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# **Migration Governance in the UN: What is the Global Compact and What does it mean?**

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### *Introduction*

On 19 September 2016, the UN General Assembly, set in motion a process to develop a Global Compact for safe, orderly and regular migration, and separately a Global Compact on refugees The New York Declaration for Refugees and Migrants ‘the Declaration’<sup>1</sup> is a response to the growing global phenomenon of large movements of refugees and migrants. Safe, orderly and regular migration is stated as a benefit and opportunity: the term is repeated over and over in the Declaration and the documents around it. The UN’s 2030 Agenda for Sustainable Development,<sup>2</sup> adopted in 2015, was considered so central as to merit immediate reference – the purpose being to recognize the positive contribution of migrants in inclusive growth and sustainable development.

In adopting the Declaration, member states reaffirmed the purposes and principles of the UN Charter, the Universal Declaration of Human Rights and the core international human rights treaties in the specific context of refugees and migrants. Full respect for international law, international human rights law and where applicable international humanitarian law was also reaffirmed. The shared responsibility of the international community to manage large movements of refugees and migrants was acknowledged. The Declaration commits states to protect the safety, dignity, human rights and fundamental freedoms of all migrants regardless of their migratory status and to cooperate to facilitate safe, orderly and regular migration (the key term), including return and readmission, taking into account national legislation. Member states committed to strengthening global governance of migration and in this regard welcome the agreement to bring the International Organization for Migration (IOM) into a closer legal and working relationship with the UN as a ‘related agency’.<sup>3</sup> The IOM is referred to as ‘being regarded by its Member States as the global lead agency’ on migration. The objective of the Compact, according to the Declaration, is to assist and protect migrants more comprehensively, help states to address migration issues and promote better coherence between migration and related policies.

The Declaration represents a momentous step for the UN system. In most policy fields which involve movements across borders, such as climate change, international trade, finance and communicable diseases, states have developed institutionalised co-operation, primarily through the UN. But as yet no formal or coherent framework has been developed by the UN within which states’ responses to international migration should be framed.<sup>4</sup> This is because the UN has long had difficulty finding sufficient political

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<sup>1</sup> A/71/L.1

<sup>2</sup> Resolution 217/A (III)

<sup>3</sup> Resolution 70/296.

<sup>4</sup> Alexander Betts, ‘Introduction: Global Migration Governance’, in *Global Migration Governance*, ed A. Betts, OUP, 2011, pp 1 – 29.

consensus among its member states to take action in the field of migration. However, a number of steps which contribute to international migration governance have been taken in the last 20 years.<sup>5</sup>

The UN Convention on Migrant Workers adopted in 1990 sets out the basic rights which all migrants should enjoy.<sup>6</sup> Although it remains unpopular among states of destination in the global ‘north’,<sup>7</sup> it has, however, been ratified by states which have become destinations for substantial numbers of migrants such as Mexico and Turkey. The issue of smuggling and trafficking of human beings was dealt with as a matter of international criminal law in two protocols to the UN Convention against Transnational Organised Crime 2000.<sup>8</sup> In 2005 the then Secretary General, Kofi Anan, was unable to garner sufficient support for a global conference on migration, and instead invited a Global Commission on International Migration to examine the issue of migration outside the UN. In 2006, the General Assembly held its first High Level Panel Meeting on Migration. Progress was made on common approaches to migration in the field of development inside and outside the UN. In particular, an inter governmental Global Forum on Migration and Development was created in 2007, outside the UN, to address migration through the lens of development.<sup>9</sup> Following one of the recommendations of the Global Commission, the Global Migration Group was established to bring together those UN agencies and bodies with a migration interest to share and exchange information and knowledge on the subject.<sup>10</sup>

A mandate of Special Rapporteur on the Human Rights of Migrants was created in 1999 by the UN Commission on Human Rights.<sup>11</sup> The mandate’s first duty is to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation. Thus the issue of state categorisation of

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<sup>5</sup> See *Migration & Human Rights: improving human rights based governance of international migration*, OHCHR, 2011.

<sup>6</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, Part III, available at: <http://www.refworld.org/docid/3ae6b3980.html> [accessed 23 December 2016]

<sup>7</sup> Mainly, according to commentators because it protects the rights of irregularly present migrant workers. See generally, *Migration and Human Rights, The United Nations Convention on Migrant Workers' Rights*, Eds. De Guchteneire, P; Pecoud, A & Cholewinski, R., Cambridge University Press, 2008)

<sup>8</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html> [accessed 23 December 2016]

<sup>9</sup> It is a voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes.

