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Keeping on the Move

Study of the Genesis of the 1990 Convention
on the Rights of All Migrant Workers and their
Families and its Implications today

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Study of the Genesis of the 1990 Convention on the Rights of All Migrant Workers and Their Families and its Implications today

by Nicola Piper, The University of Sydney

On the author:

Nicola Piper, a political sociologist, is Professor of International Migration at the University of Sydney, Australia, and Director of the Sydney Asia Pacific Migration Centre (SAPMiC). She is an advisor on migration research to the UNRISD as well as the co-founder and Vice President of Global Migration Policy Associates (GMPA). She carried out the first study on identifying the obstacles and opportunities to ratification of this Convention in the Asia Pacific region of a series of such (sub-) regional studies commissioned by UNESCO in 2003.

E-Mail: nicola.piper@sydney.edu.au

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German Commission for Justice and Peace, Kaiserstr. 161, D – 53113 Bonn,
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Tel: +49-228-103217 - Fax: +49-228-103318

Internet: www.justitia-et-pax.de - E-Mail: Justitia-et-Pax@dbk.de

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Caritas Internationalis Preface

It is difficult to write an introduction at the moment, although this has nothing to do with Professor Nicola Piper's studies and research. Rather it has to do with the current situation at the global level.

December 2015 marked the 25th anniversary of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Yet, to date, only 48 states are parties to this Convention.

Increasing migratory flows, which are often under dangerous conditions as there are few channels for safe and lawful labour migration, make this Convention as important today as it was 25 years ago. This is when *“the Convention set forth, for the first time, internationally uniform definitions agreed upon by States for different categories of migrant workers. It also obliged sending, transiting and receiving States parties to institute protective action on behalf of migrant workers.”*

For years many organisations have been striving for migrants' human and labour rights. They have done so either by providing services directly to them or generating awareness among host countries that migrants are a source of cultural enrichment and knowledge sharing, and generators of wealth and enterprise.

Some (Immigrazione Dossier Statistico, IDOS, in Italy, for example) have published reliable statistics that show how migrants form an integral part of their host countries, producing more wealth and paying more social security contributions than is generally thought. Indeed, the numbers show very few migrants are actually a burden on our countries' economies. For example, if we look at functionally family care systems, especially for the elderly, we see we owe a debt to the immigrant women who look after our families and homes, enabling us to go out to work all day without any worries. These same studies show that workers who do not have a residence permit, cannot work legally nor have access to adequate health services or decent housing, are more likely to experience a lack of respect for their human and labour rights. They are often also victims of forms of slavery-like working conditions and serious workplace accidents.

Caritas Internationalis, a confederation comprising 165 national Caritas organisations, promotes decent work for all, paying particular attention to the most vulnerable and those who find it hard to defend themselves. These categories include migrants, migrant women and minor migrants who are sometimes accompanied by their families. Also minors who leave home alone and have to get by as best they can, working in terrible conditions at an age when they should be

receiving guidance and protection, attending school, playing, and enjoying the tranquillity that should mark everyone's childhood.

With this motivation in mind, Caritas Internationalis is delighted to contribute towards the dissemination of this accurate and comprehensive study. Starting with the birth of the Convention, it analyses the course of events and reasons that led to the failure of far too many countries – most of whom are destination countries for migrants – to ratify it. This study should inspire us to learn from history and thus identify new ways for moving forward.

In conclusion, Pope Francis has recently asked us all on many occasions to open our arms and our borders and receive our brothers and sisters in need. This refers not only to asylum seekers, but also those who have come because of the economic situation in their countries does not allow them to live in dignity nor offers a future of prosperity. At Caritas Internationalis we believe the Convention is still valid in contents for the protection of migrant workers and their families, and we would like to promote its ratification by as many countries as possible to ensure that migrants can live legally where they have found means to earn their living. For receiving countries, it would be better to know who is living in their territories and that these people are protected by law as workers and feel part of society. We have recently seen the kind of long term side effects that social exclusion can cause, from dropping out of school early without any life project to not seeing the country where they live as theirs and, as such, a place to care for.



Michel Roy

Secretary General Director
of Caritas internationalis



Martina Liebsch

Policy and Advocacy
of Caritas internationalis

Vatican City, 15 April 2016

Editor's Preface

The engagement of the German Commission for Justice and Peace with issues of decent work in the informal economy was, and still is, guided by the fight of domestic workers for their rights and therefore links directly to the concerns of migrant workers.

Networking with migrant organisations, human rights and development organisations, labour movements and scientists has fostered an even stronger recognition of the relevance of international standards as the precondition for fair economic and social globalisation.

Hence the activities performed in the long term approach/project on 'Decent work and Food Security in Informal Economy as a Precondition for Poverty Alleviation and Integral Development' encompasses several steps of advocacy in regard to the nexus of migration and development.

This study is an important step in the longer term project for three reasons: (1) it is a product of networking and therefore a symbol for strengthened civil society; (2) it sheds new light on existing instruments which gain new importance due to new political processes like the Agenda 2030; and (3) it provides insight and understanding for the need for economic transformation with human labour at its core.

For these reasons this study received financial support primarily from German Commission for Justice and Peace and a contribution by Caritas Internationalis. The author and the editor would like to acknowledge the input into the original idea behind conducting this study by Mr William Gois, chairperson of the Migrant Forum in Asia. Without his inspiration this project would have never been started.

General background research was carried out with the assistance of Ms Lilly Moody. The section on the Sustainable Development Goals (SDGs) benefited from research assistance by Ms Manisha Rajak and Mr Prasiddha Pandey. Special gratitude is also given to all the experts who were interviewed by the author.

We highly appreciate the first preface by Michel Roy as Secretary General and Martina Liebsch, Policy and Advocacy Director of Caritas internationalis, who are important stakeholders in the struggle to promote respect, dignity and rights of

migrants all over the world. They enriched the study and lifted it from a historically interesting, intellectually challenging political document to one of practical relevance.

Last but not least we thank the author Professor Dr Nicola Piper from The University of Sydney for her high expertise and precious time. Professor Piper provided her research in spite of her many other obligations in respect to research on migration.

As editors we hope this study will inspire further discussions and encourage stakeholders to engage again in advocacy work for the ratification of the International Convention of the Rights of Migrant Workers and their families.

A handwritten signature in black ink, appearing to read 'Hildegard Hagemann', with a long horizontal flourish extending to the right.

Dr Hildegard Hagemann

Keeping on the Move

1. Introduction

December 18, 2015 marked the 25th anniversary of the United Nations General Assembly's adoption of one of the most controversial international human rights instruments: the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW). The road to this Convention was long. Discussions started at least 15 years prior to its final adoption in 1990, with recommendations for its existence made in 1975, followed by a 10-year negotiation period that started in 1979.

Furthermore, this Convention underwent the slowest progress between adoption and entry- into- force compared with the other eight¹ core international human rights instruments. It took until 2003 to gain the minimum 20 ratifications for it to proceed to the next stage. Since it has since gone through a comparatively slow process, obstructed partly by the United Nations (hereafter: UN) itself who had initially not taken any interest in the Convention's promotion. This state of affairs changed in April 2003 with the formation of the Geneva Migration Group, comprised of all major UN agencies involved in migration. This group later evolved into the Global Migration Group². After finally coming into effect in 2003, a period of relatively high attention was followed by advocacy activities slowing down again. All in all, there are to date 48 State Parties (and 18 signatories).

1.1 This paper

The objective of this paper is to analyse the institutional and political background to the relative 'lack of success' of this Convention. It does so by tracing the political, economic and intellectual environment that led to the discussion by, and recommendations from, the then UN Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1975-76, to the Convention's final adoption. The drivers behind this exploration are three-fold: (1) to test the thinking and vision at that time about the benefits of such Convention in

¹ Those are: ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, CPED, and CRPD. See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> for more information.

² This is an inter-agency group established by the UN General Secretary to promote wider application of relevant international and regional instruments and norms relating to migration. For more details, see <http://www.globalmigrationgroup.org>.

addition to the existing two migrant worker conventions by the International Labour Organisation (hereafter: ILO); (2) to test the political drive to embark upon the drafting of the UN Migrant Worker Convention, in comparison to the current state of affairs where some regard this Convention as ‘out of date’ (i.e. a ‘pre-globalisation’ document); and (3) to establish a bridge between the thinking at the time of its inception in terms of this Convention’s main benefits, and in today’s context. The overall analysis is, therefore, primarily approached from a politico-institutional perspective based on a governance or regulation frame, set within a global context.

