

2 November 2016 FINAL

Background Paper for GFMD Roundtable 3.2

Principles, institutions and processes for safe, orderly and regular migration¹

Introduction

On 19 September, world leaders gathered in New York for the United Nations Summit for Refugees and Migrants to find joint solutions to address large movements of refugees and migrants. Their commitments are embodied in the New York Declaration that was adopted at the Summit.

In relation to migrant-specific responses, Member States firmly grounded their commitments in existing international legal obligations, including to fully protect the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times and to devise responses to large-movements with full respect for international human rights law and other relevant standards. The Declaration further includes a commitment to “strengthening global governance of migration”. The Declaration also supported and welcomed the International Organization for Migration (IOM) joining the UN system as a related organization, regarded by its Member States as the global lead agency on migration.

Bringing IOM into the UN system is only one, albeit important, aspect of improving the global governance of migration. The New York Declaration spells out a number of other commitments related to the global governance of migration, including importantly, to launch a two-year process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration. The Declaration establishes that this global compact would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions, and that as such, it would make an important contribution to the global governance of and enhance coordination on international migration. The Declaration further notes the valuable contribution of the GFMD towards global dialogue and collaboration and mandates the Forum to contribute to the intergovernmental negotiations on the global compact, through the coordination of the Special Representative of the Secretary General.²

The concept of governance³

The term “governance” has multiple meanings. For the layperson, the term may simply be a synonym for management or stewardship. The Commission on Global Governance has offered a politically neutral definition of governance as “the sum of the many ways in which individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting

¹ The commitment in the 2030 Agenda for Sustainable Development to “*cooperate internationally* to ensure safe, orderly and regular migration” (paragraph 29) and to “facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies” (target 10.7) points to the relevance of including discussions on the governance of migration a forum dedicated to migration and development.

² A/RES/71/1, paragraph 55 and Annex II, IV, paragraph 13.

³ For the purpose of this paper, the term governance is referred to as governance at global level.

and diverse interests may be accommodated and cooperative action may be taken. It includes formal as well as informal arrangements that people and institutions have agreed to or perceive to be in their interest”. More specifically, in relation to migration, the Global Commission on International Migration establishes that governance “assumes a variety of forms, including the migration policies and programmes of individual countries, interstate discussions and agreements, multilateral for a and consultative processes, the activities of international organisations, as well as the laws and norms...”⁴.

Governance and migration: The unfinished business of globalization?

The migration area is one of the newer areas of governance to receive attention and migration governance is therefore best thought of as a construction site rather than as a completed edifice. The discussion on global governance of migration has risen in line with the understanding that migration presents opportunities and challenges that individual states cannot deal with exclusively at the national level.

In many comparable areas of socially-oriented domains of international endeavours (for instance human rights or refugee protection or employment) the international community has sanctioned the development of solid foundations for governance typically in the form of binding legal instruments. In 1990, the international community adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),⁵ which sets out minimum standards for the treatment of migrants workers and members of their families, which includes Part VI on migration governance, calling on States to “consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families”. The ICRMW also provides that “due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned”⁶. It should be noted however that ICRMW has a relatively low level of ratification, especially among traditional destination countries. Nonetheless, there are numerous elements of international law that are of direct or indirect relevance to migrants, for example international human rights law, refugee law, labour law, humanitarian law, nationality law, or consular law. Gaps still exist in the governance of migration though and consequently some observers have justifiably described migration as “the unfinished business of globalization”.⁷

In last year’s IOM Council, its member states adopted the Migration Governance Framework⁸, which lays out some of the essential elements for facilitating orderly, safe, regular and responsible migration and mobility of people. This Framework, designed to support governments to plan and manage migration at national level, identifies three cross-cutting principles: i) adheres to international standards and fulfils migrants’ rights; ii) formulates policy using evidence and a “whole-of-government” approach; and iii) engages with partners to address migration and related issues; as well as three objectives: i) advance the socioeconomic well-being of migrants and society; ii) effectively

⁴ *Migration in an inter-connected world: New directions for action*, report of the Global Commission on International Migration (2005) p. 65. For further discussion on governance of migration, see e.g. OHCHR’s 2013 publication on governance: http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf

⁵ Adopted by General Assembly Resolution 45/158 of 18 December 1990.

