

GLOBAL MIGRATION GOVERNANCE

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Abstract: *International migration is an important global issue that requires a more effective system of global governance. This paper focuses on movements of people across international borders and on governance at the global level. Managing movements of people across international borders cannot be achieved through unilateral state action alone; rather, the development and implementation of migration policy benefits from international cooperation in addressing the complex drivers and processes of migration. Global governance in the migration area still lags the systems in place to manage the international flow of capital and goods.*

Key words: *global migration governance*

Introduction

In recent decades, there have been incremental and substantial efforts to improve the global governance of migration, building on the norms and institutions developed over the course of the last century. In the 2016 New York Declaration for Refugees and Migrants (New York Declaration) – the negotiated outcome of the most high-profile plenary meeting to take place on human movements at the United Nations (UN) General Assembly (GA) – states committed to set in motion a process of intergovernmental negotiations leading to the adoption of a global compact for safe, regular and orderly migration. In an area in which global governance has lagged other transnational issues, this development is particularly noteworthy. It reflects the extent to which confidence in multilateral approaches has been built by efforts to strengthen international cooperation through informal dialogues and initiatives that allowed states to consult and share information. Yet, as at other times in history, it is also emblematic of the need for global cooperation in the face of underlying political, demographic, environmental and socioeconomic drivers of migration.

This paper describes key aspects of the existing architecture relevant to the global governance of migration and reviews recent developments. It focuses on movements of people across international borders and on governance at the global level – that is, governance relevant to, or open to participation by, all UN Member states. In this context, governance encompasses the following substantive rules and norms, processes for decision-making, and mechanisms for implementation and monitoring: 1. Binding laws and norms, non-binding normative frameworks, and agreements among states to cooperate on various aspects of migration; 2. Institutional actors and institutional frameworks and mechanisms; and 3. Processes such as dialogues and initiatives that have taken place at the global level or that relate to governance at the global level.

Benefits and barriers to global migration governance

There are advantages to enhancing the global governance of migration. Managing movements of people across international borders cannot be achieved through unilateral state action alone; rather, the development and implementation of migration policy benefits from international cooperation in addressing the complex drivers and processes of migration. By definition, international migration involves at least two countries – origin and destination – and increasingly implicates numerous other countries that serve as transit points, competitors for talent, collaborators in combating organized crime and movement of

terrorists, and participants in the global financial system that moves remittances. Moreover, migration also involves non-state actors that intersect with governments and each other in managing movements of people. Some of these have formal, sanctioned roles (e.g. multinational corporations, labour recruitment agencies, humanitarian aid organizations and trade unions) whereas others are engaged in illicit activities (e.g. migrant smuggling and human trafficking). Furthermore, international migration intersects with other transnational issues, including development, trade, security, environmental change, conflict resolution, disaster risk reduction, human rights and humanitarian action. But, unlike these other areas, efforts to develop global governance systems to respond to existing and emerging challenges have lagged in the migration area.

In the face of global cooperation and coordination problems, a more effective system of global migration governance has the potential to improve collective responses and create opportunities for mutual benefits. Such a system can bring states together to discuss issues of mutual concern; identify common goals and strategies; create the space for learning and understanding; and allow states to coordinate and cooperate, including in the development and implementation of systems, processes and initiatives. Global norms, including principles, rules and guidance, whether legally binding or not, establish benchmarks against which state behaviour can be measured. Even when they are not widely ratified or adhered to, global norms can affect state behaviour. Ultimately, the benefits stemming from the global governance of migration should also be judged by the extent to which such a system enhances the realization of rights and the well-being of migrants. In this sense, the system for global migration governance and any improvements to it should necessarily be grounded in a recognition and acceptance that migrants, like everyone else, are entitled to inalienable rights.

Efforts to improve global governance of migration are not new. The post-World War I and II eras saw significant progress in establishing international norms, rules, procedures and institutions in the area of labour migration and refugee movements, as part of the broader establishment of the modern international system dealing with a range of economic, social and political issues. At the same time, however, the global governance of migration remains fragmented, with robust international law in some areas, significant gaps in others, and inadequate decision-making processes and mechanisms for implementation of policies. The legal and institutional frameworks are strongest and oldest for refugees, with a widely ratified UN convention and a clear lead agency, the UN High Commissioner for Refugees (UNHCR). International treaties on human trafficking and migrant smuggling are also relatively widely ratified. By contrast, the various instruments to protect migrant workers have received less support. While migrant workers, and indeed all migrants, are covered under core international human rights instruments, normative gaps also remain, especially with regard to access to territory and stay for migrants in highly vulnerable situations, including those who do not qualify for protection as refugees.

