

White Paper 15

migration

AD1/ILA **150** ANS-YEARS



2023 PARIS

coordinators

Vasilka Sancin

Professor, Ljubljana University, Faculty of Law

Thibaut Fleury Graff

Professor, Paris-Saclay University

assistants / rapporteurs

Mariana Ferolla Vallandro Do Valle

PhD Student, International Law Department,
The Graduate Institute, Geneva (IHEID)

Rok Kljajic

PhD Student, Department of International Law,
Faculty of Law, University of Ljubljana

steering committee

(by alphabetical order)

Tano Kassim Acka

PhD Student, Paris-Saclay University

Philippine Mieuzet

Public Rapporteur, National Court for Asylum (France)



Delphine Nakache

Professor, Ottawa University, Faculty of Law

Adel-Naim Reyhani

Assistant Professor, Human Rights Institute Ludwig Boltzmann,
Vienna (Austria)

Jie Wang

PhD Student, Paris-Saclay University

introduction	page 6
1. state of the art current state of international migration law	page 11
2. challenges for the regulation and governance of international migrations	page 29
3. questions for the future of international migration law	page 59
annex 01	page 79

Introduction

The purpose of this thematic White Paper on Migration is to provide a basis for discussions that will take place throughout 2023, on the occasion of celebrating the 150th anniversary of the International Law Association (ILA/ADI), under the able leadership of Professor Catherine Kessedjian, Honorary President of the ILA/ADI French Branch and President of the ADI/ILA 2023 celebrations.

The theme was chosen as it corresponds to one of the major challenges humanity faces in the 21st century.

The preparation of this White Paper was guided by two underlying questions:

(1) In what kind of international society do we want to live by 2050?

and

(2) To achieve such international society, what international law do we need?

The White Paper begins with a brief sketch of the current state of international migration law, mentioning both developments at the global, as well as regional levels (Part I). It then turns to

the analysis of the replies received during the interviews conducted for the purposes of this project and on their basis discussed challenges for the regulation and governance of international migrations (Part II). On the basis of the foregoing, the paper then ends with questions for the future of international migration law (Part III). Finally, appendix lists the names of the interviewees, some with their names and affiliations, others, who were not comfortable in revealing their identities, just by references to the regions they are coming from or working in.

This is not an academic paper and it is not limited to issues of international law alone. The research conducted for this White Paper aimed at gathering views and thoughts from individuals from many different parts of the World, of different generations, professional profiles and backgrounds. We gathered insights from well-renowned experts in the field, as well as those, who are concerned about the phenomenon of migration, from individuals who have been working or studying in the field, and those who have themselves experienced migration in one form or another.

The White Paper will now be available for a broad public consultation and will serve as a basis for the work carried out in 2023, in particular as a Concept Note for the webinar organized on this particular topic in October 2023.

The present White Paper is the result of collaborative work of all the individuals mentioned on the cover page. We would like to warmly thank all our interviewees for their invaluable contribution to our research that resulted in our conclusions drawn in this document. Any possible misinterpretation is the responsibility of the authors only.

1.

state of the art

International migration law has developed not as a unified framework, but as a **system, connecting and building upon norms from several different international legal regimes**, that, to lesser and greater extents, impact the movement of persons across States' borders and its regulation, as well as their legal position in countries of which they are not nationals. Permeating all discussions on international migration law is the customary principle of States' territorial sovereignty. This principle encompasses States' power and authority to exercise migratory regulation and control, deciding who may enter and leave their borders, reside and work within within their territories, and under which circumstances. The ways in which norms of international migration law are construed and developed reflect tendencies to frame this prerogative.

The notion of **'migrants'** has not been defined in any existing international legal instrument, however, this White Paper adopts a broad description of this notion, to encompass all people who leave or flee their home to seek safety or better prospects abroad, and who may be in distress and need of protection or humanitarian assistance, including refugees and asylum seekers, who are entitled to specific protection under international law. However, for recognition of certain rights of migrants a condition of a

minimum duration of stay (for example 3 months in the definition of the International Organization for Migration) may apply.

International law provides specific frameworks and instruments for a few categories of migrants: refugees, migrant workers, and smuggled and trafficked persons. Beyond that, international human rights law occupies a prominent position in international migration law. Moreover, norms stemming from other fields such as the laws of regional economic and integration blocs on freedom of movement, the law of the sea, international humanitarian law, and international criminal law are also of relevance in migration contexts. In the following, we highlight the **main sources, principles and norms**, of these regimes that together form international migration law.

The specific protection of **refugees at the international level** is most centrally and comprehensively regulated by the 1951 Convention relating to the Status of Refugees¹ and the 1967 Protocol relating to the Status of Refugees,² which broadens the

Note 1 As of 1 July 2022 it has 146 States parties.

Note 2 As of 1 July 2022 it has 147 States parties (including the United States of America, which is not a State party to the 1951 Convention).

applicability of the 1951 Convention by removing the geographical and time limits that were part of the 1951 Convention and initially restricted the Convention to persons who became refugees due to events occurring in Europe before 1 January 1951. This core of the international refugee law framework sets out the conditions for a person to qualify as a refugee, the standards of treatment owed to refugees under the jurisdiction of a host State, including access to different socio-economic and political rights, and the core principle of non-refoulement, which asserts that a refugee should not be returned to a territory where they face serious threats to their life or freedom, which is now considered a rule of customary international law. The fundamental purpose of the Refugee Convention is to provide persons who cannot resort to the protection of their countries of origin access to a secure legal status elsewhere, while requiring them to abide by the laws and regulations of their host countries and respect measures taken for the maintenance of public order. Despite the wide ratification of these instruments by States, some of the most significant refugee-receiving States are not parties to one or either of them - this is the case, for example, of the United States, which has only partially ratified the Protocol, and of Lebanon, which hosts a large number of refugees. Nevertheless, international refugee law norms are spread and used also in non-signatory or non-par-

ty States, who are present and active in global fora (e.g. UNHCR Executive Committee), and in negotiating soft law instruments drawing on the 1951 Convention and 1967 Protocol, and these States also participate in the evolution and interpretation of international refugee law.

Relevant **regional norms regulating the protection of refugees** include the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa³ and, within the European Union (EU), a complex network of rules pertaining to the coordination and harmonisation of the asylum and migration systems of its Member States (currently 27)⁴. Although not legally binding, the 1984 Cartagena Declaration on Refugees, adopted by delegates from 10 Latin-American countries,⁵ has since been incorporated into the national laws and state practices of more countries and has shaped the practice of Latin American States regarding

Note 3 It has 46 States parties.

Note 4 The legal framework is being importantly clarified by jurisprudence of the relevant courts of the EU, in particular the Court of Justice of the European Union and the General Court.

Note 5 Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela.

refugee protection. Other non-legally binding instruments that inform State practice and may lead to the development of new international norms on refugees protection include: at the international level, the Global Compact for Refugees affirmed by the United Nations General Assembly in 2018, as a framework for more predictable and equitable responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation; in Africa, the 1994 Addis Ababa Document on Refugees and Forced Population Displacements in Africa and the 2004 Cotonou Declaration and Programme of Action; in Latin America, the 1994 San José Declaration on Refugees and Displaced Persons, the 2004 Mexico Declaration and Plan of Action, and the 2014 Brazil Declaration and Plan of Action.

The category of **migrant workers** is most comprehensively covered by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁶. This Convention contains norms applicable to all migrant workers, regardless of their migratory status, while some

Note 6 As of 1 July 2022 it has 57 States parties. The Convention is monitored by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter CMW).

provisions remain applicable only to documented migrant workers. It encompasses both labour-related rights as well as other human rights, such as freedom of thought and religion, and the prohibition of ill-treatment. However, the fact that the Convention has not been ratified by many relevant migrant-receiving States limits its practical relevance. This is also true concerning the Conventions on migrant workers concluded by the International Labor Organization⁷.