<sup>10</sup> Included were ILO, OHCHR, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UNU,WHO, the World Bank, and – from outside the UN - IOM

<sup>11</sup> Resolution 1999/44, extended through resolutions 2002/62 and 2005/47 and subsequently by the Human Rights Council by resolutions 8/10, 17/12 and 26/19, each for a period of three years.

people as ‘regular’ or ‘irregular’ was firmly on the table. The role of the Special Rapporteur took time to develop; since the appointment of Professor Francois Crepeau in 2011, its visibility and impact has come into its own. Starting around 2002, Treaty Bodies separately confirmed that all migrants, regardless of legal status, are protected under the core human rights treaties.

In a second innovation, the New York Declaration builds on the structural link which had been created between the IOM and the UN in July 2016; for the first time the UN would associate a migration organisation, as a related agency. The non-normative mandate of IOM would be a source of tension. This tension will undoubtedly need to be examined by policy makers and academics as the negotiations towards the Compact take shape.

### *The New York Declaration*

One of the most striking aspects of the New York Declaration is just how human rights oriented it is. The first of the commitments set out regarding migrants is the protection of the safety, dignity, human rights and fundamental freedoms of all migrants irrespective of their migratory status. This is a most welcome acknowledgement of the normative, human rights framework within which the negotiations should be conducted. Although it has taken the UN quite a while to address directly the issue of migration, placing it immediately in a human rights framework is very important. This commitment is not unrelated to the long and gradual engagement with the issue of migration by, and pressure from, a number of UN agencies and bodies which have become deeply engaged in the protection of migrants (and refugees) such as the UNHCR, OHCHR and the ILO’s specialized department on migrant workers’ rights.

The second commitment of the Declaration is to safeguard the rights of, protect the interests of, and assist migrant communities abroad, including through consular protection, assistance and cooperation in accordance with international law. This is, of course, a reference to the Vienna Convention on Consular Relations of 1963 which sets out the rights of consular authorities, and the duties of states vis-à-vis those authorities, to protect their citizens abroad. By setting this as the second migration commitment, the Declaration reminds states and readers alike that every migrant is legally the citizen of some country (except for the stateless who are a small minority). Although the right of a country of citizenship to provide consular protection to its nationals abroad is legally well established, much less attention has been given to developing a wider role for consuls in the protection of migrants’ human rights, to reflect international human rights law which post-dates the Vienna Convention. In deciding a series of cases involving migrants on death row, the ICJ addressed the duty<sup>12</sup> to notify a state of nationality when one of its nationals was arrested, but did not characterise notification as a human right or deal with wider human rights issues.<sup>13</sup>

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<sup>12</sup> Vienna Convention on Consular Relations.

<sup>13</sup> *LaGrand Case (Germany v. United States of America)*, International Court of Justice (ICJ), 27 June 2001, available at: <http://www.refworld.org/docid/3f2927934.html> [accessed 21 December 2016]. In this case the International Court of Justice found that the German authorities had a right to provide consular assistance to the LeGrand brothers who were German nationals awaiting execution following a court order. This judgment was followed by *Avena and Other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice

A number of specific initiatives are referred to in the Declaration including: (1) Migrants in Countries in Crisis, an IOM initiative of 2014 involving the Secretary General's Special Representative for International Migration (Sir Peter Sutherland, the Special Representative) and the Intergovernmental Consultations on Migration, Asylum, and Refugees; (2) the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (based on the outcome of the Nansen Conference on Climate Change and Displacement in Oslo, June 2011) and (3) the Global Migration Group<sup>14</sup>

The Declaration commits states only to 'consider developing' non-binding principles and voluntary guidelines consistent with international law on the treatment of migrants in vulnerable situations who are not refugees but who need assistance. This is to be a state-led process which will complement national efforts to protect and assist migrants. The relevant stakeholders specifically referred to regarding the process are: the Special Representative, IOM, and the Office of the United Nations High Commissioner for Human Rights OHCHR). Other (unspecified) relevant UN system entities are to be involved. The objective of 'considering' establishing non-binding principles and voluntary guidelines may seem rather un-ambitious for such a grand project. It also seems somewhat out of step with the Declaration's commitment to safeguard the safety, dignity and human rights of all migrants. As will be examined below, there is already a substantial body of UN treaty law and interpretation by the Treaty Bodies, and its application by special rapporteurs, which provides a solid basis in international law for principles of a more binding nature, and for guidelines, which reflect existing legal obligations for states.

The Compact is to build on existing bilateral, regional and global cooperation and partnership mechanisms which facilitate migration in accordance with the 2030 Development Agenda. Cooperation with countries of origin, transit and destination is planned, including regional consultative processes, international organisations (with specific reference to the Red Cross and Crescent Movement), regional economic organisations, local government authorities, the private sector, labour unions, civil society and migrant and diaspora groups. Specific emphasis is placed on the role of local authorities.

