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MIGRATION AND REFUGEES AT THE UNITED NATIONS. Toward new Global Compacts and the Emergence of an International Migration Regime

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Global human mobility, in all its variety and complexity, presents enormous challenges for national policy-making and international relations in the twenty-first century. Migration and forced displacement have become increasingly politicized under present conditions of globalization and technological revolution, changes in the nature of work and gender relations, widening inequality among and within nations, protracted conflicts, and climate change.

From the standpoint of international governance, there is a sharp distinction between those people who are forced to move due to persecution — and thus qualify for protection as refugees— and all other sorts of migrants. For the former, there has been an international refugee regime in place for more than 65 years, with established norms, procedures, and institutions. These include the 1951 UN Refugee Convention and its 1967 Protocol; the associated UN refugee agency (the Office of the High Commissioner for Refugees, or UNHCR, founded in 1950); regional agreements; national-level asylum laws, agencies, and practices; and a set of non-

governmental organizations committed to humanitarian assistance and refugee resettlement. The refugee regime is quite imperfect in its operation, and is being put to the test by the millions of Syrian war refugees, widespread displacement in Africa, and the contentious political response to mi-

grants and asylum-seekers in Europe, the United States, and elsewhere. But nonetheless, with the 1951 Convention at its center, there continues to exist an international legal regime for the protection of refugees.

The same cannot be said for “other-than-refugee” international migrants — those whose flight is prompted by causes not recognized by the international community as grounds for refugee designation, or those who (in the terms of an implicit dichotomy that is as damaging as it is pervasive) are considered to be “opportunists” rather than “victims.” While not classifiable as refugees, migrants are nonetheless vulnerable to abuse and exploitation. Control over the entry and stay of so-

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We are witnessing a crucial phase of the path toward a multilateral migration regime, as the process of “internationalizing” migration policy moves toward something potentially more robust and consequential.

A defensive posture, based on a fear of “watering down” refugee protection, is evident in UNHCR’s institutional response to efforts to broaden the definition of refugees to include those displaced by environmental factors.

The Comprehensive Refugee Response Framework is unlikely to hold states to binding commitments regarding the thorniest problems facing the global refugee regime: burden-sharing, responsibility-sharing, and resolving protracted refugee situations.

The relative autonomy of the migration compact process from national-level politics (and EU politics as well) means that, for many actors, the global arena offers a more open platform for discussion of policy innovation than does the national political space.

The migration side is moving faster and in a more expansive direction, with possibilities for progressive change still present. But the migration compact still lacks a substantive focus and a clear *raison d’être*.

called “economic migrants” has long been the near-exclusive purview of national governments, and host and transit states too often fail to provide effective legal protections for their human rights. A relevant UN human rights treaty, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, entered into force in 2003 but has yet to be ratified by any major country of destination. In an era when the power of nation-states to regulate economic activity has receded due to globalization, national governments zealously guard (and increasingly assert) their sovereign right to regulate the movement of people across their borders.

However, despite the prevalence of populist anti-immigrant sentiment in many parts of the world, a countervailing trend toward greater international cooperation on migration is playing out within the context of the United Nations, where a new international migration regime is slowly emerging. The prehistory of this regime encompasses the inclusion of migration at the UN’s 1994 International Conference on Population and Development in Cairo, the establishment (over the past two decades) of a set of regional consultative processes on migration, and – from the early 2000s to the present – an accelerating series of international commissions, global fora, and UN high-level dialogues on the topic.

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The current two-year period – beginning in the latter part of 2016 and continuing through late 2018 – represents a crucial phase of the path toward a multilateral migration regime, as the process of “internationalizing” migration policy moves toward something potentially more robust and consequential. The resulting global regime is likely to be weak in terms of its ability to constrain state behavior; any new norms or institutions are unlikely to supplant national-level controls on immigration. But, given favorable circumstances, the new regime could stimulate the progressive adoption of more humane, rights-based policies and practices, enhance international cooperation, and – over time – lead to growing appreciation and acceptance of global human mobility as a set of challenges to be met and opportunities to embrace, rather than as a source of threat and instability.