Furthermore, international migration law specifically covers the category of **trafficked and smuggled persons**, regulated mainly by the UN Protocol against the Smuggling of Migrants by Land, Sea and Air⁸ and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,⁹ both adopted in 2000 and supplementing the 2000 UN Conven-

Note 7 See Convention n°97 on migrant workers, adopted on July 1st, 1949 and Convention n°143 on migrant workers (supplementary provisions), adopted on June 24th, 1975.

Note 8 As of 1 July 2022 it has 150 States parties.

Note 9 As of 1 July 2022 it has 178 States parties.

tion against Transnational Organized Crime¹⁰. These instruments aim to prevent and combat smuggling and trafficking, promote respective cooperation among States, and protect the rights of affected individuals. In contrast to the approach taken towards refugees and migrant workers, the focus of this legal framework lies on security and the fight against crime and impunity.

Beyond the frameworks covering the specific situation of these groups, a significant part of the rules concerning the rights of migrants comes from the more general framework of **international human rights law**, under either treaty-regimes, further elaborated through the work of their supervisory bodies - Committees¹¹ or customary international law. While all human rights

Note 10 As of 1 July 2022 it has 190 States parties.

Note 11 In addition to the CMW mentioned above, in particular the 1966 International Covenant on Civil and Political Rights, monitored by the Human Rights Committee (CCPR); the 1966 International Covenant on Economic, Social and Cultural Rights, monitored by the Committee on Economic, Social and Cultural Rights (CESCR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, monitored by the Committee on the Elimination of Racial Discrimination (CERD), the 1979 Convention on the Elimination of Discrimination against Women, monitored by the Committee on the Elimination of Discrimination against Women (CEDAW); the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, monitored by the Committee against Torture (CAT) and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading

norms are relevant for migrants, the following are highlighted due to their special pertinence in the context of migration:

- The *principle of non-refoulement*, as also derived from the right to life and the prohibition of torture, which constitutes an absolute prohibition of the removal of any person to a State or territory where they are at risk of being subjected to serious human rights violations;
- *The right to seek and enjoy asylum*;
- The *right to liberty of movement*, as well as the right to leave any country, including one's own, which allows individuals, in the absence of a right to enter another country, to move towards a potential host State, in which they can apply for asylum;
- The *right to liberty and security*, which can protect migrants against arbitrary arrest or detention in transit or host countries;

ding Treatment or Punishment; the 1989 Convention on the Rights of the Child, monitored by the Committee on the Rights of the Child (CRC); the 2006 Convention on the Rights of Persons with Disabilities, monitored by the Committee on the Rights of Persons with Disabilities (CRPD); and the 2006 International Convention for the Protection of all Persons against Enforced Disappearance. Monitored by the Committee on Enforced Disappearances (CED).

- The *right to enter one's own country*, which may include both the country of nationality and another country to which a person has close and special ties;
- The *principle of non-discrimination*, which is especially relevant as people on the move seek to access rights and benefits in the host State;
- The *right to family life*, which has played a role both to prevent the separation of migrant families through expulsion from the host State, and to promote family reunion when a family member seeks to enter the host State;
- The *right to private life*, which has protected migrants with strong social ties in a host State from expulsion or provided them access to residence rights;
- *Due process guarantees in migratory proceedings*, which have been derived from either the right to an effective remedy or the right to a fair trial, important in the context of procedures for obtaining international protection, a residence permit or expulsion;
- The *prohibition of collective expulsions*, requiring an individual assessment of the situation of each person before removal from a State; and

- The *right of migrants to maintain their cultural practices* and take part in the cultural life of the host State.

Rules pertaining to the **extraterritorial applicability of human rights obligations** have been increasingly relevant in migratory contexts as well. As a consequence, the efforts of States to externalise migration control measures, including the interception of migrants before they reach the host State, especially at sea, offshore migratory processing, and containment policies do not necessarily allow States to escape their human rights obligations.

Another set of norms that have become increasingly relevant in migration contexts concerns **search and rescue at sea**, as migrants often have to resort to dangerous sea routes in their attempts to reach host States. These norms are found in particular in the 1974 International Convention for the Safety of Life at Sea (SOLAS)¹² as amended, the 1979 International Convention on Maritime Search and Rescue (SAR),¹³ and the United

Note 12 It has 167 States parties.

Note 13 It has 113 States parties. A revised Annex to the SAR Convention, adopted in May 1998 and in force since January 2000, clarifies the responsibilities of Governments and puts greater emphasis on the regional approach and co-ordination between maritime and aeronautical SAR operations.

Nations Convention on the Law of the Sea (UNCLOS)¹⁴. They require States to establish search and rescue zones and services, and to cooperate with one another in carrying out such operations. The masters of ships are also required to render assistance to people in distress at sea, taking them to a “place of safety”.

Finally, the right to **freedom of movement inside the territory of a State** provided under human rights law is furthered by bilateral and regional agreements that establish more favourable rules for nationals of States-parties to enter, reside, and work in another State-party. The specific rights accorded to individuals and their content varies greatly according to the treaty at stake. These agreements are most common within regional integration blocs and include, notably: within the EU, the Schengen acquis; between Mercosur member States, Bolivia, Chile, Colombia and Ecuador, the 2002 Residence Agreement; within the African Union (AU), the 2018 Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment; and within the Organisation of Eastern Caribbean States (OECS), the

Note 14 It has 168 States parties.

2010 Revised Treaty of Basseterre and its Protocol. The adoption of similar agreements with the aim to facilitating legal pathways for migration was endorsed by the 2018 Global Compact for Safe, Orderly and Regular Migration, the first intergovernmental (non-legally binding) agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner.

The human rights legal framework relevant for protection of migrants’ rights further evolves through jurisprudence of **regional human rights courts**, in particular the European Court of Human Rights, the African Court on Human and Peoples’ Rights and the Inter-American Court of Human Rights.

International humanitarian law (IHL) is relevant in regulating the movement of persons during armed conflicts in a number of ways. Many asylum seekers are persons fleeing armed conflict and often violations of IHL, but not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution, with no reference to armed conflicts. While there may be situations where persons are fleeing because of a fear of persecution based on their “race, religion, nationality, political opinion or membership of a particular social group”, this is not always the case. Recognising that the majority of

persons forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, but with no specific element of persecution, subsequent regional refugee instruments, such as the abovementioned 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict. The EU has also adopted a so-called “subsidiary protection” to protect people fleeing “indiscriminate violence in situation of international or internal armed conflict”. Moreover, states elsewhere have developed a variety of legislative and administrative measures, such as the notion of “temporary protection” for example, to extend protection to persons fleeing armed conflict. Such a protection is granted today in the EU to Ukrainians fleeing the Russian aggression against Ukraine.

In addition, IHL offers refugees who find themselves on a territory experiencing armed conflict a two-tiered protection: provided that they are not taking a direct part in hostilities, as civilian refugees are entitled to protection from the effects of hostilities, and additionally to this general protection, they are granted rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities. Under IHL, parties to an armed conflict

(international or non-international) may not displace civilians unless evacuation is necessary for civilians’ own security or imperative military reasons. Although prohibited, displacement of civilians frequently occurs in practice and once displaced or evacuated, civilians are entitled to various protections and rights (e.g., transfers must be carried out in satisfactory conditions of hygiene, health, safety and nutrition; during displacement persons must be provided with appropriate accommodation and members of the same family must not be separated). The 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War¹⁵ contains more specific protections for civilians, including the right to leave the territory of a party to the conflict, the prohibition of treating refugees as enemy aliens and a rule providing that protected person may in no circumstances be transferred to a country where they may have reason to fear persecution for their political opinions or religious beliefs. Furthermore, Additional Protocol I¹⁶ to 1949 Geneva Conventions provides that persons who, before the beginning of hostilities, were considered refugees under the relevant international

Note 15 It has 196 States parties.