As mentioned above, the UN is not exactly a novice in the migration field but the events specifically referred to in the Declaration are selective, perhaps reflecting political sensitivities of member states. It refers to the General Assembly's first 2003<sup>15</sup> and second

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(ICJ), 31 March 2004, available at: <http://www.refworld.org/docid/414ad8af4.html> [accessed 21 December 2016]; see Mexico's argument, paras 30 & 124.

<sup>14</sup> Established in 2006, this UN inter-agency group brings together heads of 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 – see above regarding its membership).

2014<sup>16</sup> resolutions establishing the High-level Dialogue on International Migration and Development. The purpose of the Dialogue was to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize its development benefits and minimize its negative impacts. Additionally, the High-level Dialogue was to have a strong focus on policy issues, including achieving the Millennium Development Goals.<sup>17</sup> The Declaration also acknowledges the valuable contribution of the Global Forum on Migration and Development,<sup>18</sup>

The Declaration makes it clear that expulsion (now frequently called 'return') is a central part of the project but must be safe, orderly and dignified in manner and preferably voluntary: the key phrase - safe, orderly and regular - changes here to safe orderly and dignified with no specific comment on why or what difference is intended by the different expressions). This is, according to the Declaration, 'an important element of international cooperation on migration'.<sup>19</sup> Return must be consistent with the international human rights law and refugee law principle of non-refoulement;<sup>20</sup> to this end, the Declaration calls for existing readmission agreements to be fully implemented.<sup>21</sup>

Thus the Declaration provides the basis for a process of intergovernmental negotiations to lead to the adoption of a Global Compact for safe, orderly and regular migration at an international conference in 2018. The President of the General Assembly is to make the arrangements, set timelines etc for the process (set out in Annex II of the Declaration).

### *Objective of the Global Compact*

The objective of the Global Compact is to agree on principles, commitments and understandings between UN states regarding all dimensions of international migration. It is intended to create a framework for comprehensive international cooperation on the subject of migration and mobility (both are undefined and undifferentiated). It will deal

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<sup>16</sup> UN General Assembly, *Declaration of the High-Level Dialogue on International Migration and Development : resolution / adopted by the General Assembly*, 21 January 2014, A/RES/68/4 , available at: <http://www.refworld.org/docid/5321b9694.html> [accessed 20 December 2016]

<sup>17</sup> <http://www.un.org/esa/population/migration/hld/> accessed 20 December 2016.

<sup>18</sup> <http://www.gfmd.org/process> Accessed 20 December 2016.

<sup>19</sup> Para 58.

<sup>20</sup> The prohibition on sending someone to a country where he or she has a well founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion or where there is a real risk of torture, inhuman or degrading treatment or punishment or force disappearance. See also the Human Rights Committee General Comment 31, para 12. 'Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed' .

<sup>21</sup> For a critique see Carrera, Sergio. "The Implementation Challenges and Dynamics of EURAs." *Implementation of EU Readmission Agreements*. Springer International Publishing, 2016. 37-61.

with all aspects of international migration including humanitarian, developmental, human rights-related and other.<sup>22</sup>

In order to achieve its objective, the Declaration acknowledges the important contributions made by migrants and migration to development and the complexity of the relationship between migration and development. Safe, orderly and regular migration which respects human rights and humane treatment of migrants is the solution sought. The importance of international, regional and bilateral cooperation is stressed. Further, the role of poverty, underdevelopment, lack of opportunities, poor governance and environmental factors are specified as drivers of migration. To these factors are added international economic imbalances, poverty and environmental degradation, the absence of peace and security and lack of respect for human rights.

Framing migration in a development logic is potentially a positive aspect. The 2030 Development Agenda provides an excellent opportunity to mainstream UN engagement in the field of migration. However, the choice to use a vehicle of development to press forward a migration dimension of UN work does raise some issues.<sup>23</sup>

The Declaration's Annex II sets out, at para 8, the main lines of what could be included in the Global Compact without limiting it to a prescriptive list. These elements include: (1) international migration as a multidimensional reality in the context of the 2030 Agenda; (2) migration as an opportunity for migrants; (3) addressing drivers of migration through development, poverty eradication and conflict prevention and resolution; (4) migrants as contributors to sustainable development; (5) facilitation of safe, orderly, regular and responsible<sup>24</sup> migration and mobility through planned and well managed migration policies including safe, regular pathways for migration; (6) improving migration governance; (7) the impact of migration on countries of origin; (8) remittances; (9) effective human rights protection for migrants; (10) border control cooperation; (11) combating trafficking; (12) identifying trafficking victims; (13) reduction of irregular migration; (14) migrants in countries in crisis; (15) migrant inclusion in host states; (16) regularisation; (17) protection of labour rights and promotion of labour mobility including circular migration; (18) migrants' responsibilities towards host countries; (19) maintaining diaspora links with countries of origin; (20) combating racism and

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<sup>22</sup> It is to be guided by the 2030 Development Agenda and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development. UN Resolution 68/4 adopted in 2013.

