

“Facilitating mobility” means banking on the considerable agency of migrant workers and reducing their precarity

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Undocumented migrants and temporary migrant workers perform essential economic functions in all States that receive immigration. Some temporary migrant workers will occupy jobs commanding higher salaries: they wield higher levels of social capital and remain mobile, confident that they can find a job elsewhere should they not like the work environment. They are usually called “expats”, not “migrants.”

Most undocumented migrants and temporary migrant workers, however, will work in economic sectors where labour costs must remain low if the businesses are to remain profitable. They face huge constraints: they usually have little or no social capital, they often do not speak the local language or English, they frequently carry overwhelming debts due to having had to pay recruitment fees, and they are often expected to financially support a whole family at home.

Their precarious situation is not happenstance. It is politically, socially and economically constructed, in order to extract maximum work for minimal labour costs. Indeed, globalization has led to the relocation of manufacturing sectors to benefit from lower labour costs in low-income countries. For the non-delocalizable economic sectors – agriculture, construction, extraction, hospitality, fisheries, domestic and institutional care, services – States have relocated working conditions from low-income countries to more advanced economies. These transformations have come to define today’s global political economy, in the North as in the South, and they affect many workers who are citizens (for example, those working with temporary labour agencies) and probably a majority of the 169 million migrant workers around the world.¹

The combination of restrictive migration policies, repressive border controls, the absence of meaningful pathways to permanent resident status, and a lack of enforcement of labour rights for migrant workers has led to precarity for these workers, based on the fear of being sent back empty-handed to the country of origin. This ‘constructed precarity’ has allowed a considerable reduction in the cost of labour in non-delocalizable economic sectors, an indirect subsidy generated by state-enforced measures. This precarity is today structural and constitutes a conscious strategy of reduction of the cost of labour, everywhere in the countries receiving immigration, North and South. States have thus recreated a lumpenproletariat, in the niche previously occupied by the 19th century industrial workers, the indentured labourers of the British Empire, and the slaves of other regimes.

On the one hand, repressive policies against *undocumented migrants* have targeted these workers, not their employers. Yet it is precisely the pull factor of these underground job offers that attracts migrants. They would not come if there were no jobs for them. Undocumented migrants do not have a legal status and work in economic sectors in which States often refuse to recognize that

¹ International Labour Organization, *Global Estimates on International Migrant Workers: Results and Methodology*, 3rd ed (2021) at 11, online: https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf.

they have labour needs. The absence of legal status means that those workers do not dare to stick their neck out and mobilize, protest, contest, or report to the authorities, when their rights are being trampled, for fear of being detected, detained, and deported. Their absence of immigration status deprives them of recourses against abuse, prevents their voice from being heard, and pushes them further underground, where they can be preyed upon by recruiters, smugglers, employers, lodgers, moneylenders, and other exploiters who know their situation and do not hesitate to threaten them with a denunciation to immigration authorities in order to keep them in check.²

On the other hand, States have developed temporary legal migration programs that all too often create the same precarity: Kafala in the Middle East, sponsorship in Canada or Australia, "closed" work permits, etc. *Temporary migrant workers* are often provided with a work and residence permit which is seasonal (for agricultural workers) or limited to one-year renewable, but which is often limited to one employer. This means that most of these migrants will do what they are told by the employer without protesting much, however outrageous the situation may be: long hours without overtime pay, late payment of wages, illegal deductions from the wages, inadequate lodging, psychological and verbal abuse, sexual harassment, and violence. Such illegal practices have been reported by many international and civil society organizations and are endemic in underground labour markets. These migrant workers do not dare alienate their employer for fear of being either fired and seeing their work and residence permit cancelled, which would signify returning home empty-handed or blacklisted for future years, preventing them from returning the year after. In both cases, it would be the end of the migration project, with no possibility to reimburse debts and to fund family expenses, such as education for the kids or healthcare for the parents.