Note 16 It has 174 States parties.

instruments accepted by the parties concerned or under the national legislation of the state of refuge or of residence are to be considered “protected persons” within the meaning of the 1949 Convention (IV) in all circumstances and without any adverse distinction.

Growing attention has been paid to the role of **international criminal law** in migration, as international crimes may be at the root of cross-border movements. In particular, the Rome Statute¹⁷ of the International Criminal Court, lists deportation or forcible transfer of population as acts that may give rise to crimes against humanity, whereas the displacement of the civilian population during an armed conflict may amount to a war crime. Since violations of certain provisions of IHL are war crimes, their commission may also exclude a particular individual from entitlement to protection as a refugee. Moreover, measures taken in response to migratory flows or to curb them may entail human rights violations amounting to crimes against humanity, if committed as part of a widespread or systematic attack directed against a civilian population, or the crime of genocide, if committed with the intent to destroy a national, ethnic, racial or religious group.

Finally, several **soft-law instruments** informing international migration law, some of which were also mentioned above, are regularly addressing also many other issues relevant for legal regulation of migration, including environmental and climate change induced migration. Various international instruments and reports are continuously being adopted within relevant international global and regional organisations and agencies (e.g., UN and the Special Procedures of the Human Rights Council, particularly the Special Rapporteur on the human rights of migrants, International Organisation of Migration (IOM), UN High Commission for refugees (UNHCR), International Committee of the Red Cross (ICRC), EU, Council of Europe, Organization for Security and Co-operation in Europe, Organization of American States, AU.)

Note 17 It has 123 States parties.

2.

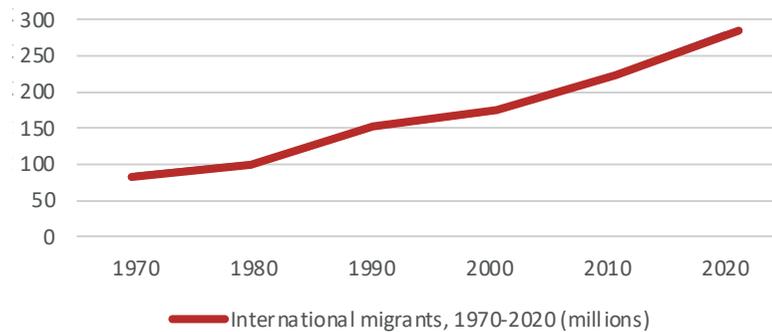
challenges
for the regulation
and governance
of international
migrations

The actual migration inflow has increased considerably since the end of the Second World War, with less than 85 million international migrants in 1970 and almost 281 million in 2020. The past decade (2010-2020) has been characterized by an exponential increase of international displacement, with a peak between 2013 and 2015. The curb slopes downward after 2015, but the inflow remains at a high level compared to the preceding decades.

If most people are estimated to be residing in the country in which they were born, the estimated number and proportion of international migrants already surpasses some projections made for the year 2050.

However, this steady increase of international migrations masks a diversity of situations. The main challenges to be addressed for a better regulation and governance of this phenomena are thus to take into account the **multiple profiles** of international migrants, the **numerous drivers** of migrations, and the sometimes **difficult and dangerous journeys** to host countries.

International migrants, 1970-2020
(millions)



First Challenge: Diversity of international migrants' profiles

Knowing who migrants are is of the utmost importance to adopt relevant and efficient laws and policies in this field. However, as underlined by several individuals interviewed for this White Book, most of the host States fail to adopt adequate laws and policies to take into account specificities of each migrant. As one interviewee puts it:

“policies in some Western countries are reluctant regarding migration (...). There are a lot of stereotypes”.

To deconstruct those stereotypes and to measure the challenge of taking into account the international migrants' diversity of profiles, it is necessary to rely on reliable data. According to the IOM statistics, **52% of international migrants are male and 48% are female**. Most of international migrants (74%) are of working age i.e., between 20-64 years old.

If the vast majority of international migrants are adults, **children are also concerned** by migration: the most recent global estimate for the total number of child migrants is approximately 31 million. If most of the children who migrate do so through safe migration processes as part of family units, many other child migrants are forced to move through unsafe ways. There are

‘
policies in some
Western countries are reluctant
regarding migration.
There are a lot of stereotypes.

| one interviewee

thus approximately 13 million child refugees, almost 1 million asylum-seeking children, and 17 million children who have been forcibly displaced inside their own countries: this is obviously a challenge for the upcoming years for national and international authorities as it raises numerous issues in terms of protection of those children, who will be the adults of tomorrow.

Last but not least, to close this portrait of international migrant, a significant part of them – almost 30% - were **forced to leave their country** or region of origin because of armed conflicts, violence, violation of fundamental rights, or, among other causes of migration, environmental catastrophes.

Turning now to the **geographical distribution of international migrants**, the USA still are the main country of destination for international migrants, followed by Germany, Saudi Arabia, the Russian Federation and UK. The main countries of origin of international migrants are India, Mexico, China, Russian Federation and the Syrian Arab Republic. If we go a little bit deeper in that picture, in 2020, Europe and Asia each hosted around 87 million and 86 million international migrants, respectively – comprising 61,4% of the total number of international migrants. These regions were followed by North America, with almost 59 million international migrants in 2020 or 20,9% of the global

migrant stock, Africa at 9%, Latin America and the Caribbean at 5,3%, and Oceania at 3,3%.

However, when **compared with the size of the population** in each of these regions of destination, shares of international migrants in 2019 were highest in Oceania, North America and Europe, where international migrants represented, respectively, 22%, 15,9% and 11,6% of the total population. In comparison, the share of international migrants is relatively small in Asia and Africa (1,8% and 1,9%, respectively) and Latin America and the Caribbean (2,3%). This being said, Asia experienced the most remarkable growth from 2000 to 2019, at 69% (around 34 million people in absolute terms). Europe experienced the second largest growth during this period, with an increase of 25 million international migrants, followed by an increase of 18 million international migrants in North America and 11 million in Africa.

One of the first challenges for the regulation and governance of migrations, at the international, regional and national levels is thus to **tackle this diversity of profiles, geographical distribution and demographic issues**. People who migrate as children have neither the same needs nor the same vulnerabilities as people who migrate for professional or family reasons as adults. In between those two extremes, there exists a multiplicity of

specificities – depending on the age, socio-economic resources, cultural profiles, etc. – that call for a comprehensive regulation of the phenomenon of migration.

One interviewee summed up the challenge in the following words:

“From the perspective of States, different States have different challenges, especially when comparing the Global North and the Global South. The Global South receives a greater number of migrants, more than 80% of the global amount. In South America, social inclusion policies are already quite fragile. In Peru, for instance, there is no general policy for the social inclusion of vulnerable groups. Some States in the Global North do not have strong policies in this regard, such as the United States, but in Europe such policies are better structured. Other issues impact the lack of adequate policies, such as lack of human resources and capacity-building. What States often do is to create new programs focused on assisting migrants instead of reinforcing existing programs for the general population and including migrants in these programs. Lastly, corruption of government officials is also an issue that affects migration in all of its dimensions.”

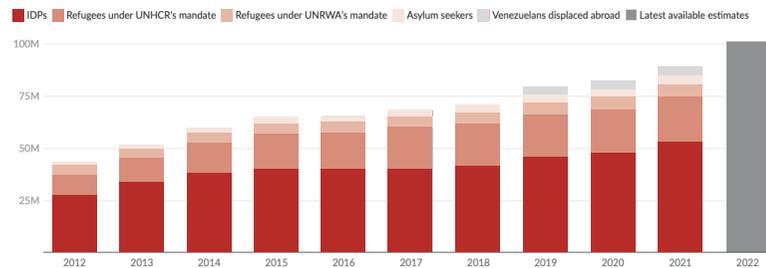
The challenge of adopting adequate laws and policies doubles when the diversity of the drivers of migrations is taken into account. Almost all the people interviewed for this White Paper insisted on the various push and pull factors that lead people to migrate: in the words of one interviewee, *“this is a multifaceted scenario”*.

