

Strengthening the Migration-Development Nexus through Improved Policy and Institutional Coherence

By Rosa Losada

Migration is a complex phenomenon that requires close cooperation and mutual support, particularly between governmental institutions. The complexity of migration issues is clearly reflected by states diverging national migration policy interests that exists within one state. In line with the Swiss Report on International Cooperation on Migration of the Swiss Federal Council¹, this complexity requires close coordination and cooperation between the governmental institutions and all offices. This would promote not only coherence but also a balancing of interests between the various mandates, priorities and objectives of the governmental institutions and offices. This contributes to curbing irregular migration, yet allow for the benefits that migration can offer to the sending, and receiving country as well as the migrants themselves (triple win²). Only through a close and coherent cooperation between all governmental actors involved in migration issues the migration-development nexus can be strengthened.³

The pressure for cooperative approaches to better manage migration flows is particularly relevant and evident in the international community. These cooperative approaches form the bases for the different ongoing multilateral dialogues on migration and development issues.⁴ The nature of transnational migration demands international cooperation,⁵ however to reach this point, regional measures must be coordinated among states that are active in a specific region. Further still migration policy is still primarily formulated at the national level, so it must be here where the coherence should stem from.

To achieve this coherence national governmental institutions and offices need to develop a multilayered system of coordination amongst them to allow for a forum in which all diverging national migration policy interests could merge and allow for the design of a coherent migration policy.

Policy and institutional coherence in migration and development policy is almost only achieved when a state is able to converge the governmental institution's and office's interests on to track as best as possible. Conflict of interest undoubtedly occurs, yet it is important to display coherence especially in front of partner states in the international community.

To achieve a policy and institutional coherence, the first step has to be the design and implementation of a functioning and multilayered cooperation system on a national level. Therefore enough resources (personnel resources, coordinated finance or budget lines) should be available to implement and maintain it. Here, all relevant layers from the bottom up, top down as well as horizontally must be linked and systematically well informed to reach a minimum coordinated output and coherent outcome. This can serve to identify concrete problems and common interests and can help to design coordinated policy responses for promotion of a mutual understanding of issues of common concern.

¹ Report on International Cooperation on Migration of the Swiss Federal Council, February 2011: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/migr.Par.0034.File.tmp/Rapport_Cooperation_en_matiere_de_migration_internationale_16022011_FR.pdf

² Rahel Kunz, Sandra Lavenex, Marion Panizzon, Governance through partnerships in international migration, in: Multilayered Migration Governance, The promise of partnership, Routledge 2011, P.2.