Despite the fact that the ICRMW is one of the nine core international human rights instruments, academic literature on this particular Convention is relatively scarce. The only monograph devoted to the Convention is Ryszard Cholewinski’s 1997 publication *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford University Press). The most recent book publication dealing with the Convention is from 2009: *Migration and Human Rights: The UN Convention on Migrant Workers’ Rights* (Cholewinski, de Guchteneire, Pécoud, eds, Cambridge University Press). A special issue published by *International Migration Review* in 1991 contained important articles on the negotiation period itself but to a lesser extent on the lead-up period. Also, those contributions lacked contextualisation with the broader economic and politico-institutional environment as regards worker migration and its governance – an issue which has since then taken on much more significance as migration has begun to figure on the global agenda more explicitly (see more detail below). Furthermore, between 2003 and 2004 the United Nations- Educational Scientific and Cultural Organisation (hereafter: UNESCO) commissioned studies on the obstacles to this Convention’s ratification in all regions of this world. There is no study that has placed the Convention in a broader politico-historical and institutional context leading up to the Agenda 2030. This paper will make a modest contribution towards filling this gap³.

³ As regards methodology, this paper is based on a mixed methods approach: desk research, personal interviews with participants of the Working Group from the ILO, delegates from Finland and the Philippines as well as use of the ILO archives. My gratitude goes to all who responded to email inquiries, took their time to meet up and allow me a glimpse into the ILO archives.

2. Background

Global human rights instruments are the product of negotiations at the level of the United Nations and are influenced or guided by the input from specialised international organisations. In the case of workers' rights and labour standards the key organisation is the International Labour Organisation (hereafter: ILO). Key constituents of the UN and any International Organisation (hereafter: IO) are states, or rather state governments. Without political and financial backing by states the UN and IOs cannot function or operate.

Discussions leading to this Convention's negotiations and resulting in its adoption started during the 1970s, at a point in time when the perceived need for migrant workers had decreased, after a heightened demand during the immediate post-war period. This decrease was related to the beginnings of rising unemployment and changes in the structure of the economies in major migrant destination countries in Europe as well as North America. In addition the attitude towards (im)migration had also begun to be influenced by changes in migratory movements and new types of migrants triggered by the end of the Cold War that gradually evolved into recent security concerns. Yet, it is partly precisely because of the increasingly restrictive policies by income richer countries that resource poorer countries had begun to raise concerns over the treatment of their nationals.

As is argued here, taking a politico-economic perspective on the institutional shifts in the regulation of migration provides a useful context for the analysis of the early discussions around the 1990 UN Convention, its genesis and its relatively slow ratification record.

2.1 Economic and Political Regulatory Shifts⁴

In the years following World War II, international migration manifested both the economic interdependencies and restrictionist tendencies that had started to emerge during the decades before the war. The speed and extent of post-war economic expansion was fuelled by a steady stream of migrants into the labour-deprived sectors of the industrialised world. At the same time, governments continued to put in place processes and institutions to foster both control of population movements and

⁴ The content of this section is discussed in more detail in N. Piper and L. Simeone (forthcoming), *Making Rights in Times of Crisis: Civil Society and the Migrant Workers' Convention*, in: A. Desmond and N. Piper (eds), *The UN International Migrant Workers Convention at 25*, Pretoria University Press.

its regulation, and thus assert control over access to their labour markets.⁵ In addition, Cold War sensitivities motivated the adoption of stringent border controls in late colonial and post-colonial territories.⁶

At the global institutional level, both the Bretton-Woods-System, initiated by the United States and Britain in 1944 to govern post-war monetary relations, and the UN, established the following year to promote political cooperation, were designed to operate as international institutional infrastructures with the explicit goal of building state capacity. Not incidentally, founding conferences were convened in the United States of America (from here: USA), the only country at that time which had the funds and political clout to host them.

Until the 1970s, economic growth was still very much understood in national terms, that is, to be a function of the state's capacity and to be managed within a national framework. Wealthier countries shared certain features of socio-political organisation: such as the Fordist mass production and consumption of manufactured commodities, the rapid proliferation of media technologies, neo-corporatism, and the Keynesian welfare state.⁷ Variations in relative socio-economic stability were considered to be the effect of inevitable business cycles that could be contained through built-in countercyclical policies such as unemployment insurance and currency stabilisation.

The huge disparities between first, second and third worlds (as they were referred to then), on the other hand, were mostly explained in evolutionary terms. That is, as the effect of inadequate property and contract law, volatile class relations, and underdeveloped industrial infrastructure. These were all features that could be remedied by political reform and successive 'stages of growth'.⁸ Less widely recognised at the time was the degree to which the terms of participation in global markets were skewed in favour of countries with growing populations, who could afford to consume what they produced. This state of affairs was made possible by a political compromise with labour and the externalisation of inflationary pressures.⁹ As

⁵ James Scott (1998), *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.

⁶ Tayyab Mahmud (2011), "Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier," *Brooklyn Journal of International Law* 36(1): 1-74; Amarjit Kaur (2009), "Labor Crossings in Southeast Asia: Linking Historical and Contemporary Labor Migration," *New Zealand Journal of Asian Studies* 11(1): 276-303.

⁷ Sam Gindin and Leo Panitch (2012), *The Making of Global Capitalism: The Political Economy of American Empire*. New York: Verso Books; Walter W. Rostow (1960), *The Stages of Economic Growth: A Non-communist Manifesto*. Cambridge: Cambridge U Press.

⁸ Bob Jessop (1982). *The Capitalist State*. New York: New York University Press.

⁹ Robert Gilpin, (2001), *Global Political Economy: Understanding the International Economic*

dependency and world systems theorists would later point out, the modernisation standards of the 'convergence club' was only possible by virtue of the comparatively lower cost of natural and human resources from the global South.¹⁰ Thus, despite the intentions of the international development project to raise standards, national interests were essentially opposed to this humanitarian outcome, as wealthier states took advantage of poorer ones in order to retain a competitive edge with their industrialised peers.

Shaped both by the unprecedented productivity of Fordist production and USA's influence in the global arena, migration practices and policies in the post-war era demonstrated both continuities and sharp divergence from the past. Following the abandonment of the gold standard in 1971 and the oil crisis of 1973, a series of economic, political, and ideological adjustments converged over the next two decades to dramatically reconfigure social relations throughout the world. A voluminous literature in the social sciences and humanities has accumulated since the 1980s to make sense of the implications of these transformations, which cannot be summarised here. Suffice to say that, whether termed globalisation, neoliberalism, postmodernism, or postcolonialism, the contemporary world may be characterised with respect to certain prevalent features: (1) a reconceptualisation of the social contract to prioritise freedom of individual choice over equality and collective well-being; (2) the deregulation of economic activities to maximise profitability through the exchange of capital, goods and services in globally integrated markets; (3) a dismantling of the welfare state accompanied by a shift from legislative to executive fora as the strategic site for policymaking; (4) rapid technological innovation and high-speed transportation, which distort spatio-temporal scales of proximity and influence; and (5) the proliferation of social networks and the diversification of migration flows¹¹.

It is, therefore, safe to say that economic globalisation undermined the stable, well-paid workforce that has been both the backbone of the post-war middle class, and the holy grail of international development. In order to compete internationally, businesses have had to streamline operations and outsource supply chains in a continual scramble to keep costs low. In industrialised countries, trade unions have

Order. Princeton, N.J.: Princeton University Press, pp. 365–366.

¹⁰ Giovanni Arrighi, Beverly J. Silver and Benjamin D. Brewer (2003), "Industrial Convergence, Globalization, and the Persistence of the North-South Divide," *Studies in Comparative International Development* 38(1): 3-31.

