

Comments and suggestions by Centro de Estudios Legales y Sociales (Argentina) to Draft Rev.1

These observations are based in a joint document¹ elaborated with the Human Rights Center of Universidad Diego Portales (Chile), Conectas Human Rights (Brazil), FUNDAR - Centro de Análisis e Investigación (Mexico), Comisión Argentina para los Refugiados y Migrantes (Caref-Argentina) and Asylum Access, in which you will find more information on the issues developed below.

A. Regularization

General Comments

1. Although there have been progress in relation to regularization criteria (particularly actionable commitment g of Objective 16), the concept has disappeared altogether from the text. This represents a problem for the incorporation of regularization as a central aspect of migratory policy and it moves the Compact away from the terms set forth in the NY Declaration. The actionable commitments may be drafted in terms of access to residence permits, but the concept of regularization must be among the objectives of the Global Compact.
2. Keeping the concept of regularization in the text is crucial to the cohesion of the Compact in promoting regular migration through a 360º perspective (when leaving, entering, staying and returning to a territory). This doesn't mean a commitment to regularize all migrants, but to create minimum criteria for regularization procedures, which are key to address migration at the countries of destination. At this stage a high number of migrants with an irregular migratory status will not be returned and will stay in an irregular situation because of obstacles created by migratory procedures. Together with regular pathways, access to services and return, regularization is one of the existing answers to irregular migration. It is key that this idea is referred to at the "chapeaus" of Objectives 12 and 5.

Specific Comments

3. The new Objective 12 gives us an opportunity to discuss State capacities in migratory procedures, and it is important to make it more concrete by:
 - Reincorporating the reference to status determination that was present in *draft zero*. The mixed migratory flows are complex and the determination of regular status of migrants is a form of protection, regardless of it is connected to the refugee conventions or not.
 - Including regular pathways and regularization as the general framework in which these procedures operate.
4. It is also necessary that the text includes commitments to regularization criteria.
 - For the commitments with the protection of vulnerable groups to have concrete impact, humanitarian reasons must be incorporated as a criteria for granting residence permits inside the territory, and not only visas (Objetivo 7). Migrants victim of crimes and human rights violations should be granted access to regularization.

¹ Available at <https://www.cels.org.ar/web/wp-content/uploads/2018/02/CELSGlobalCompact.pdf>

- A 360° approach means to recognize the reality of migrant persons at the countries of destination. The time of effective residency and social, educational and labor ties to the country of destination can be a regularization criteria. This is key to achieve Objective 16.g, because in the cases where these ties are strong enough a dignified, sustainable and human rights-based return is most mostly impossible.

Suggested Language

OBJECTIVE 12, Paragraph 27:

“We commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective, human rights-based, and protection-sensitive mechanisms for the adequate and timely identification, assessment, screening, referral and assistance **for the purpose of status determination and regularization** of migrants.”

OBJECTIVE 12, Paragraph 27.a:

“Increase **the access to** ~~transparency of~~ migration procedures by ~~publicizing~~ promoting clear eligibility criteria for entry, admission, stay, work, study or other activities, **providing adequate counseling, establishing affordable rates and simplifying documents requirements** in order to avoid unnecessary delays and expenses for States and migrants”

OBJECTIVE 7, Paragraph 22.c:

“Establish comprehensive policies that protect and assist migrants in vulnerable situations, identify individual and contextual vulnerabilities and enable access to necessary human rights protections, **such as residence permission on humanitarian grounds**, at different stages of migration through individual screening and subsequent referral to adequate assistance.”

OBJECTIVE 16, Paragraph 31.g:

“Facilitate access to procedures towards residence status, including for workers, children, youth, families **and migrants that have acquired significant social ties due to the length of effective residency in the country**, with clear and transparent criteria, as a means to fully harness their contributions to sustainable development and other benefits of their integration, as well as to reduce the stigmas that may be associated with irregular status.”

OBJECTIVE 5, Paragraph 20:

We commit to adapt options and pathways for regular migration in **origin, transit, destination and return** ~~in a manner that reflects~~ **strengthening** demographic and global labour market realities, optimizes education opportunities, reunites families, and facilitates access to human rights protection.

OBJECTIVE 9, Paragraph 24 INCLUDE A NEW ACCION:

“f) Provide migrants that have become victims of smuggling and other crimes or human rights violations with temporary or permanent residency and work permits for the purpose of allowing victims access to justice, including redress and compensation”

B. Control of Expulsions

General Comments

1. Controlling the decision to forcefully return migrants, with criteria and guarantees of due process to limit expulsion, are absent from the “chapeau” of Objective 21. They are mentioned in subpara e), but in a very general manner.

2. Indeed, the objective makes substantial progress in establishing an obligation of countries of origin to receive returned migrants, but not in determining obligations of the countries of who decide and implement forced returns (countries of transit and destination).
3. Objective 21 must incorporate the obligation of an individual assessment in returns which guarantees the human rights of migrants, the respect of the non-refoulement principle and due process, including the right to defense and the protection against summary procedures.

Specific comments

4. In subpara "e", it is essential to broaden the types of circumstances that, in an individual assessment of each case, can weight against an expulsion.
 - The violations that could emerge from an expulsion due to the situation in the country of origin must be clearly addressed, especially through a commitment with respecting the principle of non-refoulement.
 - Equally important are the life circumstances of people in the country in which they live. Violations can also be produced if these are not adequately evaluated. Family unit, humanitarian reasons, labor and social ties and time of effective residency must be included among the criteria to be weighted when analyzing an expulsion decision.

