

CHAPTER THREE

The challenge of irregular migration: State sovereignty and human security

States, exercising their sovereign right to determine who enters and remains on their territory, should fulfil their responsibility and obligation to protect the rights of migrants and to re-admit those citizens who wish or who are obliged to return to their country of origin. In stemming irregular migration, states should actively cooperate with one another, ensuring that their efforts do not jeopardize human rights, including the right of refugees to seek asylum. Governments should consult with employers, trade unions and civil society on this issue.

1. The term ‘irregular migration’ is commonly used to describe a variety of different phenomena involving people who enter or remain in a country of which they are not a citizen in breach of national laws. These include migrants who enter or remain in a country without authorization, those who are smuggled or trafficked across an international border, unsuccessful asylum seekers who fail to observe a deportation order and people who circumvent immigration controls through the arrangement of bogus marriages. These different forms of irregular migration are often clustered together under the alternative headings of unauthorized, undocumented or illegal migration. The Commission is aware of the controversy surrounding the adequacy of these concepts, and concurs with the assertion that an individual person cannot be ‘irregular’ or ‘illegal’. This chapter therefore refers to the people concerned as ‘migrants with irregular status’.

2. There are important regional differences in the way that the concept of irregular migration is applied. In Europe, for example, where the entry

of people from outside the European Union (EU) is closely controlled, it is relatively easy to define and identify migrants with irregular status. That is not the case in many parts of Africa, where borders are porous, ethnic and linguistic groups straddle state borders, some people belong to nomadic communities and many people do not have proof of their place of birth or citizenship.

3. The analysis of irregular migration is further hampered by a serious lack of accurate data, making it difficult to identify trends or to compare the scale of the phenomenon in different parts of the world. There is, however, a broad consensus that, as the number of international migrants has increased, so too has the global scale of irregular migration. It is estimated by the Organization for Economic Cooperation and Development (OECD) that between 10 and 15 per cent of Europe’s 56 million migrants have irregular status, and that each year around half a million undocumented migrants arrive in the EU. Irregular migration is by no means confined to developed countries. Asia is known to have

large numbers of migrants with irregular status: up to 20 million in India alone, according to some estimates. Such people are also thought to comprise the majority of all migrants in Africa and Latin America.

4. A growing proportion of international migrants undertake long-distance journeys that take them from one part of the globe to another, transiting through a number of countries on their way to their final destination. In the course of a single journey, it is quite possible for a migrant to slip in and out of irregularity, according to the visa requirements of the countries concerned.

Irregular migration in the USA

It is estimated that there are over 10 million migrants with irregular status in the USA, accounting for nearly one third of the foreign-born population. Over half the migrants with irregular status are Mexican. Despite increased efforts at border control, about 500,000 additional migrants enter the USA without authorization each year.

5. Seeking to defend their sovereignty and security, states have devoted enormous amounts of attention and resources to stem irregular migration, with limited success. Irregular migration is driven by powerful and complex forces, including a lack of jobs and other livelihood opportunities in countries of origin and the demand for cheap and flexible labour in destination countries. The growth of irregular migration is also linked to a lack of regular migration opportunities, and is facilitated by criminal networks that profit from migrant smuggling and from human trafficking. The growth of diaspora communities and transnational social networks has also made it easier for people to move from one country to another in an irregular manner.

6. In many parts of the world, states lack the capacity to control the movement of people across long land and sea borders. In some countries, community relations considerations limit the willingness of authorities to undertake rigorous and intrusive forms of action against migrants with irregular status and the people who employ them. More generally, states are reluctant to introduce measures that would lead to increased restrictions on the movement of their own citizens and on authorized non-citizens such as business travellers and tourists.

