵³ Meetings Coverage, General Assembly, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation Among Member States in Protecting Migrants, U.N. Meetings Coverage GA/12113 (Dec. 19, 2018).

rights instrument, it contains a series of provisions articulating the human rights of migrants.⁵⁴ For instance, the Compact recognizes in its Preamble that it rests on principles established in the UN Charter, the Universal Declaration of Human Rights, and several foundational human rights treaties.⁵⁵ It also addresses that, despite having different legal statuses, both refugees and migrants are entitled to the same “universal human rights and fundamental freedoms.”⁵⁶

The Global Compact was prepared in three stages.⁵⁷ The first stage involved six informal consultations with states, UN agencies, civil society, academia, the private sector, the National Human Rights institutions, and other actors about developing a safe, orderly, and regular facilitation process for migration.⁵⁸ The primary goal of the consultation phase was to receive input and recommendations from relevant stakeholders to incorporate into the Global Compact.⁵⁹ In addition, five regional consultations were held to discuss the unique needs and thematic topics of interest of different regions.⁶⁰

The second stage was the stocktaking phase.⁶¹ The main purpose of stocktaking was to review, clarify, and analyze the gathered information for furthering the process.⁶² The stocktaking phase consisted of a Conference held in Puerto Vallarta, Mexico, attended by states, UN agencies, National Human Rights Institutions, organizations from the civil society, the academia, the private sector, and other stakeholders. They were led by two co-chair states, Mexico and Switzerland, who compiled the information received in the preceding phase and analyzed it to determine what the next stages should be.⁶³ Based on the six major themes identified, action groups were created to consolidate recommendations for

⁵⁴ See GCM, *supra* note 12, ¶ 15.

⁵⁵ *Id.* ¶¶ 1-2.

⁵⁶ *Id.* ¶ 4.

⁵⁷ *GCM Development Process*, MIGRATION DATA PORTAL, <https://migrationdataportal.org/themes/gcm-development-process> (last updated June 9, 2020).

⁵⁸ Mexico and Switzerland played important roles as facilitators. While the process of developing the Global Compact is state-led, civil society played a key role in contributing ideas and expertise.

⁵⁹ *GCM Development Process*, *supra* note 57.

⁶⁰ *Id.* Regional consultations included Africa, Latin America and the Caribbean, Western Asia, and Asia and the Pacific. In Africa, IOM supported the organization of sub-regional consultations. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Chair of the Preparatory Mtg. for the Global Compact for Migration, *Chair's Summary of the Preparatory (Stocktaking) Meeting 4–6 December 2017, Puerto Vallarta, Mexico*, at 2 (Dec. 6, 2017), https://refugeesmigrants.un.org/sites/default/files/171222_final_pv_summary_0.pdf.

actionable commitments.⁶⁴ The action groups highlighted key dimensions of migration: human, community, local/sub-national, national, regional, and global.⁶⁵ Following the stocktaking meeting, the co-chairs prepared a summary of their findings and then the United Nations Secretary-General published a report with recommendations.⁶⁶

Lastly, the third stage consisted of intergovernmental negotiations and finalizing the draft of the Global Compact.⁶⁷ This phase began with the publication of the Zero Draft of the Global Compact, written by the co-facilitators of the second stage and containing the discussions and recommendations from phases one and two.⁶⁸ Governments were able to advocate for their interests and there was significant participation from civil society at this stage, too.

Though the initial outlook of the Global Compact was unclear and may have even concerned observers, the final text of the Global Compact exceeded expectations.⁶⁹ Proponents of the Compact noted its comprehensive view of migration and the need for global responsibility to ease the burden that host countries can experience due to surges in migration.⁷⁰ Many groups favored a Global Compact structure resembling a human rights instrument—one which included a list of rights and narrowly tailored limitations, such as the International Covenant on Civil and Political Rights (ICCPR).⁷¹ However, the Global Compact is neither structured in such a way, nor was it intended to be. Despite these constraints, countries of origin and destination, civil society, and academia helped ensure that the human rights of migrants were protected in the Global Compact by explicitly referencing core human rights treaties such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights.⁷²

Unlike other agreements, the Global Compact for Migration combines different approaches to immigration, including the security approach, the development

⁶⁴ *Id.* at 4-5.

⁶⁵ *Id.* at 5.

⁶⁶ *GCM Development Process*, *supra* note 57.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Michele Klein Solomon & Suzanne Sheldon, *The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration*, 30 INT'L J. REFUGEE L. 584, 588 (2018).

⁷⁰ *Id.*

⁷¹ See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁷² GCM, *supra* note 12, ¶ 2.

approach, and the human rights approach. The security approach recognizes national sovereignty and reaffirms that states may control their domestic policy and govern within their jurisdiction while comporting with international law.⁷³ The development approach recognizes the far-reaching impacts of migration for origin, transit, and destination countries, thus requiring sustainable development at the local, national, regional, and global levels.⁷⁴ The United Nations Sustainable Development Goals provide guidance and strategies for each of these levels.⁷⁵ The human rights approach recalls existing international human rights law and calls for the protection of the rights of all migrants during each step of the migration process, regardless of their legal status.⁷⁶ By providing a comprehensive view of migration and its impacts, the Compact lays the groundwork for safe migration and effective multilateral cooperation.⁷⁷

The mandate of the UN Special Rapporteur (the “Mandate”) on the human rights of migrants is working to incorporate the codified linkages between the Global Compact and human rights into practice. The initial effort is to apply a systematic analysis of the Global Compact based on international human rights instruments, including pertinent treaties and the UN Declaration of Human Rights.⁷⁸

D. The Role of a Rapporteur

The United Nations Human Rights Council is empowered to appoint leading experts in human rights worldwide to the position of Special Rapporteur, and each Rapporteur is assigned a mandate that defines the scope of their purview.⁷⁹ Mandates can either focus on specific countries (country mandates) or on broader human rights violations worldwide (thematic mandates). In this capacity, Special Rapporteurs independently monitor human rights conditions, conduct fact-finding missions, publish country and thematic reports, and send Urgent Actions and Allegation Letters of alleged human rights violations to states, among their main

⁷³ *Id.* ¶ 15.

⁷⁴ *Id.* ¶ 10.

⁷⁵ *Id.* ¶ 18.

⁷⁶ *Id.* ¶ 15.

⁷⁷ *Id.* ¶ 8.

⁷⁸ *Id.* ¶¶ 2, 7.

⁷⁹ *Special Procedures of the Human Rights Council*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last visited Nov. 26, 2021).

functions. Rapporteurs then formulate specific recommendations and present them to states and UN bodies. Policies can change at the country level as a result of initiatives that Rapporteurs undertake in cooperation with state actors and civil society.⁸⁰

The former UN Commission on Human Rights⁸¹ created the mandate of the Special Rapporteur on the Human Rights of Migrants in 1999 via Resolution 1999/44.⁸² Consistent with its mandate, the Office of the Special Rapporteur on the Human Rights of Migrants releases extensive reports on international trends in migration. These reports address situations of migrants in countries of origin, transit, and destination, and the findings are presented to the UN General Assembly and the Human Rights Council in Geneva. In recent years, these reports have covered issues such as the return and reintegration of migrants,⁸³ access to justice for migrants,⁸⁴ gender and migration,⁸⁵ migratory detention of children and alternatives to it,⁸⁶ the right to freedom of association of migrants (including the right to belong to and form trade unions) and of their defenders,⁸⁷ “pushbacks” of

⁸⁰ For instance, after Cecilia Jimenez–Damary, UN Special Rapporteur on the Human Rights of Internally Displaced Persons, prepared a report on the link between violence and insecurity, and forced displacement, and on the situation of internally displaced persons in El Salvador, El Salvador’s Supreme Court relied in part on that report to rule that “an ongoing phenomenon marked by the forced displacement of persons stemming from the context of violence and insecurity in El Salvador” and the state must take certain actions to remedy the situation. *IACHR and the UN’s Special Rapporteur on the Human Rights of Internally Displaced Persons Welcome Decision Made by El Salvador’s Constitutional Chamber on Internal Displacement Caused by Violence*, INTER–AM. COMM’N H.R. (Aug. 10, 2018), https://www.oas.org/en/iachr/media_center/PReleases/2018/178.asp.

⁸¹ The Human Rights Council replaced the Commission in 2006. G.A. Res. 60/251, ¶ 1 (Apr. 3, 2006).

⁸² Commission on Human Rights Res. 1999/44, ¶ 3 (Apr. 27, 1999).

⁸³ Hum. Rts. Council, Rep. of the Special Rapporteur on the Hum. Rts. of Migrants, U.N. Doc. A/HRC/38/41 (May 4, 2018).

⁸⁴ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *Human Rights of Migrants*, U.N. Doc. A/73/178 (Sep. 26, 2018).

⁸⁵ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *The Impact of Migration on Migrant Women and Girls: A Gender Perspective*, U.N. Doc. A/HRC/41/38 (Apr. 15, 2019).

⁸⁶ François Crépeau (Special Rapporteur on the Hum. Rts. of Migrants), *Report of the Special Rapporteur on the Human Rights of Migrants*, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

⁸⁷ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *Right to Freedom of Association of Migrants and Their Defenders*, U.N. Doc. A/HRC/44/42, ¶ 30 (May 13, 2020).

migrants at land and at sea,⁸⁸ and the impact of the COVID–19 pandemic on the human rights of migrants.⁸⁹

About two–thirds of UN Member States have standing invitations to Special Rapporteurs.⁹⁰ Generally, states must grant an invitation to a Special Rapporteur to conduct a country investigation or grant a rapporteur’s visit request—even when states have a standing invitation to rapporteurs.⁹¹ For example, the Mandate repeatedly requested a visit to the United States during the Trump Administration but received no response. Additionally, it sent communications and urgent actions to the U.S. regarding certain policies and measures.⁹² These communications discussed the massive practice of migratory detention, the “Remain in Mexico” policy, the lack of an adequate policy on regularization, the issue of racism and migrants, the system of policies that discriminate against migrants, and many other issues. The Mandate also cited concerns regarding the death of Jakelin Caal, a seven–year–old Guatemalan migrant who died in U.S. Customs and Border Protection custody after crossing the U.S.–Mexico border with her father.⁹³ At the beginning of 2017, the U.S. government responded to the Mandate’s communications in a generic manner, and the Trump Administration left

⁸⁸ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*, U.N. Doc. A/HRC/47/30 (May 12, 2021).

⁸⁹ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *One and a Half Years After: The Impact of COVID–19 on the Human Rights of Migrants*, U.N. Doc. A/76/257 (July 30, 2021).