⁶ ICRMW, Article 64

⁷ Wickramasekara, P. ‘Protection of Migrant Workers in an Era of Globalization: The Role of International Instruments’, in Blanpain, P. 2010, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer Law & Business: Alphen aan den Rijn.

⁸ IOM Council, C/106/40, 4 November 2015, *IOM Governance Framework: The essential elements for facilitating orderly, safe, regular and responsible migration and mobility of people through planned and well-managed migration policies*, <https://governingbodies.iom.int/system/files/en/council/106/C-106-40-Migration-Governance-Framework.pdf>.

address the mobility dimensions of crises; and iii) ensure that migration takes place in a safe, orderly and dignified manner.⁹

Approaches to migration governance

Given the complexity of migratory phenomena and, especially, the diverse interests of migration stakeholders, it is hardly surprising that several distinct orientations towards migration governance have emerged. A survey of the literature reveals at least four inclinations. They are not necessarily mutually exclusive and have several points of overlap but each orientation is a reflection of the key interests and priorities of its main proponents.

1. The rights-based approach to migration governance focuses, as the name would suggest, on the human rights including labour rights of migrants. It is normatively based on international human rights standards that apply to all migrants, irrespective of their migration status. Its principal preoccupation is to ensure that these human rights are promoted and protected. It seeks to establish accountability between duty-bearers and right-holders and to develop measures to address marginalization and exclusion. The human-rights-based approach places emphasis on the importance of migrant participation and empowerment.¹⁰
2. The institutional approach gives priority of attention to the setting up of an appropriate institutional architecture for the governance of migration. From this perspective, governance is essentially about achieving an effective “placement” of the migration issue within the international organizational framework, specifically in relation to the UN system. Of key interest here is the nature of the relationship that exists between IOM and the rest of the UN system and the evolution of that relationship. The Global Migration Group is a coordination effort among UN agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration. The emergence of migration governance as a part of regional economic and political integration frameworks, such as EU, ECOWAS, ASEAN and CARICOM, also bears witness to an increasingly multi-layered institutional architecture.
3. A third approach to migration governance underlines the importance of managing the mobility of human capital, so as to achieve a balance between supply and demand of labour. There is a parallel here with the method of work of the World Trade Organization and its goal of setting up of agreed modes of exchange between participating states. In this regard, GATS mode 4 is an oft quoted example, but some would also like to see migration governance to include dispute settlement mechanism.
4. A fourth approach is predicated on the value of consultation among stakeholders, with the active participation of states. This approach is less focused than the three previous ones on the *content* of governance, preferring instead to devote attention and energy to the *process* of consultation. As such it can be seen as a mechanism that could contribute to advances in all of the above areas. The starting assumption here is that migration is a complex and politically

⁹ Other relevant multilateral initiatives include inter alia ILO’s The Multilateral Framework on Labour Migration, a set of non-binding principles and guidelines for a rights-based approach to labour migration aims to assist governments, social partners and stakeholders in their efforts to regulate labour migration and protect migrant workers, and UN OHCHR’s Recommended principles and guidelines on human rights at international borders.

¹⁰ For more details on the promotion and protection of the human rights of migrants, please refer to the Secretary-General’s report on this issue A/69/277.

sensitive issue requiring – initially at least – investigation and exploration before there can be agreement on modes of governance. Regional consultative processes are now to be found in all parts of the world. They are, for the most part, informal and non-binding. Global consultative processes have been launched in parallel with regional efforts. Examples of such purposeful enquiry and discussion include the Berne Initiative and the Global Forum on Migration and Development (GFMD). More formal processes include the Cairo Conference on International Population and Development in 1994, the first UN High Level Dialogue 2006, the Second UN High Level Dialogue 2013, and the UN Summit for Refugees and Migrants 2016.