The combination of migration policies that induce fear of deportation and practices of non-implementation of labour law in workplaces where migrant workers are a significant proportion of the workers results in the creation of lawless zones in which migrants are exploited without being able to protest. Racialized persons are disproportionately affected. Race and other intersectional factors, such as gender and class, operate as structures of oppression within migration policies.³ The COVID-19 pandemic further exacerbated the precarity of undocumented migrants and temporary migrant workers who experienced unsafe working conditions, income loss, and lack of governmental support.⁴ Legislation and regulations prohibit, either officially or in practice, these migrants to unionize, to negotiate their working conditions, to denounce the abuse to oversight mechanisms, and to fight for their rights in courts or labour boards. Labour inspections are often ineffective at protecting migrant workers' rights, when they are not colluding with migration authorities in hunting down undocumented migrants, thus pushing them deeper in the underground and into the hands of their exploiters. Migrants may not be aware of their rights, due to language barriers or isolation. For those who know their rights, speaking up is not really an option when it may lead to the end of their migration project, in which they and often their entire family have invested so much in time, money and energy, and which has entrusted them with the

² Report by the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau: *Labour Exploitation of Migrants*, HRC, 26th Sess. UN Doc A/HRC/26/35 (2014) at paras 57–58.

³ Tendayi Achiume, "Race, Refugees and International Law" in Cathryn Costello, Michelle Foster & Jane McAdam, eds, *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, 2021) 43 at 44.

⁴ See generally Graham Hudson, Chloé Cébron & Rachel Laberge Mallette, "Access to Health Care for Precarious and Non-status Migrants During COVID-19: Ontario and Québec" (2020) 17:3 *Can Diversity* 45, online: <https://acs-metropolis.ca/wp-content/uploads/2021/11/canadiandiversity-vol17-no3-2020-d3549.pdf>

duty to support their loved ones – a duty for which they will often prefer to suffer considerable abuse rather than “fail”.

Despite all the agency they demonstrate to survive and support their families, the fear of dismissal and deportation prevents migrants from mobilizing, publicly protesting, suing in complaint mechanisms or the courts, or unionizing.

Yet, no marginalized group has ever had its rights handed to it by the majority on a silver platter: workers, women, indigenous peoples, the LGBTQ+ community, minorities, detainees and many others have had to fight publicly for the recognition of their rights. Migrants do not have the right to vote and therefore do not count in the context of public debate. Unlike citizens, they can neither reward nor punish politicians. The political class is free to say whatever is politically useful against them, since the electorate is not enlightened about the issues by the inclusion and effective participation of migrants themselves in the public debate. We cannot even blame most politicians: warts and all, electoral democracies are the best political system ever invented and politicians – even the best ones – are spurred by electoral pressure.

Migration policies are thus made by non-migrants – the politicians – for non-migrants – their electorate, just as policies towards women have long been made by committees of men. That is, those setting government agendas do not know what they are talking about, and migration policies are reduced to an electoral issue, being too often based on populist prejudices, myths, fantasies and fears that are conveyed in the public debate, without contradiction, for lack of meaningful opposition. This is particularly evident in the prominent role the ‘security fantasy’ plays in discussions of migration: migrants are increasingly framed as a pernicious – if not existential – threat, when all the research demonstrates lower levels of criminality in immigrant communities than in the native communities of similar social environment.⁵

Even though precarity has become a strategy to reduce labour costs, most migrants manage to send money home, to reimburse debts, and to support their families. Since they cannot speak up, protest, contest, or make the reality of their lived lives known to all, they exercise considerable daily agency to avoid the pitfalls that precarity sets on their path: they need to if they are to survive. For an undocumented migrant, taking the subway (instead of the usual bicycle ride) to return home in order to see one’s children before they go to bed means taking the risk of being arrested in a police ID check. For a temporary migrant worker, mobilizing in order to protest the fact that wages have not been paid for several months means taking the risk of being fired or blacklisted.