⁹⁰ See *Standing Invitations*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Nov. 20, 2021), <https://spinternet.ohchr.org/StandingInvitations.aspx> (“A standing invitation is an open invitation extended by a Government to all thematic special procedures. By extending a standing invitation States announce that they will always accept requests to visit from all special procedures.”).

⁹¹ *Country Visits*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/issues/assemblyassociation/pages/countryvisits.aspx> (last visited Nov. 26, 2021).

⁹² E.g., E. Tendayi Achiume (Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) et al., *Mandates of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; The Special Rapporteur on the Human Rights of Migrants; And the Working Group on Discrimination Against Women and Girls*, 1, U.N. Doc. AL USA 20/2020 (Aug. 12, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25476> (calling attention to increased anti–Asian rights violations documented in the U.S., both physical and verbal, amidst the pandemic and requesting that the U.S. provide information on the action being taken to prevent these harms).

⁹³ Chantal Da Silva, *Trump Administration Accused of Ignoring U.N. Requests for Access to U.S.–Mexico Border*, NEWSWEEK (Mar. 18, 2019), <https://www.newsweek.com/trump-administration-accused-denying-united-nations-migrants-human-rights-1366084>.

subsequent inquiries unanswered.⁹⁴ In June 2018, the U.S. made an unprecedented move by stepping away from the UN Human Rights Council, stopping communications with all Special Rapporteurs altogether.⁹⁵ In August 2020, the U.S. government began communications again.⁹⁶

There was only one visit, which evaluated the extreme poverty and human rights issues in the United States, and it was allowed because the previous presidential administration had accepted the visit request.⁹⁷ Such lack of engagement with UN institutions and officials is an issue of transparency, exemplified by the Trump administration's communications with international organizations. If a thematic rapporteur is not granted an official visit, they cannot produce a country report. Only country rapporteurs can produce country reports without first conducting an official visit. The United States, like most countries, does not have a Special Rapporteur appointed, so a report cannot be produced without a prior visit.

Such reports are important because by assessing the current situation in a country or within a theme, the United Nations and the international community become aware of the pressing issues they must correct. Naturally, conditions are ever-changing. The COVID-19 Pandemic, for instance, has introduced many unique challenges and exacerbated the vulnerability of migrant populations.

⁹⁴ *Id.*

⁹⁵ Mark Leon Goldberg, *US Ceases Cooperation with UN Human Rights Special Rapporteurs*, UN DISPATCH (Jan. 8, 2019), <https://www.undispatch.com/us-ceases-cooperation-with-un-human-rights-special-rapporteurs/>.

⁹⁶ *See, e.g.*, David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment) et al., *Mandates of the Special Rapporteur on the Rights of Indigenous Peoples; the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment; The Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association; And the Working Group on Discrimination Against Women and Girls*, U.N. Doc. AL USA 21/2020 (Aug. 5, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25481>.

⁹⁷ *See* Hum. Rts. Council, Rep. of the Special Rapporteur on Extreme Poverty and Hum. Rts. on His Mission to the United States of America, U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018).

II. MIGRANT RIGHTS, MIGRATION POLICY, AND PUBLIC SERVICES DURING A PANDEMIC

The coronavirus pandemic has highlighted existing structural gaps, sharpened the case for reconsidering how states provide public services to migrants, and attracted the attention of policymakers and the public. In May 2020, the UN Committee of Migrant Workers and the Special Rapporteur on the Human Rights of Migrants issued a Joint Guidance Note on the Impacts of the COVID–19 Pandemic on the Human Rights of Migrants.⁹⁸ The Joint Guidance Note emphasizes the need to: (1) establish a firewall between public services and migration agencies, (2) facilitate the regularization processes, (3) minimize migratory detention of adults and ban child detention as a consequence of migratory status, (4) guarantee access to justice and to social and economic rights for migrants throughout the pandemic, and (5) ensure adequate oversight and judicial control of the extraordinary measures countries may deploy during the pandemic.⁹⁹ The pandemic has heightened inequalities in access to rights and opportunities. Therefore, states must take direct measures to address the growing gaps in migrants' access to rights. This Joint Guidance Note was later followed by an additional note, issued by the same bodies, on equitable access to COVID–19 vaccines for migrants.¹⁰⁰ To ensure safe access to public services, states should take proactive initiatives to shield migrants from immigration enforcement when seeking public services.

A. A Firewall Between Public Services and Migration Agencies

The pandemic has demonstrated that migrants' rights may ordinarily be best served by establishing a firewall, which is essentially a separation between public

⁹⁸ U.N. Comm. on Migrant Workers & U.N. Special Rapporteur on the Hum. Rts. of Migrants, Joint Guidance Note on the Impacts of the COVID–19 Pandemic on the Human Rights of Migrants (May 26, 2020), <https://reliefweb.int/sites/reliefweb.int/files/resources/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf> [hereinafter Joint Guidance Note].

⁹⁹ *Id.* at 3.

¹⁰⁰ U.N. Comm. on Migrant Workers et al., Joint Guidance Note on Equitable Access to Covid–19 Vaccines for All Migrants (Mar. 8, 2021), <https://www.ohchr.org/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>.

services and the immigration enforcement apparatus.¹⁰¹ Firewalls ensure that immigration enforcement authorities cannot access information concerning the immigration status of individuals seeking public services or assistance. Immigration enforcement will often issue detainers—notices to other law enforcement agencies that immigration enforcement intends to assume custody of an irregular migrant¹⁰²—upon learning of an individual's legal status from local health or law enforcement authorities.¹⁰³ In the absence of such firewalls, migrants, especially irregular ones, will often avoid public services due to the fear of detention and deportation.¹⁰⁴ Health services and education are two critical public services that should be protected through the erection of a firewall.

Migrants are often denied health and public services because slow administrative procedures for processing migrants and other restrictive mechanisms implemented by states limit their access. This divide between administrative procedures and public services, particularly during the pandemic, often has broader public health impacts. For example, migrants who are fearful of arrest and deportation are generally reluctant to seek out health services.¹⁰⁵ In the context of the pandemic, irregular migrants are less likely to access COVID-19 diagnostic testing, medical care, or vaccines when doing so can draw attention to their status.¹⁰⁶ While data is variable from country to country, early evidence suggested migrants have experienced higher mortality rates from COVID-19 than native-born populations.¹⁰⁷ This trend is partially explained by a reluctance by migrants to

¹⁰¹ François Crépeau & Bethany Hastie, *The Case for 'Firewall' Protections for Irregular Migrants*, 17 EUR. J. MIGRATION & L. 157, 166 (2015).

¹⁰² An irregular migrant is one who lacks a lawful immigration status.

¹⁰³ Jessica Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUDIES (Mar. 22, 2021), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

¹⁰⁴ KRISTA M. PEREIRA ET AL., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, BARRIERS TO IMMIGRANTS' ACCESS TO HEALTH AND HUMAN SERVICES PROGRAMS 11 (2012), <https://aspe.hhs.gov/reports/barriers-immigrants-access-health-human-services-programs-0>;

Whitney L. Duncan & Sarah B. Horton, *Serious Challenges and Potential Solutions For Immigrant Health During COVID-19*, HEALTH AFFAIRS (Apr. 18, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200416.887086/full/>.

¹⁰⁵ Heide Castañeda et al., *Immigration as a Social Determinant of Health*, 36 ANN. REV. PUB. HEALTH 375, 381 (2015).

¹⁰⁶ ELAYNE J. HEISLER & ABIGAIL F. KOLKER, CONG. RESEARCH SERV., UNAUTHORIZED IMMIGRANTS' ACCESS TO COVID-19 VACCINES 2 (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11617>.

¹⁰⁷ Org. for Econ. Co-operation and Dev. [OECD], *What Is the Impact of the COVID-19 Pandemic on Immigrants and Their Children?*, OECD (Oct. 19, 2020),

seek medical help for serious COVID–19 symptoms for fear of arrest and deportation. Outside of the context of the current pandemic, immediate and continuing access to public services is critical to the wellbeing, health, and education of migrants.¹⁰⁸ In general, a firewall between public services and migration law enforcement or executive agencies involved in the migration oversight is a key measure to prevent undue delays in, or constraints on, the provision of public services.

Access to education is another critical public service that should be protected through firewall policies. A central aim of many human rights instruments is to ensure the right to education regardless of immigration status.¹⁰⁹ In fact, the European Court of Human Rights considers the right to education to be one of the “most fundamental values in democratic societies.”¹¹⁰ Consequently, some states, such as Germany, have lifted proof of local residence requirements so that irregular migrant children are not reported to enforcement agencies.¹¹¹ The Netherlands has even taken additional steps to expand access to education by subsidizing school–related expenses such as classroom supplies and fees for school trips.¹¹² While these educational models are key examples of the benefits of firewall policies, some areas have taken different approaches, such as sanctuary cities in the United States.

In the United States, cities that implement such firewalls are known as “sanctuary cities.” The phrase “sanctuary city” first emerged in the context of migration in the 1980s as a term associated with faith communities that provided temporary sanctuary to migrants fleeing Central American violence.¹¹³ This label, while imprecise and lacking a consistent definition, generally indicates a city or region that “limits cooperation with the national government to enforce immigration laws.”¹¹⁴ The U.S. Justice Department defines a sanctuary city as “a jurisdiction that when asked to detain a noncitizen [due to his/her irregular immigration status], says ‘no.’”¹¹⁵ Examples of sanctuary cities in the U.S. include,

<https://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/#section-d1e242>.

¹⁰⁸ See Joint Guidance Note, *supra* note 98, at 1–2.

¹⁰⁹ Crépeau & Hastie, *supra* note 101, at 161.

¹¹⁰ *Id.* at 162.

¹¹¹ *Id.* at 178–179.

¹¹² *Id.* at 179.

¹¹³ Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1709 (2018).

¹¹⁴ *Sanctuary Cities Symposium*, 81 ALB. L. REV. 679, 680 (2017).

¹¹⁵ *Id.* at 682.

among others, Austin, Chicago, Houston, Los Angeles County, and Newark.¹¹⁶ The methods by which sanctuary cities limit this cooperation is variable and depends significantly on regional factors, including city size, infrastructure, population density, economic factors, and political climate.¹¹⁷ However, the most common policy shared by sanctuary cities is a requirement that police not investigate either civil or criminal immigration violations.¹¹⁸ For instance, a police officer in a sanctuary county might not reach out to federal immigration authorities after issuing a citation to an irregular migrant. This separation, between local law enforcement and immigration agencies in the examples above, builds trust and promotes confidence among migrants that they can securely access public facilities like hospitals, schools, and the justice system without fear of being detained or deported.¹¹⁹

Sanctuary cities remain a controversial topic in the U.S. At the state and local level, cities and municipalities have clashed with state legislatures over the legality of sanctuary cities. For example, Texas adopted Senate Bill 4 (SB4) to prohibit cities from adopting sanctuary city policies within the state.¹²⁰ In the opposite direction, California declared itself a sanctuary State in 2017.¹²¹ At the federal level, the Trump administration made ending sanctuary cities a central policy of his immigration platform.¹²² To this end, it restricted hundreds of millions of dollars in grant funding to sanctuary cities to discourage their limited cooperation with the U.S. Immigration and Customs Enforcement (ICE) and encourage compliance.¹²³ Conversely, the Justice Department under the Biden administration has since reversed the Trump-imposed funding restrictions and restored law enforcement grants to sanctuary cities.¹²⁴ Recently, the Biden administration announced that it

¹¹⁶ Vaughan & Griffith, *supra* note 103.