7. The issue of irregular migration is inextricably linked to that of human security. Many of the people who migrate in an irregular manner do so because their own countries are affected by armed conflict, political instability and economic decline. While they are in transit, migrants who move in an irregular manner often find themselves exposed to danger, or become stranded for long periods of time while *en route* to their final destination. Unless carefully implemented, efforts to prevent irregular migration can further jeopardize the welfare of such migrants. In this context, addressing the issue of irregular migration presents a major challenge. This chapter examines that challenge, while the two subsequent chapters examine the social situation and the human rights of migrants with irregular status.

The negative consequences of irregular migration

States and other stakeholders should engage in an objective debate about the negative consequences of irregular migration and its prevention.

8. Irregular migration has a number of negative consequences. When it takes place on a significant scale, and when it receives a great deal of

media attention, irregular migration can undermine public confidence in the integrity and effectiveness of a state's migration and asylum policies. Irregular migration challenges the exercise of state sovereignty and can even become a threat to public security, especially when it involves corruption and organized crime. When irregular migration results in competition for scarce jobs, irregular migration can also generate xenophobic sentiments that are directed not only at migrants with irregular status, but also at established migrants, refugees and ethnic minorities.

9. Irregular migration can also endanger the lives of the migrants concerned. A large but unknown number of people die each year trying to cross land and sea borders without being detected by the authorities. Smugglers may extract a high price from migrants, sometimes charging thousands of dollars to transport them from one place to another. Smugglers do not always inform migrants in advance of where they will be taken. The means of transport used by migrant smugglers are often unsafe, and migrants who are travelling in this way may find themselves abandoned by their smuggler and unable to complete the journey they have paid for. Using the services of smugglers, many migrants have drowned at sea, suffocated in sealed containers or have been raped and abused while in transit.

The dangers of irregular migration

The International Centre on Migration Policy Development estimates that some 2,000 migrants die each year trying to cross the Mediterranean from Africa to Europe. According to Mexican consulates, about 400 Mexicans die trying to cross the border into the USA each year.

10. Human traffickers ruthlessly exploit migrants. By definition, victims of human trafficking are not free to decide on the activities in which they engage. They are often forced into low-paid, insecure and degrading work from which they may find it impossible to escape and for which they receive trivial or no compensation. The US State Department estimates that every year, between 600–800,000 women, children and men are trafficked in every region of the world.

11. More generally, people who enter or remain in a country without authorization can be at risk of exploitation by employers and landlords. Because of their irregularity, migrants are often unable to make full use of their skills and experience once they have arrived in a country of destination.

12. Women constitute a substantial proportion of the many migrants with irregular status. Because they are confronted with gender-based discrimination, including restricted access to regular migration opportunities, female migrants with irregular status are often obliged to accept the most menial informal sector jobs. The majority of migrant domestic workers and migrants employed in the sex industry are women and are at particular risk of abuse. The latter in particular also face specific health-related risks, including exposure to HIV/AIDS.

13. While a great deal of recent attention has been given to the trafficking of women, it is important to note that this phenomenon also affects men and children. Migrant children with irregular migration status who are separated from their parents are a particularly vulnerable group, and may be trafficked into the sex industry. Such children are also at risk of becoming stateless.

14. Migrants with irregular status are often unwilling to seek redress from authorities because they fear arrest and deportation. As a result, they do not always make use of public services to which they are entitled, for example emergency health care. In most countries, they are also barred from using the full range of services available to citizens and migrants with a regular status. In such situations, NGOs, religious bodies and other civil society institutions are obliged to provide assistance to migrants with irregular status.

15. Irregular migration is a particularly emotive issue, and one that tends to polarize opinion. In discussions of the issue, those who are concerned by border control and national security are often opposed by those whose main concern is the human rights of the migrants concerned. States and other stakeholders should move away from these contradictory perspectives and engage in an objective debate on the causes and consequences of irregular migration and the ways in which it might be most effectively addressed.

The need for a comprehensive and long-term approach

Border control policies should form part of a long-term approach to the issue of irregular migration that addresses the socio-economic, governance and human rights deficits that prompt people to leave their own country. This approach must be based on interstate dialogue and cooperation.