Second challenge: diversity of drivers of migrations

All studies show that it is *hard to determine precisely which factors make people migrate*. There are multiple and diverse “drivers of migrations”, defined as a complex set of interlinking factors that influence an individual, family or population group’s decisions relating to migration, including displacement. Indeed, in both areas of origin and destination, there are factors that act to hold, retain, or attract people (pull factors) or those that repel people (push factors).

No single push factor is clearly identified as the leading one in the decision of individuals to migrate. However, all of the people interviewed list the same ones as potential factors of international migrations, which include armed conflicts, natural disasters, the enduring violations of human rights, discrimination against minorities – with specific references to sexual orientation and gender issues – and violence. According to the UNHCR, the number of people forced to flee worldwide rose from 36 million people in 2009 to almost 90 million people at the end of 2021. The number of refugees under UNHCR’s responsibility doubled, from 10 to 20 million, during the last ten years and internal displacement grew by nearly 60%.

People forced to flee worldwide (2012 - 2022)



Note: 2022 figures are estimated using data available as of 9 June 2022
Source: UNHCR Refugee Data Finder

One of the major causes of migration in 2022 is also the aggression of the Russian federation against Ukraine and the ongoing armed conflict. As of July 2022, according to data provided by the UNHCR, more than 5,5 millions of individual refugees from Ukraine were recorded across Europe, and more than 3,5 millions refugees from Ukraine registered for Temporary protection or similar national protection schemes in Europe.

‘When the group imposes itself, and the individual opposes this situation, and no longer wishes to remain in this situation, he or she migrates.

one lawyer
interviewed

‘ Whatever our country of origin, each person aspires to freely exercise his or her choices concerning fundamental elements of his or her identity, concerning religion, sexual identity, political opinions, etc.

one lawyer
interviewed

More broadly, one lawyer interviewed for this project interestingly considers that:

“Whatever our country of origin, each person aspires to freely exercise his or her choices concerning fundamental elements of his or her identity, concerning religion, sexual identity, political opinions, etc. Nevertheless, in many countries, the social functioning is such that the group takes precedence over the individual.

Certain practices, linked to the attachment of the clan, ethnic group or tribe to a tradition, deprive individuals of their freedom. Thus, when the individual is deprived of his or her freedom of choice, when the group imposes itself, and the individual opposes this situation, and no longer wishes to remain in this situation, he or she migrates”.

However, in the popular opinion, the economic factor seems to play a leading role, at least in Europe and in the USA. It is often referred to by the people interviewed for this paper as one of the definite drivers of migration. Some of the people interviewed also put forward the effects of “globalization” and of the “disruptive effects of capitalism and urbanization” on migration. The same is true for climate change that is almost always referred to by the people interviewed as a growing driver of migration. However, the importance of those two drivers of migration must be put into perspective.

The economic factor

Studies show that the so-called “economic factor” appears to be **only one of the many factors that make people migrate**. Other factors such as **fertility rates, networks and distance** play a determining role in people’s decision to leave their country for another¹⁸. More precisely, depending on the GDP of the country, the factors of migrations diverge. GDP level does not encourage or refrain people from migrating in itself: *it influences the type of factors that will make people migrate or not*. More precisely, it appears that in low-income countries, international migration decreases when there are higher fertility rates in the country of origin, and longer distances to potential countries of destination, while there is more international migration when there are more networks with communities in destination countries; on the contrary, in high-income countries, more international migration happens when GDP per capita rises in the country of origin and when there are networks between communities in countries of origin and destination. Changes in the GDP level in destination countries have then only a small influence on migration.

Note 18 Joint Research Center, « International migration drivers. A quantitative assessment of the structural factors shaping migration », Luxembourg, Publications Office of the European Union, 2018.

Environmental degradation and climate change

Climate change is definitely an important cause of displacement, but it has not yet generated important influx of *international migrations per se*: as of today, there is only a “slow-onset impacts” of climate change on migration¹⁹. It is however true that sudden or progressive environmental and climate changes may lead individuals to migrate, either temporarily or permanently. Thus, according to the IOM and International Displacement Monitoring Center (IDMC), **in 2020, 30.7 million new displacements were triggered by disasters in 145 countries and territories**. However, the IOM underlines that it is “important to note that these numbers mostly focus on new displacements in reaction to a sudden-onset disaster and within their own countries – the data regarding slow-onset events and disasters, and data on cross-border movements remain incomplete”. Nevertheless, the IDMC calculated an estimated 46,000 new displacements due to extreme temperatures, and 32,000 new displacements due to droughts in 2020. Over the period 2008–2020, over 2.4 million new displacements were caused by droughts and over

Note 19 IOM 2022, p. 233.

1.1 million by extreme temperatures²⁰. It has to be noted though that the vast majority of displacements driven by environmental and climate change, including disaster displacement, occurs within the borders of countries (and thus qualifies as internal displacement and not as international migration), and that it is hard to identify whether or not a displacement is led by climate change and/or other factors. Considering this challenge, one interviewee states that:

“it is difficult to pinpoint to what extent the environmental change led to the displacement and to what extent this was due to other circumstances. One example is the earthquake in Haiti; Haiti had other socio-economic problems that led people to move, migration did not happen only because of the natural disaster”.

In any case, as remarked by another interviewee:

“There is no clear definition of what environmental migrants/refugees are, either in the law or in policy. We do not know how to deal with people in this situation (...). There is simply no common understanding on how to approach this topic.”

This quick panorama of the drivers of migration shows how complex the phenomenon of migration is. It depends on the interaction of multiple factors which influence migrants' decisions to migrate, from their country of origin to the destination country. These drivers are diverse and often overlap. It is therefore quite difficult to try to figure out what the migrations will look like in the next years: this is another important challenge for the upcoming years in this field.

Global trends & future of migration

Some tried indeed to measure migration inflow for the coming years, taking into account two main variables:

- economic development, on the one hand, and
- the type of international relations (grounded upon unilateralism or multilateralism) between States, on the other hand.

According to such projections and theories, the more economies are divergent, and the more States cooperate together, the more migrations are rising. On the contrary, the more economies are similar and the less States cooperate together, the more international migrations are declining. This means that, depending on the scenarios – ranging from a migration-favorable scenario

Note 20 IOM 2022, p. 237.

of economic divergence and multilateralism to unfavorable one of economic convergence and unilateralism - migration inflows could double by 2030 compared to what they are today.

That said, it is widely recognized that the **scale and pace of international migration is difficult to predict with precision**. It is too closely linked to unpredictable events – as recently proved by the Covid-19 pandemic – as well as long-term trends to allow reliable projections. It is also well-known from long-term data that **international migration is not uniform across the world but is shaped by economic, geographic, demographic, and other factors resulting in distinct migration patterns**, such as migration “corridors” developed over many years. The largest corridors tend to be from developing countries to larger economies such as those of the United States, France, the Russian Federation, the United Arab Emirates and Saudi Arabia. As noted by the IOM in its 2020 report, this pattern is likely to remain the same for many years into the future, especially as populations in some developing subregions and countries are projected to increase in coming decades, placing migration pressure on future generations.

However, it is important to keep in mind that international migrants are agents of their own migration. Indeed, the push-pull factors approach to explain migration tends to “undermine the individual motivations, assuming automated responses or pas-

sive reactions to the factors, and might “set structural arguments unrelated to the complexity of human mobility”. If such a framework can be “useful to categorize the reasons that may prompt movement”, it makes “strong assumptions about the way individuals respond to stimuli”. Indeed, it “presumes that individuals are rational, have access to full information, that markets tend to a general equilibrium, which is far from the reality of migration”. So, as such, the model “fails to explain why, for instance, people respond differently to the same “push” and “pull” forces, and why emigration and immigration occur simultaneously in the same areas, or why the vast majority of the world’s population does not migrate”²¹.