¹¹⁷ Estefanía Cruz Lera, *The Spectrum of Sanctuary Cities in the United States: Contrasting the Genesis and Practices of Proimmigrant Local Policies*, 20 ESTUDIOS FRONTERIZOS, Dec. 11, 2019), at SciELO, http://www.scielo.org.mx/scielo.php?pid=S0187-69612019000100108&script=sci_arttext&tlng=en.

¹¹⁸ Lasch et al., *supra* note 113, at 1739.

¹¹⁹ *Sanctuary Cities Symposium*, *supra* note 114.

¹²⁰ *See City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) (upholding most of the law's provisions).

¹²¹ CAL. GOV'T CODE § 7284 (2018).

¹²² Lasch et al., *supra* note 113, at 1704.

¹²³ *See Sarah N. Lynch, U.S. Justice Department Ends Trump-era Limits on Grants to 'Sanctuary Cities'*, REUTERS, <https://www.reuters.com/world/us/exclusive-us-justice-department-ends-trump-era-limits-grants-sanctuary-cities-2021-04-28/> (last updated Apr. 28, 2021, 8:31 AM).

¹²⁴ *Id.*

would expand the number of locations in which Immigration and Customs Enforcement agents could not make immigration status–related arrests, stating that the policy change was designed to ensure immigrants in the U.S. are less deterred from accessing critical social services.¹²⁵ While this policy does not constitute a firewall between local and federal agencies, it indicates that federal–level actors are recognizing the chilling effect—and the social and public health implications—when migrants are deterred from accessing critical services.

The creation of sanctuary cities is a cornerstone of the framework to ensure that migrants have legal rights and access to public services. Comparisons between sanctuary cities and non–sanctuary cities have revealed new insights across a variety of social and economic indicators.¹²⁶ For example, there are 35.5 fewer crimes committed per 10,000 people in sanctuary cities compared to non–sanctuary cities.¹²⁷ The median household annual income is higher while the poverty and unemployment rates are generally lower in sanctuary cities.¹²⁸ Despite these metrics, there is not a single country that has established firewalls at the national level. There are, presently, only sanctuary cities and counties, not sanctuary countries, which is important to note. This gap is unacceptable, and the international community must examine why barriers exist between city and State adoption of firewall policies. However, firewall policies are not the only barrier created by states. There is also disconformity between international borders and various procedures, if any, for unauthorized migrants to gain legal status after entering a country.

¹²⁵ See U.S. DEP'T OF HOMELAND SEC., GUIDELINES FOR ENFORCEMENT ACTIONS IN OR NEAR PROTECTED AREAS (2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.

¹²⁶ See Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

¹²⁷ *Id.*

¹²⁸ *Id.*

B. The Need for Regularization Processes

Regularization is the process or procedures by which eligible unauthorized residents may be granted either temporary or permanent legal status.¹²⁹ Irregular migrants face many challenges, including exclusion from the legal labor market, property ownership, and other basic rights.¹³⁰ They face limited access to health services and are often ineligible for many of the social services available to citizens.¹³¹ For example, a COMPAS study found that irregular migrants in the EU often only received emergency services while higher levels of care were reserved for specific migrant populations such as children or those with special medical conditions.¹³² Furthermore, irregular migrants are particularly vulnerable to abuse and exploitation.¹³³ Irregular migrants may also be subject to criminal charges based on their residency status.¹³⁴

Regularization policies are heterogeneous and depend on local contextual factors, particularly local politics.¹³⁵ Some programs target specific groups of migrants while others are conditioned upon employment or residency duration.¹³⁶ Regularization programs and procedures of any form are crucial for incorporating irregular and often vulnerable migrant populations into their communities and into the broader society by providing temporary or permanent legal status.¹³⁷ Regularization programs are often controversial, with supporters frequently extolling the economic and humanitarian benefits of fully incorporating migrants

¹²⁹ Donald Kerwin et. al., *Unauthorized Immigrants in the United States and Europe: The Use of Legalization/Regularization as a Policy Tool*, MIGRATION POL'Y INST. (May 9, 2012), <https://www.migrationpolicy.org/article/unauthorized-immigrants-united-states-and-europe-use-legalizationregularization-policy-tool>.

¹³⁰ McGovern, *supra* note 31.

¹³¹ Maria Mallet-Garcia & Nicola Delvino, *Migrants with Irregular Status During the COVID-19 Pandemic: Lessons for Local Authorities in Europe* (Glob. Exch. on Migration & Diversity, Working Paper, Nov. 2020), <https://www.compas.ox.ac.uk/wp-content/uploads/CMISE-Impact-of-COVID-on-access-to-services-for-irregular-migrants.pdf>.

¹³² *Id.* at 3.

¹³³ McGovern, *supra* note 31.

¹³⁴ *Id.*

¹³⁵ See SHERRIE A. KOSSOUDJI, IZA WORLD OF LABOR, WHAT ARE THE CONSEQUENCES OF REGULARIZING UNDOCUMENTED IMMIGRANTS? (2016), <https://wol.iza.org/uploads/articles/296/pdfs/what-are-consequences-of-regularizing-undocumented-immigrants.pdf?v=1>.

¹³⁶ *Id.*

¹³⁷ See generally Albert Sabater & Andreu Domingo, *A New Immigration Regularization Policy: The Settlement Program in Spain*, 46 INT'L MIGRATION REV. 191 (2012) (examining and discussing the effectiveness of case studies).

into society.¹³⁸ Lawful status can improve irregular migrants' labor rights and freedom of movement while reducing exploitation.¹³⁹ Conversely, detractors of regularization programs are often critical of purported benefits and potential competition for jobs in the labor market. As a result, governments may face considerable political pressure to curb irregular immigration under the belief that regularization policies reward unlawful behavior.¹⁴⁰

The COVID–19 pandemic has underscored the importance of regularization procedures for protecting human rights and promoting the welfare of migrants during and beyond the pandemic. The Office of the Special Rapporteur on the Human Rights of Migrants, the Parliamentary Assembly of the Council of Europe, and the Inter–American Commission have vocalized the importance of ensuring that migrants, who hold a regularized immigration status, maintain their status and the corresponding benefits throughout the pandemic.¹⁴¹ For example, migrants frequently experience increased risk of exposure to COVID–19 because they work in industries, such as healthcare or the service industry, where they are considered essential workers.¹⁴² Even before the pandemic, many migrants experienced unsafe working conditions with low wages.¹⁴³ These conditions have been exacerbated because migrants' immigration status limits the types of job opportunities that are available to them, frequently relegating them to positions that put them at a higher risk of contracting COVID–19.¹⁴⁴ Additionally, others may face immigration challenges from border closures that inadvertently caused them to commit an immigration violation. For instance, someone with lawful permanent residence status in the U.S. may risk inadmissibility if they reenter the country after a departure of 180 days.¹⁴⁵ Others have been forced to overstay their visas due to

¹³⁸ McGovern, *supra* note 31.

¹³⁹ Stephen P. Rusczyk, *Moral Career of Migrant Il/legality: Undocumented Male Youth in New York City and Paris Negotiating Deportability and Regularizability*, 55 LAW SOC'Y REV. 496, 507 (2021).

¹⁴⁰ Kerwin et al., *supra* note 129.

¹⁴¹ See Acosta, *supra* note 30, at 275–76.

¹⁴² See David Torres, *The Immigration Regularization of Undocumented Immigrants is Also Essential*, AM.'S VOICE (Apr. 8, 2020), <https://americasvoice.org/uncategorized/the-immigration-regularization-of-undocumented-immigrants-is-also-essential/>.

¹⁴³ Ruben J. Garcia, *The Human Right to Workplace Safety in a Pandemic*, 64 WASH. U. J. L. & POL'Y 113, 116 (2021).

¹⁴⁴ *Id.* at 118.

¹⁴⁵ See 8 U.S.C. § 1101(a)(13)(C)(ii) (2006).

border closures which can result in removal.¹⁴⁶ In the European Union, individuals may face sanctions for overstaying their visas.¹⁴⁷ However, the European Commission has recommended that all sanctions caused by the COVID-19 pandemic be waived and not considered in future immigration proceedings.¹⁴⁸ Considering the extraordinary circumstances of the pandemic, more protection must be given to migrants to ensure their human rights are met now and in the future.

Current U.S. regularization programs evaluate several factors when determining the legal status of migrants, including continuity of residence, employment status, family ties, and other humanitarian considerations.¹⁴⁹ However, these evaluations are often challenging because they rely on incomplete and sometimes speculative information.¹⁵⁰ The U.S. has granted select regularization programs that allow migrants to register with the government for legalization of status if they arrived by a certain date, yet these threshold dates have been set irregularly by Congress and do not update automatically.¹⁵¹ A prominent legislation proposal that would operate automatically is the Development, Relief, and Education for Alien Minors (DREAM) Act that, if passed, would allow migrants who arrived in the U.S. as children a pathway to citizenship.¹⁵²

Despite pressure from advocates, the European Union has generally been hesitant to adopt broad regularization programs and instead, member states have utilized regularization on a case by case basis for economic or humanitarian reasons.¹⁵³ The EU is uniquely situated because of the Schengen agreement which allows free movement between member states.¹⁵⁴ Consequently, policies adopted in one state have immediate implications for other member states. Spain, as a result,

¹⁴⁶ See, e.g., *USCIS Response to Covid-19*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/about-us/uscis-response-to-covid-19> (last updated Nov. 24, 2021).

¹⁴⁷ *Further Guidance on Schengen COVID-19-Related Travel Ban and Solutions for Overstay*, FRAGOMEN, DEL REY, BERNSEN & LOEWY LLP (Apr. 1, 2020), <https://www.fragomen.com/insights/further-guidance-on-schengen-covid-19-related-travel-ban-and-solutions-for-overstay.html>.

¹⁴⁸ *Id.*

¹⁴⁹ DEMETRIOS G. PAPADEMETRIOU ET AL., MIGRATION POL'Y INST., OBSERVATION ON REGULARIZATION AND THE LABOR MARKET PERFORMANCE OF UNAUTHORIZED AND REGULARIZED IMMIGRANTS 9–10 (2004), <https://www.issuelab.org/resources/5576/5576.pdf>.