<sup>23</sup> It is unclear just how much migration is, properly speaking, development related. The development setting means that the focus is on the migration of poor people from countries where they are poor and countries which are poor, in comparison with others, to countries which are richer where the people on the move plan to become richer. Nonetheless, there is a pragmatic justification for this focus as migration by people who are wealthy in economic or human capital terms tends to raise many fewer human rights issues than migration by people poor in economic and human capital terms. The highly skilled migrant is much less likely to be categorised by state authorities as irregularly present, detained or expelled. There may be issues about equal treatment in working conditions and wages which nonetheless need to be addressed but the more profound human rights abuses are less in evidence.

<sup>24</sup> Another new word added to the standard phrase here for the first time.

intolerance against migrants; (21) better data on migration;<sup>25</sup> (22) recognition of qualifications; (23) cooperation at national, regional and international levels.

### *The Process*

Negotiations towards the Global Compact will start in 2017 and finish with an international conference in 2018 where the Compact will be presented for adoption by the UN General Assembly. It will be followed by a Third High Level Dialogue in New York no later than 2019.<sup>26</sup> The General Assembly's President has appointed two co-facilitators (representatives of Switzerland and Mexico) to lead the consultations with states and determine the modalities, time lines and other preparatory work. Specific mention is made of integration of Geneva-based expertise and UN agencies. The General Assembly foresaw that support would be provided by the UN Secretariat and the IOM which would jointly service the negotiations: the UN would provide capacity and support, and IOM would provide technical and policy expertise. The Special Representative was charged with the role of coordinating contributions from the Global Forum and the Global Migration Group. The Resolution anticipates that the ILO, UN Office of Drugs and Crime (UNODC) the UN Development Programme, the UNHCHR and other unspecified entities with significant mandates and expertise relating to migration would contribute to the process. Regional consultations are also foreseen as well as contributions by civil society and private sector, diaspora and migrant organisations.

### *Coming in from the Cold: IOM and the UN*

The IOM was established in 1951 and is seen by its members as the leading inter-governmental organization in the field of migration. It works closely with governmental, intergovernmental and non-governmental partners and is answerable to the member states. It currently has 166 member states, 8 observer status states and offices in over 100 countries – giving it a very substantial presence on the ground. According to its Statute, IOM is dedicated to promoting humane and orderly migration by providing services and advice to governments and migrants. Its mandate includes ensuring orderly and humane migration management, promoting international cooperation on migration issues and assisting in the search for practical solutions to migration problems. It also provides humanitarian assistance to migrants in need, sometimes including refugees and internally displaced people – an aspect which has led to friction with UNCHR. This tension was resolved (temporarily at least) in the Global Compact by UNHCR arranging for the UN to adopt commitments for refugees which will result in a comprehensive refugee response led by UNHCR (para 69 Declaration).

The substantial role planned for the IOM in the migration Global Compact process follows an agreement between the UN and IOM that the latter would become a 'related' agency of the UN.<sup>27</sup> The status of related agency is a fairly arcane area which has been little examined.<sup>28</sup> The UN also has working agreements with a number of international

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<sup>25</sup> This matter of migration data is a minefield in itself which begs elucidation.

<sup>26</sup> Resolution 69/229.

<sup>27</sup> UN Resolution 70/296.

<sup>28</sup> The UN Charter does not mention related agencies. Article 57 only states that:

'1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social,

organizations such as the World Trade Organization and the International Atomic Energy Agency.

The Resolution containing the agreement between IOM and the UN makes reference only to 'the relevant provisions of the Charter' and a number of preceding Resolutions as the foundation for the agreement. The purpose of the agreement is to define the terms on which the UN and IOM are brought into relationship with one another. The objective is to strengthen cooperation and enhance ability to fulfil the respective mandates in the interest of migrants and the member states. All IOM's member states are members of the UN but the converse is not the case. The UN recognises the IOM as an organisation with a global leading role in the field of migration and notes that the IOM's Council has designated the IOM as 'the' leading global agency on migration. The UN recognises the IOM's role as an essential contributor in the field of human mobility (undefined), the protection of migrants, operational activities related to migrants, displaced persons and migration-affected communities including resettlement and return. It notes also the role of IOM in mainstreaming migration in development.