Migrants in precarity rely on underground solidarity networks, connecting with family members, friends, relationships, and other “operators” in order to respond to the daily challenges of their lives. Finding the cheapest way to reach their destination, avoiding the traps of an undocumented journey, choosing the “best” migrant smuggler, seeing a doctor when one is ill, buying groceries when the working hours are long – all these actions will be based on the information collected through the migrants’ networks, thanks mostly to the use of smartphones and word of mouth.

It is remarkable that immigration States do not realize how much more these migrants could contribute to wealth creation and social transformation, were they not hobbled by precarity.

⁵ Francesco Fasani et al, “Immigration and Crime: Perceptions and Reality” in Fasani et al, eds, *Does Immigration Increase Crime? Migration Policy and The Creation of the Criminal Migrant* (Cambridge: Cambridge University Press, 2019) 9 at 19.

Immigration States shoot themselves in the foot when they encourage and indirectly subsidize criminal networks to prey on those migrants, preventing them from deploying all their talents and energy, and leaving their agency in the shadows.

Yet, another policy framework is possible and the 2018 *Global Compact for Migration*⁶ outlines how this may be realized. This Compact is the first truly universal instrument on migration, 152 member states of the United Nations General Assembly approving it.

A soft law instrument, the Global Compact creates a conceptual framework – a long-term game plan for the coming decades. One should not expect major results in the short term. This is especially the case as it often suggests the opposite of what most States are currently doing. But this gap between the principles and values the Global Compact articulates and contemporary state practice should not be taken to undermine its importance. Consider the *Universal Declaration of Human Rights* of 1948, a similarly non-binding instrument which for the first time articulated the principles and values of human rights at the global level. It took 18 years to adopt the two *International Covenants*, then another 18 years for the *Convention against Torture*, then 22 years for the *Convention on Enforced Disappearances*, to take only these examples of how today's international human rights regime came into being. One hopes that the *Global Compact for Migration* will gradually engender a culture of migrants' rights, just as the *Universal Declaration* created a culture of human rights.

The central recommendation of the *Global Compact for Migration* is to "facilitate" mobility. In the negotiated English version, this term appears 62 times! Realizing this recommendation will be the greatest challenge for all of those who care about migrants' rights in the years to come. And this realization in great part means unleashing the power of migrants' considerable agency.

In unpacking how its recommendations ought to be realized, the *Global Compact* proposes twenty-three objectives. Most of them aim at integrating migrants, decriminalizing their activities and respecting their rights. Here are a few of the States' political commitments: to enhance availability and flexibility of pathways for regular migration;⁷ to facilitate family reunification;⁸ to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work;⁹ to facilitate changes of employer and modification of conditions or length of stay, without unnecessary red tape, and without fear of arbitrary deportation;¹⁰ to facilitate regularization of status;¹¹ to include migrants in crisis preparedness, emergency response, and evacuation measures;¹² to save lives;¹³ to use immigration detention only as a measure of last resort and work towards alternatives;¹⁴ to provide access to basic services for migrants, regardless of their migration status, including by instituting

⁶ *Global Compact for Safe, Orderly and Regular Migration*, UNGA, 73rd Sess, UN Doc A/RES/73/195 (2018) GA Res 73/195.

⁷ *Ibid* at objective 5.

⁸ *Ibid* at objective 5(i).

⁹ *Ibid* at objective 6.

¹⁰ *Ibid* at objective 6(g).

¹¹ *Ibid* at objective 7(h).

¹² *Ibid* at objective 7(j).

¹³ *Ibid* at objective 8.

¹⁴ *Ibid* at objective 13.

‘firewalls’ between public agencies;¹⁵ to empower migrants and societies to realize full inclusion and social cohesion;¹⁶ to eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration;¹⁷ to invest in skills development and facilitate mutual recognition of skills, qualifications and competences, at all skill levels.¹⁸

States must therefore aim for a normally regulated labour market that allows migrants to come and look for work, provides equal protection for the rights of all workers regardless of their migration status, and gives all migrant workers a voice in negotiating their working conditions. Additionally, in line with the *Global Compact*, States must undertake regularization programs, develop accessible and expedient procedures that facilitate transitions to stable legal status and inform migrants of their rights, so as to prevent them from falling into an irregular status.¹⁹ Banking on the migrants’ agency is key, in the same way that States bank on their citizens’ mobility in order to respond to labour needs throughout the country.