¹¹ So much so that Steven Vertovec speaks of "super-diversity" (see "Super-diverity and its implications", in: *Ethnic and Racial Studies*, 30:6, 2007, pp. 1024-1054)).

had varying degrees of success in preventing this 'race to the bottom' and 'social dumping' by reaching out to migrant workers.¹² Yet a shrinking percentage of the world's workforce is unionised, and most international migrants find work in sectors notoriously under-regulated or considered un-organisable, such as the service industries¹³, construction, agriculture and informal sectors. This often results in substandard working conditions relative to the local, or native, workforce.¹⁴

Though globalisation has accelerated economic growth in much of the developing world, structural adjustment policies and stiff competition among economic actors have also had destabilising effects. Burgeoning industries in smuggling, trafficking and the unethical recruitment of migrant workers must be understood in this light. They are not only an expansion of illegality and entrepreneurial opportunism, but also the effect of a policy environment that approaches poverty and immigration as an inevitable security threat rather than a problem to be ameliorated through social supports.¹⁵ The ill-conceived development project of the Fordist era has been eclipsed by an equally incoherent optimism that equates economic well-being with growth rates, privatisation of state functions, international investment, and the stimulation of consumer spending by diaspora remittances.¹⁶ At the domestic level, however, public discourse surrounding immigration continues to assume a unified state interest, enhanced by the relatively free circulation of goods and services, yet threatened by the socially marginal and unassimilable 'other'.

The international institutions that were assembled to support self-sufficient welfare states along the lines of John Maynard Keynes and T.H. Marshall, have been gradually reoriented towards the project of building interdependent global systems from within their borders. Such an interpretive approach helps account for why, despite the predictions of early globalisation theorists, the national emphasis on sovereignty has neither withered away nor lost its political valence.

¹² See Kevin Banks (2006). "The Impact of Globalization on Labour Standards," in *Globalization and the Future of Labour Law*, John Craig and Michael Lynk, eds. Cambridge: Cambridge University Press, pp. 77-107.

¹³ Except for public services which is a sector that has in fact been subject to union growth in many post-industrialised countries.

¹⁴ See ILO (2011), *Global Wage Report: Wage policies in times of crisis*. Geneva: ILO: p. 81.

¹⁵ See Susan Bibler Coutin (1995), "Smugglers or Samaritans in Tucson, Arizona: Producing and Contesting Legal Truth," *American Ethnologist* 22(3): 549-571; Johan Lindquist (2010), "Labour Recruitment, Circuits of Capital and Gendered Mobility: Reconceptualizing the Indonesian Migration Industry," *Pacific Affairs* 83(1): 115-132.

¹⁶ See Philip McMichael (2008) *Development and Social Change: A Global Perspective*. Thousand Oaks: Pine Forge/Sage; Gilbert Rist (2008), *The History of Development: From Western Origins to Global Faith*. London: Zed Books; and Pauline Gardiner Barber (2004), "Contradictions of Class and Consumption When the Commodity is Labour," *Anthropologica* 46(2): 203-218.

Though certain institutional features of liberal governance have been universalised since the fall of the Soviet bloc, states remain differentially situated within a historically and geographically fractured terrain. The legacy of colonialism makes itself felt through unequal trade relations, diplomatic paternalism, and particular configurations of wealth and power that influence policy outcomes in unexpected ways.¹⁷ The brutal histories of expropriation, enslavement and exploitation that have accompanied the emergence and expansion of capitalism haunt the politics of race and migration both within and between countries today. It would be naive to assume that these complex and specific constellations of forces past and present could be evenly addressed through the project of democratisation or the universal application of human rights standards.¹⁸

At the same time, human rights can also be understood as ‘work in progress’¹⁹ and therefore as a practice, not only a principle. Although formulated through a highly legalistic ritual performance of compromise, international norms can only be realised through the participation of a wide range of social actors. In particular, non-governmental organisations, activists and community leaders serve as critical knowledge brokers, translating transnational ideals into local strategies, whilst also pushing for the (re-) interpretation of the meaning of rights to ensure greater inclusion.²⁰ Indeed, the current prevalence of a human rights discourse within domestic and international politics can be attributed to the proliferation of transnational advocacy networks following the end of the Cold War. This phenomenon has been termed ‘globalisation from the bottom up’.²¹ For the migrant rights movement in particular, global civil society has provided the vantage point from which to expose the structural vulnerability of non-citizens.

¹⁷ For a pointed critique of the Euro-American bias of much globalization scholarship, see Frederick Cooper (2005), *Colonialism in Question: Theory, Knowledge, History*. Berkeley: University of California Press, pp. 91-112.

¹⁸ For nuanced discussion of the unintended consequences of democratization and human rights interventions, see John L. and Jean Comaroff (1997), “Postcolonial Politics and Discourses of Democracy in Southern Africa: an Anthropological Reflection on African Political Modernities,” *Journal of Anthropological Research* 53(2): 123-146; Lisa Wedeen (2013), “Ideology and Humor in Dark Times: Notes from Syria,” *Critical Inquiry* 39(4): 841-873; and Sally Engle Merry (2003), “Human Rights Law and the Demonization of Culture,” *Political and Legal Anthropology Review* 26(1): 55-76.

¹⁹ VeneKlasen, L., Miller, V., Clark, C. and Reilly, M. (2004) “Rights-based Approaches and Beyond: Challenges of Linking Rights and Participation”, *IDS Working Paper No. 235*, Brighton: Institute of Development Studies.

²⁰ See Annelise Riles (2000), *The Network Inside Out*, Ann Arbor, MI: University of Michigan. Press; and Merry (2006), “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108(1): 38-51; Grugel, J.B. and Piper, N. (2009) ‘Do rights promote development?’, in: *Global Social Policy*, vol. 9(1): 79-98

²¹ R. Falk (1997), ‘Resisting ‘globalization-from-above through ‘globalization-from-below’, in: *New Political Economy*, 2(1): 17-24 Piper and Grugel use the phrase “governance from below” (Piper, N. and Grugel, J. B. (2015) ‘Global Migration Governance, Social Movements and the Difficulties of Promoting Migrant Rights’, in: *Migration, Precarity and Global Governance – Challenges for Labour*, edited by C-U Schierup, R. Munck, B. Likic-Brboric, and A. Neergaard, Oxford University Press, pp. 261-278).

And so we come to understand that the Migrant Worker Convention is rooted in migratory problems and policies of the 1960s and 1970s. It is concerned with the effect of South-North migratory movements, issues with migrant workers in Central and Northern Europe and undocumented migrants having crossed borders into North America. Its focus on traditional mobility of industrial workers, rather than new forms of migration such as transient professional and skilled personnel, international students, is attributable to the 'mass movement' phase of migration in the 1950s/60s. This was directed towards the assembly lines of mass production in the industrialised countries that experienced significant workforce reductions because of the Second World War. This phase ended in the early 1970s when oil shocks saw drastic cuts to the inflow of workers accepted on labour market grounds. The period saw enhanced efforts to integrate the established stock of migrants, alongside active incentives to return to country of origin. Tensions increased between destination and source countries: the discrimination that had affected the migrants who stayed became second-class citizens persisted to affect the second generation. The prolonged stay of industrial workers increased also the need for family reunion. Increasingly restrictionist approaches to migration policy, saw the mass movements of until then, documented workers, transformed into 'illegal' migration and irregular labour.

Since the 1970s, we have observed certain continuities but also discontinuities. The realities of contemporary mobility have changed. Examples include polarisation which has seen highly skilled workers distinguished from low-skilled workers, with the former typically having access to a more extensive bundle of rights than the latter; diversification with regards to source and destination countries; the rising significance of intra-regional movement, sometimes referred to as 'South South' migration, and increasingly complex policy frameworks. Recent economic and/or financial crises have led to countries that had recently become major receiving countries like Greece, Spain, Portugal, turn into significant sending countries again. Furthermore, the internationalisation of education and training has led to rising numbers of students and trainees moving to overseas institutions and, also, often taking up jobs outside of their birth countries. We have seen that one's first migration often leads to prolonged periods away from one's birth country due to further migration onto a third destination, and so forth. Facilitating such trends are an expanding network of recruitment agencies and labour hiring services. These groups serve an important purpose in terms of matching labour demand and supply, but

have also played a part in problems of corruption and exploitation²². Their existence points to increasing privatisation of the 'business of migration', whereby migrants shoulder the costs of financing their movement. This does not only affect those labouring in low-wage sectors. There are signs of intra-company transfers being more and more replaced by hiring practices of 'self-initiated expatriates'²³. One major result of such trends is heightened precarity²⁴ – legally, socially and economically – which affects a widening range of categories of migrants.