16. In recent years, many states, particularly the more prosperous ones, have devoted billions of dollars to a variety of border control techniques. These include the deployment of additional frontier guards and immigration officers, the construction of border fences and barriers, the interdiction and detention of migrants who are travelling in an unauthorized manner, the im-

position of additional visa requirements; the introduction of machine-readable passports and, most recently, the use of biometric data. States have also invested substantially in the apprehension of migrant smugglers and human traffickers and have introduced a variety of legal and administrative measures to ensure the speedy rejection of asylum applications submitted by people who are deemed to have manifestly unfounded claims to refugee status.

17. While such initiatives have a role to play in stemming irregular migration, such border control policies must be implemented in a sensitive manner. The use of biometric data, for example, has the potential to facilitate the movement of people from one country to another, but also carries the risk of being used in a discriminatory manner and with inadequate regard for data protection, privacy and civil liberties. Strengthened border controls and visa restrictions have not always been effective in preventing irregular migration and can expose people to additional hazards when they seek to move in an irregular manner. When seeking to attain their legitimate objective of effective border control, states must respect their human rights obligations.

18. Border control policies must be combined with other relatively short-term approaches that are designed to stem irregular migration. While the record of such policies is somewhat mixed, there is scope for additional information programmes, notably by providing prospective migrants with a better understanding of the risks entailed in irregular migration, as well as guidance in finding regular migration opportunities. Capacity-building programmes, involving training, institutional development and the introduction of new legislation, policies and practice are also needed in many countries, especially those that have only recently been confronted with the issue of irregular migration.

Proactive approaches

19. As noted in Chapter One, the number of people seeking to migrate seems likely to increase in the future as a result of the ‘3Ds’ – developmental and demographic disparities, as well as deficits in the quality of governance and protection of human rights. It is therefore essential to ensure that short-term policy responses to the issue of irregular migration are complemented with longer-term and proactive approaches. In formulating such approaches, states must develop a better understanding of irregular migration and the constraints they face in attempting to prevent it.

20. Dialogue and cooperation among states, at both a bilateral and regional level, is essential; the Commission therefore endorses the initiatives of regional consultative migration processes to include irregular migration in their agendas. States have a shared interest in this issue and must strive towards shared responsibility and joint action.

21. As suggested in preceding chapters, it is in the interest of both states and migrants to create a context in which people migrate out of choice and in a safe and legal manner, rather than irregularly and because they feel they have no other option. All states must strive to ensure that their citizens are able to benefit from peace, human rights and the opportunity to participate in a democratic political process, as well as a thriving economy and decent work. The world’s more prosperous countries must support such efforts by implementing the commitments they have made to the development process in countries of origin.

Addressing the demand for irregular migrant labour

States should address the conditions that promote irregular migration by providing additional opportunities for regular migration and by taking action against employers who engage migrants with irregular status.

22. To a greater or lesser extent, dual labour markets have evolved in the majority of states: a formal labour market, in which wages, working hours and other conditions of service are regulated, and an informal labour market, dominated by casual workers who do not benefit from such protection. In some parts of the world, certain sectors of the economy, including agriculture, construction, hotel and catering services, as well as domestic and sex work, have come to rely to a significant extent on migrants with irregular status, who are prepared to work in difficult, dangerous and dirty jobs with little security and low wages. Employing migrants with irregular status can be viewed as a form of ‘insourcing’, a strategy used by some employers as an alternative to outsourcing or offshoring when confronted with a need to cut costs and to compensate for local labour shortages.

Irregular migrant labour in the Russian Federation

According to the ILO, there are between 3.5 and 5 million migrants currently employed in the informal labour market in the Russian Federation, particularly in industry, construction and agriculture. These migrants mainly originate in countries of the Commonwealth of Independent States and South-East Asia.

