

ARTICLES

GLOBAL MIGRATION GOVERNANCE

AVOIDING COMMITMENTS ON HUMAN RIGHTS, YET TRACING A COURSE FOR COOPERATION

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Abstract

This article maps the global governance processes on migration and assesses whether the human rights of migrants are effectively included and mainstreamed therein. It is argued that the lack of a comprehensive framework for migration governance and the insufficient focus on the human rights dimension in migration management have led to serious human rights violations in the treatment of migrants and asylum seekers, and to a lack of oversight and accountability when these violations occur. The article commences with an examination of the legal and normative framework related to the three areas that have been the main objects of global migration governance: the refugee regime, international labour standards and transnational criminal law regarding human trafficking. It goes on to explore the complex institutional framework of global migration governance and how it has been mostly informal, ad hoc, non-binding and State-led. The article concludes with a discussion on the future perspectives for a human rights-centred approach in global migration governance. It is contended that there is a need to bring the migration dialogue inside the United Nations, as it already plays a key role in international cooperation, with human rights as one of its pillars.

Keywords: governance; human rights; international cooperation; migration; United Nations

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1. INTRODUCTION

Migration is a transnational and global phenomenon which, with an estimate of more than 244 million international migrants in the world, affects most States, as countries of origin, transit and destination, often as all three. This complex and multifaceted issue is closely linked to other global policy areas, such as development, trade, health, environment, security, integration and human rights.¹ The cross-cutting nature of international migration has been acknowledged by the international community, together with the need to address the phenomenon in a coherent, comprehensive and balanced manner.² Migration is one of the main manifestations of globalisation, as it cannot be managed unilaterally by national policies. Over the past two decades, the behaviour of States on migration issues has been constrained and shaped by a range of norms, processes and institutions which have been developed beyond the national State through international cooperation.³

The notion of “migration management” was initiated in the early 1990s with the aim of achieving a new international framework on global mobility and migration. According to the World Bank, ‘management concerns the day-to-day operation of the program within the context of the strategies, policies, processes, and procedures that have been established by the governing body’.⁴ More recent developments have transformed it into “migration governance”. Governance can be defined as the ‘framework of accountability to users, stakeholders and the wider community, within which organisations take decisions, and lead and control their functions, to achieve their objectives’.⁵ Accordingly, rather than focusing on the day-to-day operation of their national migration policies, States have opted for a more structural and strategic approach to migration with a view to addressing economic, social, demographic and other related issues, in coordination with other, and especially neighbouring countries.

¹ United Nations, Department of Economic and Social Affairs, Population Division (2016). *International Migration Report 2015: Highlights* (ST/ESA/SER.A/375), 1; Alexander Betts, ‘Conclusion’ in A Betts (ed), *Global Migration Governance* (OUP 2010) 307, 311.

² UNGA, *Declaration of the High-level Dialogue on International Migration and Development* (adopted in New York, 3–4 October 2013) para 1.

³ Alexander Betts, ‘Introduction: Global Migration Governance’ in A Betts (ed), *Global Migration Governance* (OUP 2010) 1, 5.

⁴ Independent Evaluation Group – World Bank, *Sourcebook for Evaluating Global and Regional Partnership Programs. Indicative Principles and Standards* (Washington, DC 2007) 71 <<http://siteresources.worldbank.org/EXTGLOREGPARPROG/Resources/sourcebook.pdf>> accessed 26 February 2015.

⁵ United Kingdom Audit Commission, *Corporate Governance: Improvement and Trust in Local Public Services* (October 2003) 4, as quoted by the Independent Evaluation Group – World Bank (n 5). See also: Commission on Global Governance, *Our Global Neighbourhood*, 1995 <www.gdrc.org/u-gov/global-neighbourhood/chap1.htm> accessed 1 February 2015, which defines it as “the sum of the many ways individuals, institutions, public and private, manage their common affairs (...) a continuing process through which conflicting or diverse interests may be accommodated and cooperative action taken.”



The aim of migration governance is to regulate the causes and consequences of migration in order to change a traditionally spontaneous and unregulated phenomenon into a more orderly and predictable process. Making migration beneficial for all stakeholders and especially the receiving and sending States, as well as the migrants themselves, implies both a 'regulated openness' towards economically needed and beneficial migration flows, and the continuation of restrictions regarding unwanted migration.⁶ Governance assumes a variety of forms, including the migration policies and programmes of individual countries, inter-State discussions and agreements, multilateral forums and consultative processes, and the activities of international organisations, as well as relevant international standards and norms.⁷ It also strives for providing a number of functions for the benefit of countries of origin, transit and destination, and for migrants themselves, such as normative oversight, service provision and forum for dialogue.⁸

Migration exposes tensions between a number of parameters: State sovereignty, border security, economic logics of globalisation, integration and the values relating to protection of migrants' rights. Moreover, these tensions have been compounded by the development of toxic debates on migration issues on the national political stage in many countries of destination, due to the growth of anti-immigration nationalist populist movements. Consequently, States have been reluctant to engage in a comprehensive global discussion of all aspects of migration policies. In particular, they have been hesitant to discuss the issue of the human rights of migrants: effectively, recognising that migrants have rights has been politically toxic in many national political contexts. States have therefore favoured discussion forums where the issue of the human rights of migrants need not be discussed, or at least would not be central to the discussions.

Today, despite the existence of complex normative and institutional structures, a comprehensive framework for migration governance is still lacking. This void has been particularly highlighted in the European and Asian migration "crises" of 2014 and 2015. More than a million migrants arrived in Europe in 2015.⁹ In September 2015, 168,000 people crossed the Mediterranean, the highest monthly figure ever recorded and almost five times the number in September 2014.¹⁰ The vast majority of these

⁶ New International Regime for Orderly Movement of People (NIROMP) was launched in 1997 with the financial support of the UN Population Fund and several European governments; Bimal Ghosh, 'NIROMP: What Will It Look Like?' in B Ghosh (ed) *Managing Migration: Time for a New International Regime?* (OUP 2000) 235.

⁷ SRHRM Report (n 1) para 10; Betts, 'Introduction: Global Migration Governance' (n 4) 4.

⁸ Kathleen Newland, *The Governance of International Migration: Mechanisms, Processes and Institutions* (paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, 2005) 7.

⁹ 'Migrant Crisis: Migration to Europe Explained in Seven Charts' *BBC News* (4 March 2016) www.bbc.com/news/world-europe-34131911 accessed 19 March 2016.

¹⁰ UNHCR, 'Refugee Sea Arrivals in Greece This Year Approach 400,000' (2 October 2015) News Stories <www.unhcr.org/560e63626.html> accessed 9 February 2016.



migrants were fleeing the war in Syria, but also conflicts, and ethnic and religious tensions, in many other countries such as Afghanistan, Iraq, Somalia and Eritrea. As a response, Germany adopted an “open door” policy, admitting more than one million refugees, whereas other countries such as Hungary, reacted by closing their borders and erecting fences to stem the migration movement. The European “migration crises” clearly illustrates the lack of a common framework of action on helping migrants caught in crises, as well as the weakness of solidarity and responsibility-sharing in Europe and internationally.

This article examines the global governance processes on migration, in particular whether the human rights of migrants are effectively included and mainstreamed therein. It is argued that, especially due to States’ above-mentioned approach to the human rights of migrants, global migration governance is fragmented, with different institutional approaches and normative frameworks relating to specific aspects of migration. This, in turn, has a negative impact on the situation of migrants whose human rights are neglected. It is further held that, in order to make migration beneficial for all stakeholders, international migration governance needs to be strongly focused on human rights.

The first part of the article starts with a brief discussion on how human rights law permeates the legal framework regarding international migration. It then examines the three areas that have been the main objects of global migration governance: the refugee regime, international labour standards and transnational criminal law regarding human trafficking. It critically analyses the nature of the global governance framework, with a special focus on the migrants’ human rights protection regarding these three areas.

The second part explores the complex institutional framework of global migration governance and how it has been mostly informal, ad hoc, non-binding and State-led. After a brief analysis of the United Nations (UN)-led initiatives, it goes on to examine global migration governance, first at multilateral level outside the UN framework, and then at the regional level, including within the European Union (EU) and regional consultative processes. The article will conclude with a discussion on the future perspectives for a human rights-centred approach in global migration governance.

2. A COMPLEX NORMATIVE FRAMEWORK

The legal and normative framework regarding international migrants is derived, apart from customary law, from a variety of binding and non-binding global and regional legal instruments concluded by States.¹¹ Many elements of this framework are not migration specific, but address broader questions of individual rights, State

¹¹ Betts, ‘Introduction: Global Migration Governance’ (n 4) 15.



responsibility, and interstate relations.¹² The international human rights law offers a comprehensive legal framework for migrants' human rights protection.

2.1. INTERNATIONAL HUMAN RIGHTS LAW APPLIES TO ALL MIGRANTS, EVERYWHERE

All migrants, without discrimination, are protected by international human rights law. There are very few and narrowly defined exceptions to this, namely the right to vote and be elected and the right to enter and stay in a country, which are reserved for citizens. Even for those exceptions, procedural safeguards must be respected, as well as obligations related to the principles of *non-refoulement*, best interests of the child, and family unity.¹³ All other human rights extend to all migrants, whatever their administrative status. States may legitimately permit differences of treatment between citizens and non-citizens or between different groups of non-citizens such as legally residing and irregular migrants.¹⁴ However, according to the right to equality and prohibition of discrimination, any distinction between individuals must be proportionate, reasonable, and serve a legitimate objective. The International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights¹⁵ explicitly refer to 'national origin' as a prohibited ground of discrimination in the enjoyment of rights.¹⁶ All States have ratified at least one of these core international human rights treaties and, owing to the non-discrimination principle, are thus obliged to respect the human rights of all migrants, including migrants in an irregular situation.¹⁷ Quite a number of international bodies have developed case law on the protection of the human rights of migrants: the UN Human Rights Committee, the Committee against Torture, the European Court on Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), the Inter-American Court of Human Rights, to name only a few. For

¹² Khalid Koser, 'Introduction: International Migration and Global Governance' (2010) 16 *Global Governance* 301, 302.

¹³ Susan F Martin and Rola Abimourched, 'Migrant Rights: International Law and National Action' (2009) 47 *International Migration* 115, 118.