This note describes and analyzes recent and ongoing progress toward the emergence of an international migration regime, as exemplified by September 2016 UN Summit for Refugees and Migrants, the adoption by the General Assembly (at that summit) of the New York Declaration for Refugees and Migrants, the entry of the International Organization for Migration into the United Nations system, and the parallel processes now underway for developing two new global compacts – one on migration, the other on refugees – which are slated for completion and approval by UN member states in the fall of 2018.

Background to the 2016 UN Summit

The September 2016 UN Summit and the resulting processes for developing the two global compacts, mark the culmination of more than a decade of efforts to raise the profile of migration as an international policy issue.¹ In this arena, there has been neither universally binding international law nor (until very recently) a global institutional structure. An intergovernmental organization, the International Organization for Migration (IOM) was established about the same time as UNHCR, but remained outside the United Nations system. Lacking a clear legal mandate grounded in international human rights law, the IOM was viewed for decades as primarily a vehicle for the interests of wealthy migrant-receiving countries. Traditional countries of destination long blocked any attempt to bring migration into a multilateral legal-institutional framework. In 1994, a chapter on migration was included in the outcome document for the Cairo Conference, and this was followed within the General Assembly by repeated attempts, all unsuccessful, to convene a UN conference specifically devoted to migration.

The situation began to change in the early years of the 21st century. In 2003, prompted by a report authored by then Assistant Secretary-General Michael Doyle, UN Secretary-General Kofi Annan convened a Global Commission on International Migration. This commission’s final report, issued in 2005, called for increased international cooperation on migration. This led to the January 2006 appointment of Peter Sutherland as the UN’s first Special Representative of the Secretary-General (SRSG) on Migration, and to the convening by the General Assembly (in September 2006) of its first High-Level Dialogue on Migration and Development. While no binding decisions were taken at this day-long event, it marked the first time that migration had gained such a prominent platform at the United Nations.

Out of the High-Level Dialogue there emerged a plan to convene a Global Forum on Migration and Development (GFMD) as a non-binding, voluntary process that would be “states-led” (that is, at the direction of member-states and not under official UN auspices) and devoted to discussion, information-sharing, and partnership-building to enhance the positive impacts of migration on development. In 2007, Belgium hosted the first GFMD. The forum subsequently reconvened on an annual basis, and between 2008 and 2012 was hosted in turn by the Philippines, Mexico, Greece, Switzerland, and Mauritius. Representatives of over 140 governments attended each meeting, along with over 200 civil-society actors and participants from UN agencies and other intergovernmental bodies.

1. For a good overview of the recent history of global migration policy initiatives, see Bauloz, Céline. *A Comparative Thematic Mapping of Global Migration Initiatives: Lessons Learned towards a Global Compact for Safe, Orderly and Regular Migration*. International Organization for Migration (IOM), 2017. Available at http://publications.iom.int/system/files/pdf/global_compact_paper.pdf.

As a way of keeping both developing and developed countries at the table, the GFMD was intentionally framed around migration and *development*. In the aftermath of the September 11 attacks, it was seen by those close to the process as essential to avoid framing migration as a security issue; to counter this prevalent discourse, the GFMD focused on the benefits of migration to countries of origin and destination, and to migrants themselves. Backed up by new scholarship and an appreciation for the rising scale of migrant remittances around the globe, the migration-and-development framing partially displaced earlier characterizations of migration that focused on “brain drain” and depicted migration as evidence of the failure of development.

But this new framing was – and remains – vulnerable to serious criticism. Members of the G77 (and African countries in particular) were suspicious of talk of “circular migration,” seeing it as an attempt to repackage longstanding guest-worker programs in new “win-win” language. Civil society groups (who participated in the GFMD through both an official civil society meeting and unofficial parallel events) protested the Global Forum’s absence of an explicit human-rights framework. And while the GFMD prompted many countries to establish new migration-related policies, programs, agencies, and partnerships, it failed to make a dent in the rise of anti-immigrant politics at the national level, a phenomenon that grew increasingly prominent and widespread in the aftermath of the global recession.

Nonetheless, the GFMD was a significant success in one crucial aspect – it built confidence among countries from the global North and the global South that they could sit down together for rational, calm discussion of migration issues in a neutral, multilateral arena. A second UN High-Level Dialogue on Migration and Development took place in New York in 2013, with subsequent annual GFMD meetings hosted in turn by Sweden, Turkey, Bangladesh, and Germany.