23. The growth of such employment opportunities has provided an important incentive for people to migrate in an irregular manner. As the global economy becomes more competitive and companies seek to reduce costs further, it is likely that the market for irregular migrant labour will continue to expand, especially in countries where the formal labour market is highly regulated. The Commission calls on states to consider and address this issue. At the same time, tougher administrative, civil and even criminal sanctions are required against employers and contractors who knowingly engage irregular migrant labour, exploit these workers and expose them to danger.

24. The Commission also urges states to consider making more regular migration opportunities available when gaps in the labour market need to be filled, and to establish clear and transparent criteria for the recruitment of foreign workers. In this respect, the Commission reiterates the proposal made in Chapter One for the introduction of appropriately designed temporary migration programmes.

25. The Commission is fully aware of the argument that the establishment of regular migration programmes will not necessarily reduce the scale of irregular migration, as the supply of migrants is currently greater than the demand for their services, and also because regular migration creates transnational social networks that can be used to facilitate irregular migration. However, regular migration programmes could reinforce public confidence in the ability of states to admit migrants into their territory on the basis of labour market needs. Programmes of this kind would also help to create a more positive image of migrants and foster greater public acceptance of international migration.

Resolving the situation of migrants with irregular status

States should resolve the situation of migrants with irregular status by means of return or regularization.

26. In addition to adopting policies that seek to reduce the scale of international migration, steps must also be taken to resolve the situation of people who have already entered a country and who have an irregular status. A first challenge is to identify such people. As long as they remain invisible to the authorities, they cannot be made aware of, and guaranteed access to, the rights and services to which they are entitled, including protection against exploitation.

27. NGOs, migrant and diaspora organizations and other stakeholders should cooperate with the authorities in establishing contact with migrants with irregular status and finding solutions for them. The Commission recognizes that migrants attain an irregular status in a wide variety of ways and that certain solutions are more appropriate to some groups of migrants than others. States should consider the judicious application of two specific solutions – return and regularization – as ways of resolving the situation of migrants who lack legal authorization to be in their country of residence.

Return

28. Effective return policies are required if national and international migration policies are to have any credibility and are to retain the support of the public. The Commission recognizes there are times when the mandatory repatriation of migrants with irregular status is appropriate, but stresses the importance of ensuring that such returns take place after due process of law and only to destinations where the life or liberty of the

migrants involved are not placed at risk. Countries of origin should provide consular services to attend to the needs of migrants with irregular status who are subject to removal. Every effort should be made to facilitate returns on a voluntary basis.

29. All returns should be undertaken in a manner that is safe, dignified and humane, with full respect for fundamental human rights. The migrants in question also have a responsibility to return, and an obligation to cooperate with the authorities, when they have legitimately been requested to leave a country.

30. It is an established principle that states have an obligation to re-admit their own nationals. The Commission calls upon all states to uphold this principle in its full scope and to apply it in situations where the migrants concerned have failed to cooperate with the authorities in the country they have been required to leave. Development assistance should be used to support the re-integration of returning migrants in countries of origin, focusing on the provision of community-based aid to the areas most seriously affected. While individual re-integration grants may also be used to promote and facilitate returns, such grants should not be set at a level which suggests that there is something to be gained from irregular migration and deportation.

31. There are certain situations in which it might not be feasible or appropriate to insist on the return of migrants with irregular status. Asylum seekers who have entered or remained in a country in an irregular manner, and whose claims have not yet been determined, are clearly one such group. They only become subject to removal once their claim to refugee status or some other form of protection has been rejected after a full and fair consideration of their case. Asylum seekers whose claims have been definitively re-

jected but who are unable to gain the documents required for them to re-enter their country of origin should also be helped to find an interim solution to their plight, pending the time when return becomes possible.

32. Special efforts must be made to identify victims of human trafficking. Many countries offer such people a 'reflection period', which ensures that they are not immediately repatriated and are granted access to legal services and rehabilitation assistance. The Commission urges all countries to introduce such reflection periods for the victims of human trafficking.