¹⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No 20* (2009) para 13; Ryszard Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Strasbourg: Council of Europe, 2005); Office of the United Nations High Commissioner on Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (New York and Geneva, 2014) 26.

¹⁵ *International Covenant on Civil and Political Rights*, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, art 2.1; *International Covenant on Economic, Social and Cultural Rights*, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976, art 2.2.

¹⁶ The Committee on Economic, Social and Cultural Rights has affirmed that Covenant rights apply to everyone, including non-nationals such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation. *General Comment No 20* (2009), paras 27, 30.

¹⁷ SRHRM Report (n 1) para 28.



instance, over the past few years, the ECtHR adopted several important judgments regarding the concept of jurisdiction regarding interception operations, the prohibition of collective expulsion, the principle of *non-refoulement*, the right to an effective remedy, the right to appeal with suspensive effect, and the prohibition of arbitrary detention of migrants.¹⁸

Nevertheless, the decisions regarding migrants and refugees remain a marginal part of the case load of the ECtHR and the other international human rights adjudication bodies, and, however important the judicial pronouncements may be in principle, their number remains very low as compared to the potential number of cases that they could have to deal with if all exploited migrants were to complain. The access of migrants to these international bodies is impeded by various obstacles, such as the absence or weakness of procedural guarantees, which are aggravated by migrants' economic and social marginalisation. Moreover, this case law has not sufficiently influenced domestic policy making, an area still most often dominated by short-term local politics and electoral considerations. The management of migration is still considered as a matter of State sovereignty, as stated in the ECtHR's settled case-law: 'as a matter of well-established international law, States have the right to control the entry, residence and removal of aliens'.¹⁹

Susan Martin *et al.* note that

there is ample international law setting out the basic rights of migrants even though the principal migrant-centric instruments are not widely ratified. Failures in protecting migrant rights arise from the lack of implementation of these standards at the national level. What happens at the ground level to migrants is determined by State policies and programs, which may or may not be in accord with international norms'.²⁰

As will be discussed below, State and other organisations' human rights policies have little consistency, and lack a comprehensive approach. Another major impediment to the establishment of rights for international migrants has been the lack of advocates with powerful tools to hold governments accountable.²¹ Against this background, this article argues that it is time to rethink the international migration governance, including the establishment of a global lead organisation with a clear mandate focusing on the protection of the human rights of migrants.

¹⁸ *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012); *IM v France* App no 9152/09 (ECtHR, 2 February 2012); *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); *Horshill v Greece* App no 70427/11 (ECtHR, 1 August 2013); *Efremidze v Greece* App no 33225/08 (ECtHR, 21 June 2011); *Abdolkhani and Karimnia v Turkey* (No 2) App no 50213/08 (ECtHR, 27 July 2010).

¹⁹ *Abdulaziz, Cabales and Balkandali v UK* (ECtHR 1985) Series A no 94, para 67.

²⁰ Martin and Abimourched (n 13) 117, 125.

²¹ Peter Sutherland, 'The International Migrants Bill of Rights: Why It Matters?' (2013) 28 *Georgetown Immigration Law Journal* 269, 270.



The international human rights regime interacts with the refugee regime, with international labour standards, and with transnational criminal law; three areas where States have developed a more sophisticated normative framework. It thus helps protecting the rights of refugees, migrant workers, and trafficked persons. However, as outlined below, the normative structures pertaining to these categories of migrants have been developed on a piecemeal basis and therefore lack coherence. They also suffer from weak monitoring and oversight mechanisms to hold States accountable of migrants' rights violations. In addition, since 1980s, these structures have come under strain due to various geopolitical and economic developments.²²

2.2. THE GLOBAL GOVERNANCE OF THE REFUGEE REGIME IS INCREASINGLY DIFFICULT

The global refugee regime is based on the 1951 Convention relating to the Status of Refugees²³ and the 1967 Protocol thereto. It provides a status to persons who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The regime protects them *inter alia* from *refoulement*. The United Nations High Commissioner for Refugees (UNHCR) is the UN Agency tasked with leading and coordinating international action to protect refugees and find them 'durable solutions' worldwide. In order to achieve its mandate, the UNHCR must work closely with States and other organisations.

The current debate over the governance of the international refugee regime has emerged during the 1990s, with challenges such as the end of the Cold War, the growth in numbers of asylum seekers, internally displaced persons and irregular migrants, the growing reticence of States and declining asylum opportunities, the growth of humanitarian emergencies in conflicts, and the rise of nationalist populist discourses linking migrants and refugees to security threats.²⁴

As noted by Martin Jones, the debate over the governance of the international refugee regime

occurred during a time when the UNHCR's own operations shifted to the direct provision of services and away from its supervisory functions. Progressive proposals for a fundamental renegotiation of the Refugee Convention including for regional refugee solutions, were decisively rejected while at the same time the regime was facing increasingly vociferous criticism by States.²⁵

²² Newland (n 9), 3; Stephen Castles, 'Why Migration Policies Fail' (2004) 27(2) *Ethnic and Racial Studies* 205.

²³ *Convention relating to the Status of Refugees*, 189 UNTS 150, entered into force 22 April 1954.

²⁴ Martin Jones, 'The Governance Question. The UNHCR, the Refugee Convention and the International Refugee Regime' in JC Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013) 78.

²⁵ *Ibid.*



In response to this situation, since 2001, the UNHCR has undertaken a series of global consultations and initiatives to address issues of international protection. These initiatives aimed at addressing policy objectives as diverse as strengthening implementation of the 1951 Convention and 1967 Protocol, protecting refugees within broader migration movements, sharing responsibilities more equitably, building capacities to receive and protect refugees, addressing security-related concerns more effectively, and redoubling the search for durable solutions.²⁶

These efforts have partially borne fruit since UNHCR has extended its protection role by following the wider UN commitment to human rights law. The principle of *non-refoulement* together with the other human rights and freedoms, such as the prohibition of inhuman and degrading treatment and arbitrary detention, as well as the right to an effective remedy, are now being reinforced in the case-law of international and regional human rights bodies.²⁷ The expansion of the *non-refoulement* principle has led to the concept of ‘subsidiary protection’ reaching beyond the scope of the 1951 Convention. Recent changes have clarified what States’ responsibilities are when it comes to rescue at sea and interception.²⁸

However, over the past 20 years, while the number of refugees and asylum seekers soared, the international refugee regime has been unable to respond to the new range of circumstances under which people are forced to leave their country of origin. Forced migration related to crises such as armed conflicts and political unrest continues to grow, increasingly exacerbated by climate change, natural disasters and struggles for scarce resources. Against this background, including the lack of authoritative international interpretation of the Refugee Convention itself, the global refugee regime has quickly reached its limits. Today this regime is facing difficulties in adequately addressing the protection needs of forced migrants. This situation is exacerbated by the security logic that has dominated States’ responses to mixed migration movements and irregular migration.²⁹ Many States have deployed a range of preventive and deterrent measures, such as: visa regimes, carrier sanctions, the criminalisation of irregular entry, and enhanced surveillance. The immediate objectives of these measures are to disrupt terrorist financing networks, to control the movement of “high risk” populations, and to protect the integrity of

²⁶ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* (Geneva, January 2007) <www.refworld.org/docid/45b0c09b2.html> accessed 29 November 2014; Tom Clark and James C Simeon, ‘UNHCR International Protection Policies 2000–2013: From Cross-Road to Gaps and Responses’ (2014) 33(3) *Refugee Survey Quarterly* 1, 12–15.

²⁷ *John Doe et al v Canada*, Case no 12.586, OAS Doc OEA/Ser.L/V/I.141, Doc 29 (IACHR, 23 March 2011); *Hirsi Jamaa and Others v Italy* (Judgment) App no 27765/09 (ECtHR, 23 February 2012).

²⁸ Clark and Simeon (n 26) 10; *Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (EUROSUR)* [2013] JO L 295/11, art 1.

²⁹ Georges Karyotis, ‘The Fallacy of Securitizing Migration: Elite Rationality and Unintended Consequences’ in Gabriella Lazaridis (ed), *Security, Insecurity and Migration in Europe* (Ashgate 2011) 13.



immigration and refugee systems. States are entitled to take such measures. They also have, however, a duty to protect the human rights of everyone within their jurisdiction.

The reinforcement of security-related migration policies and ongoing international cooperation implementing systematic interception and interdiction mechanisms have resulted in the deterioration of asylum seekers' rights. Although, over time, they often have adopted an extensive interpretation of the definition of the refugee, States have tightened the criteria for granting refugee status, with a view to limiting the number of persons granted asylum, deterring "abuse" and reducing the "burden" of "manifestly unfounded" asylum claims. The "safe country" notion, accelerated time-lines and reduced procedural guarantees have become part of the refugee status determination system in many countries.³⁰ States now constantly balance their asylum system with concerns about national security, in ways that impel the UNHCR to be politically responsive to their concerns.³¹ The lack of solidarity and responsibility-sharing between States has exacerbated the problems of protection. In fact, the number of resettled international protection beneficiaries remains alarmingly low, especially in view of the unprecedented number of forced migrants.³² The days of the Comprehensive Plan of Action, which allowed for the resettlement of 2.5 million Indochinese refugees, are definitely past.³³ Instead, Global North States prefer "regional" solutions, far from their shores, such as enhancing the protection capacity and asylum systems in partner countries and regions. Recent examples include the EU's Regional Development and Protection Programme for the Middle East and the Refugee Settlement Plan concluded between Australia and Cambodia in September 2014.³⁴ Therefore, in terms of the refugee regime governance, States' interests and security concerns prevail over the search for human rights-centered durable solutions to the refugee problem.

³⁰ Idil Atak and François Crépeau, 'The Securitization of Asylum and Human Rights in Canada and the European Union' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary issues in Refugee Law*, (Edward Elgar Publishing 2013) 227, 242–46.

³¹ Betts, 'Conclusion' (n 2) 320.

³² According to the UNHCR, the number of people forcibly displaced at the end of 2014 had risen to 59.5 million compared to 51.2 million a year earlier and 37.5 million a decade ago. UNHCR, 'Worldwide Displacement Hits All-Time High As War and Displacement Increase', Press Release, 18 June 2015 <www.unhcr.org/558193896.html> accessed 6 September 2015. During 2013, only 98,400 refugees were admitted for resettlement in 21 countries. UNHCR, *Global Trends 2013 Report* (Geneva, 2014) 2–3.