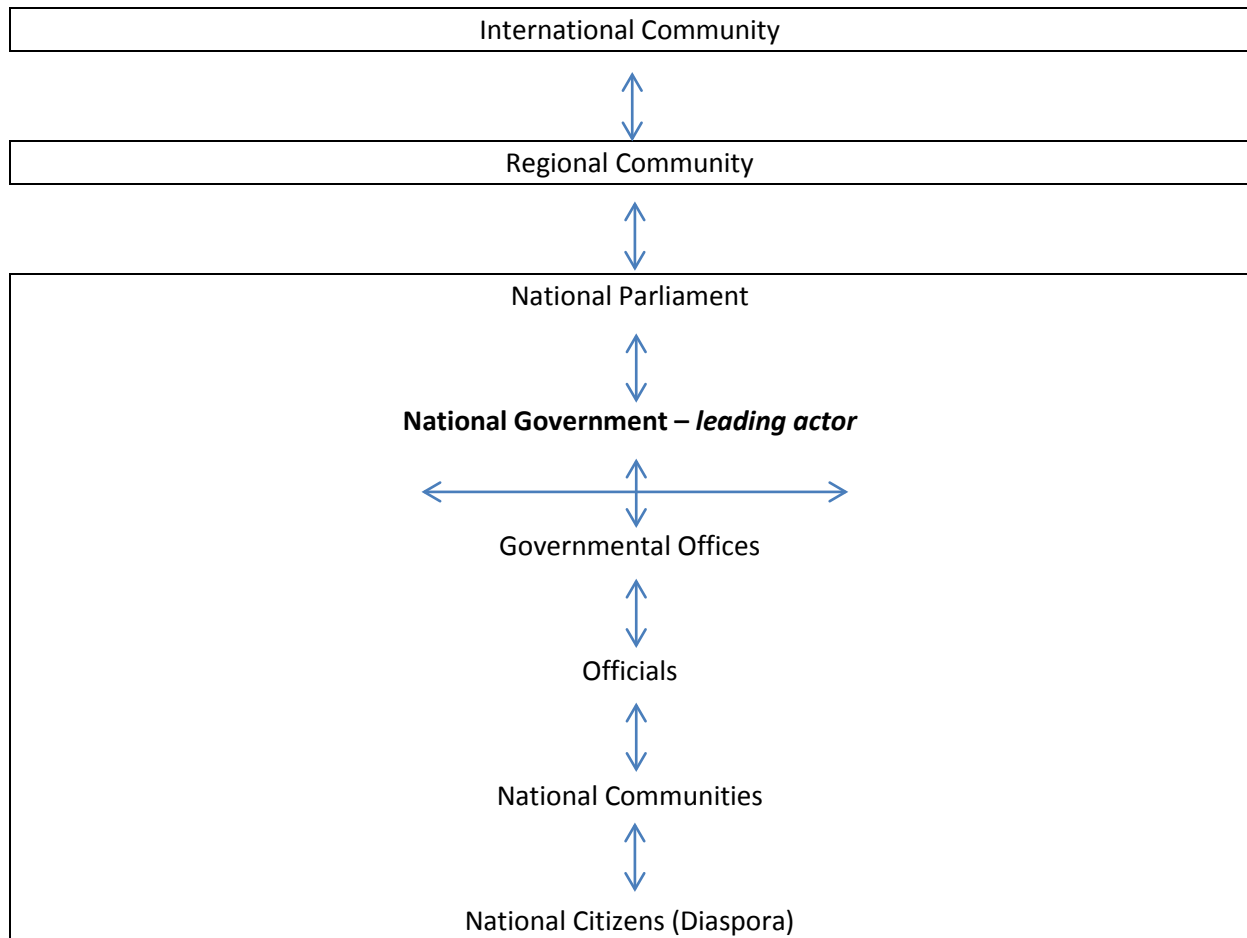
³ Odile Rittener, Rosa Maria Losada, Lauret Perriard, Stefano Toscano, A paradigm shift, in: Multilayered Migration Governance, The promise of partnership, Routledge 2011, P.250-254.

⁴ So the UN High Level Dialogue in Migration and Development: The Special Rapporteur welcomes the High Level Dialogue as an important opportunity for the widest range of actors, including States, intergovernmental organisations and civil society organisations, to come together to discuss migration in a multilateral setting:

<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/HighLevelDialogueonMigrationandDevelopment.aspx>

⁵ Report of the Global Commission on International Migration, 2005, p.67.

The design of such a multilayered system to achieve more coherence should mainly involve the following actors:



The development of this multilayered system should technically not be a problem from the point of view of a developed country but more difficult to accomplish for developing and for least developed countries because of weak or not well functioning governmental structures.

In line with the EU to manage legal migration coherently and to address the root causes in countries with high emigration rates (especially low/middle-income countries), states should in the framework of such cooperative, inter-institutional and multilayered coordination system focus on:

- employment issues
- governance
- demographic developments.

In economic terms, this means focusing on:

- reform and job creation
- improving working conditions
- improving socio-economic prospects
- wider access to quality education
- better vocational training

- improving management skills
- encouraging declared work.⁶

It is possible to achieve a widespread coherence if states develop and implement a system where coherent and complimentary decisions are possible. As the Swiss examples shows it is absolutely possible to achieve a widespread coherence in a state's international migration policy, however this will not be the case for states with weak or no functioning institutional structure

Institutional coherence can greatly reduce the costs associates with overlapping and duplicating work among involved national institutions.