A number of factors have impeded progress in establishing a more coherent system of global migration governance. *The first* is concern articulated by a number of states about the effect on their sovereignty. Migration is understood to affect sovereignty directly by its impact on the integrity of borders, economic growth, social relationships, demography, cultural values and – in rare cases – political stability. These impacts are felt not only by countries of destination, but also by origin and transit countries. Immigration, for example, is a pathway in many states towards citizenship, which determines who will be making decisions about the identity and future of the country. Large-scale or specific manifestations of emigration (such as of highly skilled or leadership groups) can have a detrimental effect on a country's stability. Concerns about loss of sovereignty in the context of international cooperation are significant, but often misconstrue the nature of global governance systems.

Recognition of the sovereign rights of states to manage migration is likely to be a core feature of any system of global migration governance. Even when states agree to the free movement of people across their borders, they retain the right to reinstate border controls when they believe national interests dictate such action, as occurred in some European Union Member States in 2015. States understandably prefer to operate on a “mutual interest” basis, rather than relinquish aspects of sovereignty to other countries that may have vastly different interests at stake.

Second, migration is often a contested issue in domestic politics. Publics are divided as to whether migration is a problem or an opportunity. Interest groups tend to take more consistent stances in favour of, or opposed to, enlarging or contracting immigration, but they may cancel each other out in public immigration debates. Moreover, even among those who see migration as an opportunity, there are concerns that governments are increasingly unable to manage it well in the context of deepening globalization.

Third, and related, effective international cooperation requires states to consider the interests of other countries, which is difficult when states are conflicted about their own interests with regard to migration. When states are unclear about what they want to achieve through their own migration policies, it is difficult for them to engage constructively with others in international forums. Many states are, at one and the same time, countries of origin, transit and destination. Their interests may differ significantly, depending on the topic under discussion or the agreements being negotiated. Finding consensus is all the more difficult because there is little agreement as to whether all parties to any accord would, on the whole, benefit from specific migration policies. Even though the economic research literature suggests that migration can generate significant economic benefits, economics is not the only – or sometimes even the most important – factor in considering the effects of population movements. Social, fiscal, cultural, religious and other impacts may be as salient to governments when weighing how to manage flows of people or enter into agreements with other states.

Fourth, there is a natural asymmetry in the process of building a global migration governance system. Most destination countries tend to be global or regional hegemons in relationship to the countries of origin from which people migrate. This is equally true for South–South and South–North migration. Destination countries are generally wealthier and are often also strategically and militarily dominant. In negotiations, the destinations can have disproportionate power to define the terms by which their visas will be allocated. Even among countries with similar economies and political systems, agreement on policies is often elusive. The European Union has been working on such issues for decades and has still not achieved the level of policy coherence it has sought.

Finally, and perhaps most importantly, migration is fundamentally about people, in contrast to the global regimes to address movement of capital and goods. For the system of global migration governance to benefit states, migrants and societies, the very people to be regulated have to be engaged in developing and improving relevant frameworks, institutions and processes. However, incorporating migrants into such a system is exceedingly difficult, particularly since it is not always clear who can represent migrants’ interests in any given context. Some progress has been made at the Global Forum on Migration and Development (GFMD) through the establishment of a civil society component, which includes representatives of migrant and diaspora-led organizations. As the GFMD is a consultative rather than a decision-making process, however, whether these organizations would indeed represent the interests of the vast array of different types of migrants is an open question.

Given these barriers, progress in establishing international norms, procedures and rules of decision-making has been slow, focused mostly on building confidence among states and between states and other partners. Two decades ago, the UN Secretary General (SG) asked

states if they wanted the UN to convene an international conference to discuss greater cooperation in migration management. The opposition to such a discussion at a global level was strong. The SG concluded: The disparate experiences of countries or subregions with regard to international migration suggest that, if practical solutions are to be found, they are likely to arise from the consideration of the particular situation of groups of countries sharing similar positions or concerns with the global international migration system. In the light of this, it may be expedient to pursue regional or subregional approaches whenever possible.