Suggested language

OBJECTIVE 21, Paragraph 36:

“We commit to cooperate for safe, human rights-based and dignified return and readmission, ensuring that our returning nationals are duly received, in accordance with the obligation of States to readmit their own nationals. We further **reaffirm our commitment** to uphold the prohibition of collective **expulsion and the principle of non-refoulement, and ensure due process, effective remedy and individual analysis that consider human rights at stake, as well as** the preference of voluntary over forced return. **We will put an end to summary expulsions and deportations that endanger a serious and fair evaluation of the migrant’s situation. We will** create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, to ensure that reintegration of migrants and members of their families upon return to their countries of origin is sustainable”.

OBJECTIVE 21, Paragraph 36.e:

“Ensure that return decisions are carried out by competent authorities, and that ~~returns avoid collective expulsions and~~ follow an individualized assessment of the circumstances that **would prevent** the return, such as risks of torture or other irreparable harm, **family separation or social ties and humanitarian reasons, as well as other considerations that would weigh against return**, in compliance with due process guarantees, **the right to defense and the best interests of the child**, and in accordance with international human rights law.”

C. Criminalization

General Comments

1. Non-criminalization of migration does not appear in the text as a cross-cutting issue, nor is it mentioned in any particular objective.
2. By “criminalization” we understand both the practice of considering irregular migration a crime, and indirect criminalization - when migrants are discriminated against, persecuted and even deprived of their liberty as suspects for the commission of other crimes, especially when they have an irregular migration status. The overlap between security and migratory policies also promotes the symbolic criminalization of migrants and discrimination, racism and xenophobia.

Specific comments

3. It is therefore important to include a commitment with non-criminalization in objetivo 7, on vulnerable migrants; and in objective 16, on social inclusion.
4. The language on access to services in objective 15 must be kept. However, it is important to note that the concept of firewalls had an important aspect of protection against persecution and criminalization that can be developed elsewhere, for example in objective 7 subpara h.
5. In objective 13, it is crucial to recognize the reality of countries that do not use detention as an instrument of migratory policy. States should commit to the progressive end of detention for migratory reasons, incorporating to this language the principle of non-regressivity.

Suggested language:

OBJECTIVE 16, Paragraph 31:

“Empower migrants and societies to realize full inclusion and social cohesion 31. We commit to foster inclusive and cohesive societies by empowering migrants to become active members of society and promoting the reciprocal engagement of receiving communities and migrants in the exercise of their rights and obligations towards each other. We further commit to strengthen the welfare of all members of societies, **by ensuring the non-criminalization of migration**, minimizing disparities, avoiding polarization and increasing public confidence in policies and institutions related to migration, in line with the acknowledgment that fully integrated migrants are better positioned to contribute to prosperity.”

OBJECTIVE 7, Paragraph 22.h:

“Develop predictable migration policies that prevent migrants from falling into an irregular status due to legal and practical impediments in the country of destination **and implement the necessary measures to eliminate state action aimed at the persecution of irregular migration**, in order to reduce precariousness of status and related vulnerabilities, including by ensuring that public services are independent from immigration enforcement and **discouraging security forces, in the framework of their crime prevention functions, from developing administrative functions related to migration procedures.**”

OBJECTIVE 13, Paragraph 28:

“We commit to ensure that any detention in the context of international migration is based on law, non-arbitrary, based on necessity, proportionality and individual assessments, and carried out by competent officials, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return. **We will ensure the non-regression principle in relation to the use of detention on migratory grounds.** We further commit **to work progressively to end all forms of migration detention and** take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only and working to create alternatives.”

D. Access to justice

General comments:

1. Access to justice is present in two actionable commitments of the text (3.d y 10.h), but it is not present in any objective. It could be incorporated in a broad manner in Objective 7. The importance of access to justice in migratory procedures can be developed in acción “b” of objective 12.
2. Objectives 8 and 9, related to crimes against migrants, do not have a perspective key for the crimes not to be repeated, which is access to justice for the victims.

Suggested language:

OBJECTIVE 7, Paragraph 22:

We commit to protect and assist migrants, in accordance with our obligations under international human rights law, by responding to particular, multiple and intersecting forms of vulnerability arising from personal characteristics, the reasons for leaving their country of origin, the circumstances in which they travel or the conditions they face on arrival. We further commit to uphold access to justice, the principle of the best interests of the child as the primary consideration in issues where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements.

OBJECTIVE 12, Paragraph 27.b:

“Develop and conduct intra- and cross-regional specialized human rights-based trainings for first responders and government officials, including law enforcement and judicial bodies, to facilitate and standardize identification and referral of, as well as appropriate assistance and counselling, in a culturally-sensitive way, to victims of crimes and human rights violations, ~~trafficking in persons~~, migrants at risk, including children, in particular those unaccompanied or separated, and persons affected by any form of exploitation and abuse related to smuggling of migrants under aggravating circumstances.”

OBJECTIVE 8, Paragraph 23:

“We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through joint search and rescue operations, standardized collection and exchange of information. We further commit to identify those who have died or gone missing, and to facilitate access to justice and communication with affected families.”

OBJECTIVE 8, Paragraph 23.d:

“Establish transnational coordination channels and designate contact points for families looking for missing migrants, through which families can have access to justice and be kept informed on the status of the search, while respecting international data protection standards