Over the course of this second cycle of GFMD meetings, UN Special Representative Sutherland – who had been a significant diplomatic force behind the forum’s momentum – turned to the task of producing a comprehensive report on migration, which would synthesize a set of policy recommendations to the global community.

The September 2016 UN Summit

On 19 September 2016, the UN General Assembly hosted a one-day Summit on Addressing Large Movements of Refugees and Migrants. Its immediate backdrop to the summit was the Syrian refugee crisis, which had come to a head in late 2015, exposing significant shortcomings in the European asylum system and generating a highly politicized anti-refugee backlash. But the summit was also motivated by the broader, long-term failure of the world’s governments to deal effectively and humanely with large-scale movements of people.

The UN summit saw the promulgation of the New York Declaration for Migrants and Refugees. This nonbinding document noted that the total number of international migrants had reached 244 million in 2015, of which 65 million were forced migrants. The latter category that includes “over 21 million refugees, 3 million asylum-seekers, and over 40 internally displaced persons.”² The New York Declaration acknowledges “a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner” (Art. I, Para. 11), and makes several references to the UN Sustainable Development Goals, adopted in 2015, which incorporates language calling for the empowerment of refugees, internally displaced persons, and migrants.

The New York Declaration includes three sets of commitments – those applying to both refugees and migrants, those applying specifically to migrants, and those applying specifically to refugees. The commitments sum up the state of international policy discussions on migrants and refugees, and include pledges to “fully protect the human rights of all refugees and migrants, regardless of status” (Art I, Para 5), and a call for “strengthening the global governance of migration” (Art III, Para 49).

In a pair of annexes to the Declaration, UN member states committed to undertake two parallel two-year efforts, one

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leading to a Global Compact on Refugees and the other to a separate Global Compact on Safe, Orderly and Regular Migration. UNHCR is tasked with developing the refugee compact and presenting for approval by the UN General Assembly in September 2018. The migration compact involves a broader set of institutional stakeholders and is to be approved at a special intergovernmental conference on migration, to be held in the fall of 2018. On September 20th, the day after the UN summit, the United States and President Obama co-hosted a meeting of heads of state to gather concrete pledges for greater humanitarian aid and increased refugee resettlement.

Its admirable content notwithstanding, the New York Declaration is, indeed, declaratory and non-binding, and more than a few observers have criticized the wide gulf between the high-minded principles it enumerates and the anti-migrant, anti-refugee policies that so many governments continue to pursue. It is unclear to what extent the specific pledges made on September 20th represented simply a re-packaging of existing commitments, or to what extent those pledges will be honored. Specific criticisms of the Declaration point to its lack of discussion of the root causes of mi-

2. *The New York Declaration for Migrants and Refugees*. Resolution adopted by the General Assembly on 19 September 2016. A/RES/71/1, Art 1. para. 3. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1.

gration, and for such shortcomings as its failure to categorically denounce the practice of detaining unaccompanied child migrants. Many commentators expressed disappointment that more solid measures to reform the international refugee system – such as firm commitment to more equitably sharing the logistical and political burdens and financial costs of hosting refugees – had been put off in favor of another two years of international negotiations.

However, the September UN summit and the New York Declaration were significant in that, for the first time, United Nations took up both migrants and refugees – two policy realms that had previously been kept apart – in the same meeting and the same resolution. Another significant development, as formally announced at the UN summit, was that the International Organization for Migration (IOM) entered the UN system as a “related organization.” For the first time, the United Nations has an entity focused exclusively on migration. While the extent to which the IOM’s mandate is grounded in human rights law has been a subject of some debate; the fact of IOM’s entry into the UN means that international migration as an issue area is now firmly planted within a universal, multilateral setting.

Less than two months after the UN and US summits, Donald Trump won the US presidential election. Trump’s early actions as President, and other political events (from the

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Brexit fallout to European national elections) risk moving international political discourse even further in the direction of anti-immigrant, anti-refugee sentiment. And yet, the migrant and refugee agenda remains in place at the United Nations. This issue area’s prominence on the UN agenda is bolstered by the presence of the new Secretary-General, Antonio Guterres, who took office on 1 January 2017. Previously, Guterres served for a decade (2005-2015) UN High Commissioner for Refugees, and is thus both knowledgeable on the topic and – although he appears to have been careful not to let refugee issues dominate his agenda in the early months of his term – is likely to be a strong advocate for the compacts.