It is therefore important, to address this key challenge of “migrations drivers”, to take into account the motivations of the migrants themselves. As one interviewee, an international migrant herself, puts it:

“[migrants] want to have a chance. It’s not only running away from something that is making your life unbearable in your home country. It represents a challenge (...)”.

Note 21

G. Lanau, « Migration drivers: why do people migrate? », *EU Logos Athena*, May 31, 2019.

Third challenge: safe migration and international cooperation

Alongside the multifaceted aspects of the drivers of migrations and the diversity of the migrants' socio-cultural and economic profiles, **the concern for safe ways of migrations is among the most shared by the people interviewed for this project** – and, more broadly, by the most authorized observers of the strengths and weaknesses of international migration law. This challenge involves States' cooperation, the respect of migrants' rights, and the impact of world-wide phenomenon such as the recent Covid-19 pandemic.

States' implementation of international law and cooperation

Most of the people interviewed first of all remark that States do not implement the existing law, they break it or circumvent it. Even though there has been some improvement on this point, as this will be seen later²², there is a **clear lack of cooperation between States, but also confusion regarding the international regime**. On this point, one interviewee states that:

“The policies of countries of immigration vary widely and there is no comprehensive, let alone effective legal framework. Each country is using the principles of [migration] law in its own ways and that creates a situation of confusion and bad temper. We cannot say that one country is completely right or that one country is completely wrong because the profiles of migration are diverse and above all the questions of sensitivity and absorption capacity in immigration societies are not certain.”

There are thus numerous challenges regarding States' cooperation on international migration issues. Notably, in the European system, there is for example a large consensus that the Dublin Regulation system is a failure and that its reform is one of the most pressing challenges for the EU and its Member States.

It is also possible to detect another concerning **trend of externalizing migrations, harsh migration policies and pushbacks**. The 2022 agreement between the United Kingdom and Rwanda, which creates a “mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda, which will process their claims and settle or remove

Note 22 See Part III.

(as appropriate) individuals after their claim is decided”²³ is only the most recent and striking example of an old **policy of “burden-shifting”**, already developed by Australia, and which generally amounts to a violation of international migration law²⁴.

Examples of pushbacks at States’ borders or on the high-seas also **illustrate States’ willingness to endanger migrants’ journeys** by forcing them either to go back to the country from which they came, or to take even more dangerous routes to make sure they will not be found and refouled by States’ authorities. Recent reports issued by independent NGOs²⁵, but also by Eu-

ropean²⁶ and International authorities²⁷, have set the light on those practices. One interviewee notes also the practice of **“administrative harassment” by States’ authorities, to obstruct the work of NGOs.**

Human rights of migrants

The practice of pushbacks is contrary to the rights of migrants not to be refouled to countries where their life or liberty is threatened, as enshrined, for example in Article 33 of the 1951 Geneva Convention on the Refugee status or in Article 3 of the 1984 Convention against torture. More globally, there exists a consensus among the people interviewed for this project and among international authorities competent on this issue²⁸, that

Note 23 “Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement”, Apr. 14, 2022.

Note 24 See UNHCR, “Analysis of the legality and appropriateness of the transfer of asylum-seekers under the UK-Rwanda arrangement”, 8 June 2022.

Note 25 See e.g., Amnesty International, “Greece: violence, lies and pushbacks. Refugees and migrants still denied safety and asylum at Europe’s borders”, June 23, 2021; Human Rights Watch, “Die here or go to Poland: Belarus’ and Poland’s shared responsibility for border abuses”, Nov. 24, 2021.

Note 26 See e.g., “Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe’s borders”, *Recommendation by the Council of Europe Commissioner for Human Rights*, Apr. 2022.

Note 27 See e.g., “Report on means to address the human rights impact of pushbacks of migrants on land and at sea”, *Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales*, U.N. Human Rights Council, 12 May 2021, A/HRC/47/30.

Note 28 See e.g., “Regional study: management of the external borders of the European Union and its impact on the human rights of migrants”, *Report of the Special rapporteur on the human*

the human rights of migrants are not sufficiently guaranteed, en route as well as at the borders of and on the territory of their countries of destination. Whereas relevant human rights are proclaimed in numerous well-known international global and regional instruments, the vulnerabilities inherent to dangerous journeys from the countries of origin to the countries of destination exacerbate the risks of violation of those rights by relevant States' authorities.

Migrants are more exposed to discrimination, abduction, human trafficking, arbitrary detention and/or torture as regular and legal routes to escape a country of origin in which their lives are threatened are very difficult to access. Moreover, there is neither international courts nor committees specifically competent on those issues – except the Committee on migrant workers, which however cannot receive individual complaints until a sufficient number of States have ratified the individual complaint mechanism. Violations of human rights are a direct consequence of these difficulties. As one interviewee puts it:

“The main problem is that when people decide to migrate or are forced to migrate, there are no organized and safe migration routes. People become trapped in these routes. They walk in circles; it is like an open prison because there is no chance for you to leave. The survivors are broken people. The psychological effects of what they endured are going to be long term and it is going to be very difficult for these people to create a normal life, even if they succeed and either gain refugee status or find employment.”

Whereas States' authorities tend to, as observed by one interviewee “feed, especially in the run-up to political elections, a security, hateful, xenophobic discourse pointing the finger at this or that community”, there is then a challenge for the forthcoming years to “humanize migrants” in public discourses and policies, to make sure that they are considered as subjects of laws and holders of human rights. The Covid-19 pandemic has shown that this challenge is far from being addressed.

Obstacles to international migration: the case of the Covid-19 pandemic

The impact of the Covid-19 pandemic on international migrations has been particularly significant. According to the IOM, “Covid-19 related immobility became the “great disrupter” of migration”.

rights of migrants, François Crépeau, U.N. Human Rights Council, 23 Apr. 2013, A/HRC/23/46 and, for e.g., V. Chetail, *International Migration Law*, Oxford UP 2019, pp. 119 sq.

States have focused on responding to the global health crisis by virus testing, disease treatment and vaccination; however, the pandemic has also prompted them to make important changes to freedom of movement of people all around the world, impacting human mobility globally. Indeed, governments all around the world implemented various measures to limit the spread of the virus and a range of restrictions was introduced from early 2020, evolving over time. From late March/early April 2020, States put travel restriction measures, both internal and international. *Some countries stopped all entry of foreign citizens, some even banned citizens of specific countries to enter, while even further, some countries completely closed borders to stop departure and entry of all people, including their own citizens.* Covid – 19 related restrictions thus had a massive effect on migration inflows. A lot of those measures are still in force today. According to the OECD Annual International Migration and Forced Displacement Trends and Policies Report to the G20, the number of new asylum applications lodged in the first half of 2020 was 32 % less than the number during the same period in 2019.

Despite the mobility constraints existing due to Covid – 19 pandemic, *migrants continued to embark on clandestine journeys, which pushed them into more perilous situations where humanitarian help and rescue might not be present.* Moreover, pandemic related restrictions impeached the operations of civilian vessels by denying or delaying disembarkation at safe ports in multiple places all over the world. For example, in the case of South – Eastern Asia, Rohingya migrants attempting to leave Myanmar were stranded at sea because States refused to disembark them due to fears of infection. In April 2020, even though it is difficult to know the reasons of deaths on the stranded boats, on one boat an estimated 70 individuals died after the boat was refused entry to any country for more than two months.

This showed again that mobile populations are often the most vulnerable ones, because they have more difficulty accessing health care services, thus tending to be the most affected ones by the spread of Covid – 19. Low – skilled labor migrants in crowded dormitories may have been disproportionately affected by the pandemic in some areas of the world. The UNHCR also constantly highlighted the urgency for States *to end unlawful detention of refugees and asylum seekers amidst the pandemic.* The UNHCR reminded that States must act to ensure

their actions are in line with international law and that amidst the ongoing Coronavirus pandemic, vulnerable refugees aren't being placed at heightened unnecessary risk.²⁹

From the vantage point of migration, the pandemic has thus been a health crisis, a socio-economic crisis, and a protection crisis.