⁶ http://ec.europa.eu/europeaid/what/development-policies/intervention-areas/migration/index_en.htm

Opinion Note

Workshop: Strengthening the Migration-Development Nexus through Improved Policy and Institutional Coherence

by Marion Panizzonⁱ

Migrant host countries, through a process of fragmentation of international decision-making in migration, of installing and maintaining different international agencies for different migration challenges (ILO, UNHCR, IOM, UNDP, UNESCO, WTO), use the global level to reinforce the national level and thus to maintain power. The fragmentation of the mandates of existing international and intergovernmental institutions, each dealing in an isolated manner with a specific aspect of the migratory process should be overcome, since this fragmentation prevents a coherent single solution which could be offered to encompass the globality of the migratory process, spanning from the migrant's decision to leave, his or her admission and authorization to work, to the duty to return home.¹

Strategic fragmentation with its multiple layers and its mixture between soft and hard rules has been a deliberate strategy and choice by strong states to mobilize weaker states to cooperate on migration control and readmissions, much in the way that Abbott and Snidal would argue.² Such fragmentation is thus driven by the more powerful, which in the case of migration, are migrant host countries who desire to keep migrants out, labour standards low and migrant labour cheap. These goals can only be sustained if there is a system of layers which have the potential of ruling each other out, correcting each other, contradicting, overriding each other etc. rather than building onto each other in a coherent manner. Moreover migration is a policy field where there is a typical gap between policy objectives and outcomes.³

A further question is to what extent governance has the function of coherence-building or of fragmentation. We agree with Grainne de Burca that "policy segmentation", which has a similar function to "laundering", may lead migrant host states to opt for multi-level integration, diversity and decentralisation, deliberation, flexibility and revisability, experimentation amounts to a certain degree of fragmentation as a way to use one level of governance to be able to better enforce another level of governance.⁴

In addition to this "strategic" fragmentation, there exists "normative fragmentation" and "thematic" or "topical" fragmentation as detailed below. We find that whereas strategic or institutional fragmentation is still alive and kicking, "normative fragmentation" is being gradually replaced through the means of bilateral migration agreements which in fact build coherence and evidence a burgeoning constitutionalism. At the same time, thematic or topical fragmentation still runs strong, also in the light of the skill-biased and thus selective labor migrant recruitment policies and the unclear status of environmental migrants.

Fragmentation in migration continues to be the rule of the day as there still is a North-South divide on how migration should be managed. Yet, we observe isolated "moments" of coherence in what we describe as the balancing/corrective function of

¹ Jason Gagnon and David Khoudour-Castéras, *Tackling the Policy Challenges of Migration* (OECD 2011) 36.

² Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 449; see their example of the United States, which 'ran its [first] Gulf War operation through the UN Security Council, even though doing so was burdensome, because this helped it to mobilize valuable support from weaker states, including bases in Saudi Arabia and financing from Japan.'

³ Nastasja Reslow, *Partnering for Mobility, Three-level games in EU external migration policy* (Maastricht University, 2013) 17.

⁴ Grainne de Burca and Joanne Scott, 'New Governance, Law and Constitutionalism' in Grainne de Burca and Joanne Scott (eds), *Law and New Governance and Constitutionalism in the EU and US* (Hart Publishing 2006).

certain bilateral migration agreements of the second-generation. Counterintuitive as it may seem, bilateral migration agreements are not further fragmenting the system of migration law, but instead contribute to more coherence. Nowhere is this “normative fragmentation” more obviously overcome than in the Spanish and the French cases, where bilateral agreements offer more preferential market access for labor migrants and other more favorable benefits than the restrictive national (unilateral) immigration laws of these two countries. By correcting the stringency of the French /Spanish immigration law in favor of the migrant sending country, bilateral migration agreements amount to a burgeoning feature of a constitutional system for migration that has moved beyond the fragmented islands of norms interconnected only by topical similarity rather than by normative or even hierarchical considerations. Indeed even EU Mobility Partnerships are equipped with certain correctives which may play a constitutional role in the EU Global Approach to Migration and Mobility and vis-à-vis national immigration laws as they offer, in the ideal case, more than the sum of the parts they are constituted with. To the extent that bilateral migration agreements correct or introduce flexibilities to the stringency of national (unilateral) immigration law, they build up the contours of a system of migration law, and thus introduce a degree of coherence rather than of fragmentation as one would be tempted to assume at first sight.