³³ European Asylum Support Office, *Annual report on the situation of asylum in the European Union*, July 2014, 73–74. <<http://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>> accessed 6 September 2015.

³⁴ European Commission, *Report on the Implementation of the Global Approach to Migration and Mobility 2012–2013*, COM (2014) 96 final, Brussels, 21 February 2014, 17; Rob Taylor, 'Australia, Cambodia agree on Refugee Settlement Plan' *Wall Street Journal* (24 September 2014) <<http://online.wsj.com/articles/australia-cambodia-asylum-seeker-agreement-allows-refugees-to-settle-in-southeast-asia-nation-1411630788>> accessed 30 November 2014.



2.3. THE PROTECTION OF RIGHTS IN LABOUR MIGRATION IS STILL NASCENT

Labour migration is the area with the least formalised structures of global governance. The primary locus of labour migration governance remains at the level of individual sovereign States, which control entry into their national labour markets, with the exception of the European Union and some of the other regional free movement processes mentioned below.³⁵ Today, all international labour standards of the International Labour Organization (ILO) apply to migrant workers, unless otherwise stated. They include the eight ILO fundamental rights conventions and the specific instruments concerned with the protection of migrant workers and the governance of labour migration, namely the Convention concerning Migration for Employment of 1949 (no 97) and the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Migrant Workers (Supplementary Provisions) Convention) of 1975 (no 143), as well as other instruments that contain specific provisions on migrant workers, such as the Convention concerning Private Employment Agencies of 1997 (no 181) and the Decent work for Domestic Workers Convention of 2011 (no 189).³⁶ These instruments have been ratified by a limited number of States. For instance, only 49 States ratified Convention 97, and 23 States Convention 143 as of September 2015.

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Convention on Migrant Workers)³⁷ is the most recent comprehensive effort at a human rights response to migration in international law, which addresses the situation of working migrants, entitling them to the same pay, hours, safety considerations and other workplace conditions that nationals enjoy, with the goal of acknowledging migrant workers as more than simply economic factors of production. The Convention also protects irregular migrants who are ensured some legal rights identical to those afforded to regular migrant workers and their families. It came into force 13 years after it was opened for ratification and, as of September 2015, is still only ratified by 48

³⁵ Alexander Betts, *Migration Governance: Alternative Futures* (IOM, Background Paper WMR 2010) 10.

³⁶ *Convention concerning Migration for Employment* (Revised, ILO No 97) entered into force 22 January 1952; *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (ILO No 97) entered into force 9 December 1978; *Convention concerning Private Employment Agencies* (ILO No 181) entered into force 10 May 2000; *Convention concerning Decent Work for Domestic Workers* (ILO no 189) entered into force 5 September 2013; In addition to legally-binding treaties, there are also non-binding instruments which provide guidance on the human rights of migrant workers, regardless of their status, and on the regulation of recruitment agencies. See ILO, *Multilateral Framework on Labour Migration; Non-binding Principles and Guidelines for a Rights-based Approach* (Geneva 2006).

³⁷ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA res 45/158, annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990), entered into force 1 July 2003.



States, excluding most migration-receiving States and all Global North States. The unwillingness of States to ratify this Convention as well as the above-mentioned ILO Conventions stems from their reluctance to accomplish the political speech-act of legally endorsing the rights of irregular migrant worker, for fear of electoral consequences on their domestic political stage: this proves how low the human rights of migrants remain in the international migration governance and domestic electoral agendas.

While refugees benefit from a clear normative and institutional framework governing their access to rights, there is no such mechanism for economic migrants who are not covered by any organisation with a mandate to protect them. Nevertheless, as mentioned above, a body of case law protecting the rights of migrants is being progressively developed especially by regional human rights courts. For instance, in 2003, the Inter-American Court on Human Rights stated that:

[T]he migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his [or her] human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his [or her] regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship.³⁸

Similarly, the Court of Justice of the EU and the European Court of Human Rights have also defined the scope of their rights and freedoms, such as the principle of non-discrimination, the right to an effective remedy, and the right to family and private life.³⁹

Despite these positive normative developments, migrants' rights are still not adequately protected under national law and there are lacunae in the effective supervision of relevant provisions. Migrant workers are concentrated in sectors and activities where labour standards are weak and/or where enforcement of existing standards is lax or non-existent. There are clear coincidences between the expansion of precarious work, the declining job stability, the increase of informal work, the deterioration of working conditions, and the difficulties in accessing justice and redress mechanisms, alongside conditions facing migrant workers that oblige them to accept sub-standard work.⁴⁰ Similarly, States increasingly implement temporary forms of migration regimes, such as circular migration and temporary foreign workers

³⁸ Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion), 2003, OC-18/03, serie A, No 18 <www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf> accessed 30 November 2014.

³⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to Asylum, Borders and Immigration* (Luxemburg 2014) 179–210.

⁴⁰ Global Migration Policy Associates, *A Contribution to Evaluating the Stockholm Programme regarding Migration*, 21 January 2014 <http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/gmpa-global-migration-policy-associates_en.pdf> accessed 30 November 2014.



programs that explicitly apply reduced rights.⁴¹ These regimes pose fundamental ethical and legal questions about how the programmed temporary nature of mobility and the economic rationale can be reconciled with the human rights of migrants.⁴² The lack of a human rights-centred global governance framework exacerbates the social, economic and legal marginalisation of migrant workers.

The situation is even worse for irregular migrants.⁴³ Presently, in many Global North countries, legal migration opportunities remain quite limited, especially in low-wage sectors. The fact that migrants are increasingly unable to regularly enter the destination countries to look for work in person, while there are huge underground labour markets for an exploitable labour force in almost all countries, is actually creating more irregular migration and constitutes a major incentive for criminal organisations to offer their services to circumvent border controls. The ILO estimates that, globally, some 15 per cent of international migrant workers are in irregular situations, namely without legal authorization for residence and/or employment, or undocumented.⁴⁴ One can easily analyse the increasing repression of irregular migration as a mechanism that ensures a pliable workforce for sectors of the economy (such as agriculture, construction, hospitality, care giving, fisheries or extraction) which would not be profitable in an open labour market and which are thus subsidised through the reduction in labour costs that labour exploitation provides.

As previously mentioned, the international community is devoting increasing energy to stemming irregular migratory flows.⁴⁵ States have given top priority to policing and border security, as well as to strengthening international cooperation. Regional consultative processes on migration (RCPs) have also been increasingly involved in the governance of irregular migration. Following the example of the EU, other regional economic communities, such as the Economic

⁴¹ HRC, *Report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau – Addendum – Mission to Qatar (3–10 November 2013)*, A/HRC/26/35/Add.1, 23/04/2014; HRC, *Report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau – Labour Exploitation of Migrants*, A/HRC/26/35, 03/04/2014; Jesse Beatson and Jill Hanley, *The Exploitation of Foreign Workers in our Own Backyards. An Examination of Labour Exploitation and Labour Trafficking in Canada* (Committee of Action Against Human Trafficking National and International (CATHII) August 2015).

⁴² Betts (n 35) 13–14.

⁴³ Lilian Magalhaes, Christine Carrasco and Denise Gastaldo, 'Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions' (2010) 12 *Journal of Immigrant and Minority Health* 132, 132; Alice Bloch and Milenia Chimienti, 'Irregular Migration in a Globalizing World' (2011) 34(8) *Ethnic and Racial Studies* 1271, 1282.

⁴⁴ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (Geneva, 2005) 32; Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization' (2010) 28(4) *Refugee Survey Quarterly* 1, 9.

⁴⁵ Ben Hayes and Mathias Vermeulen, *Borderline: EU Border Surveillance Initiatives: An Assessment of the Costs and its Impact on Fundamental Rights* (Heinrich Böll Stiftung 2012); Efrat Arbel, 'Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States' (2013) 25(1) *International Journal of Refugee Law* 65.



Community of West African States (ECOWAS) and the North American Free Trade Agreement (NAFTA), have strengthened cooperation on the control of their common external borders. Stricter measures which focus on the security aspects of irregular migration, improving border controls through logistical and technological means, capacity-building in other countries towards stopping irregular migration, and the criminalisation of migration through both legislative acts and technical programmes, including extensive detention of irregular migrants, are on the rise. In sum, the governance of labour migration is characterised by limited channels for legal migration, proliferation of temporary forms of migration regimes, and increasing international cooperation to stem unwanted migration.

2.4. THE CRIMINAL LAW FRAMEWORK FOR TRAFFICKING IN PERSONS IS AN OBSTACLE

The fight against human trafficking is another area which has been a main object of global migration governance. The 2001 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)⁴⁶ requires States to establish criminal liability for human trafficking and to adopt cooperative measures to deter the phenomenon. It contains rules concerning the prevention of trafficking, as well as assistance to and protection of victims of trafficking. It also provides that States should consider permitting victims of trafficking to remain in their territory, temporarily or permanently, in appropriate cases. The Protocol has received wide acceptance by the international community.⁴⁷

However, the provisions dealing with the rights of trafficked persons and their legal status in the destination country set forth minimal obligations for States in terms of substantive and procedural rights. They are also formulated in a way that leaves a wide margin of discretion to authorities. For instance, Article 6(1) requires States to protect the privacy and identity of victims ‘in appropriate cases and to the extent possible under their domestic law’. Such provisions are largely aspirational and underscore the limitations of the Trafficking Protocol. They do not create a strong incentive for States to implement the protection measures. Other instruments, such as the Council of Europe’s Convention on Action against Trafficking in Human Beings (Council of Europe Trafficking Convention),⁴⁸ impose higher standards of protection upon States

⁴⁶ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, GA Res 25, annex II, UN GAOR, 55th Sess, Supp No 49, 60, UN Doc A/45/49 (Vol I) (2001), entered into force 25 December 2003.

⁴⁷ Article 5; The Trafficking Protocol has 159 States Parties.

⁴⁸ *Convention on Action against Trafficking in Human Beings*, CETS 197, entered into force 1 February 2008.



Parties. Such instruments were adopted with the aim of promoting a more human rights-centered approach to human trafficking than the Trafficking Protocol, which is criticised for its exclusive criminal justice approach. Yet, these standards have yet to be implemented by the European States and an effective monitoring mechanism established.