The UN specifically recognises that the IOM is and will function as an independent, autonomous and non-normative international organization including in its working relationship with the UN (para 3). In return, the IOM recognises the UN's responsibilities under the Charter and the mandates and responsibilities of other UN organizations, organs and agencies in the field of migration. The recognition of IOM as a 'non-normative' part of the UN system has led to comment both within and outside the UN system. The UN is a standard setting organization as regards its Charter and normative in respect of the human rights obligations which it has developed and promulgated. In order to resolve some of these concerns, the agreement states that the IOM will undertake to conduct its activities in accordance with the Purposes and Principles of the UN Charter and with due regard for the policies of the UN and other relevant instruments in international migration, refugee and human rights fields.

The cooperation between the UN and IOM is intended to result in mutual objectives being achieved without duplication. Arrangement is made for some participation of UN and IOM executives in relevant governance bodies of the other for information purposes. Exchange of information is planned and cooperation between the secretariats to develop a close working relationship. Under a separate arrangement IOM will make a financial contribution to the UN.

For the moment, the new relationship between the IOM and UN appears to be dominated by the Global Compact process. However, other suggestions have been put on the table such as that of the UN Special Rapporteur on the Human Rights of Migrants who proposed that the IOM might have a central role in the application of the UN Convention on the Rights of All Migrant Workers and their Families 1990: 'This little ratified Convention would benefit from an institutional champion able to muster adhesion to its principles.

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cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.'

Such a responsibility would contribute to strengthening the human rights culture within IOM and provide it with an appropriate normative tool to measure its action and to negotiate projects with states. IOM would thus complement the important work of the United Nations Committee on Migrant Workers, in the same way that UNICEF and the Committee on the rights of the child are complementing each other in the implementation of the Convention on the rights of the child.<sup>29</sup>

The IOM, on the other hand has long cherished its independence from the UN system. According to IOM's founding document, its objectives are:

- (a) to make arrangements for the organized transfer of migrants, for whom existing facilities are inadequate or who would not otherwise be able to move without special assistance, to countries offering opportunities for orderly migration;
- (b) to concern itself with the organized transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them;
- (c) to provide, at the request of and in agreement with the States concerned, migration services such as recruitment, selection, processing, language training, orientation activities, medical examination, placement, activities facilitating reception and integration, advisory services on migration questions, and other assistance as is in accord with the aims of the IOM;
- (d) to provide similar services as requested by states, or in cooperation with other interested international organizations, for voluntary return migration, including voluntary repatriation;
- (e) to provide a forum to states as well as international and other organizations for the exchange of views and experiences, and the promotion of cooperation and coordination of efforts on international migration issues, including studies on such issues in order to develop practical solutions.

In order to carry out its functions the IOM is instructed to cooperate with international organisations, states and non-governmental organisations concerned with migration, (and refugees) to facilitate coordination of international activities. It recognises 'that control of standards of admission and the number of immigrants to be admitted are matters within the domestic jurisdiction of States, and, in carrying out its functions, shall conform to the laws, regulations and policies of the States concerned'. The objectives and how they should be achieved, as set out in the IOM constitution, are indeed 'non-normative', and in contrast to the gradual development of a human rights law dimension to international migration within UN agencies over the past two decades.<sup>30</sup>

Two points can usefully be made. First, the IOM Constitution makes no reference either to human rights, or to international – as distinct from national – law. Second, as an inter governmental organisation outside the UN, IOM was unaffected by the measures taken within the UN after 1997 to integrate human rights in all its activities;<sup>31</sup> UN agencies such

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<sup>29</sup> Report to General Assembly A/71/40767, para 120.

<sup>30</sup> In September 2015, IOM's Council adopted a Policy on Protection: C/106/INF/9.

<sup>31</sup> Starting with the Secretary- General's reform programme of 1997, which designated the issue of human rights as cutting across each of the four substantive fields of the Secretariat's work programme (peace and security, economic and social affairs, development cooperation, and humanitarian affairs).

as UNICEF, FAO and WHO, which had not previously seen human rights as central to their work, began to mainstream human rights in their operations.

According to the report of the first special session of the IOM Council 30 June 2016 (13 September 2016), the IOM Director General noted that he had been mandated in 2015 to approach the UN with a view to improving the legal basis of the relationship between IOM and the UN based on specific essential elements (para 12). In presenting a draft to the Council, the Director General brought to its attention that (1) the IOM's position as global lead organization for migration must be acknowledged, (2) it would remain an intergovernmental, non-normative organization with its own constitution and governance system (3) maintain its predominantly 'projectised'<sup>32</sup> budgetary model and decentralized organisational structure and (4) as the Director General saw it, maintain its essential characteristics of responsiveness, efficiency, cost-effectiveness, independence and flexibility. However, while the IOM/UN relationship was approved there were dissenting voices. From the documents it appears that some of the IOM representatives considered that the agreement did not properly acknowledge IOM's lead role in the field of migration and that it left IOM the weaker partner in the relationship. They considered that this would be a difficult relationship in any event. However, other representatives would have wished for stronger wording on IOM's role to promote and protect the human rights of migrants. At least one representative worried that IOM's independence was insufficiently safeguarded in the agreement with the UN.<sup>33</sup> Nonetheless, the IOM Council agreed the signature of the agreement at the end of June 2016.<sup>34</sup> It also adopted the necessary resolution on the issue of funding.<sup>35</sup>