However, such a mobility goal cannot be achieved overnight. Forty years of ‘cheap labour’ practices in non-delocalisable sectors cannot be erased instantaneously or else entire economic sectors will collapse under the weight of increased labour costs. These sectors will require a longer transition with investments to support them during this modernization process, as has been done for other industries.

The 152 states that adopted the *Global Compact* recognized the need to “empower” migrants. However, unless these migrants can exercise their agency without fear of arbitrary expulsion, and thus influence the elaboration of migration policies (ultimately gaining the right to vote after a few years of residence), non-migrant politicians will continue to want to please their non-migrant electorate by preferring to score short-term political points over achieving long-term economic and social gains.

Unfortunately, there is no long-term strategic planning for human mobility in any country. Governments plan strategically for 20, 30 or 50 years in all other areas of governance: infrastructure, urban development, transport, energy, food security, health, education, environment, etc. In contrast, migration policies are almost always reactive to current events: “we need IT workers now” or “we need to stop illegal aliens now”. Such changes thus depend on the mood of the mobilizable electorate. For the most part, the constituency that is most vocal on migration issues is essentially made up of citizens who oppose immigration, an electorate courted by all politicians, left and right. Most citizens have other priorities when elections come around.

The absence of long-term strategic planning of mobility is strikingly indicative of how migrant workers are still considered in most societies. Indeed, States do strategically plan for their citizens’ needs, as there could be electoral consequences in not preparing for the future. Migrants in precarity are considered as temporary workers, as people who should return home when not needed anymore, as an ‘expendable’ labour force, and States thus do not fear an electoral backlash should migrants be unhappy with their conditions. Moreover, precarity is precisely the means through

¹⁵ *Ibid* at objective 15.

¹⁶ *Ibid* at objective 16.

¹⁷ *Ibid* at objective 17.

¹⁸ *Ibid* at objective 18.

¹⁹ *Ibid* at objectives 7 i)–h).

which States keep the prices of essential goods and services low: any significant increase would trigger an electoral reaction from citizens. Therefore, States still seem to consider that short term policies, geared towards electoral results by keeping employers happy and prices for goods and services low is a winning electoral tactics.

However, current labour shortages in many Global North countries and the realization that they are not a temporary feature of the economic landscape are starting to create conversations regarding migration policies: it is anticipated that their labour force will need a growth rate that birthrates will not provide. Such conversations are much better informed than was the case even twenty years ago, due to several factors. Societies are diversifying considerably: younger urban generations have family and friends of many ethnicities, creeds, or languages, and they will not accept the kind of discrimination that previous generations have accepted. Employer associations are currently lobbying governments to increase immigration rates to respond to labour needs, a push that many governments are still resisting. Except for the ‘yellow press’ everywhere, the media are doing a much better job at informing their readership on migration policy issues, having specialized journalists, producing feature reports on migrants, their families, their contributions to society, and their role in the economy, especially at regional level. An international dialogue between States started with the creation in 2007 of the *Global Forum on Migration and Development*, an annual meeting where state representatives and civil society organizations meet to discuss migration policy directions and outcomes, and it was enhanced with the inclusion of the *International Organization for Migration* in the United Nations family in 2016 and the preparation of the 2018 *Global Compact for Migration*. Such conversations are hopefully the start of a generational change that will bring most citizens to regard migration as mostly a benefit for their societies if well governed.