The regularization option

33. A number of states in different parts of the world have established regularization programmes. Such programmes offer legal status to migrants with irregular status, who have been present in a country for significant periods of time, who have found employment and whose continued participation in the labour market is welcomed by the state and private sector. It is the Commission's view that the very need for such regularization programmes exposes a lack of coherence between national migration and labour market policies. The Commission also makes a distinction between such selective regularization programmes and amnesties, in which migrants with irregular status are given legal status in an across-the-board manner.

34. The Commission recognizes that regularization programmes can be complex undertakings and accepts that they can promote additional irregular migration, especially if states establish ongoing or rolling regularization programmes. It nevertheless calls on states to acknowledge the fact that many migrants with irregular status have found a place in their economies and societies.

35. The Commission recommends that regularization takes place on a case-by-case basis. A transparent decision-making process for regularization programmes is essential, with clearly defined criteria for migrants to qualify for regular status. These might include, for example, the applicant's employment record, language ability, absence of a criminal record and the presence of children who have grown up in the country; in other words, those who have already achieved a substantial degree of integration in society.

Migrant smuggling and human trafficking

States must strengthen their efforts to combat the distinct criminal phenomena of migrant smuggling and human trafficking. In both cases, perpetrators must be prosecuted, the demand for exploitative services eradicated and appropriate protection and assistance provided to victims.

36. The Commission emphasizes the legal distinction that exists between migrant smuggling and human trafficking in the context of irregular migration. In international law, trafficking is defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion or deception, for the purpose of exploitation. According to this definition, human trafficking is independent of victim consent and is a human rights violation. In contrast, the concept of smuggling refers to consensual transactions where the smuggler and the migrant agree to circumvent immigration control for mutually advantageous reasons. Migrant smuggling constitutes a breach of national immigration laws and is considered to be a serious crime in a growing number of countries.

The geography of human trafficking

Although the scale of human trafficking between regions is increasing, most takes place within regions. According to the US State Department, about two thirds of global victims are trafficked intra-regionally in East Asia and the Pacific (260–280,000) and Europe and Eurasia (170–210,000).

37. The Commission recognizes that there can be convergences between migrant smuggling and human trafficking and that a clear distinction between the two phenomena cannot be made in every case. The legal status of a single migrant and the degree of exploitation she or he experiences may change in the course of a journey. The definitional issue is further complicated by the fact that some victims of trafficking and smuggled migrants may seek asylum and qualify for refugee status.

38. The Commission calls upon states to prosecute the perpetrators of migrant smuggling and human trafficking, and to bring their law into conformity with the two United Nations Protocols that have been introduced to address these issues. Some states, including parties to the smuggling and trafficking protocols, lack the resources, capacity and will to implement these protocols effectively. The Commission therefore underlines the importance of multilateral cooperation, including targeted funding and capacity-building, to ensure that these phenomena can be addressed on a worldwide basis.

Protection of victims

39. States must take three complementary forms of action if they are to address the problems of migrant smuggling and human trafficking in an effective manner. First, they must prosecute the perpetrators, including those who recruit and

harbour trafficked persons, and confiscate these perpetrators' assets. Second, they must reduce the demand for the services of smuggled and trafficked people, both by means of information campaigns and educational initiatives, and through the strengthening of national law. The reinforced regulation of marriage, tourist and adoption agencies is of particular importance in this respect. Third, action against those who are engaged in migrant smuggling and human trafficking must go hand-in-hand with effective protection for their victims.

40. The needs of trafficking victims may differ from those of smuggled migrants, but some common approaches are required. Awareness-raising is of particular importance in order to provide victims with information on the protection, assistance and other services that are available to them. Likewise, the training of prosecutors, judges, police officers, border guards, labour inspection units and social workers is also required, so as to strengthen the capacity of states to provide victims with adequate and appropriate protection. Given the number of women and children (including unaccompanied minors) who are smuggled and trafficked from one country to another, such services must evidently be provided in a gender and age-sensitive manner. They must also be fine-tuned to address the different levels of exploitation and abuse that are involved in the discrete, but often interconnected, crimes of migrant smuggling and human trafficking.