In addition, States have had difficulties in detecting, apprehending, prosecuting and convicting human traffickers.⁴⁹ The gap between the increasing number of trafficked persons, with an estimate of 20.9 million trafficked persons globally, and the much lower number of criminal convictions is due to a variety of factors, including an overemphasis on law enforcement and criminal justice responses that have limited the identification of internationally trafficked persons in several countries.⁵⁰ Human trafficking often overlaps with offences such as illegal entry or migrant smuggling that are more familiar to police and prosecutors, easier to investigate and prosecute and more strongly established in case law.⁵¹ This results in the treatment of such persons as irregular migrants or criminals rather than potential victims of trafficking and/or asylum seekers.⁵² Asylum authorities are not always able to detect indications of trafficking in applicants for international protection.⁵³ Trafficked persons are routinely detained and deported.⁵⁴ Their lack of information on their rights and their reluctance to testify against the traffickers are other factors limiting successful prosecution. Many States still make access to assistance, including access to health care and trauma counselling, conditional upon the capacity or willingness of the trafficking victims to cooperate in the criminal investigation and prosecution.⁵⁵

⁴⁹ The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA), *Report concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, First Evaluation Round, 12 September 2012, para 342; According to the US State Department estimates, in 2013, 44,758 victims were identified globally. There were 9,460 prosecutions, including 1,199 on labour trafficking, globally. The estimated number of convictions was 5,776. US Department of State, *2014 Trafficking in Persons Report – Introductory Material* (2014) 45.

⁵⁰ Julie Kaye, John Winterdyk, and Lara Quarterman, 'Beyond Criminal Justice: A Case Study of Responding to Human Trafficking in Canada' (2014) 56 *Canadian Journal of Criminology and Criminal Justice* 23, 38.

⁵¹ GRETA, *Report concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France*, First Evaluation Round, 28 January 2013, paras 202–04.

⁵² *R v Ng*, 2007 BCPC 204; Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line' (2008) 18 *International Criminal Justice Review* 318, 331.

⁵³ European Migration Network, *Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures*, 2014, 15.

⁵⁴ HRC, *Report by the Special Rapporteur on the Human Rights of Migrants*, François Crépeau – A/HRC/20/24, 12/04/2012, paras 43–46.

⁵⁵ Canadian Council for Refugees, *Temporary Resident Permits: Limits to Protection for Trafficked Persons* <<http://ccrweb.ca/en/temporary-resident-permit-report>> accessed 6 September 2015.



National tribunals have progressively extended the scope of refugee protection to trafficked persons. However, the case law lacks consistency and relies on a stereotyped understanding of trafficking.⁵⁶ Also, those who are compelled to engage in criminal acts such as prostitution or illegal entry, in the course of their victimisation, still face considerable difficulties in meeting the 1951 Refugee Convention criteria. In addition, the case law on human trafficking is scant.⁵⁷

The problems discussed above highlight the shortcomings of the criminal justice system and the refugee regime in addressing the precarious situation of trafficked persons.⁵⁸ They also point to the need of implementing a human rights framework based, notably, on a secure residence status without fear of deportation and on access to social services, in order to *ensure* the protection of trafficking victims. The Trafficking Protocol fails to promote such an approach as it predominantly focuses on the prosecution of traffickers. A human rights-centered global governance framework would also serve as a strategy for combating effectively human trafficking since it would encourage trafficked persons to come forward, testify against traffickers, enhance victims' identification and increase prosecution and conviction rates.

To conclude, the normative and legal framework related to the refugee regime, international labour standards and transnational criminal law is becoming increasingly sophisticated. However, the global governance in these areas fails to provide an effective protection to migrants' human rights. This is due not only to States' unwillingness to be constrained by their international obligations when implementing migration policies, but also to the absence or weakness of independent oversight and enforcement mechanisms. Such mechanisms would enable an evaluation of States' norms and practices that might infringe upon human rights of migrants and ensure compliance with human rights. The global governance rather focuses on States' concerns over the security of their borders, domestic political sensitivities and their economic interests. The lack of constructive and lasting solutions to challenges, such as the increasing number of irregular migrants and the marginalisation of migrant workers and trafficked persons, shows the need for a cohesive global institutional structure endowed with strong accountability and supervision mechanisms in migration governance.

⁵⁶ Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking Within a 'Non-Refoulement' Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23 *International Journal of Refugee Law* 489, 497; Idil Atak and James C Simeon, 'Human Trafficking: Mapping the Scope and Legal Boundaries of International Refugee and Criminal Justice' (2014) 12(5) *Journal of International Criminal Justice*, Special Issue on "Refugee Law and International Criminal Justice" 1019, 1029.

⁵⁷ Susan Kneebone, 'Protecting Trafficked Persons from *Refoulement*: Re-examining the Nexus' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in International Refugee Law*, (Edward Elgar Publishing 2013) 138, 146.

⁵⁸ Tom Obokata, 'Global Governance and International Migration: A Case Study of Trafficking of Human Beings' (2010) 29(1) *Refugee Survey Quarterly* 120, 135.



3. A FRAGMENTED INSTITUTIONAL FRAMEWORK FOR GLOBAL MIGRATION GOVERNANCE

While migration still remains part of the States' sovereign jurisdiction, and despite the reluctance of States to openly discuss the issue of the human rights of migrants, some aspects of migration policies are increasingly debated at the bilateral and multilateral levels: the connections between migration and development have recently been emphasised.⁵⁹ In addition to States, migration governance involves global and transnational bodies and institutions, as well as non-State actors, such as NGOs and private companies which have become increasingly influential in policy making, implementation, monitoring and enforcement of regulations.⁶⁰ The UN has taken a number of important initiatives in terms of global migration governance. The next section offers an overview of some of its major achievements.

3.1. THE GROWING THOUGH LIMITED ROLE OF THE UN

There is no organisation dedicated to migration within the UN family. In effect, until recently, migration was not really an issue that was discussed in multilateral forums such as the UN.⁶¹ Multilateral cooperation has had little role to play in that field and, with the exception of the role of UNHCR in favour of refugees, it remained essentially within the sovereign powers of States to decide on migration policies. However, as will be demonstrated below, the UN could play and has in recent years begun to play a much bigger role.

To start with, several UN agencies and entities have mandates and expertise on a wide range of migration-related issues, even if, for most, it remains a marginal part of their agenda. Examples include the ILO, the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Conference on Trade and Development, the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Population Fund, the United Nations Department of Economic and Social Affairs (UNDESA), and the UNHCR. As an 'independent specialized agency of the

⁵⁹ Peter Sutherland, 'Migration's Hall of Mirrors' *Project Syndicate* (10 September 2014).

⁶⁰ Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' in M Geiger and A Pécoud (eds), *The Politics of International Migration Management*, (Palgrave Macmillan 2010) 1, 3; Betts, *Migration Governance: Alternative Futures* (n 36) 13.

⁶¹ Writing about the Global Commission on International Migration, Catherine Dauvergne says: "Launched in 2003 by then Secretary-General of the United Nations Kofi Annan, it was the largest ever effort to confront migration as a truly international issue. Not since the early twentieth century had there been such an extensive effort to tackle migration as an international issue", in Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies*, (Cambridge University Press 2016), 194.



UN', the World Bank has also taken a keen interest in migration issues, in particular with regard to remittances.⁶²

In 1990, the adoption by the UN General Assembly, of the UN Convention on Migrant Workers⁶³ has been a major milestone in global migration governance. As previously discussed, despite its shortcomings and the small number of ratifications, the Convention recognises the importance of the work done on migration issues in various UN organisations and underlines the need to bring about a significant international protection of human rights in favour of migrants.⁶⁴ Moreover, the International Conference on Population and Development, held in Cairo in 1994, included a chapter on international migration in its Programme of Action,⁶⁵ and it remains a key UN policy statement even today. Another major UN achievement is the creation in 1999 by the then UN Commission on Human Rights of the mandate of the UN Special Rapporteur on the human rights of migrants: three mandate-holders have already contributed to the discussions. And it should be noted that the OHCHR has recently taken a keen interest in migration issues. In his inaugural speech to the Human Rights Council on 8 September 2014, the new High Commissioner, Zeid Ra'ad Al Hussein, dedicated the last seven substantive paragraphs to issues related to migration.

In 2002, UN Secretary-General Kofi Annan noted the need to take a more comprehensive look at the various dimensions of the migration issue.⁶⁶ Subsequently, he set up a working group on migration as part of his proposals for strengthening the UN. The working group's report recommended creating a commission on migration and closing the normative gaps in the legal regimes applicable to migrants and the institutional gaps through enhanced coordination. As a response, the Global Commission on International Migration was created in 2003 by a group of States as an independent body tasked with making recommendations on how to strengthen the national, regional and global governance of migration.⁶⁷ The 2005 report of the Global Commission was a disappointment for all observers, as it barely went beyond reaffirming the capacity of States to exercise territorial sovereignty and cooperate to regulate migration: innovative proposals would have to wait.⁶⁸

⁶² The World Bank, 'Remittances Growth to Slow Sharply in 2015, as Europe and Russia Stay Weak; Pick up Expected Next Year', Press Release, 13 April 2015 <www.worldbank.org/en/news/press-release/2015/04/13/remittances-growth-to-slow-sharply-in-2015-as-europe-and-russia-stay-weak-pick-up-expected-next-year> accessed 6 September 2015.

⁶³ See n 38.

⁶⁴ Ibid, preamble.

⁶⁵ International Conference on Population and Development, *Report*, A/CONF.171/13, 18 October 1994, 135–51.

⁶⁶ UNGA, *Report of the Secretary-General, Strengthening of the United Nations: An Agenda for Further Change*, A/57/387, 09/09/2002.

⁶⁷ SRHRM Report (n 1) paras 16–17.

⁶⁸ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (Geneva, 2005); Antoine Pécoud, *Depoliticising Migration. Global Governance and International Migration Narratives* (Palgrave 2015) 36–37; see also Dauvergne (n 62).