2.2 Global Institutional Regime Building

International labour migration has received an unprecedentedly high level of attention by global (international) organisations in recent years, as evident from the flurry of regional and multi-lateral activities pertaining to the gradual emergence of a global approach to international migration ('global migration governance'). Many intergovernmental organisations are now actively involved in producing data on migration from their respective areas of expertise or interest; several international commissions and state-led initiatives have placed migration governance on the global policy agenda, and a number of institutions for inter-state dialogue and cooperation have been established at the regional and global levels²⁵. This cooperation is facilitated by a number of international and intergovernmental organisations as well as the state-led Global Forum on Migration and Development (GFMD) process. That these initiatives have placed the topic of international migration high up on the agenda is a reflection of both the volume, nature and (gendered) patterns of labour migration having undergone important changes during the last decade, such demographic shifts, shrinking national workforces, neoliberal

²² Verite (2016). *An Exploratory Study on the Role of Corruption in International Labor Migration* (https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment_0.pdf; accessed 10 March 2016)

²³ Nana Oishi, conference paper delivered at City University of Hong Kong, 30 March 2016.

²⁴ G. Standing (2014) *The Precariat: the new dangerous class*, Bloomsbury.

²⁵ Concrete examples include (not an exhaustive list): the setting-up of the Global Commission on International Migration (2003-2005), the ILO Conference in 2004 devoted to a rights-based framework to labour migration, UN High Level Dialogue on International Migration and Development in 2006, the subsequent annual Global Forum on Migration and Development, various reports by UN agencies on migration (UNFPA, UNDP) and INGOs. For the region of Asia, these include: the Inter-Governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), 1996; the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in the Asia-Pacific region, 2002; the Ministerial Consultation on Overseas Employment and Contractual Labour for countries of Origin in Asia (Colombo Process), 2003 (followed by a second meeting in Manila in 2004 and a third in Bali in 2005); and the Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin and Destinations in Asia (Abu Dhabi Dialogue), 2008 (with 9 Asian destination countries, among them the six Gulf states).

restructuring of economies and changing geo-politics. In the wake of such changes, migration has come to implicate most countries in the world in one way or another.

The global discourse on migration is based on two dominant paradigms: (1) the 'management of migration' discourse (whereby migration is managed through legally controlling the exit and entry of workers and, therefore, their access to employment opportunities), and (2) the 'migration-development nexus' discourse (which particularly focuses on alleviation of poverty in resource poorer countries of origin through migration to typically resource richer destination countries). Temporary or circular migration is a topic that has found a firm place on the global policy agenda, first and foremost via the GFMD which was established in 2007. The discourse on migration policy is thereby predominantly shaped by state preferences that are largely characterised by utilitarian, macro-economic concerns.

This means that the two major policy concerns that dominate the global agenda on migration (management of migration and the migration-development nexus), have the same core element in common. That is, they focus on controlling migration through state cooperation and extracting economic benefits of migration whilst paying lip service to the human rights of migrants. This is evident, for example, from the under-ratification of international standards specific to migrant rights; the piecemeal process of easing the many hardships experienced by individual migrants by addressing the exploitative practices of recruitment agencies and the employer-tied nature of temporary migration schemes, and providing prospects for secure residential rights and eventually full citizenship. On the contrary, however, more hurdles and obstacles to obtaining permanent residence and citizenship are being put in place whilst labour inspection authorities are notoriously under-resourced.

The global governance of migration is, therefore, premised upon normative interpretations as well as practices linked to a specific understanding of migration. This understanding equates human mobility with the need to have tight control and a selective approach to immigration on the one hand, and an increasingly aggressive 'labour export' policy that views migration's potential for economic development in resource poorer countries of origin, on the other. States hold onto their right to manage labour relations and poverty, not by liberalising the free flow of populations across borders. Instead they implement increasingly restrictive policies which allow for high levels of flexibility of temporary contract workers, hyper-exploitated 'illegal'

migrants, and the maintaining of strong ties to the origin country conducive to the securing of a steady flow of remittances²⁶. In the current scenario, the movement of persons is a function of market forces, restrictive regulation and macro-level politics rather than an aspect of personal choice²⁷. In addition, the 'management' discourse is also linked to the increasing concerns over migration in a securitising world. Events such as '9/11' and '7/7' have placed in focus the threat that especially Europe and the US face from the disaffected.

A considerable proportion of migrants are low-wage temporary contract workers who find themselves in a highly vulnerable situation on several accounts. Firstly due to the severe limitation of their rights, exploitation and discrimination that they are exposed to in the receiving countries; secondly, because temporary migrants may not only receive limited or no support from their sending countries, and may also face extortion (for instance by recruitment agencies) before and after their return, as well as in the transit process. It is because of the structural and experiential vulnerability and marginalisation of the many migrant workers that migrant rights organisations from around the world have come together to voice a common critique of the dominant discourse at the global level. This critique is based on the disregard for, or side-lining of, human rights issues by the dominant discourse. The argument made instead is in favour of a human rights framework considered essential for successful migration management and human development. This critique, therefore, constitutes a counter-discourse: the rights-based approach to migration.

2.3 Tracing the Human Rights Framework

The above-mentioned developments are manifested in the discursive and cognitive framework of rights within the emerging regulatory efforts around international migration. Of this, the ICRMW is a cornerstone.

The ICRMW is unique in the sense that it covers not only migrants but 'migrants as workers' (even though it does so by treating migrant workers essentially as social beings who have families and social welfare needs). This indicates a marked distinction from the other main group of migrants: refugees, who were the first major group of migrants subject to an international legal instrument, namely the 1951

²⁶ N. Piper (2010) 'All Quiet on the Eastern Front? – Temporary contract migration in Asia revisited from a development perspective', in: *Policy and Society*, vol. 90, pp. 1-13.

²⁷ M. Koskeniemi (2002). "Human Rights, Politics, and Love," *Finnish Yearbook of International Law* 13, 79-94.

Geneva Convention. The distinction between refugees and economic migrants/migrant workers is the outcome of a process of definitions and delineations based on politics and the development of institutional mandates. It is the product of a time when the global migration governance system was, and in many ways still is, fragmented and non-unified. As a result, apart from a 'refugee regime', no general 'migration regime' has been established.

The current international framework is in fact characterised by a multiplicity of organisations involved in migration. Calls have been forthcoming in favour of a new, unified regime and institutional arrangements but consent has not yet been found on how to move such institutional framework forward. It has been argued that the basic weakness of the current regime derives largely from the artificial distinction between refugees and migrants²⁸. This system may need reconstructing in order to suit today's world of high mobility and diversified patterns of international movement.

Historically, this system derives from a battle between the USA and two international institutions: ILO and the UN. The original conflict was over how to resettle the surplus populations generated in post-war Europe²⁹. According to Long³⁰, during this period refugees and migrants were treated as fluid identities, both used to describe the so-called "surplus population". Their collective emigration would solve Europe's economic and political problems in the post war period. Since the 1950s states' interests in restricting and 'managing' migration has grown.

The 1951 regime that centred upon the Refugee Convention and the establishment of the United Nations High Commissioner for Refugees (hereafter: UNHCR) as the core international organisation, preceded similar attempts made for migrant workers. As a politically crafted construction of Western states, it was shaped by cold war rivalries and grown out of a fluid and changing understandings of poverty, persecution and protection that international policy makers employed in developing regimes to govern both refugees and migration during interwar period.

Since that time, refugees and migrants have been presented as categorically different groups, and a discourse has emerged regarding the detection of 'genuine' refugees among otherwise so-called 'bogus' asylum seekers. Refugees' moves to

²⁸ Rieko Karatani (2005) *"How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origin"*

²⁹ Karatani (2005)

³⁰ Long (2013)

another country are supposed not to be economically motivated, thus the ideal refugee is to represent a figure of humanitarian rescue, qualifying only by virtue of the absence of any explicit economic aspirations³¹. In a climate of public hostility towards migration in general, preserving space for refugee protection is seen by many as depending on this separation of identities. There is a real difficulty persuading states to adopt more flexible approaches to the migration of the 'poor'³² which has persisted to today. As a result of this political environment, Non Government Organisations (hereafter: NGOs) and the UNHCR have broadly followed the line that 'refugees are not migrants' as a means of protecting the asylum space. This is despite broad recognition that the line is often arbitrary, as expressed in the phrase 'mixed migration'.