### *The UN Actors on Migration*

Within the UN there are a number of bodies and agencies which have substantial experience and knowledge about human rights and migration.<sup>36</sup> Among the longest standing is the ILO with its migrant workers department. The choice of the ILO Committee of Experts to dedicate its 2016 General Survey to the issue of state compliance with the ILO's migrant worker instruments (Conventions Nos 97 and 143 and Recommendations Nos 86 and 151) is significant. The wealth of information which has been produced by that report on the circumstances of migrant workers should be of great value to the New

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<sup>32</sup> This is a reference to the financial model of the IOM which depends to a substantial degree on finance provided mainly from governmental sources for specific projects rather than core funding. Its entry into the UN may now encourage states to provide core funding.

<sup>33</sup> IOM C/Sp/1/14/Rev.1

<sup>34</sup> IOM Resolution 1317, C/Sp/1/RES/1317.

<sup>35</sup> IOM Resolution 1318 C/Sp/1/RES/1318: 'Decides that the additional core funding needs will be met through an increase in the level of the Administrative Part of the Budget of 2,400,000 Swiss francs for the budget year 2017. This budget increase will fund the cost-sharing arrangements with the United Nations System Chief Executives Board for Coordination and the United Nations Development Group, as well as one staff position both in New York and Geneva, and related office support costs, to ensure the Organization's active participation in the relevant cooperation and coordination bodies and its ability to influence decision-making, thus strengthening its work globally.'

<sup>36</sup> *Migration and Human Rights*, OHCHR, 2011, supra, note 5.

York process.<sup>37</sup> Similarly, OHCHR has been very active in the field of human rights and migration. Among the most influential initiatives has been its Recommended Principles and Guidelines on Human Rights at International Borders issued in 2014 and followed up in 2016.<sup>38</sup> The Global Migration Group, drawing on the expertise and operational experience of its members from all UN sectors, has developed rights-based policies in a number of important areas.

### *The Process of the Global Compact*

The Global Compact will be drafted through a process of intergovernmental negotiations, beginning in early 2017. They are to be concluded by an international conference on international migration in 2018 at which the Compact will be presented to the UN General Assembly for adoption. At the time of writing there are a number of documents which are entitled Zero Draft(s) regarding the modalities for the intergovernmental negotiations of the Global Compact for safe, orderly and regular migration. The latest Zero Draft to which we have had access, dated 9 December 2016, was circulated by the Permanent Representatives of Mexico<sup>39</sup> and Switzerland<sup>40</sup> (the co-facilitators of the process) in advance of a meeting held in Geneva on 13 December intended to assist states in responding to requests for clarification. Consultations on the Zero Draft began on 16 December 2016. The draft was circulated by the President of the General Assembly to all Permanent Representatives and Permanent Observers of the UN.

The Zero Draft clarifies that the two processes, one for a Compact on migration the other for a Compact on refugees, are separate and distinct but may be complementary. The separation of the two subject matters appears to be maintained primarily by the legal context – there exist numerous conventions which have been widely ratified protecting a refugee's (enlarged to include torture victim or person at risk of extrajudicial disappearance) right to cross borders even irregularly and to be within the territory of a state of refuge.<sup>41</sup> For migrants there is a single convention which specifically protects migrants' rights: the ICMW,<sup>42</sup> has not been popular with states of destination of migrants except for a handful of states like Mexico and Turkey which have become destination states after signature of the convention. Although they do not refer specifically

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<sup>37</sup> [http://www.ilo.ch/global/standards/WCMS\\_453917/lang--en/index.htm](http://www.ilo.ch/global/standards/WCMS_453917/lang--en/index.htm) accessed 21 December 2016.

<sup>38</sup> <http://www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx> accessed 21 December 2016.

<sup>39</sup> Juan José Gómez Camacho.

<sup>40</sup> Jürg Lauber.

<sup>41</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 22 December 2016]; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 22 December 2016]; UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html> [accessed 22 December 2016].