¹⁵⁰ *Id.* at 2.

¹⁵¹ See Kerwin et al., *supra* note 129.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

announced that it would no longer implement major regularization programs due to the political implications of the EU.¹⁵⁵ Currently, most regularization programs tend to be smaller in scale and more targeted.¹⁵⁶ For example, Germany has tested the Global Skill Partnership model that trains potential migrants in their home countries before migration.¹⁵⁷ Canada has implemented the Agri–Food Pilot program that provides residency to experienced, nonseasonal workers in agriculture and various related industries.¹⁵⁸

An alternative model, the Model International Mobility Convention (MIMC), encourages states to strengthen regularization mechanisms by providing transparent and nondiscretionary criteria to access legal status and by prioritizing residence status as a primary pathway for undocumented migrants.¹⁵⁹ Its goal is to reaffirm and expand the rights of mobile people, “regardless of status.”¹⁶⁰ MIMC contemplates a definition of migrants that is broad enough to span categories that include tourists, migrant workers, refugees, and human trafficking victims.¹⁶¹ Furthermore, it allows states parties to create their own requirements for regularization which allows the policies to be tailored to state needs and values.¹⁶² Additionally, it prioritized the rights of children when considering the family connections or family life of migrants lacking legal status.¹⁶³ The MIMC also affirms the principle of non–refoulement which prevents individuals from being

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see also Gonzalo Fanjul & Helen Dempster, *Regularizing Migrant Workers in Response to COVID–19*, CTR. FOR GLOB. DEV. (July 28, 2020), <https://www.cgdev.org/blog/regularizing-migrant-workers-response-covid-19>.

¹⁵⁷ See MICHAEL CLEMENS ET AL., CTR. FOR GLOB. DEV., *MAXIMIZING THE SHARED BENEFITS OF LEGAL MIGRATION PATHWAYS: LESSONS FROM GERMANY’S SKILLS PARTNERSHIPS* (2019), <https://www.cgdev.org/publication/maximizing-shared-benefits-legal-migration-pathways>.

¹⁵⁸ See generally *Agri–food Pilot: Eligible Industries and Occupations*, GOV’T OF CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/agri-food-pilot/eligible-industries.html> (last updated June 21, 2021).

¹⁵⁹ Acosta, *supra* note 30, at 279; The Model International Mobility Convention Commission, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, 56 COLUM. J. TRANSNAT’L L. 342, 389, art. 84, 397, art. 97 (2018).

¹⁶⁰ *Id.* at 346. MIMC further aims to “[e]xpand[] those basic rights of mobile people where warranted in order to address the growing gaps in protection and responsibility that are leaving people vulnerable.” *Id.*

¹⁶¹ *Id.* at 363–67 (tourists); *Id.* at 368–72 (students); *Id.* at 373–411; *Id.* at 412–37; *Id.* at 438–45 (human trafficking victims).

¹⁶² Acosta, *supra* note 30, at 277.

¹⁶³ *Id.*

expelled to nations where they face a significant threat of harm.¹⁶⁴ By affirming the aforementioned principles and working toward uniformity, the MIMC works toward consistency among regularization processes. Such regularization procedures must also be attentive to the issue of migrants detained while awaiting immigration processing.

C. The Need to Release Most of the Migrants Who Are in Immigration Detention, Including All Detained Children

One Trump administration migration policy involved the separation of thousands of migrant children from their parents and detaining them in facilities along the U.S.–Mexico border. Descriptions of these facilities were widely reported to be increasingly dangerous and overcrowded, often rife with illness and squalid living conditions.¹⁶⁵ UN human rights experts decried these actions and further called on the U.S. government to reunite the separated children with their parents. Experts have further stated that “the detention of children is punitive, severely hampers their development, and in some cases may amount to torture.”¹⁶⁶ Parents of the separated migrant children are often themselves detained without being provided information or updates regarding the status or whereabouts of their children.¹⁶⁷ In response to public outrage worldwide,¹⁶⁸ the Trump administration reversed course by issuing EO 13841, which effectively halted this policy of

¹⁶⁴ *Id.* at 278.

¹⁶⁵ See *Conditions in Migrant Detention Centers*, AM. OVERSIGHT, <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers> (last updated (Jan. 20, 2021)).

¹⁶⁶ *UN Experts to US: “Release Migrant Children from Detention and Stop Using them to Deter Irregular Migration”*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. (June 22, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>.

¹⁶⁷ See Priscilla Alvarez, *Parents of 270 Children Separated at Border Under Trump Have Still not Been Found, Court Filing Says*, CNN POLITICS (Nov. 3, 2021), <https://www.cnn.com/2021/11/03/politics/border-separations-trump-administration/index.html>.

¹⁶⁸ *E.g.*, Ashley Fetters, *The Moral Failure of Family Separation*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-family-separation-policy-causes-national-outrage/579676/>; Will Grant, *Migrant Children: Latin America Unites in Outrage*, BBC NEWS, MEXICO (June 22, 2018), <https://www.bbc.com/news/world-latin-america-44574589>; Chico Harlan & William Branigin, *Trump’s Family–separation Policy Faces International Condemnation from Pope Francis, Theresa May and Others*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/world/pope-francis-criticizes-trumps-family-separation-policy-on-migrants-says-populism-is-not-the-solution/2018/06/20/65c15102-7472-11e8-9780-b1dd6a09b549_story.html.

separation; however, the executive order was silent on how to manage and reunite the children with their parents,¹⁶⁹ and the struggle to reach such reunification has continued to date. In the absence of clear federal action or oversight, migrant children faced protracted detention in substandard facilities and the trauma of separation from their families.

The separation of migrant children along the U.S.–Mexico border raises important questions of how the U.S. should best manage cross–border movement involving families and children. A survey of child detention policies by various states worldwide reveals a stark contrast in policy.¹⁷⁰ The UN has previously adopted resolutions that emphasize the importance of safeguarding the human rights of migrant children and further illustrate the deleterious consequences of separating children from their families.¹⁷¹ Consequently, some States have passed legislation that unconditionally prohibits the detention of migrant children.¹⁷² For example, Ireland has passed the International Protection Act of 2015 that specifically prohibits the detention of any applicant for status–based legal protection under the age of 18.¹⁷³ Costa Rica issued the Decree on the Regulation of Refugees, which “emphatically prohibits the detention of children regardless of where they are accompanied or unaccompanied by their parents.”¹⁷⁴ The Council of Europe has stated that children should not be detained.¹⁷⁵ Building on these principles, the Council of Europe adopted an Action Plan on Protecting Refugee and Migrant Children in Europe.¹⁷⁶ The Action Plan addressed the primary challenges of protecting migrant children by promoting measures to prevent the

¹⁶⁹ Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29,435 (June 20, 2018).

¹⁷⁰ Michael Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, in Human Rights Watch World Report (2016), 41, at 45 & 50, (describing the range from Australia’s mandatory detention policy to nations that have committed to ending child detention altogether), https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf.

¹⁷¹ Human Rights Council Res. 33/7, Unaccompanied Migrant Children and Adolescents and Human Rights (Sept. 26, 2016).

¹⁷² E.g., *New Italian Law Protects Unaccompanied Migrant and Refugee Children*, INT’L DET. COAL. (Apr. 13, 2017), <https://idcoalition.org/news/new-italian-law-protects-unaccompanied-migrant-and-refugee-children/>.

¹⁷³ Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), *Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, ¶ 35, U.N. Doc. A/75/183 (July 20, 2020).

¹⁷⁴ *Id.* ¶ 36.

¹⁷⁵ *Id.* ¶ 40.

¹⁷⁶ *Id.*

detention of children and providing the appropriate resources to care for them.¹⁷⁷ Furthermore, the Council of Europe has adopted a series of recommendations and resolutions that discourages the detention of children for immigration-related reasons.¹⁷⁸ States are encouraged to develop and implement community-based alternative programs for children and their families.¹⁷⁹

In many countries, unprocessed migrants are placed in overcrowded detention centers.¹⁸⁰ These living conditions greatly exacerbate the risk of spreading diseases, including COVID-19. Detained migrants are further at risk because receiving states are ill-equipped to provide basic health services at detention centers.¹⁸¹ Compounding this further, in the case of the United States, efforts by third parties to monitor COVID-19 in immigration detention facilities have been severely hampered by limited data availability and inconsistent reporting by ICE.¹⁸² For this reason, it bears repeating that separating administrative procedure and public services during the pandemic has broader public health impacts.¹⁸³

The right of access to education is often another casualty of policies placing migrants in detention centers. In these centers, child migrants are deprived of their right to an education; often, they do not receive the resources necessary to continue their education.¹⁸⁴ A settlement agreement reached in the U.S. case *Flores v. Reno* stipulates that basic living and education standards should be maintained in detention centers that house children.¹⁸⁵ The agreement mandates that these children should receive an “appropriate” education adapted to each child’s “level of development” and “communication skills in a structured classroom setting.”¹⁸⁶ However, the implementation of this policy has been frustrated by inadequate

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *Annex to Policy Brief of the United Nations Network on Migration on COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?*, at 2 (Feb. 2021), https://migrationnetwork.un.org/sites/default/files/docs/annex_to_policy_brief_on_atd_and_covid-19.pdf.

¹⁸¹ Joint Guidance Note, *supra* note 98, at 3.

¹⁸² See Noelle Smart & Adam Garcia, *Tracking COVID-19 in Immigration Detention: A Dashboard of ICE Data*, VERA INST. OF JUST. (Nov. 18, 2020), <https://www.vera.org/tracking-covid-19-in-immigration-detention>.

¹⁸³ See Rep. of the Special Rapporteur on the Hum. Rts. of Migrants, *supra* note 83.

¹⁸⁴ See Catalina V. Visico, “Appropriate” Education: Educating Undocumented Children in Detention, 54 U.S.F. L. REV. 339, 342 (2020).

¹⁸⁵ Stipulated Settlement Agreement, *Flores v. Reno*, No CV 85-4544-RJK(Px) (C.D. Cal. 1997).

¹⁸⁶ Visico, *supra* note 184, at 342.

English Language Learner (ELL) programs and unqualified teachers who lack the language credentials to effectively communicate with migrant children.¹⁸⁷ Consequently, efforts to provide an education are severely undermined by the shortsighted development of English-based lesson plans. Without adequate educational resources, migrant children face increased social and educational disadvantages and loss of future opportunities. All migrants, however, are susceptible to unique harms during the pandemic as there are challenges to accessing key government services that many rely on, even without the added strain of the pandemic.