Factors that impact effective governance

The 2030 Agenda calls for the international community to cooperate with a view to ensuring safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, including refugees and other displaced persons¹¹. This is an ambitious undertaking. A plethora of drivers shape contemporary mobility. Combine this with the wide range of actors involved in the promotion or facilitation of migratory activity, including individual migrants, governments, employers, worker unions, transportation companies and not to mention smugglers and traffickers, the magnitude of the task becomes starkly evident. A number of diverse interests exist that must be considered in managing migration “in a manner through which conflicting and diverse interests of legitimate actors may be accommodated and cooperative action may be taken”.

First, notwithstanding the recognition of the need for cooperation to ensure effective management of migration, *migration is managed for the most part at individual government level*. The main reason for this is the principle of sovereignty and the right of states to determine who may or may not have access to their territory. While recognising the sovereign right of States to control their borders, it is important too to recognise that this right is not unfettered, and is constrained by the obligations under international law that the State has voluntarily undertaken. The exercise of border control is linked to sensitive issues of national security and identity. The observations of the 2005 Global Commission on International Migration about governmental policies are just as valid today:

“Controlling who enters and remains on their territory is an integral part of the sovereignty of States. Immigration plays an important part in maintaining and enhancing the competitiveness of States. It is also a sensitive public issue, and one that has, as a result of recent terrorist attacks, become increasingly associated with threats to public security. The challenge, especially for countries of destination, is to cooperate with other states without at the same time yielding control over an issue that is central to many areas of national interest.”

This gives rise to a second challenge impacting the elaboration of effective approaches to the governance of migration: *a lack of political will* to undertake the politically onerous task of constructing a global legal/policy framework. It is worth remembering that more than 10 years ago the Berne Initiative established that it was indeed possible for the international community to agree on a set of common understandings outlining fundamental shared assumptions and principles underlying effective migration management. The 2005 Global Commission on International Migration took note of the political reluctance, but saw three reasons for (cautious) optimism: i) state sovereignty is the very basis for international cooperation and (as observed above) states have already learnt to establish cooperative interstate mechanisms; ii) with sovereignty comes responsibility and just as individuals have rights and responsibilities towards the state, so individual states have rights and responsibilities

¹¹ Over and above the commitment to develop a global compact on migration, the New York Declaration includes a commitment to committed to working towards a global compact on refugees. This will be based on the comprehensive refugee response framework outlined in Annex I of the Declaration.

as members of the international community; and iii) there is an argument that national competitiveness is not threatened by international cooperation but rather strengthened through openness.

A third factor has to do with *the international system's focus on individual migratory realities or separate aspects of migration rather than addressing it comprehensively and supporting safe and orderly migration processes as a whole*. Thus there are multilateral efforts that focus primarily on labour migration, or smuggling and trafficking, or on migration and development (at times even more narrowly on remittances) but there is relatively little effort applied to the construction of a *comprehensive* global framework for the governance of migration, which seems to be the ambition for the global compact on migration. Migration policy makers could learn from the achievements in other domains of international affairs as diverse as trade, the environment or child protection to model new cooperation frameworks.

The relationship between regional and global migration governance also needs to be considered in view of the growing number of regional organisations opting for cooperation on migration and mobility for and between their member states. The depth and scope of regionalisation varies considerably throughout the world, with the supranational powers of the EU at one end of the spectrum, but the trend is there. And with it comes the need for inter-regional cooperation beyond current informal frameworks which intimately link these regional sets of norms, rules and principles with the global level.

A way forward?

It is a near certainty that factors such as demographics or global inequalities, including imbalances in the global distribution of skills, labour or opportunities will produce ever increasing human mobility, if not in relative numbers so in real terms. The resulting economic and social impacts will be enormous and defy any individual country's ability to manage them singlehandedly, even if much can be gained by mainstreaming migration into development planning. There is a long way to go to develop frameworks of cooperation, to establish common objectives and strategies of action, to create legal instruments and to set up monitoring and accountability mechanisms in the field of migration. There is a choice to be made: either governments acting as a global community will manage human mobility to beneficial ends or they risk to forfeit some of the benefits of migration and that illegitimate actors will continue to influence the outcome of migration, thereby exposing migrants to unscrupulous networks of smugglers and traffickers and endangering the lives and rights of millions of migrants.