However, the pandemic has also been challenging for States, as some of them realized the importance of migrant workers for their economy. As one interviewee puts it:

"The pandemic created new challenges regarding access to basic services in host countries. Some of these restrictions applied to civil society as a whole. For instance, many surgeries or medical visits were postponed because all the doctors were employed in the anti-COVID efforts. This also affected migrants, documented and undocumented.

On the other hand, the pandemic made it clear that we need migrants for the functioning of society as a whole. The majority of agricultural workers in Italy are migrants. If these workers had not been around during the pandemic, the provision of products like vegetables and milk to the population would have been insufficient. The same goes for domestic workers.

The pandemic was a chance for us to finally understand the important role of migrants in our society and, in Italy, society failed to accept that."

The pandemic proved to be a challenge both for States and migrants. It showed how global phenomenon impacts human mobility and needs to be addressed through States' cooperation and international law.

Note 29 See for e.g., UNHCR, "Refugees and the impact of Covid-19. Background guide", available at <https://www.unhcr.org/5fc1262e4.pdf>.

3.

questions
for the future
of international
migration law

The second part of this White Paper outlined the main challenges facing international migration law: **the steady increase of international migration, the diversity of international migrants' profiles and of the drivers of migration, and the respect of migrants' human rights**, both during the migration process in itself and upon migrants' arrival on the territory of the States they are not the nationals of. Compared to the statements made in the first part, those challenges raise some questions as to the capacity of today's international migration law and governance to address them, now and over the next few years.

Most of the people interviewed for this White Paper consider that today's international migration law addresses "relatively poorly" or "insufficiently" those challenges.

They identify four main lacunas of the legal system regulating – or failing to regulate – international migrations, the first two related to **the architecture of the international system**, the last two focused on some of its **substantive aspects**.

Questions regarding the architecture of the international legal system

There is a major concern among the people interviewed about the **capacity of the international legal order to deal efficiently and fairly with migration issues**, given the classical architecture of international law. Those concerns relate to the inefficiencies and weaknesses of international law, and the lack of courts specialized in international migrations litigations.

Besides the classical issues regarding the implementation of international law by States, the permeability of migration issues to political constructions and discourses, with the development of hate speech and xenophobia in the public arena, **questions international laws' ability to regulate States' actions in this field**. Thus, in the words of one interviewee:

"Mechanisms of international law are not strong enough, so political actors are caught between a weak legal framework and strong public opinion. Particularly, democratically elected politicians are prone to this dilemma. This is the dynamic of where we are as a world."

According to another interviewee, there are also a lot of difficulties stemming from the very architecture of the international society:

“The UN is marginalized, and its action paralyzed by the Security Council’s voting system, which is an anti-democratic and unrepresentative system. The permanent member countries with the right of veto no longer correspond to the reality of the world. The Security Council does not reflect democracy. It would therefore be necessary to reform the UN system, in particular the Security Council, either by cancelling the right of veto for the five permanent countries and making a majority rule, or by integrating new third world countries with the right of veto so that there is a balance.”

In line with this first set of arguments, the lack of an international court or committee with special jurisdiction over international migration law cases is also a matter of concern. According to one interviewee:

“we should strive toward a binding and enforceable mechanism in order to safeguard human rights affected by the issues of migration.”

Indeed, as of today, there is no international or even regional court or monitoring committee with special jurisdiction and specialization on alleged violations of the human rights of all migrants by States – except the Committee on migrant workers, which still has no jurisdiction to hear individual complaints.

At the universal level, neither the International Court of Justice, nor the UN treaty bodies, such as the Human Rights Committee, the Committee on the Rights of the Child, the Committee against

torture, etc. have specific jurisdiction in migration cases. The same is true at the regional level, since, for example, neither the European Court of Justice nor the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and Peoples’ Rights have *specific* competence on those issues. Moreover, when they are engaged in adjudicating on cases related to migration issues – the risk of torture or degrading or inhuman treatments in cases of deportations, for example – they lack power to enforce their decisions. This is highly regrettable for most of the individuals interviewed, even though the lack of enforcement powers is a common feature of the international legal order that protects States’ sovereignty.

Bringing cases to national courts is in any case a pre-condition (due to the requirement of exhaustion of domestic remedies), even though in several countries, the litigation in the field of migration is divided between various courts. Thus, one interviewee expressed an aspiration that:

“one day there might exist a large court specializing in aliens law in general, organised by section, dealing with visa, nationality, residence permit, asylum litigations, etc.”

Those various concerns lead to a central question for the future of the international law and regulation of migration:

How to improve cooperation among sovereign States in a world of increasing international migrations influx and how to sanction any committed violations of international law?

There is a consensus among the participants to this White Paper that **bilateral cooperation, on the one hand, and global governance, on the other hand, need to be developed further to ensure better regulation of migration issues in the coming years** and to make migration safer, especially by developing legal pathways to avoid dangerous routes. One interviewee thus pleads for:

“an international agreement or mechanism on the international level to provide logistics support and to organize migration and refugee pathways.”

As the creation of a specialized International Migration Court with jurisdiction to hear migration cases and the development of a set of universal hard laws appear largely unrealistic in the near future, even though some call for it³⁰, it appears more

Note 30 One interviewee opined: “The international refugee system is not uniform, it is very ad hoc. Even though it would be impossible to achieve complete uniformization, the law should

realistic to develop governance mechanisms and soft laws – or **bilateral and/or regional agreements**. For example, one interviewee proposes that:

“The countries of origins (...) should increase the number of agreements on workers, so that migrants are accepted in accordance with bilateral agreements that provide for the guarantees for migrants to integrate (training, language, etc) (...).

Through a good international legal system, and through proper agreements, bilateral, regional, or multilateral, you can govern or regulate migration, taking into account that, at the end of the day, that migration is part of specificity of human beings since the very old age”.

Another interviewee considers that:

“The role of international law seems to me to provide States with tools, such as bilateral conventions, enabling them to formalize conventions, for example, enabling them to formalize reciprocal commitments designed to enable them to deal with these crisis situations”.

establish parameters and reinforce the sense of the rights when dealing with migration management. The 1951 Refugee Convention and Protocol are getting outdated due to new migratory movements and need to be updated. For instance, the Refugee Convention strictly speaking does not guarantee refugee status to many Syrians who fled due to the armed conflict. International law should be more focused on ensuring rights to individuals than on “controlling” migration from States’ perspectives”.

Some interesting proposals were voiced to **develop the roles of actors other than States**. Thus, for example, one interviewee explains that:

“I am a practitioner of international law and I am in constant contact with refugees, which allows me to identify difficulties. My role is therefore to make proposals so that the law can adapt to the concrete needs of individuals (...). These ideas and proposals can also be conveyed by associations, NGOs, people working in the field, by UN agencies, etc. (...).”

The same interviewee also thinks that some existing international courts could develop their jurisdiction on international migration matters:

“The ICC prosecutor, for example, should be able to act against any state that commits crimes against humanity or war crimes, even if that state has not ratified the Rome Statute. The Security Council should be able to impose sanctions on any state, including permanent members: when such a state is affected by the measure, its veto power must be suspended”.

The Global compact for safe, orderly and regular migrations adopted in 2018 by the UN General Assembly set rules to meet some of these challenges. Adopted as a “cooperative framework that recognizes that no States can address migration on its own due to the inherently transnational nature of the phenomenon” (§15), it insists on the importance of both “access to justice to

file complaints about rights violations” (§19.d) and “international, regional and bilateral cooperation and dialogue” (§15).