2.4 ILO versus UN

The ILO was established in 1919, at the time of the Treaty of Versailles and alongside the set-up of the League of Nations. Since its foundation, protection of migrants as workers was part of the ILO's general mandate. Its founding constitution mentioned the 'protection of the interests of workers when employed in countries other than their own' and the ILO's work on orderly migration and population distribution dislocation was seen as a contribution to the realisation of peace and social justice. Since its inception, the ILO's conception of migration was as a fundamental component of basic development. Freedom of movement was embraced by post-war socialism, and emphasis placed on the economic value of Europe's surplus population, with the refugee issue of secondary importance³³. The first General Director, Alberto Thomas, was keenly interested in developing the ILO into a supranational authority that would regulate migration movements in fairly impartial terms.

The ILO's work on migration grew after the Second World War, and several migration conferences in the 1940s endorsed its expansion on this subject. The ILO wanted to take care of all activities connected with migration and was ambitious to turn itself into a mammoth organisation. In support of this plan was the fact that migration was a question extending over the whole field of manpower, and a key component of the

³¹ Long (2013).

³² Critical migration scholarship has for long argued that international migrants are not the poorest of the poor as significant human and social capital is required in order to become an international migrant. However, there is also significant evidence that the expanding private recruitment sector has been sponsoring considerable numbers of migrant who can be regarded poor or poorer as they sponsor their migration through loans.

³³ Elie (2010).

general peace programme as well as of the fight for worldwide economic and social betterment. The ILO took an increasingly prominent role in leading the discussion on the international coordination of migration during the 1950s. For example, it invited other international organisations to the Preliminary Migration Conference where it was recommended the ILO should 'intensify its present activities in the field of migration'. Some governments, however, notably France, UK and USA, were concerned that too much international coordination would interfere with their migration policies, especially their right to select immigration according to their own standards and criteria. In particular the USA became cautious of being drawn into the ILO's expansionism on the basis of internationalism, let alone humanitarianism.

In 1951 the ILO held an inter-governmental conference in Naples, Italy at which it advanced its plan for a comprehensive agency that would incorporate refugees within a wider migration framework. The ILO-UN combined plan recommended international cooperation under the leadership of a single international organisation, the ILO³⁴. The idea was that the ILO would be responsible for migrants, including refugees, as workers. However, the Naples conference was a total failure for the ILO, with the USA essentially quashing the ILO-UN quest to build a single comprehensive regime for people on the move. The USA's congress was not prepared to release \$10 million in funding to an organisation whose members included the Soviet Bloc states. Instead of supporting the ILO, the US instead supported the creation of an alternative organisation, the Provisional Inter-governmental Committee for the Movement of Migrants from Europe (PICMME). This group later became the Intergovernmental Committee for European migration (ICEM), and today is known as the International Organisation for Migration (IOM). In this manner, the USA displayed a political commitment to protect refugees, especially from Communism.

After the conferences in Naples in 1951 and the creation of the PICMME (now IOM) the distinction between migrants and refugees emerged as a way of helping the restructuring and dissolution of the pre-war refugee protection organisations. According to Karatani (*see footnote above*), the two parameters for this division – forced movement and violation of civil and political rights – appeared inadvertently rather than deliberately. From the perspective of the USA, the main goal was to limit international influence over national migration and refugee policies as much as possible.

³⁴ Karatani (2005)

The key problem at that time was that only the USA had political and financial capacity to set up some form of international arrangement. Yet the USA's immigration policies remained restrictive. Their primary concern was how to deal with European refugees, especially the 1 million Displaced Persons (DPs) of mainly East European origin. After the USA's sabotage of the Naples conference, the alternative solution was ILO, UNHCHR, UN and NGOs interested in migration to attend the conference in Brussels in December 1951.

Since then, the debate about whether migrants (as opposed to refugees) need some sort of international protection did not reoccur at the UN level until the early 1970s. The UN began to then involve itself with issues regarding the protection of migrants, and later in 1990 it finally succeeded in establishing the ICRMW. Even today voices in favour of the international protection of migrants form a minority in the international political arena.

2.5 Tracing the ICRMW: Convention-specific and Organisational-specific Issues

In the early 1970s the issue of irregular and undocumented migration, especially the plight of victims of trafficking/smuggling³⁵, gained greater international attention. The ILO, for example, began addressing the issue of irregular migration and trafficking of workers around that time. In addition, at that time, the UN General Assembly established the link between migrant discrimination and racial discrimination, a link which was taken up by first World Conference to Combat Racism and Racial Discrimination held in Geneva in 1978. In its programme for action, states were invited to consider the possibility of an international convention on the rights of migrant workers³⁶. Concern for migrants entered the UN system from two different but interrelated perspectives: the human rights perspective, and the labour perspective with specific preoccupation for the clandestine traffic of workers. According to Battistella (2009), this indicates the specific cognitive frame at that time was to separate human rights and labour rights³⁷.

³⁵ The exact difference between the two was not known nor defined until the Palermo Protocol of 2000.

³⁶ G. Battistella (2009) 'Migration and Human Rights: the uneasy but essential relationship'. *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*. Cholewinski, R. et al (ed.). 47-69

³⁷ In academic scholarship, this division has been countered arguing for a perspective that subsumes labour rights under human rights, see Virginia Mantouvalou (2012), "Are Labour Rights Human Rights?", in: *European Labour Law Journal*.

When viewed as a whole, these steps can be seen as resulting in the eventual UN General Assembly (GA) Resolution 33/163 of 20 December 1978. This in turn, started off a chain of efforts aiming at the creation of a new migrant rights instrument. Most major countries of destination in the rich parts of the world at that time were neutral or expressed a negative view on the need of such instrument. Less well-off countries of origin reacted generally more positively.

The adoption of ILO Conventions No. 97 (Migration for Employment Convention, 1949) and No. 143 (Migrant Workers Supplementary Provisions Convention, 1975) were also primarily informed by the turbulent events affecting post-war Europe, its economic recovery in the face of a reduced workforce, followed by economic downturn and its first post-war recession almost three decades later. This is evident in the first ILO Convention No. 97, which has at its centre equality of treatment of migrant workers who move from labour surplus countries to those experiencing labour shortages. This was a particular feature that had arisen in Western Europe in the aftermath of the Second World War. The Convention was only concerned with migrant workers moving in accordance with the laws at the time, leaving out irregular migration. This context had changed when ILO Convention No. 143 was adopted. The oil crisis of 1973 and subsequent economic recession had resulted in a halt to the recruitment of foreign workers, which in return triggered clandestine migration. Incidences of trafficking and smuggling more noticeably rose from then onwards. Convention No. 143, therefore, aimed to address irregular migration by stipulating basic human rights of all migrant workers including those in irregular status, and the obligation by states to respect those regardless of workers' migration status. In the sense that its main concerns were the increasing violations of the human rights of all migrant workers, discrimination and lack of equality of treatment, the background to the adoption of this Convention is not too dissimilar from the lead up to the ICRMW³⁸.

At the global level, in terms of UN engagement, the genesis of the ICRMW goes back to 1975 with the submission of the Warzazi report to the United Nations Economic and Social Council (hereafter: ECOSOC). This report, entitled 'Exploitation of Labour through Illicit and Clandestine Trafficking', recommended finding ways to protect migrants in other ways beyond what the ILO Conventions offered. However it did not recommend drafting a new instrument; rather it said to proceed to the harmonisation of existing ones concerning migrant workers. The perception was that the UN was

³⁸ R. Cholewinski (forthcoming) "Working Together to Protect Migrant Workers: ILO, the UN Convention and its Committee", in: A. Desmond and N. Piper (eds), *The UN International Migrant Workers Convention at 25*, Pretoria University Press.

more appropriately tasked with this exercise, as the ILO's approach was considered too focused on economic aspects of migration. According to Boehning³⁹, the report was quite scathing of the ILO conventions and possibilities for improving migrant situations through the ILO. Mexico took on important role as sponsor by 1977 of resolution 32/120 that recommended consideration of the instruments adopted by UN and Warzazi's study. In 1978, Mexico suggested that a recommendation be made to explore possibility of a new convention (ibid).

At the 33rd session in 1979, the General Assembly adopted a resolution (34/172) calling on all states to ratify ILO C143 and explore the possibility of a new international convention.