The SDG Report (Para 29) lays out the broad dimensions of the task:

“We recognize the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will *cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons*. Such cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries. We underline the right of migrants to return to their country of citizenship, and recall that States must ensure that their returning nationals are duly received.”

The commitment to negotiate a global compact on migration presents a unique opportunity to strengthen the international cooperation on migration. The global compact will naturally draw on, but not be limited to, the commitments in the New York Declaration. In broad terms these can be clustered

into the following broad and inter-connected policy objectives which would all contribute to improving and delivering migration governance¹²:

- Ensuring that migrants' human rights and safety are protected in times of crisis;¹³
- Ensuring inclusion, non-discrimination and the human rights of migrants, including particular attention to *inter alia* women and children;¹⁴
- Making it easier for migrants to move;¹⁵
- Preventing irregular migration including trafficking and smuggling;¹⁶
- Reducing the costs for migrants and enhancing the development impacts of migration;¹⁷
- Addressing the drivers/root causes of forced migration and displacement¹⁸

It is essential that the global compact does not become an exercise of merely restating or, even renegotiating, existing commitments made by states. Instead, it must be geared towards making further progress, operationalizing existing obligations, and establishing the institutional and legal conditions for doing so. Thus, importantly, it will be founded on existing international law, including international human rights, labour, humanitarian and refugee law and other related standards including the guidance of the international human rights mechanisms, as well as inter-governmentally negotiated agreements, including, but not limited to the Declaration of the Second High-level Dialogue on International Migration and Development (2013), the 2030 Agenda for Sustainable Development (2015), the Addis Ababa Action Agenda (2015) and the Sendai Framework for Disaster Risk Reduction (2015).¹⁹ Together these agreements firmly establish the consensus on the human dimension of migration and human rights as fundamental elements, while recognizing migrants as important partners for development and economic, social and cultural enrichment of countries destination and origin.

As noted in the Declaration, adopted at the UN High Level Meeting on addressing large movements of refugees and migrants, the UN Special Representative of the Secretary-General for International Migration, Mr Peter Sutherland, will be issuing a report on ways of strengthening international cooperation and engagement of the United Nations on migration. The Declaration further envisages that he will coordinate the contributions to the negotiation process by the GFMD and the GMG. Other important reference points will be, *inter alia*, the Migration Governance Framework of the International Organization for Migration, which was adopted by its council in 2015 and is being measured through the Migration Governance Index²⁰, as well as recommendations from the Global Forum on Migration and Development, the regional consultative processes, the Doyle Report, the Berne Initiative and the Global Commission on International Migration.

The policy objectives identified in the New York Declaration and the migration-related priorities outlined in the above mentioned agreements could be addressed within three broad streams of human mobility, which can be envisaged for the global compact; (*promoting*) *migration and development*; (*addressing*) *irregular migration*; and (*addressing*) *forced migration/displacement*. Ultimately,

¹² Key paragraphs on improving migration governance: 25, 40, 45, 48, 49, 54,55,61, 62, 63

¹³ Key paragraphs on the human rights and safety of migrants in times of crisis: 22, 23, 26, 28, 29, 30, 31, 38, 50, 51, 52, 53 + all commitments on refugees

¹⁴ Key paragraphs on the inclusion, non-discrimination and the human rights of migrants: 32, 33, 39, 41, 42, 56, 59, 60

¹⁵ Key paragraphs on making it easier for migrants to move: 41, 54, 57

¹⁶ Key paragraphs on preventing irregular migration: 24, 27, 34, 35, 36, 41, 42, 58

¹⁷ Key paragraphs on reducing the costs for migrants and enhancing the development impacts of migration: 44, 46, 47, 57

¹⁸ Key paragraphs on addressing the drivers/root causes of forced migration and displacement: 37, 43, 44

¹⁹ Other important inter-governmentally negotiated reference points include the International Commission on Population and Development from 1994, resolutions in the General Assembly on migration and development and migrants rights.