However, because most of norm-setting and law-making in the field of migration occurs outside the UN system, with the exception of the refugee system (UNCHR), IDPs and migrant workers’ rights (ILO), and horizontally between the IOM, the WTO, the GFMD one would need to worry about what Teubner identifies as the ‘horizontal’ constitutional problem”, which emerges aside the traditional ‘vertical’ constitutional problem [of] the limits to be imposed on the new global regimes in their relation to nation states”; the horizontal problem is “whether the autonomy of the function systems might not lead to mutual burdens to the limits of their structural adaptability with their very differentiation.”⁵ Also we cannot speak yet of an institutionalized, far less of a constitutionalized international migration law, since constitutionalization, in the sense of Andreas Paulus would require a constitutional treaty, like the UN Charter and “secondary rules on law-making”.⁶ Efforts to construct global governance top-down through a UN-sponsored initiative, the Global Commission on International Migration (GCIM) ended in 2005,⁷ and its successor, the Global Forum on Migration and Development (GFMD) refuses all attempts to formalize its decision-making process or attributing some normativity or source-like quality to its decisions, which would offer it some *erga omnes* and thus constitutional quality. Yet, we must bear in mind that even when compared to fields of “partial constitutionalization” like the WTO or in human rights,⁸ migration falls short of such features, since it fails to dispose of a dispute settlement system.⁹ Authors, including Teubner, Fischer-Lescano, Simma and Pulkowski agree that there is rather fragmentation than coherence in the international legal system, despite pockets of “legally stabilized, institutionalized and hierarchized international subsystems, like the WTO”.¹⁰ As the Report by the International Law Commission has found, unity in public international law, if at all, comes from the methods of interpretation by which international law maintains the coherence of its sources”, which basically means an authority derived from substantive principles, like good faith, rather than from “functionalist claims of legitimacy based on a “constitutional superstructure.”¹¹ So while there is fragmentation in public international law, it is principles which play a key part in constitutionalizing this order.¹² The international system of migration has certain legal principles, like the powerful non-refoulement concept, but these principles do not apply to all types of migrants; so that there is a normative fragmentation in addition to the institutional fragmentation of migration law. Solidarity may be another such a principle, and it is in fact the nucleus of migration governance according to the GCIM Final

⁵ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 10.

⁶ Andreas L. Paulus, ‘The International Legal System as a Constitution’ in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the world? Constitutionalism, International Law & Global Governance* (Cambridge University Press 2009) 77.

⁷ Ronaldo Munck, ‘Globalisation, Governance and Migration: an introduction’ (2008) 29(7) *Third World Quarterly* 1227, 1231.

⁸ Paulus (n 6) at 82.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Paulus (n 6) at 86-87.

¹² Marion Panizzon, ‘Fairness, Promptness and Effectiveness: How the Openness of Good Faith Limits the Flexibility of the DSU’ (2008) 77 *Nordic Journal of International Law* 275.

Report in 2005,¹³ but again, it is more of an institutional principle than a normative one, so that this links to the finding of the ILC Report that “[w]hatever the prospects of ‘codification and progressive development’ today, it seems clear that most of the development of international law will take place within specialized lawmaking conferences and organizations”.¹⁴ For migration, this points to the potential far-reaching role of the GFMD, which holds yearly conferences and issues soft law. Yet, as the ILA Commission Report notes, “more recently, theories of interdependence and international regimes in international relations studies as well the sociology of globalization point to the advantages of governance through units wider than States, including regional units.”¹⁵ This points to the fact that notably the regional layer will play an increasing role in advancing the coherence of migration law and policy. This role is corroborated by our findings on regionalism in migration, notably our on EU migration policy, as well as by Betts, who argues that regionalism is a type of governance of “increasing importance”, notably because it succeeds in “capturing the proliferation of cross-cutting institutions that have emerged to regulate relations between migration sending, receiving and transit regions, in particular”.¹⁶