As the *Global Compact* invites States to do, they will therefore need to think about human mobility in the long term, as they do for most other fields of governance. To do so, societies will have to collectively ask themselves some difficult questions. What population do we want to have in 20 or 50 years, in terms of numbers for geopolitical reasons, but also in terms of skills for economic and cultural reasons? How should we account for the loss of creativity of an aging population, as well as growing needs for care-work? How can we ensure the maintenance of the standard of living and compensate for the differences in wealth? How do we better manage social diversity in all its components: age, gender, ethnicity, religion, etc.? How should we respond to migration emergencies, caused by violence or the environment?

This kind of debate requires the participation of all those affected by these issues: all ministries, all social actors, all institutions, all citizens. This is what the *Global Compact* calls “whole-of-government” and “whole-of-society” approaches. Most importantly, one needs to hear from migrants themselves – whatever their status – to bring their lived experience into the debate and as a reality check against myths, stereotypes, and fantasies. Migrants also need a *MeToo* movement, in the sense of a broader societal reckoning with perspectives and experiences that have remained marginalized and ignored for far too long. A key condition for enabling this debate is to reduce the constructed precarity of migrants and to ensure their empowerment, to bring migrants out of the margins and give them “papers” and a regularized status, to recognize the legitimacy of their “voices”, to provide them with the means to express themselves, to participate in public debates, and to showcase their considerable agency – without fear of deportation. As suggested above, today’s migrant workers correspond exactly to the industrial workers of the 19th century whose collective efforts invented trade unions and brought about the much-needed reform

of labour law. Together with other actors – NGOs, lawyers, social workers, health care workers, educators – unions could powerfully carry the voices of migrant workers and migrants' inclusion could trigger a welcome renewal of a currently weakened labour movement.

From this concern to hear the 'voices' of migrants, States will have to develop a strategic plan extending over one or more decades, with precise benchmarks, and foresee the necessary investments to reach these goals. Important components of this agenda should include: progressively applying labour laws to all migrant workers in all sectors; strengthening the mission of labour inspectorates and public officials responsible for monitoring working conditions; effectively sanctioning exploitative employers, considering that the short-term inconvenience to a small number of businesses will be beneficial to the economy as a whole over the long term; offering more and more work and residence permits to foreigners who request them and allowing them to look for work; not discouraging unionization, but actively enabling migrant worker organization; regularizing most undocumented workers; seriously reforming the temporary migrant worker recruitment industry; doggedly combatting negative stereotypes; facilitating access to permanent residence and to nationality, in order to recognize social integration.

These objectives should of course be developed with the input and participation of those most directly affected by them, especially migrants themselves. The *Global Compact for Migration* serves as a benchmark and a framework in this endeavour. States should undertake an overview of existing domestic policies and practices to assess their consistency with the *Global Compact* and re-evaluate them at regular intervals. They should also take steps to ensure the *Global Compact* objectives are accounted for when new policies are adopted in order to ensure the greatest level of protection for migrants.

Such a thoughtful and collective approach necessary to implement the *Global Compact* will allow to take maximum advantage of the migrants' agency and achieve several goals: meeting the demographic needs of many countries; gradually increasing the economic and social contribution of migrants; easing pressures on asylum systems by facilitating refugees' access to immigration mechanisms; diminishing the power of criminal networks by reducing precarity; increasing border control capacity as most migrants will have travel documents, thus allowing to focus security resources on intelligence about individual threats; and reducing anti-immigration sentiments across societies through more enlightened public debates.

Human mobility will not abate. Growing inequality and environmental challenges will increase the migration pressure. Closing borders is and will remain a costly and ineffective response. To get out of the repressive spiral, States must accept that governing mobility is not about prohibiting it. It means legalizing, regulating and taxing it. It means investing in a governance infrastructure that accelerates the response to the many needs of societies by relying on the ingenuity of migrants themselves and that offers them pathways to integration, for the benefit of all. This transition must take place in the context of regional and international cooperation. No State can liberalize mobility alone. The role of free movement areas such as the EU, Mercosur, ECOWAS, SADC and the African Union will be decisive as models of what needs to be done on a global scale.

'Facilitating mobility' means progressively banking on the migrants' agency and making migration simpler, safer, faster and cheaper, for both migrants and host societies.