<sup>42</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <http://www.refworld.org/docid/3ae6b3980.html> [accessed 22 December 2016]

to migrants, all UN human rights conventions protect migrants in so far as they apply to everyone irrespective of citizenship or migratory status, something which is often overlooked by some governments (see our comments above on General Comments adopted by the Treaty Bodies expressly including migrants irrespective of their migratory status).

The Zero Draft reiterates the objectives of the Global Compact as set out in the New York Declaration: it should contain principles, commitments and understandings regarding all dimensions of international migration. This means that there are likely to be three layers of engagement with differing legal content: first there will be principles which a number of states hold are not legal binding but can be used to interpret legislation; ‘actionable’ commitments which normally are legally binding (though bearing in mind that international commitments have different impacts according to national constitutions) and understandings which seem more likely to be aspirational in nature. Of course documents which were aspirational when drafted can gain legal effect, as has happened through the adoption of treaties to implement the UN Declaration of Human Rights.<sup>43</sup> Further, the process is to be guided by the 2030 Development Agenda, the Addis Ababa Agenda (financing for development), and the Declaration of the High-level Dialogue on International Migration and Development 2013.

The Draft further states that the conference will take place in New York, will be held at the highest possible political levels (including Heads of State or Government), and the result will be a negotiated outcome which will have the title ‘global compact for safe, orderly and regular migration’ in accordance with Annex II of the New York Declaration (see above). There will be summaries of the plenaries and other deliberations of the conference which will be included in the conference report. The outcomes should include as main components actionable commitments, means of implementation and a framework for follow-up and review of implementation. The references to implementation, follow-up and review may signpost a role for IOM, and could lead towards greater long term financial stability for the agency. What may be particularly important in this regard is to keep a close eye on how human rights commitments are addressed to ensure that the implementation, follow-up and review of the actionable commitments do not escape into the territory of the ‘non-normative’. This will be essential not least to the review of implementation which will need to refer to the protection of the human rights of all people (including migrants irrespective of their migratory status).

#### *Who gets to participate?*

According to the Zero Draft, access to the preparatory process and conference will be limited to UN member states and specialised agencies. Intergovernmental organisations and other entities which have received a standing invitation to participate as observers in the work of the General Assembly are also included. Similarly organisations and bodies of the UN can participate. Although the limits of this list are not clear, the process of the consultations to be carried out must be open, transparent and inclusive.

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<sup>43</sup> See also Baldinger, Dana. *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* Martinus Nijhoff Publishing, 2015.

All relevant stakeholders including civil society, the private sector, academic institutions, parliaments, diaspora communities and migrant organisations are to have the possibility of effective participation in the process subject to three conditions: (1) non-governmental organisations which have consultative status with the Economic and Social Council must register with the Secretariat; (2) the President of the General Assembly is to draw up a list of other relevant representatives of relevant non-governmental organisations, civil society organisations, academic institutions, the private sector, diaspora communities and migrant organisations who may attend and participate (this process is to be completed by April 2017); (3) the President is also called upon to draw up another list of potential participants who will be allowed to attend and participate in the conference taking into account the principles of transparency, equitable geographic representation and meaningful participation by women (to be completed by April 2018).

The process of choosing participants is to take into account the 'different realities' and ensure effective contributions from stakeholders. This is to include sharing best practices and concrete policies including national multi-stakeholder consultations and regional platforms. The issue here relates to the criteria according to which practices are classified as best. There is an inherent normativity in such classification which, within the UN system, must be founded in the human rights conventions.

The non-formal state representatives, international nongovernmental organisations, stakeholders (ie the non-governmental, private, academic, parliaments and local authorities etc sectors) are encouraged to participate through informal dialogues at the invitation of the co-facilitators. But the Draft reassures states that the intergovernmental nature of the negotiations will be fully respected. It would seem that there is some tension here regarding the mechanisms for recognition of legitimacy of different stakeholders in the process. While on the one hand, the New York Declaration acknowledges the importance for example of local authorities in migration, finding a meaningful way for such bodies to participate in the process is inevitably complicated. If central governments (represented by Foreign Ministries) have a monopoly over the process, this risks relegating other institutions of government (Parliaments, local authorities etc) to a subsidiary role.

#### *What will be the mechanisms of consultation?*

A series of informal thematic sessions are to be organised on the subjects set out at point 8 of Annex II of the Resolution (see above under Content of the Declaration) but not limited to them. From the rather unwieldy 27 topics, the Zero Draft reduces the main themes to five: (1) sustainable development: this reflects the centrality of development which has been the entry point through which the UN has been able to engage politically with migration; (2) human rights: this is paramount in light of the critical normative issues; social inclusion and anti-discrimination rules may provide a mechanism to engage with obligations under the International Covenant on Economic Social and Cultural Rights<sup>44</sup> (3) international cooperation and governance of migration: this subject will undoubtedly require serious engagement with regional mechanisms such as MERCOSUR, the Bali Process, the EU etc where the reality of governance is taking place; (4) climate

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<sup>44</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 22 December 2016]

change and environmental phenomena and crisis migration: climate change and its complex causal relationship to migration has been a subject of research for some time; environmental phenomena would include tsunamis, earthquakes, and flooding which may or may not have long term consequences in terms of international migration; (5) decent work and labour mobility: these are bread and butter issues of the ILO which has a substantial migration team and presence (see above).