During the same session, it was noted that all ILO member states would be called upon in 1979 to supply reports on ILO Convention No. 143 as well as additional ILO conventions on migrants. These reports would indicate the extent to which the ILO standards were applied, difficulties encountered in applying them and reasons for not ratifying the conventions. This would determine the necessity for an international convention⁴⁰.

Many UN members felt there was a sectoral approach regards existing instruments. For example the ILO was in charge 'labour' matters and UNESCO in charge of 'education. They pushed for an instrument that would comprehensively cover all aspects of migrant rights⁴¹. Further, ILO Convention No. 143 proved unacceptable to significant number of states: A few European employment states did not vote in favour of the Convention because article 14(a) on free choice of employment was seen to undermine the temporary guest-worker system. Less developed countries also wanted to avoid the ILO because being bound by Convention No. 143 was seen as a threat to cut off employment opportunities and hard foreign exchange remittances from illegally employed migrants in North America and Western Europe.

³⁹ Boehning, R. 1991. 'The ILO and the New Convention on Migrant Workers: The Past and Future'. *International Migration Review*, 25(4), 698-709

⁴⁰ Note: Sweden proposed an amendment to RES 34/172 to revise ILO C143 before proceeding to an international convention which was rejected by 65 votes to 12 with 34 abstentions (voting results on this proposed amendment are contained in appendix 3 of this resolution RES 34/172). In regards to Sweden's amendment to resolution 34/172, it is interesting to note the countries voting in favour of examining the potential for ILO convention 143 to be revised and expanded before proceeding to an international convention:

Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Federal Republic of, Iceland, Ireland, Israel, Italy, Netherlands, New Zealand, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America.

⁴¹ International Labour Office 1980 *Role and Place of the ILO in the Restructured United Nation System*. GB.212/IO/1/8

Furthermore, the ILO was not subject to automatic majority of Third World versus First World countries like at the UN. Also, the ILO was seen as the symbol of trade unions independence of governments, a system then not in fashion in African countries and Mexico.

In favour of ILO Convention, after the 1979 resolution was passed, Sweden issued an amendment to wait and see if the ILO could revise or enlarge its Convention. 17 'first world' countries voted in favour, 65 'third world' countries voted against, and a mixed group of developing and developed voted to abstain.

The ILO's initial response to the early conversation about the ICRMW was to disagree with the need on the basis of four main grounds. These were summarised by Battistella⁴² as having to do with duplication; waste of resources regarding supervising mechanisms and standards for workers fall into the competence of the ILO. The UN was seen as being able to focus on those aspects that go beyond the competence of the ILO.

3. Global Vision – Global Politics

The gestation period of the Migrant Worker Convention happened during a time when the UN provided a platform for countries in the so-called 'third world' (as they were referred to then), many of whom newly independent former colonies, in their attempt to promote the New International Economic Order (NIEO). It was, in particular, the shift in oil prices that made developing countries sense an opportunity to change the economic order to their advantage. Mexico was among those. The history of rights claims made by developing countries post-independence had led up to, and was surrounded by, the formulation of the NIEO. Such state-based rights claims had to do with the desire to gain more control over the ways in which aid, trade and foreign investment affected their economic performance⁴³. Given that most reasons for emigrating are economic in nature, such a new order would also affect outmigration.

⁴² G. Battistella (2009) (pp. 53-54)

⁴³ V. Ogle (2014) "State Rights against Private Capital: The "New International Economic Order" and Struggle over Aid, Trade and Foreign Investment, 1962-1981", *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, 5(2): 211-234.

Developing countries argued for the UN, rather than other specialised agencies, as being the better forum for discussing global development and the closing of the gap between rich and poor countries. This is because the UN provides a system where the 'one-state one-vote rule' applies, leaving the rich countries of the Global North in the minority. Voting rights elsewhere are weighted on the basis of financial contributions. The suggestion for shifting negotiations to the UN as opposed to the International Monetary Fund (IMF) and the General Agreement on Tariff and Trade (GATT) were, however, opposed by the USA. This was evident in the speech delivered by President Ronald Reagan in Cancun in 1981 at a meeting which brought together leaders of 14 developing and eight industrialised countries. In his speech, Reagan insisted that such discussion remain within the framework of international agencies, declaring that "the decisions reached by these agencies (World Bank, IMF) within respective areas of competence are final" and that new institutions should not be created⁴⁴.

The NIEO, and especially the Charter of the Economic Rights and Duties of All States, are said to be the product of nearly 20 years of conferencing led by the newly independent postcolonial states, the Group 77⁴⁵. The Conference on the Problems of Economic Development held in 1962 led to the establishment of a common Third World stance on development policy: the Cairo Declaration of Developing Countries. This produced the first seeds of NIEO. The Charter of Algiers from 1967 laid its second normative foundations. The Economic Declaration of the Algiers Conference of Non-Aligned Countries from 1973 asserted these countries' views to safeguard sovereignty over natural resources. Algeria seemed to have been the leader of the Non-Aligned Movement (NAM) at that time⁴⁶. A speech made at the 21st session of the United Nations General Assembly by the then Senegalese foreign minister, Doudou Thiam, was the first articulation of the right to development in the context of the need for a NIEO.

Such issues also filtered into the ICRMW negotiations. The Preamble text, which resulted from the first reading (A/C.3/39/WG.1/WP.1) on October 26th, 1984, contained references to the NIEO and the social and economic costs of labour

⁴⁴ Alan Riding (1981), "Reagan supports talks on poverty in Cancun Speech", The New York Times, October 23, 1981 (<http://www.nytimes.com/1981/10/23/world/reagan-supports-talks-on-poverty-in-cancun-speech.html>, accessed on 10 March 2016).

⁴⁵ D. Whelan (2015) "Under the Aegis of Man": The Right to Development and the Origins of the New International Economic Order", *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, 6(1): 93-108

⁴⁶ G. Haight (1975) "The New International Economic Order and the Charter of Economic Rights and Duties of States", *The International Lawyer* 9(4): 591-604

mobility on sending and receiving countries. In the context of the 1980s, however, these references were not seen as politically relevant and were therefore dropped.

3.1 Effects on the Convention's Drafting Process

The drafting process began formally with adoption of 1979 resolution 34/172 to establish a working group for the development of the migrant worker convention. Two main groups emerged, the Group 77⁴⁷ and the MESCA group (Finland, Italy, Norway, Portugal, Spain, Sweden). The first complete draft text was submitted by Group 77, but the proposals made by the MESCA group became the basis for the Convention's negotiation.

The MESCA group's main view (from May 1981) was to discourage employers from hiring illegal or undocumented migrants while recognising fundamental rights that must be accorded regardless of status. In other words, the objective was to counter irregular movements and hiring on the one hand, whilst providing rights to migrant workers and their families on the other hand⁴⁸.

The Working Group was composed of a mixture of three types of delegates: (1) experts on migration wishing to concentrate on substantive provisions connected with cause and effect of migration; (2) experts on international law and human rights interested in linking provisions with existing human rights instruments and creating coherent legal framework; and (3) experts on UN politics who used the negotiations as forums for exchanging political signals in accordance with UN work.

The UN Secretariat itself assumed a largely passive role, which amplified the role of MESCA group as an acting secretariat. The role of ILO was to assist MESCA closely with drafting proposals. Part VII – Application Machinery – was the climax of debate between the ILO and UN. The extent to which the ILO should be allowed to participate in the supervisory committee was a controversial issue. The ILO was, in the end, included in a consultative role (without voting rights) on the committee.

National/group interests are also reflected in the negotiation period. The socialist countries operated on the socialist understanding of migration and labour flows. They therefore wished to avoid inclusion of migratory movements within socialist countries

⁴⁷ <http://www.g77.org>

⁴⁸ Boehning (1991)

since migration was seen as a ‘socialist exchange of labour’ (article 3(b) reflects this). The Group 77 promoted the interests of citizens living and working in industrialised countries, and initially treated the draft as political instrument to achieve moral condemnation of states of employment for discriminatory treatment of migrant labour. The MESCA countries had modest powers and relied on international instruments and close international cooperation. Their aim was a universally acceptable instrument that would promote these objectives. Other Western countries outside MESCA emphasised the right of states to determine the criteria for admission and regulation. Provisions implying social or other costs to state caused by the inflow of migrants were of particular interest to this group.