D. The Need to Guarantee Access to Justice, Health Services and Economic Rights for Migrants During the Pandemic

Undocumented workers and their families are among those most affected by the COVID-19 pandemic and the resulting economic disruption.¹⁸⁸ States can adopt pandemic measures to mitigate the impact on migrants, or they can alternatively pursue affirmative measures to address the disparate effects the pandemic and policy measures are having on migrants. Public health measures have included mandatory lockdowns, quarantine, physical distancing, restrictions on the right to freedom of movement, and border closures.¹⁸⁹ Affirmative measures, to mitigate the harmful impacts of pandemic emergency measures, have included the extension of migrant work permits, changes to unemployment benefit qualifications, free access to healthcare for COVID-19 related issues, and public information campaigns to prevent discrimination against migrants.¹⁹⁰ In either case, receiving states must take note that migrants and their families represent a high percentage of persons who are unemployed or earning substantially decreased income following implementation measures intended to counter the spread of COVID-19.¹⁹¹

The consequences of these efforts can have widespread impacts on vulnerable populations and require increased efforts to mitigate the detrimental economic

¹⁸⁷ *Id.* at 363.

¹⁸⁸ See RAUL HINOJOSA-OJEDA ET AL., UCLA NORTH AM. INTEGRATION AND DEV. CTR., ESSENTIAL BUT DISPOSABLE: UNDOCUMENTED WORKERS AND THEIR MIXED-STATUS FAMILIES 1, 3 (2020), <https://irle.ucla.edu/wp-content/uploads/2020/08/Essential-Undocumented-Workers-Final-w-Cover.pdf>.

¹⁸⁹ Joint Guidance Note, *supra* note 98.

¹⁹⁰ *What Is the Impact of the COVID-19 Pandemic on Immigrants and Their Children?*, *supra* note 107.

¹⁹¹ See *id.* at 9-12.

effects on migrants while preventing the spread of COVID-19. For example, economic relief is often necessary for migrants' families in their countries of origin because the pandemic has caused a significant reduction in global remittances.¹⁹² Furthermore, administrative delays attributable to the pandemic have had significant impacts on migrants' abilities to obtain work permits.¹⁹³ Economic relief must encompass a holistic approach that incorporates direct and indirect measures of economic relief. Numerous jurisdictions have offered short-term disaster assistance, stimulus payments, or other relief to individuals unable to access federal economic impact payments or unemployment insurance programs.¹⁹⁴ Some migrants who previously did not qualify for Medicaid may be eligible to access emergency funds if they are otherwise eligible for their state's Medicaid program.¹⁹⁵ For example, the state of California has extended statewide unemployment insurance, earned income tax credits, and prepaid food and living subsidies to irregular migrants.¹⁹⁶ States can utilize indirect measures by improving and expediting legal and administrative processes, so that migrants will not be without working papers and documents that are necessary to obtain work legally and access the benefits of many public services.

In addition to the right to work and employment issues, the right to health has become another central issue for migrants during the pandemic. In response, some states have made efforts to maintain flexible access to basic health services.¹⁹⁷ Despite these efforts, the situation has remained unstable for migrants.¹⁹⁸ In response, some countries have implemented policies that grant temporary residence to migrants.¹⁹⁹ For example, Portugal grants a temporary residence permit subject

¹⁹² Joint Guidance Note, *supra* note 98.

¹⁹³ See Daniel Costa, *Temporary Work Visa Programs and the Need for Reform*, ECON. POL. INST. (Feb. 3, 2021), <https://www.epi.org/publication/temporary-work-visa-reform/>.

¹⁹⁴ See TANYA BRODER ET AL., NAT'L IMMIGRATION L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (2021), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms>.

¹⁹⁵ See *id.*

¹⁹⁶ Acosta, *supra* note 30.

¹⁹⁷ See REFUGEES AND MIGRANTS IN TIMES OF COVID-19: MAPPING TRENDS OF PUBLIC HEALTH AND MIGRATION POLICIES AND PRACTICES, WHO 17-20 (2021), <https://www.who.int/publications/i/item/9789240028906> (detailing pandemic case studies from numerous states).

¹⁹⁸ See *What Is the Impact of the COVID-19 Pandemic on Immigrants and Their Children*, *supra* note 107, at 3.

¹⁹⁹ See *Regularizing Undocumented People in Response to the COVID-19 Pandemic*, PLATFORM FOR INTER'L COOPERATION ON UNDOCUMENTED MIGRANTS (July 1, 2020), <https://picum.org/regularising-undocumented-people-in-response-to-the-covid-19-pandemic/>.

to yearly renewal for persons wanting to settle in Portugal that meet monthly income minimum levels.²⁰⁰ Temporary residence permit holders are granted basic legal protections as well as varied tax and social benefits.²⁰¹ Migrants who meet minimum income requirements are eligible for health insurance, work permits, and ultimately permanent legal residence after five years. The temporary residence permit allows migrants to access healthcare services and study in Portugal without restrictions.²⁰² Temporary residence programs are an important stopgap measure, as they enable migrants to have full access to the labor market and social welfare.²⁰³

Finally, access to justice is another key mechanism to ensure the enjoyment of all human rights, including economic and social ones. Undocumented immigrants are particularly vulnerable because they lack legal status in countries such as the United States. As the U.S. Supreme Court explained in *Plyler v Doe*, undocumented migrants experience heightened vulnerability because they lack the protections against neglect and exploitation that are enjoyed by natural citizens.²⁰⁴ Despite being concentrated in sectors of the economy deemed to be ““essential and critical”” by the U.S. Department of Homeland Security, undocumented immigrants receive the lowest wages and face the highest risk of exposure to the virus.²⁰⁵ Furthermore, such undocumented immigrants are more likely to be exposed to wage theft, hazardous working conditions, and other labor practices that violate employment law with limited legal recourse.²⁰⁶ Access to legal aid and justice services helps ensure migrants are protected from abuse and exploitation. However, government action must be closely monitored during the pandemic as an imbalance of power also creates the potential for abuse and exploitation.

²⁰⁰ *Residency in Portugal*, LEXIDY L. BOUTIQUE (July 5, 2021), <https://www.immigrate-portugal.com/residency-in-portugal>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See, e.g., U.N. Office of the High Commissioner for Human Rights, COVID-19 and the Human Rights of Migrants: Guidance (Apr. 7, 2020), https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf.

²⁰⁴ Deborah M. Weissman, *Undocumented Immigrants and Access to the Courts*, 17 N.C. ST. B.J. 20, 21 (2012).

²⁰⁵ HINOJOSA-OJEDA ET AL., *supra* note 188, at 3.

²⁰⁶ Weissman, *supra* note 204, at 21.

E. Exceptional Measures that Countries May Adopt During the Pandemic Should be Supervised and Independently Monitored

The primacy of the rule of law is central to modern government and maintaining predictable and reliable government institutions. Historically, governments have often asserted broad discretionary powers during states of emergency under the rationale that such crises require swift action that would otherwise be hampered by judicial and legislative oversight. In the international law context, abuse of this power has led to egregious human rights violations, such as the genocide committed in Sudan's Darfur region following the government's declaration of emergency in 1999.²⁰⁷ However, contemporary human rights standards call upon judiciaries to check executive decisions regardless of the circumstances to address abuses committed under the guise of emergency discretion.²⁰⁸ Similarly, the UN has stressed the importance of the judiciary in checking excessive use of emergency powers to suppress dissenters or target vulnerable and marginalized groups.²⁰⁹ Such measures ensure that migrants have access to "fair, timely, and effective justice services," including the right to equality before courts and tribunals as provided by the International Covenant on Civil and Political Rights.²¹⁰

In addition to judicial oversight, non-governmental organizations (NGOs) provide surveillance during emergencies. NGOs have emerged as important actors on the world stage, serving a variety of functions across the ambit of international law while relying on government transparency and public information to effectively monitor crises and provide accountability.²¹¹ Such monitoring in the context of migration includes "the examination over time of immigration detention through on-site visits with the aim of ensuring that immigration detention is only used as a measure of last resort and to improve the treatment, conditions, and respect for

²⁰⁷ Evan J. Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 HUM. RTS. Q. 39, 45 (2012).

²⁰⁸ See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2585 (2003).

²⁰⁹ See U.N. Office on Drugs and Crime, Guidance Note: Ensuring Access to Justice in the Context of COVID-19 (May 2020), https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf.

²¹⁰ *Id.*; ICCPR, *supra* note 71, art. 14(1).

²¹¹ See MAAIKE VANDERBRUGGEN ET AL., INT'L DET. COAL., NGO MONITORING OF IMMIGRATION DETENTION: TIPS, EXAMPLES AND POSITIVE PRACTICES 8 (2015), https://idcoalition.org/wp-content/uploads/2016/07/IDCReport_NGO-Monitoring-and-Immigration-Detention_cover1_22Dec-2.pdf.

rights in detention.”²¹² There has been increased global recognition that monitoring is a necessary mechanism to ensure accountability and foster a culture of respect for human rights in immigration detention.²¹³

Recently, NGOs have faced increased resistance and outright denial of access to public information on the impact of current migrant policies.²¹⁴ Refusal to permit access to migrant detention facilities and to release public information has been increasingly attributed to COVID–19 safety precautions,²¹⁵ sparking concerns that the pandemic is being used to obfuscate monitoring efforts. Current health policies and regulations for detention centers often overlook migrant populations, leading to decreased visibility, fewer possibilities for assistance, and limited access to humanitarian services.²¹⁶ Health experts, advising that detention centers are considered extremely high–risk facilities for infection and transmission of COVID–19, have advocated for the release of detained migrants whenever possible.²¹⁷ The Joint Guidance Note on the Impacts of the COVID–19 Pandemic on the Human Rights of Migrants calls on governments to publicly declare emergency measures and communicate how such measures will affect migrants’ rights, including rights under the Convention on Migrant Workers.²¹⁸ The highlighted policies are necessary to help monitor and respond to sensitive questions concerning public health, legitimate state action, and human rights. Judicial oversight and independent monitoring by NGOs help discourage government abuses and ensure fair and humane treatment of migrants detained in detention centers. Regrettably, these issues are frequently overlooked in international discourse.

²¹² *Id.* at 5.

²¹³ *See id.* at 6.

²¹⁴ *E.g.*, INT’L DET. COAL. & W. SYDNEY UNIV. HUMANITARIAN AND DEV. RSCH. INITIATIVE, COVID–19 IMPACTS ON IMMIGRATION DETENTION: GLOBAL RESPONSES 56, 58 (Vivienne Chew et al. eds., 2020), <https://idcoalition.org/wp-content/uploads/2020/10/COVID-19-Impacts-on-Immigration-Detention-Global-Responses-2020.pdf> (detailing NGOs’ increasing lack of access to reliable information in the U.K. during the pandemic and the U.S.’s unwillingness to provide data on COVID–19 infections in detention centers and immigration staff).