Other voices, notably Castles¹⁷ Cottier and Sieber¹⁸ and Koser¹⁹ have found that nonmigration policies in particular trade liberalization, investment and education policies, which can be key causes for migration, could also be used to manage migration. This topical fragmentation is what Betts labels “embeddedness” of “global migration governance” in the sense that other disciplines, like trade or climate change provide “docking stations” for select migration issues.²⁰ In this vein, Castles notes that “nonmigration policies may be more powerful in shaping South-North movements than explicit migration policies.”²¹ McAdam has similarly found that migration governance “suffers from significant fragmentation, both vertically with actors at the international, regional and local levels and horizontally with the phenomenon addressed in part or, more rarely, as a whole under the auspices of a range of other ‘policy categories’ and associated institutions.”²²

There are the following ways non-migration policies can impact on migration and development:

- Engaging diaspora skills and talents and entrepreneurship
- Reducing the costs of remittances transfers
- Enhancing/encouraging nostalgia trade and heritage tourism
- Mobilizing diaspora financial resources, circular migration through fiscal and financial incentives
- Integration of return migrants into home societies
- Whole-of-government approach; less agricultural subsidies and more development
- Regulating private recruitment

In many countries an express policy design that would explicitly mandate coherence between migration and other policies is still outstanding. Switzerland introduced the whole of government approach, which aims at coherence-building among two

¹³ GCIM; 2005, p. 55 (equality), 20, 66 (shared responsibility)

¹⁴ UN Working Document A/CN.4/L.682 of 13 April 2006, INTERNATIONAL LAW COMMISSION, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006 FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, pp. 255, 256.

¹⁵ Ibid at 107.

¹⁶ Alexander Betts, *Global Migration Governance* (Oxford University Press 2011a).

¹⁷ Stephen Castles, ‘Why Migration Policies Fail’ (2004) 27(2) *Ethnic and Racial Studies* 205.

¹⁸ Thomas Cottier and Charlotte Sieber-Gasser, ‘Trade, Investment and Migration: Coherence through Policy Alignment’ in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *Promoting International labor Mobility* (forthcoming Palgrave 2013).

¹⁹ Khalid Koser, ‘Introduction: International Migration and Global Governance’ (2010) 16 *Global Governance* 301.

²⁰ Betts at 4, 24.

²¹ Castles, ‘The Factors that Make and Unmake Migration Policies’ (n Error! Bookmark not defined.) at 864.

²² Jane McAdam, *Environmental Migration Governance* (February 28, 2009). UNSW Law Research Paper No. 2009-1. Available at SSRN: <http://ssrn.com/abstract=1412002>.

out of seven ministries, being the Department of External Affairs and the Department of Justice. This joint undertaking was translated into practice when the so-called migration partnerships were designed. These binding or non-binding bilateral agreements which Switzerland concludes with third countries, represent a best endeavor to streamline themes and competencies emanating from both ministries—readmission, border securitization, police cooperation, identification of persons and documents, combatting document falsification, trafficking and smuggling of humans, and thus all themes linking to the Department of Justice with other themes, such as capacity building, peace-building, development aid being formulated by the Department of Foreign Affairs. However, the coherence is not comprehensive, as one important actor, the State Secretariat of Economic Affairs does not participate, which means that labor migration is not brought into the equation. This has the downside that in the Swiss bilateral migration agreements no labor market access quotas can be put on offer. In turn, this has the effect that source countries tend to view little benefits from signing onto those agreements and this means that other areas of migration governance, like combatting irregular flows cannot be dealt with bilaterally with the source country as a partner, since that country perceives no benefits from participating in a bilateral agreement that does not offer his surplus population some job perspectives abroad.

Despite tendencies of coherence we find that in the field of labor migration fragmentation runs deep, as its regulation is reflective of labour market segmentation. Yet we observe, notably in the proliferation of bilateral migration agreements, tendencies of defragmentation trending towards coherence and, in the final analysis a constitutionalisation of migration law and policy. Such defragmentation is particularly strong where a regional integration unit is involved in migration policy making, such as in the EU's external dimension of migration policy.

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