

# What role for the EU in the UN negotiations on a Global Compact on Migration?

Elsbeth Guild and Stefanie Grant

## Abstract

In January 2017, the UN began international negotiations for a Global Compact on Migration, as called for in a General Assembly Resolution of 19 September 2016, called the New York Declaration. The document calls for substantial consultation with regional bodies and organisations and the participation of civil society in a transparent and open procedure. Notwithstanding the promise of transparency, there is no information concerning which bodies in the EU will participate in the process and how best to engage civil society. This paper sets out the background to the resolution, which calls for two compacts: one on migration and one on refugees (the second, led by the United Nations High Commissioner for Refugees, is outside the scope of this paper). It examines the political developments that have preceded the New York Declaration and the role of the International Organization for Migration (IOM), which became an UN-related organisation in July 2016. Two key issues are closely examined: i) existing UN migration norms, previously adopted mainly in the framework of human rights (conventions, General Comments of Treaty Bodies, Resolutions and Guidelines), that need to be at the heart of the Compact and ii) the central role allocated to the IOM in aiding the negotiation of the Global Compact. The agreement setting out the terms of the relationship between the IOM and the UN acknowledges and reiterates the former's status as a 'non-normative' body. This paper argues, however, that it is important that this status of the IOM does not become an obstacle to building the Global Compact based on the existing UN normative human rights framework.

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# What role for the EU in the UN negotiations on a Global Compact on Migration?

Elsbeth Guild and Stefanie Grant

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## 1. 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<sup>1</sup> is a response to the growing global phenomenon of large movements of refugees and migrants. The Declaration and its accompanying documents make repeated references to safe, orderly and regular migration as a benefit and an opportunity. 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 recognise the positive contribution of migrants to 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. It reaffirmed full respect for international law, international human rights law and, where applicable, international humanitarian law and acknowledged the shared responsibility of the international community to manage large movements of refugees and migrants. 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 strengthen global governance of migration and in this regard welcomed 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 "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 involving movements across borders, such as climate change, international trade, finance and communicable diseases, states have developed institutionalised cooperation, primarily through the UN. But no formal or coherent framework has been developed to date by the UN within

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

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

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

which states should frame their responses to international migration.<sup>4</sup> This is because the UN has had great difficulty in finding sufficient political consensus among its member states to take action in the field of migration. However, a number of steps have been taken in the last 20 years that contribute to international migration governance.<sup>5</sup>

The UN Convention on Migrant Workers adopted in 1990 sets out the basic rights that all migrants should enjoy.<sup>6</sup> Although it remains unpopular among states of destination in the global 'north',<sup>7</sup> the convention has been ratified by states that have become destinations for substantial numbers of migrants such as Mexico and Turkey. Smuggling and trafficking of human beings were treated as matters 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 Annan, 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 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 to the full and effective protection of the human rights of migrants, recognising the particular vulnerability of women, children and those undocumented or in an

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<sup>4</sup> Alexander Betts, "Introduction: Global Migration Governance", in A. Betts (ed.), *Global Migration Governance*, Oxford: OUP, 2011, pp 1-29.

<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, P. De Guchteneire, A. Pecoud and R. Cholewinski (eds), *Migration and Human Rights, The United Nations Convention on Migrant Workers' Rights*, Cambridge: 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.

irregular situation. Thus, the issue of state categorisation of 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 François 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 that 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.

## 2. The New York Declaration

One of the most striking aspects of the New York Declaration is its strong human rights orientation. 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 that have become deeply engaged in the protection of migrants (and refugees), such as the UNHCR, OHCHR and the ILO’s specialised 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 legal right of a country of citizenship to provide consular protection to its nationals abroad is 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 International Court of Justice (ICJ) addressed the duty<sup>12</sup> to notify a state if one of its nationals is 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

The Declaration refers to a number of specific initiatives, including: i) 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, ii) 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 iii) 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 include the Special Representative, the 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 unambitious 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 that 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

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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 (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.

of member states. It refers to the General Assembly's first 2003 and second 2014<sup>15</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>16</sup> The Declaration also acknowledges the valuable contribution of the Global Forum on Migration and Development.<sup>17</sup>

The Declaration makes it clear that expulsion (now frequently called 'return') is a central part of the project but it 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>18</sup> Return must be consistent with the international human rights law and refugee law principle of non-refoulement.<sup>19</sup> To this end, the Declaration calls for existing readmission agreements to be fully implemented.<sup>20</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 responsible for making arrangements, setting timelines, etc. for the process (set out in Annex II of the Declaration).