Sensing the lack of appetite for engagement of States on the issue, the UN Secretary-General then decided to provide them with a character which would attract their confidence. He appointed a UN Special Representative of the Secretary-General on migration and development.⁶⁹ By doing this, the UN Secretary-General achieved two objectives. First, through linking migration and development, he affirmed that migration was an issue that also belonged in the UN. Second, by appointing and supporting someone they could trust as Special Representative, he managed to get States engaged in a meaningful discussion on migration issues. Indeed, Sir Peter Sutherland has significant credentials: former Attorney General of Ireland (an elected office), former European Commissioner, former director general of the GATT, former founding director of the World Trade Organization, Chair of the Board of Goldman Sachs, Chair of the Board of the London School of Economics. Indeed, he is a man who is used to the corridors of power and who has had the trust of States for a long time. He has been heavily criticised by a large part of the civil society migration community for his approach to migration policies, which was seen as focused too closely on States' interests, with little consideration for the migrants themselves. However, under his mentorship, States came together in different ways to cooperate on migration policy issues and develop a series of initiatives for sustaining an ongoing discussion at global level, and, almost unavoidably, the issue of the human rights of migrants has crept into such debates.⁷⁰

In addition, the UN Secretary-General created the Global Migration Group (GMG) in 2006, as a way to provide a space for inter-agency dialogue and improve the coordination of migration-related work within the UN family. Membership of the Group currently comprises 17 UN entities and agencies, as well as the IOM. As a meeting of the heads of member agencies, the GMG plays an important role in overcoming their reluctance to debate issues that are complex, often contentious, and generally somewhat marginal to their mission. Through biannual meetings on thematic issues and continuous dialogue under the annual chairpersonship of one member organisation (in 2014, the ILO), the GMG disseminates information on policies and practices and publishes reports on important topics, such as irregular migration,⁷¹ or migration and youth.⁷² It has created a series of working groups and taskforces on specific themes, such as Mainstreaming Migration into National

⁶⁹ United Nations, 'Secretary-General Appoints Peter Sutherland as Special Representative For Migration', Press Release, SG/A/976-BIO/3735, 23 January 2006.

⁷⁰ Cahal Milmo, 'Calais Crisis: UN Official Slams the UK Government for Accepting Fewer Refugees Than Neighbours' *The Independent* (30 July 2015); Clar Ni Chonghaile, 'UN Official Decries Toxic Backdrop As EU Debates New Migration Policies' *The Guardian* (31 March 2015).

⁷¹ OHCHR, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation* (Geneva, 30 September 2010) <www.globalmigrationgroup.org/sites/default/files/uploads/news/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf> accessed 29 November 2014.

⁷² GMG, *Migration and Youth: Challenges and Opportunities*, 2014 <www.globalmigrationgroup.org/gmg-documents> accessed 29 November 2014.



Development Strategies; Data and Research; Migration, Human Rights and Gender; Capacity Development; Migration and Decent Work. Overcoming growth pains due to the fragmented institutional picture, the GMG has undertaken a consolidation effort in 2013, establishing a yearly chair and a permanent secretariat, and it seems capable of becoming a major participant in the international migration discussions for the years to come.⁷³

Another major UN development in the field of global migration governance was the General Assembly's organisation of the first High-level Dialogue (HLD) on International Migration and Development in 2006.⁷⁴ The Special Representative of the Secretary-General prepared the speech of the UN Secretary-General to the HLD, which provided an ambitious intellectual agenda for the States to reflect upon. This first HLD adopted neither a declaration nor a plan of action, but it was considered a success for the simple fact that it happened, that States were actually interested in coming together and discussing the issue within a UN context. It then took several years before States decided to hold a second HLD, which was organised in New York in October 2013. This time, under the leadership of Mexico and several other countries, and to the surprise of many, the HLD adopted a comprehensive Declaration, which highlighted a number of issues which needed the urgent involvement of States. In particular, it focused on issues about migrants' human rights, such as labour standards; xenophobia, racism, and discrimination; migrant smuggling; the protection of victims of trafficking; and stranded migrants.⁷⁵ Although the HLD adopted no plan of action, which means the absence of an evaluation process and accountability mechanism, and although States have still refused to adopt the principle of regular HLDs and did not decide if and when the next one will happen, there is a common appreciation for the change of attitude on the part of States. It is not taboo anymore to talk about complex and divisive migration policy issues at the UN.

All in all, the issue of migration policy debates at the UN seems to have come of age within the last decade. One example of this is the report of the Director General of the ILO to the International Labour Conference in 2014, which was entitled 'Fair Migration'. This step seems to indicate that the ILO is now willing to take a leadership role on the rights of migrant workers. The UN family is poised to be a major contributor to the transformation of the normative and institutional landscape regarding global migration governance. The wealth of experience and expertise within the UN should infuse such discussions with a healthy dose of both vision and pragmatism.

⁷³ SRHRM Report (n 1) para 47.

⁷⁴ UNGA, *Summary of the High-Level Dialogue on International Migration and Development*, A/61/515, 13 October 2006.

⁷⁵ UNGA, *Declaration of the High-level Dialogue on International Migration and Development*, Resolution adopted on 3 October 2013, A/RES/68/4, 21/01/2014.



3.2. GLOBAL MIGRATION GOVERNANCE IS CONDUCTED MAINLY OUTSIDE THE UNITED NATIONS FRAMEWORK

Today, although the UN system as a whole has, since 2006, come together to contribute to such policy debates, global migration governance discussions largely fall outside the UN framework, due to the States' preference for informal flexible "processes" and their reluctance to be bound by formal normative frameworks and technical monitoring mechanisms, such as those established within the UN. In particular, often for reasons connected with their domestic political and electoral agenda, States have wanted the migration governance discussions to be generally delinked from any type of human rights normative or institutional framework. Some of the major migration governance processes and institutions developed outside the UN are discussed in the next sections.

3.2.1. *The Global Forum on Migration and Development as a trust-building mechanism*

The creation of a global forum as a venue for discussing issues related to international migration and development in a systematic and comprehensive way was a proposal by the UN Secretary-General during the 2006 HLD.⁷⁶ Subsequently, the Global Forum on Migration and Development (GFMD) was created by States, outside the UN framework, and has met annually since 2007.⁷⁷ The Special Representative of the Secretary-General has been a driving force behind the GFMD which is defined as a 'voluntary, informal, non-binding and government-led process'.⁷⁸ This self-description is very indicative of the objectives of States. The UN is not the preferred forum and no decision being actually formally taken during the GFMD meetings, accountability will be kept to a minimum.

The Global Forum provides the most visible and high-profile platform for multilateral dialogue on migration issues. It was devised essentially as a trust-building mechanism, allowing States to share experience and expertise, in a non-threatening environment, essentially an environment in which the debates do not risk to spill into their national political stage, such as would be the case if these debates were aiming at providing mandatory decisions, normative frameworks, institutional constructions and budget lines. The "process" indicates the informality that States required to engage. In that sense, the GFMD has been a considerable success as a record number of 150 States have participated in the GFMD meeting in Stockholm in May 2014.⁷⁹ The

⁷⁶ UNGA, *High-level Dialogue on International Migration and Development – Note by the President of the General Assembly*, A/61/515, 13/10/2006.

⁷⁷ GFMD Operating Modalities <www.gfmd.org/process/operating-modalities> accessed 9 February 2016.

⁷⁸ See *The GMFD Process* <www.gfmd.org/process> accessed 29 November 2014.

⁷⁹ Seventh Meeting of the Global Forum on Migration and Development, 14–16 May 2014, Stockholm, Sweden, <www.gfmd.org/meetings/sweden2013-2014> accessed 6 September 2015.



GFMD has filled a need for multilateral discussions in a politically-sheltered format and States have taken to the process.

Since its creation, the GFMD has tended to focus on the economic development dimensions of migration. Initially, human rights were not even part of the agenda and the discussions were exclusively held on the economic aspects of migration.⁸⁰ Moreover, the meeting was considered exclusive to States, and civil society was not invited. It might have been a strategy on the part of the Special Representative of the Secretary-General to engage States in technical discussions and avoid spooking them with visions of highly divisive political debates. It is only with the fourth GFMD meeting in Mexico,⁸¹ in 2010, that human rights became officially part of the agenda and that civil society organisations (CSO) were finally invited to contribute to the debates in the form of a short open space which allowed for a dialogue between State representatives and CSOs. The language regarding human rights still remains remarkably cautious. For instance, the 2014 GFMD held in Stockholm gave priority to the integration of migration in global, regional and national development agendas with a view to operationalising mainstreaming and coherence in migration and development policies, and framing migration for the Post-2015 UN Development Agenda. It also defined migration as an enabler for inclusive economic and social development. ‘Empowering migrants for improved protection of rights and social development outcomes’ was mentioned as one of the aims of ‘inclusive social development’.⁸²

Moreover, although some ministerial diversity has emerged in recent years, meetings of the GFMD are attended largely by either ministry of interior or home affairs officials or diplomats, rather than by human rights, or social affairs, or labour ministry officials. Limited access of civil society results in the loss of valuable expertise in terms of human rights and monitoring of normative frameworks.⁸³ Finally, the Global Forum lacks institutional memory, as the Chair alternates annually, between developed and developing countries. Despite the existence of a small support unit, it does not have a permanent secretariat. There is no proper record of the discussions and, therefore, no transparency. One of the main objectives of the Global Forum is to exchange good practices and lessons learned, but, in the absence of a normative

⁸⁰ For instance, the First Meeting of the Global Forum on Migration and Development, 9–11 July 2007, Brussels, Belgium: The roundtable sessions were structured around the central theme of “Migration and socio-economic development”, as drawn from the priorities identified in a UN Member State-wide survey conducted by the Belgian Chair-in-office. The three roundtable themes were: a) Human Capital Development and Labour Mobility; b) Remittances and other Diaspora Resources, and c) Enhancing Policy and Institutional Coherence and Promoting Partnerships.

⁸¹ Mexico GFMD 2010, *Fourth Meeting of the Global Forum on Migration and Development*, 8–11 November 2010, ‘Partnerships for Migration and Human Development: Shared Prosperity–Shared Responsibility Report of the Proceedings’ <www.gfmd.org/meetings/mexico2010> accessed 6 September 2015.

⁸² Swedish Chairmanship of the Global Forum on Migration and Development 2013–2014, *Unlocking the Potential of Migration for Inclusive Development* (Report October 2014) 7.