More specifically, as to the first point, the objective to “address and reduce vulnerabilities in migration” includes the development of “access to justice and effective remedies, especially in cases of sexual and gender-based violence, abuse and exploitation” (§23.c). The Compact also underlines the importance of facilitating victims of trafficking in persons in the context of international migration’s access to justice, “including redress and compensation, in accordance with international law” (§26.h).

As to bilateral agreements and mechanisms, as well as international and regional ones, the Global Compact presents them as the main tools to be developed to govern of international migrations. States commit to “promote and improve systematic bilateral, regional and international cooperation and dialogue to exchange information on migration-related trends” (§19.b), to “develop (...) bilateral, regional and multilateral labour mobility agreements (...)” (§21.a) or, among other examples, to “manage [their] national borders in a coordinated manner, promoting bilateral and regional cooperation, ensuring security for States, communities and migrants” (§27). More globally, those agreements appear as comprehensive tools to promote pathways

for regular migrations – including resettlement of refugees, one of the “durable solution” promoted by the Global Compact for Refugees – and to promote and organize **solidarity between States** (§§14, 39, 42). **The Compact insists on the “shared responsibilities to one another as States Members of the United Nations to address each other’s needs and concerns over migration, and an overarching obligation to respect, protect and fulfill the human rights of all migrants, regardless of their migration status (...)”.**

However, there is no reference, neither in the Global Compact for Migrations, nor in the Global Compact for Refugees, to the creation of a new court or committee, or to the specialization in international migration and/or refugee law cases of existing ones. The Compact for Migrations indeed mainly relies on exis-

ting mechanisms to ensure the respect of international migrants’ rights³¹, including national ones³².

As to the governance of migrations, the two Global Compacts rely on a wide and diversified galaxy of stakeholders, ranging from States and international organizations (e.g., UNHCR, IOM, ILO but also WHO and FAO) to NGOs, private actors, and the civil society. Point 44 of the Global Compact on Migrations summarizes the diversity of the actors involved: States assert that they “will implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamen-

Note 31 See e.g., §29.a : “To realize [the commitment to use immigration detention only as a measure of last resort and work towards alternatives, States] will draw from the following actions : a) use existing relevant human rights mechanisms to improve independent monitoring of migrant detention (...) ensuring that it is a measure of last resort, that human rights violations do not occur, and that States promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children”.

Note 32 See e.g., §31.d : to “provide access to basic services for migrants », States will « establish or mandate independent institutions at the national or local level, such as National Human Rights Institutions, to receive, investigate and monitor complaints about situations in which migrants’ access to basic services is systematically denied or hindered, facilitate access to redress, and work towards a change in practice”.

tarians, National Human Rights Institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders". Finally, the Compacts themselves create new actors in the establishment process of a global governance, such as the Global Refugee Forum (created by Paragraph 101 ff of the Global Compact on Refugees), or the Asylum Capacity Support Group (established by the Global Compact on Refugees, Point B.1.6). Thus, beyond the mobilization of traditional actors of the global governance, the Compacts encourage the creation of new ones.



Regarding those recent developments, the **main question** that remains to be addressed is therefore whether today's **expanding galaxy of migration governance** will successfully be **turned into a comprehensive, well-coordinated and effective system**. Other related and just as important issues that demand answers and will affect the future of the international migration law, are:

- *the articulation between the different levels of governance – local, national, regional, international, universal...;*

- *the role and competencies of the different and numerous stakeholders;*
- *the consequences of the development of legal pathways of migration on the protection of refugees;*
- *the willingness of States to apply the non-legally binding Global compacts adopted in 2018.*

Questions regarding the substantive aspects of international migration law

As to questions related to the substantive aspects of international migration law, there are many concerns among the people interviewed about **the relevance of the distinction between international migrants on the one side, and refugees** on the other in a world where international migrations are driven by a multiplicity of factors.

As of today, there is no global and binding comprehensive treaty-regime to regulate migrations in general. Current treaty-regimes are grounded upon the logic known as "one-cause of migration". Moreover, those regimes, logically, do not encompass factors of migration that were not foreseeable when they were adopted. This is especially true concerning the **protection of**

people fleeing climate change and natural disasters. Even though some consider that international law is “sufficiently open-ended and flexible for States to include environmental migrants in some legal definition, refugee or not, if they so wished”³³, most of the interviewees regret the lack of an agreed definition on what constitutes environmental migration and of an international instrument to protect those who are driven to migrate by such factors. In the words of one interviewee:

“International law does not contain rules that are regulating climate change migrants. The problem is becoming painfully real and one of the foremost challenges is to act in time and if we don’t act in time we will be faced with the challenge of dealing with the problems”.

One of the main questions to be addressed in the future is therefore:

How to take properly into account the diversity and new drivers of international migration?

People disagree as to the best way to answer this question. The distinction between refugees and “other migrants” is mainly at stake here. According to one interviewee,

Note 33 This is an idea expressed by one of the interviewees.

“Finally, migrants are escaping from closed societies, authoritarian non-democratic regimes, or because of their beliefs (religious), minority belongings and identities. They don’t want to be refugees or become refugees. The difference between refugees and migrants has to be very clear. For refugees you have a very clear definition (in 1951 Convention), and the rights of refugees, the role of IOs (UNHCR), and host societies. We have to differentiate between those fleeing conflict, those who are politically persecuted, and those looking for a better life. There is a line between legal migration and irregular migration”.

On the contrary, others think that this distinction has to evolve in one way or another. One interviewee thinks for example that:

“International law needs to be developed more and maybe even the Geneva Convention has to be modified to include environmental reasons as a basis for some kind of protection.”³⁴

However, another interviewee thinks that:

“there is no single formula on how to deal with [migrations] because the phenomenon itself is more multi-causal (...). Causes of migration change over time and we live in an era where there is a combination of causes, which produce mass migrations or mass exodus of people. Internal conflicts are one of the reasons for migrations and have produced massive

Note 34 This is an idea expressed by one of the interviewees.

migration flows in the recent past. There are also problems of economic and social nature. If you look at Central America you can see that the socio-economic collapse of societies, social disintegration of societies, and resulting massive crime produced migration flows. And then of course there are new global phenomena such as global warming that create unbearable climatic conditions for large populations, which can lead to migration either directly as a result of unbearable living conditions or indirectly by creating conditions for armed conflicts (...)".

Whatever the solution to be found, the same interviewee adds: "it is necessary in the future to hold governments accountable for their policies for the mitigation of the effects of climate change"³⁵.

The 2018 Global Compacts only partially answer this question. In 2016-2018, when negotiating the UN Global Compacts, States as well as the UNHCR made it clear that the **distinction between migrants and refugees would not be called into question**. As one interviewee put it:

"despite grey zones (mixed flux, vulnerable migrants, environmental migrants...), the distinction [between refugees and migrants] has to be preserved, in order to avoid undermining the protection of refugees and confusions [between the two categories]".

The 2016 New York Declaration recognizes that "refugees and migrants have the same universal human rights and fundamental freedoms" and that "they also face many common challenges and have similar vulnerabilities, including in the context of large movements" (§6), and it contains commitments "that apply to both refugees and migrants" (§21). But this does not lead to the adoption of one unique international instrument encompassing both migrants and refugees. Instead, **States adopted different and distinct Compacts, with different principles and objectives for migrants and refugees**, questioning by so doing refugees' mobility and migrants' protection³⁶.

However, the Global compact for safe, orderly and regular migrations is presented as a comprehensive set of rules to protect international migrants' rights and to govern international migration, whatever the reasons why people migrated. Migration

Note 35 *Ibidem.*

Note 36 See C. Costello "Refugees and (Other) Migrants: will the global compacts ensure safe flight and onward mobility for refugees", *International Journal of Refugee Law*, vol. 30, n°4 (2018).

is defined as “multidimensional reality” (§15.i, §35, §39...) to be governed by general principles, encompassing all causes of international mobility. In that sense, the 2018 Global Compact on Migration constitute also a “a ray of hope”³⁷ for environmental migrants. Several provisions of the Compact do indeed point towards taking these issues into account.