The nitty gritty of the thematic sessions is spelt out in detail in the Zero Draft. The sessions are to be for a maximum of 12 working days and have two or three expert panels each. Before each thematic session, inter-agency thematic briefs must be prepared and circulated. Exactly which agencies will be included in which thematic session is not indicated though some are more self evident than others such as the role of the ILO in thematic session (5). The co-facilitators are charged with preparing notes of the thematic sessions for general consumption. Member states are called upon to provide concrete recommendations and substantive inputs. Further, member states are called upon to make use of relevant global, regional and sub-regional processes and other existing migration related initiatives to contribute in the form of summaries and concrete recommendations to the preparatory meeting or the thematic sessions.

As part of Phase II (presumably everything referred to already was in Phase I which is not specifically signposted) the Zero Draft calls for a preparatory meeting of three days to be held by November 2017 chaired by the co-facilitators to take stock of the contributions from all stakeholders with the objective of setting the ground to move forward to the negotiation phase of the Compact. By the beginning of 2018 the inputs will have to be synthesised by the Secretary General and presented before Phase III commences. This Phase starts with an initial draft of the Compact prepared by the co-facilitators and presented no later than January 2018. The negotiations are set for three days each in March and April 2018 and five days each in May and June of that year. The possibility of further informal meetings with all stakeholders is acknowledged. Four days for such are set aside between April 2017 and May 2018. Finally, regarding financing, a voluntary trust fund is to be established for the preparation and conference to support all the relevant activities and states are encouraged to donate.

### *Conclusions*

A momentous change is occurring in the UN in respect of migration. First, from an issue to be avoided if possible or if not, approached with a long stick, it is now finding its political place in the UN system, primarily as an issue tied to development in which human rights play an integral role. Second, an inter-governmental migration agency, the IOM, which has no constitutional duty in respect of international human rights or refugee law, has been brought into the UN and must now carve out its role in a complex and highly contested field. Whether 2017 is politically a good time for this change to be occurring is another matter. However, it is worth noting that neither in the New York Declaration nor the follow up Zero Draft, is there any mention of security. Migration (and asylum) has rightly been separated from issues of national security and terrorism, at least for the moment. Instead migration has rightly been recognised as a normal and inevitable part of international cooperation and development for which systems of governance are required.

There are of course potential pitfalls in the New York process towards a Global Compact on migration. First and foremost is the impression provided both by the Declaration itself and the Zero Draft that the international community is coming to the matter of a Global Compact on Migration from a standing start. It is as if the Declaration, after making reference to the existing standards set within the UN, including and with specific reference to the human rights obligations of the member states, seeks to restart the clock at zero. This may well be the result of varying interests and struggles within the committees which drafted and negotiated the Declaration. It is clear that many member states are anxious to keep national control over migration and border control which are traditionally a central element of state sovereignty.

At the same time there are now more than two decades of UN standard setting in the field. These standard setting activities have been driven to a large extent by concerns regarding the protection of the international human rights of people on the move. One of the complicating factors regarding the development of UN human rights standards for migrants is they have come into existence in a fragmented framework, and are to be found in a number of treaties. Many UN Bodies and agencies have taken responsibility for different parts of the work. For example standard setting in respect of children on the move is by the UN Committee on Rights of the Child, work-related rights by the ILO, human rights in border controls by UNHCHR. There has been too little consolidation of the standards, both hard law and in the form of guidance and recommendations.

Before the negotiations towards the Global Compact move forward in a substantive manner it is critical that the negotiators are fully aware of the existing obligations applicable to states. It would be a grave error if the Compact process failed to build on the existing standards as a starting point. A subsequent review of outcomes in light of human rights obligations is never satisfactory in this type of negotiation.

At the same time the process creates opportunities for academics. One example is a review of the scope of consular protection – the oldest form of protection for migrants – in light of human rights treaties which have been adopted and ratified since the 1963 Vienna Convention on Consular Relation. States of nationality and states of migration now have duties, and migrants have rights, which go far beyond consular protection as it has been traditionally understood.

It is critical that academics pay attention to the unfolding events following the New York Resolution and engage with setting the framework for migration governance in the international community.

6 January 2017