²¹⁵ *See, e.g., id.* at 34 (explaining that Libyan groups’ access to detention centers, to provide assistance and conduct monitoring, has been inconsistent during the pandemic).

²¹⁶ *See id.* at 38.

²¹⁷ *Id.* at 11.

²¹⁸ Joint Guidance Note, *supra* note 98, at 1–2.

III. INTERNATIONAL ISSUES AND TRENDS

Several trends have developed over the past decade that concern the human rights and well-being of migrants. Some trends concern state policy responses to increasing migration flows and others concern the rhetoric and anti-migrant sentiment that has mixed with politics and policy. This section highlights the following international trends: (A) the feminization of migration, (B) migration of children, (C) climate change and forced migration, and (D) criminalization of migration and the externalization of borders.

A. *The Feminization of Migration*

The recent trend concerning the feminization of migration is an important focus area for policymakers. Over the last few years, the percentage of female migrants has grown to nearly half of the migrant population.²¹⁹ In some years, there has been a greater proportion of female than male mobility.²²⁰ There are multiple possible explanations for the prevalence of female migrants. One explanation considers female gender stereotypes that lead to gender-specific labour demands.²²¹ Another possible explanation is the exclusion of women from the domestic workforce, either as an extension of cultural norms or a result of limited labor demand already fulfilled by male workers, and the need for females to migrate to serve as principal wage earners for their families.²²² Women are also disproportionately affected by displacement resulting from natural disasters or other situations affecting security.²²³

Female migrants are particularly vulnerable to sexual violence and exploitation.²²⁴ Consequently, this demographic trend compels the examination of policy questions such as how women migrants integrate into the societies of

²¹⁹ *Gender and Migration*, MIGRATION DATA PORTAL, <https://www.migrationdataportal.org/themes/gender-and-migration> (last updated Sept. 28, 2021).

²²⁰ Linda W. Gordon, *Trends in the Gender Ratio of Immigrants to the United States*, 39 INT'L MIGRATION REV. 796, 798 (2005).

²²¹ See generally U.N. Department of Economic and Social Affairs, Division for the Advancement of Women, *Women and International Migration* (2004), https://www.un.org/en/development/desa/population/migration/events/coordination/3/docs/P01_DAW.pdf.

²²² See *id.* at 27–28.

²²³ See *id.* at 27.

²²⁴ See *id.* at 29.

destination, the needs and the vulnerabilities of women migrants, and the specific mechanisms that should be taken into consideration by states to ensure that the rights of women migrants are fully protected.²²⁵ Policymakers recognize that women often flee traumatic abuses, a reality that, in combination with cultural and language barriers, often makes it difficult for them to adequately articulate their experiences and motivations for migration.²²⁶ Consequently, immigration and asylum policies must be sensitive to the disparate impact of migration on women. Detention policies that subject female migrants to prolonged detention can compound the previous trauma that induced their decision to migrate. Female migrants should be provided adequate health resources, including mental health and competent translation services, to ensure migrant welfare.

B. Child Migration

Another noteworthy trend is the increase in child migration rates. Migrant children—especially unaccompanied children—face unique vulnerabilities. As a result, there is an enhanced need for adequate reception infrastructure, education, and childcare programs within receiving countries.

An important category of child migrants is unaccompanied children, because this category of child migrants is most affected by inadequate receiving infrastructure. The U.S. defines unaccompanied children as persons under the age of 18 with no immigration status in the U.S. and without a parent or legal guardian in the U.S. able to provide physical care or custody.²²⁷ According to the U.N. High Commissioner for Refugees, the primary driver for the increase in unaccompanied child migration to the U.S. is violence in their home countries.²²⁸ Large interstate movements of unaccompanied child migrants create unique policy challenges, and when states struggle to respond to movements of unaccompanied children at their borders, they are susceptible to implementing heavy-handed, inappropriate policy

²²⁵ *Id.* at 27.

²²⁶ *See generally id.*

²²⁷ Shani M. King, *Child Migrants and America's Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 85 (2019).

²²⁸ U.N. HIGH COMMISSIONER FOR REFUGEES, REGIONAL OFFICE FOR THE U.S. AND THE CARIBBEAN, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 9–11 (Pamela Goldberg ed., 2014), <http://www.unhcr.org/56fc266f4.html> (documenting high rates of societal and domestic violence in El Salvador, Guatemala, Honduras, and Mexico as primary self-reported factors for child migrants).

measures that affect children's access to education, reunification with family, and other crucial rights.

The need for adequate reception infrastructure cannot be separated from the practice of child migrant detention. The extended detention of child migrants, with harmful effects, is one of the most concerning trends of the past half-decade.²²⁹ A 2019 global study on children deprived of liberty reported that seventy-seven states are known to still detain children for migration-related reasons, in which "at least 330,000 children are detained for migration-related purposes per year."²³⁰ States must recognize that "detention of any child is a violation of children's rights and always contravenes the principle of the best interests of the child."²³¹ While family separation is equally harmful, child detention cannot be justified on the basis of family unity; instead, child migrants' rights must be extended to their family members.²³² States must avoid the practice of child detention, regardless of whether children come alone or with families.

The first step toward building adequate reception infrastructure is, of course, to commit to ending the practice of child migrant detention. A growing number of states have made varying levels of commitments to end or greatly curtail the practice, and in some countries, the practice does not even exist.²³³ In states that have used detention facilities for child migrants, states should embody their commitment to ending the practice through legislation,²³⁴ and couple this prohibition with policies that connect children and their family to vital services.²³⁵

²²⁹ Migrant detention is harmful to children and to society. "In recent years, a consensus has emerged among the international community that detention damages children's physical, developmental, emotional and psychological health." *Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, *supra* note 173, ¶ 13. See also Section II(C), *supra* (elaborating on detention practices); DAVID CORLETT ET AL., INT'L DET. COAL., CAPTURED CHILDHOOD: INTRODUCING A NEW MODEL TO ENSURE THE RIGHTS AND LIBERTY OF REFUGEE, ASYLUM SEEKER AND IRREGULAR MIGRANT CHILDREN AFFECTED BY IMMIGRATION DETENTION (2012), <https://www.refworld.org/pdfid/510a604c2.pdf> (reporting on child migrant detention in detail).

²³⁰ Manfred Nowak (Indep. Expert for the U.N. Glob. Study on Children Deprived of Liberty), *Global Study on Children Deprived of Liberty*, ¶ 57, U.N. Doc. A/74/136 (July 11, 2019).

²³¹ *Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, *supra* note 173, ¶ 16.

²³² *Id.* ¶ 23.

²³³ *Id.* ¶¶ 33–34.

²³⁴ See *id.* ¶¶ 35–40 (highlighting various state and regional-level commitments to prohibit the practice).

²³⁵ E.g., *id.* ¶ 38 (noting Thailand agencies' coordinated planning to provide social services and alternative care for migrant children).

Many states have taken the first step, and leading states and international actors have provided guidance on the second, equally necessary step: to protect the rights of child migrants.

States are obligated, under the Convention on the Rights of the Child, to ensure that every child can access an education and essential services, such as healthcare services.²³⁶ One way for states to do so, with respect to migrant children, is to codify non-discrimination and equal protection in access to education and essential services.²³⁷ A number of countries make access to education truly universal, at least under the law, but some have already gone further through affirmative steps to reach migrant families and provide preparatory and language support in the classroom.²³⁸ States must go further to ensure safe access to health services, for which regularization and firewall policies can advance migrant and public health, and they must ensure that child migrants have adequate representation if or when they must interact with the legal system.

States must make firm commitments to ending child detention, and they should move away from a criminalization approach, which encourages detention practices and keeps children away from education and critical services. Many states are in different phases of eliminating or curtailing this practice. Due to the substance of children's rights under international law, states must incorporate principles of non-discrimination in their laws and policies to help children, regardless of migration status, access the education system, healthcare, and the legal and administrative system. Only a limited number of states have legislated in this zone, but their approaches provide useful guidance and demonstrate that positive outcomes are attainable for any country. Lastly, the family unit and the safety of minors must be a central element of policymaking.²³⁹

²³⁶ *Id.* ¶ 22 (citing Convention on the Rights of the Child, arts. 24, 28, 29, Nov. 20, 1989, 1577 U.N.T.S. 3).

²³⁷ Portugal, Sweden, Thailand, and Uruguay have implemented different approaches, demonstrating how countries can make progress through innovation and policies that fit their unique legal and social context. *See id.* ¶ 64.

²³⁸ *Id.* ¶¶ 65–70. Malta, *id.* ¶ 65, Morocco, *id.* ¶ 67, and the Republic of Korea, *id.* ¶ 70, each has unique policies in this regard.

²³⁹ *See generally id.*; CORLETT ET AL., *supra* note 229, at 100.

C. Climate Change

Another emerging international trend is the increase in climate-driven migration. Climate-driven migration is most likely to manifest in waves of irregular migration, such as a massive displacement caused by natural disasters or resource-driven conflict, rather than as waves of regular migration, such as the uninterrupted flow of seasonal workers between two countries. In the 2012 thematic report on climate change and migration, the Mandate highlighted five general scenarios that the Secretary-General's office identified at the time concerning climate-driven migration: (i) sudden-onset disasters, (ii) slow-onset environmental degradation, (iii) sinking small island states, (iv) high-risk zones designated by Governments, and (v) unrest that seriously disturbs the public order, violence, or armed conflict.²⁴⁰ These five scenarios are comprehensive and account for the reality that some impacts will be unforeseeable. There are also more specific considerations regarding how climate change may add drivers of migration, such as impacts on natural resources and the loss of traditional food sources, like fishing, for indigenous populations.²⁴¹

Climate change will result in environmentally-driven changes in migration patterns due to phenomena such as extreme drought, increasing severe weather frequency, and rising sea levels.²⁴² Besides the quantifiable effects of global warming, impacts of climate change may also drive new conflicts and affect migration patterns in less foreseeable ways. The Mandate noted that "since mankind has existed, people have been moving in response to changes in their environment, often seasonally,"²⁴³ but the current international system is ill-equipped financially, legally, and politically to respond to what is anticipated to be a major shock to migration flows.²⁴⁴ While environmental displacement has been a topic of public discourse since at least the mid-1980s, there is still no international

²⁴⁰ François Crépeau (Special Rapporteur on the Hum. Rts. of Migrants), *Human Rights of Migrants*, ¶ 19, U.N. Doc. A/67/299 (Aug. 13, 2012).

²⁴¹ *Id.* ¶ 34.