Thus, for example, the Second Objective of the Compact is to “minimize the adverse and structural factors” of migration”, which includes “disaster risk reduction, climate change adaptation and mitigation”. Specifically, points K) and L) of this second goal call on states to develop and harmonize strategies and mechanisms to address the vulnerabilities of people affected by natural disasters, ensuring that they have access to humanitarian assistance that meets their basic needs with full respect for their rights. In addition, and most importantly, the fifth objective of the Compact calls States to “develop or build on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their

countries of origin owing to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible” (§21.g).

*
* *

Despite the developments described above, there are still **many questions that remain to be addressed**, such as:

- *the consequences of the development of regular pathways of international migrations on the protection of refugees;*
- *the resilience of the general migration framework to global crisis such as the Covid-19 pandemic;*
- *the development of new forms of general protection, such as temporary protection, as a durable solution.*

Note 37 W. Kälin, « The global compact on migration : a ray of hope for disaster-displaced persons », *International Journal of Refugee Law*, Vol.30, No.4 (Dec.2018), pp. 664-667.



annex 01

persons interviewed

All persons interviewed speak in their own capacity and do not necessarily represent the views of their employers.

- **ACOSTA Diego**, Spanish, Professor of European and migration law at the University of Bristol.
- **ANGLADE Claire**, Lawyer working with migration and refugee law.
- **AL-HADHAA Ebrahim Hasan Abdullah**, Yemeni, formerly worked with Médecins sans Frontières (MSF) in Yemen as a field coordinator assistant.
- **ANMAR OYON ALSOOD Mohamed**, Syrian
- **ARALICA Adriana**, Currently works at the International Organization for Migration in issues related to family reunification.
- **AWWAD Waed**, Syrian psychologist, formerly worked at the International Committee of the Red Cross.
- **BARDUTZKY Samo**, Slovenian Associate Professor of constitutional, migration, and refugee law at the University of Ljubljana.
- **BASSIM Wafaa**, Emeritus Egyptian ambassador, member of the Egyptian Council for Foreign Affairs.
- **BLOUIN Cécile**, Peruvian researcher at the Democracy and Human Rights Institute of the Pontificia Universidad Católica de Perú.
- **BRUMAT Leiza**, Argentinian researcher at the Migration Policy Centre and doctor in social sciences. She previously worked as a consultant for the International Organization for Migration and Mercosur.
- **CAMERON Geoffrey**, PhD by the University of Toronto in the department of political science. His research focuses on comparative immigration and refugee policy, religion and politics, and Canadian public policy.
- **CILIBERTO Giulia**, Italian researcher at the University of Cagliari and international protection and human rights expert at the Cagliari Territorial Commission.
- **CORRADI SANDER Silvia**, Brazilian coordinator of the protection unit of the United Nations High Commissioner for Refugees in São Paulo.
- **DAL MASO JARDIM Tarciso**, Brazilian, legal consultant for the Brazilian Senate, member of the editorial committee of the International Review of the Red Cross, and professor of international law at the Brasilia University Center.

- **DEL VECCHIO Victor**, Brazilian private consultant on human rights and migration, Master's student in international law at the University of São Paulo.
- **D Rados**, Serbian, lawyer, general director of the Asylum Protection Center.
- **GAHLEITNER Lukas**, Spokesman and jurist for the "Asylum Coordination Austria", an NGO in the field of asylum in Austria.
- **GOLMOHAMMADI Gloria**, PhD candidate in European law.
- **HAKIMOVA Aigul**, Activist with a bachelor's degree in international relations.
- **IZOULI Aydin**, Syrian coming from Damas, lawyer working with human rights and refugee law.
- **JUBILUT Liliana Lyra**, Brazilian professor of International Law at the Catholic University of Santos. She is the university's coordinator for the Sergio Vieira de Mello Chair, in partnership with the United Nations High Commissioner for Refugees, and an associate researcher in the RefMig project.
- **KBESI Khalil**, Young Syrian refugee in Austria, studies mechanical engineering.
- **KOGOVSEK SALAMON Neza**, Lawyer and member of the European Commission against Racism and Intolerance.
- **MEDIZEVEC Anze**, Slovenian law student.
- **MARECHAU-MENDOZA Michèle**, Trained as a specialized educator, then worked in a sub-division responsible for the integration of immigrant populations. Appointed by the Council of State as an assessor within the French National Court of Asylum.
- **MILIC Nikolina**, Serbian lawyer, worked with refugee law and currently works with the organization Save the Children.
- **PAPPALARDO Maria**, Italian lawyer who provides free legal assistant to migrants and asylum seekers.
- **PENALBER Thais**, Brazilian, Associate Support Officer of the Intergovernmental Consultations on Migration, Asylum and Refugees at the International Organization for Migration in Geneva.
- **PLANITZER Julia**, Member of the European Council's Group of Experts on Action against Trafficking in Human Beings (GRETA). Her comments were made in her personal capacity and she did not speak as a member of GRETA.

- **PONCELET Léa**, Legal coordinator at Human Rights Observers.
- **RENGVAR Ursa**, Slovenian lawyer representing asylum seekers in asylum proceedings in Slovenia.
- **REZAI Mohsen**, Afghan refugee in Greece, formerly worked with Médecins sans frontières as a health promoter and interpreter.
- **SANDIC Goran**, Works at the Belgrade Center for Human Rights, in partnership with the United Nations High Commissioner for Refugees.
- **SAWHNEY Sugandha**, LLM candidate in international law at the Graduate Institute of International and Development Studies in Geneva and human rights lawyer.
- **SCHEWEL Kerilyn**, Lecturing Fellow at the Duke Center for International Development and a Senior Researcher at the International Migration Institute.
- **SETINC VERNIK Manca**, Project Leader at the NGO Humanitas - Centre for Global Learning and Cooperation.
- **THALER Iza**, Slovenian lawyer, works at the Centre for Peace Studies in Ljubljana with international migration.

- **THOMAS François**, Licensed captain of the merchant navy, was second captain and engineer officer. Today, he is the president of SOS Mediterranean.
- **TRIGGIANO Marta**, Italian
- **TÜRK Danilo**, International law professor, former Slovenian ambassador at the UN and former president of Slovenia.
- **VIDOVIC DALIPI Tea**, Croatian sociologist working at the Center for Peace Studies in Zagreb.
- **ZLATAR Franci**, Geologist, works at a Slovenian NGO, "Slovenian Philanthropy".

Interviewees who preferred not to reveal their identity.

- **French interviewee**, Administrative judge.
- **Chinese interviewee**, Environmental lawyer in the United States.
- **Chinese interviewee**, Researcher in computer and artificial intelligence in China.
- **Chinese interviewee**, General counsel of a Chinese company.

- Chinese interviewee, CEO of a Chinese carbon emissions compan.
- Chinese interviewee, Partner of a Chinese law firm.
- Chinese interviewee, PhD candidate in tourism in a Chinese university.
- Chinese interviewee, Air law researcher in China.

IN THE SAME COLLECTION

Food / Agriculture

Anthropocene

Fight Against Corruption

Mass Crimes and Impunity

Law In Support of Democracy

Human Rights

Energy

Business and Human Rights

Outer Space

Civil Status

International Finance

Taxation

Global Governance / Multilateralism

International Investments

Migration

Digital Challenges for International Law

Ocean

Sdgs beyond 2030

Cultural Heritage

Intellectual Property

Dispute Resolution

Health

Labour

Cities in International Law

White Paper n° 15 - Migration

realisation: July, 2022

graphic design: *clémence hivert - bluclemence@gmail.com*

www.ilaparis2023.org/en

Public consultation from September 1 to December 31, 2022

ila.adi2023.migration@gmail.com