### 3. The 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 intends to create a framework for comprehensive international cooperation on the subject of

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<sup>15</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 ([www.refworld.org/docid/5321b9694.html](http://www.refworld.org/docid/5321b9694.html)) [accessed 20 December 2016].

<sup>16</sup> <http://www.un.org/esa/population/migration/hld/> [accessed 20 December 2016].

<sup>17</sup> <http://www.gfmd.org/process> [accessed 20 December 2016].

<sup>18</sup> Para 58.

<sup>19</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>20</sup> For a critique, see S. Carrera, "The Implementation Challenges and Dynamics of EURAs," in *Implementation of EU Readmission Agreements*, Springer International Publishing, 2016, pp 37-61.

migration and mobility (both are undefined and undifferentiated). It will deal with all aspects of international migration, including humanitarian, developmental, human-rights considerations, inter alia.<sup>21</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. It stresses the importance of international, regional and bilateral cooperation and further specifies the role of poverty, underdevelopment, lack of opportunities, poor governance and environmental factors 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>22</sup>

The Declaration's Annex II sets out, in 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>23</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 intolerance against migrants;

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<sup>21</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>22</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 that are poor, in comparison with others, to countries that 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 that should be addressed, but the more profound human rights abuses are less in evidence.

<sup>23</sup> Another new word added to the standard phrase here for the first time.



21) better data on migration;<sup>24</sup> 22) recognition of qualifications; and 23) cooperation at national, regional and international levels.

#### 4. 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>25</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) of 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.

#### 5. Coming in from the cold: The IOM and the UN

The IOM was established in 1951 and is seen by its members as the leading inter-governmental organisation 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, eight observer status states and offices in over 100 countries – giving it a very substantial presence on the ground. According to its statutes, the 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 that 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

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<sup>24</sup> This matter of migration data is a minefield in itself, which begs elucidation.

<sup>25</sup> Resolution 69/229.

UN.<sup>26</sup> The status of related agency is a fairly arcane area, which has been little examined.<sup>27</sup> The UN also has working agreements with a number of international organisations such as the World Trade Organization and the International Atomic Energy Agency.

The Resolution containing the agreement between the IOM and the UN makes reference only to “the relevant provisions of the Charter” and a number of preceding Resolutions such as the foundation for the agreement. The purpose of the agreement is to define the relationship between the UN and the IOM, with the aim of strengthening cooperation and enhancing their ability to fulfil their respective mandates in the interest of migrants and the member states. All IOM 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 the 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 organisation 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 organisations, organs and agencies in the field of migration. The recognition of the IOM as a ‘non-normative’ part of the UN system has led to comment both within and outside the UN system. According to its charter, the UN is a standards-setting organisation and is normative with respect to the human rights obligations 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.

Cooperation between the UN and the IOM aims to achieve mutual objectives without duplication of effort. Arrangements have been 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.

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<sup>26</sup> UN Resolution 70/296.

<sup>27</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, 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.

For the moment, the new relationship between the IOM and the UN appears to be dominated by the Global Compact process. Other suggestions have been put on the table, however, 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 adherence to its principles. 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>28</sup>

The IOM, on the other hand has long cherished its independence from the UN system. According to the 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; and
- (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

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<sup>28</sup> Report to General Assembly A/71/40767, para 120.