Developing the Global Compacts

As foreseen in the New York Declaration, the two global compacts are being developed through separate processes, which parallel each other in the sense that they share an overall timetable but are otherwise very different in terms of actors, politics, procedures, and content.

The Global Compact for Refugees is by far the more straightforward of the two. UNHCR is assigned the task of preparing its content, which is to be based on the Comprehensive Refugee Response Framework (CRRF), as outlined

in its essentials in Annex I of the New York Declaration. According to UNHCR, the CRRF “specifies key elements for a comprehensive response to any large movement of refugees . . . [including] rapid and well-supported reception and admissions; support for immediate and on-going needs (e.g. protection, health, education); assistance for local and national institutions and communities receiving refugees; and expanded opportunities for solutions.”³ The Global Compact on Refugees will incorporate the results of a set of pilot implementations, stakeholder consultations, and consequent refinement of the CRRF’s content. The finished compact is to be approved by UN member-states in September 2018, when it will be presented as part of the High Commissioner for Refugee’s annual report to the General Assembly.

Within the UN system, UNHCR is the sole “owner” of the refugee compact. This circumstance allows for a focused, outcome-oriented process, but it also reflects a certain defensive stance on the part of the international refugee policy community. Within that community, the expert consensus is that – despite the clear shortcomings of the present refugee regime – now is not the time to open the 1951 Refugee Convention for renegotiation, as under current political circumstances such a move could only further weaken existing refugee protections. This defensive posture, based on a fear of “watering down” refugee protection, is evident in UN-

HCR’s institutional response to efforts to broaden the definition of refugees to include those displaced by environmental factors: the agency supports specific non-binding initiatives to enhance protections for such displaced persons, but it consistently resists terminology such as “climate refugee,” which has no basis in international law.⁴ And while the New York Declaration dealt with both refugees and migrants, the refugee policy community has been by and large devoted to maintaining sharp boundaries between the two policy realms. The projected 2018 conference will most likely deal solely with the migrant compact.

Some observers characterize the CRRF as basically a consolidation and updating of existing operational guidelines; with that as the basis of the refugee compact, and UNHCR in control of its preparation, the compact will likely be a relatively cautious, politically realistic document. It may result in incremental improvements in the way states and other entities cooperate on refugee protection, but it is unlikely to hold states to binding commitments regarding the thorniest problems facing the global refugee regime: burden-sharing, responsibility-sharing, and resolving protracted refugee situations.

3. *Comprehensive Refugee Response Framework: From the New York Declaration to a Global Compact on Refugees*. United Nations High Commissioner for Refugees (UNHCR), 2016. <http://www.unhcr.org/584687b57.pdf>.

4. This posture also extends to a certain discomfort with the ambiguous, overlapping nature of the terms “migrant” and “refugee” — thus the recurrent terminological skirmishes over whether refugees can or should be considered to be a subset of the broader category of migrants. In the context of the two compacts, this plays into the disputed question of whether and how to define and incorporate discussion of the liminal category of “vulnerable migrants” into one or both compacts.

The process through which the Global Compact on Safe, Orderly, and Regular Migration is being developed is much more complicated and open-ended. This process is supported by a constellation of entities connected to the UN system, including the International Organization for Migration, the Global Migration Group, the Office of the Secretary-General, and the Presidency of the General Assembly. Political leadership comes from the two member-states that serve as co-facilitators for the migration compact – Mexico and Switzerland – each of which is strongly committed to the success of the process. The IOM has been particularly energetic in its role as organizer of a series of preparatory activities contributing to the development of the compact, bolstered by a set of key experts on loan from governments and civil society organizations.⁵ An extensive set of thematic, regional, and multi-stakeholder consultations are taking place between April and November 2017. Expert input from the throughout the UN system is being channeled into the process by the Global Migration Group, an informal interagency grouping of 22 UN entities, currently chaired by United Nations University. Civil society organizations are playing an active role in the process, their participation facilitated in part through umbrella groups such as the Global Coalition on Migration.

An important role in the migration compact process is played by Louise Arbour, appointed by Secretary-General Guterres in early 2017 to succeed Peter Sutherland as Special Representative of the Secretary-General (SRSG) for International Migration. As SRSG, Arbour is charged with overseeing the migration-related aspects of the follow-up to the September 2016 summit, promoting migration cooperation throughout the UN system, and serving as secretary-general of the 2018 conference.