Overview of legal and normative architecture

Stemming from a state's authority over its territory and population, international law recognizes a significant role for unilateral state action in regulating migration. States possess broad powers in this field, which include authority to determine admission, residence, expulsion and naturalization laws and policies. Yet this authority is also constrained by substantive and procedural norms relating to the exercise of state power. States have entered into treaties and agreements, and agreed to customary international law that restrict their authority to regulate migration, as an exercise of their sovereignty and in pursuance of their interests and duties. Thus, in essence, under international law, states have expressly or implicitly consented to limits on their power to regulate migration. This has meant that the laws and norms relevant to migration governance are found in customary international law and diverse instruments, including multilateral treaties, bilateral agreements and domestic laws. Some of these instruments relate to specific facets of migration, although, given its multidimensional nature, migration governance naturally intersects with and is influenced by laws and norms in many other areas.

Persecution, torture and war

The most elaborate, well-established and widely adopted global laws and norms relate to movements associated with persecution, particularly to persons who can satisfy the legal definition of a refugee. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) establish a framework of surrogate protection for any person who “owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. In its preamble, the Refugee Convention explicitly recognizes the international scope and nature of refugee problems and the need for international cooperation in achieving solutions.

Victims of torture who cross international borders – whether or not they qualify as refugees – can also seek protection on the basis of human rights treaties and customary international law. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the return of persons to torture, while the ICCPR prohibits return to torture and other forms of ill-treatment. Unlike the Refugee Convention, the CAT contains an express and absolute prohibition against refoulement of a person to a state where there are substantial grounds for believing that the person would be subject to torture. The prohibition is implied in the ICCPR.

Trafficking and smuggling

The other thematic areas in which a relatively large number of states have converged on the need for an international approach and agreed to global laws and norms relate to human trafficking and migrant smuggling. The 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (the so-called “Palermo Protocol”) to the Convention against Transnational Organized Crime (UNTOC) defines “trafficking in persons” as comprising three key elements: an act; a means or method; and a

purpose or motivation. This means trafficking in persons, as defined, can apply to both internal and international movements, even though the Protocol's scope is limited to offences that are transnational in nature and where trafficking involves an "organized criminal group". Among the Protocol's objectives are protection and assistance of victims of trafficking with full respect for human rights, and the Protocol explicitly articulates ways of achieving this, although these have been criticized for insufficiently addressing the interests and needs of victims. States are required to consider laws or other measures that would allow victims to remain temporarily or permanently on their territory; however, subject to the state's international protection obligations such as those stemming from refugee or human rights law, victims can be repatriated.

Smuggling, on the other hand, a key means through which irregular migration takes place, is generally viewed as a commercial transaction rather than a situation of vulnerability, although contemporary research is generating greater insights into its complexity. The commercial lens is arguably due in part to the definition in the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol) to UNCTOC, which characterizes "smuggling of migrants" as a transaction between the smuggler and a migrant that entails a benefit to the smuggler. Unlike trafficking, smuggling requires the crossing of an international border and the unauthorized entry of a migrant into a state in which the person is not a national or a permanent resident. The Protocol's purpose is to prevent and combat the smuggling of migrants and to promote cooperation among states' parties towards these ends, while protecting the rights of smuggled migrants. Importantly, this means that the smuggler can be subject to criminal prosecution for smuggling, but not the smuggled migrant.

Labour and services

In contrast to movements associated with persecution, torture, trafficking and smuggling, there is less convergence and cooperation at the global level on laws and norms for migrant workers. To regulate international movements related to labour and services, states have primarily adopted bilateral agreements and multilateral agreements at regional and subregional levels, including under broader frameworks for free movement. Nonetheless, a number of relevant laws exist at the global level: the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); the 1949 Migration for Employment Convention (Revised) (ILO Convention No. 97); and the 1975 Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No. 143). Although individually these instruments are not widely ratified, about 86 states have ratified at least one of the three; together, they "comprise an international charter on labour migration, providing a comprehensive framework covering most issues of treatment of migrant workers and members of their families."

The ICRMW seeks to secure for migrant workers the rights guaranteed by the UDHR and core human rights treaties. The ICRMW relates to the whole labour migration process, including prevention of abuses; it covers migrants in both regular and irregular situations and includes substantive and procedural safeguards. The two binding ILO conventions, which are supported by non-binding recommendations, also relate to the protection of migrant workers throughout the labour migration process. Among the key themes covered by ILO Convention No. 97 are the conditions governing the orderly recruitment of migrant workers, as well as equal treatment with nationals for lawfully resident migrants in respect of working conditions, trade union membership and enjoyment of benefits including collective bargaining, social security and employment taxes. ILO Convention No. 143 supplements ILO Convention No. 97; for example, it includes provisions specifically on migrants in irregular situations. In addition, the ILO's eight fundamental rights conventions – recognized as fundamental to the rights of human beings at work as well as ILO

instruments of general applicability, such as the 2011 Convention Concerning Decent Work for Domestic Workers (ILO Convention No. 189) – are relevant to migrant workers.