²⁴² MICHAEL WERZ & LAURA CONLEY, CTR. FOR AM. PROGRESS, CLIMATE CHANGE, MIGRATION, AND CONFLICT: ADDRESSING COMPLEX CRISIS SCENARIOS IN THE 21ST CENTURY 3-4, 15, 21 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/01/pdf/climate_migration.pdf.

²⁴³ Crépeau, *Human Rights of Migrants*, *supra* note 240, ¶ 31.

²⁴⁴ Among the reasons that future migration events will be different, taxing states and the international system, is that "the rate and scale of [climate-driven] migration could be multiplied." *Id.*

legal framework to address affected persons.²⁴⁵ Failure to establish said framework prevents affected individuals from accessing basics such as shelter, food aid, or grants.²⁴⁶

One challenge the international system faces is how to classify those displaced by environmental factors. Whether persons displaced by climate change are considered refugees or migrants has vast implications, as noted earlier. Refugees receive a number of protections under international law that migrants do not. While the international community has shown support for expanding the definition of refugee, some key actors have shown reluctance.²⁴⁷ For instance, some developed countries fear that by accepting the idea of climate refugees, they would have to offer the same protections as political refugees and risk becoming overburdened.²⁴⁸ The United Nations High Commissioner for Refugees must also view expanding the amount of people who fall under its mandate within the context that the organization is already overstretched.²⁴⁹

To the extent that states can mitigate the effects of climate change and adapt, there is an urgent need to strengthen infrastructure and prepare for droughts and severe weather.²⁵⁰ The Netherlands, for instance, has enacted policies such as

²⁴⁵ *European Parliamentary Research Service Briefing on The Concept of 'Climate Refugee': Towards a Possible Definition*, at 6–7, PE 621.893 (Feb. 2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf).

²⁴⁶ *Id.* at 6.

²⁴⁷ *See id.* at 3.

²⁴⁸ Oli Brown, *Migration and Climate Change*, INTERNATIONAL ORGANIZATION FOR MIGRATION, Report No. 31 IOM Migration Rsch. Series, 14, (2008) (available for download from www.ipcc.ch, under the title “Migration and Climate Change – IPCC”).

²⁴⁹ SYED MUNIR KHASRU & JOHN THWAITES, G20 INSIGHTS, *DISPLACED POPULATIONS DUE TO ENVIRONMENTAL PERILS: THE CHALLENGE OF CLIMATE MIGRANTS FOR THE G20 COMMUNITY 3* (2020), https://www.g20-insights.org/wp-content/uploads/2020/11/T20_TF2_PB21.pdf.

²⁵⁰ Extreme weather events, including flooding, are occurring more frequently and causing damage to infrastructure systems, like electrical grids. This in turn weakens other parts of the system, such as the water supply, and affects vulnerable populations. If states incorporate climate change action in their infrastructure operations now, it will make long-term adaptation to climate change effects easier and less costly. Examples include burying distribution lines or adjusting the design of transmission lines to help minimize any damage from climate events. U.S. GLOB. CHANGE RSCH. PROGRAM, *CLIMATE CHANGE IMPACTS IN THE UNITED STATES: HIGHLIGHTS 38–39* (Jerry M. Melillo et al. eds., 2014), https://nca2014.globalchange.gov/downloads/low/NCA3_Highlights_LowRes.pdf (explaining how infrastructure systems are dependent on each other); Michael Mullan et al., *Climate-Resilient Infrastructure*, at 12, OECD, *Env't Pol'y Paper No. 14* (2018), <https://www.oecd.org/environment/cc/policy-perspectives-climate-resilient-infrastructure.pdf> (outlining adaptation measures).

“building higher storm surge barriers, controlling the expansion of the rivers into side channels and wetlands, and leading regular safety reviews.”²⁵¹ The Maldives also built a wall around its most inhabited island, Malé.²⁵² But certain migration impacts may already be inevitable. Droughts and high temperatures have led local populations in landlocked developing countries to migrate to areas with better water resources.²⁵³ In other countries, desertification and land degradation has led pastoralists to search for better land.²⁵⁴ Since affected populations often decide to migrate to urban areas, already weak urban infrastructure is further strained by the influx of migrants.²⁵⁵ When the solutions are costly, poorer countries will be less able to adapt, and the safest option for residents will be to flee.²⁵⁶ It is critical that both state and international institutions recognize this reality and work collaboratively toward solutions.

D. The State and International Institutions

Exceptional circumstances, such as the current pandemic, require contributions from multilateral institutions capable of guiding research and policy responses. The interplay between states and international institutions embodies the idea of multilateralism. It is important to emphasize that until recently, the United Nations lacked a multilateral approach, or a global institutional approach, on migration.²⁵⁷ Before the adoption of the Global Compact on Migration, states were collaborating at the regional level, but not at the global level. Regional developments include, among others, Mercosur in South America, the ECOVAST in Europe, the European Union, ECOWAS (Western African countries), and the Colombo Process countries

²⁵¹ Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. ENVTL. L. & POL'Y 357, 371 (2011).

²⁵² *Id.*

²⁵³ Int'l Org. for Migration [IOM], *Climate Change and Migration in Vulnerable Countries*, at 18 (2019),

https://publications.iom.int/system/files/pdf/climate_change_and_migration_in_vulnerable_countries.pdf.

²⁵⁴ *Id.* at 21.

²⁵⁵ *Id.* at 11.

²⁵⁶ Mayer, *supra* note 251, at 372.

²⁵⁷ See Michele Klein Soloman & Suzanne Sheldon, *The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration*, 30 INT'L J. REFUGEE L. 584, 584–588 (2018).

in Southeast Asia.²⁵⁸ Some policy changes include origin countries increasing their institutional capacity to address migration,²⁵⁹ as well as coordinating with destination countries to ensure that migrants' rights are met and that they travel legally into nearby destination countries, with access to the labor market.

Multilateral efforts to promote the rights of migrants is a key achievement of the past decade. The Global Compact represents a degree of cooperation that is unprecedented at the global level, and its completion is likely to improve migration policies at the state level. Final implementation of the Global Compact elevates the role of United Nations agencies such as the International Organization for Migration, United Nations High Commissioner for Refugees, Office of the United Nations High Commissioner for Human Rights, UN Women, UNICEF, International Labour Organization, and other agencies involved with migration issues. Multilateral efforts to complete the Compact also facilitated greater dialogue between states, multilateral institutions, and civil society. A strong civil society at the international and state level, working in cooperation and conversation with governments and international institutions, will enhance migration policy outcomes.

²⁵⁸ Int'l Labour Org., *MERCOSUR Residence Agreement* (2009), https://www.ilo.org/dyn/migpractice/migmmain.showPractice?p_lang=en&p_practice_id=187 (establishing uniform immigration requirements and affirming the rights of migrants in MERCOSUR); European Council for the Village and Small Town [ECOVAST], *A Global Strategy for Europe* (2013), <http://www.dorfwiki.org/wiki.cgi?PhilTurner/DraftPositionStrategyForRuralEurope> (calling for cohesion and recognizing the unique migration challenges that may be posed by climate change); Acosta, *supra* note 30, at 275 (regularization processes adopted by the European Union); ECOWAS COMM'N, 33rd Ordinary Sess., *ECOWAS Common Approach on Migration* (Jan. 18, 2008), <https://www.unhcr.org/49e47c8f11.pdf> (proposing a need for a common regional approach to migration that addresses both regular and irregular migration); Int'l Org. for Migration [IOM], *Labor Migration Ministerial Consultations for Countries of Origin in Asia: Summary of Statements and Recommendations*, 12 ASIAN & PACIFIC MIGRATION J. 217, 217 (2003), <https://journals.sagepub.com/doi/pdf/10.1177/011719680301200110> (providing a forum for Asian countries to discuss and collaborate on migration issues, including inter-state cooperation).

²⁵⁹ Building institutional capacity can require a variety of context-dependent policy measures. See, e.g., *Labor Migration Ministerial Consultations for Countries of Origin in Asia: Summary of Statements and Recommendations*, *supra* note 258, at 217, 219–20 (recommending developing and providing administration officials with a training course on labor migration; strengthening inter-state cooperation and collaboration across defined, measurable goals).

State-level racism and xenophobia are also tied to international discourse and multilateral efforts.²⁶⁰ Countries with administrations hostile to migrants are less likely to cooperate with international efforts to monitor and protect migrants' rights. Such hostility is often translated into policy that criminalizes migration and prevents the resettlement of refugees and asylum seekers.²⁶¹ Discourse on migration and the rights of migrants is more complex at the state level, as hate speech against migrants has become a disturbing trend.²⁶² The media plays a key role in perpetuating racist and xenophobic discourse by portraying minority groups as criminals or those who cannot integrate into the nation's culture.²⁶³

Racism is usually present in this xenophobic discourse, since local attitudes within a state differ between migrants of the state's majority race or ethnicity and migrants who are racial or ethnic minorities. In some countries, xenophobic discourse and practices by members of the local populations, particularly in the context of the pandemic, are commonplace.²⁶⁴ For instance, migrants have been blamed, without any evidence, for spreading COVID-19.²⁶⁵ This rhetoric has detrimental impacts and can permeate policy decisions as well as the treatment of migrants in legal systems.

E. Criminalization of Migration and Externalization of Borders

One final trend to be mindful of concerns the interrelated issues of the externalization of borders and criminalization of migration. The criminalization approach to migration applies the criminal policy toolbox to irregular migrants,

²⁶⁰ See, e.g., U.N. Office of the High Commissioner for Human Rights, *Legal Changes and Climate of Hatred Threaten Migrants' Rights In Italy, Say UN Experts* (Nov. 21, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908>.

²⁶¹ See Cristina Baussan et al., *When Climate Change and Xenophobia Collide*, THE NEW YORKER (Feb. 16, 2020), <https://www.newyorker.com/news/dispatch/when-climate-change-and-xenophobia-collide>.

²⁶² U.N. Office of the High Commissioner for Human Rights, *Joint Open Letter on Concerns About the Global Increase in Hate Speech* (Sept. 23, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25036&LangID=E>.

²⁶³ Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 407 (2020).

²⁶⁴ E.g., *Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide: National Action Plans Needed to Counter Intolerance*, HUM. RTS. WATCH (May 12, 2020), <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide> (identifying increased anti-Asian and xenophobic rhetoric, fueled by politicians and the media, connected to COVID-19).