4. Looking into the Future

The 1980s were characterised by a strong impulse towards neoliberalism, which was consolidated during the 1990s. By the year 2000, labour and employment rights were increasingly talked about in relation to global supply chains, a trend reflected within the field of human rights studies by a marked shift from a state-centric approach to one that considered the role of non-state actors as potential violators of human and labour rights. This role is captured by concepts such as ‘Corporate Social Responsibility’ and ‘voluntary codes of conduct’; the UN’s establishment of UN Special Representative on Business and Human Rights in 2005; and the ILO’s core principles and rights at work⁴⁹ declared in 1998, criticised for lacking reference to the minimum wage. Such changes indicate an increasing awareness of global interconnections. They also infer a shift away from western-centric approaches to labour standards anchored in the socio-historical realities of European socio-economic development and, therefore, the attempt to gain greater relevance and traction in the Global South where, the informal economy is still of considerable size, if not predominant.

A further manifestation of global interconnectedness was the Agenda 2030 for Sustainable Development (hereafter: Agenda 2030), adopted in September 2015 by the UN General Assembly. This Agenda is aimed at all countries, both ‘developing’ and ‘developed’, pledging to “leave no one behind”. It differs from its predecessor with its Millennium Development Goals (MDGs) (adopted in 2000) in that migration is explicitly referred to in a number of places in its Sustainable Development Goals (SDGs). In many ways this is a reflection of the heightened awareness and flurry of

⁴⁹ See <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

events on international migration at the global level that has been seen since the early 2000s, such as the work by the Global Commission on International Migration (between 2003 and 2005); the UN High Level Dialogue on Migration and Development in 2006 and the subsequent annual Global Forum on Migration and Development. Global discussions on international migration have led to a greater understanding of the significance of migration from the perspective of all countries involved, which in turn has provided the opportunity for putting the ICMRW back on the agenda.

This endeavour that may have a greater chance if pursued through the Agenda 2030, which identifies the promotion of decent work as the most effective route out of poverty, on the basis of good quality jobs and support for adequate social protection⁵⁰.

4.1 New Changes, New Challenges - Agenda 2030

The Agenda 2030 is regarded as a human rights initiative that opens a door for advocating the rights of migrant workers under the ICRMW. It is based on the basic declaration which aims ‘to realize the human rights of all’, and mostly has goals (in the SDGs) structured inline with the nine core human rights treaties.

An important aspect of these SDG goals is their universality. As the Agenda 2030 centres on the notion of ‘leaving no one behind’, it is uniformly applied to both developing and developed countries. This is positive in terms of protecting the rights of migrant workers by countries who are not a State Party to the ICRMW. Similarly, it can be helpful to promote migrant worker’s rights in developed states, most of which have not ratified the ICRMW.

Further, the SDGs have more power and traction to work in the national, regional and global arenas as they are economically, ecological, socially and developmentally more receptive than the previous MDGs. Therefore, they have a better chance for resource allocation and easier access to aid in comparison to the functioning of international obligations arising from conventional human rights treaties.

Also, the SDGs are timebound with a deadline of 2030. Unlike the vague interpretation of progressive realisation similar to International Convent of Economic

⁵⁰ Statement of Catholic-Inspired Organizations on Decent Work and the Post-2015 Development Agenda, Jun 13, 2013.

Social and Culture Rights (ICESCR), states' goals and implementation guidelines are based on the actual situation of human rights and their ability to achieve improvements and fulfil goals within the timeframe. International donors and aid programs will also be directed towards achieving the SDG goals by 2030. This is a clearer boundary for implementation than human rights mechanisms usually provide and should have practical implication for achieving the SDG goals.

In terms of accountability and transparency, the SDGs have adopted two important approaches that will be crucial under the ICRMW. Firstly, they have recognised the role of the private sector needs to play in the protection of labour rights and upholding environmental and health standards. Its call for 'all relevant stakeholders' to contribute to reports (follow-up and review) has also paved the way for private sector reporting obligations. Secondly, they also recognise the existing reporting mechanism such as the treaty bodies and Universal Periodic Review (UPR).

The rights of migrant workers under the ICRMW can be ensured through other human rights envisaged by the Agenda 2030 including gender equality, healthy lives and general well being, education, and the reduction of inequality between countries. Goal 8, which deals with employment and decent work (especially Goal 8.8, 8.9 and 8.10) is prominent to ensure the rights of migrant workers under the ICRMW. Similarly, Goal 10 on the reduction of inequality can also be an entry point under which planned and well-managed policies and the issue of migrant remittances can be dealt with.

Similarly, the Agenda has also paved the way for interpretation by mentioning 'other status' in the promotion of social, economic, ecological and political inclusion. The SDG has many entry points for migration related regulation in pursuance of the ICRMW. In Goal 4, which is related to education, scholarships that incorporate student mobility are mentioned for example. Similarly, Goal 5, which comes under the heading of gender equality, mentions mobility through trafficking of women and girls; Goal 16 deals with trafficking of children and their birth registration. Other avenues for migrant rights are, for example, Goal 17 (and other goals also) which deals with data disaggregation (including by migration status).

4.2 Challenges to Ensure the Rights of Migrants Workers under the ICRMW through the SDGs

Application of general provisions to migrants, regardless of the provisions' specific status, will be a challenge since most states do not feel obligated to work towards the

protection of migrant rights. This state of affairs can also provide an excuse to those states that have persistently refrained from providing any protection to migrants.

The main challenges to guarantee the rights of migrant workers under the ICRMW through the SDGs can be summarised as follows:

- i. The issue of decent work and full employment has been linked with, and also preconditioned by, economic growth. This link should not be explicitly made. Rather, decent work should be detached from the imperative of economic growth and thus be ensured, even in the absence of economic growth. Instead, it should include the four core principles of the ILO, emulated by various articles in the ICESCR that fall into the pre-existing international obligations. In this way, it could create obligation without additional approval or ratification from states and also provide for monitoring mechanisms.
- ii. With reference to sustainable development, the private sector is mentioned as an important partner, and therefore its role in protecting labour rights and maintaining environmental and health standards is acknowledged. However, there is a lack of acknowledgment of the need for private sector *regulation*. There needs to be better accountability and transparency about the abuses committed by the private sector with regards to the commodification of migrant labour and its responsibility for many labour rights infringements.
- iii. Through the lens of human rights accountability and the ICRMW, there are a number of lacunas:
 - a) Implementation, monitoring and reviewing are described in vague, tentative and voluntary terms that might lead to discrepancies and inconsistencies in terms of accountability.
 - b) There are no meaningful participatory channels for civil society organisations' input built into the framework for collecting data in order to follow up and monitor implementation. Similarly, there is no recognition of independent or alternative shadow reporting.
 - c) The SDGs did not require a guarantee of human rights accountability on the international level, for instance with regards to policies that have trans-border impact, including free trade agreements.
- iv. The SDGs do not provide recourse to structural inequalities relating to the rights of migrant workers.

- v. In terms of implementation, the Addis Ababa Action Agenda (AAAA)⁵¹ of which the outcome of the UN Third International Conference on Financing for Development is considered an important aspect, has been criticised in many regards, namely for:
- a) Its lack of concrete and time-bound commitments for rich countries and international organisations;
 - b) Its undue corporate influence;
 - c) The Women's Working Group on Financing for Development (WWG) criticizes AAAA as instrumenting women and financing gender equality and women's empowerment for achieving economic growth;
 - d) Its reliance on the traditional notion of economic growth, and ultimately
 - e) Its commodification of people, human labour and nature.

4.3 Possible Way Forward

The contribution of migrants to societies and economies has been tremendous and it is important to shape the Agenda 2030 such that it assists addressing the infringement of their human rights. There have been many attempts to identify the problems that migrants face and many strategies have been recommended by relevant organisations. For example the report on international migration and development to the High-level Dialogue on International Migration and Development (A/68/190) held in 2013 aims to identify the possibility of inscribing the issue of migration into the post-MDG period. It enlists the problems that migrants face and the proper steps to be taken in order to create better human rights mechanism for migrants. It makes the following points:

- i. Protect the human rights of all migrants;
- ii. Reduce the costs of labour migration;
- iii. Eliminate migrant exploitation, including human trafficking;
- iv. Address the plight of stranded migrants;
- v. Improve public perceptions of migrants;
- vi. Integrate migration into the development agenda;
- vii. Strengthen the migration evidence base;
- viii. Enhance migration partnerships and cooperation.