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>29</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, the IOM was unaffected by the measures taken within the UN after 1997 to integrate human rights in all its activities.<sup>30</sup> UN agencies such 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 the 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 organisation for migration must be acknowledged; 2) it would remain an intergovernmental, non-normative organisation with its own constitution and governance system; (3) it would maintain its predominantly 'projectised'<sup>31</sup> budgetary model and decentralised organisational structure; and (4) as the Director General saw it, it would maintain its essential characteristics of responsiveness, efficiency, cost-effectiveness, independence and flexibility. Although the IOM-UN relationship was approved, there were dissenting voices. From the documents circulated, it appears that some of the IOM representatives considered that the agreement did not properly acknowledge the IOM's lead role in the field of migration and that it left the IOM as 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 the IOM's role to promote and protect the human rights of migrants. At least one representative worried that the IOM's independence was insufficiently safeguarded in the

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<sup>29</sup> In September 2015, IOM's Council adopted a Policy on Protection: C/106/INF/9.

<sup>30</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).

<sup>31</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.

agreement with the UN.<sup>32</sup> Nonetheless, the IOM Council agreed to sign the agreement at the end of June 2016.<sup>33</sup> It also adopted the necessary resolution on the issue of funding.<sup>34</sup>

## 6. The UN actors on migration

Within the UN, there are a number of bodies and agencies with substantial experience and knowledge about human rights and migration.<sup>35</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 produced by that report on the circumstances of migrant workers should be of great value to the New York process.<sup>36</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>37</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.

## 7. 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 that 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>38</sup> and Switzerland<sup>39</sup> (the co-facilitators of the process) in advance of a meeting held in

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<sup>32</sup> IOM C/Sp/1/14/Rev.1

<sup>33</sup> IOM Resolution 1317, C/Sp/1/RES/1317.

<sup>34</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>35</sup> *Migration and Human Rights*, OHCHR, 2011, supra, note 5.

<sup>36</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>37</sup> <http://www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx> [accessed 21 December 2016].

<sup>38</sup> Juan José Gómez Camacho.

<sup>39</sup> Jürg Lauber.

Geneva on 13 December 2016 intended to assist states in responding to requests for clarification. Consultations on the Zero Draft began on 16 December 2016. The President of the General Assembly circulated the draft 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 subjects appears to be maintained primarily by the legal context – there exist numerous conventions that have been widely ratified protecting a refugee’s (enlarged to include torture victims or persons at risk of extrajudicial disappearance) right to cross borders even irregularly and to be within the territory of a state of refuge.<sup>40</sup> There is a single convention that specifically protects migrants’ rights: the ICMW.<sup>41</sup> It has not been popular with states of destination of migrants, except for a handful of states like Mexico and Turkey, which became destination states after signature of the convention. Although they do not refer specifically to migrants, all UN human rights conventions protect migrants insofar as they apply to everyone irrespective of citizenship or migratory status, a fact that 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: i) there will be principles that a number of states hold are not legally binding but can be used to interpret legislation; ii) ‘actionable’ commitments, which normally are legally binding (although bearing in mind that international commitments have different impacts according to national constitutions) and iii) understandings, which seem more likely to be aspirational in nature. Of course, documents that were aspirational when drafted can gain legal effect, as happened through the adoption of treaties to implement the UN Declaration of Human Rights.<sup>42</sup> Furthermore, 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.

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<sup>40</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>41</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].

<sup>42</sup> See also D. Baldinger, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law*, Martinus Nijhoff Publishing, 2015.

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 will result in a negotiated outcome entitled “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 signal a role for the 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 disappear 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).

## 8. 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 that have received a standing invitation to participate as observers in the work of the General Assembly are also included. Organisations and bodies of the UN can also 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.

All relevant stakeholders, including civil society, the private sector, academic institutions, parliaments, diaspora communities and migrant organisations have the possibility to participate in the process subject to three conditions:

- 1) Non-governmental organisations that 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, including the sharing of best practices and concrete policies, e.g. 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 on the human rights conventions.

The non-formal state representatives, international non-governmental organisations, stakeholders (i.e. the non-governmental, private, academic, parliaments and local authorities, etc.) 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.