⁸³ SRHRM Report (n 1) paras 55–56.



framework to guide the discussions, a follow-up process to take stock and an accountability mechanism to identify precise issues, there is a fear that the Forum can turn into an exchange of bad practices or even a race to the bottom in terms of policies.⁸⁴

The discussions of the GFMD contribute to more formal cooperation and coordination, as well as to the development of a more informed and balanced discourse regarding the complexities of immigration, a discourse that State authorities badly need to inject on their domestic political stages if they want to reduce the toxicity of their national discussions about migration. However, these discussions have so far not led to much substantive change, especially not one that could actually be experienced and lived by the migrants themselves as regards the protection and promotion of their human rights.

3.2.2. *The Role of Non-UN Intergovernmental Organisations (IGOs): The Case of International Organisation for Migration*

Several non-UN IGOs have experienced rapid and substantial growth over the last decades at the global level. IGOs' main task is capacity building in order to help States improve their capacity to address migration challenges by themselves.⁸⁵ They also provide services related to different aspects of migration management. The International Organization for Migration (IOM) and, to a much lesser degree, the International Centre for Migration Policy Development (ICMPD) emerge as a key players in this respect.

IOM has 151 member States, 12 observer States and more than 7,800 staff members in more than 470 locations. Its primary goal is to facilitate the orderly and humane management of international migration. IOM acts essentially as a service provider to States. Its purposes and functions include the assisted voluntary return of migrants, their organised transfer and the provision of migration services related to recruitment. IOM also offers a forum for the exchange of views and practices.⁸⁶ As IOM's funding is project-based and its work is donor-driven, its agenda is largely decided by its member State constituency. Its mandate and funding pose structural problems with regard to fully adopting a human rights framework for its work. IOM does not have a comprehensive mandate on migration issues. It especially lacks a legal protection mandate enshrined in its Constitution, or a clear transversal policy on protection. For instance, assisted voluntary return programmes have been criticised for not being genuinely voluntary, particularly when offered to migrants kept in detention centres.⁸⁷ IOM has also taken a leadership role in shepherding the regional

⁸⁴ Ibid paras 51–53.

⁸⁵ Geiger and Pécoud (n 61) 8.

⁸⁶ IOM Constitution, entered into force 30 November 1954, art 1.

⁸⁷ Ishan Ashutosh and Alison Mountz, 'Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration' (2011) 15(1) *Citizenship Studies* 21, 21–22.



consultative processes (RCPs), providing a secretariat for 11 of them and organising regular meetings of RCPs, where good practices and lessons learned can be exchanged, and the experience and expertise of each can benefit all the others. It is therefore party to all the discreet discussions that States have among themselves in such fora and has a precious overarching perspective on all the migration policy developments that States are fostering.

The fact that IOM is not part of the UN family implies that it is not officially bound by the three core mandates of the UN, namely security, development and human rights, as embodied by the UN's three councils. Added to the absence of a constitutional human rights protection mandate, this gives it arguably the flexibility and even the pliability that States find useful when dealing with sensitive migration issues, such as repatriations and border controls. However, IOM has a wealth of field experience, including on human rights issues which it witnesses on a daily basis, and has developed programmes with very interesting human rights components, such as on migrants' health, the fight against human trafficking (where it had a pioneer role), or on migrants' rights training programmes for stakeholders, such as law enforcement corps. Given the chance, IOM could develop into a fully-fledged multilateral organisation of the UN family. For that, its Member States need to demonstrate the political will to include a core human rights protection mandate in an IOM revised constitution and to accept that IOM thus become also the guardian of a human rights normative framework which may limit, on occasion, its capacity to provide the services States would like it to provide. Under such conditions, IOM could quickly become the lead global agency on migration issues that it aspires to become. The Special Rapporteur on the human rights of migrants has called for such a transformation.

The ICMPD is also a non-UN IGO which plays a similar role, on a much smaller scale. Based in Vienna, its membership is limited to 15 States, mostly from Central Europe and the Balkans. It provides research-based policy advice, oversees capacity building and monitors several regional consultative processes (or 'migration dialogues', as they are called by ICMPD) between European States and neighbouring regions, towards Asia (Budapest Process and Prague Process) and towards Africa and the Middle East (MTM Dialogue, Rabat Process, EUROMED Migration III and MME Partnership).⁸⁸

The increasing involvement of non-UN IGOs in controversial global migration governance is a general trend, which started arguably when, in 1990, EU States created the Schengen mechanisms outside the EU, as a form of laboratory in which they could experiment migration policy developments without the constraints of EU official processes. These processes included the respect of the founding treaties of the EU, a democratic legislative process, as well as a judicial oversight mechanism.

⁸⁸ Sabine Hess, 'We are Facilitating States! An Ethnographic Analysis of the ICMPD' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010) 105.



This “externalisation” of migration policy building to self-centred IGOs is problematic in terms of migrants’ human rights. Their reliance on funding from predominantly migrant-receiving States, their managerial rhetoric and focus on ‘efficiency’, and their ‘customer-oriented’ approach linked to their donor-driven agenda appear to be difficult to reconcile with an appropriate consideration of the human rights of migrants as a core element of the migration policies they are promoting or implementing.⁸⁹

In some cases, governments rely on such IGOs and on their managerial approach to justify their harsh measures and escape any kind of political debate on the orientations of their migration policy.⁹⁰ The heterogeneity among the IGOs enables States to selectively decide what issues they wish to address in which institutional context, thus hampering a coherent international approach. The intervention of IGOs may actually weaken governments by creating parallel structures that compete with helpless political systems and government institutions, especially in countries of transit and origin.⁹¹ But it may also be that discussions within IGOs will enable mainstream State authorities to develop the kind of sophisticated conceptual framework and nuanced public policy discourse that will allow them to respond to and delegitimise nationalist populist anti-immigration fantasies, stereotypes and prejudices.

3.2.3. *The Key Importance of Governance at the Regional Level*

The unprecedented level of international migration in recent years, coupled with the lack of a global framework on migration, has contributed to enhanced activity at the regional level, including migration-related agreements within regional organisations. Other increasingly used instruments at the regional level are regional consultative processes on migration.

Regional organisations over the world have some form of agreement or intention on the free movement of people within their region. Examples include the ECOWAS, the Commonwealth of Independent States (CIS), the Common Market of the South (MERCOSUR), the Association of Southeast Asian Nations (ASEAN) and the EU.⁹² Increased labour mobility is seen as a component of integration equally essential to eliminating barriers to free movement of capital, goods, and services. The legal regimes regulating the regional circulation have recognised that freer movement of

⁸⁹ Sandra Lavenex and Rachel Stucky, ‘Partnering’ for Migration in EU External Relations’ in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance* (Routledge 2011) 116.

⁹⁰ Geiger and Pécoud (n 61) 12.

⁹¹ *Ibid* 4, 8.

⁹² Graziano Battistella, ‘Migration Without Borders: A Long Way to Go in the Asian Region’ in Antione Pécoud and Paul de Guchteneire (eds), *Migration Without Borders. Essays on the Free Movement of People*, Berghahn, 2007, 199; Caroline Caplan, ‘L’ouverture des frontières à l’épreuve de la résistance: l’exemple du MERCOSUR’ (2015) 17(1) *Éthique publique* <<http://ethiquepublique.revues.org/1725>> accessed 6 September 2015.



people enhance economic activity and development in larger markets to the extent it is based on equality of treatment and protection of rights.⁹³

3.2.3.1. Regional organisations: The European Union's free movement of persons' model

The EU is considered as the most elaborate system of all the regional economic communities.⁹⁴ Despite the high level of integration, the individual EU Member States continue to have the jurisdiction to decide on the number of non-EU migrants they wish to admit to their territory. The EU thus provides an interesting example of how States' sovereignty can be maintained while at the same time engaging in significant joint governance processes in the field of migration. As highlighted below, this may however result in a framework where migrants' human rights are pushed into the background.

From the start, EU Member States avoided giving the EU a mandate on migration policies. Most of what are today EU standards and norms on migration have been initially developed, over two decades, in the Schengen process, an intergovernmental mechanism, completely independent from the EU, and especially unaccountable politically to the European Parliament or legally to the European Court of Justice or the ECtHR. Once the Schengen process had produced a comprehensive framework, it was only then integrated into EU law, under the name of Schengen Acquis. The Schengen Acquis was essentially focused on border control and the fight against irregular migration. The pattern identified above regarding multilateral debates thus also proved true at the EU level, even if the Schengen framework has been reworked and reformulated in recent years with the recasting of most of the initial decisions, directives and regulations that had integrated the Schengen Acquis into EU law.

Since its beginning, the EU has expanded considerably, both in terms of Member States and mandate. With the entry into force of the 1999 Amsterdam Treaty,⁹⁵ migration and asylum policies, including the Schengen Acquis which regulates the creation of a common external border with free movement inside the border, were officially incorporated into the legal framework of the EU. The management of irregular migration has been a central political concern for the EU's 'common migration policy'. A range of common or harmonised preventative and deterrent measures have been taken over the past few decades.⁹⁶ The EU has also progressively

⁹³ Cholewinski and Taran (n 45) 14.

⁹⁴ Helen Wallace, Mark A. Pollack and Alasdair R. Young, 'An Overview' in Helen Wallace, Mark A. Pollack and Alasdair R. Young (eds), *Policy-Making in the European Union* (Oxford University Press 2015) 4.

⁹⁵ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing European Communities, and Certain Related Acts*, signed in Amsterdam June 18, 1997, OJ L 340 10.11.1997.

⁹⁶ European Commission, *An Open and Secure Europe: Making it Happen*, COM (2014) 154 final, Brussels, 11.03.2014, 8–13; European Commission, *Implementation of the Communication in the work of the Task Force Mediterranean*, SWD (2014) 173 final, Brussels, 22.05.2014, 3–6; Alessandro



established a sophisticated legal framework regarding the status and rights of migrants legally residing in its Member States.⁹⁷ But little progress has yet been made on the harmonisation of legal migration and the establishment of common legal channels for migration. For instance, the first legal migration instrument addressing low-skilled migrants, the Seasonal Workers Directive, was adopted only in February 2014.⁹⁸ In fact, key determinants of migration policy, including the ever important factor of the number of admissions for all categories of regular migrants, remain within the decision-making power of individual Member States.

