

Differentiation between regular and irregular

Can ‘regular’ and ‘irregular’ migrants be easily distinguished? In reality, distinctions between migrants in regular and irregular situations are rarely clear. The overwhelming majority of the world’s migrants arrive to their host country in a regular manner and only later become ‘irregular’ due to administrative overstay. This may be due to no fault of the migrant herself, but instead to unclear or overly bureaucratic migration procedures, discrimination, or practical barriers such as high visa renewal costs, language barriers and lack of access to legal aid. Such overstay affects migrants from all countries and at all socio-economic and educational levels. Members of the same family may even hold a different status to each other, and such status can regularly change throughout the course of one’s migration and/or stay. For the minority of migrants who do arrive irregularly, it is important to note that such irregular arrival can be justified, for example in the case of irregularly arriving migrants seeking protection from *refoulement*.

Do ‘regular’ and ‘irregular’ migrants enjoy different human rights? Human rights are rights inherent to all human beings, whatever our nationality, migration status, sex, race, religion, language, or any other status. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights (UDHR) in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.

Additionally, the core principles of equality and non-discrimination, which are enshrined in the International Bill of Human Rights, require non-discriminatory access to all civil, political, economic, social and cultural rights with only two limited exceptions as to the right to vote and take part in public affairs, and the right to freedom of movement within a country. All other human rights should be enjoyed equally and without discrimination by all people under the jurisdiction or effective control of the State, including migrants in irregular situations. Any differential treatment between nationals and non-nationals, or between non-nationals with different migration statuses, must be lawful, proportionate and pursue a legitimate aim. An attempt to define different classes of migrants with different classes of rights other than those explicitly allowed within the International Bill of Human Rights would be contrary to these core values of universality, equality and non-discrimination.

In addition, it is important to recall that the human rights framework places a focus on the most excluded, discriminated and marginalized groups in society, and in this way recognizes and seeks to address the particular vulnerability of irregular migrants. While the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that Covenant rights such as the right to health, education, housing or social security can be achieved progressively to the maximum available resources of each State party (art. 2.1), States may not simply postpone action indefinitely or deny access to these fundamental rights indiscriminately or selectively. States have an immediate obligation to take appropriate steps towards the full realization of these rights and, at a minimum, fulfil the “core obligations” of the Covenant. They are obliged to avoid measures that would restrict or deny access to these rights, and to respect the principle of non-discrimination. Civil and political rights such as the right to liberty or the right to equality before the law similarly require the State to take immediate action, including through appropriate investment, to ensure non-discrimination and fulfilment of the right.

What commitments have been made in this regard by Member States? In the New York Declaration, Member States have already reaffirmed that all migrants are rights holders, regardless of status (para. 5), and have committed themselves to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times (para. 41). States have also agreed to uphold equality and non-discrimination in the 2030 Agenda for Sustainable Development, where they committed to “cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants *regardless of migration status*”, and to report on the enjoyment of these human rights for all, including inter alia: Social protection 1.3; Access to basic services 1.4; Health 3.8; Education 4.1-5; Decent work 8.8; and Access to justice 16.3. Finally, there are a number of commitments contained in General Assembly and Human Rights Council resolutions regarding non-discrimination and universal access to consular officials, access to justice, access to health care including access to migrant-sensitive health services, avoiding criminalization, stigmatization, and other impediments or restrictions on migrants’ access to health services, and providing assistance and relief to migrants in transit.