²⁰ The Migration Governance Index also provides a valuable indicator for thematic follow-up and review of the 2030 Agenda, in particular target 10.7 *facilitating safe, orderly, regular and responsible migration, including through planned and well-managed migration policies*.

operational commitments in these areas will facilitate delivering on the above-mentioned agreements. Noting that this global compact will be intrinsically linked to the improvement of global governance of migration, it also needs to address the current institutional and legal shortfalls in this domain.

The proposed enterprise is clearly a vast one, but it can be summarized through reference to four essential policy equations:

- How does one increase global productivity through skills mobility at all levels while protecting the rights of migrant workers and those of native workers?
- How does one manage social diversity while maintaining social cohesion and confronting xenophobia and racism?
- How does one facilitate movement while ensuring control and security of movement?
- How can the above-mentioned policy equations be integrated to ensure that global migration governance serves to respect, fulfil and protect the human rights of migrants as well as of host communities?

These questions require answers urgently. The exercise needs to be taken further with the exploration of principles and policies that could form the basis for the kind of cooperative endeavour envisaged in the 2030 Agenda as well as the New York Declaration.

Preliminary recommendations

1. The GFMD should engage with the issue of global governance of migration, in particular the inter-governmental process leading to the adoption of the global compact on migration, including by:
 - a. compiling its recommendations of relevance for a global compact on migration (from 2007 onwards) and submitting these for consideration by the inter-governmental process on the global compact;
 - b. dedicating part of its work in 2017-2018 towards deliberating on the potential content of a global compact, promoting consensus on feasible recommendations for this global compact, and communicating those to the inter-governmental process;
 - c. promoting multi-stakeholder problem solving initiatives that could advance the migration agenda on specific commitments in the 2030 agenda and New York Declaration;
 - d. exploring if and how the GFMD could adapt to meet institutional shortcomings in the global governance of migration;
 - e. continuing to explore its role vis-à-vis the 2030 agenda and how this relates to the global compact on migration [consider including more specific recommendations from the ad hoc working group on the GFMD's role in the implementation, follow-up and review of the 2030 Agenda].

Guiding Questions

1. *What are the current **limitations** of existing principles, processes and institutions of governing migration at the global and regional level?*
2. *What are the major elements that should be covered in a **comprehensive migration policy framework** to support the implementation of SDG target 10.7?*
3. *How can the **GFMD** engage with and provide recommendations to the process for the global compact on migration?*

4. How could international/regional **principles, processes and institutions** be strengthened to facilitate:
- a) **orderly, safe, regular and responsible mobility** for the purpose of protecting all persons on the move;
 - b) **cooperation** among states, including for addressing vulnerabilities and protection of women, men and children on the move, including migrants in vulnerable situations;
 - c) **regional mobility**; and
 - d) more **effective partnerships among stakeholders** (states, local authorities, regional and international organizations, private sector and civil society etc)?

Annex 1 Overview of international legal instruments relevant to migration and human rights²¹

Universal Declaration of Human Rights (1948)

Core international human rights treaties

- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
- Convention on the Rights of Persons with Disabilities (2006)
- International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Relevant ILO conventions

- Forced Labour Convention, 1930 (No. 29)
- Labour Inspection Convention, 1947 (No. 81)
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Equal Remuneration Convention, 1951 (No. 100)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)
- Private Employment Agencies Convention, 1997 (No. 181)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Domestic Workers Convention, 2011 (No. 189)
- Migration for Employment Convention (Revised), 1949 (No. 97)
- Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No. 143)

Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967)

Convention relating to the Status of Stateless Persons (1954) Convention on the Reduction of Statelessness (1961)

Convention against Transnational Organized Crime (2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; Protocol against the Smuggling of Migrants by Land, Sea and Air

Instruments of general relevance to migration

- International humanitarian law: Geneva Conventions (1949)
- Convention on Consular Relations (1963)
- International Convention for the Safety of Life at Sea (1974); International Convention on Maritime Search and Rescue (1979)
- Convention on the Law of the Sea (1982)
- Rome Statute of the International Criminal Court (1998)

²¹ Source: OHCHR (2013) *Migration and human rights: Improving human rights-based governance of international migration*