## 9. What will be the mechanisms of consultation?

A series of informal thematic sessions are to be organised on the subjects set out in 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*, which reflects the centrality of development that has been the entry point through which the UN has been able to engage politically with migration

2) *Human rights*, which are 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>43</sup>

3) *International cooperation and governance of migration*, which 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 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).

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<sup>43</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].



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. Furthermore, 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 and 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, for which four days 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 to which states are encouraged to donate.

## 10. A role for the EU and what part of the EU?

In February 2017, the UN adopted the modalities for the intergovernmental negotiations of the Global Compact. This document sets out a timetable for the consultations that will lead to the Compact. According to this document, consultations on human rights of migrants will take place in April-May 2017 in Geneva, international cooperation and governance of migration in June 2017 and irregular migration and labour standards (also in Geneva) in October 2017. At the UN headquarters in New York, consultations on drivers of migration and climate change will take place in May 2017 and the contributions of migrants and diasporas in July 2017. Consultations on smuggling of migrants and trafficking will take place in Vienna in September 2017.

According to the document (paragraph 5), the preparatory process will take place in consultation with “regional groups” and they must be “transparent and inclusive in order to promote and strengthen Member States ownership”. Further the modalities document calls for effective participation of all relevant stakeholders with an equitable geographical representation. It states (paragraph 7) that the preparatory process and conference (for adoption) will include the convening of consultations with regional and sub-regional platforms. Again, (paragraph 9) regional consultations are envisaged specifically with National Human

Rights Institutions. Paragraph 22 calls for the Secretary-General of the UN in close consultations with the IOM to examine regional and sub-regional aspects of international migration and highlights the importance of regional and sub-regional consultative processes.

In terms of participation, paragraph 6 of the Modalities document specifically includes civil society, the private sector, academic institutions, parliaments, diaspora communities and migrant organisations as part of the preparatory process. This wide inclusive process is reiterated (paragraphs 8 and 30). But what does this mean for the European Union?

As a regional body, the EU clearly will have a role to play in the negotiations in accordance with the New York Declaration and the modalities document. Yet, from the EU's side, there is no clarity on what part of the EU will participate – will it be the Council or the European External Action Service (which has become increasingly focused on migration issues over the past two years) or DG Home in which the Commission has responsibility for third-country national migration? Will there be a role for the European Parliament, bearing in mind that the modalities document specifically refers to the participation of Parliaments? Furthermore, how is EU civil society going to engage with this process if the institutional actors are silent? None of these questions has yet to be clarified, but the ground rules of the consultations state that they will be transparent and inclusive. So far, there is no evidence of transparency in the EU regional participation, let alone evidence that it will be effective, as promise in the modalities document.

## 11. Conclusions

A momentous change is occurring in the UN with respect to 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 with respect to 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 a good time politically for this change to take place is another matter. It is worth noting, however, that neither in the New York Declaration nor in the follow up Zero Draft is security mentioned. Migration (and asylum) has rightly been separated from issues of national security and terrorism, at least for the moment. And 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, is seeking to restart the clock at zero. This may well be the result of various interests and struggles within the committees that 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 standards setting in the field. These standards-setting activities have been driven largely 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 dispersed throughout a number of treaties. Many UN bodies and agencies have taken responsibility for different parts of the work. For example, standards-setting with respect to children on the move is done by the UN Committee on Rights of the Child, work-related rights by the ILO and human rights in border controls by UNHCHR. There has been too little consolidation of the standards, both in 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 adopted and ratified since the 1963 Vienna Convention on Consular Relations. 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.

The process of the negotiation of the Global Compact is stated to include regional consultations and must be transparent and inclusive. Specific reference is made to the role that should be played by parliaments, which includes the European Parliament. Now, however, there is a lack of clarity exactly how the EU is going to engage with this process, let alone what parts of the EU will be involved. This situation should be remedied as quickly as possible. It would be most helpful if the relevant EU bodies would issue a consultative document setting out how and in accordance with what principles it will be participating in this important international initiative.



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