The 1994 General Agreement on Trade in Services (GATS), a key instrument in international trade law further liberalizing the trade in services, contains provisions indirectly supporting the temporary movement of persons between trading partners, thus facilitating international mobility at the global level. GATS applies to all measures by 164 WTO Members affecting trade in services, except where services are supplied in the exercise of governmental authority (on a non-commercial basis). GATS contains rules and a framework for countries to make specific commitments to open particular service sectors to foreign suppliers. GATS establishes four possible modes through which services can be traded between WTO Members. Under Mode 4, WTO Members can commit to permit the presence of natural persons from other WTO Members for purposes of supplying services. GATS commitments are subject to national immigration provisions and accordingly, GATS does not require WTO Members to confer rights to live in their territories. GATS commitments are enforceable in the WTO.

Family unity

There are no global treaties specifically on international movements related to family unity. Indeed, the term “family unity” is not expressed as such in international instruments; it is generally used to describe rights that respect, protect and support the family, including its ability to be together. Similarly, while the family is regarded as the fundamental unit of society, a single internationally accepted definition does not exist. The United Nations Human Rights Committee (UNHRC) has interpreted the term, as contained in the ICCPR, in broad terms as embodying “all interpersonal relations that are held to constitute a family in the society concerned.” Protection of family unity is underscored by universal rights, including Articles 12 and 16 of the UDHR, Articles 17 and 23 of the ICCPR, and Article 10 of the ICESCR, as well as provisions in the 1989 Convention on the Rights of the Child and the ICRMW. These rights interact with, and impose constraints on, state authority to regulate on migration, particularly in situations where a state seeks to deport a non-citizen member of a family residing within their territory or to deny entry to a non-citizen seeking to join family members residing in the territory.

Modes of movement

State interests have also converged at the global level to regulate modes of movements. Customary international law and key global treaties are relevant to, and impose obligations on states, and in some instances on other actors, in the context of movements by sea and air. These treaties and customary international law are particularly relevant in an environment and context where states, through bilateral agreements and other mechanisms, increasingly seek to prevent and deter movements. Arguably, lack of clarity under international law on certain critical issues has also created the space for such arrangements. Key treaties on maritime movements and international transport by air are: • 1982 United Nations Convention on the Law of Sea (UNCLOS); • 1979 International Convention on Maritime Search and Rescue (SAR); • 1974 International Convention for the Safety of Life at Sea (SOLAS); and • 1944 Convention on International Civil Aviation (also known as the “Chicago Convention”), in particular Annex 9. Movements across land or “green” borders, the other key mode of entry for migrants, tend to be controlled unilaterally or via bilateral agreements.

Overview of institutional architecture

These institutions are the International Organization for Migration (IOM), UNHCR and the International Labour Organization (ILO), the three international organizations with the most robust normative and/or operational mandates related to the global governance of migration, the Global Migration Group (GMG) and the Special Representative of the Secretary General (SRSG) on International Migration..

Since its founding in 1951, **IOM** has adapted significantly, expanding from a regional organization with primarily logistical responsibilities to a global one with a much broader set of objectives, especially in humanitarian engagement. Established through a state-led process outside the UN system and under a different name and without the underpinnings of a convention, IOM joined the UN as a related organization in September 2016. IOM's Constitution does not exhaustively define or limit the populations able to benefit from IOM's efforts and services in pursuance of its purposes and functions. This has allowed IOM to be entrepreneurial and flexible in responding to evolving political and humanitarian needs. Since 2001, IOM has convened an annual International Dialogue on Migration (IDM) as a key global forum that brings together relevant stakeholders to discuss emerging and complex migration governance themes. IOM's Migration Governance Framework, adopted in 2015, is particularly relevant to the themes of this chapter. The framework identifies essential elements for facilitating orderly, safe, regular and responsible migration (and mobility) of people through planned and well-managed migration policies. It articulates three principles: (1) adherence to international standards and fulfilment of migrants' rights; (2) formulation of policy using evidence and a whole-of-government approach; and (3) engagement with partners to address migration and related issues; and three objectives: (1) advance the socioeconomic well-being of migrants and society; (2) effectively address the mobility dimensions of crises; and (3) ensure that migration takes place in a safe, orderly and dignified manner.