In an effort to promote a comprehensive migration strategy, the European Commission published the Global Approach on Migration and Mobility (GAMM) in December 2005.⁹⁹ It is based on the assumption that migration issues are an integral part of the EU's external relations and that any harmonious and effective management of migration must address the organisation of legal migration and the control of irregular migration as ways of encouraging the synergy between migration and development.¹⁰⁰ A revised GAMM adopted by the EU Council in May 2012 moves towards a more global approach which takes into account the human rights at stake in movements across borders, by placing emphasis on establishing legal channels of migration and protecting human rights, including international protection.¹⁰¹

The GAMM has been subject to fierce criticism by human rights organisations for being too weak in terms of effective human rights protection mechanisms and for promoting the EU's interests without offering tangible integration prospects to

Di Giorgi, 'Immigration Control, Post-Fordism, and Less Eligibility. A Materialist Critique of the Criminalization of Immigration Across Europe' (2010) 12(2) *Punishment & Society* 147, 158; European Union Agency for Fundamental Rights, *Criminalisation Of Migrants in an Irregular Situation and of Persons Engaging With Them*, 4; Ana Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement' (2012) 16 *Theoretical Criminology* 417; Elspeth Guild, 'Criminalisation of Migration in Europe: Human Rights Implications' Issue Paper commissioned and published by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Strasbourg, 4 February 2010 CommDH/IssuePaper (2010) 1.

⁹⁷ See for example, Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents, OJ L 6/44; Council Directive 2003/86/EC of 22 September 2003 on The Right to Family Reunification, OJ L 251; Pieter Boeles and others, *European Migration Law* (Intersentia 2014).

⁹⁸ Directive 2014/36/EU of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers OJ L94.

⁹⁹ Council of the European Union, *Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean*, Document No 15744/05, Brussels, 13.12.2005; European Commission, *Report on the Implementation of the Global Approach to Migration and Mobility 2012–2013*, COM (2014) 96 final, Brussels, 21.02.2014.

¹⁰⁰ European Commission, *Global Approach on Migration and Mobility*, COM (2011) 743 final Brussels, 18.11.2011.

¹⁰¹ European Commission, *Priority Actions for Responding to the Challenges of Migration: First Follow-up to Hampton Court*, COM (2005) 621, Brussels, 30.11.2005, 4; European Council, *Conclusions on the Global Approach to Migration and Mobility*, Document No. 9417/12, 03.04.2012.



third-country nationals.¹⁰² In fact, scant attention is given in the GAMM to the push factors, which include under-development and weak rule of law in the countries of origin and transit, or to the pull factors in destination countries, such as the large underground labour markets for exploitable irregular migrant workers in many sectors of the European economies, including agriculture, care-giving, construction and hospitality.

Additionally, the regional dialogues established by the EU, such as the Eastern Partnership Panel on Migration and Asylum towards the East, the Africa-EU Partnership on Migration, Mobility and Employment and the Khartoum and Rabat Processes in the South, appear to be used as a means for the EU to further pursue its agenda of strengthening border controls. In fact, the EU is preconditioning limited labour opportunities, largely for skilled migrants, and the promise of visa liberalisation/facilitation for citizens of the partner country, to that country implementing repressive measures that would reduce irregular migration flows transiting through its territory on their way to the EU territory, a quid pro quo which effectively operates to externalise migration control.¹⁰³

Another matter of concern is the lack of an available independent oversight mechanism that can be applied in order to ensure full compliance with international human rights law by all EU programmes and institutions in the field of migration. It is true that the EU Charter of Fundamental Rights is applicable to all institutions and bodies of the Union, has direct effect since the Lisbon Treaty, and will serve as supreme reference in the implementation of these rights; however, obtaining a judgement based on the Charter is not an easy matter, especially for disempowered migrants who often fear contacting any kind of authority.

Although the GAMM cites human rights as a cross-cutting concern, it does not establish any enforcement mechanism that would enable an evaluation of practices that might infringe upon the human rights of migrants. Moreover, although international cooperation with transiting countries with a view to build their migration control capacities has considerably increased – which is not in itself a bad thing, as one would hope that border management be implemented through a corps of well-trained, human rights-sensitive and gender-sensitive professionals – one does not witness a parallel effort being made to increase the same countries' capacities in terms of human rights protection, including migrants' rights, for example through capacity-building programmes for national human rights institutions or the judiciary.

¹⁰² European Council for Refugees in Exile, *ECRE Comments to the Commission Communication on the Global Approach to Migration and Mobility*. <www.ecre.org/index.php?option=com_downloads&id=482> accessed 26 November 2014.

¹⁰³ European Commission, *Report on the Implementation of the Global Approach to Migration and Mobility 2012–2013*, COM(2014) 96 final, Brussels, 21.02.2014, 10, 15; See also 'Khartoum Process: EU and African Union launch initiative against smuggling of migrants', ECRE Weekly Bulletin, 5 December 2014 <<http://us1.campaign-archive2.com/?u=8e3ebd297b1510becc6d6d690&id=70da b8a6dd&e=263816af1b>> accessed 10 December 2014.



Despite the fact that EU law now provides in principle a much better general framework for the protection of the human rights of migrants on EU territory, especially since the recent recasting of several relevant EU directives, the interplay between EU and national competences in the field of migration remains complex. This complexity often means that human rights slip through the gaps: Member States advocate for opaque policies at the regional level, then use those standards to enable the implementation of more restrictive domestic policies with regards to migration, and subsequently seek to attribute this to the regional system.¹⁰⁴ This situation can perhaps be exemplified by the fact that, while the Commission's original proposal for the EU Returns Directive set six months as the maximum period of detention, it was, at the insistence of the Council, extended to up to 18 months in 'exceptional' cases. Unfortunately, this exception seems to have become the rule in many countries.¹⁰⁵

3.2.3.2. The variegated role of regional consultative processes

The Regional Consultative Process (RCP) model began in 1985 with the Intergovernmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia, and has subsequently developed almost universal coverage. RCPs bring together representatives of States of the region – often with some international organisations as observers – in a setting that is non-binding, informal, flexible, and focused on information-sharing, good practices, lessons learned, and capacity building. They offer States a cooperation process that excludes creating new norms or formal commitments. They exist at regional, inter-regional and trans-regional levels¹⁰⁶ and address a wide range of issues. RCPs driven by Global North countries will cover mostly irregular migration, the use of forged documents, smuggling and trafficking, and the social integration of migrants. RCPs driven by countries of the Global South will also be interested in issues such as remittances, migration and development, labour migration, the human and labour rights of migrants, the matching of migrant skills with labour needs, migration and health, and trade and migration.

Over 15 Regional Consultative Processes, covering most challenging migration routes, include the Budapest Process, the Puebla Process, the South American Conference on Migration, the Mediterranean Transit Migration Dialogue, the Bali Process, the Colombo Process, the Abu Dhabi Dialogue and the Migration Dialogue

¹⁰⁴ Virginie Guiraudon, 'De-nationalizing Control: Analyzing State Responses to Constraints on Migration Control' in Virginie Guiraudon and Christian Joppke (eds), *Controlling A New Migration World* (Routledge 2001) 45–48.

¹⁰⁵ European Commission, *Communication on Return Policy*, COM (2014) 199 final, Brussels, 28.03.2014, 16–17; HRC, *Report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau – Addendum – Mission to Italy (29 September–8 October 2012)*, A/HRC/23/46/Add.3, 30/04/2013. Italy has since reduced the maximum detention time to 90 days, in part for human rights reasons, in part for cost effectiveness and management motives.

¹⁰⁶ Alexander Betts, *Global Migration Governance. The Emergence of a New Debate*, November 2010, 2.



for West Africa. Some of the regional consultative processes are driven by external actors, with funding coming from States of the Global North. IOM and/or ICMPD participate in most of the major regional consultative processes as a partner or observer, and provide secretariat services for many of the major processes. Even in RCPs driven by countries of the Global South, States of the Global North are most often observers, thus participants in the discussions.

RCPs take place behind closed doors, with little involvement on the part of civil society. Governments exchange what they consider good practices, including the technological advances that they have been able to make and the processes that they have adopted, and develop forms of cooperation around knowhow transfer. Often this will include a transfer in technology or training of personnel. RCPs may sometimes contribute to elaborating bilateral, regional or trans-regional agreements.¹⁰⁷ However, given the informal nature of these mechanisms, there is no detailed record of the proceedings, and accountability is therefore minimal.¹⁰⁸ They do not focus on human rights, although human rights are on the agenda of some of them, including the Puebla Process and the South American Conference on Migration.

RCPs provide the same type of informal governance as the GFMD, namely informal structures intended to create trust between countries in their dialogue on migration issues, in order to allow for frank exchanges on their interests, priorities, 'good practices'. RCPs are not intended to lead to any normative changes or institutional developments at a pluri-lateral level, although they may have a major impact in driving changes in policies and practices at national level. This type of approach often does not embrace the complexity of migration issues. It can lead to a dilution of normative standards and a lack of accountability, monitoring and oversight, thus potentially negatively affecting the human rights of migrants. This is evidenced, *inter alia*, in the agenda of many regional consultative processes, which are heavily focused on measures to control migration through aggressive border enforcement, a preference for precarious circular migration schemes, and the restriction of any reference to human rights to the lowest common denominator.

Furthermore, some RCPs are characterised by power asymmetries, whereby the most powerful countries, often destination States, dominate the discussions.¹⁰⁹ The

¹⁰⁷ IOM, *An Assessment of Principal Regional Consultative Processes on Migration*, IOM Migration Research Series No 38, Geneva, 2010, 20–22.

¹⁰⁸ Colleen Thouez and Frédérique Channac, 'Shaping International Migration Policy: The Role of Regional Consultative Processes' (2006) 29(2) *West European Politics* 370, 379; Jobst Kohler, 'What Government Networks Do in the Field of Migration: An Analysis of Selected Regional Consultation Processes' in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance* (Routledge 2011), 76–77.

¹⁰⁹ Virginie Guiraudon and Gallya Lahav, 'Comparative Perspectives on Border Control: Away From the Border and Outside the State' in Peter Andreas and Timothy Snyder (eds), *The Wall Around the West: State Borders and Immigration Controls in North America and Europe* (Rowman and Littlefield Publishers 2000) 55–77.