⁵¹ See http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf.

Although the SDGs have been agreed upon, the elaboration of an international plan of action and national implementation strategies are still in progress. This may provide entry points for advocacy to ensure there are ‘human rights first’ approaches in dealing with migrants. Intervention in the strategic process will require the following steps:

- A wider range of discussion among stakeholders including the private sector, employers’ and workers’ organisations, civil society and migrant organisations.
- A coherent policy framework within, and across governments and private sectors. Policies must focus on social, employment, economic, trade, investment, agriculture, industry and the environment.
- Addressing the recruitment costs of migration in many major migration corridors, which create a situation of forced labour that exposes migrants to greater vulnerability and reduces their ability to be ‘agents of development’. Enhancing discussion about remittance transactions costs and recruitment, portability of social security benefits and other acquired rights, and promoting mutual recognition of diplomas, qualifications and skills.

4.4 In Sum

The Agenda 2030 envisages goals and targets that are in line with established human rights instruments. Ensuring ICRMW rights through the SDGs, given that many states have not ratified the ICRMW, may be an important avenue to protect the rights of migrant workers. There are some provisions that explicitly mention migrant workers (although not enough) and the goals and targets enlisted can be advocated to protect their rights in an implicit as well as explicit manner. Despite the obstacles, certain features of the Agenda 2030 can help to guarantee ICRMW rights; these include its universality, human rights agenda, time-bound nature, recognition of private sector and current reporting mechanism under accountability and transparency.

If the steps illustrated in the above are followed, this could be a significant stepping stone of the future strategy to improve the situation of migrant workers by creating suitable indicators around decent work, reduction of poverty, better access to health and education, food security, housing with access to safe water and sanitation, and proper social protection. This would help to reduce high levels of inequality that migrant workers are disproportionately exposed to.

5. Concluding Remarks – Past and Present: Lessons for Advocacy

The ICRMW came about as an instrument with a vision for a global human rights convention that would counter trafficking and illegality whilst providing rights at work and for workers beyond their sole role as income providers. During the time of its deliberations and negotiation, several trends had progressed: a trend towards greater restrictiveness and consolidation, the spreading of temporary migration along with a generally greater precariousness of workers in light of rising curtailment of 'rights at work' and lowering labour standards. Classic immigration countries that had turned migrants into citizens, like Canada and Australia, have also begun to shift towards admitting migrants on a temporary basis whilst placing greater obstacles on the pathway to citizenship. This increased the significance of the ICRMW since claims that such countries of settlement do not have a 'migrant worker problem' (made during the ICRMW's negotiation) are most certainly no longer correct (if they were then).

Furthermore, the directions and composition of migration have changed such that migration has become increasingly diversified, and a significant proportion of it is occurring in an intra-regional, or 'South-South' context, where the bottom ranks of global production chains are located. Workers from the Global South also populate sweatshops in so-called 'developed countries' where they tend to labour in sectors shunned by the native workforce. We can also observe significant migration from the Global North, especially among young graduates and retirees.

The dynamics underpinning such complex migratory movements are rooted in spreading economic neoliberalism and the privatisation of vital services such as education and health. This is so much the case that education and social reproductive costs are financed by migrant remittances in many income poorer countries, whilst retirees from the Global North, in light of reductions in pension payments and rising living expenses, are resettling to countries where housing, daily living expenses and health care are more affordable.

The majority of migrants also sponsor their own migration, often through the services provided the widening net of private agencies, which has led to the serious problems of exorbitant recruitment fees and corruption. This situation is compounded by the revival or consolidation of temporary contract migration, often the sole route available

for legal migration. Lip service is being paid to human rights and the human rights language appropriated and co-opted by states and IOs, whilst few concrete efforts are made to realize them. This context shows that the issue of migrants' human and labour rights is still a pressing concern – beyond symbolism, with a focus on substance.

The current socio-political and institutional environment has long been adverse to the promotion of migrant rights. It is characterised by, among other features, a generalised predominance of intergovernmental discourse relativising and often rejecting the centrality of the existing international normative-regulatory framework for migration governance at national and international levels. Additionally a global narrative characterising migrants as actors –indeed *heroes* – of development, valued first and foremost for their economic contributions to both origin and destination countries⁵² is now predominant.

5.1 Key Considerations for Advocacy

A positive shift in the advocacy scene is the increasing collaboration between trade unions and migrant rights organisations. When negotiating the ILO Convention C 189 on Decent Work for Domestic Workers, for example in 2010 and 2011, this collaboration of unions, domestic worker and migrant organisations as well as development organisations has been proven successful. This reflects a closer alignment between labour rights and human rights in terms of normative framework as well as the range of advocacy organisations involved.

On a practical note, ratification, domestication and implementation of international normative instruments is very 'serious business', all the more so in the contentious domain of migration. It requires ambitious legislative, policy, practical and public relations efforts as well as the allocation of significant material, financial and human resources by governments and other stakeholders. Ratification alone, in each country, involves organising promotional activities; mobilising constituencies to support action; generating political will in government; assessing legal, policy and practical consequences; identifying legislative and policy changes required; motivating parliamentary action, and much more⁵³.

⁵² GMPA (2015), *A contribution on the question of promotion of ratification of the ICRMW and the ILO Conventions regarding migrant workers, their rights and migration governance*, to the UN Committee on Migrant Workers, 22nd Session, Geneva, 13-24 April 2015.

⁵³ GMPA (2015), *A contribution on the question of promotion of ratification of the ICRMW and the ILO Conventions regarding migrant workers, their rights and migration governance*, to the UN Committee on Migrant Workers, 22nd Session, Geneva, 13-24 April 2015.

This leads to the argument that a strategic, long-term approach is more essential than ever today to achieving further ratifications of the migrant worker Conventions – the ICRMW, ILO C97 and ILO C143. Further successful promotion will depend on re-asserting the validity and primacy of the existing normative framework and discourse on migration governance and its implementation. Key to this is to re-emphasise the centrality of normative instruments as the essential foundation for migration governance – and to do so by pointing to the fact that temporary migration is spreading, conventional pathways to citizenship even in liberal democracies made harder and precarity affecting all workers, migrant and non-migrant.

A new dynamic is provided by the SDGs. Progress has been made that migrants and their rights are explicitly mentioned therein. Therefore it is a matter of setting strong and human rights based indicators as well as participatory monitoring mechanisms. Civil society therefore has the opportunity for advocacy and participation in implementation on national, regional and international level.

5.2 Keeping on the Move

In conclusion, it appears helpful to provide concrete entry points for advocacy in order to make use of the new dynamics. Some of the activities listed below have proven successful and promising. They should be intensified. Others are still idle and need further research and engagement. Nevertheless all of the activities will be keeping us on the move:

- Building alliances of unions, migrant and development organisations;
- Joining in advocacy for the SDGs - indicator on number of ratifications of ILO and UN conventions;
- Formulating strategies to use existing instruments and to approach additional political platforms e.g. recommendation R 204 Transition informal to formal Economy; G8/G20 level and the ILO;
- Providing South-South-North research on the relevance of migrant workers in global value chains and the future of work and employment relations;
- Engaging in discussion on the nexus of climate change and migration;
- Tracing migration in the ecological SDGs 13-15;
- Launching the discussion on the nexus of demographics and migration.

Interview Schedule

- **Helsinki, April 1st, 2015**

Juhani Loennroth, *formerly Head of Finnish government delegation, later Chairman of the Drafting Committee*

- **Nice, April 7th and 8th, 2015**

Roger Boehning, *formerly Director of MIGRANT, ILO*

- **Geneva, April, 11th - April 22nd, 2015**

- a) OHCHR Migrant Treaty Body, meeting April 13th, 2015
General discussion with members of Treaty Body about this project
- b) Archival search at the ILO (*Boehning files*)

- **Geneva, September 23rd, 2015**

Archbishop Silvano M. Tomasi, *Permanent Representative of the Holy See to the UN and International Organisations,*

- **Sydney, December 9th, 2015**

Dr Graziano Battistella, *Director, Scalabrini Migration Center, Manila*

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Deutsche Kommission Justitia et Pax

Geschäftsstelle
Kaiserstr. 161
53113 Bonn

Tel: ++49/228 - 103 217 / Fax: ++49/228 - 103
318
e-mail: justitia-et-pax@dbk.de
www.justitia-et-pax.de