Established as a temporary regionally focused organization tasked to provide legal protection, over time in the context of evolving political and mobility landscapes and humanitarian exigencies, **UNHCR**'s responsibilities and operations have adapted and expanded significantly. It is the primary global institution responsible for protection and assistance to refugees, asylum seekers and stateless persons. Under the Refugee Convention, states undertake to cooperate with UNHCR in the exercise of its functions, particularly to facilitate UNHCR's specific duty to supervise the Convention's application. In this sense, UNHCR is the "guardian" of the Refugee Convention and promotes and monitors implementation and compliance. UNHCR's mandate and functions are set out in its 1950 Statute; its core mandate is to provide international protection and seek permanent solutions for refugees. The Statute also provides for UNHCR's mandate and activities to evolve, based on instructions and policy directives from the GA and the UN Economic and Social Council (ECOSOC). UNHCR also convenes agenda-setting global consultations, hosts the annual High Commissioner's Dialogue on key protection challenges and publishes Guidelines on International Protection to clarify the application of the Convention. Its Executive Committee, which is comprised of 101 Member States, is "the only specialized multilateral forum at the global level responsible for contributing to the development of international standards relating to refugee protection."

The **ILO**'s operational role is much narrower than either of the other two organizations, but it continues to play an important normative function. In addition to its conventions, the ILO's non-binding Multilateral Framework on Labour Migration, adopted in 2006, and developed in the context of the ILO's general commitment to decent work, represents consensus on the part of the three sets of actors that make up the ILO's governing structure: governments, employers and trade unions. Its aim is to assist states "in implementing more effective policies on labour migration, including on rights, employment and protection of migrant workers." Operationally, the ILO supports programmes to enhance social protection of migrants, such as the negotiation of agreements that allow portability of benefits; prevent human trafficking; improve migrant labour recruitment practices; enhance skills recognition of migrants; support reintegration of migrants; and protect domestic workers. In contrast to UNHCR and IOM, migration is one among many priorities within the ILO.

Beyond these three key UN agencies, a whole host of other institutional actors and mechanisms are relevant to the governance of migration at the global level. In recognition of the complexity of the institutional landscape, the **GMG** was established to promote greater cooperation and coordination. It is comprised of 22 entities that meet regularly at heads of agency and working levels. In its terms of reference, the GMG identifies establishing comprehensive and coherent institutional responses to international migration and working to ensure full respect for rights of international migrants, including protection to vulnerable migrants, among its key priorities.

A final important actor is the **SRSO** on International Migration. The office, established in 2006 in the leadup to the UNHLD, supports and advises the Secretary-General in promoting and advocating the UN agenda on international migration and provides policy advice and coordinates the engagement of UN entities on migration-related issues. The office has led efforts to foster international cooperation, including initiatives on specific issues such as migrants affected by crises and will coordinate the work to implement the New York Declaration.

During the twenty-first century, there have been recurrent efforts to improve global migration governance through formal UN mechanisms as well as through informal state-led mechanisms. The three sets of such activities are: (1) dialogues and consultative processes to build confidence and consensus among states; (2) mini-multilateral normative initiatives to enhance protection of migrants; and (3) efforts to ensure that migrants are included in decision-making on other, related global issues.

Conclusion

Global governance in the migration area still lags the systems in place to manage the international flow of capital and goods. Migration governance more generally also lacks the strong normative bases that guide responses to refugees and UNHCR's activities. Yet, even here, there has been progress in gaining universal recognition that the rights and safety of migrants must be at the centre of any actions taken to manage movements of people across international borders. Significantly, states affirmed in the New York Declaration that they “will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders” and that their “response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.” Equally salient, the Declaration emphasized the benefits, not just the costs of international migration, and the important contributions that migrants make to their countries of origin and destination.

International migration is an important global issue that requires a more effective system of global governance. States have demonstrated willingness during the past decade, since the first HLD and establishment of the GFMD, to explore ways to enhance their cooperation both within and outside of the UN. At the same time, international organizations charged with helping states manage the movement of people and protect their rights have also shown greater willingness to cooperate among themselves and with states. The entry of IOM into the UN family is but the latest manifestation. Nonetheless, barriers to global migration governance abound and will grow if states turn inward and xenophobia is not addressed. Countering these forces will be difficult but not impossible. The step-by-step process of consultation, cooperation and confidence-building that has taken place to date has shown that progress can occur, albeit in incremental ways. It remains the most promising path towards global migration governance.

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