Sutherland had served as Special Representative for Migration since the position was first created in January 2006. As SRSG, Sutherland had been a motive force behind the GFMD and a strong voice pushing for more global cooperation on migration. Unfortunately, he fell ill in September 2016 and was unable to attend the UN summit. His final report, prepared with significant input from a team of advisors, was released in February 2017. The Sutherland Report encapsulated a set of forward-looking policy recommendations, distilled from the SRSG's eleven years of service, on topics including protecting migrants at risk, facilitating labor mobility, fostering migrant integration, and enhancing the governance of migration.⁶ Seen as a key text by important actors, the Sutherland report provides specific recommendations that could be taken up in the compact.

5. Now that it is part of the United Nations, the IOM has enthusiastically rebranded itself as "the UN Migration Agency."

6. *Report of the Special Representative of the Secretary-General on Migration*. United Nations General Assembly. A/71/728. 3 February 2017. Available at http://www.un.org/en/development/desa/population/migration/events/coordination/15/documents/Report%20of%20SRSG%20on%20Migration%20-%20A.71.728_ADVANCE.pdf.

As of mid-2017, the most important, fundamental questions regarding the migration compact – its substantive content, and whether it will lead to any binding commitments on the part of member states – remain to be decided. The question of the compact's substance is particularly open-ended. The New York Declaration lists 24 potential elements that could be included in the global compact, ranging from ways of promoting the development benefits of migration, increasing legal pathways for migrants, enhancing protections for labor rights and for vulnerable, and improving international cooperation on migration.

Most observers believe that it unlikely that the global compact will lead to any binding commitments. However, some stakeholders hold out hope for a compact which, like the Paris climate accord, includes a mix of binding and non-binding agreements — or a nonbinding compact with a set of targets and indicators (in the manner of the Sustainable Development Goals) that can chart progress toward goals that could include ending child migrant detention, lowering the costs of remittance transfers, or eliminating the practice of charging recruitment fees to migrant workers. These questions will be decided through the intergovernmental negotiations that begin in earnest at the end of 2017 and will lead up to the finalization of a finished compact to be approved at the fall conference.

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Conclusion

The processes leading to the global compacts demonstrate the increasing multilateralization of issues of global human mobility. On the migration side, the path from the New York Declaration, the entry of the IOM into the UN system, the development of a global compact, and the 2018 conference make this a period of significant, rapid consolidation of a nascent international migration regime. The relative autonomy of the migration compact process from national-level politics (and EU politics as well) means that, for many actors, the global arena offers a more open platform for discussion of policy innovation than does the national political space.

The global compact processes demonstrate the continued bifurcation of the broader global human mobility arena into separate migration and refugee issue areas. Although these two grew closer together for the September 2016 summit, they have once again diverged. The migration side is moving faster, with greater inclusivity in terms of participants, and in a more expansive direction, with possibilities for progressive change still present. But the migration compact still lacks a substantive focus and a clear *raison d'être*, and probably will not achieve these unless and until strong political leadership emerges from among the mul-

titude of entities involved in its preparation. The refugee side is moving more cautiously, through a process that is more bounded and less open-ended, and with more modest aims that are to a significant extent more conservative, in the sense that key players in the existing refugee regime are on the defensive.

Broader global struggles over power and resources shape the international movement of people, and migrant and refugee policy cannot be expected to resolve fundamental questions of governance, development, global political economy, and human security. For those who want current UN processes on migration and refugees to be effective, the challenge is to steer a middle course between an idealism bordering on utopianism that is entirely divorced from broader political realities, and a lowest-common-denominator approach that results in promises too weak and uninspiring to stimulate significant progress.

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If regimes consist of ideas, norms, and institutions, it is at the level of ideas that the international migration regime is most fully developed. The global migration policy arena is increasingly capable of serving as a seed bank of policy ideas that can be drawn upon for national and regional policy innovations. It is one space where improved migration policies can be developed, debated, and kept alive through periods of turmoil and retrogression at the national level. However, the most optimistic participants in the migration compact process see it not just as a platform for ideas, but as a once-in-a-generation opportunity to establish an international policy framework for migration.