²⁶⁵ See, e.g., *id.*

especially through the detention and deportation of migrants who enter a country irregularly, which is often framed as criminal or criminal-like punishment.²⁶⁶ Externalization of borders refers to “extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims.”²⁶⁷

The United States has externalized its borders by means of an agreement with Mexico and Central American countries.²⁶⁸ According to these agreements, people seeking asylum in the United States have to remain beyond its borders while their administrative proceedings are finished.²⁶⁹ European Union states externalize their borders through agreements with countries such as Turkey.²⁷⁰ Additionally, the European Union has allocated funds to countries at the southern border of the Sahara Desert in an effort to impede migrants from moving northwards through the Sahara Desert and across the Mediterranean to Europe.²⁷¹

In October of 2018, the Mandate conducted an official visit to Niger, one of the countries that received this funding, in order to report about this situation.²⁷² This transfer of aid for migration control has not produced revenue or benefits for the country’s development, the procurement of Nigeriens’ human rights, or for aiding the migrants who live or stay in Niger.²⁷³ In Australia, this externalization has taken place through agreements with Papua New Guinea and Nauru, as well as through

²⁶⁶ Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1258 (2014).

²⁶⁷ Bill Frelick, Ian M. Kysel, & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 193 (2016).

²⁶⁸ *Id.* at 200.

²⁶⁹ See Memorandum from Katherine Culliton-Gonzalez and Susan Mathias to Troy Miller, Scott K. Falk, Tae D. Johnson, Michael P. Davis, Tracy Renaud, and Molly M. Groom, U.S. DEP’T OF HOMELAND SEC., at 3 (Jan. 29, 2021), <https://www.dhs.gov/sites/default/files/publications/mpp-redacted-recommendation-memo-01-29-21.pdf>.

²⁷⁰ Frelick, Kysel & Podkul, *supra* note 267, at 208. See also Ayşen Üstübcü, *The Impact of Externalized Migration Governance on Turkey: Technocratic Migration Governance and the Production of Differentiated Legal Status*, 7 COMP. MIGRATION STUD. 46 (2019).

²⁷¹ See *Niger Factsheet*, EUR. COMM’N, EUR. CIVIL PROT. AND HUMANITARIAN AID https://ec.europa.eu/echo/where/africa/niger_en (last updated June 17, 2021).

²⁷² Felipe González Morales (Special Rapporteur on the Hum. Rts. of Migrants), U.N. Off. of the High Comm’r for Hum. Rts., End of Mission Statement of the UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, on His Visit to Niger (1–8 October 2018) (Oct. 8, 2018),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23698&LangID=E>.

²⁷³ *Id.*

Australia's use of its own offshore islands as external places to detain asylum seekers.²⁷⁴ Thus, although it takes many forms, the externalization of borders, as a means to keep migrants out, is a feature that has become very common.

The externalization of borders through diplomatic or executive measures can be considered a precursor to the criminalization of migration,²⁷⁵ but both are a means of exerting control on migration flows. For instance, the Migrant Protection Protocols, which required migrants to remain in Mexico pending immigration proceedings as opposed to entering the United States, was intended to deter asylum seekers from coming to the U.S.²⁷⁶ The policy is one way that the United States seeks to halt migration and criminalize those migrants who do arrive irregularly. Criminalization of migration may take on different meanings in different contexts. For instance, some countries legislate irregular entry into a country as a criminal offense.²⁷⁷ This was a typical feature in Latin America for a long time, although for the past ten years or so, it has been largely decriminalized.²⁷⁸ In the United States, this has long been a feature, even going so far as establishing the act of irregular immigration as a crime.²⁷⁹ Its enforcement, however, had been discontinued for a

²⁷⁴ Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement In, Papua New Guinea of Certain Persons, and Related Issues, Austl.–Papua N.G., Aug. 6, 2013, <https://www.dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr>.

²⁷⁵ Jennifer Podkul & Ian Kysel, *Interdiction, Border Externalization, and the Protection of the Human Rights of Migrants* n.5, GEORGETOWN L. HUM. RTS. INST., Working Paper (2015), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2015-WRC-HRI-Submission-to-IACmHR.pdf>; see also Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GERMAN L.J. 311, 316–18 (2020) (discussing private-sector externalization, externalization of borders, and the natural evolution from policies that bar travel into a country to criminal policy approaches to immigration).

²⁷⁶ Mark Sherman, *Supreme Court Orders 'Remain in Mexico' Policy Reinstated*, AP NEWS (Aug. 24, 2021), <https://apnews.com/article/mexico-courts-immigration-us-supreme-court-a3fe33081fa2909c17e8c08a2c37f818>.

²⁷⁷ See, e.g., GLOB. LEGAL RSCH. DIRECTORATE, LAW LIBRARY OF CONG., CRIMINALIZATION OF ILLEGAL ENTRY AROUND THE WORLD (2019), <https://www.hsdl.org/?view&did=829757> (out of the 164 countries included in the research study, 124 countries, including Germany, France, Canada, and Denmark, treat unauthorized entry as a crime).

²⁷⁸ *Id.*; see also JORGE CHOY ET AL., CENT. AM. & MEX. POL'Y. INIT., MEXICO'S MIGRATORY DETENTION SYSTEM (2019), https://www.strauscenter.org/wp-content/uploads/prp_207-mexicos_migratory_detention_system-2019.pdf.

²⁷⁹ See 8 U.S.C. § 1325.

long time, until the U.S. Attorney General during the Trump Administration gave instructions to prioritize prosecuting those violations.²⁸⁰

However, the fact that irregular immigration is not a crime does not mean that criminalization does not already exist formally or informally in the legal and executive apparatus of a state. Massive migratory detention, for instance, persists in many countries where immigration is not criminalized. For example, in Mexico, irregular immigration is not a crime because the country's legislature decriminalized irregular migration in 2008.²⁸¹ However, Mexico practices massive detention on arrival. Mexico does not stand alone, as more than five hundred migrant detention centers operate globally with more than half of them located in the United States.²⁸²

Furthermore, the issue of criminalization involves the defenders of migrants' rights.²⁸³ There is a worrisome trend that defenders of migrants' human rights are receiving threats and are sometimes killed in response to their work.²⁸⁴ This important issue is stressed in the thematic report on the right of association of migrants and their defenders.²⁸⁵ In 2019, approximately three hundred human rights defenders were killed globally.²⁸⁶ Human rights defenders face persecution in a

²⁸⁰ AM. IMMIGRATION. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 3 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf.

²⁸¹ See Francisco Alba, *Mexico: The Migration Narrative*, MIGRATION POL'Y INST. (April 24, 2013), <https://www.migrationpolicy.org/article/mexico-new-migration-narrative>.

²⁸² See *Detention Centres*, GLOB. DET. PROJECT, <https://www.globaldetentionproject.org/detention-centres/list-view> (last visited Dec. 16, 2021).

²⁸³ Human rights defenders are "people who, individually or with others, act to promote or protect human rights in a peaceful manner." *About Human Rights Defenders*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx> (last visited Nov. 22, 2021). They may operate on a local, national, or international level to contribute to implementation of human rights treaties, provide human rights education and training, or take action to secure accountability." *Id.*

²⁸⁴ See, e.g., FRONTLINE DEFENDERS ET AL., DEFENDERS BEYOND BORDERS: MIGRANT RIGHTS DEFENDERS UNDER ATTACK IN CENTRAL AMERICA, MEXICO & THE UNITED STATES 38 (2019), https://www.frontlinedefenders.org/sites/default/files/frontline_defenders_mexico_english_v2.pdf; *USA: Authorities Are Misusing Justice System to Harass Migrant Human Rights Defenders*, AMNESTY INT'L (July 2, 2019), <https://www.amnesty.org/en/latest/press-release/2019/07/usa-authorities-misusing-justice-system-harass-migrant-human-rights-defenders/>; FRONTLINE DEFS., FRONTLINE DEFENDERS GLOBAL ANALYSIS 2019 11–12 (2020), https://www.frontlinedefenders.org/sites/default/files/global_analysis_2019_web.pdf.

²⁸⁵ *Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 87.

²⁸⁶ FRONTLINE DEFENDERS GLOBAL ANALYSIS 2019, *supra* note 284, at 7.

variety of other ways, as well. The most common reported violations are detention or arrest, legal action taken against them, or physical attacks.²⁸⁷

Governments may use these tactics to prevent human rights defenders from providing aid to migrants. In the United States, the Department of Homeland Security (DHS) has sought to open criminal proceedings against human rights defenders, particularly for the crime of human smuggling.²⁸⁸ Defenders have been subjected to detention and interrogations without a warrant, searches, and surveillance. Amnesty International has identified ten human rights defenders who were included on a DHS surveillance watchlist for human smuggling. Their professions included activists, lawyers, journalists, and clergy members.²⁸⁹ In Arizona, a humanitarian aid worker was charged with, but ultimately acquitted by a jury of, harboring undocumented immigrants after he provided food, water, and shelter to two Central American migrants in the Arizona desert.²⁹⁰ These actions not only threaten the rights of migrants, but also those of the human rights defenders who seek to protect them.

CONCLUSION

As the world has become highly interconnected, and migration movements are historic in both scale and source, the multilateral system is a crucial element of the state's toolbox to address migration flows. States must concern themselves with understanding drivers of migration, and with developing adequate policy responses to in-migration. The COVID-19 pandemic has exposed weaknesses in state-level migration infrastructure, as well as invigorated and made more urgent conversations about building firewalls between the administrative state and access to services. Furthermore, there is a growing need to institute regularization processes to help migrants access service and update infrastructure to meet the basic human rights of migrants. That includes, first and foremost, ending migratory detention, particularly for children.

²⁸⁷ *Id.* at 11.

²⁸⁸ *USA: Authorities are Misusing Justice System to Harass Migrant Human Rights Defenders*, *supra* note 284.

²⁸⁹ *Id.*

²⁹⁰ Bobby Allyn & Michel Marizco, *Jury Acquits Aid Worker Accused of Helping Border-crossing Migrants in Arizona*, NPR (Nov. 21, 2019), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona>.

One cannot understate the importance of global management to mass migration—it is important to states because they face challenges they cannot tackle alone, and it is vital to migrants, who benefit from inter-state cooperation that advances their rights and builds safeguards of their rights into state-level policies. During the pandemic, states have struggled to maintain judicial and executive transparency, and some countries have faltered in their communication with international mechanisms and other states. Moving forward, transparency and sustained engagement on the conditions of migrants must be a guiding principle, so that emergency situations do not serve as a pretext for policies that curtail migrants' rights and wellbeing. The pandemic, like the historic scale of migration, is a challenge that must be addressed through multilateral cooperation.

Individual states and localities have been innovators and leaders in the past decades on migration policies, but these states are in the minority, and few of these states are in the top receiving countries. Multilateral cooperation has seen great strides in the past few decades, through the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Global Compact. This foundation is capable of addressing emerging migration trends including climate change-driven migration, the increasing feminization of migration, and increasing child migration. Each of these emerging trends pose unique policy challenges, but criminalization and externalization of borders is not an acceptable solution. Only with a multilateral approach can these challenges be met in a manner that reaffirms the rights of migrants and creates a holistic framework for addressing future migration challenges.