Irregular migration and asylum

In their efforts to stem irregular migration, states must respect their existing obligations under international law towards the human rights of migrants, the institution of asylum and the principles of refugee protection.

41. During its consultations, the Commission's decision to discuss the issue of asylum in the context of irregular migration has been queried by stakeholders. They have pointed to the danger of confusing the two issues and jeopardizing the rights of people claiming refugee status. The Commission shares this concern but also considers that important linkages exist between irregular migration and asylum.

42. First, movements from a single country may include some people who qualify for refugee status and others who do not, especially when that country is simultaneously affected by human rights violations, armed conflict, political instability and economic collapse. Second, many asylum seekers move in an irregular manner, often making use of migrant smuggling networks, because they are unable to gain the documents they need to travel in an authorized manner. Indeed, a person who is being persecuted by her/his government may well find it impossible to obtain a passport, let alone a visa to enter another country. Third, some migrants who manifestly have no need of international protection nevertheless submit an asylum application once they have arrived in another country, so as to maximize the time that passes until they become liable to repatriation. Finally, migrants who move for economic reasons may become destitute and vulnerable to human rights abuses while they are in transit, and require protection and assistance, even if they do not have a valid claim to refugee status.

43. The Commission is committed to the principle enunciated in the 'Agenda for Protection' established by the Office of the UN High Commissioner for Refugees (UNHCR), that the institution of asylum should not be undermined by the efforts of states to stem irregular migration. As specified in Article 31 of the 1951 UN Refugee Convention, refugees must not be

penalized on account of their illegal entry or presence in a country, “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” If this principle is to be respected, police officers, border guards, immigration and asylum officials must be well versed in the fundamentals of international refugee law.

44. The Commission urges all states to establish fast, fair and efficient refugee status determination procedures, so that asylum seekers are quickly informed of the outcome of their case. In some countries significant backlogs remain, leaving asylum seekers in limbo for months or years on end. The Commission recommends immediate action to address this problem. In situations of mass influx, states should consider offering the new arrivals *prima facie* refugee status, a practice used to good effect for many years in Africa and developing countries in other regions.

Onward movements

45. The Commission draws special attention to the issue of onward movements, in which asylum seekers and refugees move in an irregular manner from a country where they have already applied (or could have applied) for asylum or where they have already been granted refugee status. The Commission underlines the need to address this issue by ensuring that asylum seekers either have their claim to refugee status fairly and speedily examined in the country where they initially arrive, or that they be granted *prima facie* recognition.

46. Those granted refugee status, either on an individual or a *prima facie* basis, must subsequently be able to enjoy an adequate degree of protection, security, a reasonable standard of living and the prospect of finding a solution to their plight, whether by means of voluntary repatriation, local integration or resettlement. In the absence of such conditions, some refugees will inevitably seek to move further afield, usually in an irregular manner.

47. The Commission endorses the principle of improving refugee protection and assistance standards in regions of origin, but calls on states and other stakeholders to recognize that these efforts are unlikely to prevent all onward movements by refugees and asylum seekers. This is partly because differing standards of living and levels of human security across and between regions will continue to prompt such onward movements, and partly because migrant smugglers and transnational social networks will continue to have an interest in facilitating them.

48. Almost 75 per cent of the world’s 9.2 million refugees are to be found in developing countries, and the Commission is aware that improving protection and assistance in regions of origin may require the world’s poorest states to assume responsibility for an even greater proportion of the world’s refugees than is already the case. It is essential to put the principles of responsibility and burden-sharing into practical and immediate effect, through, for example, the provision of additional development assistance to refugee-populated areas and the expansion of refugee resettlement programmes.