Member States have different levels of development and economic strength, thus creating an uneven level for their bargaining power. There are significant overlaps between several RCPs, and this has been deemed unsustainable from a political, financial and human resources perspective. The overlaps create a risk of duplication and contradiction, thus requiring enhanced coordination between the different processes.¹¹⁰ However, given that the majority of RCPs are not linked to each other, and have different agendas, making them come together as a whole seems unlikely.¹¹¹

3.2.3.3. Bilateral migration initiatives remain important

Between States, there has been a considerable increase in bilateral agreements on migration, which cover such areas as visas, readmission, knowledge-sharing, labour migration and border management. The reason is that they offer an effective method for operational coordination, as well as for regulating the recruitment and employment of foreign workers. Bilateral agreements can be tailored to the specific supply and demand characteristics of the countries of origin and destination, and they can provide effective mechanisms for protecting migrants.¹¹²

There are challenges in ensuring the transparency of bilateral agreements and in monitoring their human rights impact. Bilateral readmission agreements offer a typical example. These agreements which are the result of private negotiations, are used as a means of border control and expedited removal of irregular migrants. Not only are negotiations seemingly conducted with very little external oversight or input, but often the final text is not publicly available, thus contributing to the uncertainty regarding the content, interpretation and implementation of these agreements.¹¹³

Additionally, there has been a proliferation of actors involved in bilateral migration governance. As an example, bilateral agreements on the recruitment of migrant workers often involve private recruitment agencies. Monitoring those agencies in order to ensure that they fully respect the human rights of the migrants concerned is actually very difficult. Many States fail to streamline the whole of the recruitment chain, the oversight being limited to annual or semi-annual meetings at ministerial or top civil servant levels.¹¹⁴

¹¹⁰ Charles Harns, *Regional Inter-State Consultation Mechanisms on Migration: Approaches, Recent Activities and Implications for Global Governance of Migration* (IOM Migration Research Series, Geneva, 2013) 91.

¹¹¹ SRHRM Report (n 1) paras 70–74.

¹¹² European Commission, *Evaluation of EU Readmission Agreements*, COM (2011) 76 final, Brussels, 23.2.2011; Koser (n 13) 312.

¹¹³ Idil Atak and François Crépeau, 'Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges' (2014) 5 *European Journal of Human Rights* 591, 607–08.

¹¹⁴ SRHRM Report (n 1) para 78.



4. CONCLUSION: THE NEED FOR A HUMAN RIGHTS-BASED FRAMEWORK FOR GLOBAL MIGRATION GOVERNANCE: ALLOWING MIGRANTS TO FIND THEIR ‘VOICE’

Migration governance dialogues often take place outside the UN and international human rights frameworks, with a focus on the economic development and political aspects of migration, without properly integrating human rights concerns. The insufficient focus on the human rights dimension in migration management has led to serious human rights violations in the treatment of migrants and asylum seekers by States’ agents and third parties such as employers and landlords, and to a lack of oversight and accountability when these violations occur. In the context of well-governed migration policies, it is imperative to acknowledge the importance of the protection of individual rights for all, and the facilitation of access to justice for migrants. It will therefore be necessary to inject more human rights guarantees in migration policy frameworks as well as more migration concerns in human rights protection mechanisms.

Diversity, multiculturalism, anti-racism, anti-discrimination and integration policies, together with initiatives to counter exclusion and violence, are important tools in fighting negative public discourses and policies on migration and changing public perceptions of migrants. Good governance at the national level is a basis for more effective cooperation at the regional and global levels. This can be achieved by establishing a coherent national approach addressing all stages of the migration process, and developed in widespread consultation with the private sector, civil society and migrants themselves.¹¹⁵

Contrary to what the dominant international human rights doctrine advocates for persons belonging to traditionally marginalised groups, migrants – in particular asylum seekers, irregular migrants and temporary migrant workers – are rarely empowered to defend themselves. By definition, they do not have access to the political stage and their voices do not carry in the public debates on migration policies. Moreover, their access to remedies and independent decision-making bodies, already hampered by the fear of being detected, detained and deported, is rarely facilitated through State-based mechanisms. If one is to hear their “voice”, migrants, including irregular migrants, must be empowered to effectively fight for the proper respect, protection and promotion of their own human rights.

An efficient, well-trained, human rights- and gender-sensitive immigration enforcement corps is an important component of State authority. However, they do not need to enlist all other public authorities to accomplish their mission. “Firewalls” between public services (health care, education, housing, labour inspection, local

¹¹⁵ Ibid para 80.



police, *inter alia*) and immigration enforcement should be implemented in order to allow migrants access to their rights without fear of being arrested, detained or deported: public services should be instructed not to communicate immigration status information to anyone and immigration enforcement should not have access to the information they collect on immigration status.¹¹⁶ This system will reassure migrants that communicating with such authorities will not endanger their status or situation and will allow them to speak up for themselves. This will also allow doctors, teachers, social workers, labour inspectors, and police officers, to name only a few, to speak up in migration debates, thus carrying the voice of migrants. Capacity-building is also required among civil society organisations, including trade unions, to increase their effectiveness in lobbying for the rights of migrants, monitoring and reporting on conditions for migrant workers, and providing them with services and information.¹¹⁷

The global migration governance's main objective should be fostering mobility at all levels. Migration policies should emphasise mobility rather than closure. Well-managed migration can play a positive role in boosting growth and addressing labour market shortages. Indeed, opening legal channels of entry may prove to be more efficient and less costly than punitive measures, and may also contribute to a decrease in smuggling activities and a reduction in irregular migration. At the regional level, this could be achieved by further developing and interconnecting free-movement-of-persons areas such as the EU, MERCOSUR and ECOWAS. At the international level, the mobility could be enhanced by mainstreaming migration and human rights in various agendas, including Post-2012 Rio+20 sustainable development agenda, Post HLD 2013 migration & development agenda, Post-2014 population & development agenda, and Post-2015 sustainable development goals agenda.

Additionally, international migration cooperation should rest on formal commitments and accountability mechanisms. The principle of accountability, which is key to good governance, requires that decision makers communicate the nature and the extent of decisions and their implementation to stakeholders. This means, among others, that there has to be a system or procedure in place to promote transparency and flow of information.¹¹⁸ The lack of accountability of the GFMD and RCPs due to the absence of detailed records of proceedings needs therefore to be progressively remedied or compensated through other more accountable mechanisms. In addition to trust-building informal processes, a strengthened and coherent institutional framework, which draws from the experience and expertise present in many international or regional organisations, is needed to address the above mentioned human rights challenges.

Any future model for global migration governance should encompass several functions, including: standard setting and normative oversight; capacity building and

¹¹⁶ Ibid para 82.

¹¹⁷ Koser (n 13) 310.

¹¹⁸ Ngaire Woods, 'Good Governance in International Organizations' (1999) 5(1) *Global Governance* 39, 41; Obokata (n 59) 122–23.



technical assistance; a platform for dialogue, collaboration and political facilitation; and the development of a knowledge base or capacity through data, indicators, and dissemination. These functions are currently carried out by a wide range of actors, both inside and outside the UN framework.

This article argues that there is a need to bring the migration dialogue inside the UN, as it already plays a key role in international cooperation, with human rights as one of its pillars. Only the UN, with its diversity of experience and institutional capabilities, is capable of embracing the extreme complexity of migration movements in all their dimensions, and to respond to the new realities of international migration. Creating a new, UN-based institutional framework would not preclude regional or bilateral agreements, processes or organisations outside the UN from also dealing with migration.

Several steps can be imagined in order to increase the role of the UN in global migration policy making. Increasing the capacity of several UN agencies (OHCHR, ILO, UNDP, World Bank, to name only a few) to deal with migration issues and making this one of their key priorities through boosting the role and resources of the Global Migration Group, would already considerably help. Then, the establishment within the UN of a standing platform on the human rights of migrants would enable systematic interaction between all relevant stakeholders (including Member States, Global Migration Group agencies, other international and regional organisations, civil society and migrants themselves) on a broad range of cross-cutting human rights and migration issues.¹¹⁹

In the longer term, integrating IOM into the UN seems like a logical next step, an effective way of creating a UN organisation for migration which could become the 'global lead organisation on migration' that it aspires to become. IOM has a unique field experience and expertise on many migration issues, including some really connected to human rights, such as human trafficking or voluntary returns. IOM already works very closely with the UN, including as a member of the GMG, and in many countries it forms part of the UN Country Teams. To this end, IOM would need to be given a formal legal protection mandate, guided by the core international human rights treaties, including the UN Convention on Migrant Workers. The principles of the UN Charter would need to be integrated into IOM's constitution. IOM's staff, including in all field presences, would need to be properly trained in this regard, while capitalising on the unique experience and expertise of IOM in such trainings. It would also be important for IOM to gain the membership of key countries which are currently observer States and its work to be coordinated, probably through an enhanced GMG, with that of all other relevant United Nations entities and agencies working on migration, such as OHCHR, UNHCR, ILO, UNICEF and UN Women, to name only a few.

¹¹⁹ OHCHR, *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration*, December 2012, 8. <www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf> accessed 6 September 2015.



One cannot expect that an agreement on a new institutional framework for migration inside the UN will be reached any time soon. In the meantime, there is a need to look at measures to strengthen the current institutional framework, to take stock of recent developments and plan future steps. This could be achieved, *inter alia*, by holding regular High Level Dialogues at the General Assembly, for example every five years, and by streamlining cooperation between all agencies with experience and expertise in migration.

Promoting effective migration governance is essential to maximising the positive and minimising the negative impacts of migration on development. At the same time that bilateral and regional processes may contribute to global migration governance through building trust between countries, global governance may also improve regional and bilateral processes if States agree on global standards and practices, and bring those to the regional or bilateral level. Therefore, better governance means improving the coordination and cooperation between States, as well as accountability to all stakeholders including the migrants themselves, leading to more effective migration policies and practices that would better integrate the human rights dimension. As the scope and complexities of migration continue to grow, better migration governance would also assist States in combating the exploitation of migrants by, among others, traffickers, smugglers, recruitment agencies and unscrupulous employers, and contribute to discrediting nationalist populist fantasies and stereotypes regarding migration, thus changing the negative public perceptions about migrants and opening a political space for meaningful social discussions on how to reap the promise of mobility and migration.

